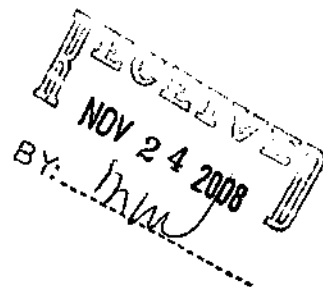


Pennsylvania
Special Education Hearing Officer



DECISION

Child's Name: A [REDACTED] T [REDACTED]

Date of Birth: [REDACTED]

Dates of Hearing:
August 6, 2008, August 13, 2008, September 16, 2008, October 16, 2008
CLOSED HEARING
ODR #8852/07-08 KE

Parties to the Hearing:

[REDACTED]
[REDACTED]
[REDACTED]

Lake-Lehman School District
P.O. Box 38
Lehman, PA 18627-0038

Representative:

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Date Record Closed:

November 7, 2008

Date of Decision:

November 22, 2008

Hearing Officer:

William F. Culleton, Jr., Esquire

P-1

1 of 45

INTRODUCTION AND PROCEDURAL HISTORY

A [REDACTED] T [REDACTED] (Student) is a [REDACTED] year old eligible child who resides within the Lake-Lehman School District (District). (NT 13.) The Student at all relevant times was identified as a child with a disability for special education purposes under the categories of Autism and Speech and Language Impairment. (NT 9-12.) The Student currently attends a private school. (NT 391-489.) Until December 21, 2007, the Student attended the Lake Lehman – Jackson Elementary School (School). (NT 21, 29; S-53.)

[REDACTED] (Parents) requested due process by letter of counsel dated May 14, 2008, alleging that the District had failed to provide a FAPE for the two years prior to the filing of the Complaint Notice. Parents requested tuition reimbursement and transportation to a private school, reimbursement for an independent educational evaluation and compensatory education for two school years, in the amount of three hours per school day. (NT 23.) The Parents requested that compensatory education encompass Extended School Year (ESY) services for two summers. (NT 33.)¹ In the alternative, the Parents requested an order requiring the District to provide the program that the independent educational evaluator had recommended. (NT 30-31.)

The District asserted that the Student had made meaningful progress during the time in question. It asserted that the Parents gave no notice of dissatisfaction with the District's evaluations. Therefore, it argued that no relief was appropriate. (NT 24-28.)

The hearing was conducted on four dates from August 6, 2008 to October 16, 2008. The parties requested written summations, and the deadline was extended at request of counsel. The record closed on November 7, 2008, upon receipt of the parties' summations.²

ISSUES

1. Did the District offer and implement an appropriate IEP during the period from May 14, 2006 until the date on which the Student left

¹ Parents had requested an order for Extended School Year services, but later withdrew that request.

² Parents' summation is marked HO-1; District summation is marked HO-2.

the District, December 21, 2007, so as to provide the Student with a free and appropriate public education?

2. Was the Student entitled to Extended School Year services during the summers of 2007 and 2008, and did the District provide appropriate ESY services?
3. Should the hearing officer award compensatory education to the Student for any part of the period from May 14, 2006 until the date on which he left the District, December 21, in the amount of three hours per school day, as well as compensatory education in respect to ESY for the summers of 2007 and 2008?
4. Should the hearing officer award tuition reimbursement and transportation costs for the period from December 21, 2007 to August 6, 2008 for the cost of tuition at the dePaul School?
5. In the alternative, should the hearing officer award compensatory education for the period from December 21, 2007 to August 6, 2008?
6. In the alternative, should the hearing officer order an appropriate educational program for the Student prospectively?
7. Should the hearing officer award reimbursement for the cost of the independent educational evaluation of the Parents' expert, Dr. K.

FINDINGS OF FACT

MEDICAL AND EDUCATIONAL HISTORY

1. The Student was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) in 2001, at the age of four and one half years. (P-4, 6, 58, 61, S-53.)
2. The Student was diagnosed with Asperger's Disorder at in 2002, at the age of five years eight months. (P-4, 58, S-53.)

3. In 2002, the Parents requested the District to perform an evaluation, reporting to the District a diagnosis of Asperger's disorder and ADHD. (P-6.)
4. On October 15, 2002, the District issued an evaluation report which found that the Student's IQ was in the average range. The District found that the Student was not a child with a disability. (P-4, S-53.)
5. On November 1, 2002, the District offered and the Parents accepted a Service Agreement under section 504 of the Vocational Rehabilitation Act of 1973 (section 504), which recognized that the Student's ADHD required accommodations under that Act. Accommodations included redirection, additional time for response, repeated directions, eye contact and individual prompting. (P-7, 8.)
6. In June 2003, a neuropsychological evaluation resulted in a diagnosis of ADHD and Asperger's Syndrome. Weaknesses were detected in processing speed, visual scanning and processing, social cognition and perception of social cues, and clerical speed and accuracy. (P-13, 61, S-53.)
7. Effective September 28, 2004, the District amended the section 504 Service Agreement to add accommodations involving preferential seating, understanding directions, testing and work assignments. Title One services were also provided. (P-11, 13.)
8. The Student's school guidance counselor referred him to a private behavioral services agency for evaluation due to reluctance to work, inability to pay attention, disorganization, and poor social skills due to failure to recognize social cues. (P-62.)
9. On February 22, 2005, the Student's teacher reported that he required repeated directions, refocusing and one-to-one prompting. He would not decode words unless prompted, but relied upon sight vocabulary. He found difficult questions concerning inferential reading comprehension and main ideas points. He showed difficulty with mathematics problem solving. He tended to play alone. (P-70.)

10. On February 23, 2005, when the Student was in second grade, the District issued an evaluation report and identified the Student with Other Health Impairment, detecting cognitive weaknesses in processing speed, attention and organization, as well as obsessiveness about work. The Student was performing at the instructional level on the Dolch Word List, Pre-Primer, and was frustrational at the Primer level. He exhibited difficulty with decoding, inferential reasoning and non-factual comprehension, as well as mathematics problem solving. He was found to be performing at the expected range in all subjects except mathematics calculation. (P-13, S-53.)
11. On March 11, 2005, the District offered an IEP that noted present levels in reading and mathematics at the beginning of second grade. It noted problems with attention, organization and transitions. It offered itinerant learning support, but its only goal was that the Student "be included" in general education curriculum with specially designed instruction. There were no goals that identified any measurable performance to be attained. (P- 15, S-53, S-54.)
12. In June 2005, the local behavioral services agency increased the Student's TSS services and recommended recreational camp to assist with social skills. (S-53.)
13. In June 2005, the District issued a revised IEP that noted problems in attention, organization, cognitive rigidity, non-verbal reasoning, processing speed, sequencing, social reasoning and retrieval of both verbal and visual material. (S-53.)
14. In September 2005, the local behavioral services agency confirmed diagnoses of ADHD and Pervasive Developmental Disorder NOS. It approved therapeutic staff support for the Student, thirty-two hours per week, a behavioral specialist consultant, development of a behavior plan, and mobile therapy. (S-53.)
15. In September 2005, the Student's teacher at the School requested reevaluation based on the Student's problems with attention and being unable to keep up with the volume of work assigned. (S-53.)

16. On September 29, 2005, the Student's teacher requested a reevaluation due to the Student's problems with attention and work completion in the classroom. (S-54.)
17. The District issued a reevaluation report on November 15, 2005, the Student's third grade year, noting inconsistent scores on two tests of word reading at the third grade level; the Student demonstrated independent reading comprehension at the first grade level, frustration at second grade, and instructional comprehension at the third grade level. Reading deficits were not adequately addressed. (NT 77-79; P-19, S-53.)
18. In November 2005, the Student's school guidance counselor recommended continued TSS services in school due to the Student's attention and social skills deficits. (P-70.)
19. In January and June 2006, the local behavioral services agency confirmed continued symptoms of ADHD and Pervasive Developmental Disorder. (S-54.)
20. The Student did not attain his mathematics goal as set forth in the December 2005 IEP. (P-21.)
21. The District was aware of or on notice of the Student's diagnoses of ADHD and Autism during the period from 2002 to 2006. (NT 45-50; P-19, S-54.)

THE DECEMBER 2005 EDUCATIONAL PLAN AND AMENDMENTS

22. In December 2005, the District revised the student's IEP to add goals and objectives in speech, and language, including articulation of the phoneme "r" and oral comprehension, as well as one goal in mathematics computation. The goals were not based upon a baseline. (P-21, S-54.)
23. From the second quarter of the 2005-2006 school year, the District probed the Student's mathematics computation weekly and the

results were charted. The Student's teacher reported that his performance was inconsistent. (P-24.)

24. In May 2006, the District revised the December 2005 IEP to offer regular education class placement for mathematics. (P-24, S-7.)
25. In June 2006, a medical evaluation showed that the Student continued to exhibit significant problems with attention, organization, transitions and emotional regulation while in school. These symptoms were less evident to the teachers when the Student was attended by the one-to-one TSS during class hours. Some improvement in social behaviors was noted. (P-58 p. 19-25.)
26. The TSS worker was not trained to provide educational services and her role was to implement a non-educational behavior plan provided by the behavioral services agency. (NT 61-62, 80; P-78.)

2006-2007 SCHOOL YEAR - SERVICES

27. In September 2006, the District modified the IEP to add items to the specially designed instruction section, at the request of Parents. (P-24, 30, S-7.)
28. At a meeting in September 2006, the District agreed to amend the December 2005 IEP to offer a one-to-one educational aide. (P-30, S-6, 9, 12, 13.)
29. In September 2006, the Student's IEP services were not provided. The District raised the possibility of transferring the Student to the Intermediate Unit program. (NT 81-86; S-19.)
30. In October 2006, the District began providing a one-to-one academic aide, full time. (NT 86; P-32.)
31. On November 22, 2006, the District offered a re-evaluation report and an IEP that noted needs in reading, mathematics, speech articulation, attention, impulsivity, organization, non-verbal reasoning, processing speed, social reasoning and judgment. The

Student was tested in the average range of cognitive ability. The Student was identified with Other Health Impairment and Speech or Language Impairment, but was not identified with Autism. (P-32, 33.)

32. The November 2006 IEP reported standardized test scores for reading in grade equivalency form; however, the standard scores were not reported. No scores were provided for oral or written expression. (S-19, 53.)
33. The November 2006 IEP offered no additional related or supportive services. (P-33, S-54.)
34. The November 2006 IEP provided a goal and progress monitoring in speech articulation. However, the District did not provide data-based progress monitoring. (NT 63, 90, 314-315; S-19.)
35. The November 2006 IEP offered placement in regular education with itinerant learning support and speech and language support. Supportive services were offered in the form of a one-to-one educational aide. Learning support classroom was offered for tests and individual work. (S-17, 19, 53.)
36. The November 2006 IEP offered some specially designed instruction and individualized accommodations. Three of the accommodations listed were a reduction of the amount of work to be assigned, requiring fewer items correct in grading, and extra time to complete tests. Implementation by regular education teachers was supervised loosely. (NT 225-232; S-19.)
37. The November 2006 IEP did not offer ESY services but did offer data collection to assess eligibility. (S-19.)
38. In December 2006, the Parents made available to the District a neuropsychological evaluation report. The report found low average intelligence, and strengths in verbal generalizations and sound-symbol relationships. It noted weaknesses in executive functions, attention, phonological processing, complex comprehension, inferential thinking, social cognition, long term memory, non-verbal reasoning, visual perception and scanning,

verbal fluency, processing speed, clerical speed and accuracy, and graphomotor skills. It diagnosed the Student with Asperger's Disorder, ADHD, Disorder of Written Expression and Adjustment Disorder. It recommended regular education with a one-to-one educational aide, and a multi-sensory approach to instruction. (P-61, S-14, 53.)

39. The December 2006 neuropsychological report showed regression from previous testing in cognitive skills, and academic achievement about one year behind his grade, except in written expression, in which the Student was over four years behind his grade. (P-61.)
40. The IEP team and the Parents actively considered transferring the Student to a Life Skills program at the Intermediate Unit, or to a private or out-of-district school. Ultimately, it was decided to place the Student in learning support. (NT 93-96.)
41. On January 18, 2007, the District amended the November 2006 IEP to include goals for reading, spelling, language arts and mathematics, and to offer placement in a learning support classroom. (NT 91-92; P-38, 41, S-28.)
42. On February 13, 2007, the District amended the November 2006 IEP to provide numerical grading, and to both add and subtract techniques listed in the program modification and SDI section of the IEP. (P-42, S-32, 33.)
43. On February 27, 2007, the District determined that the Student was qualified for ESY services and amended the IEP to offer ESY services at an unspecified program to address IEP goals in reading and mathematics. (P-43, S-35, 36.)
44. On April 2, 2007, the District issued a re-evaluation report in consideration of a private psychological report provided in December 2006 by the Parents. (S-41.)
45. The April 2007 re-evaluation report noted the need for testing accommodations. (S-41.)

46. The April 2007 re-evaluation report noted that the Student's second marking period grades in all subjects were passing. (S-41, 53.)
47. The April 2007 re-evaluation report noted that teachers reported oppositional behavior. (S-41.)
48. The April 2007 re-evaluation report noted that the Student, as measured by a standardized self-concept scale, evidenced a strong positive general self appraisal. (S-41.)
49. The April 2007 re-evaluation report noted that a standardized behavior assessment instrument showed adaptive weaknesses in functional academics, health and safety, and leisure skills. (S-41.)
50. The April 2007 re-evaluation report noted that the report of a private evaluation showed average verbal comprehension and working memory, with below average perceptual reasoning and processing speed. Cognitive functioning was low average with differences between index scores. (S-41.)
51. The April 2007 re-evaluation report concluded that the Student did not demonstrate characteristics of a specific learning disability. (S-41.)
52. The April 2007 re-evaluation report identified the Student with Autism and Speech and Language Impairment. It found the existing IEP to be appropriate; yet it recommended goals to address the Student's "developmental needs", continued speech and language support services and "indirect" occupational therapy services. (S-41.)
53. On April 2, 2007, the District issued a NOREP offering to identify the Student as Autistic. (P-50, S-54.)
54. At no time in the 2006-2007 school year did the District offer placement in an autistic support classroom, or supportive services calculated to address the needs of an autistic child in the general education setting. At no time did it offer goals to address executive functions, attention and organization, social reasoning

and judgment (except for the vague speech goal of appropriate conversation in formal situations), writing and writing fluency, functional academics, or behavior control. (NT 312; P- 21, 24, 30, 33, 38.)

55. The Parents repeatedly expressed gratitude for, and agreement with, many of the District's evaluations and IEP revisions, both in writing and orally to District staff. (NT 148; S-6, 9, 12, 14, 31, 33, 36, 38, 50, 56.)

2006-2007 SCHOOL YEAR - READING

56. The November 2006 reevaluation report and IEP showed present levels of performance in reading that were about one year behind the Student's fourth grade level. Scores indicated that he was on grade level in word comprehension and word attack, and about one and one half years below grade level in passage comprehension. (P-32, 33, S-54.)

57. The November 2006 IEP provided no goals in reading. (P-32, 33.)

58. The December 2006 private neuropsychological evaluation report showed that the Student's reading comprehension and his word identification were variable, revealing weaknesses that required special instruction. (P-61.)

59. In the January 2007 IEP, the reading goals for fluency and comprehension were not based upon a baseline set forth in the Present Levels section of the IEP. The measurement methods proposed for fluency and comprehension were multiple, vague categories of measurement methods. Measurement probes were not identified specifically. Mastery was unclear, but appeared to be defined as one instance of performance at the specified level, rather than requiring repeated demonstration of mastery over time. Prompting and support were assumed, but the goals did not account for a level or degree of prompting, fading, or independent performance. (NT 373-376, 593-594; S-19, 28, 51, 52, 53.)

60. The April 2007 re-evaluation report noted that in the Spring of 2005, the Student was in the 53rd percentile in total reading. (S-41.)
61. The April 2007 re-evaluation report noted that the Student's teachers reported that he was weak in reading and higher level reading comprehension skills. (S-41, 53.)
62. The April 2007 re-evaluation report noted that the private evaluation report showed achievement testing in the expected range for reading. (S-41.)
63. The April 2007 re-evaluation report recognized needs in comprehension of abstractions, such as inferences, conclusions, evaluation of text and vocabulary. (S-41.)
64. The Student scored Proficient in reading in the 2007 PSSA test. (P-93.)
65. The learning support teachers assigned to the Student kept data on reading fluency. This was measured in words correct per minute on the DIBELS assessment instrument. The learning support teachers used subjective judgment to raise the grade level of material on which the Student was tested before he attained the goal stated in the IEP. Data showed that the Student never attained his goal in reading fluency. (NT 566-571; S-51, 52.)
66. In June 2007, the Student's special education teacher reported subjectively that the Student had made "moderate" progress in reading comprehension, but needed further work on fluency. Teachers admitted that the Student struggled in reading comprehension. (NT 107; S-49.)

2006-2007 SCHOOL YEAR - MATHEMATICS

67. The November 2006 re-evaluation report and IEP showed standardized mathematics scores from the Key Math Revised NU, Form A, scores from which had been reported in the November 2005 re-evaluation report. The Student's scores were higher in basic concepts but the same or lower in operations and

applications. Scores indicated that the Student was performing at or above grade level overall. (P-19, 33.)

68. The November 2006 IEP provided no goals in mathematics. (P-33.)
69. The December 2006 private neuropsychological evaluation report showed that the Student's mathematics skills were weak, requiring special instruction. (P-61.)
70. In the January 2007 IEP, the mathematics goals were not based upon a baseline set forth in the Present Levels section of the IEP. The proposed measurement methods were multiple, vague categories of measurement methods. Measurement probes were not identified specifically. Mastery was unclear, but appeared to be defined as one instance of performance at the specified level, rather than requiring repeated demonstration of mastery over time. Prompting and support were assumed, but the goals did not account for a level or degree of prompting, fading, or independent performance. (NT 373-376; S-19, 28, 51, 53.)
71. The learning support teachers assigned to the Student kept data on mathematics fluency. This was measured in digits correct per minute on the Math Steps assessment instrument. Math Steps fluency levels were not reported in the IEP. There was no goal for mathematics fluency. The learning support teachers used subjective judgment to raise the grade level of material on which the Student was tested. (NT 576-580; S-51.)
72. The April 2007 re-evaluation report noted that in the Spring of 2005, the Student was in the 45th percentile in total math. (S-41.)
73. The April 2007 re-evaluation report noted that the Student's teachers reported that he was weak in mathematics. (S-41, 53.)
74. The April 2007 re-evaluation report noted that the private evaluation report showed achievement testing in the expected range for mathematics. (S-41.)

75. The April 2007 re-evaluation report recognized needs in multiplication, division, word problems and computation. (S-41.)

76. The Student scored Below Basic grade four mathematics in the 2007 PSSA test. (P-93.)

2006-2007 SCHOOL YEAR - SPELLING AND WRITING

77. The November 2006 re-evaluation and IEP noted the Parent's input that the Student struggled with handwriting despite individual tutoring. (P-32.)

78. The November 2006 re-evaluation reported average or above average scores from a test of visual perception and visual-motor skills. Observations during testing revealed appropriate posture and grasp, and indicated that the Student is capable of legible printing and handwriting of letters. Occupational Therapy services were considered and not recommended. (P-32.)

79. The December 2006 private neuropsychological evaluation report showed that the Student's spelling was weak and his written expression was disordered, with achievement at the kindergarten level. Special instruction was considered necessary in these areas. (P-61.)

80. In April 2007, the District amended the IEP to offer present levels data on hand writing, as well as goals, objectives and accommodations for hand writing legibility. The District also offered occupational therapy consultative services. (P-49.)

81. The November 2006 IEP offered no goals in spelling or writing. (P-33.)

82. The November 2006 re-evaluation did not assess the Student's written expression skills. (P-32, S-54.)

83. In the January 2007 IEP, the spelling goals were not based upon a baseline set forth in the Present Levels section of the IEP. (S-19, 28, 53.)

84. In the January 2007 IEP, the language arts goals were not based upon a baseline set forth in the Present Levels section of the IEP. The proposed measurement methods were multiple, vague categories of measurement methods. Measurement probes were not identified specifically. Mastery was unclear, but appeared to be defined as one instance of performance at the specified level, rather than requiring repeated demonstration of mastery over time. Prompting and support were assumed, but the goals did not account for a level or degree of prompting, fading, or independent performance. (NT 373-376; S-19, 28, 53.)

85. The April 2007 re-evaluation report noted that a norm referenced test of writing showed poor written expression. (S-41.)

86. The April 2007 re-evaluation report noted that the Student's teachers reported that he was weak in language arts, spelling, handwriting, and written expression. (S-41, 53.)

87. The April 2007 re-evaluation report identified needs in functional written communication and organization. (S-41.)

88. The April 2007 re-evaluation report noted that the private evaluation report showed deficient written expression. (S-41.)

89. The April 2007 re-evaluation report recognized needs in writing, including spelling, punctuation, capitalization, and organization of ideas. (S-41.)

90. In June 2007, the Student's special education teacher reported subjectively that the Student had made "moderate" progress in language arts. (S-49.)

2006-2007 SCHOOL YEAR - ATTENTION AND ORGANIZATION

91. The November 2006 re-evaluation and IEP noted a history of cognitive difficulties in executive processing, including managing information, motor coordination, reasoning, abstraction and planning, as well as problems with non-verbal reasoning, difficulty

with sequencing, and problems with retrieval of verbal and visual material. It recognized educational needs in the areas of attention and concentration (constant need for redirection), distractibility, impulsivity, organization, retrieval of verbal and visual material, non-verbal reasoning, difficulty with following directions and slow processing speed. (P-32.)

92. The November 2006 IEP offered the services of a one-to-one academic aide, as well as various accommodations listed in the Program Modification section, to help the Student stay on task, organize his school materials and complete more of his work. (P-33.)
93. The November 2006 IEP indicated that curriculum modifications would be directed toward reducing the amount of material covered and the pace of instruction. (P-33.)
94. The November 2006 IEP did not offer any goals directed toward attention, organization, or executive functions. There was no method of addressing the extent of support and the need for fading of support in these areas. (P-33.)
95. The December 2006 private neuropsychological evaluation report showed that the Student continued to have significant needs with regard to attention and organization. (P-61.)
96. The January 2007 IEP did not offer any goals directed toward attention, organization, or executive functions. There was no method of addressing the extent of support and the need for fading of support in these areas. (S-28.)
97. The April 2007 re-evaluation report identified needs in organization. (S-41.)
98. The April 2007 re-evaluation report noted that an inventory for executive functions showed significant difficulties in all areas. (S-41.)

99. The April 2007 re-evaluation report noted that the Student's teachers reported that he was weak in attention, problem solving, and organization skills. (S-41, 53.)

100. The April 2007 re-evaluation report recognized the need for specially designed instruction for attention, processing speed and production, and organization. (S-41.)

2006-2007 SCHOOL YEAR – BEHAVIOR AND SOCIAL SKILLS

101. The November 2006 re-evaluation and IEP noted difficulties with social reasoning and judgment, as well as communication needs in the classroom. (P-32, 33.)

102. The November 2006 IEP offered continued speech and language services. (P-33.)

103. The November 2006 IEP offered one goal to address pragmatic language skills. This goal was not based upon a baseline, did not have corresponding objectives or benchmarks, and was not measurable. (P-33.)

104. The November 2006 IEP did not reflect an applied behavior analysis and did not offer a behavior plan or any goals directed toward behavior. (NT 218-220; P-33.)

105. The December 2006 private neuropsychological evaluation report showed that the Student continued to need services in the area of social skills. (P-61.)

106. The January 2007 IEP did not offer any goals directed toward behavior, social skills or pragmatic language skills. There was no method of addressing the extent of support and the need for fading of support in these areas. (S-28.)

107. The April 2007 re-evaluation report noted improvement in auditory comprehension of main ideas. The report identified continuing needs in the articulation of the phoneme "r". (S-41.)

108. The April 2007 re-evaluation report noted that the Student's teachers reported that he was weak in social skills. (S-41, 53.)

109. The April 2007 re-evaluation report recognized the need for specially designed instruction for emotional and behavior control. (S-41.)

2007-2008 SCHOOL YEAR - SERVICES

110. In the Fall of 2007, the District's staff went on strike and the Student did not receive services from the District during this time. The Parents enrolled the Student in the Sylvan Learning Centers. (NT 104.)

111. After the strike ended, and the Student was tutored at the Sylvan Learning Centers, the Student was tested and demonstrated some gains in reading. (NT 106-108, 111-112.)

112. On November 21, 2007, the District offered an IEP that reflected needs in reading, mathematics, spelling, writing, speech articulation, attention, impulsivity, organization, non-verbal reasoning, processing speed, social reasoning and judgment. (S-49.)

113. The November 2007 IEP offered placement in a learning support classroom for mathematics, reading, language arts and support in science and social studies. Related services included speech and language support reduced from two sessions to one session per six day cycle, and occupational therapy monitoring services. Supportive services included a full time educational aide. (S-49.)

114. The November 2007 IEP offered an essentially unchanged list of techniques listed in the program modification and SDI section. It added only "preferential seating" and typing skills practice to that section. Three of the accommodations listed were: a reduction of the amount of work to be assigned, fewer items in testing, and extra time to complete tests. The IEP offered no guidance for implementing specially designed instruction. Implementation by

regular education teachers was supervised loosely. (NT 225-232; S-32, 49, 53.)

115. The November 2007 IEP found the Student eligible for ESY services. (S-49.)
116. On April 7, 2008, the Parents obtained a private educational evaluation which diagnosed the Student with Asperger's Syndrome, Mathematics Disorder, Disorder of Written Expression, and Pragmatic Language Disorder. (S-54.)
117. The evaluator relied upon extensive documentary evidence from past evaluations and educational plans. The evaluator also relied upon parental history and teacher input from the private school that the Student was attending. The evaluator did not discuss the matter with any District personnel, and did not observe the Student in the classroom. (NT 348-349, 355, 368; S-53, 54.)
118. The evaluator tested the Student with six instruments, for three hours, all in one day, blocking off the entire day and providing breaks and rests as appropriate. (NT 339, 345-346; S-54.)
119. The private evaluator found an overall level of intellectual functioning in the Low Average range of ability. (S-54.)
120. Based upon substantial deficits in scores on multiple tests, the private evaluator found weaknesses in complex comprehension, inferential thinking, nonverbal reasoning, and clerical speed and accuracy. (S-54.)
121. The Parents' private evaluator, based upon multiple normed instruments, observations and history, concluded that the Student should be identified with Autism, Other Health Impairment (for inattention, hyperactivity and impulsivity), Speech or Language Impaired (with pragmatic language deficits), and Specific Learning Disabilities in basic reading skills, reading fluency, written expression, mathematics reasoning and mathematics calculation. (S-54.)

122. The Parents' private evaluator found that the District's interventions were not implemented in accordance with the data driven Pennsylvania model; therefore, she concluded that the District's curriculum based testing was insufficient to determine the Student's response to these interventions, and the only way to determine his functioning is by norm-referenced tests. (S-54.)

123. At no time in the 2007-2008 school year did the District offer placement in an autistic support classroom, or supportive services calculated to address the needs of an autistic child in the general education setting. At no time did it offer goals to address executive functions, attention and organization, social reasoning and judgment (except for the vague speech goal of appropriate conversation in formal situations), writing and writing fluency, functional academics, or behavior control. (S-49.)

2007-2008 SCHOOL YEAR - READING

124. In October 2007, the Student was assessed by Sylvan Learning Center and demonstrated poor expressive and receptive vocabulary at the third percentile. (P-78.)

125. On the Gray Oral Reading Test administered by Sylvan, the Student demonstrated poor oral reading, with a rate in grade equivalent 2.3, and passage comprehension at grade equivalent 3.7. On the California Achievement Test administered by Sylvan, the Student demonstrated vocabulary at grade equivalent 2.0, comprehension at grade equivalent 3.0 and a total grade equivalent of 2.4. Sylvan grade equivalents are considered to be below the grade level of local curricula. (P-78.)

126. Sylvan progress reports repeatedly noted the Student's lack of fluency and speed. (P-78.)

127. By November 2007, after eight sessions of individual tutoring, the Student had demonstrated mastery of various phonemes and vocabulary at the program's level 2. He had demonstrated two comprehension skills at level 3, but had yet to master various

phonemes, vocabulary and comprehension skills at levels 2 and 3. (P-78.)

128. The November 2007 IEP reported scores of the Woodcock Reading Mastery Tests – grade equivalent only - that reflected approximately one year's growth as compared to the scores reported in the November 2006 IEP. These scores indicated that the Student remained approximately one year behind his grade level, being instructed on a fourth grade level. (S-19, 49, 50.)
129. As reported in the November 2007 IEP, the Student's grade equivalent scores in reading comprehension on the Woodcock Reading Mastery Tests indicated less than one year's growth in reading comprehension, leaving him approximately two years behind his grade level. (S-19, 49, 50.)
130. The November 2007 IEP reported a DIBELS fluency score of 82 on a fourth grade level. (S-49, 51, 52.)
131. In the November 2007 IEP, the reading goals for fluency and comprehension were not based upon a baseline set forth in the Present Levels section of the IEP; rather, it was assumed that the instructional level of the material would be raised according to the progress that the Student had made. The measurement methods proposed for fluency and comprehension were multiple, vague categories of measurement methods. Measurement probes were not identified specifically. Mastery was unclear, but appeared to be defined as one instance of performance at the specified level, rather than requiring repeated demonstration of mastery over time. Prompting and support were assumed, but the goals did not account for a level or degree of prompting, fading, or independent performance. (NT 373-376, 593-594; S-28, 49, 51, 52, 53.)
132. The learning support teachers assigned to the Student kept data on reading fluency. This was measured in words correct per minute on the DIBELS assessment instrument. The learning support teachers used subjective judgment to raise the grade level of material on which the Student was tested before he attained the

goal stated in the IEP. Data showed that the Student never attained his goal in reading fluency. (NT 566-571; S-51, 52.)

133. The Student's learning support teacher subjectively discerned a trend upward in the Student's reading fluency; however, there was no trend line reported in the DIBELS data. (NT 570; S-51, 52.)
134. There was no systematic data reporting on reading comprehension. (NT566- ; P-50, S-51, 52.)
135. In April 2008, based upon substantial deficits in scores on multiple tests, the Parents' private evaluator found weaknesses in visual scanning and tracking, and low processing speed. The Student's reading fluency was measured at the first percentile, at a second grade level. (S-54.)
136. In April 2008, the Parents' private evaluator found that the Student experiences difficulty decoding words, visually tracking along a line and reading with automaticity; thus, he has difficulty with reading comprehension, including predicting events, identifying the main idea, sequencing and making inferences. (S-54.)
137. In April 2008, the Parents' private evaluator found no severe discrepancy between the Student's ability and achievement in word reading and reading comprehension (literal comprehension of read material). On the Wechsler Individual Achievement Test – Second Edition, in word reading, the Student functioned on the thirteenth percentile a grade equivalency of 3.6. In reading comprehension, the Student scored in the twenty-third percentile, a grade equivalency of 4. The Student's reading composite score was in the tenth percentile. (S-54.)
138. In April 2008, the Parents' private evaluator found a severe discrepancy between ability and achievement in pseudo-word decoding. On the Wechsler Individual Achievement Test – Second Edition, in pseudo-word decoding, the Student functioned on the fifth percentile, a grade equivalency of 1.8. (S-54.)

139. In May 2008, the dePaul School tested the Student with the Woodcock-Johnson III Tests of Achievement. The Student demonstrated broad reading achievement at the seventeenth percentile, a grade equivalent of 3.7. Reading fluency was at the fourteenth percentile, a grade equivalent of 3.3. Passage Comprehension was at the thirteenth percentile, a grade equivalent of 3.0. Word attack was at the twenty-second percentile, a grade equivalent of 2.7. The Student was being instructed at the fifth grade level. (P-92, 94.)

2007-2008 SCHOOL YEAR – MATHEMATICS

140. In October 2007, the Student was assessed by Sylvan Learning Center and demonstrated low achievement in mathematics. Computation on the California Achievement Test was scored at a grade equivalent of 1.5 and mathematics concepts scored at grade equivalent of 1.1. Both were within the first percentile on the test. (P-78.)

141. By March 3, 2008, after 39 sessions of individual tutoring, the Student had mastered adding 3 and 4 digit numbers with regrouping and had learned multiplication tables. He was not yet able to do division, and was still working on level 2 skills. (P-78.)

142. The November 2007 IEP reported mathematics grade equivalent scores that suggested either no gain or decline in basic concepts, operations and applications. Low fluency was measured. The Student was beginning work at a fourth grade level, more than one year behind his grade level. (S-19, 49.)

143. In the November 2007 IEP, the mathematics goals were not based upon a baseline set forth in the Present Levels section of the IEP; rather, it was assumed that the instructional level of the material would be raised according to the progress that the Student had made. The proposed measurement methods were multiple, vague categories of measurement methods. Measurement probes were not identified specifically. Mastery was unclear, but appeared to be defined as one instance of performance at the specified level, rather than requiring repeated demonstration of

mastery over time. Prompting and support were assumed, but the goals did not account for a level or degree of prompting, fading, or independent performance. (NT 373-376; S-19, 28, 45, 49, 53.)

144. The learning support teachers assigned to the Student kept data on mathematics fluency. This was measured in digits correct per minute on the Math Steps assessment instrument. Math Steps fluency levels were not reported in the IEP. There was no goal for mathematics fluency. The learning support teachers used subjective judgment to raise the grade level of material on which the Student was tested. (NT 576-580; S-51.)
145. In June 2007, the Student's special education teacher reported subjectively that the Student had been "improving" in mathematics in small group instruction. The teacher reported that the Student needed extra time to complete equations but understood the concepts. (S-49.)
146. In April, 2008, based upon substantial deficits in scores on multiple tests, the Parents' private evaluator found weaknesses in mathematics fluency and reasoning, interpreting abstract symbols, utilizing number facts and conceptualizing numbers. Fluency was measured below the first percentile, and a kindergarten grade equivalency. (S-54.)
147. On the Wechsler Individual Achievement Test – Second Edition, in numerical operations, the Student functioned below the first percentile, a grade equivalency of 2.5. In mathematics reasoning, the Student scored in the fourth percentile, a grade equivalency of 3.2. the Student's mathematics composite score was in the first percentile, considered "extremely low." (S-54.)
148. In April 2008, the Parents' private evaluator found a severe discrepancy between ability and achievement in mathematics reasoning and calculation. (S-54.)
149. In May 2008, the dePaul School tested the Student with the Woodcock-Johnson III Tests of Achievement. The Student demonstrated mathematics calculation achievement at the

twentieth percentile, a grade equivalent of 3.3. The Student demonstrated mathematics fluency at the first percentile, a grade equivalent of 1.6. The Student demonstrated mathematics applied problems achievement at the forty-seventh percentile, a grade equivalent of 5.6. The Student was being instructed at the third grade level. (P-92, 94.)

2007-2008 SCHOOL YEAR – SPELLING AND WRITING

150. The November 2007 IEP reported a spelling inventory that placed the Student at the fifth grade level. (S-49.)
151. In the November 2007 IEP, the spelling goals were not based upon a baseline set forth in the Present Levels section of the IEP; rather, it was assumed that the instructional level of the material would be raised according to the progress that the Student had made. (S-28, 49, 53.)
152. In April 2008, the Parents' private evaluator found no severe discrepancy between ability and achievement in spelling from dictation. On the Wechsler Individual Achievement Test – Second Edition, in spelling, the Student functioned on the twelfth percentile, a grade equivalency of 3.2. (S-54.)
153. In June 2007, the Student's special education teacher reported subjectively that the Student had made significant progress in spelling. (S-49.)
154. The November 2007 IEP reported difficulty taking notes and offered typing practice in the learning support class. An Occupational Therapy report noted no change in handwriting, and that it was inconsistently legible. (S-49)
155. The November 2007 IEP added a goal in occupational therapy, aimed at legible writing. It was not based upon a baseline set forth in the Present Levels section of the IEP. The goal itself was based upon "Benchmark Levels", but was vague regarding how the 85% called for in the goal was to be measured. Accommodations were prescribed for the classroom, to be implemented by the one-to-one

aide, with oversight by the occupational therapist. One objective was measurable, calling for 90 % legibility in 6 of 7 assignments over four sessions. (S-49, 53.)

156. In June 2007, the Student's special education teacher reported subjectively that the Student had made "moderate" progress in writing. (S-49.)
157. In April 2008, the Parents' private evaluator found the Student's handwriting legibility to be in the sixth percentile, rated at t first grade level, on a normed instrument that evaluates handwriting and penmanship. (S-54.)
158. In the November 2007 IEP, the language arts goals were not based upon a baseline set forth in the Present Levels section of the IEP; rather, it was assumed that the instructional level of the material would be raised according to the progress that the Student had made. The proposed measurement methods were multiple, vague categories of measurement methods. Measurement probes were not identified specifically. Mastery was unclear, but appeared to be defined as one instance of performance at the specified level, rather than requiring repeated demonstration of mastery over time. Prompting and support were assumed, but the goals did not account for a level or degree of prompting, fading, or independent performance. (NT 373-376; S-28, 49, 53.)
159. The Student's learning support teacher subjectively discerned improvement in spelling and written expression. (NT 590.)
160. In Spring 2008, teachers at the DePaul School reported that the Student demonstrated difficulty completing written assignments. (S-54.)
161. In April 2008, based upon testing in March 2008, the Parents' private evaluator found that the Student experiences poor visual, spatial and organizational skills. (S-54.)
162. In March 2008, on both the Beery Developmental Test of Visual Motor Integration, and the Jordan Left-Right Reversal Test, administered by the Parents' private evaluator, the Student scored

below average, indicating difficulty with orthographic information processing, writing and written work organization. (S-54.)

163. In April 2008, the Parents' private evaluator found a severe discrepancy between ability and achievement in written expression. On the Wechsler Individual Achievement Test – Second Edition, in written expression, the Student functioned in the first percentile, a grade equivalency of 1.8. His written language composite score was in the second percentile, considered poor. (S-54.)

164. In April 2008, the Parents' private evaluator found that the Student's writing fluency was below the second percentile, at a first grade level. (S-54.)

165. In May 2008, the dePaul School tested the Student with the Woodcock-Johnson III Tests of Achievement. The Student demonstrated spelling achievement at the thirty-sixth percentile, a grade equivalent of 4.8. The Student demonstrated writing fluency at the fifteenth percentile, a grade equivalent of 3.6. The Student was being instructed at the fourth grade level. (P-92, 94.)

2007-2008 SCHOOL YEAR – ATTENTION AND ORGANIZATION

166. The November 2007 IEP did not offer any goals directed toward attention and organization. (S-49.)

167. The Student's learning support teacher subjectively discerned improvement in attention and organization in her learning support classroom. (NT 573, 590.)

168. In Spring 2008, teachers at the DePaul School reported that the Student demonstrated attention problems in class and had difficulty completing assignments. (S-54.)

169. On March 25, 2008, the Parents' private examiner observed that the Student in testing exhibited attention difficulties. (S-54.)

170. In April 2008, the Parents' private evaluator found that the Student experiences difficulty comprehending language and questions as they are asked, difficulty in abstracting, and a rigid mindset that hinders problem solving. This may explain the Student's sometimes irrelevant responses to questions. (S-54.)

2007-2008 SCHOOL YEAR – BEHAVIOR AND SOCIAL SKILLS

171. The November 2007 IEP did not reflect an applied behavior analysis and did not offer a behavior plan or any goals directed toward behavior or social skills. (NT 218-220; S-49.)
172. The Student's learning support teacher subjectively discerned improvement in social skills in her learning support classroom. (NT 573-574, 590.)
173. The Student's guidance counselor noted a decrease in classroom visits for behavior problems. (NT 205-211.)
174. In Spring 2008, teachers at the DePaul School reported that the Student demonstrated impulsive, silly behavior in class. (S-54.)
175. On March 25, 2008, the Parents' private examiner observed that the Student in testing exhibited difficulty with questions that had a social component. (S-54.)
176. In April 2008, the Parents' private evaluator found that the Student has impaired social cognition, impaired ability to use language in a social context, impaired judgment in social situations and an over-dependence upon others to make decisions in social situations. (S-54.)
177. The District's evaluations failed to assess the Student appropriately in all areas of suspected disability. (S-53.)
178. The District's IEP's during the relevant time period failed to offer individualized services that addressed all of the Student's educational and behavioral needs and were reasonably calculated

to provide meaningful educational benefit in the least restrictive educational environment. (S-53.)

2007-2008 SCHOOL YEAR – PRIVATE PLACEMENT

179. On December 7, 2007, the Parents notified the District that they would withdraw the Student from the District and place him in a private school, and that they were demanding tuition reimbursement. (P-73.)
180. On or about December 21, 2007, the Student withdrew from the District and in mid-January, 2008, he was enrolled in the private Allied Services – dePaul School (dePaul). (NT 113, 158, 417, 465-466.)
181. The dePaul School is licensed to provide special education, but is not an approved private school. It is accredited by the Middle States Association of Colleges and Schools. (NT 396-397, 402, 449; S-54.)
182. The dePaul School is primarily established to provide remedial special education for students with dyslexia; however, it also accepts students with specific learning disabilities and ADHD and provides them with the same educational program as it provides to students with dyslexia. Children with Autism and Asperger's Disorder are rarely admitted. (NT 401-417, 457-461, 472-473; P-92.)
183. The dePaul School is located in Scranton and it does not admit typical students. (P-92.)
184. The dePaul School provides research based programs, most of which are of its own creation. Not all of its teaching programs are research based. (NT 406-408, 452-453; P-92.)
185. Curricular placement is based upon curriculum based assessments during the year, and standardized testing at the end of the year. (NT 465, 486-487.)

186. The dePaul School principal is not certified as a principal in Pennsylvania. She is certified in Pennsylvania in elementary education and special education. She has no professional experience with Asperger's Disorder. (NT 394, 444, 472-473; P-91.)

187. Only two of the six teachers on staff are certified in special education. One is a certified reading specialist. (NT 449-451.)

188. The dePaul School does not address behavioral, emotional and social skills needs through specially designed instruction. (NT 115-116, 420-421, 454-456, 470-471, 482-483; P-92.)

2007-2008 SCHOOL YEAR – REIMBURSEMENT FOR PRIVATE EDUCATIONAL EVALUATION

189. On May 13, 2008, the Parents forwarded to the District reports of a private educational evaluation and demanded reimbursement for the private evaluator's fee. (P-77.)

2007-2008 SCHOOL YEAR – EXTENDED SCHOOL YEAR

190. The Student attended Extended School year programming in the summer of 2007. (P-42, 43, 84.)

191. The Student was not enrolled in the District in 2008, and ESY services were not requested. (NT 164.)

DISCUSSION AND 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.³ The United States Supreme Court has addressed this issue in the case of an administrative hearing challenging a special education IEP. Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005). There, the Court held that the IDEA does not alter the traditional rule that allocates the burden of persuasion to the party that requests relief from the tribunal. Therefore, the burden of persuasion is upon the Parents.

The Court noted that the burden of persuasion determines the outcome only where the evidence is closely balanced, which the Court termed "equipoise" – that is, where neither party has introduced a preponderance of evidence⁴ to support its contentions. In such unusual circumstances, the burden of persuasion provides the rule for decision, and the party with the burden of persuasion will lose. On the other hand, whenever the evidence is clearly preponderant in favor of one party, that party will prevail.

THE DUTY PROVIDE FAPE AND TO INDIVIDUALIZE EDUCATIONAL PLANNING

A school district offers FAPE by providing personalized instruction and support services pursuant to an IEP that need not provide the maximum possible benefit, but that must be reasonably calculated to enable the child to achieve meaningful educational benefit. Meaningful educational benefit is more than a trivial or de minimis educational benefit. Whether an IEP is reasonably calculated to afford a child educational benefit can only be determined as of the time it is offered to the student and not at some later date. 20 U.S.C. §1412; Board of Education v. Rowley, 458 U.S. 176, 73 L.Ed.2d 690, 102 S.Ct. 3034 (1982); Ridgewood Board of Education v. M.E. ex. rel. M.E., 172 F.3d 238 (3d Cir. 1999); Stroudsburg Area School District v. Jared N., 712 A.2d 807 (Pa. Cmwlth. 1998); Polk v. Central

³ 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).

⁴ 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. Dispute Resolution Manual §810 (please note that the Manual was promulgated before the Supreme Court ruled in Schaffer v. Weast, at a time when the Local Educational Agency had the burden of persuasion in Pennsylvania and elsewhere in the federal Third Judicial Circuit. Thus, the first sentence of section 810, indicating that the LEA has the burden in most cases, is outdated and was effectively overturned by Schaffer).

Susquehanna Intermediate Unit 16, 853 F.2d 171 (3rd Cir. 1988) Fuhrmann v. East Hanover Board of Education, 993 F.2d 1031 (3d Cir. 1993); Daniel G. v. Delaware Valley School District, 813 A.2d 36 (Pa. Cmwlth. 2002)

The IDEA requires a local educational agency to address every substantial educational need of the child with a disability, including behavior and social skills. If the IEP is inadequate in any material way, it is inappropriate as a matter of law. Rose v. Chester Co. Intermed. Unit, 196 WL 238699, 24 IDELR 61, aff'd 114 F.3d 1173 (3d Cir. 1997). This is reflected in the requirements for both evaluations and individual education plans.

The local educational agency must conduct a "full and individual initial evaluation" 20 U.S.C. §1414(a)(1)(A). The child must be "assessed in all areas of suspected disability." 20 U.S.C. §1414(b)(3)(B). The regulation implementing this statutory requirement adds that this includes "social and emotional status" 34 C.F.R. §300.304(c)(4). The regulations require that the evaluation procedures "assist in determining ... [t]he content of the child's IEP. 34 C.F.R. §300.304(b)(1). The evaluation must be "sufficiently comprehensive to identify all of the child's special education and related services needs" 34 C.F.R. §300.304(c)(6).

The IEP must be specific enough to address all of the child's needs which are identified, both academic and functional. 20 U.S.C. §1414(d)((1)(A)(i)(II), (IV); Christen G. v. Lower Merion Sch. Dist., 919 F.Supp. 793 (E.D. Pa. 1996). The child's developmental and functional needs must be considered. 20 U.S.C. §1414(d)(3)(A)(iv). Where a child's behavior impedes learning, the IEP team must consider strategies to address that behavior. 20 U.S.C. §1414(d)((3)(B)(i).

ADEQUACY OF EDUCATIONAL PLAN OFFERED BY THE DISTRICT AND ITS IMPLEMENTATION

The hearing officer finds that the educational program offered by the District was strikingly deficient under the standards set forth above. The extensive history of private and public evaluations of this Student presented a long list of educational needs in the areas of reading, mathematics, spelling, writing, written expression, attention, organization and executive functions, social skills, behavior and academic pragmatics. (FF 1-21, 25, 31,

38-39, 44-52.) All of these needs were known to the District years before May 2006, the start of the relevant period for purposes of this matter. However, the educational plan – which the IDEA requires to be formulated in an IEP – barely addressed even the most central of these needs. Moreover, the IEP, despite multiple amendments over time, fell far below the minimum standard of the law for clarity, precision, and reliance upon performance data.

The hearing officer finds it significant that the educational plan was set in a context of full inclusion in regular education for a child whose identified disabilities were severe and complex. It was the Parents' choice to seek the benefits of inclusion for their child. 34 C.F.R. §300.116(e). The District did not object to such inclusion, so there is no basis to conclude that the Parents' desire for inclusion was unreasonable. Indeed, the Student's ability was in the average range. (FF 4, 31.) However, this context is significant because the District was obligated to provide adequate educational planning to enable the Student to benefit from education in the regular education setting. Such an attempt necessarily raises the bar on what is necessary in order to provide meaningful education, by calling for careful educational planning, fully responsive to the demands of the IDEA set forth above. The District clearly failed to provide the necessary level of care in its educational planning.

The first IEP that provided a plan for part of the period of relevance (beginning in May 2006) is the December 2005 IEP. This IEP contained only two goals. (FF 22.) The first was a goal seemingly for speech pragmatics that was so vague as to be unintelligible (except for a very specific objective for the correct pronunciation of the phoneme "r" that is not in contest here). The second was an appropriate goal for mathematics calculation. There was no goal for reading decoding, fluency or comprehension; no goal for mathematics problem solving; no goal for spelling, writing, written expression, attention, organization, executive functions, social skills or any other goal addressing the Student's developmental needs.

Throughout the next year and one half, the December 2005 IEP was revised and amended numerous times, usually in response to parental requests, (FF 27, 28, 35, 36, 41, 42, 53), and yet at no time did the District ever offer goals in many of the above areas of need – needs that had been recognized in numerous evaluations, including the District's own

evaluations. (FF 52, 54.) Not until January 2007 did the District offer goals for reading fluency, reading comprehension, mathematics facts, spelling, or written expression (understanding parts of speech and grammar). (FF 41, 57, 68, 81.) Not until April 2007 did the District offer to identify the Student with Autism; autistic support placement and services were never offered. (FF 52, 53.) Not until April 2007 did the District offer a goal for legibility of writing. (FF 80.) After that, the goals remained the same, even though the Student was at best not progressing. No goals were ever offered for mathematics fluency, problem solving, writing fluency, attention, organization, social skills or behavior control. No functional behavior analysis or behavior plan was ever offered. (FF 104, 171.)

Most of the goals that were offered were not based upon measured baselines. (FF 34, 59, 65, 70, 71, 77, 78, 83, 84, 94, 96, 103.) Indeed, baselines were not established in most areas of educational need. Most of the goals, including the crucial goals in reading and mathematics, were not measurable, or did not establish measurement over time to ensure mastery. There was little data driven progress monitoring. The limited data collected for reading fluency and mathematics fluency were not coordinated with the present levels in the IEPs or the small number of goals that were actually offered. (FF 65, 66, 71.)

In short, the District's program, and its implementation, were incomplete and disorganized. Neither the plan nor its implementation addressed all educational needs. The plan was not data driven, and its implementation was guided by teacher subjectivity, without clear parameters or supervision to established goals.

The District argued that its numerous accommodations, program modifications and specially designed instructional techniques were sufficient to offer meaningful opportunity despite the above deficiencies. (FF 23, 26, 27, 28, 30, 40, 42, 43, 54, 65, 66, 71, 92, 93, 114, 178.) While the parties jostled about whether or not these lists in the various IEPs were truly special education – and the hearing officer is satisfied that many were not, but some were – the more salient problem is that none of these were linked to either present levels or measurable goals. Without comprehensive, measured baselines and relevant goals, the educational plan lacked both direction and responsiveness to data. Moreover, the plan was never managed rigorously to provide assurance that FAPE was offered in spite of the lack of adequate goals. (FF 36, 114.)

The District argued that its provision of a one-to-one educational aide sufficed to address all of the educational needs that were not addressed in goals. This argument is not even pertinent to the period from May 2006 until November 2006, when the District finally provided an educational aide; prior to this, one-to-one services in the classroom had been provided by the local behavior services agency – not the District – and these services were clinical, not educational. (FF 12, 14, 18, 26.) Despite numerous requests and complaints, the District personnel had resisted providing an educational aide. (FF b26, 30.) After November 2006, however, the aide was an educator; however, there is no evidence defining what the aide was supposed to do in the classroom. There are no goals, behavior analyses or plans, directives or even witness testimony that specified the aide's role, or what educational needs he or she addressed. There was no data collection or progress monitoring. There was no attention at all to the need to define levels of support and track the fading of such support over time. (FF 84, 94, 103-106, 114, 132, 143, 171.) Under these circumstances, the record is preponderant that the District's program and its implementation were inadequate and inappropriate during the entire period of relevance in this matter.

The District relies heavily upon the argument that the Parents were satisfied with the plan and its implementation, and repeatedly said so. (FF 55.) The District suggests that this proves that the plan was adequate and the Student received meaningful educational benefit. Parental expressions of satisfaction are too slender a reed upon which to rest such sweeping conclusions.

The Parents' expressions of consent signify only their eagerness to accept any help that the District would provide; the Parents repeatedly pointed out that they are not professional educators, and consequently, they relied upon professional judgments expressed by District personnel. (NT 43-44, 99-100, 121-125, 131-134, 149-154.) Having observed the Parents during this hearing, the hearing officer finds them credible, and accepts their assertion that they were respectful of the expertise of the District personnel, assumed that such personnel were providing advice and service within their professional judgment, and that the Parents desired to foster cooperation in the interests of their child. Such behavior hardly amounts to a ratification of District decisions that failed to provide adequate educational services.

The District argues that, despite the deficiencies in its educational program, it nevertheless provided meaningful educational benefit. It relies for this assertion almost exclusively upon the testimony of a single learning support teacher. (FF 65, 66, 71, 90, 132, , 133, 144, 145, 153, 156, 159, 167.) This teacher was well liked and trusted by the Parents, so her testimony became central to the defense. However, her testimony is given less weight than the record of test scores and the testimony of the Parents' expert, because in several important instances, the record itself contradicted her claims of subjective detection of meaningful educational gain. Moreover, much of the subjective and objective evidence provided that suggests some progress in reading fluency is based upon the period of time after the school strike – a period during which the Parents obtained explicit instruction for this skill privately for several weeks. Thus, though there is no finding of intentional untruth, the hearing officer finds the teacher's testimony to be unreliable with regard to the extent of the Student's progress while under her care, and the objective evidence of progress to be equivocal evidence at best of progress in reading.

The District points to objective data that the Student progressed in reading and mathematics from November 2006 to November 2007. (FF 46, 56, 67, 142, 150.) The hearing officer notes this but also notes that the Student did not close the gap with his age appropriate class level, and in some skills showed less than one year's progress. Also, these data are contradicted by the weight of the evidence in this matter, especially later objective testing that shows the Student functioning below the levels reported by the District. (FF 38, 39, 49-52, 56-109, 116-176.) The hearing officer therefore concludes that these data are not enough to prove meaningful progress by a preponderance of the evidence.

The District also argues that the Parents' expert's opinions were deficient because her methodology did not include interviews with District personnel in-class observations of the Student and review of the Student's work product. As to contacts with the District, the hearing officer agrees that such contacts are desirable, and that their omission argues against the reliability and weight to be accorded to this opinion testimony.

However, the record must be considered as a whole. Here, even if the Student's teachers could have referred the evaluator to subjective observations of progress or curriculum-based measures of progress, the

expert's opinion as to the failure to provide a FAPE would have been supported amply by the numerous objective evaluations showing the Student falling behind in key academic areas such as reading comprehension, mathematics and writing. As to review of Student work product, the expert stated credibly that she had reviewed some, though she could not identify it specifically. (NT 349.) This inexact documentation does not sufficiently undercut the expert's opinion as to render it unreliable.

Moreover, any curriculum based assessments were in the context of supports, such as one-to-one prompting, extra time given to complete tests, and reduced quantities of materials. There is no evidence that any of these accommodations was defined systematically or provided in the context of a data driven methodology. Supports were not measured or counted so that they would be amenable to fading. This failure to define and measure the assistance given to the Student in testing detracted from the reliability of curriculum based testing as a measure of progress. (NT 314-315.) Thus, the expert's failure to thoroughly explore the extent of in-house measures of progress in this matter is not fatal.

The District challenged the expert's testing methodology by suggesting that her scheduling of such testing all on one day could have diminished the Student's performance by exhausting or frustrating him. The expert admitted that her scores did not reflect whether incorrect answers were due to inability to perform or to lack of time in light of the Student's serious problems with fluency and inattention. However, the expert explained that her methods were in accord with the instructions of the pertinent manuals, and that the only timed tests she gave were measures of fluency itself. The District provided no evidence of deviation from professional standards or competence in the testing administration. Thus, the hearing officer does not accept the argument that the testing circumstances rendered the scores unreliable.

The District suggests that the expert obtained scores on the Woodcock-Johnson III Normative Update (WJ) that were so divergent from the Woodcock-Johnson scores obtained by the District that the examiner's methodology should be questioned. However, close examination shows that the expert's WJ scores were for different kinds of tests than those reported by the District. The expert's scores reflected fluency, which was a central weakness of cognitive functioning that the Student experiences across the board; therefore, it is not surprising that the Student's fluency scores are

relatively low. The District provided no expert testimony suggesting that these scores were incompatible with the District's reported scores in different sub-tests.

The District challenges the expert's methodology by reference to two Appeals Panel decisions that rejected the same expert's reports in other cases. In re Educational Assignment of D.S., Spec. Educ. Op. 1857 at 15-18 (December 24, 2007); In re Educational Assignment of G.T., Spec. Educ. Op. 1808 at 11-13 (March 19, 2007). The District argues that the same methodological flaws arise in this case as were considered determinative in the Appeals Panel decisions. The hearing officer disagrees. In D.S., the expert performed substantially more tests in no more than three hours, and the record was substantial that the student was prone to fatigue; here, the total testing time was three hours, but the record reflects that the whole day was set aside and breaks were given as appropriate. The record of fatigue was not nearly so clear as in D.S. In G.T., the Panel relied upon evidence of "cherry-picking" of data for the discrepancy analysis and reliance upon parents for critical data underlying the ADHD diagnosis. Here, there is no evidence of improper use of data, and the expert relied upon an extensive history of repeated diagnoses and findings of cognitive impairment that mitigated the potential for error posed by heavy reliance upon test scores.

The hearing officer, having carefully listened to the expert's testimony, finds that her opinions were credible and reliable. They were based upon extensive testing with norm referenced instruments, whose utilization and scoring were not challenged in this matter. They also were grounded in a thorough review of the extensive record of evaluations and educational plans, by both private consultants and District personnel. The expert witness is highly qualified and presented extensive evidence of her lengthy career and accomplishments.

In sum, the Parents' expert report is weighed in the context of IEP and re-evaluation documents that failed to provide any coherent, data-driven depiction of the Student's supposed academic progress. The expert's report is consistent with numerous scores and observations of functional deficiencies in the record, which weighed heavily in favor of a finding that the Student was not making meaningful progress in reading fluency, mathematics achievement, writing legibility, written expression, attention, organization, social skills or behavior control. In this context, the report provides significant weight to the inference that the hearing officer draws

directly from the extensive documentation of history and test scores - that the District was not providing a comprehensive, individualized program of specially designed instruction that addressed all of the Student's educational needs in the least restrictive setting necessary to provide a FAPE. In conclusion, the District failed to provide a program reasonably calculated to provide meaningful educational benefit, and the record is preponderant that the District failed to provide such benefit during the relevant period. Compensatory education will be awarded; in light of the District's prior notice of the Student's educational needs at the beginning of the relevant period, the usual equitable discovery and remediation period will not be allowed.

EXTENDED SCHOOL YEAR SERVICES

The record is preponderant that the District did provide ESY services for the Student in the summer of 2007, and that the Parents did not request ESY services for the summer of 2008. (FF 190, 191.) Under these circumstances, compensatory education will not be awarded on account of ESY in these years.

REIMBURSEMENT FOR TUITION AND TRANSPORTATION

An administrative hearing officer may award tuition reimbursement when parents unilaterally place their child outside the public school system under the Burlington-Carter test. Florence County Sch. District v. Carter, 510 U.S. 7, 114 S.Ct. 361 (1993); Burlington Sch. Committee v. Dept. of Educ., 471 U.S. 359, 105 S. Ct. 1996 (1985). The test requires three findings: 1) the District's program and placement is not appropriate; 2) the private school selected by the parents is appropriate; and 3) the "balance of the equities" favors reimbursement. See Carter, 510 U.S. at 13; Ridgewood Bd. of Educ. v. N.E. for M.E., 172 F.3d 238, 248 (3d Cir. 1999).

Here, the District's program was not appropriate, as discussed above. Therefore, the hearing officer must reach the second step of the Burlington-Carter analysis - whether or not the private school selected by the Parents is appropriate for the Student. The hearing officer finds that the school is not appropriate.

The school selected is the Allied Services – dePaul School. (FF 179-188.) The Parents presented the testimony of its principal and brochure materials to delineate its mission and services. It is a private elementary special education school, but not on the approved list. It is historically and primarily a school for children who need remediation for dyslexia, and it is a highly restrictive educational setting, with no opportunities for inclusion with typical students. It is not experienced with autistic spectrum disorders, and most of its staff are not certified special education teachers. Its program is not primarily research based, but derives from a program developed many years ago for children then classified as dyslexic. The program is proprietary, but there is no evidence of its efficacy or of replication of its claimed efficacy by independent researchers. Its principal is not certified in education administration. Its program is not primarily data-driven, and it does not offer specially designed instruction for social skills. The Parents' own expert opined that the DePaul School is not an ideal setting, but was chosen largely for its proximity to Scranton, and the desire of the Parents to have the Student continue living at home. (NT 331-332.)

In conclusion, the Parents have not shown that the second part of the Burlington-Carter test has been satisfied, because the hearing officer finds by a preponderance of the evidence that the DePaul School is not an appropriate placement. Consequently, tuition reimbursement will not be awarded.

REIMBURSEMENT FOR INDEPENDENT EDUCATIONAL EVALUATION

For a parent-initiated evaluation, (FF 189), parents are entitled to reimbursement if a hearing officer finds the district's evaluation inappropriate,. In the Matter of the Educational Assignment of J.B., Spec. Ed. Opinion 1341 (April 2003). The hearing officer finds preponderant evidence that the Parents did not disagree with the District's evaluations.

On the contrary, they disagreed with the District's educational plan and its implementation. Indeed, the parties contended largely about whether or not the Student has a Specific Learning Disability; yet the first time this was asserted was in May 2008, by the Parents' expert, and this came long after the Parents withdrew the Student unilaterally from the District, based

solely upon their concerns about the Student's program and placement in the District. Therefore, the hearing officer will not award reimbursement for the Parents' expert's evaluation.

COMPENSATORY EDUCATION IN LIEU OF TUITION REIMBURSEMENT

Compensatory education may be awarded for the period of deprivation of FAPE, with an offset for the period of time reasonably needed to discover and remedy the deficiencies in the district's services to the student. Ridgewood Board of Education v. M.E. ex. rel. M.E., 172 F.3d 238 (3d Cir. 1999); M.C. v. Central Regional School District, 81 F.3d 389 (3rd Cir. 1996).⁵

The Parents argue that the hearing officer should award them compensatory education for the period of time after they withdrew the Student from the District until the date of the first session of this hearing. This is plainly not authorized. In re Educational Assignment of D.H., Spec. Educ. Op. 1732 at 15-18 (May 22, 2006)

Therefore, the Student will be made whole with an order structured under the traditional test set forth in M.C. As Parents requested, this will consist of compensatory education for every school day between May 2006 and December 21, 2007, in the requested amount of three hours per day. The hearing officer has considered the extent of the failure of meaningful opportunity in this case and finds that the requested amount is equitable. The Student made no progress in mathematics or written expression, and his social skills needs were ignored. These unmitigated deprivations merit at

⁵ In a gifted education case, the Commonwealth Court rejected the M.C. standard for compensatory education, holding that the student is entitled to an amount of compensatory education reasonably calculated to bring him to the position that he would have occupied but for the school district's failure to provide a FAPE. B.C. v. Penn Manor School District, 906 A.2d 642 (Pa. Cmwlth. 2006). Regardless of whether or not this gifted case applies in an IDEA setting, the hearing officer will not apply the B.C. standard here. It is not possible on this record to determine what position Student would have occupied had he received FAPE when it was due him. Cf. In Re A.Z. and the Warwick School District, Special Education Opinion No. 1783 (2006) (compensatory education awards would be the same whether Appeals Panel used the M.C. analysis or the B.C. analysis).

least two hours per day of compensatory relief. Another hour per day is fair in light of the evidence which shows a failure to meaningfully benefit from teaching in reading, since the Student's modest gains in decoding and fluency were offset by his lack of progress in reading comprehension.

PROSPECTIVE RELIEF

As requested, the hearing officer will order prospective relief. In so doing, the hearing officer is guided by the recommendations of the Parents' expert, but does not incorporate them in detail. Following her advice, however, and agreeing that the order of planning that she suggests is appropriate in light of the recent history of this matter, the hearing officer will order the District to take the following steps: First, it will offer to reevaluate the Student at public expense and provide a comprehensive evaluation report to the parents within sixty days of the date of this decision; such report will establish measurable baselines of present functioning in all of the areas of the Student's educational need, and will take into account all private evaluations submitted by the Parents. Second, it will convene an IEP meeting within ten days of the date of the evaluation report, or of the date of this decision, if the Parents do not consent to reevaluation, for the purpose of determining a program and placement for the Student. Such program and placement will address all of the Student's educational needs as required by law; these must include reading fluency and comprehension, mathematics facts, calculation, fluency and problem solving, writing legibility and fluency, written expression, attention, organization, social skills and behavior in the school setting. Placement will be determined by the IEP team. Third, the IEP team will determine what research based programs are necessary to provide the Student with explicit instruction in the above areas of need, considering all of the recommendations in the Parents' expert's report in may 2008. Fourth, it will offer autistic support and learning support services as needed and as appropriate, in the least restrictive environment appropriate to the needs of the Student, including his needs for the benefits of inclusion. Fifth, it will establish measurable goals and objectives or benchmarks, with explicit methods for data collection and progress monitoring to be reported to the Parents. Sixth, it will offer specially designed instruction and program modifications as defined by law. Seventh, it will offer such related and supportive services as are necessary and appropriate.

CONCLUSION

Weighing all of the evidence as stated above, the hearing officer finds that the District failed to provide a FAPE to the Student during the relevant period. Compensatory and prospective relief will be ordered. The hearing officer finds no legal basis for awarding either tuition reimbursement, the cost of a private evaluation, or compensatory education in lieu of tuition reimbursement.

ORDER

1. The District failed to offer and implement an appropriate IEP during the period from May 14, 2006 until the date on which the Student left the District, December 21, 2007.
2. The Student was provided Extended School Year services during the summer of 2007 and was not entitled to Extended School Year services during the summer of 2008. Therefore, compensatory education will not be awarded on account of ESY services.
3. The District is ordered to provide compensatory education to the Student in the amount of three hours per day for every school day from May 14, 2006 until December 21, 2007.
4. The compensatory education ordered above shall not be used in place of services that are offered in the current IEP or any future IEP. The form and utilization of services shall be as follows: The form of services shall be decided by the Parent, and may include any appropriate developmental, remedial, or enriching instruction, or therapy. The services may be used after school, on weekends, or during the summer, and may be used after the Student reaches 21 years of age. The services may be used hourly or in blocks of hours. The costs to the District of providing the awarded hours of compensatory education shall not exceed the full cost of the services that were denied. Full costs are the salaries and fringe benefits that would have been paid to the actual professionals who should have provided the District services and the usual and customary costs to the District for any contracted services. The

District has the right to challenge the reasonableness of the cost of the services.

5. The hearing officer will not award tuition reimbursement and transportation costs for the period from December 21, 2007 to August 6, 2008 for the cost of tuition at the dePaul School.
6. The hearing officer will not award compensatory education for the period from December 21, 2007 to August 6, 2008.
7. The hearing officer hereby orders the District to offer an appropriate program and placement for the Student forthwith, in compliance with the following:
 - a. The District will offer to reevaluate the Student at public expense and provide a comprehensive evaluation report to the parents within sixty days of the date of this decision; if Parents consent to such evaluation, the evaluation report will establish measurable baselines of present functioning in all of the areas of the Student's educational need, and will take into account all private evaluations submitted by the Parents.
 - b. The District will convene an IEP meeting within ten days of the date of the re-evaluation report, or of the date of this decision if the Parents do not consent to reevaluation, for the purpose of determining a program and placement for the Student.
 - c. Such program and placement will address all of the Student's educational needs as required by law; these must include reading fluency and comprehension, mathematics facts, calculation, fluency and problem solving, writing legibility and fluency, written expression, attention, organization, social skills and behavior in the school setting. Placement will be determined by the IEP team.
 - d. The IEP team will determine what research based programs are necessary to provide the Student with explicit instruction in the above areas of need, considering all of the recommendations in the Parents' expert's report in May 2008.

- e. The District will offer autistic support and learning support services as needed and as appropriate, in the least restrictive environment appropriate to the needs of the Student, including his needs for the benefits of inclusion.
 - f. The District will establish measurable goals and objectives or benchmarks, with explicit methods for data collection and progress monitoring to be reported to the Parents.
 - g. The District will offer specially designed instruction and program modifications as defined by law.
 - h. The District will offer such related and supportive services as are necessary and appropriate.
8. The hearing officer will not order reimbursement for the cost of the independent educational evaluation of the Parents' expert, Dr. K.

William F. Culleton, Jr. Esq.

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

November 22, 2008