

IN THE OFFICE FOR DISPUTE RESOLUTION

DECISION
CLOSED HEARING¹

ODR No. 01513-1011 AS

Child's Name: K.P. [REDACTED]
Child's Date of Birth: November 15, 1992

Hearing Dates: November 2, 8 and 12, 2010
Record Closed: December 30, 2010
Date of Decision: January 14, 2011

Parties to the Hearing:

W.P. [REDACTED], Father
R.P. [REDACTED], Mother
K.P. [REDACTED], Student

Complainants

[REDACTED] School District

Respondent

Representative:

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Hearing Officer: Brian Jason Ford

Introduction and Procedural History

On August 31, 2010, W.P. and R.P. (collectively, Parents), on their own behalf and on behalf of their child, K.P. (Student), requested a special education due process hearing against the [REDACTED] School District (District). The request was made through the submission of a Due Process Compliant Notice (Complaint), alleging violations of the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* (IDEA) and its federal and state implementing regulations. A due process hearing was originally

¹ The Student's name appears only in the caption of the original, un-redacted copy of this decision. The Student's name has been omitted from the remainder of the decision as a privacy consideration.

scheduled for October 21, 2010, but was continued. Hearing sessions convened on November 2, 8 and 12, 2010. After the hearing, I granted joint requests for a brief extension to file written closing statements. My receipt of those statements on December 30, 2010, constituted the close of the record.

It is not contested that the Student is a student with a disability as defined by the IDEA, and is therefore entitled to a free appropriate public education (FAPE). During the first hearing session, the specific issues to be decided were clarified:²

1. Should the Student be identified as having a specific learning disability in the area of math and apraxia?³
2. Is the Student entitled to three hours per day of compensatory education for each day of the 2008-2009 and 2009-2010 school years, stemming from an alleged denial of FAPE for that period of time?
3. Is the Student entitled to additional compensatory education for the District's alleged failure to offer extended school year (ESY) services for the summers of 2009 and 2010?
4. Are the Parents entitled to reimbursement for tuition incurred during the 2010-2011 school year when they placed the student in an out-of-state, residential private school?
5. Are the Parents entitled to reimbursement for the cost of independent educational evaluation (IEE)?

Findings of Fact

All witnesses testified credibly, except as explicitly noted herein. Upon consideration of the testimony and evidence, I make the following findings of fact:⁴

I. Background

1. The Student was first identified with attention deficit hyperactivity disorder in the 2003-2004 school year, which was the Student's third grade year. NT at 28, P-1.
2. By October of 2003, the District knew that the Student was medicated for ADHD. S-34, P-13.
3. The Student received an IEP in November of 2005. P-2. Under that IEP, the Student received an itinerant level of speech and language support. The Student received the same level of the same type of support when the IEP was renewed in November of 2006.

² The Parents, in their closing brief, describe the issues differently. However, the issues as stated at the beginning of the hearing, with the agreement of the parties, are the issues that I am deciding. NT at 24.

³ In the Complaint, the Parents demanded the identification of other disabilities. During the first hearing session, the District stipulated that the Student is properly identified as the Parent's suggest, with the exception of the disabilities specifically at issue in this case.

⁴ References to to pages of the hearing transcript are NT at #, the Parent's exhibits are P-#, and the District's exhibits are S-#.

4. The District prepared a reevaluation report (RR) for the Student October 17, 2007. P4. The RR includes PSSA scores placing the Student at the basic level in 7th and 8th grade reading and below basic in 7th grade math. *Id.* The evaluator attributed these scores to "inconsistent effort" and concluded that the Student "needed to pay better attention in math." *Id.* The RR also notes continuing auditory processing weaknesses and recommends the continuation of special education services.
5. Another IEP was prepared for the Student on November 7, 2007.⁵ P5. At that time, the Student had a "D" in Language Arts, a 51 in Oral Communication and a 73 in Applied Algebra I. *Id.* The District attributed the Student's academic performance, in part, to a failure to complete homework, but also noted that the Student needed to improve reading comprehension skills. *Id.*

II. The 2008-2009 (10th Grade) School Year

6. During the 2008-2009 school year, the Student took the lowest level of regular education classes that the District provides. NT at 35.
7. A reevaluation report (RR) for the Student was completed in November of 2008. P-6. That RR was completed by a Speech/Language Clinician employed by the intermediate unit serving the District. *Id.* A school psychologist did not participate in the development of the RR. *Id.*
8. The November 2008 RR reports that the Student received grades of "D" in Oral Communications, Applied Algebra I and Computer Applications at the end of the prior school year, as well as the PSSA results described *supra*. *Id.* The RR notes that the Student was receiving poor marks in some academic subjects at the time of the report (English 2-65; US History 1-68; Applied Algebra 2-65) and attributes those marks, in part, to missed homework assignments. *Id.*
9. Relying upon her impressions of the Student's progress and abilities in speech and language (as opposed to new or updated evaluations) the Speech/Language Clinician recommended that the Student should stop receiving speech and language support.⁶ *Id.*, NT at 374.
10. The Student's Mother testified, credibly, that the Speech/Language Clinician told her that the Student had "improved as far as he could improve" in speech and language. NT at 38-48.
11. A new IEP was prepared for the Student on November 5, 2008. S-29. This IEP listed the Student's eligibility classification as deaf/hard of hearing. *Id.* The Student is neither deaf nor hard of hearing and never has been. The the District chose designate the Student as in need of hearing support for the sole purpose of obtaining supports (either funding or personnel) from the intermediate unit serving the District.
12. The November 2008 IEP provided an itinerant level of hearing support from a Hearing Support Teacher employed by the Intermediate Unit. The Hearing Support

⁵ The record indicates a number of procedural deficiencies in the process by which that IEP was drafted, and a number of significant, substantive shortcomings (e.g. failure to provide SDI to address a reading comprehension deficiency). Again, this IEP falls outside the scope of this due process hearing.

⁶ No actual progress monitoring data was presented.

Teacher provided no hearing support services to the Student who - again - is not hearing impaired. Rather, the Hearing Support teacher would read passages from the Student's textbook to the Student and then ask questions about the readings. NT at 471-472.

13. Parents signed a notice of recommended educational placement (NOREP) approving the November 2008 IEP.
14. During the 2008-2009 school year, other students wrote on the Student's body, clothing and binder.⁷ Their comments were vulgar, offensive and hurtful - and are well known to the parties so they need not be repeated here. NT at 41-42, 45-46, 63-64. As this was happening, the Student stopped attending after school events.
15. In an email dated March 10, 2009, the Hearing Support Teacher told the Parents that the Student no longer qualified for hearing support services. P-30. The Hearing Support Teacher acknowledged that the Student was struggling academically, but attributed those struggles to "difficulty with the content" and the Student's "own motivational issues." *Id.* The email of March 10, 2009 does not purport to be a reevaluation, and no additional testing was completed at this time.
16. On March 19, 2009, the District issued a Permission to Evaluate - Request Form. S-22 That form was signed by the Student's mother on March 28, 2009. The concerns prompting the request were "Inconsistent performance, lack of motivation, focus, structure [and] poor homework discipline." The District received this form back from the Parents on April 9, 2009.
17. On April 24, 2009, the District issued a Permission to Evaluate - Consent Form. S-23. This form seeks the Parents consent to conduct a psychological evaluation. The Student's Mother checked a box on that form indicating her refusal to give consent to the proposed evaluation. The Mother signed the form on July 20, 2009 and it was received by the District on July 21, 2009.
18. The Hearing Support Teacher (not a school psychologist) prepared a new RR on March 9, 2009. S-21. According to the RR, the Student had been tested by an audiologist from the intermediate unit, who concluded that the Student no longer qualifies as a student with a hearing impairment. *Id.*, S-21. The following grades were reported in the new RR, reflecting the third marking period of the 2008-2009 school year: English 2 - 69; PSSA Reading/Writing - 69; US History I - 64; Applied Algebra II - 74. *Id.* The RR concludes that the Student "does not have a disability and therefore no longer is eligible for special education." *Id.*
19. A new NOREP, exiting the Student from special education, was prepared and approved by the Parents. S-20. The NOREP is dated March 18, 2009 and was signed by the Student's mother on March 30, 2009.

⁷ During the hearing, the Parents attempted to introduce the binder itself as an exhibit. The District objected based on the fact that the binder was not disclosed five days in advance of the hearing, as required by 22 Pa Code § 14.162(k). The District's objection was sustained. Despite this, and despite my admonitions to the contrary, the Parents' counsel repeatedly attempted to bring the binder into my field of vision and make references to it. My findings of fact are based on testimony about the binder, which I find credible, and not the binder itself. Divorcing that testimony from the Parent's counsel's behavior in this regard was a considerable mental endeavor that would have been unnecessary had the Parent's counsel obeyed my instructions during the hearing.

20. As the Student was not "in" special education at the end of the 2008-2009 school year, ESY services were not offered.

III. The 2009-2010 (11th Grade) School Year

21. The Student started his 11th grade year without an IEP. The Student's Math teacher described the Student as "average" and opined that his grades were diminished by incomplete homework and the Student's failure to make up assignments and correct tests. NT 400-417. The Math teacher described the Student's math fluency as "average," but did not actually evaluate the Student's math fluency using any sort of standard assessment. NT at 411-416. Nevertheless, the Math teacher testified to the best of his ability, basing his testimony on his own observations.

22. As instructed by his English teacher, the Student maintained a journal for his English class. The Student kept his journal in a traditional, bound composition notebook.

P-42

23. On March 24, 2009, the Student wrote:

Today was a really bad day because of how the darn JROTC cadets messed with me. Some of them messed with my stuff and one of them at the end of class pushed me against the wall. There [sic] all asking for it. They don't know what I can and what I will do.

24. The above-quoted text is evidence that the Student was bullied in school during JROTC.

25. On March 26, 2009, the Student submitted his journal for grading. The Student's English teacher wrote "50/70" on the page after the above-quoted entry. *Id.* With the composition notebook open, the above-quoted text would have been visible to the English teacher when she made her marks. Although the English teacher did not testify at the hearing, I find that the English teacher saw the above-quoted entry when she made her marks. I make this finding based on the physical design of the notebook.

26. It is difficult to conceive of a plausible scenario in which the English teacher would have seen but not read the quoted text. There is no evidence in the record, however, that the English teacher actually read the quoted text.⁶ Although I cannot find that the English teacher read the quoted text, I do find that the English teacher took no action after grading the journal. *See* NT at 57-58, 538. The English teacher either did not read the quoted text or was not alarmed by it. Either scenario is deeply concerning.

27. The Assistant Principal of the District's high school testified that the District's anti-bullying policy requires teachers to intervene when they become aware of bullying.

⁶ As discussed herein, *infra*, the Parent's bear the burden of proof in this matter. As such, I cannot find a fact adverse to the District without evidence of that fact's existence. In light of this standard, and my authority to issue subpoenas at the request of either party, it is difficult to understand why the English teacher did not testify.

The Assistant Principal also testified bullying is “generally a repeated offense” and that teachers do not necessarily need to report isolated incidents of bullying. P-42, NT at 338-340. The District’s Director of Special Education shares the same belief about how bullying is defined, but was quick to add that even single incidents should be reported. NT at 588, 589.

28. The Student’s mother testified, credibly, that the Student refused to use the bathroom in school during the 2009-2010 school year, that other students would not partner with the Student for Science labs and that teachers reported unsatisfactory work product during parent-teacher conferences.⁹ NT at 64-65, 180.
29. Sometime in January of 2010, a group of female students began bullying the Student by making comments to the Student concerning his lack of friends. P-25. This bullying continued once or twice per week between January and April of 2010. *Id.*
30. On April 8, 2010, in response to the bullying, the Student made a gun gesture with his thumb and forefinger. P-25. This behavior was reported to the Assistant Principal. The Assistant Principal notified the School Resource Officer (SRO), and called the Student’s mother to school.¹⁰
31. After the incident on April 8, 2010 - his own definition of bullying notwithstanding - the Assistant Principal instructed the female students to stop their harassment. The incident was also brought to the attention of the female students’ parents. NT at 311-315.
32. According to the Mother’s uncontested testimony, the Student is a fan of World Wrestling Entertainment (WWE) - particularly of the wrestler Randy Orton.¹¹ As part of the WWE story line, it was revealed that Mr. Orton (or at least the character he plays) suffers from Intermittent Explosive Disorder, or IED. IED is, in fact, a condition described in the Diagnostic and Statistical Manual of Mental Disorders, fourth edition (DSM-IV at 312.34). IED is also the well-known abbreviation for Improvised Explosive Device - the bombs that are used against United States armed forces in the wars in Iraq and Afghanistan.
33. On April 26, 2010, the Student was accused of making a terroristic threat, using the word “IED.” NT at 78-79, S-16, S-17. The Student also said that he would “shoot up the school” - targeting the School Resource Officer first. S-16, NT at 319. A teacher who witnessed the incident (but who did not testify at this hearing) reported that other students were joking with the Student at the time of the incident. That teacher did not report that the Student made any threats. The Student denied making threats. P-48.

⁹ Although the Mother did not observe the Student in school directly, her credible testimony was unrefuted and consisted (at least in terms of academics) with the Student’s low marks in several classes.

¹⁰ In Pennsylvania, SROs are on-site uniformed law enforcement officers, employed by local police departments, stationed in school buildings. As such, the SRO at the Student’s high school was not an employee of the District. More information about SROs can be found at the website for the Pennsylvania Commission on Crime and Delinquency, <http://www.pccd.state.pa.us>.

¹¹ For those who are unfamiliar, WWE stages highly stylized wrestling matches pitting colorful characters against each other in the context of a soap opera story line.

34. After an investigation, the District suspended the Student for 10 days and referred the Student for a "threat assessment" which concluded that the Student was a "mild" threat of harm to other students at that time. The threat assessment recommended placement in an alternative education program. P-12
35. The incident on April 26, 2010 was, ultimately, reported to the the local police department. Shortly thereafter, the Student was charged with making terroristic threats. These charges were prosecuted, and that matter ultimately resolved in a conviction with a sentence of probation and a mandatory psychological examination. P-28.¹²
36. On May 6, 2010, the Student was moved into the District's "Twilight" program. P-38. The Twilight program is an after school alternative education program operated by the District. The Student had been exited from special education nearly a year before the transfer to the Twilight program, and so none the IDEA's procedural protections were implemented during this transfer.
37. On May 11, 2010, the Assistant Principal requested psychological services from a District-employed psychologist. S-13.
38. On May 19, 2010, a school psychologist who also has a Ph.D. completed a new evaluation report (ER) for the Student. P-12. The ER of May 19, 2010 concludes that the Student suffers from Asperger's Syndrome.
39. On May 24, 2010, the psychological examination ordered in the juvenile matter was completed by a psychologist employed by York County Juvenile Probation. P-13. That evaluation also diagnoses the Student with Asperger's and ADHD and recommends, *inter alia*, out-patient mental health therapy and social skills interventions.
40. The Student received several poor grades at the end of the 2009-2010 school year, including: English III - 50; Physical Science - 50; US History - 68; and Applied Geometry I - 61. P36.

IV. The Summer of 2010

41. The District did not consider the Student's potential need for ESY services in the summer of 2010 and none were offered.
42. During the summer of 2010, the Parents obtained an independent educational evaluation at their own expense from a Pennsylvania Licensed Psychologist who is also holds an Ed.D. and is a Nationally Certified School Psychologist. New testing was completed for that report and numerous recommendations were made therein. P-14
43. More Specifically, the independent evaluator conducted a WAIS-IV, a WIAT-III, and a BASC-2. *Id.* In sum, these evaluations revealed that the Student has significant

¹² The Parents allege that the District was instrumental in the prosecution of the juvenile matter while the District denies direct involvement. There is no preponderant evidence in the record to support the Parents' claim in this regard. Yet even if there were preponderant evidence to suggest that the District actively encouraged the prosecution, the fact remains that the Student was actually convicted of making terroristic threats. The Parents testified that the conviction was the outcome of a plea bargain. My misgivings about the outcome of the juvenile matter notwithstanding, Judge Patterson's final order is the subject of *res judicata*, and I shall not serve as a *de facto* appeals court.

needs in reading comprehension, math fluency and essay composition as well as functional communication needs.

44. The IEE diagnoses the Student with “high-functioning autism,” ADHD and specific learning disabilities in reading comprehension, written expression and math calculation. *Id.* The independent evaluator recommended intensive therapy in language processing, direct instruction in word-finding and social/pragmatic language assistance as well as remediation in written expression. *Id.*, NT at 133. Recommended SDI to improve reading comprehension and assistive technology to help with writing are specified in the IEE. P-14. The IEE also recommends a functional behavioral assessment (FBA) to develop a behavior intervention plan (BIP) for the Student. *Id.*
45. More specifically regarding math, the IEE reports that the student was “below average” in numerical operations, “average” in math problem solving, “below average” in math fluency-subtraction, and “average” in math fluency. Saxon math is recommended.
46. Regarding apraxia, the IEE says “rule IN/OUT apraxia of speech.” S-11
47. The IEE ultimately recommends that the Student would benefit from placement in a private school and specifically lists a boarding school in Connecticut (the Boarding School) as an option if there are no schools in commuting distance from the family’s home. *Id.* The independent evaluator testified that she is familiar with the Boarding School, and that it is appropriate for the Student.
48. The independent evaluator reviewed educational records generated by the District and relied upon them in her report, but did not communicate or coordinate with the District in reaching her conclusions.
49. The Student was also evaluated by the District in the summer of 2010. NT at 499-500, S-9, S-10. An evaluation report was completed. S-4. The District’s evaluation was completed after the IEE, and incorporates its test results and some of - but not all of - its recommendations. The Parents disagreed with the District’s evaluation report and indicated their disagreement in writing. S-5.
50. As part of its evaluation, the District own findings were somewhat different than the independent evaluator’s. The District’s evaluator, a staff psychologist with 16 years of experience, testified about these differences. That testimony was inconsistent. The District’s psychologist said that she did not “exactly agree that [the Student] has a writing disability,” but that the Student, “needs extended time to process that information and put it down on paper,” and “needs specially designed instruction to support ... writing,” and that she did not disagree with the independent evaluators’ findings in terms of the Student’s ability to write. NT at 506-508. The District’s psychologist disagreed with the independent evaluator’s diagnosis of apraxia.
51. The sharpest criticism of the IEE - and of the independent evaluator herself - substantially harmed the District’s psychologist’s credibility. An evaluator need not be schooled in the nuances of special education law to be credible. However, the District psychologist’s testimony revealed both an extreme animus towards the independent evaluator and an incomplete understanding of the purpose of evaluation reports. As such, the testimony of the District’s psychologist will be given very little weight.

52. The District's psychologist criticized the IEE for recommending specific programs. NT at 509. Instead, the District's psychologist testified that evaluation reports should explain "how are you going to address the [Student's] needs." *Id.* Evaluation reports should explain to IEP teams how a student's needs should be met. Evaluation reports must, minimally, recommend what type of special education the student should receive. *See* 20 U.S.C. § 1414(b)(2)(A)(ii). Evaluation reports need not necessarily recommend a "brand name" program, although that is permissible.¹³ Therefore, the District's psychologist is tarnished because she did not understand the type of information that evaluation reports are supposed to convey to IEP teams.
53. Further, the District psychologist testified that was unethical for the independent evaluator to "include all the tables and graphs and information from the computer printouts [of standardized testing results] that help you come up with a diagnosis." NT at 509. This position was based on the District psychologist's incorrect assumption that the independent evaluator bills for IEEs by the page. NT at 556-557. So, more accurately, the District's psychologist believes that the independent evaluator is unethical (as opposed to the IEE itself). One is left to question why the District's psychologist was willing to incorporate the findings of a purportedly unethical independent evaluator when making conclusions about how to address the Student's needs.
54. The Student's speech and language was also assessed on August 3, 2010. At that time, the Student exhibited noticeable errors in the "R" and "TH" sounds. It is not clear whether these findings contradict the November of 2008 determination that the Student no longer required speech therapy, or demonstrate regression between November of 2008 and August of 2010.
55. A new IEP was prepared for the Student on August 10, 2010. P-18. Through that IEP, the District acknowledged that the Student is diagnosed with an autism spectrum disorder. The IEP contains goals that match Pennsylvania's academic standards. These goals include no baseline data. The IEP does contain program modifications, but these are poorly defined.¹⁴
56. The August 2010 IEP offered one session of social skills instruction per week. *Id.* The IEP does not specify what sort of social skills instruction will be provided, and it is unclear how that instruction relates to any of the goals. The IEP also offers one similarly vague counseling session per *month*.
57. The IEP recommends developing a BIP for the Student. *Id.*
58. The District's Director of Special Education testified in support of the IEP offered in the summer of 2010. In sum, the Director believes that the IEP is appropriate because it incorporates the independent evaluator's recommendations and because

¹³ This is the difference between recommending a sequential, multi-sensory, phonemic reading program that teaches to automaticity and a packaged curriculum that does the same thing.

¹⁴ The example of the August 2010 IEP's modifications referenced by the Parents in their closing brief is apt. Saying that "firm classroom rules" should be established for the Student is ambiguous. Does this mean that teacher's should tell the Student what the classroom rules are and then apply them rigidly? Does this mean that different classroom rules apply to the Student? And if the latter, how is a teacher to know what rules should be applied to the Student or created for the Student? The IEP itself contains no guidance in this regard.

the Student's needs are less severe than other students who are successfully educated in the District. *See, e.g.* NT at 579. The Director does not believe that the IEP is inappropriate for its failures to include benchmark data, any particular Math curriculum, or assistive technology as recommended in the IEE¹⁵.

59. Under the IEP, the Student should receive "math strategies." S-8. This was described by the Director of Special Education as an ad hoc program in which the Student is informally assessed by the Math teacher at the start of school, and then instructed in areas of weakness. NT at 611. Math strategies is, therefore, a methodology, not a curriculum. Under the IEP, the Student would have received math instruction under a curriculum chosen by the math teacher, not specified in the IEP. *Id.* The Director also testified that math strategies is not specially designed instruction. Rather, after assessing the student, the teacher would determine what specially designed instruction should be provided and whether a particular curriculum should be used. NT at 613-614.
60. The IEP includes a social skills goal and provides social skills instruction in the form of role playing and rehearsing uncomfortable situations. S-8. The IEP calls for the creation of a visual schedule for the Student, pairing with positive role models, and a pass for the student to go to an "identified safe place." *Id.*
61. The IEP also includes speech and language goals. *Id.*
62. All of the IEP goals are modeled after Pennsylvania state standards. *Id.*
63. The Director did not testify that the Boarding School is inappropriate. Rather, she testified that the program provided through the offered IEP is less restrictive than the Boarding School.
64. That testimony reveals that the Director has virtually no first-hand knowledge of the Student and was not involved in the prior development, provision and withdrawal of special education services to the Student. NT at 583. Rather, her involvement was triggered when the Parents retained counsel. The Director had fewer interactions with the Student than even the Parents' independent evaluator.
65. The Parents rejected the August 2010 IEP and enrolled the Student in the Boarding School.

V. The 2010-2011 School Year

66. According to the Parents, the Student is thriving in the Boarding School. *See, e.g.* NT at 107-115. This testimony was highly credible and totally uncontradicted.
67. The Education Director of the Boarding School, who holds a Ph.D. in Clinical Psychology testified. NT at 204; P-32. According to the Director's testimony, the Boarding School serves about 90 students in grades 9 through 12, all of whom have average or above-average intellectual functioning, but who have been diagnosed with nonverbal learning disabilities and/or Asperger's Syndrome. NT at 208-210. The students at the Boarding School are college-bound, but require a high degree of social/emotional support. *Id.*, NT at 232.

¹⁵ The testimony was that the District can provide assistive technology equivalent to what was recommended in the IEE, but only after the Student receives an additional assistive technology evaluation. NT at 602.

68. The Director described the Student's start at the School as typical, albeit later grade-wise than most. NT at 214-216. Moreover, the Director noted that the Student struggles in some academic areas and has difficulty with abstract thinking, but has blossomed socially. NT at 213-216.
69. The Director described the Boarding Schools' program in some detail. The program is targets executive functioning, reading, writing, math and emotional skills, while preparing student for independent college living. NT at 204- 205. This is accomplished by placing students and teachers in teams. Each team includes a learning specialist, a counselor and subject-specific teachers. NT at 206-207. There are extensive athletic and weekend social activities while students receive constant support in their dorms. NT at 208-210.
70. At the Boarding School, the Student receives seven hours of instruction per day, six days per week. NT at 225. The Director expects that the Student will need to attend the Boarding School during the 2011-2012 school year to prepare for college. NT at 238-239.
71. The Student does not have an IEP at the Boarding School. At the same time, the Director's testimony regarding the Student's progress was detailed, credible, un-refuted and based on direct observation. Consequently, I find that the Student's progress in the Boarding School is what what the Director said it is - described above.

DISCUSSION

I. The Burden of Proof

The Parents bear the burden of proof. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). As such, they must support their claims with preponderant evidence.

II. Specific Learning Disabilities - Math and Apraxia

The Parents claim that the Student must be identified with a specific learning disability in Math. The best evidence in support of that contention is the IEE. The IEE concludes that the Student does have a math disability. FF-46, 47. This conclusion is based on testing results, the independent evaluator's observations, and parental input. The independent evaluator did not consult with any of the District's employees, and so she did not speak with the Student's Math teacher. The Math teacher does not believe that the Student has a math disability based on his observations of the student in Math class.

The results of a single assessment cannot be used to determine that a student has any particular disability. Rather, a verity of tools and assessments should be used. 20 U.S.C. § 1414(b)(2)(A),(B). On its own, the IEE reports that the Student has difficulty in discrete math sub-tests, but has average math fluency. As such, on its own, the IEE does not support the Parent's claim that the Student has a math disability. Combined with the other testimony, the evidence is weaker. The Math teacher's testimony regarding the

cause of the Student's diminished grades was credible¹⁶, and the Boarding School director did not point to math as one of the Student's weaknesses. Consequently, the Parents did not prove by preponderant evidence that the Student has a math disability.

The Parents also claim that the Student must be identified with apraxia of speech, which is a speech/language disability that interferes with motor planning of speech. This is quite different than the articulation problems that were described by some of the witnesses. Whatever progress the Student made with his speech - in the literal sense - has nothing to do with apraxia. Further, the Student may have difficulty communicating effectively as a result of Asperger's syndrome. Regardless, the IEE does not find that the Student has apraxia. The "rule out" diagnosis, in context, indicates that the independent evaluator was concerned about apraxia, but could not make the diagnosis. NT at 132-133. No other evidence was presented to support the Parents' claim that the Student should be identified with apraxia. Consequently, the Parents did not prove by preponderant evidence that the Student has apraxia.

III. Compensatory Education, Including ESY

The IDEA requires the states to provide a "free appropriate public education" (FAPE) to all students who qualify for special education services. 20 U.S.C. §1412. In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that this requirement is met by providing personalized instruction and support services to permit the child to benefit educationally from the instruction, providing the procedures set forth in the IDEA are followed. The Third Circuit has interpreted the phrase "free appropriate public education" to require "significant learning" and "meaningful benefit" that need not be optimal but must be more than trivial. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999); *M.C. v. Central Regional School District*, 81 F.3d 389 (3d Cir. 1996). Compensatory education is an equitable remedy that compensates the child for the period of time of deprivation of special education services, excluding the time reasonably required for a school district to correct the deficiency. *M.C.*, 81 F.3d 389; *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

For reasons set forth below, the Student was denied FAPE during the 2008-2009 and 2009-2010 school years and is owed compensatory education.

The District misused eligibility categories. The Parents contend that the Student was labeled as having a speech/language or hearing disability so that the District could access services from the IU that the District would otherwise have to pay for. The Parents proved half of this assertion. The record does not support the claim that the IU provided services to the District free of charge. It is clear, however, that the Student's eligibility categories were intentionally selected to secure services from the IU. This is a substantive violation that constitutes a denial of FAPE in and of itself - especially regarding the "hearing impairment" designation. There is no connection whatsoever

¹⁶ Whether the District should have done more to address those causes is a different matter.

between the disabilities that the Student actually suffers from and his ability to hear. By making this designation, the District secured personnel to provide services to the Student. In doing so, the District brought in a Hearing Support Teacher to work with a student who has no difficulty hearing. It is not surprising that the Hearing Support Teacher did not actually provide hearing support to the student while he was supposed to receive itinerant hearing support. Worse, in choosing eligibility categories solely for the purpose of securing IU support, the District failed to systematically evaluate and program for the disabilities that actually impede the Student's learning and social development.

At the outset of the hearing, the District stipulated that the various diagnoses reflected in the IEE are appropriate with the exception of SLD-Math and apraxia. The District argues, however, that the Student never exhibited symptoms of these disabilities in school - or at least not to the extent that would require intervention. By way of example, the District's psychologist testified (based on a review of records) that the Student never exhibited social skills deficits consistent with Asperger's syndrome. The District argues that the Student never exhibited problematic behaviors in school, that that excuses the fact that the Student's IEPs in the 2008-2009 and 2009-2010 school year included no goals to address the Student's behaviors or social skills.

It seems that the District was less aware of the Student's needs than his classmates were. The Student's peers were conscious of the Student's differences, with upsetting results. The evidence and testimony clearly indicates that the Student was bullied as a result of his social awkwardness and lack of friends. The testimony regarding the District's lack of knowledge about the bullying is disturbingly credible. The Student was cooperative with his teachers, but the Student's social skills were never carefully examined before the IEE.

The District points to the Student's academic performance as evidence of his progress. FAPE, of course, involves more than academics for a student with Asperger's syndrome. The District made no effort to investigate the Student's deficits as discovered in the IEE. Without baselines, goals and progress monitoring, the District's assertion that the Student actually made progress is unsubstantiated.

With the burden of proof assigned to the Parents, however, the District need not substantiate anything. It is the Parents burden to prove that the Student's needs were not addressed during the period of time in question. The Parents have satisfied this burden. One does not acquire Asperger's syndrome the way one catches a cold. The District stipulates that the Student has Asperger's syndrome. This stipulation itself is very strong evidence that the Student actually had Asperger's syndrome during the 2008-2009 and 2009-2010 school years. The symptoms of Asperger's syndrome are evident in the testimony concerning the Student's interactions - or lack thereof - with his peers. Other students refused to work with the Student, wrote on the Student, wrote horribly offensive comments on the Student's belongings, and made fun of the Student for his lack of social interactions. Given the externally visible nature of these incidents and their frequency, I find that the District was on constructive notice both that the

Student was bullied and that the Student was exhibiting social skills deficits that should have prompted an evaluation.

Relying upon *Forrest Grove School District v. T.A.*, 129 S. Ct. 2484 (2009), *H.G. v. Audubon Board of Education*, 2006 WL 1675072 (D.N.J. 2006) and *C.H. v. Cape Henlopen School District*, the District argues that it faces no liability for the period of time after the Student was exited from special education in March of 2009 because the Parents refused to provide consent to evaluate. This argument has merit, but ultimately is unpersuasive.

The District prepared a RR on March 9, 2009 supporting the decision to exit the Student from special education. The actual NOREP exiting the Student was drafted on March 18, 2009. The decision to exit the Student from special education was based on the fact that the Student no longer qualified as a student with a hearing impairment. S-20. As this was happening, the Parents requested an evaluation that had nothing to do with the Student's non-existent hearing impairment. S-22. The evaluation request was made *after* the exiting NOREP was drafted but *before* it was approved. In response to those concerns, the District offered a psychological evaluation. S-23. Strangely, the evaluation consent form says that the Parents requested a psychoeducational evaluation but offers a psychological evaluation. The Parents actually requested neither of these, but did ask the District to assess the Student's lack of motivation, focus, structure, etc. S-22.

As such, the District had been providing an IEP to the Student under the false pretense that the Student had a hearing impairment, exited the Student from special education after determining the Student no longer required services for a disability that never existed, but not before the Parents requested an evaluation to assess issues that were not previously evaluated in any serious way. Then, a month after the Student was exited from special education, the Parents received a form requesting their consent for the District to conduct a battery of evaluations that they never asked for. If the District truly believed these evaluations were necessary, a verity of mechanisms were at the District's disposal to secure the Parent's consent.¹⁷ The District did not take advantage of any of those procedures, but was content to rely on the Parents lack of consent while not providing the evaluations that - according to the consent form - the District believed the Student needed. Under these specific, factual circumstances, the Parents' withholding of consent did not terminate the District's obligation to provide FAPE during the period of time in question.

During the 2009-2010 school year, the Student received no special education. As discussed, his removal from special education was improper. Importantly, I find nothing improper in the District's response to the bullying once it became actually aware of it in April of 2009. Similarly, I find nothing improper with the District's referral for a threat assessment. What is improper is that the District never evaluated specifically to determine whether the Student had a disability (be it an emotional disturbance or

¹⁷ This includes a due process hearing, even if the District considered any evaluation subsequent to the Student's exit from special education to be an initial evaluation. See 20 U.S.C. § 1415.

anything else) after the threat assessment. The purpose of the court-ordered evaluation and the threat assessment was not to determine the Student's educational needs - a term that covers more than academics. Clearly, at this time the Student was exhibiting behaviors (making gun gestures with his hand, saying things that understandably frightened other students) that impeded his learning and the learning of others. These behaviors were not only acknowledged by the District, but the District took action. I cannot understand why the District never proposed an evaluation for IDEA purposes at this time. The IDEA obligates districts to propose evaluations when they suspect that a student may be in need of special education.

For the foregoing reasons, I find that the Student was denied FAPE in the 2008-2009 and 2009-2010 school years. To remedy this denial, the Student will be awarded the compensatory education demanded by the Parents: three (3) hours per school day, totaling one thousand eighty (1,080) hours.¹⁸ This award shall not expire on the Student's 21st birthday, and shall be directed by the Parents to secure appropriate remedial services. Should the Student return to the District, the compensatory education may not be used to fund services that the District would otherwise be obligated to provide as necessary components of the Student's IEP.

Furthermore, I find that the District completed none of the analysis required by 22 Pa Code § 14.132 to determine the Student's need for ESY services. As such, no evidence exists to demonstrate if the Student would have qualified and, if so, how much of what type of services the Student should have received in the summers of 2009 and 2010. It would be grossly inequitable to penalize the Student for the District's failure in this regard. Consequently, the Student shall be awarded an additional 180 hours of compensatory education to remedy the District's failure to assess the Student's need for ESY services.

III. IEE Reimbursement

A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency. 34 CFR § 300.502 (b)(1). The Parent need not spell out in detail the basis of the disagreement, but there must be some evaluation that the parent disagrees with. In this case, educational evaluations were not pending when the Parents obtained the IEE. The Parents obtained the IEE before asking for an evaluation from the District. With no evaluation in dispute, the standard established by the federal regulations is not met, and the Parents are not entitled to reimbursement for the IEE.

IV. Tuition Reimbursement

IDEA case law establishes a multi-part test to determine whether Parents are entitled to tuition reimbursement. Known as the *Burlington-Carter* test - for *Burlington School Committee v. Department of Education of Massachusetts*, 471 U.S. 359 (1985) and

¹⁸ There are 180 instructional days in a school year.

Florence Count School District v. Carter, 510 U.S. 7 (1993) - the Parents must first prove that the District failed to offer an appropriate IEP. Second, the Parents must prove that the private placement is appropriate. To be appropriate, the private placement must provide a meaningful educational benefit to the student. See *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 242 (3d Cir. 2009). Finally, if the first two parts are satisfied, the hearing officer must determine whether the equities favor reimbursement.

The Parents argue that the history of bullying presented in this case renders the District's high school an inappropriate placement and, as the IEP offered for the 2010-2011 school year places the Student in the District, it is inappropriate. In making this argument, the Parents rely upon *Shore Regional High School. v. P.S.*, 381 F. 3d 194 (3rd Cir. 2004). In *Shore Regional*, the student was called foul names, rocks were thrown at him, bullies to other students not to socialize with him, and one bully hit the student with a padlock in gym class. This carried on throughout elementary and middle school to such an extent that no remedial measures could have adequately protected P.S. *Id* at 201.

In the matter *sub judice*, the Student was written on and highly offensive comments were written on his property. Other students refused to partner with the Student in science lab. The Student was physically bullied in JROTC, and mean girls abused the Student emotionally. The District did not act when it should have known about these incidents, but did act when it gained actual knowledge. No evidence was presented to suggest that appropriate protective measures cannot be implemented to protect the Student in the District's high school. Under the facts of this case, the bullying does not make the District's high school an inappropriate placement *per se*.

The first prong of the *Burlington-Carter* test hinges on the appropriateness of the IEP offered for the 2010-2011 school year. S-8. While this IEP is better than the rest, it is still inappropriate.

The IEP in question offers an itinerant level of emotional support in the District's high school. The proposed primary disability category is Autism with secondary categories of SLD and OHI (accounting for the Student's ADHD). Specified needs include reading comprehension, math fluency, written expression homework completion, organizational skills, study skills, various social skills, speech articulation and the use of non-literal language. The IEP contains goals for reading comprehension, math fluency, written expression, self advocacy, organizational skills, social skills, speech/language and transition. The IEP notes that the Student exhibits behaviors that impede learning, and the development of a BIP was recommended. All of these are vast improvements over the prior IEPs.

Unfortunately, none of the goals in the IEP are individualized. Rather, they are pulled directly from Pennsylvania's academic standards. The District argues that IEP goals must be aligned to state academic standards. The IDEA does require states to "establish goals for the performance of children with disabilities in the State that... are consistent, to the extent appropriate, with any other goals and standards for children

established by the State.” 20 U.S.C. § 1412(a)(15)(A)(iv). This provision of the IDEA addresses state funding eligibility criteria, not IEP content. In terms of IEP content, IEPs must include “a statement of measurable annual goals, including academic and functional goals, designed to ... meet the child’s needs that result from the child’s disability to enable the child to be involved in and make progress in the general education curriculum; and meet each of the child’s other educational needs that result from the child’s disability.” 20 U.S.C. § 1414(d)(1)(A)(i)(II). None of this compels IEP teams to, literally, use state academic standards as IEP goals - which is what the IEP in question does.

Further, an appropriate IEP must include “a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child [that enable the child to] advance appropriately toward attaining the annual goals...” 20 U.S.C. § 1414(d)(1)(A)(i)(IV)(aa). The IEP contains almost no information about what services will be provided to enable the Student to meet the goals, such as they are.

For example, the first goal in the IEP (S8, page 20) says: “Given an reading passage at [the Student’s] baseline level, [the Student] will read the passage silently and then answer multiple choice literal and inferential comprehension questions with an 85% comprehension rate on 4 out of 5 trials.” Assuming that this goal is appropriate, and assuming that the District can be forgiven for failing to establish baseline data indicating the Student’s reading comprehension level, the IEP still must say **something** about how the Student will gain reading comprehension skills. The IEP in question contains no such information. The IEP need not list a “brand name” curriculum, and need not be so rigid as to plan out every moment of the Student’s day. Nevertheless, the IEP’s failure to include sufficient information concerning what services will be provided to enable the Student to reach the goals renders the IEP inappropriate.

Based on the foregoing, the Parents have satisfied the first prong of the *Burlington-Carter* test. Therefore, the appropriateness of the Boarding School must be considered. The District itself notes that

“A parent’s decision to unilaterally place a child in a private placement is proper if the placement ‘is appropriate, i.e. it provides significant learning and confers meaningful benefit...’ That said, the ‘parents of a disabled student need not seek out the perfect private placement in order to satisfy the IDEA.’ In fact the Supreme Court has ruled that a private placement may be proper and confer meaningful benefit despite the private school’s failure to provide an IEP or meet state educational standards.”

Mary Courtney T. v. School District of Philadelphia, 575 F.3d 235, 242 (3rd Cir. 2009), citations omitted.

All of the testimony and evidence concerning the private school points to its appropriateness. The District's Director of Special Education, who has very limited knowledge of the Boarding School, testified that the Boarding school is inappropriate because it is more restrictive than the program offered by the District. This standard is incorrect, as it would render all specialized private schools inappropriate. Rather, testimony by the Parents and their independent evaluator shows that the Parents had every reason to believe that the Boarding School would provide significant learning. Evidence and testimony showing that the Student has made meaningful progress at the Boarding School is credible and uncontested.

It is worth noting that the *Burlington-Carter* test (and more recent tuition reimbursement cases) does not compel parents to select the best placement, or the least expensive placement, or the geographically closest placement, or the most appropriate placement as compared to other private schools. As the District recognizes, a unilaterally selected private placement is appropriate if it meets the standard articulated in *Mary Courtney T.* The evidence supporting the appropriateness of the Boarding School is preponderant. Consequently, the Parents have satisfied the second prong of the *Burlington-Carter* test.

Under the third prong of the *Burlington-Carter* test, I must determine whether it is equitable for the Parents to receive tuition reimbursement. In this case, the District intentionally mis-labeled the Student, withdrew special education supports when the Student did not meet eligibility criteria under the wrong labels, learned that the Student was bullied after it should have known about the bullying, received an IEE showing that the Student had previously un-addressed learning disabilities and, in response, drafted an inappropriate IEP. The equities favor tuition reimbursement.

The Parents have satisfied all parts of the *Burlington-Carter* test. The District shall be ordered to reimburse the Parents for the costs of the Student's attendance at the private school. This includes tuition, room and board, related costs (such as activity fees, if any) and transportation to and from the Boarding School. See 20 U.S.C. §1402(26), 34 C.F.R. §300.24.

ORDER

Wherefore, this 14th day of January, 2011, it is hereby ORDERED that:

1. For the reasons articulated *supra*, the Student was denied FAPE during the 2008-2009 and 2009-2010 school years.
2. The Student is awarded 1080 hours of compensatory education, to be used as described *supra*, as a remedy for the District's failure to provide FAPE in the 2008-2009 and 2009-2010 school years.

3. The Student is awarded an additional 180 hours of compensatory education, to be used as described *supra*, to remedy the District's failure to consider the Student's need for ESY services in the summers of 2009 and 2010.
4. Having satisfied the *Burlington-Carter* test, the Parents are awarded reimbursement of the costs that they incurred to educate the Student in the 2010-2011 school year. This reimbursement is valued at the cost of tuition, room and board, related costs and transportation to and from the Boarding School selected by the Parents.

/s/ Brian Jason Ford
HEARING OFFICER