

Pennsylvania  
Special Education Hearing Officer

DECISION

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ODR No. 01070-0910 AS

OPEN HEARING

Parties to the Hearing:

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Dates of Hearing:

November 8, 2010; November 29,  
2010; December 20, 2010; January  
21, 2011; January 26, 2011; February  
7, 2011

Record Closed:

February 28, 2011

Date of Decision:

March 13, 2011

Hearing Officer:

William F. Culleton, Jr., Esquire

## INTRODUCTION AND PROCEDURAL HISTORY

The captioned high school Student is an eligible resident of the captioned District. (NT 9-4 to 10-3, 38-3 to 8.) The Student is identified with Specific Learning Disability under the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA). (NT 38-3 to 8.) The captioned Parent requests due process under the IDEA and section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (section 504), seeking compensatory education for prior years and prospective relief, as well as reimbursement for independent educational evaluations. (NT 47-19 to 49-19.) The District asserts that it provided appropriate services at all relevant times and that the Parent is not entitled to reimbursement under the law.

On the District's pre-hearing motion, I dismissed Parent's claims regarding racially disproportionate identification; racial discrimination; altering or amending educational records; and altering or amending District policies. I reserved judgment on Parent's claim for compensatory education in the form of college courses, tuition or college related expenses. I denied the District's motion regarding Parent's claim of inappropriate identification due to racial animus, and Parent's request for an order to train staff with regard to diabetes. (HO-1.)

Also on the District's motion, I dismissed all claims by the Parents that arose from events occurring before May 10, 2008. (HO-2.) At the hearing, after receiving oral argument, I declined to order prospective relief, because the Student at the time was in custody of the Juvenile Court without a release date. Thus the period for which I will provide relief (relevant period) ends on the date of confinement by the Court, August 13,

2010. (NT 82-13 to 83-4.) This matter was heard in six sessions and the record closed on February 28, 2011, upon receipt of written summations.

### ISSUES

1. During the relevant time period, did the District maintain an inappropriate identification of the Student?
2. During the relevant time period, did the District place the Student in an inappropriate educational setting that was not the least restrictive appropriate educational setting or that was otherwise inappropriate for the Student?
3. During the relevant time period, did the District fail to provide the Student with a free appropriate public education with regard to educational needs in reading, writing or mathematics?
4. Should the hearing officer award compensatory education to the Student for all or any part of the relevant period?
5. Should the hearing officer award reimbursement for private evaluations by two private evaluators - by an educator of diabetes patients dated August 13, 2010 and October 30, 2010, and by a neuropsychologist dated August 23 and August 24, 2010?

### FINDINGS OF FACT

1. The Student was diagnosed with diabetes in 2002 and was insulin dependent during the relevant time period, from May 10, 2008 to August 13, 2010. (S-7 p. 1.)
2. The acceptable blood sugar range for the Student was 80 to 240 milligrams per deciliter. (NT 871-1 to 24; S-79.)
3. A re-evaluation report in November 2004, when the Student was in elementary school in the District, identified the Student with Specific Learning Disability and Other Health Impairment. It specifically found a causal relationship between the Student's diabetes and Student's learning problems, based upon literature

indicating a causal relationship between the diabetes and cognitive impairments, and based upon data from the previous year showing that the Student was three times more likely to demonstrate positive behaviors when Student's blood sugar was within the accepted range. (P-35.)

4. The report noted that random reinforcement and incentive for work performance had proven unsuccessful in extinguishing the Student's frequent work refusal and avoidance behaviors. It recommended a behavior plan that set objectives of on-task behavior for short intervals followed by immediate rewards in the form of preferred activities, with the eventual goal to reduce work refusals to zero over a three month period. It also recommended an intensive, systematic and repetitive program of reading instruction to build automaticity, word banks for writing assignments and assistive technology of writing in the form of specially designed software. (P-35.)
5. Inappropriate blood sugar levels, either hyperglycemia (high) or hypoglycemia (low) can possibly affect behavior control, but hyperglycemia has not been shown to affect cognitive functioning at the ranges measured in the Student. The record did not support a conclusion that the Student's poor diabetes management contributed significantly to Student's poor behavior in school. (NT 246-17 to 24, 662-16 to 669-8, 875-25 to 882-6.)
6. During the relevant period, the Student's blood sugar varied from hypoglycemic to hyperglycemic; usually, Student was in a hyperglycemic state. The Student was not able to effectively control Student's blood sugar levels. (NT 241-3 to 7, 873-14 to 875-1; S-31, 45 p. 2, 85.)
7. As of March, 2008, the Student was enrolled in a non-residential private school (School), where he had been placed for almost three years. Student received direct instruction in decoding skills and a basic mathematics curriculum. (S-9 p. 1, S-73 p. 1.)
8. The School maintained a protocol for assisting the Student in managing Student's blood sugar levels. The Student's doctors from a local children's hospital (Hospital) provided criteria for determining when medication should be used and what dose should be used, based upon the Student's blood sugar levels as measured in school every morning. (S-35, 45 p. 2, 67, 75, 76, 80, 81, 82, 83, 85, 86, 91 p. 10, 94.)
9. The level of services provided by School was appropriate and in accord with the best practices in the field of diabetes education and management. (NT 352-19 to 358-14, 400-7 to 408-5, 413-15 to 414-7, 882-18 to 90-10, 918-12 to 22.)
10. Inappropriate blood sugar levels, either hyperglycemia (high) or hypoglycemia (low) can possibly affect behavior control, but hyperglycemia has not been shown to affect cognitive functioning at the ranges measured in the Student. The record

did not support a conclusion that the Student's poor diabetes management contributed significantly to Student's poor behavior in school. (NT 246-17 to 24, 662-16 to 669-8, 875-25 to 882-6.)

11. The Student had exhibited behaviors that interfered with learning, including refusal to hand in or complete assignments, rushing through work and poor classroom behavior. (S-3.)
12. The District's re-evaluation report dated March 11, 2008 found educational needs with regard to reading, writing and mathematics. It noted behaviors interfering with learning, including task avoidance, submission of work not reflecting academic ability and refusal of direction from staff. The report indicated needs to learn task orientation skills, independent learning skills and social skills. (S-7.)
13. The report identified the Student with learning disability in reading decoding, writing conventions and mathematics. It also identified the Student with Other Health Impairment due to diabetes, which it asserted can affect learning when blood sugar levels vary, causing fatigue and other symptoms reducing availability for learning. (S-7.)
14. The report recommended learning support placement to be delivered by a structured, integrated program with opportunities for small group and individualized instruction. (S-7.)
15. The report recommended consideration of vocational training at a local technical school for high school students (Technical School). This was recommended for half of the school day. (S-7.)
16. The report did not include a Functional Behavioral Assessment (FBA). (S-7, S-9.)
17. In the spring of 2008, the Parent asked the District to consider returning the Student to the neighborhood high school (High School). (NT 963-5 to 14.)
18. The IEP dated April 14, 2008 placed the Student in full time emotional support, located at the School until the end of the school year, with a plan to change the Student's placement to part time emotional support and enrollment for half days in the Technical School in the subsequent school year. (S-9, P-68.)
19. The IEP team considered and rejected the Parent's proposal that the Student return to the High School. (NT 969-10 to 21.)
20. The April 14, 2008 IEP offered measurable goals and program modifications or specially designed instruction, addressing mathematics calculation, decoding and sight vocabulary, writing conventions, remaining on task, completing assignments, emotional self regulation and following directions. (S-9.)

21. The IEP dated April 14, 2008 noted social and emotional needs that impeded Student's ability to progress within the general curriculum; the IEP indicated that the emotional and social needs would be addressed in the program offered in the IEP. (S-9 p. 3, 6.)
22. The IEP offered to address the Student's behaviors through the School's school-wide behavior management system, one period per week of group counseling, consultation support for school personnel and a crisis intervention plan. (S-9.)
23. The IEP dated April 14, 2008 did not provide a Positive Behavior Support Plan (PBSP). (S-9.)
24. The School behavior management system was not individualized to meet the Student's needs. It did not address the Student's unique work avoidance behaviors, including truancy. (NT 1179-1 to 1189-14, 1207-2 to 1208-14; S-1.)
25. Pursuant to the April 14, 2008 IEP, in September 2008, the Student was enrolled in the Technical School for one half of every school day. This was seen as a transitional placement modification. In October 2008, Student's IEP was revised to reflect that Student withdrew from that program. (NT 965-21 to 967-9; S-12 p. 9.)
26. Quarterly progress reports from the School indicated subjectively that the Student had made progress with regard to all IEP goals; no data were provided in the quarterly reports. (S-14.)
27. The IEP was revised on March 30, 2009; the IEP team reformulated goals and objectives, recognized behaviors that impeded learning and included an FBA and PBSP. Placement and location of service delivery were unchanged. (S-16.)
28. From February 2008 to March 2009, the Student improved less than one grade level in letter and word recognition, from 3.2 to 3.7, as measured by the Kauffman Test of Educational Achievement (KTEA-II). Student's reading comprehension improved from 7.8 to 10.2 grade equivalent in the same period. In Math Concepts and Applications, the Student's grade equivalent did not rise from 9.0 during the same period and Student's computation skills improved less than one grade, from 5.2 to 5.10. (S-9 p. 4, S-16 p. 7.)
29. The Student improved by two points from September 2008 to March 2009 in writing, based upon Student's scores on the Pennsylvania Writing Assessment Domain Scoring Guide. Student improved by one point in Organization and by one point in Conventions. (S-9 p. 5, S-16 p. 8.)
30. The Student exhibited the same behavioral problems in March 2009 that Student exhibited in September 2008. (S-9, 16, P-74.)

31. The Student was truant in the 2008-2009 school year. (S-23.)
32. From May, 2008 to the end of the 2008-2009 school year, the Student's academic performance deteriorated, as evidenced by declining grades. (P-122 p. 2.)
33. The March 2009 IEP offered two goals in reading that were more clearly measurable than the reading goals in the September 2008 IEP. (S-9, 16.)
34. The March 2009 IEP offered two goals in mathematics that were more clearly measurable than the mathematics goals in the September 2008 IEP. (S-9, 16.)
35. The March 2009 IEP offered one goal in writing that was more clearly measurable than the writing goal in the September 2008 IEP. (S-9, 16.)
36. The March 2009 IEP offered one goal relating to behavior and focus, which did not account measurably for the level of prompting. It omitted four behavior and focus-related goals from the previous IEP. It included a new goal for emotional self-regulation without a stated base line. It included a new goal for attendance. (S-9, 16.)
37. In the spring of 2009, the Parent asked the District to consider returning the Student to the High School. (NT 963-5 to 14; P-122 p. 4 to 5, S-34 p. 2.)
38. District personnel considered this request but did not accept it, concluding that the Student needed a small setting with high structure, family support, and the ability to address the Student's diabetes, learning disability, and behavior problems. In addition, the District personnel concluded that a program with access to vocational programming would provide important educational benefits for post secondary transition. District personnel considered and disagreed with placing the Student in a mainstreamed setting with supportive services. (NT 153-7 to 154-10, 158-17 to 25, 167-11 to 20, 978-6 to 982-20, 985-25 to 17, 989-19 to 990-14, 994-13 to 1002-19.)
39. It would have been impossible to provide the services that the Student needed at the High School. (NT 193-1 to 195-2.)
40. In April 2009, the District's coordinator of out of district placements inquired about placing the Student in two private schools and a private school (IU School) operated by the local Intermediate Unit (IU). (S-17 to 21, 24, 91 p. 17.)
41. An intake meeting with the Parent was delayed for over three months due to Parent's unavailability and lack of response. (S-24, 29.)
42. In August 2009, the IU obtained a psychiatric evaluation of the Student, as a result of which Student was diagnosed with Disruptive Behavior Disorder, ruling

- out Oppositional Defiant Disorder. The evaluation indicated that fluctuating blood sugar levels were a possible cause of mood swings that were observed in the Student. The report recommended provision of emotional support and learning support in the educational program for the Student. (S-28.)
43. The evaluator concluded that the placement at IU School was appropriate for the Student and was sufficiently individualized to meet all of the Student's educational needs. (NT 698-14 to 701-5, 706-4 to 706-22, 706-3 to 717-9.)
  44. Disruptive Behavior Disorder is considered the least severe of three levels of behavior disorders in the Diagnostic and Statistical Manual of Mental Disorders, 4<sup>th</sup> edition, text revision (DSM-IV). (NT 659-8 to 661-22.)
  45. The IEP was revised in September 2009 to change the location of services to the IU School. The Parent accepted the NOREP only as a temporary placement. (S-33, 34, 91 p. 3.)
  46. Student was accepted in the IU School with a placement of emotional support, and started school at the high school level on September 14, 2009. (NT 1318-24 to 1319-25; S-32.)
  47. The IU School was at that time an approved alternative education provider operated through the IU for children with emotional disturbances. Its enrollment was small and its mission was to educate, provide opportunities for behavior modification, and provide emotional support to students enrolled there, through qualified and certified special education teachers and related service providers. (NT 657-12 to 658-13; 1244-17 to 1251-17, 1258-2 to 1263-21, 1305-5 to 1307-6, 1309-10 to 1315-7.)
  48. The IU School provided a high degree of structure and teacher support to the Student. (NT 237-6 to 10; S-69.)
  49. The IU School maintained a protocol for assisting the Student in managing the Student's blood sugar levels. The Student's doctors from the Hospital provided criteria for determining when medication should be used and what dose should be used, based upon the Student's blood sugar levels as measured in school every morning. (S-35, 45 p. 2, 67, 75, 76, 80, 81, 82, 83, 85, 86, 91 p. 10, 94.)
  50. The level of services provided by the IU School was appropriate and in accord with the best practices in the field of diabetes education and management. (NT 352-19 to 358-14, 400-7 to 408-5, 413-15 to 414-7, 882-18 to 90-10, 918-12 to 22.)
  51. The IU School provided a school-wide behavior support system, and its certified special education teachers were expected to differentiate each student's program

- to meet individual needs, both for behavior modification and for academic instruction. (NT 1251-18 to 1257-17, 1265-2 to 1305-4, 1325-16 to 1327-2.)
52. The IU School, through its behavior specialist and principal, attempted to provide individualized instruction and behavior management techniques to the Student, and attempted to alter their strategies in this regard when the initial attempts failed. (NT 1344-16 to 1345-17, 1620-12 to 1634-23.)
  53. The IU School provided academic special education supports appropriate to address the Student's academic needs. (NT 1309-5 to 9, 1315-9 to 1318-23.)
  54. The Student did not take advantage of the opportunity for group or individual counseling while Student was at the IU School. (NT 1263-7 to 22.)
  55. From September 2009 to March 2010, the Student exhibited defiant and disruptive behavior at school on numerous occasions. These included making threats of physical violence, wandering the hallways and refusing to return to class, disruptive noise making, and rudely interrupting the teacher. (NT 1327-5 to 1345-17; S-30, S-37, S-45 p. 4, S-45 p. 9, P-77, P-79.)
  56. In October 2009, the Student threatened a staff member and was suspended out of school for one day. (S-37, 38 p. 2 to 5.)
  57. During the 2009-2010 school year, the IU School principal attempted to correlate the Student's measured blood sugar levels with Student's negative behavior. No correlation was discerned. (NT 690-12 to 697-14; S-91 p. 11 to 12.)
  58. The Student was absent 58 times during the 2009-2010 school year. Student left assigned areas over 200 times in a ten week period. (S-32, 49 p. 10.)
  59. During the fall of 2009, the District attempted to secure permission to evaluate, in response to the Parent's questions about returning the Student to the District, but the Parent was unresponsive for approximately six weeks, until October 29, 2009. (NT 292-14 to 15; S-38.)
  60. During the 2009-2010 school year, the principal attempted to discuss the Student's high number of absences with the Parent but was not able to secure Parent's cooperation; this interfered with the Principal's efforts to provide more specific behavior management planning with regard to truancy. (NT 1350-10 to 1351-2, 1657-16 to 25.)
  61. In November 2009, the Student's progress report indicated that Student was not meeting IEP goals in reading and mathematics, as measured by grades. Student was not meeting the goal for reducing absences. Student met the goal in writing, although it was recommended that the data were insufficient to discontinue the

- goal. The behavior goal was not measurable due to the change in schools during the reporting period. (S-41.)
62. During the first half of the 2009-2010 school year, the Student made no meaningful progress in changing behaviors that interfered with learning, and was failing all but one course. (NT 263-22 to 264-18; P-94, S-1, S-44.)
  63. The District issued a re-evaluation report in December 2009. Present levels in reading, mathematics and writing were based upon the testing reported in the March 2009 IEP. The evaluator was certified and experienced in school psychology, but was not experienced in evaluation of students with diabetes. (NT 212-12 to 13, 288-19 to 290-1; S-45 p. 4.)
  64. Although the Student refused to complete the entire Woodcock Johnson achievement battery, the evaluator was able to administer the Woodcock Johnson Tests of Cognitive Abilities. The Student's scores indicated average phonemic awareness and language development and borderline performance in cognitive efficiency tests including working memory and processing speed. (S-45 p. 7.)
  65. The evaluator obtained BASC-2 forms from two teachers; the Parent did not return the form. The Student scored in the clinically significant range on numerous indicators of emotional disturbance. (NT 257-6 to 258-21; S-45 p. 8.)
  66. The re-evaluation included a data-based FBA. The assessment ruled out physical causes of the Student's inappropriate behaviors. It noted that the Student's disruptive behaviors seemed to be "maintained" by attention received from peers and staff. It concluded that the sole function of the behaviors was to escape task demands. (NT 301-3 to 305-8, 1343-13 to 1344-15; S-45 p. 9.)
  67. The re-evaluation identified the Student with Specific Learning Disability and Other Health Impairment, but did not identify Serious Emotional Disturbance. The evaluator intended that the OHI category encompass both impacts caused by diabetes and those caused by attention issues. (NT 276-18 to 21, 319-8 to 320-12; S-45.)
  68. The report found needs with regard to basic reading, mathematics and writing skills, work completion, compliance, reduction in verbal outbursts, and developing independent living and employability skills. (NT 276-18 to 21; S-45.)
  69. Because of the Student's behavioral issues, the report recommended a structured and supportive learning environment. (NT 321-2 to 25; S-45.)
  70. On January 14, 2010, the District offered a revised IEP. This was developed by District personnel without the participation of the Parent. The Parent had been invited to participate but declined to do so. (S-47, 49.)

71. The January 2010 IEP offered two measureable goals in mathematics, one measureable writing goal, and one language arts goal that appeared to be measureable but included both vocabulary and reading comprehension features in an unclearly combined formulation. The IEP also offered a measureable goal in compliance with adult directives. (S-49.)
72. The IEP offered full time emotional support placement located at the IU School, and related services including daily thirty minute social skills group and monthly meetings with a school social worker. District personnel on the IEP team concluded that IU School was an appropriate placement for the Student. (NT 1007-16 to 1008-10; S-49, 54.)
73. The IEP included an FBA and a PBSP. The PBSP consisted of a goal for compliance with adult directives and individualized specially designed instruction techniques including increased privileges for work completion, opportunities for extra support from preferred staff, extra gym and recreation time as a reward, and social contracts with preferred teachers. Related services in the form of daily "social skills group" and monthly counseling were offered. The "Social Skills Group" included direct assistance in making up work. (NT 1253-23 to 1257-14, 1665-1 to 1668-2; S-49 p. 51 to 55.)
74. The IEP offered Extended School Year services with direct reading instruction and a goal of developing letter and word recognition skills. (S-49.)
75. In January 2010, the Parent withdrew the Student from the District and enrolled Student in a cyber charter school. (NT 1393-18 to 1394-7; P-99, S-48, 50.)
76. On March 11, 2010, the Parent re-enrolled the Student in the District and the Student was assigned to the IU School over the Parent's objection. (S-32, 56, 57, 60.)
77. The District offered to meet with the Parent to discuss assigning the Student to the High School, and a meeting scheduled for March 9, 2010, was postponed to enable the Parent's advocate to appear, and again postponed due to Parent's family emergency. (S-60 to 62, 65, 71.)
78. The District reported its re-evaluation of the Student on April 29, 2010. The report found no basis to identify the Student with Serious Emotional Disturbance but recommended itinerant emotional support services and placement in Instruction in the Home, with a gradual transition from instruction in the home to full time attendance at the High School. There was no new FBA or PBSP. (S-73.)
79. High School staff were concerned that the Student's poor diabetes management might be a factor interfering with Student's academic performance and behavior. (NT 246-27 to 247-4; S-85.)

80. Assessments by High School staff indicated very poor skills in reading, mathematics and writing. (S-81.)
81. Standardized testing indicated slow and poor progress from May 2008 to August 2010. (NT 610-7 to 17; S-118.)
82. The District offered an IEP after team meetings on April 22, 2010 and May 4, 2010, attended by the Parent. The IEP changed the Student's placement to Supplemental Learning Support, located at the High School, with instruction in the home in the form of one to one tutoring. Related services included daily blood sugar levels by the school nurse; itinerant emotional support services were offered. ESY was offered for basic reading skills. (S-77, 78, 80.)
83. The IEP offered goals in mathematics computation, writing, reading comprehension, word recognition and vocabulary, and compliance with staff directives. (S-77.)
84. The IEP included the FBA and PBSP developed at the IU School. (S-77.)
85. The District assigned the Student to the High School for one half days. Expected attendance was from 10:20 AM to 2:10 PM. (S-78, 85.)
86. The IEP also provided a tutor to work with Student on a one-to-one basis daily for most major subjects, including mathematics, science and history. The hours of service were one hour per day, three days per week, and tutoring was conducted in the local library. (S-78, 85.)
87. The Student was absent frequently, declared a desire not to be in school, and left both classes and tutoring sessions early. Student also failed to do homework. (S-68, 71, 74, 81, 84, 91 p. 23 to 24.)
88. Student was oppositional and uncooperative with the efforts of the High School nurse to monitor blood sugar and to encourage proper blood sugar management. (S-80, 85.)
89. A private evaluation was conducted on August 23, 2010 and August 24, 2010 by a developmental neuropsychologist who is also a certified school psychologist. The neuropsychologist did not purport to have particular expertise in children with diabetes, and had evaluated only one or two previously. The neuropsychologist reviewed selected documents from the Student's educational and medical records, and talked with the Parent. The neuropsychologist did not talk with anyone from the District or the District staff assigned to the Student. (NT 493-15 to 495-21, 504-6 to 507-17, 510-5 to 18, 547-15 to 551-13, 555-14 to 557-18, 586-13 to 587-9, 607-4 to 608-1; S-118.)

90. The neuropsychologist reported that the Student's cognitive impairments and behavioral problems are directly related to diabetes. This was based upon literature showing an elevated incidence of cognitive impairment and behavioral problems in adolescents with diabetes, as well as a correlation of Student's behavior and blood sugar levels performed when the Student was in grade school. (S-118.)
91. The neuropsychologist diagnosed the Student with Depressive Disorder, Not Otherwise Specified, Attention Deficit Hyperactivity Disorder and Disruptive Behavior Disorder by history. The neuropsychologist admitted that the diagnosis of depression could have been situational, because when seen the Student was in the Juvenile facility for a delinquency charge; yet, there was evidence that the depression was not situational. The neuropsychologist was not sure whether or not the depression affected the Student's learning. (NT 513-2 to 514-2, 587-24 to 588-9; S-118.)
92. The neuropsychologist criticized the student's identification, which the neuropsychologist erroneously believed to be Other Health Impaired and Emotional Disturbance. The neuropsychologist also criticized the IEP goals and called for a new behavior analysis and plan, as well as tutoring in study skills. Nevertheless, the neuropsychologist supported the provision of emotional support by the district. The neuropsychologist recommended treatment with a psychologist. (NT 551-13 to 553-19, 588-17 to 589-7; S-118.)
93. The neuropsychologist testified that the Student's deficits in executive functions affected Student's ability to manage blood sugar levels, but that the Student was competent to count carbohydrates and measure blood sugar levels. (NT 510-19 to 511-10, 604-15 to 605-9.)
94. A second private evaluator, an expert in diabetes education, provided a report dated August 13, 2010. The diabetes educator reviewed the Student's history from selected documents, and interviewed the Parent, but did not see the Student due the Student's failure to appear at two appointments. (NT 329-24 to 331-12, 335-1 to 15, 337-4 to 14, 338-8 to 340-16, 395-1 to 398-9; P-119 p. 7 to 19, S-119.)
95. The diabetes educator found that poor diabetes management would have some negative effect on the Student's emotional and intellectual functioning, but that the diagnosed learning disability was having the "preponderance of influence on his academic performance." The diabetes educator specifically disagreed with the conflicting conclusion of the neuropsychologist that diabetes can interfere with academic functioning. (NT 331-13 to 333-7, 336-6 to 338-17, 350-10 to 351-10; S-119 p. 5.)
96. The diabetes educator noted that the Student was poorly motivated; was using an outdated medication for diabetes management; had not been appropriately

educated about diabetes management by medical providers; and receives inadequate supervision at home for self-management of diabetes. The diabetes educator found that the Student's cognitive deficits could impede the Student's self-management of blood sugar levels. (NT 332-14 to 333-12, 402-11 to 15; S-119.)

97. The diabetes educator recommended against having the schools manage the diabetes, placing that responsibility upon the family and the patient's medical team. The diabetes educator testified that the High School was doing what was needed to make self-management of diabetes possible for the Student. (NT 355-12 to 358-14, 393-2 to 25, 402-15 to 407-20.)
98. The diabetes educator recommended updated diabetes self-management training and a change in the prescribed insulin program. (S-119.)
99. In a second report dated October 30, 2010, the diabetes educator materially altered the diabetes educator's original opinion concerning the comparative impact of diabetes and learning disability upon the Student's functioning. The diabetes educator removed one sentence from the report that noted the previous discrepancy analysis of ability and achievement in reading, mathematics and writing. The diabetes educator then modified the previously expressed opinion to state that the learning disability influences academic performance "greatly", rather than preponderantly. (NT 408-10 to 410-14; S-121.)
100. The diabetes educator also attributed the Student's lack of self-management of blood sugar levels to the Student's cognitive deficits as reported by the first private evaluator, concluding that the Student is unable to comprehend Student's own diabetes or the importance of self-management. (S-121.)

#### DISCUSSION AND CONCLUSIONS OF LAW

In this matter, the Parents assert an inappropriate identification of the Student, and a failure to provide a free appropriate public education in the least restrictive environment to the Student with regard to reading, writing, mathematics and behavior management. (NT 83-5 to 84-9.) In particular, Parents argue that, by placing Student in Emotional Support located in a special school for children with emotional disturbances, the District tacitly and erroneously identified the Student with Serious Emotional Disturbance. Parents assert that this misperception by the District led it to place the student in two

highly restrictive special schools that failed to address the Student's behaviors individually or competently. Parents claim that Student is therefore entitled to compensatory education and reimbursement of two private evaluations.

The record reveals that the Student tragically suffers from three disorders that, in combination, have led the Student to behave in a most self-destructive way. There is no dispute that the Student has insulin-dependent diabetes and a learning disability with serious deficits in cognitive functioning that, despite Student's average range IQ and potential, make it very difficult for Student to learn in school. (FF 1 to 3.) On top of these functioning challenges, the Student has been diagnosed with Disruptive Behavior Disorder and has learned over several years to avoid school work to an extreme degree. (FF 4, 11, 42, 43.)

Student has developed the ability to defeat behavior control systems that work for numerous young people with behavior disorders. (FF 4, 7, 12, 14, 21, 30, 55.) As a result, Student has been truant for many days over the last two years, has avoided attending numerous classes even while in school, and has learned to avoid working even while in class. (FF 4, 11, 12, 30, 31, 55, 56, 58, 62, 87.) Student's behavioral repertoire also includes loud and disruptive behavior, threats and profanities, and, occasionally, assaultive behavior. Ibid. As a result, the Student is learning little at school other than how to avoid doing the work that all experts agree the Student is capable of doing with appropriate supports.

I find for the Parent with regard to the provision of a FAPE in the 2008-2009 school year. I deny the remainder of Parent's claims.

## 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.<sup>1</sup> 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. Thus, the moving party must produce a preponderance of evidence<sup>2</sup> that the District failed to fulfill its legal obligations as alleged in the due process Complaint Notice. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006)

In Weast, 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 evidence 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 preponderant (i.e., there is greater evidence) in favor of one party, that party will prevail. Schaffer, above.

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<sup>1</sup> 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).

<sup>2</sup> 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. In this decision, I refer to “preponderant” evidence, which is a quantity or weight of evidence that is at least great enough to constitute a “preponderance” of evidence.

Based upon the above rules, the burden of proof, and more specifically the burden of persuasion in this case, rests upon the Parent, who initiated the due process proceeding. If the Parent fails to produce a preponderance of the evidence in support of Parent's claims, or if the evidence is in "equipoise", the Parent will not prevail.

#### OBLIGATION TO PROVIDE A FREE APPROPRIATE PUBLIC EDUCATION

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

"Meaningful benefit" means that an eligible child's program affords him or her the opportunity for "significant learning." Ridgewood Board of Education v. N.E., 172 F.3d 238, 247 (3d Cir. 1999). In order to properly provide FAPE, the child's IEP must specify educational instruction designed to meet his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. Board of Education v. Rowley, 458 U.S. 176, 181-82, 102 S.Ct. 3034, 1038,

73 L.Ed.2d 690 (1982); Oberti v. Board of Education, 995 F.2d 1204, 1213 (3d Cir. 1993). An eligible student is denied FAPE if his program is not likely to produce progress, or if the program affords the child only a “trivial” or “de minimis” educational benefit. M.C. v. Central Regional School District, 81 F.3d 389, 396 (3<sup>rd</sup> Cir. 1996), cert. den. 117 S. Ct. 176 (1996); Polk v. Central Susquehanna Intermediate Unit 16, 853 F. 2d 171 (3<sup>rd</sup> Cir. 1988).

Under the Supreme Court’s interpretation of the IDEA in Rowley and other relevant cases, however, a school district is not necessarily required to provide the best possible program to a student, or to maximize the student’s potential. Rather, an IEP must provide a “basic floor of opportunity” – it is not required to provide the “optimal level of services.” Mary Courtney T. v. School District of Philadelphia, 575 F.3d at 251; Carlisle Area School District v. Scott P., 62 F.3d 520, 532 (3d Cir. 1995).

The law requires only that the plan and its execution were reasonably calculated to provide meaningful benefit. Carlisle Area School v. Scott P., 62 F.3d 520, (3d Cir. 1995), cert. den. 517 U.S. 1135, 116 S.Ct. 1419, 134 L.Ed.2d 544(1996)(appropriateness is to be judged prospectively, so that lack of progress does not in and of itself render an IEP inappropriate.) Its appropriateness must be determined as of the time it was made, and the reasonableness of the school district’s offered program should be judged only on the basis of the evidence known to the school district at the time at which the offer was made. D.S. v. Bayonne Board of Education, 602 F.3d 553, 564-65 (3d Cir. 2010).

## 2008-2009 SCHOOL YEAR

In the present matter, I find by a preponderance of the evidence that the District failed to provide a free appropriate public education during the 2008-2009 school year, because the District's IEP and the school to which Student was assigned failed to provide individualized intervention to address the Student's extreme behavior that interfered with Student's learning. 20 U.S.C. § 1401(29)(specially designed instruction must meet the "unique needs" of the child); 20 U.S.C. § 1414(d)(1)(A)(i)(II)(aa),(bb)(IEP must meet all of the child's needs that arise from his or her disability); L.G. v. Wissahickon Sch. Dist., 2011 WL 13572 at\*9 (E.D. Pa. 2011)(LEA must provide individualized program). The record is also preponderant that the Student did not receive meaningful educational benefit during that school year.

There is clearly preponderant evidence that the Student exhibited disruptive and avoidant behavior during a long history with the District, including four years in a District placement at the School. (FF 4, 7, 11, 12, 14, 21, 42, 43.) Thus, it could come as no surprise to the District or to the School that the Student was exhibiting behaviors that impeded Student's learning and that of others. Many previous evaluations and educational plans had recognized behavioral intervention as an educational need.

The District's March 2008 re-evaluation report specifically noted behaviors that interfered with learning and the Student's educational need to learn independent study skills and behavioral control. (FF 12.) For this reason, the report recommended a small, highly structured setting that would be able to address these behavioral needs. (FF 14.)

The subsequent IEP in March 2008 failed to provide sufficient behavioral intervention to afford the Student with a reasonable opportunity to derive meaningful

educational benefit from the School's educational program. The IEP included a goal for behavioral self control; however, there was neither an FBA nor a PBSP. (FF 16, 20, 23.) The IEP simply relied upon the school-wide behavior control system, which was based upon points, levels and a set of incentives open to all students at the School. (FF 22.)

There is no evidence that the School took any action to individualize its behavior control techniques to the Student's specific needs. On the contrary, a preponderance of the evidence establishes that the School did not take any specific action to attempt to curtail the Student's dramatically self-defeating repertoire of avoidant behaviors. (22, 23, 24.)

The School made no attempt to address the Student's truancy problem. Indeed, it had an ineffective system for addressing truancy, with inadequate data keeping and reporting procedures. (FF 24, 30, 31, 36.) Truancy is the epitome of a behavior that interferes with learning, since it makes the student completely unavailable for learning. I conclude that the School's failure to do anything to address this and the other problem behaviors of the Student falls below the standard the IDEA requires – that of addressing the unique needs of each child with a disability.

The record is preponderant also that the Student failed to make meaningful progress during the period from May 10, 2008 to the end of the 2008-2009 school year. (FF 26, 27, 28, 29, 30, 31, 32.) The Student's performance in letter and word recognition, already years behind Student's assigned grade, improved only .5 grade equivalent on a standardized measurement. (FF 28.) There was no progress in mathematics concepts and applications, and computation skills improved less than one year grade equivalent. Ibid. Student's writing conventions improved by one point (about

25% on a scale of one to four) on a state writing rubric. Ibid. Similarly, the Student's writing organization improved by one point. Ibid. The Student's behavior, if anything, deteriorated during this period. (FF 30, 31.)

The Student's potential was average; Student could be expected to close the gap between Student and peers. (FF 12 to 15, 64.) Yet, Student fell farther behind.

I conclude that the District's failure to individualize its approach to the Student's behavior was the primary reason that the Student made little progress. The record shows preponderantly that, no matter what academic supports were available to the Student, the failure to address Student's behaviors made it impossible for the Student to derive meaningful benefit. Thus, the District's educational plan for that year was not reasonably calculated to provide such meaningful benefit.

#### 2009-2010 SCHOOL YEAR

Like the District's plan for the Student's 2008-2009 school year, the District's 2009-2010 plan also relied upon referral to a small specialized school with a school-wide behavior control system. (FF 18, 38, 40, 42.) By March 2009, it was apparent that changes would need to be made in the Student's educational plan and the District made substantial changes to the IEP. (FF 27, 33 to 36, 38.) The Parent asked for a new placement – requesting that the Student be returned to the High School after four years in a small highly structured special school. (FF 37.) District personnel disagreed, finding that the Student continued to need a small, highly structured placement. (FF 38.) Instead of placing the Student in the High School, the District searched for an alternative to the School. (FF 40.)

After some delay occasioned by the Parent's lack of cooperation, the District found a placement for the Student in the IU School, another small, highly structured, special school. (FF 40 to 46.) The IU School was specially designed for students with emotional disorders, and its program emphasized behavior modification and emotional support. (FF 47, 48.) The IU School was staffed by experienced, certified special education teachers and had the capacity to provide learning support. (FF 43, 47.)

The District personnel believed that this setting and the emotional support placement in this school would best meet the Student's needs. (FF 38, 43.) District personnel believed that the IU School would provide better structure to the Student and support to the Parent through more frequent contacts than would be possible at the High School. Ibid. In addition, the District personnel concluded that a program with access to vocational programming, through the IU, would provide important educational benefits for post secondary transition. Ibid.

Like the placement at the School, the placement at the IU School proved inadequate to meet the Student's needs. (FF 54 to 56, 58, 61, 62.) As in the School, the Student was able to thwart the IU School's building-wide behavior modification system, which also emphasized earning points, a level system, and a series of rewards earned through the point and level systems. Ibid. The Student made no progress in this system – in fact, the Student regressed behaviorally. Ibid. Student's academic performance plummeted. Ibid.

However, as stated above, the test of an offer of FAPE is whether or not it is reasonably calculated to provide meaningful opportunity for meaningful educational benefit – not whether it is ultimately successful. Allyson B. v. Montgomery County Int.

Unit, 2010 WL 1255925 at \*13 (E.D. Pa. 2010)(analysis is prospective, not retrospective). Here, the subsequent failure of the placement does not prove that the District made an inappropriate placement decision - based upon what was known by District personnel when the placement was made.

The record preponderantly discloses a substantial difference between the behavior system in the School and that in the IU School. Unlike the School, the program at the IU School was expected to be differentiated to meet the individual needs of its students, and the IU School made substantial efforts to individualize its behavior modification programming for the Student. (FF 51, 52, 57, 60.) Teachers were reassigned, incentives especially appealing to the Student were put in place (such as extra gym time, which appealed to the Student's athletic interest), and strenuous efforts were made to collaborate with the Parent, who did not cooperate. Ibid. When, after a reasonable time of trying to make the existing system work for the Student, it was clear that the behavior system was not working for the Student, the IU School redrafted the IEP and offered the draft to the Parent. (FF 59, 63 to 74.) Despite weeks of delay in a District-requested re-evaluation, caused by the Parent's lack of response, the District offered a new IEP to the Parent by January of the 2009-2010 school year. Ibid.

I conclude that, because of this difference in the two programs, it was reasonable and appropriate for District personnel to consider the IU School placement likely to succeed. I conclude, based upon a preponderance of the evidence in the record before me, that the IU School provided an appropriate program to the Parent by repeatedly attempting to adjust its programming to meet the Student's individual needs. Thus, I

conclude that the District did not fail to provide a FAPE to the Student during the 2009-2010 school year.

#### DIABETES MANAGEMENT

Parent asserts that the District failed to assist the Student appropriately in managing Student's diabetes-induced blood sugar imbalance. There is no dispute that the Student's blood sugar levels were chronically outside the acceptable range, and that Student showed an inability or unwillingness to manage those levels by counting carbohydrates in consumed food, measuring blood levels using a meter, and taking appropriate insulin injections. (FF 2, 5, 6, 38, 42, 49, 57, 67, 79, 90, 93, 96, 100.) Parent argues that the District was responsible to teach the Student and the Parent how to manage the blood sugar levels better, and to monitor the Student's progress in implementing that learning.

The record proves the opposite – that the District took an appropriate role in supporting the Student's training in self management of blood sugar, and that it went if anything beyond its legal duty in that regard. (FF 8, 9, 49, 50.) Parent's own witness, a diabetes educator, agreed with the District's highly qualified endocrinologist in the opinion that it would be inappropriate and counterproductive for a school to attempt to train the Student or the Parent in blood sugar management – beyond simply reinforcing what the Student's medical team is teaching. (FF 94 to 100.) The role of the school is to reinforce that teaching and follow the protocols provided by the medical team. Ibid. Both experts were satisfied that the District was fulfilling this role appropriately.

Both experts testified that the Student and the Parent were receiving diabetes education and training in management of the disease from their medical team. (FF 96, 98.) While the educator opined with little factual basis that the medical team was not in fact educating the Student adequately, this expert still asserted that the medical team is the appropriate source of training in this matter, not the schools. (FF 96 to 98.)

Apparently in order to show that the District had a greater duty than what the two diabetes experts would allow, the Parent argued that diabetes was the primary cause of the Student's cognitive difficulties and behavior. As to the effect on cognition, the evidence is preponderant that diabetes was not likely to be the primary cause of the Student's learning disability. The experts were split, with the School psychologist and the neuropsychologist holding that there could be such a causal relationship, and the diabetes experts clearly testifying that this is not supported by the literature. (FF 3, 5, 10, 13, 42, 57, 66, 67, 79, 89, 90, 93, 95, 96, 99, 100.) I give more weight to the diabetes experts – one for each side who agreed on this without reservation – than to the somewhat vague assertions of the neuropsychologist and the District's school psychologist.

As to the causal effect on behavior, there was some early assertion that diabetes made the Student unavailable for learning due to the fatigue it causes. However, aside from acknowledging this potential effect, again neither diabetes expert would endorse the idea, and the endocrinologist flatly disagreed, based on personal observations in hundreds of cases.

Thus, on this record, diabetes was far from being a red flag that should have prodded the District to engage in a full scale education and training effort with the

Student. On the contrary, it is more likely that the Student's cognitive and behavioral struggles were not caused by diabetes, even uncontrolled diabetes. In reaching this conclusion, I give the highest weight to the testimony of the endocrinologist. This physician provided a lengthy resume of clinical, teaching and professional experience in the medical field that specializes in diabetes. The doctor specializes in pediatric endocrinology. The doctor's testimony was straightforward and not self-contradictory. It was consistent with the factual documentary record. The doctor's answers revealed a careful attention to the factual basis for the answers, and an objectivity demonstrated by willingness to concede a point in the absence of contrary fact.

I give less weight to the opinions about diabetes offered by the Parents' neuropsychologist, who admitted a lack of clinical expertise and familiarity with diabetes in children. This expert was credible in carefully delimiting the import of answers about diabetes that were not based on sufficient personal knowledge of the literature.

I give somewhat limited weight to the opinions of the Parent's expert in diabetes education. The expert's education and training were not in a related field. The expert demonstrated, however, substantial practical experience with diabetes and a familiarity with the literature on diabetes. This expert's opinions were bolstered by agreement with the endocrinologist, whose agreement on several material issues corroborated that the educator's grasp of the current literature was reliable.

#### LEAST RESTRICTIVE PLACEMENT

The IDEA requires local educational agencies to provide services in the least restrictive environment:

To the maximum extent appropriate, children with disabilities ... [must be] educated with children who are not disabled and ... separate schooling ... occurs only when the nature or severity of the disability ... is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. [20 U.S.C. §1412(a)(5)(A)].

The United States Court of Appeals for the Third Circuit has required a two step analysis in determining whether or not a local educational agency has complied with this mandate. Oberti v. Board of Education, 995 F.2d 1204, 1215 (3d Cir. 1993):

First, the court must determine “whether education in the regular classroom, with the use of supplementary aids and services, can be achieved satisfactorily.” 874 F.2d at 1048. Second, if the court finds that placement outside of a regular classroom is necessary for the child to benefit educationally, then the court must decide “whether the school has mainstreamed the child to the maximum extent appropriate,” i.e., whether the school has made efforts to include the child in school programs with nondisabled children whenever possible. *Id.* We think this two-part test, which closely tracks the language of § 1412(5)(B), is faithful to IDEA's directive that children with disabilities be educated with nondisabled children “to the maximum extent appropriate,” 20 U.S.C. § 1412(5)(B), and to the Act's requirement that schools provide individualized programs to account for each child's specific needs, 20 U.S.C. §§ 1401, 1414(a)(5).

Thus, the court recognized a tension between the mandate for a least restrictive placement and that requiring the LEA to meet the individual needs of the child. L.G. v. Wissahickon Sch. Dist., 2011 WL 13572 at\*9 (E.D. Pa. 2011)(Oberti recognized tension). In this case, I find that the District balanced those mandates appropriately.

The evidence is close in this matter; however, I find by a preponderance of the evidence that the District did consider whether or not the Student could be educated with non-disabled children in the High School satisfactorily. The Parent repeatedly requested such an inclusive placement. (FF 17, 37, 75 to 77.) The District coordinator responsible

for the Student's case testified that the District personnel and the IEP team discussed and considered placement in the High School pursuant to the Parent's request, and determined that such a placement would make it impossible to meet the Student's educational needs, including close monitoring of Student's management of blood sugar levels, preventing the Student from avoiding school work, and supporting access to the general curriculum by addressing Student's cognitive disabilities. (FF 14, 19, 38, 39, 72, 79.)

During the relevant period, the Student's behavior was escalating – Student's avoidance reached new heights in the forms of outright truancy, leaving class and refusal to work. Student's behavior had escalated to more serious threats and even occasional assaultive behaviors. The team was concerned that the Student would be able to hide from educators trying to monitor Student's self-management of blood sugar levels and work avoidance behavior. Ibid.

Given the Student's success in avoiding work at the School, both before and during the relevant period, the record supports this concern as facially reasonable. Truancy and absence from class were a primary barrier to Student's availability for learning. Student's inability to control blood sugar levels posed a risk to Student's health and safety. Student was oppositional and unmotivated to address either of these concerns. For all of these reasons, I conclude that the record supports the reasonableness of the educators' judgment that the Student could not be educated satisfactorily at the High School, even with supplementary aids and services.

Parent attacked this judgment as a pretext for a purely resource-based, non educational judgment. Parent pointed out that the District had never attempted to place

the Student in a regular education high school setting. (NT 98-8 to 14.) Parent produced the testimony of a District psychologist who evaluated the Student in 2010 in preparation for Student's return to the High School pursuant to a team decision. (NT 89-18 to 25; S-73.) The psychologist testified that the High School did not provide the kinds of emotional support services that the Student needed, such as direct, daily access to an emotional support teacher, smaller classes, intensive and structured programming. The witness testified that it would have been impossible to provide the degree of emotional support needed in the High School setting. The witness also indicated that the reason for this impossibility was that the High School had only an itinerant emotional support teacher, and that other configurations of staffing would need to be attempted to bring the Student back to the High School. (NT 195-3 to 8.) Nevertheless, in 2010, the District agreed to try the Student at the High School on a half day basis with private tutoring for most major subjects. (FF 76 to 88.)

I credit the testimony of this school psychologist. This witness did not hesitate to provide answers that seemed to cut against the District's interests in the matter. The witness presented a demeanor, albeit of studied caution, that corroborated my finding of credibility.

While I have given this evidence weight, I do not find it to be preponderant. This was a single school psychologist who was not part of the least restrictiveness decision making in question, which occurred in the two years prior to the witness's involvement. Thus, this witness could not provide competent evidence as to the considerations that drove the decision not to bring the Student to the High School in 2008 and 2009. Nor could the witness contradict the rationales put forward by the other District witnesses for

this decision, which were based not upon administrative convenience or resources, but upon the Student's unique educational needs, given the combination of disabilities and self-defeating behaviors known to those witnesses at the times of their decisions.

Moreover, the circumstances at the times of those decisions corroborate the opinions expressed as to the student-centered basis for the decisions not to transfer the Student to the High School. Some of the conditions deemed necessary to educate the Student, such as small school environment and a specialized staff with capacity to be alert to and address the Student's avoidance behaviors, were integral to the distinction between a large public high school and a smaller environment. Given the safety implications and acuteness of the Student's three challenging conditions, this record does not suggest that the District was unreasonable in deciding to err on the side of caution with this Student.

In weighing this conflicting evidence, I give credence and weight to the witnesses who testified as to the reasons for the decisions to seek a specialized school setting for the Student in 2008 and 2009. I found the District's coordinator credible and well informed. The coordinator's testimony was careful and the coordinator admitted lack of memory or knowledge when appropriate. The witness declined an opportunity to criticize the Parent, in response to a question, thus demonstrating professionalism and objectivity to me. The witness' demeanor supported my overall impression of the witness' sincerity.

Finally, I credit the Parent's testimony, but assign it less weight. I found the Parent's testimony to be overtly sincere and forthright. However, the Parent's recollection of events often was vague, and the Parent demonstrated a limited understanding of the educational questions at issue in this matter.

Having applied the initial Oberti test, I must consider under the second test whether or not the District made sufficient efforts to include the Student with supplementary aids and services. In this case, the District did consider that option and concluded that it would be unsatisfactory, due to the Student's complex of challenges, as discussed above. There is nothing in the record to contradict this judgment, aside from the evidence discussed above. The fact that the District later agreed to an unsuccessful attempt at placement in the High School on a part time transitional basis does not weigh against the previous judgments made to decline to do so; rather, it demonstrates the appropriateness of that decision, since the Student did not succeed in that setting. (FF 85 to 88.)

The Parent seems to argue that the District should have placed the Student in the High School with supports when first requested to do so, regardless of the educational judgment of its staff. I find no authority for the suggestion that an actual experiment in less restrictive placement is mandated by law, regardless of a contrary, well founded educational judgment. While in most cases one would expect that some efforts at inclusion would be feasible, I conclude, based upon the evidence before me, that this is the rare case in which such efforts would have been imprudent and possibly unsafe. (FF 39.) Yet, the District did attempt to place the Student in a less restrictive setting in 2008-2009 school year, by placing Student for half days at the Technical School with a reduced level of restrictiveness during those hours of itinerant emotional support. (FF 25.) This placement failed within days. Ibid.

I conclude that the literal expression of the Oberti test was not intended to compel an administrative hearing officer to contradict the clearly reasonable placement decisions

of the educators in this matter. See, Leighty v. Laurel School Dist., 457 F.Supp.2d 546, (W.D. Pa. 2006)(IDEA does not deprive educators of the right to apply their professional judgment). Therefore, I conclude that the District, in the unique circumstances of this case, provided education in the least restrictive satisfactory environment for addressing the Student's unique needs.

#### EVALUATION

Parents argue that the District improperly identified the Student with Serious Emotional Disturbance, when Student should have been labeled and treated as a child with Specific Learning Disability and Other Health Impairment. This argument is unsupported in the record. All of the evaluations by the District identified Specific Learning Disability and Other Health Impairment. Parent pointed to no evaluation that found Serious Emotional Disturbance.

Parent argues that the Student was de facto identified with emotional disturbance because the District placed Student in Emotional Support. However, I find no authority requiring a classification of emotional disturbance as a predicate for placement in emotional support. Thus, the Parent's argument does not compel a finding of de facto inappropriate identification.

#### EXTENDED SCHOOL YEAR

Parent listed as an issue in this matter the appropriateness of ESY in the summer of 2010. However, the Parent failed to introduce any substantial evidence regarding it and did not address it in argument. Because the record contains inadequate evidence

regarding this issue, I deny relief with regard to the adequacy of ESY services offered in 2010.

#### REIMBURSEMENT FOR PRIVATE EVALUATIONS

Parent seeks reimbursement for private evaluations received after the relevant period (in one case, the report was received on the last day of the relevant period). These evaluations could not have been helpful to the District during the relevant period, due to their timing. Thus, there is no equitable basis for awarding reimbursement.

Parent further asserts that the evaluations should be reimbursed under the IDEA's procedural safeguard provision. When a parent disagrees with the evaluation provided by the school district, the Parent may request an independent educational evaluation at public expense. 20 U.S.C. §1415(a); 34 C.F.R. §300.502(b). Upon receipt of such disagreement, the LEA must either provide the IEE or file for due process to defend its evaluation. Ibid.

Here, the Parent expressed that disagreement for the first time in her Complaint Notice, and now complains that the District failed to either file for due process to defend its evaluations or pay for the IEE. However, the District had no chance to do either; the private evaluations were completed before the Parent expressed disagreement. Under these circumstances, and given the lack of any utility to the educational planning process during the relevant period, I decline to order payment for the private evaluations.

Moreover, the Parent sought due process review of the adequacy of the District's evaluations by filing for due process at the same time that Parent expressed disagreement with the District's evaluations. Thus, the Parent jumped the gun by filing before the

District had a chance to respond to the expressed Parental disagreement with the District's evaluations. Moreover, the District in essence requested due process on this issue in its response, by joining issue on the Complaint's allegations. Thus, the District, while not adhering to the literal requirements of the law by filing an unnecessary piece of paper, fulfilled the law's essence and intent. Under these circumstances, it would be an unnecessary adherence to formality – and certainly inequitable - to penalize the District for failing to file for due process separately. Dudley v. Lower Merion Sch. Dist., 2011 WL 346585 at \*4 (E.D. Pa. 2011)(avoiding statutory interpretation leading to absurd result).

#### SECTION 504

Generally, section 504 protects students with disabilities from discrimination in access to and equal opportunity to benefit from educational services from kindergarten through twelfth grade. 29 U.S.C. §794 ; 34 C.F.R. §104.4. To establish discrimination under Section 504, a student or parent must prove that (1) he or she is disabled or has a handicap as defined by Section 504; (2) he or she is “otherwise qualified” to participate in school activities; (3) the school or the board of education received federal financial assistance; (4) he or she was excluded from participation in, denied the benefits of, or subject to discrimination at the school; and (5) the school or the board of education knew or should be reasonably expected to know of his or her disability. 29 U.S.C. §794; 34 C.F.R. §104.4; Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 253 (3d Cir. 1999); W.B. v. Matula, 67 F.3d 484, 492 (3d Cir. 1995).

The Commonwealth of Pennsylvania protects the student's right to be free from discrimination on the basis of handicap or disability, through Chapter 15 of the

Pennsylvania Code, part of the regulations implementing the educational statutes of the Commonwealth. 22 Pa. Code Chapter 15. A “protected handicapped student” under these regulations is entitled to those related aids, services or accommodations which are needed to afford that student equal opportunity to participate in and obtain the benefits of the school program and extracurricular activities without discrimination and to the maximum extent appropriate to the student’s abilities, without cost to the student or his or her family. Chapter 15 by its terms is intended to implement students’ rights under section 504, and it does not expand or limit those rights. 22 Pa. Code §15.11(c).

In the instant case, the findings with regard to denial of a FAPE under the IDEA apply equally to the section 504 claim. Thus, there is no basis in the record for a separate finding of discrimination under section 504.

#### COMPENSATORY EDUCATION

I will order the District to provide compensatory education to the Student during the period from May 10, 2008 to September 14, 2009, when Student entered the IU School. However, compensatory education is an equitable remedy, and I must balance the equities in determining the amount of relief. In addition, I must consider what relief would be appropriate to restore the Student to the level of attainment that would have been reached if the District had implemented an appropriate educational program from May 10, 2008 to September 14, 2009. See, B.C. v. Penn Manor School District, 906 A.2d 642 (Pa. Cmwlth. 2006) .

Compensatory education is an appropriate remedy where a school district knows, or should know, that a child's educational program is not appropriate or that he or she is

receiving only trivial educational benefit, and the district fails to remedy the problem. B.C., 906 A.2d at 648; M.C. v. Central Regional School District, 81 F.3d 389 (3d Cir. 1996). Such an award 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. Id. Compensatory education is an equitable remedy. Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990). Thus, in fashioning an award, I have taken into consideration the complexity of the behavioral problem with which the District was faced. B.C., 906 A.2d at 650.

I find that the record is very sparse regarding what would be an appropriate award of compensatory education. Taken as a whole, it supports only an award based upon an hour-for-hour deprivation of educational services, M.C., 81 F.3d supra., and does not support a finding as to the position the Student would have been in if provided with a full year of FAPE, B.C., 906 A.2d supra.

I decline to award compensatory education on a full day basis. There is not a preponderance of evidence supporting such an award. While I find that the District failed to make appropriate attempts to control the Student's avoidant behavior, including truancy, and this could have affected the entire school day, there is little evidence on the Student's attainment in non-core classes during this period of time – certainly not enough evidence to support a conclusion that the Student received no benefits during the school day. The evidence focused on reading, writing and mathematics, the areas of specific Learning Disability. The remedy will be similarly delimited.

I also limit the award in consideration of the equitable nature of the remedy. In my view, a full day award would be excessive in relation to the serious challenge the

District faced. Here, three separate disabling conditions made it extremely difficult to manage the Student's behavior. Moreover, the Student's behavioral diagnosis was not such as to absolve Student of all responsibility for willfully refusing to take advantage of appropriate educational services that were offered. Also, I consider the periods of time in which the Parent failed to cooperate with the District's efforts to remediate the failures of its own educational plan. All of these considerations lead me to limit the award on equitable grounds. Therefore, I will award compensatory education in the amount of three hours per day for every school day from May 10, 2008 to September 14, 2009. This award does not include ESY during times when school was closed.

For the reasons stated above, I also will accord the usual period for discovery and remediation of the deficiencies in the District's educational plan. Therefore, sixty school days will be deducted from the award.

Given the history of this matter, I conclude that it is necessary, equitable and prudent to limit the purposes for which the award may be used. I will allow it to be used for tutoring of the Student in an appropriate, research-based program addressing Student's needs in reading, writing and mathematics. I also will allow the award to be used for counseling by a properly licensed or certified counselor, because behavior in my view was the primary impediment to learning in this matter. Given the Parent's lapses in cooperation with the District and supervision of the Student, I will require the Parent's choice of service providers to be approved by Parent's counsel of record and the District, for compliance with the restrictions imposed by this order. Parent's counsel of record will be the Parent's current counsel at the time when the Parent makes a choice of service provider under this Order.

## CONCLUSION

For the reasons set forth above, I conclude that the District failed to provide a FAPE to the Student from May 10, 2008 until September 14, 2009. I conclude that the District appropriately offered to provide a FAPE for the remainder of the relevant period. Therefore, I will direct the District to provide compensatory education as set forth above. I decline to order reimbursement for the expert reports discussed above. Any claims not specifically addressed by this decision and order are denied and dismissed.

## ORDER

1. During the relevant time period, the District did not maintain an inappropriate identification of the Student.
2. During the relevant time period, the District did not place the Student in an inappropriate educational setting.
3. From May 10, 2008 to September 14, 2009, the District failed to provide the Student with a free appropriate public education with regard to educational needs in reading, writing and mathematics. From September 14, 2009 to August 13, 2010, the District did not fail to provide a free appropriate public education to the Student.
4. The District is hereby ordered to provide compensatory education to the Student in the amount of three hours per school day during the period from May 10, 2008 to September 14, 2009, minus sixty school days as a reasonable discovery and remediation period. For purposes of this Order, a school day is any day on which school was in session in the District during the above stated period of time, not including ESY sessions.
5. The compensatory education ordered herein shall take the form of one to one tutoring in reading, writing and/or mathematics in an appropriate, research-based program, and/or counseling by an appropriately licensed or certified provider of counseling services. Compensatory education may occur after school, on weekends and/or during the summer months, when convenient for the student and the family, and may be utilized after the Student attains 21 years of age. Compensatory education must be in addition to the then-current IEP and may not be used to supplant the IEP. The hourly cost for compensatory education shall not exceed the hourly cost

of salaries and fringe benefits for qualified professionals providing similar services at the rates commonly paid by the District.

6. The hearing officer does not award reimbursement for private evaluations by two private evaluators - by an educator of diabetes patients dated August 13, 2010 and October 30, 2010, and by a neuropsychologist dated August 23 and August 24, 2010.

*William F. Culleton, Jr. Esq.*

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

March 13, 2011