

This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

Pennsylvania

Special Education Hearing Officer

DECISION

Child's Name: J.W.

Date of Birth: [redacted]

ODR No. 16587-15-16-AS

CLOSED HEARING

Parties to the Hearing:

Representative:

Parent[s]

Angela Uliana-Murphy, Esquire
106 North Franklin Street, Suite No. 2
P.O. Box 97
Pen Argyl, PA 18072

Pocono Mountain School District
135 Pocono Mountain School Road
Swiftwater, PA 18370

Timothy E. Gilsbach, Esquire
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Dates of Hearing:

October 28, 2015; November 2, 2015

Record Closed:

November 23, 2015

Date of Decision:

December 14, 2015

Hearing Officer:

William F. Culleton, Jr., Esquire, CHO

INTRODUCTION AND PROCEDURAL HISTORY

The child named in this matter (Student)¹ is a resident of the district named in this matter (District), and is enrolled in a District junior high school. (NT 7-8.) Student is identified under the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA), as a child with the disabilities of other health impairment and specific learning disability. (NT 7-8.) Student's parents (Parents)² filed this due process request, asserting that the District failed to provide Student with a free appropriate public education (FAPE) when Student was in sixth and seventh grades, as required by the IDEA. Parents request an order that the District provide Student with compensatory education on account of such asserted failure to provide a FAPE. The District states that it provided a FAPE to Student during the relevant period of time.

The hearing was completed in two sessions. I have determined the credibility of all witnesses and I have considered and weighed all of the evidence of record. I conclude that the District failed to provide Student with a FAPE, and I order it to provide Student with compensatory education accordingly.³

ISSUES

1. During the relevant period from the first day of school in the 2013-2014 school year until the last day of school in the 2014-2015 school year, did the District offer to and provide Student with a FAPE?
2. During the summer of 2015, did the District offer to and provide Student with appropriate extended school year (ESY) services?

¹ Student, Parent and the respondent School are named in the title page of this decision; personal references to the parties are omitted in order to guard Student's confidentiality.

² Parents are referred to in the plural; any reference to Parent in the singular is a reference to Student's Mother, who conducted many of the transactions and interactions underlying the claims made in this matter.

³ The parties stipulated that the hearing officer was asked to determine the appropriateness of District services for a two year period, as set forth herein.

3. Should the hearing officer order the District to provide Student with compensatory education for or on account of any failure to provide a FAPE during all or any part of the relevant period or the summer of 2015?

FINDINGS OF FACT

1. Student has a medical history of developmental delays, including significant speech and hearing deficits. Student also demonstrated emotional and affective regulation difficulties, as well as social and interpersonal skill development delays. Student has been diagnosed with Pervasive Developmental Disorder, Asperger's Disorder, and Attention Deficit Hyperactivity Disorder (ADHD), Oppositional Defiant Disorder (ODD), Language Disorder, Developmental Coordination Disorder and Mood Disorder. (S 14.)
2. Student entered the District for kindergarten, advanced through elementary and intermediate schools and advanced into junior high school. (S 14.)
3. Student's educational history includes early intervention services, including classroom-based education and speech and language support, pursuant to identification as a child with developmental delays and speech and language impairment. Starting in kindergarten with the District, Student has been identified at various times with speech and language impairment, developmental delay, emotional disturbance, and Other Health Impairment. (S 14.)
4. Starting in kindergarten and until sixth grade in intermediate school, Student was placed in itinerant speech and language support and supplemental emotional support. Student was discharged from itinerant speech and language support pursuant to a reevaluation in March 2014. (S 14.)
5. Throughout the Student's tenure in the District, Student has displayed behaviors interfering with Student's education and that of others. Behaviors of concern have included defiant, disrespectful or inappropriate behavior; physical altercations; inappropriate language; violation of bus policy; horseplay; threatening a peer; possession of a weapon; disrupting the educational process; and being out of assigned area. (S 14.)
6. When Student was in fifth grade Student received six disciplinary referrals. In sixth grade, Student received nine disciplinary referrals. In seventh grade, Student received six disciplinary referrals. In seventh grade, Student was disciplined with two days of in-school suspension, called "in-school academic program", and five days of out-of-school suspension. Student's attendance has not been problematic, except for these suspensions. (S 14.)
7. From September 2009 to November 2009, when Student was in second grade, Student was evaluated privately at the request of the District. The evaluator reported data supporting diagnoses of ADHD, ODD, and an emerging Conduct Disorder. The evaluator also reported data supporting the presence of a learning disability impacting all academic areas. The evaluator recommended classifications of Emotional Disturbance and Specific Learning Disability (S 14.)

8. In October 2012, when Student was in fifth grade, the District offered Student an IEP placing Student in Supplemental Emotional Support, with full-time inclusion in regular education. It specified referral to an emotional support classroom when needed due to frustration, and to address inappropriate behaviors. The District also provided for 60 minutes per 6 day cycle of Speech and language therapy and a behavior support plan based upon a Functional Behavioral Assessment. (S 2.)
9. The October 2012 IEP present levels of academic performance reported below fourth grade average mathematics performance in criterion-based testing, as well as below basic scores in state benchmark testing. Student's criterion-based reading fluency and comprehension scores were average for fourth grade level reading materials, but Student's benchmark testing was below basic. (S 2.)
10. The October 2012 IEP present levels of functional performance included teacher reports of little or no behavior problems, but continuing need for redirection and use of the emotional support classroom. Teachers reported disrespectful muttering under Student's breath, difficulty engaging appropriately with peers, talking back to teachers and telling them to "shut up", and displays of high levels of anger in class. In the beginning of fifth grade, teachers employed ignoring as a strategy for responding to much of this behavior. (S 2.)
11. The October 2012 IEP listed as educational needs Student's behavior in accepting consequences, making appropriate decisions, and completing tasks with little or no redirection. It noted speech needs in the areas of language processing, word association explaining, and producing sentences with proper syntax. It did not identify any academic needs in the areas of reading, mathematics or writing. (S 2.)
12. The October 2012 IEP offered measurable goals addressing reading comprehension, mathematics computation, vocabulary, language processing skills, and English language syntax. The IEP also offered goals addressing peer interaction skills and modifications and specially designed instruction were offered to address Student's educational needs regarding organization; processing instructions; below-average verbal and nonverbal processing speed; below-average written expression skills; homework completion; vocabulary; difficulty with shifting attention from one activity to another; emotional self-regulation and inappropriate classroom behavior; and behavior on the school bus. (S 2.)
13. The October 2012 IEP offered a behavior support plan addressing three behaviors of concern: work refusal, frustration behaviors (mumbling, vocalizing negative statements and crying) and physical aggression. (S 2.)

SIXTH GRADE

14. Parent approved the October 2012 IEP on October 26, 2012, and the IEP term extended for one year into sixth grade. (S 2.)
15. Student's reading score on the fifth grade Pennsylvania System of School Assessment (PSSA) was below basic. (S 7.)

16. In the 2013-2014 school year, when Student was in sixth grade, Student struggled with academic performance, organization, assignment completion and homework completion. This led to variable class participation, frequent sleeping in class, frustration with assignments, and behaviors that interfered with learning, including defiance, refusal to follow directions and rules, cursing and muttering under Student's breath, and occasional verbal or physical aggression toward staff and peers, including at least eleven reported incidents of disciplinary violations. (NT 41-49, 51, 53; P 1; S 19.)
17. Student often slept during class in sixth grade. Data were taken inconsistently and not compiled on this behavior. (NT 179, 181; P 4.)
18. The District was aware of Student's struggles and behavioral issues from the beginning of the 2013-2014 school year. (NT 53-55.)
19. Parent employed a private tutor to help Student with homework and academic remediation, and had the assistance of aides who observed Student in school. (NT 41-49, 20; P 1.)
20. In sixth grade, Student's regular education mathematics class was co-taught with a special education teacher. Student was assigned to regular education without co-teaching for all other academic subjects including reading and writing. Emotional support services were available, but were provided only occasionally, largely upon Student's initiative. (NT 163, 174-183, 326; P 4.)
21. In October 2013, when Student was in sixth grade, the District offered Student an IEP placing Student in Supplemental Emotional Support, with full-time inclusion in regular education. It specified referral to an emotional support classroom when needed due to frustration, and to address inappropriate behaviors. The District also provided for 60 minutes per 6 day cycle of Speech and language therapy and a behavior support plan based upon a Functional Behavioral Assessment. (S 4.)
22. The October 2013 IEP present levels of academic performance reported severely below fifth grade average mathematics performance in criterion-based testing, as well as basic scores in the PSSA fifth grade mathematics tests. Student's criterion-based reading fluency and comprehension scores were average for sixth grade level reading materials, but Student's PSSA fifth grade reading test scores were below basic. PSSA scores for writing were graded as basic. (S 4.)
23. The October 2013 IEP present levels of functional performance included teacher reports of little or no behavior problems, and good social skills, but continuing need for redirection and use of the emotional support classroom. Teachers reported variable class participation, frustration with assignments, struggles with organization, and struggles with assignment completion and homework completion. (S 4.)
24. The October 2013 IEP listed as educational needs Student's behavior in participating in class, organizing materials, and completing tasks with little or no redirection. It noted speech needs in the areas of language processing, word association and explaining, and producing sentences with proper syntax. It did not identify any academic needs in the areas of reading, mathematics or writing. (S 4.)

25. The October 2013 IEP offered measurable goals addressing mathematics computation, vocabulary, language processing skills, and English language syntax. The IEP also offered goals addressing appropriate classroom behavior. Modifications and specially designed instruction were offered to address Student's educational needs regarding organization; processing instructions; below-average verbal and nonverbal processing speed; below-average written expression skills; homework completion; vocabulary; difficulty with shifting attention from one activity to another; emotional self-regulation and inappropriate classroom behavior; and behavior on the school bus. (S 4.)
26. The October 2013 IEP offered a behavior support plan addressing three behaviors of concern: work refusal, frustration behaviors (mumbling, vocalizing negative statements and crying) and physical aggression. Associated behavior goals addressed peer interaction skills and appropriate classroom behavior. (S 4.)
27. The sixth grade behavior plan utilized a different method of measuring progress in behavioral self-management. This consisted of a point plan, based upon teachers' assessments of Student's overall behavior during each class, which was to be recorded in the form of points awarded in Student's agenda book after each class. (NT 165-167, 175-179, 182-183; P 4; S 4.)
28. Points were assigned based upon teacher judgment, and not based upon data collection during classes. The emotional support teacher kept no records of Student's utilization of the emotional support classroom as offered in the IEP. Points were not recorded for each class, because Student often failed to present the assignment book for recording of points for behavior. (NT 165-167, 175-179, 182-183; P 4; S 4.)
29. Parent approved the October 2013 IEP on October 16, 2013, and the IEP term was to extend for the remainder of Student's sixth grade and the beginning of Student's seventh grade years. (S 4.)
30. On March 6, 2014, the District provided a re-evaluation report pursuant to state three-year timeframe. The report recommended changing Student's IDEA identification from Emotional Disturbance to Other Health Impairment. It also recommended exiting Student from speech and language therapy, and elimination of identification with Speech and Language Impairment. The report recommended maintaining Student in Student's present programming, consisting of all classes in regular education, with access to emotional support services and classroom when needed. (S 7.)
31. The March 2014 re-evaluation report included a review of Student's educational records, including scores from criterion-based and benchmark testing, as well as the administration of subtests of a standardized achievement test. Student's emotional support special education teacher administered the achievement testing. (NT 197, 202; S 7.)
32. In reading, Student's score on one criterion-referenced assessment showed Student to be performing at a third grade level in reading; on another such assessment, Student's reading score was below basic. However, on the standardized achievement test, Student's composite score for reading was average for Student's age, although one sub-test revealed

low achievement in reading fluency. Yet Student scored above the benchmark for reading fluency in a standardized assessment intended for monitoring the emergence of early literacy skills. (S 7.)

33. Student's sixth grade benchmark testing in mathematics was below basic, but Student's fifth grade PSSA score for mathematics was basic. (S 7.)
34. Student's grades in the first two quarters of sixth grade were passing and most were at or above a "C" level. These grades were a product of local assessments modified to allow extended time, breaks, multiple testing sessions, modified instructions to allow short answers rather than long essay answers, re-testing whenever Student's grade was below 65%, and administration in a separate classroom location. The private tutoring provided by Parents, and substantial assistance of parents and tutors with homework assignments, also helped to elevate Student's grades for sixth grade. (NT 45-52; S 2, 4, 7.)
35. Student's IEPs in sixth grade provided for accommodation of local and state testing, including allowing extra time to complete tests, simplified directions, multiple testing sessions, and reading of test questions. (S 2, 4, 8.)
36. Speech and language testing indicated appropriate functioning to enable access to the curriculum. (S 7.)
37. The March 2014 re-evaluation included behavior rating inventories with regard to Student's executive functioning and overall emotional functioning. Scores indicated significant difficulties with executive functioning, including ability to adjust to changes in routine or task demands, modulation of emotions, initiation of problem solving or activity, sustaining working memory and planning and organizing problem-solving approaches. In addition, scores on executive functioning inventories revealed significant emotional dysregulation. (S 7.)
38. On April 11, 2014, the District offered an IEP to Parent. At the IEP meeting on the same date, Parent expressed concern about the placement of Student in the residence-based catchment area for junior high school; Parent preferred placement in the junior high school for the catchment area (not residence-based) in which Student had been attending at the intermediate level. (S 8.)
39. The April 2014 IEP continued the placement of Student in supplemental emotional support, with all classes in regular education. (S 8.)
40. The April 2014 IEP offered goals in mathematics computation and estimation, as well as maintaining appropriate behavior in the classroom. Modifications in specially designed instruction included most of those provided in the October 2013 IEP governing sixth grade. (S 8.)
41. The April 2014 IEP offered a behavior support plan that was essentially the same as the support plan provided in the October 2013 IEP governing sixth grade. The behavior support plan recognized a new behavior, falling asleep in class; however, no additional goals,

specially designed instruction or other strategies were articulated in the plan in order to deal with this problem. (S 8.)

42. Parents signed the April 2014 IEP on April 11, 2014 and it presented an expected IEP term of one year, extending into seventh grade. (S 8.)
43. Student continued to struggle with organizational skills during sixth grade. (NT 170.)
44. With the exception of speech and language goals administered by the speech and language therapist in a one-to-one setting, Student made at best marginal progress on Student's sixth grade IEP goals. Any progress was well below the pace that would have been required to meet the goals within one IEP term. (NT 191-192, 323-324, 330-336; S 7, 14, 18, 24, 25, 26, 27.)
45. Student's defiant and disruptive behavior continued at reduced levels throughout sixth grade, and Student's work refusal and work-avoidant behaviors continued to interfere substantially with Student's access to the curriculum. (NT 228, 324-330; S 9, 13, 19; P 2, 4.)

SEVENTH GRADE

46. Despite extensive local testing modifications continued from Student's sixth grade IEPs, Student's grades dropped significantly in seventh grade. By the second marking period, Student was failing major subjects. (S 4, 8, 11.)
47. Student's most recent benchmark reading scores were below grade level. (S 11, S14.)
48. Student was placed in the emotional support classroom for homeroom, the learning support room for English Language Arts, and in co-taught (one regular education teacher and one special education teacher) classrooms for other core academic subjects. (NT 345.)
49. On February 19, 2015, the District convened an IEP team meeting at the request of Parent and Parent's attorney. (S 11.)
50. At the February 2015 IEP team meeting, Parent expressed concerns about Student's behavior in school and homework completion difficulties. Parent also expressed concerns about Student's benchmark reading scores, which were below grade level. (S 11.)
51. Parent was reluctant to agree to specially designed instruction that would reduce the amount of work brought home for homework, and reluctant to agree to placement full time in an emotional support classroom. (NT 344-347.)
52. Two teachers reported improved behavior, with little behavioral difficulties exhibited in class. In contrast, one teacher noted an increase in inappropriate language behavior, as well as significant amount of sleeping in class. Present levels in the February 2015 IEP attributed all of Student's achievement difficulties and poor grades to Student's behaviors in class, including work refusal and sleeping in class. Teachers reported a significant need

for prompting as a result of these behaviors. Cursing and muttering behaviors were reported to be improved. (S 11.)

53. The District revised Student's IEP on February 19, 2015. It modified Student's supplemental emotional support placement to provide one class in English Language Arts to Student, located in the learning support classroom. The District also agreed to screen Student for available Wilson reading instruction programming. The District added one specially designed instruction technique: allowing Student to chew gum or suck on hard candy during class, in an attempt to reduce muttering and cursing. (S 11.)
54. In seventh grade, Student needed additional supports addressing educational needs in all core academic areas and addressing Student's behavioral difficulties. (NT 219, 228-229, 259-261, 276-288, 293-297, 300-306; S 12, 13, 14.)
55. In May 2015, the District provided an FBA that identified two behaviors of concern: expression of frustration (mumbling a negative verbal statements); and falling asleep during class. (S 13.)
56. On May 27, 2015, the District provided to Parent a re-evaluation report. The report recommended identification of Student with Other Health Impairment (due to Student's medical diagnoses and behavioral issues) and Specific Learning Disability. (S 14.)
57. The May 2015 re-evaluation report reported that Student was not achieving adequately for Student's age in basic reading skills, reading comprehension, mathematics calculation and mathematics problem-solving. The report based this conclusion on both standardized and norm-referenced testing, benchmark assessments and the PSSA, and found a severe discrepancy between Student's cognitive ability and achievement in these areas. It ruled out classification with emotional disturbance. (S 14.)
58. The May 2015 reevaluation report listed academic needs including improving academic skills in reading, writing and mathematics. It also listed needs for improving work habits, complying with teacher directives and school rules, appropriate interaction with peers and adults in the school setting, and utilizing coping skills when angry frustrated or upset. (S 14.)
59. In seventh grade, by the end of the third marking period, Student was failing English language arts. (S 15.)
60. Student's IEPs in seventh grade provided for accommodation of local and state testing, including allowing extra time to complete tests, simplified directions, multiple testing sessions, and reading of test questions. (S 4, 8.)
61. The May 2015 re-evaluation report included a thorough review of Student's educational records, classroom observation, parent input, cognitive testing, achievement testing, and three different behavior rating scales. (S 14.)
62. The May 2015 re-evaluation report found low average reading and written language skills. More specific skill testing through standardized achievement tests revealed low average

fluency with academic tasks, and academic skills within the low range for Student's age. Reading comprehension and math problem solving skills were found to be in the below average range. Criterion-referenced testing indicated weaknesses in basic reading skills, reading comprehension, mathematics calculation and mathematics problem-solving. (S 14.)

63. Contrast of the May 2015 re-evaluation report's standardized achievement testing with the standardized achievement testing in the March 2014 re-evaluation report indicates that Student made some progress but fell farther behind Student's age-level peers by May 2015. (NT 206-208; S 7, S 14.)
64. Student continued to have organizational difficulties throughout seventh grade. (NT 218; P 2.)
65. Throughout the first two marking periods of seventh grade, Student continued to exhibit behaviors that interfered substantially with Student's access to the curriculum, especially work refusal and frequent sleeping in class. From the beginning of March 2015, Student's work avoidant, defiant and aggressive behaviors were reduced somewhat, but not extinguished. (NT 214-216, 228, 263-264, 294-293; S 13, 14, 19, 23, 24; P 2.)
66. In seventh grade, Student received disciplinary action on six occasions for violations including defiant behavior and language; horseplay; repeated work refusal and sleeping; violation of bus rules and defiance; and leaving the school building, all before April 2015. (S 15.)
67. Student made some academic progress in seventh grade, especially after February 2015; however, Student's progress was incremental and at a pace well below that required to attain Student's IEP goals. (NT 219, 349-350; S 14, 20, 24.)
68. The District offered an IEP in June 2015, recognizing educational needs in reading comprehension, written expression, mathematics, classroom work habits, appropriate interaction with peers and adults and improved ability to stay awake and focused in class. (S 15.)
69. The June 2015 IEP placed Student in regular education for all subjects except English Language Arts. It also provided for a placement of itinerant emotional support. (S 15.)
70. The June 2015 IEP offered measurable goals for written expression, algebra, completing assignments, decreasing inappropriate language and staying awake and focused in class. (S 15.)
71. The June 2015 IEP offered modification of work in core academic classes according to Student's academic reading and writing ability. It also offered modification of tests and quizzes to meet academic ability, including: reducing choices for multiple-choice questions; providing word banks; chunking material; extended time up to 1 1/2 of the amount of time allotted; and retesting for initial assessments scored below 65%. Modifications also included shortened assignments and a quiet area within the classroom to be utilized when Student should become overly frustrated. (S 15.)

72. The June 2015 IEP found Student ineligible for extended school year services (ESY), due to advancement in Student's IEP goals without regression or recoupment difficulties. (S 15.)
73. The June 2015 IEP provided a behavior support plan addressing the behaviors of sleeping in class, work refusal, mumbling and cursing under the breath. (S 15.)
74. On August 26, 2015, the District revised Student's IEP to change Student's school to the catchment area school, and place Student in a supplemental emotional support classroom for mathematics, English Language Arts, science and social studies. In addition, the District offered specially designed instruction in the form of a program to address reading weaknesses, to be provided in a regular education classroom; Student's scores on the Wilson screening were cited as a basis for denying placement in a Wilson program. (S 16.)
75. Student made minimal academic progress in seventh grade. (S 24, 25, 26, 27.)

DISCUSSION AND CONCLUSIONS OF LAW

BURDEN OF PROOF

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

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

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

This rule can decide the issue when neither side produces a preponderance of evidence – when the evidence on each side has equal weight, which the Supreme Court in Schaffer called “equipoise”. On the other hand, whenever the evidence is preponderant (i.e., there is weightier evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. See Schaffer, above.

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

DUTY TO PROVIDE A FAPE

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

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

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

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

the time at which the offer was made. D.S. v. Bayonne Board of Education, 602 F.3d 553, 564-65 (3d Cir. 2010); D.C. v. Mount Olive Twp. Bd. Of Educ., 2014 U.S. Dist. LEXIS 45788 (D.N.J. 2014).

APPLICATION OF LEGAL STANDARDS TO FACTS

Applying these standards to the above findings and the record as a whole, I conclude that the District failed to provide Student with educational services that were reasonably calculated to provide Student with an opportunity for meaningful educational gain, based upon the District's state of knowledge at the beginning of Student's sixth grade and throughout Student's sixth and seventh grades. The District failed to identify Student with a specific learning disability in reading, writing and mathematics, despite its knowledge of Student's severely below-grade academic performance in previous testing. It failed to provide the intensity of supports that would have been reasonably calculated to address these needs appropriately. It failed to address appropriately Student's serious organizational and behavioral struggles during this time, despite its longstanding knowledge of Student's needs in these areas. Taken together, these failures rose to the level of a failure to provide Student with a FAPE.

In May 2015, after Student had completed the bulk of Student's seventh grade year, the District determined that Student was struggling with a specific learning disability in all three areas of basic academic skill: reading, writing and mathematics. I conclude that the District inappropriately failed to identify Student's specific learning disabilities prior to Student's sixth grade year.

The District was well aware that Student was struggling in all basic academic skills. Student had an extensive medical and special-educational history, including developmental delays,

a longstanding speech and language disorder, below-grade academic functioning for a number of years prior to the relevant period of time, and manifestly slower rates of acquisition in the early grades. This was sufficient information to demand a searching inquiry into Student's cognitive functioning and academic achievement, well prior to sixth grade.

Any re-evaluation must be "sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified." 34 C.F.R. §300.304(c)(6). Instead, the District's 2011 re-evaluation provided no cognitive or achievement testing; it was a functional behavioral analysis only. After Student had struggled in school for another three years, the District's March 2014 re-evaluation report provided no cognitive scores, and its achievement testing, conducted by the special education teacher, was inconsistent with significant criterion-based measures and benchmarks and Parent's reports of homework struggles. Yet the District's re-evaluation report did not attempt to reconcile these inconsistent results by more specific testing, nor did it explain these inconsistencies. Thus, neither of the re-evaluations that formed the basis of the District's placement and programmatic decisions was comprehensive enough to discover what the District eventually found – that Student had been struggling for years with specific learning disabilities.

In the absence of comprehensive evaluation reports, the District failed to offer appropriate special education placements for sixth and seventh grade. In sixth grade, Student was in regular education classes entirely, and there is little evidence either that the emotional support classroom was used to intervene effectively in Student's difficulties or that specially designed instruction and accommodations in the Student's IEPs were implemented effectively. In seventh grade, the District provided much more support, because Student was in both emotional support classrooms and learning support classrooms for part of the day, and was in regular education classrooms that were

co-taught by special education teachers for all core academic subjects. There was evidence that the teachers did implement many of the modifications and accommodations listed in the IEPs. Yet, the evidence, taken as a whole, is preponderant that Student failed to progress academically at more than a snail's pace. The evidence is preponderant that Student's progress was incremental; it was so slow that there was no reasonable basis to think that Student could reach IEP goals established for accomplishment within a yearly IEP term. Indeed, the evidence in 2015 showed that Student was falling farther and farther behind Student's age-based and class-based peers.

The evidence of Student's progress or lack thereof is mixed. The primary evidence supporting the District's contention that Student made meaningful academic progress during these two relevant years is fourfold: The District cites achievement testing performed by the special education teacher in late February 2014; a standardized test of early literacy skills that yielded a reading fluency score above benchmark; Student's passing grades; and teacher reports in both years. The evidence showing that Student did not make meaningful progress includes the re-evaluation report of May 2015 (including both cognitive and achievement testing) that identified Student with specific learning disabilities in reading, writing and mathematics; criterion referenced testing reported in 2014 that showed Student reading at a third grade level; below basic state benchmark scores; the incremental progress shown on student's IEP goals in seventh grade; and below basic PSSA scores. I have weighed this evidence and find that it preponderates in favor of the Parents' claims.

I find the evidence of the May 2015 re-evaluation to be most convincing. This re-evaluation was palpably more comprehensive than the 2014 re-evaluation, with a thorough review of educational records; cognitive, achievement and speech and language test scores; and several batteries of behavior inventories exploring broad emotional issues, attention needs and executive

functions. It was performed by a school psychologist. It included a discrepancy analysis, and concluded by identifying Student with a Specific Learning Disability. I find the report, taken as a whole, to be sufficient to raise an inference that the Student has struggled with specific learning disability for the entirety of the relevant time period, especially as this classification is consistent with and explains many of Student's difficulties set forth in the record.

The score indicating third-grade level functioning in reading, bench-mark scores well below grade expectations, and incremental progress reports on IEP goals, as well as the heavy supports provided to Student for both classroom functioning and local testing, add weight to the District's own findings in 2015. They are convincing that Student was not making satisfactory progress, and if anything was falling farther behind Student's peers by both age and grade.

I found the evidence in support of the District's claims of progress less convincing and I accorded it less weight. The 2014 achievement test scores were not administered by the school psychologist, but by the special education teacher, who also was Student's case manager; there was no information on compliance with standardized conditions or other attributes of standardized testing. As noted above, the scores were inconsistent with several other indicators, and there was no indication of an attempt to reconcile the inconsistencies. There was no cognitive testing against which to compare and contrast the results.

Student's grades were influenced by numerous factors, so that they must be accepted with some caution. During the relevant period, local testing was modified for Student pursuant to Student's IEP, to allow re-testing whenever Student's grade was below 65%; extended time; breaks during testing; multiple testing sessions, and modified instructions to allow short answers rather than long essay answers. Although such alterations are justifiable for educational purposes, they reduce the utility of grades for purposes of assessing whether a student has made meaningful

educational progress, as the courts have recognized. D.S. v. Bayonne Bd. of Ed., 602 F.3d 553, 567 (3d Cir. 2010)(grades in special education accorded less weight).

In addition, Student's grades were influenced positively by private tutoring that Parent provided to Student. The tutors helped Student with organization deficits, remediating academic deficits, and homework.

Teacher reports also were accorded less weight. These reports seemed facially self-contradictory. Moreover, they were purely subjective. Indeed, the District's witnesses failed to show that the data-collection methods in place for progress monitoring were systematic or employed with fidelity, in Student's sixth grade year. Also, these reports were in conflict with Parent's credible reports of Student's struggles with homework and academic performance generally.

I also find that the District failed to address appropriately Student's behaviors impeding learning, during the relevant period. For sixth grade, the District's behavior plan addressed Student's aggressive behaviors toward educators and peers, mumbling and cursing under the breath as a form of defiant behavior, and work refusal behaviors. The evidence is preponderant that these behaviors continued throughout both sixth and seventh grades. In addition, Student added a fourth behavior to Student's work avoidance function, sleeping in class, which was noted in the District's behavior plan of April 2014, but not the focus of a functional behavioral assessment until May 2015. This behavior was not effectively addressed in sixth or seventh grade behavior plans.

The District points to teachers' subjective reports that Student's behaviors improved. This evidence is not preponderant for Student's sixth grade. Teachers admitted that Student's behaviors continued, although, subjectively, they detected reduced frequency and intensity. Yet, for sixth

grade, there was not a reliable data-gathering system to corroborate these reports. Data was not a count of specified behaviors; rather, regular – education teachers with twenty or more students were called upon to give Student a global behavioral point-score after each class. Moreover, recording was at best haphazard, because it was to be placed in the Student’s assignment book, and Student, struggling with well-known organizational difficulties, often failed to present the book for assignation of points. I conclude that this procedure was not reasonably calculated to bring Student’s behaviors under control within a reasonable time, and its eventual execution without fidelity was foreseeable.

As to seventh grade, the evidence is preponderant that Student’s work avoidance behaviors and defiance continued into 2015, and only in February did they begin to ameliorate, with evidence of meaningful progress starting in March 2015. By this time, Student’s sleeping in class was the prominent form of work avoidance, and this, after being recognized as a behavior of concern in 2014, was addressed formally only in May 2015.

The District argues that Student’s sleeping behavior was not fully within its control, suggesting that Student’s admission of staying up late at night absolved it of responsibility to keep Student awake in its classrooms. However, its own assessments of this behavior concluded that the function of Student’s sleeping in class was escape and work-avoidance. Thus, I give little credence to this argument.

The District also sought to shift responsibility for its inappropriate placements and programming to Parents. There is evidence that Parents were reluctant in IEP team meetings to accept more restrictive placements and modifications of work demands in response to Student’s academic and behavioral struggles. However, I conclude that this was not the equivalent of parental obstruction that should absolve the District of responsibility. Rather, I find on the record before

me that Parents throughout were doing their best to cooperate with the educators. Their concerns for inclusion and minimizing the risk of stigmatization were not unreasonable. Yet the information that they had, especially from Student's sixth grade year, minimized the severity of Student's academic underperformance. Repeatedly progress reports indicated progress without showing how minimal such progress was, and repeatedly, educators assured Parents that Student was doing well, when in fact Student was falling further behind age and grade-level expectations academically. Thus, the evidence at most suggests that Parents resisted special education interventions based upon a misapprehension of the severity of Student's educational needs, and that the District knew or was on notice that those needs were more severe – and required more robust intervention, including more structured placement for the majority of Student's day – than Parents could be expected to realize. In these circumstances, case law teaches that the District remains responsible to take appropriate action regardless of a parent's reluctance. See, M.C. v. Central Reg. Sch. Dist., 81 F.3d 389, 397 (3d Cir. 1996)(child's right to FAPE not dependent upon vigilance of parents).

ESY

Parents seek an order for compensatory education on account of the District's denial of Student's eligibility for extended school year services in the summer of 2015. I conclude that the evidence is not preponderant that the District declined to find Student eligible inappropriately. Accordingly I deny this claim.

CREDIBILITY

It is the responsibility of the hearing officer to determine the credibility of witnesses. 22 PA. Code §14.162 (requiring findings of fact); A.S. v. Office for Dispute Resolution, 88 A.3d 256,

266 (Pa. Commw. 2014)(it is within the province of the hearing officer to make credibility determinations and weigh the evidence in order to make the required findings of fact). In this matter, I found all witnesses to be credible, but assigned lower reliability to the testimony regarding Student's progress in sixth grade, because such progress was not documented through reliable data.

COMPENSATORY EDUCATION

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

In this matter, I conclude that Student is entitled to compensatory education on account of the District's failure to offer or provide Student with a FAPE during the entirety of sixth and seventh grades. From the beginning of school in 2013 until March 1, 2015, I conclude that Student was deprived of the full benefit of the District's educational services, because Student made de minimis academic progress, and because Student's emotional state and behavioral and social behaviors rendered school a painful burden to Student, with little or no gain in these non-academic realms. Therefore, I will order the District to provide full days of compensatory education for this period of time.

However, the record shows that Student began to benefit from school from March 1, 2015. By then, the record shows, Student was showing some progress, both academically and behaviorally. I conclude that Student was able to derive meaningful benefit from school from then until the end of the school year, mainly in behavioral and social skill development, and in the

acquisition of academic knowledge in both core and special subjects. Nevertheless, the record shows that Student continued to fall behind Student's grade and age-level peers in basic skills of reading, writing and mathematics, even during this time of improvement. Therefore, I will order the District to provide two hours per school day of compensatory education to Student for this period of time, on account of the District's failure to provide meaningful educational benefit in these basic academic skill areas.

CONCLUSION

In sum, I find that the District failed to provide Student with a FAPE for Student's sixth and seventh grades. I order the District to provide compensatory education accordingly.

ORDER

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

1. The District shall provide compensatory education to Student in the amount of six hours per day for every school day on which Student attended Student's assigned District school, from the first day of school in the 2013-2014 school year until and including February 28, 2015.
2. The District shall provide compensatory education to Student in the amount of two hours per day for every school day on which Student attended Student's assigned District school, from the first day of March 2015 until and including the last day of the 2014-2015 school year.

3. The educational services ordered above may take the form of any appropriate developmental, remedial or instructional services, product or device that furthers or supports the Student's education. Services in the amount set forth above may occur after school hours, on weekends, or during summer months when convenient for Student or Parent.
4. The services ordered above shall be provided by appropriately qualified, and appropriately Pennsylvania certified or licensed, professionals, selected by Parent.
5. The cost of any ordered service may be limited to the current average market rate within a fifty-mile radius of the District's administrative offices for privately retained professionals qualified to provide such service.

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

[William F. Culleton, Jr. Esq.](#)

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

December 14, 2015