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Pennsylvania

Special Education Hearing Officer

DECISION

ODR No. 2721-1112 AS

Child's Name: M.B.

Date of Birth: [Redacted]

Dates of Hearing: 2/15/12, 3/6/12, 3/7/12,
4/12/12, 4/13/12

CLOSED HEARING

Parties to the Hearing:

Parent

Parent

School District

Pottstown

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Representative:

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Date Record Closed:

May 31, 2012

Date of Decision:

June 12, 2012

Hearing Officer:

Anne L. Carroll, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

Student in this case moved into the District in April 2009 and enrolled in the high school with an IEP from the school district in which the family previously resided. Student had received early intervention services, and upon reaching school age, identified as IDEA eligible in the category of specific learning disabilities.

Parent initially filed a due process complaint in August 2011, alleging denial of FAPE by the District beginning with Student's enrollment in April 2009. At the first hearing session on that complaint, the parties announced a settlement and the original case was closed, subject to Parent's right to reassert the claims in a new complaint, preserving the original filing date. When the District rejected the agreement, Parent commenced this case, which was also appeared to be resolved on the date the first hearing session was convened. When the District again refused to approve the settlement, the evidentiary record was completed over four hearing sessions in March and April 2012.

For the reasons that follow, Student is awarded compensatory education beginning with the first day of the 2009/2010 school year. The District is also required to fund an independent educational evaluation to determine Student's current academic needs, as well as medical and emotional/mental health needs, if any, in order to guide the selection of compensatory services. The District will not be required to provide an IEP or otherwise continue serving as Student's LEA, since Student has passed the age of 21, but is required to fund an educational consultant to assist Student and Parent in selecting compensatory services. In the alternative, if Parent so requests, the District may fulfill that role.

ISSUES

1. Did the School District appropriately evaluate Student and appropriately identify all areas of need or should the District be required to provide Student with an independent educational evaluation?
2. Did the School District offer Student an appropriate program and placement that addressed all areas of academic, social and emotional need and was reasonably calculated to yield meaningful progress?
3. Should the District be required to provide Student with compensatory education, and if so, for what period, in what amount, and in what form?
4. If compensatory education is awarded, should the School District be required to continue serve as Student's LEA and to offer an IEP to Student until the compensatory education award is exhausted?

FINDINGS OF FACT

1. Student is [over 21 years of age]. Student is a resident of the Pottstown Area School District and at all times relevant to this matter was eligible for special education services. (Stipulation, N.T. pp. 20, 21)
2. The parties agree that Student was IDEA eligible in the categories of specific learning disabilities (SLD) and speech/language impairment in accordance with Federal and State Standards. 34 C.F.R. §300.8(a)(1), (c)(10), (11); 22 Pa. Code §14.102 (2)(ii); (Stipulation, N.T. p. 22))
3. Student moved into the District and enrolled in the high school on April 3, 2009. (N.T. p. 49; S-6 p. 1)
4. On April 20, 2009 the District held an IEP meeting, at which the parties agreed that the District would implement the IEP that accompanied Student from the prior school district, where Student had been identified as IDEA eligible in the category of specific learning disabilities in reading and math. The existing IEP provided for part time learning support and no related services, but Student spent most of the day in special education classes at the prior school. The District placed Student in its high school Supplemental Learning Support Program. (N.T. pp.109; S-7 pp. 6, 8; S-8 p. 1)
5. The next IEP meeting was held on June 9, 2009. District staff had noted several concerns after Student's enrollment in the District, including slow processing speed and compromised language skills, leading to questions concerning Student's true level of intellectual functioning. (N.T. pp. 132, 133)
6. The District reading teacher probed Student's reading levels upon enrollment in the District and determined that Student's reading levels as reported by the prior school

district, ranging from grade level 1.9 to 2.5, were inaccurate. The reading teacher determined that Student was actually a non-reader, at the primer or pre-primer reading level. The teacher began instructing Student using very basic books with pictures and a few simple words, as well as reading stories aloud and asking questions based on Student's listening comprehension. (N.T. pp. 427—431)

7. The District recommended extending the IEP from the prior school district through September 30, 2009 pending completion of a District reevaluation (RE), including additional testing that it believed was necessary to fully assess Student's ability and needs. (N.T. pp.132; 133; S-9 p. 1, S-11 pp. 5, 46)
8. Parent consented to the District RE at the June 9 IEP meeting. Although Student had been due for a 3 year reevaluation in 2008, Parent waived re-evaluation at that time upon the recommendation of the prior district, resulting in little current data concerning Student's school functioning. (N.T. pp. 132, 133; S-2, S-11 p. 47)
9. With one exception, standardized measures of ability and achievement, classroom observations and personality rating scales were administered by an intern completing requirements for a masters degree in school psychology. The intern also prepared the re-valuation report (RR). The District school psychologist administered the Wechsler Adult Intelligence Scale, Fourth Edition (WAIS-IV), a measure of cognitive ability, and supervised/reviewed the remaining tests and the draft report. (N.T. pp. 40—44, 94; S-11 pp. 3, 4, 6)
10. The intern administered a different measure of intellectual ability, as well as a standardized test of academic achievement, the Woodcock-Johnson Tests of Cognitive Ability-Third Edition (WJ-III-COG) and the Woodcock-Johnson Tests of Achievement-Third Edition (WJ-III-ACH) (S-11 pp. 7—10)
11. Student's full scale IQ (FSIQ) on the WAIS-IV (77) fell into the below average range, but the perceptual reasoning index score (PRI) was measured in the average range (96). (S-11 pp. 6, 7)
12. Student's scores on the WJ-III COG were significantly below the scores obtained on the WAIS-IV. The WAIS-IV results were consistent with an evaluation completed by Student's prior school district in 2002. (P-8 p. 2, S-11 p. 7)
13. In terms of academic achievement, Student's standardized test scores in reading, math and written expression generally ranged from below average to significantly below average, with most scores falling into that category. The only skill measured in the average range was oral comprehension. (S-11 pp. 8, 9)
14. Personality assessments and information provided by Student as part of the District evaluation revealed that Student was often tired, had doubts about self-worth, low self-esteem, experienced lack of motivation and feelings of sadness and sometimes thought about suicide. (S-11 pp. 10, 11)

15. The District school psychologist was aware of several significantly stressful situations that had impacted Student before enrolling in the District, including the death of [family members]. He was also aware that Student was receiving treatment for depression, but not whether that treatment addressed Student's issues with school functioning. The school psychologist did not initiate contact with Student's mental health counselor (N.T. pp. 82, 96, 156)
16. The school psychologist considered but rejected identifying Student as eligible in the category of emotional disturbance (ED) based upon Student's depression, although it was adversely affecting Student's school functioning, and was likely the source of Student's problems with attention and sleepiness in school. He believed that Student would gain nothing, educationally, from an ED classification since the District would have provided the same kinds of services Student was already receiving through the private mental health treatment and there would have been no change in academic services based upon adding ED as a disability category. (N.T. pp. 82, 84—86, 89, 160—162)
17. Parent provided information concerning Student's ingestion of lead paint as a young child. The school psychologist noted in the RR that there was no medical documentation that Student had lead poisoning. (S-11 p. 18)
18. Lead poisoning can cause significant intellectual and cognitive functioning impairments, including verbal/linguistic deficits, as well as distractibility and attention difficulties. (N.T. pp. 75—76)
19. Despite Student's depression and the possibility of lead poisoning, the District school psychologist did not consider it necessary to refer Student for additional evaluations such as a psychiatric or other medical evaluation as part of the 2009 evaluation or at any later time. (N.T. pp. 76, 82, 138)
20. The school psychologist considered the measures of overall intellectual functioning yielded by the WAIS-IV FSIQ and WJ-III GIA scores an underestimate of Student's ability based upon the high PRI score on the WAIS-IV, perceived language deficits and the problems Student exhibited with attention/focus and fatigue, all of which he believed compromised Student's intellectual functioning and academic achievement. (N.T. pp. 73, 74, 195; S-11 p. 18)
21. With intellectual functioning in the low average range, and considered an underestimate of Student's actual ability due to language deficits and emotional factors that interfered with Student's performance, and with most standardized achievement subtest scores in the significantly below average range, the District school psychologist concluded that Student remained IDEA eligible in the SLD category. (S-11 p. 18)
22. Information for the evaluation was provided by Student's special education case manager for the 2009/2010 school year, who expressed concerns about Student's disengagement from instruction, including frequently putting his/her head down on the desk, as well as

- failing to complete assignments, difficulty focusing, inattention, poor organizational skills. (S-11 pp. 12, 13)
23. Similar concerns were noted by Student's English teacher, who noted that Student's academic performance was very low despite daily 1:1 attention from the para-professional in the classroom due to Student's inability to read fluently and to complete assignments without such assistance. (S-11 p. 13)
 24. Student performed better in art class, where the teacher rated Student's work as above average, and noted that Student was attentive, followed directions and appeared interested in art, with only occasional withdrawal. (S-11 p. 13)
 25. The school psychologist made a number of recommendations for consideration by the IEP team, including review of the evaluation results and revision of Student's goals and specially designed instruction (SDI); consideration of adding counseling as a related service; and a focus on post-secondary transition planning. (N.T. p. 136; S-11 pp. 14, 40)
 26. The school psychologist also suggested that Parent consider sharing the evaluation report with Student's mental health providers and request a medical/psychiatric evaluation. (S-11 pp. 14, 40).
 27. An IEP meeting was held on November 2, 2009 to review the results of the evaluation and develop a District program for Student. (N.T. p. 188; S-14)
 28. The IEP included annual goals in the areas of transition (independent living and career exploration), language arts/writing, reading fluency and math. (S-14 pp. 16—22)
 29. Student's primary weaknesses in reading are in comprehension and fluency. Word attack, although below average, is an area of relative strength. During the 2009/2010 school year, Student's sight word vocabulary increased. (N.T. pp. 93, 434)
 30. In math, Student had greater difficulty with reading and understanding word problems than with basic calculation skills, although Student was below grade level in calculation skills and had a learning disability in that area. The IEP math goal was directed entirely toward improving Student's ability to extract important information from a word problem and determine the appropriate calculations. (N.T. pp. 209, 210, 212, 214; S-14 p. 15)
 31. The special education teacher focused her instruction on functional, life skills math applications, such as working with money and time. (N.T. pp. 219, 220)
 32. The 2009 evaluation established that Student was weak in all areas of written expression. The language arts/writing goal in the November 2009 IEP required Student to identify errors in a pre-written sentence on a 3rd grade level. There was no provision for drafting a sentence at any level. (N.T. pp. 94, 215; S-11 p. 9, S-14 p. 21)

33. Currently, Student continues to struggle with writing, but is able to construct a sensible paragraph, despite mechanical errors with grammar, capitalization and punctuation. (N.T. p. 459)
34. The November 2009 IEP provided for two 30 minute counseling sessions with the school psychologist each month. Student participated regularly in group counseling for school adjustment issues and support. Student also receives individual counseling on an as needed basis. Subsequent IEPs provided for 1 30 minute counseling session per cycle or per week, but the type and level of counseling services have remained the same. (N.T. pp. 86, 87, 137; S-14 pp. 1, 7, 10, 24, 44, S-22 pp. 3, 30, S-49 pp. 1, 28)
35. The school psychologist's concerns about Student's oral expression during the re-evaluation in the fall of 2009, as well as the large difference between Student's verbal comprehension and perceptual reasoning index scores on the WAIS-IV prompted a recommendation for a speech language evaluation, which was completed in March 2010, after Parent signed permission for the assessments in January 2010. The results of that evaluation were included in an addendum to the RR dated April 9, 2010. (N.T. pp. 92, 95, 152; S-18 pp. 20, 21)
36. The speech/language evaluation resulted in the conclusion that Student has a mild to moderate language delay in expressive/oral language skills. Speech/language impairment was added as a disability category. Itinerant speech services were recommended to improve Student's expressive language skills, use of correct sentence structure and functional vocabulary skills. (N.T. pp. 95, 602, 603; S-18 p. 21)
37. Speech/language therapy for 30 min. per cycle was added to Student's IEP as a related service, to work on expressive language generally, including vocabulary, grammar and answering questions. The language goal did not change much in subsequent IEPs. (N.T. pp. 604—606; S-19 p. 26, S-22 p. 30, S-49 p. 28)
38. Little or no improvement was noted in Student's overall functional language ability. During the current school year, the speech/language therapist has begun "pushing in" to Student's language class to better assess Student's use within the curriculum of the skills presented in individual therapy. (N.T. pp. 152, 153, 606—608)
39. In recent testing, using one of the same assessments used in the speech/language evaluation conducted in 2010, Student demonstrated an increase of three points in oral expression, 14 points in listening comprehension and 9 points overall. The increases, however, were within the same expected range as the original test scores. (N.T. pp. 611, 615, 616)
40. Although Student was well aware of his/her difficulties with auditory skills, memory and limited verbal abilities, Student was interested in learning and attending school at the time of the District's 2009 evaluation. (N.T. p. 96; S-11 p. 11)

41. Student's special education case manager, who was also Student's special education teacher for math and science during the 2009/2010 school year, repeatedly expressed frustration with Student's lack of motivation and engagement in the classroom, and was particularly disturbed by Student sleeping in class and Parent's failure to limit Student's time playing video games. (N.T. pp. 176, 178—181, 200, 205, 206, 234, 273, 333, 336; P-19 pp. 1, 2, 5, S-11 pp. 37, 38)
42. The special education teacher was unaware of an actual diagnosis of depression, although she did know that Student exhibited symptoms of depression. Knowledge of a diagnosis of depression, or changing Student's disability category to ED, would have made no difference in instructional strategies, however, since the teacher believed that Student's falling asleep in class would still have significantly interfered with instruction. There were no discussions among District staff concerning whether Student would have been better served by placement in the District's emotional support (ES) class rather than in a learning support class. (N.T. pp.195, 197, 198, 235, 243, 330, 331; S-22 p. 14)
43. Student's case manager for the 2009/2010 and 2010/2011 school years noted no decrease in sleeping in class as a result of Student receiving counseling from the school psychologist. (N.T. p. 207)
44. The next IEP meeting was held in November 2010 and was conducted primarily by Student, who prepared a Power Point presentation. Student was encouraged to take responsibility for the IEP meeting in order to increase self-advocacy skills. Student willingly took on that responsibility and worked independently on preparing the IEP presentation and did a "great" job with it. (N.T. pp. 139, 140, 225, 314, 315, 332, 333; S-22 pp. 85—89)
45. Teacher input forms for the IEP meeting and in contacts with Student's special education case manager repeated the same concerns expressed by the teachers in the 2009/2010 school year, specifically, Student's lack of motivation and engagement, including sleeping in class and failing to complete assignments. Student had also been missing school frequently. (P-19 pp. 1, 2, S-22 pp. 66—69)
46. At the end of the first quarter of the 2010/2011 school year, Student was passing English with a "D" and failing all other classes (math, SRA reading, social studies, strength and conditioning) (S-22 p. 10)
47. In October 2010, Student's case manager re-administered the W-J III standardized achievement test that had also been included in the District's September 2009 evaluation. Student's scores, expressed as standard scores and percentile ranks, decreased or remained the same with respect to all but 1 of the subtests administered in both years:

<u>Subtest</u>		<u>9/2009</u>	<u>10/2010</u>
Letter-word Identification	SS	60	50
	<u>Percentile</u>	<u>.4</u>	<u><0.1</u>
Passage Comprehension	SS	55	49
	<u>Percentile</u>	<u>0.1</u>	<u><0.1</u>
Writing Sample	SS	62	--
	<u>Percentile</u>	<u>1</u>	<u>--</u>
Word Attack	SS	79	64
	<u>Percentile</u>	<u>8</u>	<u>1</u>
Spelling	SS	58	49
	<u>Percentile</u>	<u>0.3</u>	<u><0.1</u>
Applied Problems	SS	78	71
	<u>Percentile</u>	<u>7</u>	<u>3</u>

Student scored no points on the writing samples subtest administered in October 2010. (N.T. pp.125, 126, 228; S-11 pp. 9, 10, S-22 pp. 47—49, 52)

48. Student's score on the calculation subtest increased slightly between 2009 and 2010 (51/53), but Student remained below the 0.1 percentile. (N.T. p. 123; S-22 p. 9)
49. The November 2010 IEP included goals in the areas of transition/independent living, math calculation, reading comprehension, reading fluency and speech/language. A separate career exploration transition goal and a separate language arts/writing goal included in the November 2009 IEP were eliminated. Student's needs in writing were to be addressed through speech/language services. (N.T. p. 229; S-14 pp. 16—22, S-22 pp. 22—27)
50. IEP progress reports for the 2010/2011 school year documented no progress on any IEP goals for the first and third quarters and moderate progress on all goals during the second quarter. The District's general response to an eligible student's lack of progress on IEP goals is to make constant contact with parents, not to re-convene the IEP team to consider a need for additional assessments or changes to the IEP. (N.T. pp. 254, 255; S-30)
51. At the beginning of the 2010/2011 school year, the reading teacher found that Student's reading level was too low to properly implement the SRA reading program. The teacher modified the SRA instruction provided phonics exercises and other strategies, such as having the students create stories to read. Student's sight word vocabulary increased. (N.T. pp. 439, 440, 514, 560)
52. Student was involved in several disciplinary incidents during the 2010/2011 school year. An incident on the bus resulted in a 10 day suspension from school when reported by the bus driver in March 2011. (N.T. pp. 112, 248, 249, 251, 252; P-19 pp. 10, S-26, S-31, S-39 pp. 2, 4)

53. As a result of the bus incidents, the District suspended Student's transportation to school, although it was a related service in Student's IEP. Parent was also told that any further incidents with Student would result in the District calling the police and filing charges (N.T. pp. 256—258, 274—276; P-19 p. 10, S-22 p. 30)
54. Student did not return to school after the suspension ended, the District determined that Student had earned enough credits to graduate with a regular high school diploma and prepared a graduation NOREP. (N.T. pp. 115, 277, 281, 282; P-19 pp. 11—14, 16, 18)
55. Parent rejected the graduation NOREP and after an IEP meeting in June 2011, Student returned to school for the final year of IDEA eligibility. (N.T. pp. 110, 142; P-19 p. 15, S-35)
56. The latest IEP meeting was held in November 2011. The IEP includes goals in math computation, reading comprehension, reading fluency and speech/language goals similar to the prior IEP. Student's target in math was reduced from computing 30 digits at the 5th grade to computing 30 digits at the 2nd grade level. The target for Student's reading goals were increased from the 2nd to the 3rd grade reading level and the fluency goal increased the targeted number of correct words/minute. The speech language goal was expanded from answering "wh" questions to answering questions related to a topic. The detailed independent living transition goal was eliminated. (N.T. pp.294; S-22 pp. 22, 24—26; S-49 pp. 22, 24—26)
57. Overall, Student has demonstrated limited academic progress while enrolled in the District, due primarily to unavailability for instruction because of limited alertness and lack of attention. (N.T. p. 122)
58. During the current school year, Student has demonstrated more progress in reading and has been able to use the SRA reading program more independently, recently progressing to the B-2 book. Student was in the B1 book from the beginning of the 2010/2011 school year. In the beginning, teacher and Student read the passages alternately. When the teacher read a paragraph, Student responded to comprehension questions based on hearing it. Student can now sometimes self-correct when reading and use context clues to decode unfamiliar words. The reading teacher currently uses 3rd grade probes to assess Student's fluency. Student is at a 2nd grade level in comprehension. (N.T. pp. 441—443, 446, 447, 479, 550, 555, 556, 558, 565)
59. Student's reading instruction was significantly increased in the current school year, and an additional language course was added beginning in the second half of the 2010/2011 school year. Student now has reading twice/day for a total of 1.5 hours of SRA reading instruction daily, and an additional 90 minutes of language instruction 3 times/cycle or 270 minutes. (N.T. pp. 122, 454, 543, 544; P-19 p.7)
60. Student has been generally successful in the work-study programs in which Student has participated in terms of mastering the actual work and "soft" employment skills such as dealing successfully with employers and co-workers and arriving on time and prepared

for work as scheduled. Parent requested that Student be taken out of work study due to failing grades in academic classes. (N.T. pp. 269, 271, 272, 301—304, 311, 316; P-19 pp. 1, 2, S-16, S-24, S-29)

DISCUSSION AND CONCLUSIONS OF LAW

Before considering the facts in light of the parties' contentions, it is helpful to set out the familiar legal framework that governs consideration of the issues in dispute.

Before considering the parties' contentions and the evidence produced in this case, it is helpful to set out the familiar legal framework that governs consideration of the issues in dispute.

IDEA Requirements

The legal obligation of to provide for the educational needs of children with disabilities has been summarized by the Court of Appeals for the 3rd Circuit as follows:

The Individuals with Disabilities Education Act ("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). 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 (3rd Cir. 2009)

In the context of IDEA claims, "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 (3RD Cir. 1999). Consequently, 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, 102 S.Ct. 3034 (1982); *Oberti v. Board of Education*, 995 F.2d 1204 (3rd Cir. 1993). An eligible student is denied FAPE

if his/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; *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F. 2d 171 (3rd Cir. 1988).

Under the interpretation of the IDEA statute established by *Rowley* and other relevant cases, however, an LEA is not required to provide an eligible student with services designed to provide the “absolute best” education or to maximize the child’s potential. *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d at 251 (3rd Cir. 2009); *Carlisle Area School District v. Scott P.*, 62 F.3d 520 (3rd Cir. 1995).

The substantive protections of the IDEA statute and regulations discussed above are enforced via procedural safeguards available to parents and school districts, including the opportunity to present a complaint and request a due process hearing in the event special education disputes between parents and school districts cannot be resolved by other means. 20 U.S.C. §1415 (b)(6), (f); 34 C.F.R. §§300.507, 300.511; *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d at 240.

In *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005), the Supreme Court established the principle that in IDEA due process hearings, as in other civil cases, the party seeking relief bears the burden of persuasion, one of the components of the burden of proof. In this case, since Parent filed the complaint, it was her obligation to prove each of claim asserted in the due process complaint. As is also usual in civil cases, Pennsylvania federal courts have generally required that the filing party meet their burden of persuasion by a preponderance of the evidence. See *Jaffess v. Council Rock School District*, 2006 WL 3097939 (E.D. Pa. October 26, 2006).

Allocating the burden of persuasion affects the outcome of the case only in the rare instance when the record closes with the evidence in “ equipoise,” *i.e.*, completely in balance, with neither party having produced sufficient evidence to establish its position. In this case, although Parent did not prevail on every issue, she established her claims for an independent evaluation, denial of FAPE and Student’s entitlement to compensatory education for most of the period in dispute by a preponderance of the evidence.

Parent’s Claims

Child Find/Timeliness of Evaluation and Initial IEP

For reasons that are not clear, Parent included in her closing brief the legal standards relating to a child find claim, and argued that the District’s alleged failure to conduct a timely evaluation after Student enrolled in the District in April 2009 was a child find violation. *See* Written Closing Argument Submitted by the Family pp. 9-11. Although not a substantively important distinction in this case, Parent’s argument is misplaced.

There is no dispute that Student had been identified as IDEA eligible long before enrollment in the District, and the District began implementing the IEP that accompanied Student from the prior school district. (FF 1, 4) That procedure complied with IDEA procedural standards concerning IDEA eligible students who transfer between school districts within Pennsylvania. *See* 34 C.F.R. §300.323(e)(1). There is no requirement that the new LEA must immediately evaluate the Student, and certainly can’t treat a transferred student who was identified as IDEA eligible in the prior school district as a regular education student that it is required to “find” by recognizing a potential disability and conducting an initial evaluation as contemplated by the child find requirements. 34 C.F.R. §300.111.

Here, after initially adopting Student's IEP from the prior school district, the District proposed and conducted its own evaluation in accordance with 34 C.F.R. §300.303(a)(1) after it became apparent to District staff that additional information was needed. (FF 5, 7, 8) The question here is whether the District took too long after Student enrolled to determine that an evaluation was warranted and to initiate its own evaluation of an already identified Student in accordance with the IDEA reevaluation standards. As noted, however, there is no substantive difference in this case, since the issue raised by Parents centers on the timeliness of the District's recognition that it should conduct its own evaluation.

Timeliness of the District's Reevaluation/ Statute of Limitations

Because of the procedural posture of this case, *i.e.*, the August 2011 filing date of the original complaint was preserved due to a negotiated settlement between counsel that was ultimately rejected by the District, only the claims asserted with respect to the end of the 2008/2009 school year and summer of 2009 are potentially barred by the IDEA two year limitations period. 20 U.S.C. §1415(b)(6)(B), (f)(3)(c); 34 C.F.R. §300.507(a)(2), 511(e)

As noted above in connection with the Parent's child find claim, the District properly determined that it would implement Student's IEP from the prior school district between Student's April 2009 enrollment in the District through June 2009, a period of approximately two months, and thereafter convened Student's IEP team and obtained Parent's consent to re-evaluate Student. (FF 4, 8) That was a reasonable course to take. The District cannot be charged with the knowledge that the Student's prior IEP was deficient and/or inaccurately stated Student's educational levels from the first day Student enrolled.

There is, therefore, no substantive basis for Parent's claims concerning the period from Student's April 2009 enrollment through the end of the 2008/2009 school year. Consequently,

there is no need to determine whether there is a sufficient factual/legal basis for extending the IDEA two year limitation periods to encompass the period from April—June 2009.

ESY—2009, 2010, 2011

Parent has provided no explicit argument, and pointed to no evidence, establishing Student's entitlement to ESY services during the summer of 2009, or, indeed, the summers of 2010 and 2011. At most, Parent established that the District did not base its ESY determinations on sufficient objective data or a full consideration of either the general IDEA criteria for providing ESY services or the more explicit Pennsylvania criteria for establishing a need for ESY services. *See* N.T. pp. 222, 223, 499—502 (Summer of 2010); 34 C.F.R. §300.106(a)(2); 22 Pa. Code §14.102(a)(2)(xi); §14.132 (a)(1), (2); (c), (d), (e). Although the District's treatment of the ESY determination appears to establish a procedural violation, the IDEA regulations explicitly prohibit awarding compensatory education based on a procedural violation unless such violation had a substantive effect in terms of impeding an eligible Student's right to FAPE, a parent's participation rights, or caused a deprivation of educational benefit. 34 C.F.R. §300.513(a)(2)(i), (ii), (iii).

Here, Parent made no effort to establish any of those criteria with respect to ESY services for any of the 3 summers in dispute. In the absence of any evidence or substantive argument with respect to the substantive effect of denial of ESY services in this case, there is no basis for awarding compensatory education for ESY services at any time. Consequently, there is likewise no substantive factual/legal basis for determining whether the two year limitations period should be extended to allow a claim for compensatory education between the end of the 2008/2009 school year and August 2009, two years prior to the filing date of the original complaint.

Appropriateness of the School District Evaluation/Need for an IEE

Other than timeliness, Parent's concerns with the District evaluation in the fall of 2009—and subsequently—center on the District's decision not to seek either a medical or psychiatric evaluation of Student and its failure to propose or conduct a functional behavioral assessment (FBA). Parent, therefore argues that the evaluation conducted by the District was not sufficiently comprehensive to identify all potential disabilities and address all areas of need. 34 C.F.R. §300.15, 304(b).

There is ample evidence in this case that the District should have proposed and sought Parent's consent to obtain both a psychiatric evaluation and a medical evaluation of Student. The District school psychologist was aware that Student had been diagnosed with depression and might have ingested lead paint as a young child. (FF 15, 17) The school psychologist was also aware of the possible effects of lead poisoning, including symptoms that Student was exhibiting in the classroom. (FF 18, 19, 22, 23, 41, 45) In addition, he explicitly recognized that Student's educational performance, and possibly intellectual capacity, were adversely affected by depression. (FF 16, 20, 21) Finally, the school psychologist recommended that Parent seek both a medical and psychiatric evaluation (FF 26).

The District argued that a psychiatric evaluation was unnecessary because it does not treat depression in terms of providing medication or psychiatric services, and Student was already receiving mental health treatment. (FF 15, 16) The purpose of an evaluation, however, is to understand the full extent of an eligible student's disabilities and the educational needs arising from them to provide appropriate instruction and/or accommodations in the classroom.

In this case, a medical or mental health diagnosis that may be related to Student's classroom behaviors might at least have positively affected Student's case manager's very

negative impression of Student that was stunningly reflected in the IEPs she drafted when she talked about Student needing to develop motivation and stop sleeping in class, as well as in e-mails to other staff members, complaining about the need to expend resources on a Student the staff believed was not taking full advantage of the educational opportunity that was offered. *See* FF 41, 42; S-14 p. 9, S-22 p. 13, S-49 p. 11.

It is the District's responsibility to assess an eligible or potentially eligible Student in all areas of suspected disability—and emotional disturbance was very clearly suspected by the school psychologist. (FF 16)

With respect to Parent's claims that the District should have conducted an FBA, the record also provides overwhelming support that some type of assessment of Student's behaviors was needed from the time Student's disengaged classroom behaviors so disturbed the teachers and so obviously interfered with educational progress, as documented in the RR and as stated in every IEP that the District developed. *See* FF 41, S-14 p.9; S-22 p.13; S-49 p. 11. A classic FBA may not have been a particularly useful method to determine the cause of Student's lack of focus, need for constant prompting and sleeping in class if those behaviors were related to medical or psychiatric issues. Had Student been referred for additional evaluations in those areas, however, an FBA might not have been needed. The results of the other evaluations might have suggested effective strategies for addressing those behaviors, or might have suggested medication to address the behaviors, that Parent might have obtained.

On the other hand, District staff clearly believed that Student's behaviors were related to things entirely under Student's or Parent's control, such as staying up late to play video games, yet no one suggested an FBA or any kind of assessment or strategy to address the behaviors in the school setting. It is the District's responsibility to address behaviors that prevent an eligible

student from accessing educational services. Since the school psychologist believed that Student's behaviors such as low motivation, lethargy, need for prompting, lack of focus and engagement in academic tasks prevented Student from fully accessing academic instruction and were due to emotional factors, yet did not see the need for a medical or psychiatric evaluation, he should at least have offered assessments to determine whether those behaviors were subject to modification in the school setting by identifying antecedents, functions and replacement behaviors. If he or other District staff believed the troublesome behaviors could be changed, it was their responsibility to fully assess the behaviors and develop strategies to attempt to change them in the school setting. The District, however, did nothing, allowing Student to lose significant educational opportunities.

Independent Evaluation

After the original complaint was filed in this case, including a request for an IEE, the District issued a PTRE, proposing to again assess intelligence, achievement, speech/language, and adding assessments that had not been included in the original reevaluation, including an FBA, vocational assessments and assessments of executive functioning. (S-37, S-48). The proposed evaluation, however, is too little and too late. The District still does not propose a full medical and/or psychiatric evaluation, and at the time it was proposed, two years after the District's first evaluation and during Student's last few months of eligibility, an FBA was not likely to be particularly useful. Updated ability and achievement testing and a vocational assessment are likely to yield valuable information, particularly given the somewhat inconsistent results from the WAIS and WJ-III COG administered by the District in 2009, and the drop in standardized achievement test scores between the fall of 2009 and the fall of 2010.

(FF 11, 12, 47) Additional assessments of emotional/personality factors and executive functioning measures are also still useful—and could and should have been part of the District’s 2009 evaluation. Although some personality screening measures were used, those results suggested a need for further investigation, but the District did not either further investigate emotional factors or use the results obtained to address issues such as Student’s inability to focus, lack of motivation, lethargy and need for constant prompting. (FF 14)

In light of the District’s prior failure to fully assess Student in all areas of suspected need, failure to propose additional assessments based upon the results of initial personality screening measures and continued failure to propose a psychiatric and medical evaluation that are obviously necessary, an IEE is warranted and will be ordered, to include a medical and a psychiatric evaluation, ability, achievement and vocational assessments, as well as assessments of personality, behavior and executive functioning.

Appropriateness of IEPs/Meaningful Progress 2009/2010, 2011/2012 School Years

The school psychologist explicitly admitted in testimony that Student’s educational progress over three full school years in the District was very limited, and that was confirmed by teacher reports, Student’s grades and IEP progress reports and standardized testing. (FF 45, 46, 47, 50, 51, 57) The related services the District provided to address Student’s speech/language and emotional needs were also ineffective. (FF 38, 43)

In support of its argument that Student made meaningful progress, the District points to Student’s progress in reading. It is notable, however, that such real progress was noted until the current school year, after Student’s reading and other language instruction was significantly increased. (FF51, 58, 59) In light of the deficiencies in the District’s evaluation and its failure to even attempt Student’s school avoidant behaviors and inability to attend to and focus on

instruction, it was impossible for the District to provide an educational program reasonably likely to yield meaningful educational progress, and it did not do so.

It is most unfortunate that the behaviors the District did not even attempt to address, and that were clearly related to emotional issues caused the teachers to give up on Student. When Student enrolled in the District, Student reported interest in school and a desire to succeed. (FF 40) In addition, Student demonstrated good motivation and the ability to attend and complete work when the demands of the class did not depend on the intellectual and emotional functions that were most impacted by Student's disabilities, particularly language and memory. Student, *e.g.*, was successful in art class during the 2009/2010 school year, prepared for and conducted the November 2010 IEP meeting and was successful in work-study experiences. (FF 24, 44, 60) Those experiences should have alerted the District to the need to find ways to actively engage Student. Moreover, Student's reading skills improved dramatically with increased instruction and repetition.

It is most unfortunate that similar strategies had not been used in reading earlier and also used with math and writing in order to provide Student with the opportunity to leave public school with functional skills in all areas. The District's emphasis on Student's reading progress during the past year suggests that with proper instruction, Student could have made far greater progress in reading, and that Student will benefit from continued instruction. The District is correct in arguing that Parent cannot expect the District to entirely make up for Student's non-acquisition of functional reading, writing and math skills in the district where Student was educated for all of the school years that preceded enrollment in the District. Nevertheless, the District still had an obligation to provide Student with a reasonable opportunity for meaningful progress during the three years Student was enrolled in the District. Belatedly, the District did

provide effective reading instruction. Initially, however, after one full year in the District, Student either made no progress or lost ground in basic reading, writing and math skills as measured by the same standardized achievement test administered after a few months in the District and after a year and a few months. (FF 47) No matter how the District may attempt to argue that such standardized assessments are not adequate measures of meaningful progress, the comparison is useful as one indication of progress, or in this case, no progress or regression. Moreover, there is no conflicting evidence in this case. Student's lack of progress was confirmed by every measure of progress.

During Student's last year of eligibility, the District began effectively instructing Student in reading, and thereby provided a special education program as contemplated by the IDEA: it changed instructional strategies and the intensity of reading instruction in the face of no progress with the initial program and level of instruction. Unfortunately, it took the District far too long to revise its approach for reading instruction and it never attempted a similar strategy for math and writing.

Remedies

In addition to ordering an independent evaluation as discussed above, Student will be awarded compensatory education from the beginning of the 2009/2010 school year through the end of the 2011/2012 school year. There is ample evidence in the record that the District's failure to provide Student with sufficient and appropriate special education and related services persistently affected Student's entire school day, as well documented by the District in its IEPs that repeat the description of Student's lethargy, sleepiness, lack of focus and engagement, etc. and are described as persistently and pervasively interfering with Student's academic progress. Consequently, Student will be awarded full days of compensatory education for all days that

school was in session from the first to the last day of the 2009/2010, 2010/2011 and 2011/2012 school years.

For several reasons, the award of full days of compensatory education will not be diminished by Student's frequent absences during the 2010/2011 school year, including the period during which Student did not attend school during the final months of the 2010/2011 school year. First, the record in this case describes a Student who was initially engaged in school, as reported by the District school psychologist, and who self-reported a desire to succeed despite recognizing significant difficulties with attention, memory and language. (FF 14) As noted above, Student led the November 2010 IEP and did an excellent job.

The record also, however, describes a Student who regressed in basic reading, writing and math skills as measured by norm-referenced assessments; a Student whose academic and behavior difficulties increased as the 2010/2011 school year progressed; a Student whose memory, language and focus problems were inadequately or inappropriately addressed, or ignored, and who was, in essence blamed for classroom behaviors and difficulties potentially related to disabilities that the District suspected but took no steps to identify, much less attempt to remediate or even accommodate. Under such circumstances, and after an out of school suspension, it is not surprising that Student, or Parent or both, lost all enthusiasm for attending school in the District. It is a measure of their desire to assure that Student received the maximum educational benefit available that Parent insisted on returning Student to school, and Student agreed to return. Clearly the District would have preferred that Student graduate and divest it of the responsibility for providing Student with a FAPE. District staff may have considered Parent difficult.

In addition, the purpose of the equitable remedy of compensatory education is to put an eligible student into the same position s/he would have occupied if the IDEA violation had not occurred. Here, Student lost several years of educational benefit due to the District's failure to appropriately fulfill its IDEA obligations. Student is entitled to have those benefits restored to the extent possible, but there must be some mechanism to measure compensatory education. In cases such as this, where the violation was pervasive, aggrieved students are awarded hours of compensatory education equal to full school days. In the exercise of the equitable power to fashion an appropriate remedy, I conclude that a full and appropriate compensatory education award in this case must include the school days Student missed.

Finally, the District argues that the period of Student's absence at the end of the 2010/2011 school year must be removed from the award because Student was not available for instruction during that period. In this case, however, that is not an effective argument, since Student was not receiving appropriate instruction, except for the increase in reading instruction at that time, when Student was attending school. As noted above, compensatory education to provide the services Student should have received is an equitable remedy, and the equities in this case, including consideration of the District's part in making the school environment inhospitable, considering the negative comments of Student's case manager, as well as the District attempts to assure that Student would be given a high school diploma, and in not providing appropriate special education services, generally, provides additional justification for not removing the period of Student's absence from the compensatory education award,

Retaining LEA Status

In counsel's opening statement, Parent requested that the District be required to provide an IEP for Student until the compensatory education award is exhausted. That request was not

repeated in Parent' closing argument, however, so it is not clear whether Parent maintains that request. Parent's request is based upon a court decision where the district court concluded that student would not receive the full benefit of the compensatory education award unless the District retained its LEA status during student's use of the award. *Ferren C. v. School District of Philadelphia*, 612 F.3d (3rd Cir. 2010).

That case, however, presented a unique situation because student was attending a program that required an IEP from an enrollee's home school district in order for student to remain there. The circumstances presented by this case are not analogous. Although it is quite likely that Student and Parent would benefit from the advice of a knowledgeable consultant to maximize the benefit from the compensatory education award, whether independent or from the District, that is very different from making the District responsible for continuing to provide an IEP for Student. There is no reason to assume that an IEP is needed to allow Student to use the compensatory education hours to access a particular program or set of services uniquely or particularly appropriate for Student, as in that case. In addition it is somewhat anomalous for Parent to argue that the District utterly failed to provide Student with an appropriate IEP during more than 3 years in the District, and find sufficient support for that position in the record to warrant a significant compensatory education award, yet ask that the District be required to continue providing an IEP for the compensatory education hours.

If the real issue is how to assure that Student maximizes the benefit from the compensatory education award in terms of choosing appropriate services, that goal can be accomplished by an independent adviser or consultant, chosen by Parent, or by District staff, if the District is willing to serve in that role. That will be left to the parties to decide. The order will provide Parent with the option of asking for assistance from the District in selecting services

to which it can agree or not. In the alternative, Parent can seek the services of an educational consultant for that purpose. The cost of consulting services will be added to the compensatory education award, since it is important that Student receive all of the hours of compensatory education awarded.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, the Pottstown School District is hereby **ORDERED** to take the following actions:

1. Provide Student with an independent evaluation, to include updated intelligence, achievement, speech/language, executive functioning and vocational assessments, as well as a psychiatric and a medical evaluation.
2. Provide Student with full days of compensatory education for every day school was in session from the first to the last days of the 2009/2010, 2010/2011 and 2011/2012 school years.
 - a. The hours of compensatory education may be used for any combination of the following services: Reading, writing and math instruction; speech/language therapy; transition to adult life/vocational services, including job coaching, career exploration and vocational/technical training; emotional support/counseling services; social skills training; psychological or psychiatric treatment/services, (excluding medication), directed toward improving executive functioning, attention, focus and motivation, as well as any other types of services to which the parties may agree.
 - b. The hours of compensatory education must be used by Student's 26th birthday [redacted].
3. Provide Student and/or Parent with the services of an educational psychologist or other competent educational consultant who can review the results of the evaluation ordered in ¶1 above, and guide Student and Parent in choosing an appropriate combination of compensatory services to meet Student's needs, at that time, provided, however, that any such consultant may derive no financial benefit from the services s/he recommends, or from the providers of such services, unless agreed by the Pottstown School District. If Student and Parent so request, and the District agrees, the District may serve in the role of consultant.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are denied and dismissed

Anne L. Carroll

Anne L. Carroll, Esq.
HEARING OFFICER

June 12, 2012