

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

Student's Name: N.W.

Date of Birth: [redacted]

ODR Nos. 13589-12-13-KE

CLOSED HEARING

Parties to the Hearing:

Parent

Parkland School District
1210 Springhouse Road
Allentown, PA 18104-2119

Dates of Hearing:

Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Lorrie McKinley, Esquire
McKinley & Ryan, LLC
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West Chester, PA 19382

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60 East Court Street
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May 29, 2013; May 30, 2013;
July 25, 2013; August 8, 2013;

August 29, 2013

September 13, 2013

William F. Culleton, Jr., Esq.

INTRODUCTION AND PROCEDURAL HISTORY

The student named in the title page of this decision (Student) is, and during all relevant times¹ was, a resident of the school district named in the title page of this decision (District). (S 1, 25.) Student attended a life skills classroom at a neighboring school district's high school, placed by the District. (NT 21-22.) Student has graduated from the District and no longer attends a District school or placement. (NT 25.) Student was identified as a child with a disability pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA), in the categories of Mental Retardation (in Pennsylvania called Intellectual Disability) and Speech or Language Impairment. (NT 11.)

Student's legally authorized guardian named in the title page of this decision (Parent) requested due process pursuant to the IDEA and section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (section 504), alleging that the District failed to provide Student with appropriate re-evaluations and with a free appropriate public education (FAPE). Parent requested a "compensatory independent educational evaluation" (IEE) and compensatory education for the relevant period. The District denies all claims.

The record closed upon receipt of written summations.

ISSUES

1. Was the District's re-evaluation dated October 20, 2011, appropriate under the IDEA and section 504?
2. Did the District fail to offer or provide Student with a FAPE from March 1, 2011 to June 12, 2012, in violation of either the IDEA or section 504?

¹ The parties stipulated that the relevant period would be March 1, 2011 to June 12, 2012. (NT 10-11, 26.) The parties stipulated that this would be the period subject to review in this matter, during which I would consider whether or not any act or omission of the District denied a FAPE to which Student was entitled under the IDEA. (NT 16, 25-26.)

3. Should the hearing officer order the District to provide an IEE at public expense?
4. Should the hearing officer order the District to provide compensatory education to Student for all or any part of the period from March 1, 2011 to June 12, 2012?

FINDINGS OF FACT

1. Student is diagnosed with intellectual disability, pervasive developmental disability, and attention deficit hyperactivity disorder. Student functions in an extremely low range cognitively and functionally. Student's rate of acquisition is relatively slow and Student experiences significant regression in the absence of repetition of learned skills. It is unlikely that Student's intellectual disability would permit academic achievement at a level beyond second grade. (NT 102-107, 449-456, 504-505, 518-522, 660; P 1; S 7, 9, 19, 24.)
2. The District is aware of four full scale IQ scores from the Wechsler cognitive tests: 46 in 1998, 58 in 2001, 40 in 2006 and 48 in 2008, the last obtained by the school psychologist for the District. Only the 2001 score is significantly different from the other scores. (NT 369; P 1; S 7.)
3. Statistically significant differences in standardized scores in the intellectually impaired range do not necessarily predict significant differences in classroom performance. (NT 61-72.)
4. Upon enrollment in August 2007, Student was almost [late teen-aged] and in grade 10. The District placed Student in a life skills class operated by the local intermediate unit, located in a neighboring school District's high school. (NT 102-107; S 1, 4.)
5. Student's potential for academic progress in a life skills program was reduced due to the late age at which Student began in the program to which the District assigned Student. (NT 102-107, 660; S 1, 4.)
6. The District provided an evaluation report in January 2008. The District classified Student with Multiple Disabilities, and recommended a life skills placement with specially designed instruction to address needs for functional academic skills, self-help skills, speech and language skills (expressive, receptive and pragmatic), and vocational skills. (S 4.)
7. In the 2008 evaluation, Student's standard cognitive, achievement, developmental and speech and language scores were in the below 1 percentile rank, and most of these were in the below .1 percentile rank. (S 4.)
8. In the 2008 evaluation, cognitive subtest scores revealed no significant variation. Student demonstrated greater verbal cognitive ability than non-verbal cognitive ability; however,

the difference was slight statistically and was not educationally significant. Student's cognitive scores were almost entirely in the extremely low range. (S 4, 7.)

9. Student's Wechsler achievement scores as tested for the 2008 report were almost all 40; Student's scores were slightly higher in pseudoword decoding. Student had demonstrated some ability to learn letters and use phonetic skills to decode nonsense words. (S 7.)
10. All of Student's adaptive skills in 2008 were in the extremely low range. (S 7.)
11. Speech and language scores in 2008 were all in a low or extremely low range. (S 7.)
12. The District provided a re-evaluation report for Student in December 2009. The report was based largely upon a review of records, including the test scores from the 2008 evaluation report. It also included updated curriculum based assessments. The report recommended that Student needed to expand sight word reading and comprehension skills, vocational, shopping and money skills, as well as expressive language and pragmatic language skills. It identified specially designed instruction and modifications that had been successful. (S 6.)
13. In December 2009, Student read 30 of 40 pre-primer Dolch sight words; 18 of 52 primer Dolch sight words; and 5 of 18 first grade Dolch sight words. Student could read familiar community signs; find the day of the week independently from a newspaper; find the weather forecast with a prompt 1 of 5 times; and find the high and low temperature with prompt 1 of 5 times. (S 6.)
14. In December 2009, Student identified the name and worth of a penny 5 of 5 times in classroom and community, stated the name of a nickel (3 of 5 times), dime (4 of 5 times) and quarter (3 of 5 times), but not their worth consistently. Student counted 10 pennies independently; used a calculator to single digit numbers up to 20 (4 of 5 times); stated the cost of an item from the item's label (4 of 5 times with 1 prompt). Student could count mixed change up to one dollar with prompts, and pay for items at a store with prompts. (S 6.)
15. In December 2009, Student could state the days of the week and tell time to the half hour. (S 6.)
16. In December 2009, Student could print Student's name with 98% accuracy. (S 6.)
17. The December 2009 re-evaluation report identified Student's educational needs as increasing sight word vocabulary and comprehension skills, and developing vocational, shopping and money skills, including counting change up to a dollar, and stating the worth of a dime, nickel and quarter. Speech needs included expressive and pragmatic language. (S 6.)
18. In October 2010, Student read 35 of 40 pre-primer Dolch sight words; 25 of 52 primer Dolch sight words; and 10 of 18 first grade Dolch sight words. Student could read familiar community signs; find the day of the week independently from a newspaper; find the weather forecast with a prompt 5 of 5 times independently; and find the high and low

temperature with prompt 4 of 5 times with prompting for reversal of two digit numbers. Student could recite the alphabet. (S 9.)

19. In October 2010, Student identified the name and worth of a penny 5 of 5 times in classroom and community, and stated the name and worth of a nickel (5 of 5 times), dime (5 of 5 times) and quarter (5 of 5 times), in both classroom and community. Student could state the name of a quarter, but could not state the worth of a quarter consistently. Student counted 10 pennies independently; used a calculator to single digit numbers up to 20 (4 of 5 times); and stated the cost of an item from the item's label with 100% accuracy with one prompt; and read expiration dates from item labels 5 of 5 times with prompts. Student could count mixed change up to one dollar with prompts, and pay for items at a store with prompts. (S 9.)
20. In October 2010, Student responded to "wh" questions with 85% accuracy over 3 sessions; Student stated problems with 56% accuracy and solutions with 72% accuracy. Student maintained a topic of conversation for up to three turns independently for 2 out of 5 trials; and verbally introduced 3 new topics with 1-2 prompts. (S 6.)
21. In October 2010, Student asked "wh" questions 2 of 5 times without a prompt and correctly answered oral questions about a picture or short passage 3 of 5 times. (S 9.)
22. In October 2010, Student could state the days of the week and tell time to the half hour. (S 9.)
23. In December 2010, the District provided an IEP placing Student in supplemental life skills support with speech and language support. The IEP team identified Student's academic, developmental and functional needs as increasing sight word vocabulary and comprehension skills, and developing vocational, shopping, and money skills, including counting mixed change up to \$1.00. Speech needs included expressive and pragmatic skills. (S 9.)
24. The December 2010 IEP provided three expressive language goals, and a functional mathematics goal addressing counting mixed change, calculating items using a calculator, scanning items, locating items on a shopping list, and stating the time when Student left the store. There was no reading goal. The IEP provided for a work based learning program. (S 9.)
25. Parent participated in the IEP meeting and expressed a desire for development of Student's vocational skills. Parent did not object to the IEP or placement. (S 9, 10.)
26. In September 2011, from the Dolch word lists, Student read 35 of 40 words correctly at the pre-primer level, 30 of 52 words correctly at the primer level, and 12 of 18 words correctly at the first grade level. This was an increase over the previous assessment, given in October 2010. (S 7, 9, 13.)
27. The District re-evaluated Student in 2011, providing a report in October 2011. The Report was based upon review of records, including the test results from the 2008 evaluation report. It changed Student's classification as a child with a disability to the

classifications of Mental Retardation and Speech or Language Impairment. It recommended that Student needed to increase sight word vocabulary, increase comprehension skills, develop money skills, and develop vocational skills. It recommended the need for a replacement curriculum emphasizing communication, social, motor, self-help and vocational skills, supported with specially designed instruction and modifications. (S 7.)

28. By October 2011, Student correctly answered 5 of 5 oral questions about a 2 to 3 sentence passage about a subject of interest at a sixth grade level, and 1 of 5 oral questions about an unknown subject at the sixth grade level. Student correctly answered 4 of 5 written questions about a 2 to 3 sentence passage about a subject of interest at a pre-primer grade level. This was an increase over the previous assessment, given in October 2010. (S 7, 9, 13.)
29. By October 2011, Student found the day of the week in the newspaper independently, the forecast independently, and the temperature range 4 of 5 times independently. Student knew the seasons and holidays that match the months. This was a slight increase over the previous assessment, given in October 2010. (S 9, 13.)
30. By October 2011, Student answered “wh” questions up to 4 of 5 times. This did not represent an increase over previous levels of achievement of this skill. (S 9, 13.)
31. By October 2011, Student identified the name and worth of a penny, nickel and dime 5 of 5 times in the classroom and the community. Student counted ten pennies and totaled single digit numbers up to twenty on 3 of 5 opportunities with 75% accuracy using a calculator. Student counted by 5’s to 100 and by 1’s to 20. Student told time to the half hour 5 of 5 times correctly. This did not represent discernible improvement over previous levels of achievement of these skills. (S 7, 9, 13.)
32. By October 2011, Student stated problems correctly with 80% accuracy independently; stated solutions with 70% accuracy independently, and added 5 comments to a conversation with one prompt across two sessions. This represented improvement in two of the three skills reported. (S 7, 9, 13.)
33. As measured by progress reports from February 2011 to November 2011, Student made progress in speech goals including stating problems, making inferences, answering “wh” questions and making relevant comments in a conversation. Student did not make progress in stating solutions, but maintained the same level of accuracy. (S 9 p. 13-14.)
34. As measured by progress reports from February 2011 to November 2011 Student made progress in functional mathematics goals including reading the price on three items and calculating the total cost of three items. (S 9 p. 15.)
35. By October 2011, Student was able to print Student’s name and sign in and out at a job site. (S 7.)
36. In 2011, Student demonstrated independent self-help skills, including hygiene, feeding, dressing and managing personal belongings. (S 7.)

37. In 2011, Student was able to participate and work at a work based learning program, and made progress in learning job related skills. (S 7, 12.)
38. By October 2011, Student's community skills included using a written/picture grocery list; reading expiration dates with prompts; read prices on labels with one prompt; match coupons with prompts; count mixed change up to a dollar; and buy items at a store. (S 7.)
39. In October 2011, the District provided an IEP placing Student in supplemental life skills support with speech and language support. The IEP team identified Student's academic, developmental and functional needs as increasing sight word vocabulary, and developing work and money skills. Speech needs included expressive and pragmatic skills, as well as problem solving (stating problems and solutions as well as making inferences). The IEP team found that Student needed instruction in the life skills classroom for reading and mathematics, as well as in the community and the work based learning program. (S 13.)
40. The October 2011 IEP provided three expressive language goals; a new functional word reading goal, formulated differently; a listening comprehension goal, and a functional mathematics goal addressing purchases and counting money to the nearest dollar. The IEP provided for a work based learning program. (S 13.)
41. Parent participated in the IEP meeting and expressed a concern about Student's future support after graduation. Parent approved the placement and did not object to the IEP. (S 13, 14.)
42. In the 2011-2012 school year, Student made progress in learning work skills in the work based learning program. (S 19.)
43. As measured by progress notes for the October 2011 IEP goals, Student made progress in learning community based functional words from November 2011 to June 2012. The measured level of achievement was substantially below that stated in the goal for this period, but represented progress in attaining one of the objectives. (S 19, 21.)
44. As measured by progress notes for the October 2011 IEP goals, Student made progress in answering "wh" questions from November 2011 to June 2012. (S 19, 21.)
45. As measured by progress notes for the October 2011 IEP goals, Student made progress in stating the problem, stating solutions and making inferences from November 2011 to June 2012. (S 19, 21.)
46. As measured by progress notes for the October 2011 IEP goals, Student made progress in conversational skill from November 2011 to June 2012. (S 19, 21.)
47. As measured by progress notes for the October 2011 IEP goals, Student made progress in counting to the nearest dollar up to \$2.00 from November 2011 to June 2012. This level of achievement was substantially below that stated in the goal for that period of time, but represented progress in attaining one of the objectives. (S 19, 21.)

48. During the 2011-2012 school year, Student had a significant level of absences. (§ 19 p. 7, S 22.)

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 (which in this matter is the hearing officer).² 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 evidence³ that the other party failed to fulfill its legal obligations as alleged in the due process complaint. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006)

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 this matter, the Parent requested due process and the burden of proof is allocated to the Parent. The Parent bears the burden of persuasion that the District’s re-evaluation and services

² 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.

³ A “preponderance” of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. Dispute Resolution Manual §810.

were inappropriate and that Parent is entitled to an IEE and compensatory education. If the Parent fails to produce a preponderance of evidence in support of Parent's claims, or if the evidence is in "equipoise", then the Parent cannot prevail under the IDEA.

FREE APPROPRIATE PUBLIC EDUCATION

The IDEA requires that a state receiving federal education funding provide a "free appropriate public education" (FAPE) to disabled children. 20 U.S.C. §1412(a)(1), 20 U.S.C. §1401(9). School districts provide a FAPE by designing and administering a program of individualized instruction that is set forth in an Individualized Education Plan ("IEP"). 20 U.S.C. § 1414(d). The IEP must be "reasonably calculated" to enable the child to receive "meaningful educational benefits" in light of the student's "intellectual potential." Shore Reg'l High Sch. Bd. of Ed. v. P.S., 381 F.3d 194, 198 (3d Cir. 2004) (quoting Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 182-85 (3d Cir.1988)); Mary Courtney T. v. School District of Philadelphia, 575 F.3d 235, 240 (3rd 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). "[T]he provision of merely more than a trivial educational benefit" is insufficient. Ridley Sch. Dist. v. MR, 680 F.3d 260, 269 (3d Cir. 2012) (quoting L.E. v. Ramsey Bd. of Educ., 435 F.3d 384, 390 (3d Cir.2006)). In order to provide FAPE, the child's IEP must specify educational instruction designed to meet his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. Board of Education v. Rowley, 458 U.S. 176, 181-82, 102 S.Ct. 3034, 1038, 73 L.Ed.2d 690 (1982);

Oberti v. Board of Education, 995 F.2d 1204, 1213 (3d Cir. 1993). An eligible student is denied FAPE if his or her program is not likely to produce progress. 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 plan and its execution were reasonably calculated to provide meaningful benefit. Carlisle Area School v. Scott P., 62 F.3d 520, (3d Cir. 1995), cert. den. 517 U.S. 1135, 116 S.Ct. 1419, 134 L.Ed.2d 544(1996)(appropriateness is to be judged prospectively, so that lack of progress does not in and of itself render an IEP inappropriate.) Its appropriateness must be determined as of the time it was made, and the reasonableness of the school district's offered program should be judged only on the basis of the evidence known to the school district at the time at which the offer was made. D.S. v. Bayonne Board of Education, 602 F.3d 553, 564-65 (3d Cir. 2010).

Whether the IEP meets the above test must be judged in light of the IDEA's mandate that an IEP must address all of a student's educational needs. 20 U.S.C. § 1414(d)(1)(A)(i)(I)(bb). 34 C.F.R. §300.320(a)(2). Whether a FAPE has been offered must be judged in light of the child's unique constellation of educational needs, Board of Education v. Rowley, 458 U.S. 176,

181-82, 102 S.Ct. 3034, 1038, 73 L.Ed.2d 690 (1982), and the child's intellectual potential, Shore Reg'l High Sch. Bd. of Ed. v. P.S., 381 F.3d 194, 198 (3d Cir. 2004).

Pursuant to the above legal definition of FAPE, I conclude that the District offered and provided a FAPE to Student during the relevant period. All agreed that the Student's placement was appropriate. I find that the IEPs provided measureable goals addressing the areas of educational need identified in the re-evaluation reports, including expressive, receptive and social pragmatic language, functional mathematics, reading, community skills and vocational skills. The District monitored Student's progress on the goals and reported the results to Parent. Instruction was individualized and specially designed; accommodations were provided. All of these services were reviewed yearly and the IEP was revised in light of Student's performance on the goals. In sum, with one exception discussed below regarding the omission of a reading goal in one IEP, the District provided those services that the IDEA requires it to provide.

The December 2010 IEP did not offer a goal for reading, despite the fact that the previous re-evaluation had identified functional sight word reading as an educational need. This was a procedural violation of the IDEA, which requires the IEP to set forth goals addressing the Student's educational needs. 20 U.S.C. §1414(d)(1)(A)(i)(II). However, this failure was remedied in subsequent IEPs⁴, and the record is preponderant that the District did provide Student with instruction in functional sight word reading during the relevant time, and that Student made measured progress.⁵ Therefore, I conclude that the failure to provide a goal for reading in the December 2010 IEP did not deny Student a FAPE.

⁴ Thus I find no need to order any prospective relief regarding this issue.

⁵ Parents attempted to show that the reported progress in sight word reading was measured inappropriately; however, Parents were unable to show by a preponderance of the evidence that the district's sight word reading instruction was implemented without fidelity or was inappropriate. (NT 159-172, 259; P 14; S 5.)

Parent argues that the District should have decided to teach Student academic skills in addition to life skills on the premise that the Student had the potential to achieve in academics at a first or second grade level. However, I find no evidence in the record to support that premise. There was evidence that as a class, students with moderate intellectual disability cannot be expected to achieve beyond the second grade level; this in itself does not imply that all students at this cognitive level can be expected to achieve at a second grade level. Moreover, there is no credible testimony in the record that Student individually was capable of such achievement. Rather, credible District witnesses stated that the expectation for Student's academic achievement while placed by the District was reduced by the fact that Student came to the District with extremely low achievement at [a late age]. Thus, the record does not support Parent's argument that Student's failure to progress academically to a second grade level proved that the District's offer of educational services was inappropriate.

Parent argues that Student's scores showed that decoding was a relative strength of Student, and that therefore, Student had potential which the District should have increased by devoting greater time and resources to providing decoding instruction. The District argues that it did teach Student reading skills by teaching sight words and teaching their application to community and vocational skills.

Parent presented an expert witness whose training is in educational leadership, but who had little or no training in special education, goal writing, progress monitoring or teaching reading. The expert criticized the District's program for failing to provide a systematic, sequential program of instruction in reading, beginning with phonics. I give this testimony no weight for two reasons. First, the expert was not sufficiently trained to offer these opinions with

any reliability. Second, some of the factual underpinnings of the expert's opinions on reading were contrary to the record.

For example, the expert asserted that the District provided instruction in reading comprehension, yet stopped doing so prematurely; however, the record is preponderant that the District continued to instruct and monitor progress in reading comprehension through the answering of oral questions in the 2010-2011 school year, and in the next school year through oral questions at the first grade level. Moreover, much of the expert's criticism was based upon comparison with IEPs that the expert had seen in her experience, but there was little evidence that the expert had seen a sufficient number of life skills IEPs to render the opinions based upon such comparison reliable⁶. Thus, the Parent has failed to prove by a preponderance of the evidence that the District's reading instruction services were inappropriate for the Student.

Similarly, I give little weight to the expert's criticism of the District's mathematics instruction for Student. The expert was not trained to deliver mathematics instruction in a life skills program. The expert did not show sufficient knowledge of the facts of the matter to provide reliable opinions. The expert did not speak to District personnel about how Student was actually taught in class or about the educational strategies that were chosen for Student. The expert asserted that there was no classroom mastery prior to teaching generalization in the community, but the October 2010 progress reports plainly noted progress in both classroom and community. The expert asserted generally that District goals did not change over time in response to Student's slow progress; however, some goals did change over time⁷; thus, the

⁶ Much of the expert's testimony consisted of reporting questions that the expert would have asked if the expert were supervising the development of the Student's special education program; however, in several key respects, the expert did not ask questions to either party in order to obtain answers to those questions. (NT 500-503, 506-507, 517-524, 525-526, 538-542.) Mere questions do not constitute opinions that the Student's program was inappropriate.

⁷ I viewed with some concern that both mathematics and reading goals as set were much higher than Student's actual achievement, suggesting a questionably optimistic view of what Student could achieve in a year. However, IEP

District was not simply repeating meaningless goals from year to year, as the Parent's expert claimed.

The Parent argues that the District provided no specially designed instruction in writing to Student, and that this renders the IEP inappropriate⁸. However, there is no evidence that writing was considered an educational need for this life skills Student. The evaluation reports do not suggest that it was a need and the IEPs do not suggest it. The focus of Student's education was functional and vocational, and writing skills were taught through community life skills and vocational curricula that taught only the writing skills that Student was likely to need in the course of Student's likely vocational path, namely, how to print Student's name and sign in and out of a job site. There is no evidence that Parent disagreed with this focus for Student's education, (NT 508), and even Parent's expert agreed that this focus was appropriate. (NT 505-506.) There was some documentary evidence indicating that Student could write one or two words in response to a question; however, the Parents did not introduce preponderant evidence that Student was able to achieve at any higher level in writing. Thus, I have no basis to infer that the District failed to meet Student's educational needs with regard to writing. Therefore, I do not conclude that the limited teaching of writing skills rendered the IEP inappropriate.

The Parent argues that the District failed to address Student's needs with regard to listening comprehension through goals directed to that educational need. The 2010 IEP does not

teams are composed of persons with varying perspectives, including parents, and the IEP team process sometimes results in goals that in retrospect seem unrealistic. In light of the whole record, I do not find that this is a basis to conclude that the IEPs were not reasonably calculated to provide reasonable educational benefit, especially in light of Student's recorded progress on objectives in the IEPs that were more realistic.

⁸ Parents' expert psychologist commented upon a 2005 IEP reference to Student's use of capitalization, periods and question marks, without any progress data or measurement of prompts. The expert, qualified for purposes of a forensic review of records, concluded that this reference means that Student is able to "use punctuation correctly." Similarly, the IEP reference to "working on telling and asking sentences" means that Student "is able to use sentences" (NT 314.) I find that these brief and vague statements in the IEP provide questionable support for such conclusions. Moreover, the expert's conclusions are in conflict with Student's 2008 performance on the Wechsler Individual Achievement Test – Second Edition (WIAT-II). There, Student's written expression and written language composite scores were in the extremely low range. (S 4.)

have a goal explicitly addressing listening comprehension, but the other 2010 goals appear facially to address listening skills; for example, the 2010 goals for answering “wh” questions and maintaining a conversation would seem facially to draw upon such skills. There was no credible expert testimony to show that these goals did not address listening comprehension⁹. Moreover, I cannot draw an adverse inference in the absence of credible expert opinion that the change of the 2011 listening comprehension goal from familiar sixth grade material to first grade material one page long was an inappropriate pedagogical decision. Thus, the Parents have failed to prove by a preponderance of the evidence that the District failed to address listening comprehension in its speech goals after November 2011.

Parent argues that the Student’s desultory course of progress in academic skills proves that the District’s program was not reasonably calculated to yield meaningful educational progress. I cannot accept this argument, for two reasons. First, it is contrary to judicial authority interpreting the IDEA’s mandate. Second, Parent failed to prove a lack of meaningful progress during the relevant period.

The law is clear that the appropriateness of an IEP must be judged as of the time that it was created, as discussed above. It follows that a student’s lack of progress subsequent to the creation of the IEP cannot be evidence itself that the IEP or its implementation was inappropriate. Even evidence of no progress is insufficient to prove a failure to provide a FAPE, without a showing of something more - such as a flaw in the IEP that should have been corrected, or a failure to implement the IEP as offered, coupled with evidence that such flaws caused a lack of progress¹⁰. See Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520, 534 (3d Cir.

⁹ Moreover, the 2011 IEP present levels show that the District was still teaching and monitoring progress on listening comprehension, specifically answering oral questions. (SD 13 p. 4.)

¹⁰ Even Parent’s expert agreed that slow progress alone cannot prove the inappropriateness of an IEP; numerous other factors could cause a student not to make progress in a given time period. (NT 397-398.)

1995)(stating that the ultimate success or failure of an IEP that addresses all educational needs cannot retroactively render it inappropriate).

On the record as a whole, I conclude by a preponderance of the evidence that the Student made meaningful progress during the relevant period, in light of Student's severe cognitive limitations. Student made some progress in most areas addressed by the IEP, although that progress was strikingly incremental and slow. Parent failed to prove by a preponderance of credible and reliable evidence that Student's progress was not meaningful.

In weighing the evidence of meaningful progress, I give importance to the fact that Student's intellectual potential during the relevant period was extremely low based upon Student's cognitive test scores and age, so that small increments of progress were more meaningful for Student than they would have been for children with higher cognitive potential. I also find that Student's incremental progress during the relevant period was consistent with the pace of Student's learning in the years immediately preceding the relevant period¹¹, so that there is not preponderant evidence that Student's slow progress slowed further during the relevant period. Thus, Student's incremental academic progress in eleventh and twelfth grade was not proven to be due to inappropriate programming.

Parent also argues that the Student was able to use some decoding skills in [another state's] schools, thus showing that Student could improve upon those skills. Given this premise – that Student had shown potential for learning decoding skills – Parent argues that the District's IEPs were inappropriate because they did not include goals and specially designed instruction for decoding. However, the District expert witnesses and even the Parent's expert school psychologist agreed that the thrust of any reading instruction for Student when Student came to

¹¹ Student's reduced cognitive ability and slow pace indicate that a pattern of improvement and regression can be expected. (NT 449-456, 504-505, 518-522.)

the District should have been whole word instruction, not phonics, although it would be beneficial to continue to teach phonics as part of any reading program for Student. (NT 379-380.) The Student needed a functional reading and mathematics program. Thus, the Parent has failed to prove by a preponderance of the evidence that the District's program to teach whole word – sight word - reading skills to Student was inappropriate¹².

Parent argues that the District's IEPs were very similar over the years and that they should have been changed to reflect that Student was not making progress. However, as noted above, Student was making progress, although it was slow and incremental, with periods of regression. For some skills, progress was measured according to the amount of prompting required, and for some it was measured according to the extent of generalization over multiple settings. Even Parents' expert agreed that this is sometimes the only progress that a student with extremely low cognitive functioning can achieve¹³. (NT 405-410.)

APPROPRIATENESS OF EVALUATION

The IDEA sets forth two purposes of the required evaluation: to determine whether or not a child is a child with a disability as defined in the law, and to “determine the educational needs of such child” 20 U.S.C. §1414(a)(1)(C)(i). In this case, Parent challenges a re-evaluation conducted for the sole purpose of addressing Student's then current educational needs. Parent seeks a decision that the District's re-evaluation report of October 20, 2011 was inappropriate, and an order compensating Student through an IEE. I conclude that the re-evaluation was appropriate and I therefore deny the requested relief.

¹² The evidence also showed preponderantly that the District did provide instruction in phonics to Student, although it was not addressed through the IEP.

¹³ Parent's expert psychologist agreed that the Student's day to day performance in school is an appropriate measure of progress. (NT 348-350.)

The re-evaluation was appropriately comprehensive for the purpose of determining Student's educational needs. The re-evaluation appropriately relied upon the scores of several prior cognitive tests, including scores that the District's psychologist had obtained in 2008, most of which were consistent with each other in describing Student as functioning cognitively in the moderately intellectually disabled range of cognition. The existing data, including input from Parent, teachers and prior reports, as well as curriculum based assessments, were sufficient to address all areas of suspected educational need. The report and its recommendations, though somewhat more succinct than this hearing officer would ordinarily expect, nevertheless were sufficient to inform the IEP team of Student's educational needs that needed to be addressed through specially designed instruction and related services.

Parent argues that cognitive testing in [another state] revealed anomalous scores for verbal IQ and verbal comprehension – that there was a significant drop in Student's scores in these areas of functioning between testing in 2001 and testing in 2006 and 2007. Parent argues that this drop in scores should have prompted a more searching inquiry in 2008 when the District's evaluator tested Student, deriving lower cognitive scores that were more closely consistent with the 1998, 2006 and 2007 scores and inconsistent with substantially higher scores reported in 2001. Thus, Parent asserts, the District's 2008 evaluation was inappropriate because it did not explore the dichotomy of scores in 2001 and 2008.

However, the District's expert witness, the psychologist who did the testing, testified that the scores obtained from his testing in 2008 were comparable to those obtained in three other evaluations in which Student's cognitive ability was tested. The higher scores in 2001 were the exception. Thus, the District's psychologist credibly testified that he found his scores to be

consistent with the weight of the evidence of prior testing, and that the one anomalous score in 2001 did not merit further or different cognitive testing in 2008.

The expert concluded that the district's psychologist should have performed a second cognitive assessment in 2008, utilizing tests that are not heavily dependent upon multi-step directions and verbal processing. (NT 319-321.) The expert opined that Student's known verbal processing issues might have been impacting Student's scores on sub-tests assessing non-verbal skills, thus reducing Student's overall IQ in a misleading fashion. This opinion did not appear to take into consideration the conclusion in the District's evaluation report that there was no significant difference between the Student's performance on verbal and non-verbal tests during the assessment¹⁴. It did not take into consideration that the District's evaluation strategy was also informed by Student's performance in the District on a day to day basis, and by the detailed speech and language assessment that was reported in 2008. Thus, I accord it little weight.

The expert opined that a behavior rating inventory should have been obtained, as well as a social skills rating scale, as well as a rating scale directed to executive functions. However, behavior and social skills were not identified as problems of concern, and the record shows that difficulties with executive function are implied in the identification of Student with intellectual disability, which is characterized by executive functioning problems. (NT 338-339.) Thus, the re-evaluation report, by identifying Student as intellectually impaired, did convey to the IEP team the need to address Student's needs with regard to executive functioning.

The Parent's expert opined that the re-evaluation report did not indicate to the IEP team the exact deficits that needed to be worked upon. (NT 339.) Yet, the re-evaluation did recommend placement in life skills support with a life skills curriculum, including functional

¹⁴ Regarding performance, the record shows that a standard score of 40 is the lowest a person can get on achievement tests; all of Student's sub-test scores were 40 on the WIAT-II, except pseudoword decoding, which was 53. (S 4.)

academics, pre-vocational and vocational skills, community experiences, and adaptive and independent living skills. (S 4.) I conclude that these recommendations were appropriate for Student.

The expert also criticized the District's 2009 re-evaluation (also conducted by the District's psychologist), which was based in part on the 2008 evaluation. The expert indicated that [Student] "may have given – depending on what was going on ... another assessment" to get further clarification of the differing cognitive assessment scores in previous testing. (NT 339.) While this may have been the particular expert's preference, professionals can differ, and a mere difference of approach among psychologists is not sufficient to establish that an evaluation is inappropriate under the IDEA.

The Parents' expert had no forensic experience even though the expert had appeared to serve as a forensic expert witness. The expert had not ever met the Student. He had not ever spoken to school officials about the Student or its educational program, or the reasons for the choices that it had made with regard to Student's programming. The expert's testimony consisted largely of identifying tests that had not been administered and then stating, sometimes equivocally, that it would have been better to have done them. I find this critique to be unpersuasive on the Parent's contention that the evaluation was insufficiently comprehensive.

SECTION 504

The Parent's section 504 claim is presented as derivative of the IDEA claim, such that the claim arises out of the same facts that are the basis for the IDEA claim. Section 504 regulations set forth separate standards for delivery of a FAPE and adequacy of evaluations. 34 C.F.R. §104.33, 104.35.

The regulations define a FAPE as provision of an education that meets the requirements of the Education of the Handicapped Act, the predecessor of the IDEA. 34 C.F.R. §104.33 (b)(1). Provision of a FAPE under the IDEA satisfies this provision. Bryant v. New York State Educ. Dept., 692 F. 3d 202, 216 n. 10 (2d Cir. 2012). As I have found that the District provided a FAPE under the IDEA, section 504 FAPE requirements are satisfied.

Section 504 requirements for evaluations closely parallel those of the IDEA, and the relevant regulation under section 504 emphasizes that tests should be selected so as best to ensure that they accurately reflect the Student's aptitude or achievement despite any communication disabilities. As discussed above, I am satisfied that the District took this into consideration and appropriately ensured the accuracy of its cognitive and achievement scores.

CREDIBILITY

In reaching the above conclusions, I gave weight to the testimony of the District's school psychologist. This witness evaluated Student three times, and tested Student once. I found that the witness' defense of his strategies in these evaluations was cogent and revealed a firm and extensive knowledge of his field of expertise. After weighing the witness' demeanor, responses to specific questions, and consistency with the record, I found that the witness' testimony was on balance credible and reliable with regard to the central issues of fact in this matter.¹⁵

With the exceptions discussed above, I found all of the other witnesses – both the Student's [parent] and the District's teachers and administrators - to be credible; there were not

¹⁵ Parent noted instances in which the witness' testimony seemed to exaggerate the facts, and one of these statements gave me pause – the statement that additional testing was painful to Student at one point. I gave no weight to this statement, because I considered it an embellishment. Moreover, there were areas in which the witness admitted to a lack of knowledge or memory of things that were not essential to the opinions that the witness gave. While these flaws in the witness' credibility and reliability were of concern, I found them insignificant and beside the point of the testimony when balanced against the witness' clear and well-reasoned justification of his evaluations and recommendations.

sufficient contradictions in the record to impeach any of them. In demeanor and approach to answering questions, all impressed me as sincere and knowledgeable.

CONCLUSION

I conclude on this record that both the District's program of special education and the re-evaluation of 2011 were appropriate. Therefore I will not order the District to provide either compensatory education or a compensatory IEE.

Any claims regarding issues that are encompassed in this captioned matter and not specifically addressed by this decision and order are denied and dismissed.

ORDER

1. The District's re-evaluation dated October 20, 2011 was appropriate under the IDEA and section 504.
2. The District did not fail to offer or provide Student with a FAPE, under either the IDEA or section 504, from March 1, 2011 to June 12, 2012.
3. The hearing officer does not order the District to provide an IEE at public expense.
4. The hearing officer does not order the District to provide compensatory education to Student for all or any part of the period from March 1, 2011 to June 12, 2012.

William F. Culleton, Jr. Esq.

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

September 13, 2013