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

Eligible Young Child's Name: R.R.

Date of Birth: [redacted]

ODR No. 01822-1011 JS

CLOSED HEARING

<u>Parties to the Hearing</u>:	<u>Representative</u>:
Parent[s]	Tanya A. Alvarado, Esquire McAndrews Law Offices 30 Cassatt Avenue Berwyn, PA 19312
Northeastern Educational Intermediate Unit 19 1200 Line Street Archbald, PA 18403-1918	Erin D. Gilsbach, Esquire King, Spry, Herman, Freund & Faul, LLC One West Broad Street Suite 700 Bethlehem, PA 18018
Dates of Hearing:	February 11, 2011, March 18, 2011, March 30, 2011, May 9, 2011
Record Closed:	May 27, 2011
Date of Decision:	June 11, 2011
Hearing Officer:	William F. Culleton, Jr., Esquire

INTRODUCTION AND PROCEDURAL HISTORY

Child is an eligible young child of elementary school age; Child at all relevant times resided within the jurisdiction of the Northeastern Educational Intermediate Unit 19 (IU), and was identified as a child with a disability eligible for early intervention services. (NT 13-14; P-3.) Child presently is identified with Autism and Mental Retardation under the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA). Ibid. Parent requested due process to require the IU to pay for an Independent Educational Evaluation (IEE) and for compensatory education due to alleged failure to comply with Child Find obligations, to provide an appropriate evaluation, and provide a free appropriate public education (FAPE). The District asserts that it has evaluated Child appropriately based upon what it knew at the time of enrollment in its Preschool program, and that there is no basis to award an IEE at public expense.

The hearing was conducted in four sessions and the record closed upon receipt of written summations. I conclude that the IU failed to provide an appropriate evaluation and to provide a FAPE. I deny the request for an IEE. .

ISSUES[1]

1. Did the IU fail to perform its Child Find obligations during the period of time beginning March 30, 2009 to December 18, 2009, by failing to identify the Child as a child with a disability due to diagnoses of Intellectual Disability and Autism, scattered cognitive functioning, sensory integration issues, auditory processing issues, a gap between achievement and cognitive ability or behaviors that impede learning?

2. Did the IU fail to provide an appropriate educational evaluation during the period of time beginning February 23, 2009 to December 18, 2009 (relevant period), by failing to evaluate appropriately the Child's suspected disabilities and educational needs due to

[1] In written summation, Parent asserts as a separate issue that the IU excluded Parent from participation in the educational planning process. I do not reach this claim. It was not addressed in the Parent's opening statement, and I did not formulate that issue as one of the issues in the matter. I clearly and fairly warned both parties that my formulation of the issues at the outset would exclusively govern the issues that I would reach, and I invited counsel to refine that formulation to assure that I would reach all issues that the parties wanted to present. Parent did not raise exclusion from educational planning during that process. Therefore I do not reach that issue.

diagnoses or suspected diagnoses of Intellectual Disability and Autism, scattered cognitive functioning, sensory integration issues, auditory processing issues, a gap between achievement and cognitive ability or behaviors that impede learning?

3. Did the IU fail to offer an appropriate placement to the Child during the relevant period?

4. Did the IU fail to offer appropriate educational services during the relevant period with regard to educational needs arising from mental retardation, autism, specific learning disability, other health impairment, serious emotional disturbance, or speech and language disability, including needs for occupational therapy?

5. Did the IU fail to offer appropriate transitional services during the relevant period for the Child's transition to school age?

6. Did the IU fail to offer appropriate extended school year services to Child during the relevant period?

7. Should the HO order an IEE based on equitable considerations or based on a present need for evaluation that cannot be provided by the Child's LEA?

8. Should the HO order the IU to provide compensatory education for all or any part of the relevant period?

FINDINGS OF FACT

1. Child was born in [another country], to a [non-English] speaking family. Child has little or no language. Child was identified at age two as an infant or toddler eligible for early intervention and Child received speech therapy and occupational therapy services from Head Start and other providers in [the other country] from age two to age four. (NT 464-465; P-2, 9, 17, 20, 31.)

2. Through the Head Start agency in [the other country], Child received multiple evaluations, including psychological, cognitive and adaptive functioning tests, speech and language tests and occupational therapy testing. (NT 464-466, 490-503; P-1, 26-31.)

3. Child's family moved into the IU's jurisdiction in September 2008, when Child was four years old. (P-20.)

4. Child began receiving services from a local counseling agency in October 2008. (P-7, 20.)

5. In March 2009, Child was admitted to a partial hospitalization program due to disruptive and dangerous behaviors in the Head Start program. (P-7, 33.)

CHILD FIND

6. In October 2008, a local counseling center psychiatrist diagnosed Child with Attention Deficit Hyperactivity Disorder (ADHD). The psychiatrist started Child on three psychotropic medications. (P-7 p. 3, P-20.)

7. On January 27, 2009, Parent signed an IU consent form for billing and sharing medical and educational information with Medical Assistance. (P-5.)

8. Child began receiving services from the [local] Human Development Agency, Inc., Head Start Program (Head Start) on February 17, 2009. (P-2 p. 5.)

9. On February 27, 2009, the IU forwarded [redacted] language documents to a [redacted language] speaking school psychologist. (P-1.)

10. On March 13, 2009, the [redacted language] speaking psychologist returned a summary of the information contained in the [redacted] language documents sent to the Psychologist. (P-6.)

EVALUATION-APPROPRIATENESS IN GENERAL

11. A developmental screening instrument administered by Head Start personnel on February 23, 2009 disclosed that Child was functioning below age level in gross motor, language, fine motor, and personal-social domains. (P-33 p. 6-8.)

12. On February 23, 2009, Parent signed an authorization for the mutual release of information between Head Start and the IU. This included educational reports, records from [the other country], and audiological records. Child was referred to the IU immediately. Parent signed permission to evaluate on March 9, 2009. (P-1 p. 30, P-2, P-33 p. 21.)

13. On February 26, 2009, the IU coordinator contacted a bilingual school psychologist by email regarding possible evaluation of the Child. (P-34 p. 1.)

14. On February 27, 2009, the IU coordinator called Head Start to arrange an evaluation by a [redacted language] speaking school psychologist. (P-33 p. 105.)

15. On March 2, 2009, the IU sent a Permission to Evaluate form to Parent. Parent signed permission to evaluate on March 9, 2009. Parent returned the form to the IU on March 10, 2009. (P-1 p. 30, P-2, P-9 p. 1, P-33 p. 21, 104.)

16. On March 13, 2009, the [redacted language] speaking psychologist returned a summary of the [redacted] language documents, which did not fully translate the documents. The psychologist was not consulted further regarding the conduct of the evaluation. (NT 409-411, 436-441, 453-454; P-6, S-5.)

17. The March 13, 2009 summary provided by the [redacted language] speaking psychologist reported a speech and language evaluation in March 2007 which indicated “moderate” delays in receptive and expressive language. (P-6 p. 2.)

18. The IU sent an initial early childhood evaluation report to Parent on May 8, 2009. (P-9.)

19. The May 8, 2009 evaluation was based upon observation of Child, interview with Parent and Child’s grandmother, review of a parent input questionnaire, a teacher questionnaire completed by Child’s Head Start teacher and administration of the Battelle Developmental Inventory. In addition, the IU’s Speech Clinician observed the Child and administered a preschool language scale, and the IU’s occupational therapist administered a developmental checklist. (NT 282-285; P-9.)

20. An interpreter was utilized in the evaluation. (NT 282, 298.)

21. The IU diagnostic teacher who conducted the IU evaluation was not aware of whether or not the developmental inventory was available in [the other language], or whether or not the interpreter was qualified to provide an interpretation that would preserve standard conditions for the inventory. The Child’s grandmother was allowed to interpret randomly during the evaluation without any awareness of the potential effect on validity of the evaluation. The evaluator was aware that the inventory was normed on a United States population. The IU evaluative personnel were not aware of [redacted] language alternative assessment instruments that could have been utilized in the evaluation. (NT 298- 303, 315-316, 334-337, 410, 452-453.)

22. No records were requested or received from the Head Start program, the local counseling agency or the partial hospitalization program, or the agencies in [the other country] which had provided evaluation and services to the Child. The Child was not observed in any of the clinical or educational placements or at home. Evaluators were not aware of the existing diagnoses carried by the Child. (NT 282-292, 295-297, 452-453, 640-641.)

23. The IU personnel did not rely upon psychiatric or psychological diagnoses because such diagnoses at an early age are not reliable and because personnel preferred to identify functioning levels and isolate specific needs that can be addressed regardless of diagnosis. (NT 174.)

24. Evaluation results were not discussed with Parent, and a Multidisciplinary team did not decide on the evaluation, because Parent did not attend the IEP meeting scheduled for discussion of the evaluation; it was expected that the results would be discussed during an IEP meeting. Reasonable efforts were not made to reschedule a meeting with Parent. Neither the speech and language evaluator nor the occupational therapy evaluator attended the IEP meeting where the evaluation was discussed. (NT 134, 191-201, 211-212, 417-422, 702-703.)

25. The IU evaluation report dated May 8, 2009 found the Child eligible for early intervention services based upon a 25% delay in several areas of development, including adaptive functioning, social skills, fine motor and perceptual skills, and cognitive skills. (P-9.)

26. The IU evaluation report dated May 8, 2009 made recommendations for addressing speech and vocabulary development, as well as behavior in transitioning from one activity to another. (P-9.)

27. The IU evaluation report dated May 8, 2009 also recommended that suggestions be made to family and teachers regarding language, adaptive, cognitive, personal/social and fine motor development, as well as appropriate behavior. (P-9.)

EVALUATION –COGNITIVE IMPAIRMENT

28. The March 13, 2009 summary provided by the [redacted language] speaking psychologist indicated that the Child had never had a psychological examination, but that one had been recommended. (P-6 p. 2.)

29. On March 23, 2009, a psychiatrist at a partial hospitalization program diagnosed Child with ADHD, Oppositional Defiant Disorder (ODD), and Adjustment Disorder. (P-7 p. 4-5.)

30. On May 12, 2009, a psychologist at the partial hospitalization program concurred with the March 23, 2009 diagnoses and added Borderline Intellectual Functioning (estimated). (P-8.)

31. Only a single developmental inventory was utilized to determine Child's cognitive functioning. In Child's case, this was hard to assess because of the Child's lack of receptive and expressive communication skills and the Child's bilingual background. (NT 664-665; P-8, 9.)

32. The IU made no effort to obtain psychological reports from the partial hospitalization program, although it knew that these were available. (NT 452-454, 460.)

33. The IU evaluation report dated May 8, 2009 indicated that Child was substantially more than 25% delayed in adaptive skills, personal social skills, fine motor, perceptual motor and cognitive skills. (NT 303-305; P-9 p. 8-9.)

34. In November 2009, Child scored in the extremely low range for most standardized developmental, cognitive functioning, adaptive behavior and achievement tests administered. The local school district identified Child with Mental Retardation and Other Health Impairment. (P-20.)

EVALUATION- BEHAVIOR

35. In October 2008, Child was evaluated at a local counseling center and prescribed medications for severe negative behavior and attention issues. (P-33 p. 47.)

36. In a February 25, 2009 questionnaire, Parent disclosed that the Child was being seen by [Redacted] Counseling, named a doctor seeing Child, and listed medications the Child was taking. (P-2 p. 4, 6.)

37. The IU diagnostic teacher was not aware of the Student's extreme negative behaviors that had led to hospitalization. (NT 307-308.)

38. There was no functional Behavioral Assessment in the records and the IU did not either perform or recommend an FBA. (NT 318-319, 3223-324, 330-331.)

39. IU evaluators did not consider whether or not the Child's unique circumstances, including multiple transitions of programs and residence, changes in medications and being required to function bilingually in an English speaking environment with a [redacted language] speaking mother, along with diagnosed ADHD, had a causal relationship to Child's behavior. (NT 691-694.)

EVALUATION-SPEECH AND LANGUAGE

40. In a questionnaire received by the IU on February 25, 2009, Parent disclosed that the Child had received a hearing test that found normal hearing. (P-2 p. 4, P-9.)

41. In the February 25, 2009 questionnaire, Parent disclosed that the Child had been evaluated for speech and language delays in [the other country] through the Head Start program there and had received speech therapy and occupational therapy twice a week in [another country]. (P-2 p. 5, P-9.)

42. The March 13, 2009 summary provided by the [redacted language] speaking psychologist indicated that there had been a recommendation for preschool setting with speech therapy twice per week. (P-6 p. 2.)

43. On March 30, 2009, the IU evaluated Child for speech and language problems at the Head Start location. The assigned speech and language evaluator administered a preschool language scale to the Child through an interpreter; this was the only instrument utilized to determine speech and language needs. The speech and language evaluator also reviewed a teacher checklist from Head Start and an input form from the parent. (NT 123-129, 263, 310, 664-666.)

44. The assigned speech and language evaluator was aware that the Child had received speech therapy services through an IEP in [the other country], but did not attempt to obtain or review any such documentation or obtain a translation of any such documentation. (NT 108-111, 114; P-33 p. 102.)

45. The assigned speech and language evaluator was aware that Child was a patient at a counseling center and at the partial hospitalization program but did not attempt to review any documentation from those programs. (NT 112-114, 118-119, 254.)

46. The assigned speech and language evaluator did not interview Parent, observe Child in Child's placement at the partial hospitalization program, or interview or seek input from Child's teachers at the partial hospitalization program. The evaluator did not seek information as to the nature of speech and language services that were being provided at the time of the evaluation, or review progress notes from current service providers. (NT 118-119, 121-122, 292.)

47. The assigned speech and language evaluator did not attempt to obtain an evaluation to rule out auditory processing disabilities. (NT 119-120.)

48. The assigned speech and language evaluator did not administer any instruments for children on the autistic spectrum because the evaluator was unaware of any suspicion that the Child might be on the Autistic spectrum, and because the evaluator did not deem it necessary in light of the evaluator's conclusion that identified Child as a child with a disability. There was documentation from the Head Start program in [the other country] that Child had been referred for a medical evaluation to rule out autism. (NT 129-131, 254-255.)

49. The IU evaluation report dated May 8, 2009 found the Child eligible for early intervention services due to a 25% delay in receptive and expressive communication. (P-9.)

50. The IU evaluation report dated May 8, 2009 made recommendations for addressing speech and vocabulary development, as well as behavior in transitioning from one activity to another. (P-9.)

EVALUATION-OCCUPATIONAL THERAPY

51. The March 13, 2009 summary indicated that there had been a recommendation for an occupational therapy evaluation, but it was unknown whether or not an evaluation had been completed, and there were no scores. Nevertheless, occupational therapy had been provided twice per week. (P-6 p. 2-3.)

52. The IU occupational therapy evaluator administered a non-standardized developmental checklist to assess fine motor functioning, reviewed a teacher input form and interviewed the Child and at least one of Child's teachers at Head Start. The evaluator did not know whether or not the developmental checklist was culturally biased. The checklist requires minimal language and is administered primarily without using language. An interpreter was utilized for any questions or language communication needed by the evaluator. (NT 140-151, 167, 189, 197-198.)

53. The IU occupational therapy evaluator was aware that the Child had received occupational therapy services in [the other country] through an IEP, but did not request or receive a translation of that document and did not seek or receive any information from the head start agency in [the other country]. The evaluator did not observe Child in Child's classroom setting at Head Start, the partial hospitalization program, or at home. (NT 142-143, 146, 156-157, 172-173.)

54. The initial screening for motor abilities and sensory processing problems did not indicate a need for more detailed investigation. (NT 156.)

55. The developmental checklist indicated at least a 25 percent delay in fine motor and perceptual motor skills, and slightly less than a 25 percent delay in self care. (NT 160-161; P-9 p. 9.)

56. The IU evaluation report dated May 8, 2009 reported that the Child demonstrated appropriate motor development for functional self help and sensory motor play development. Thus, it did not recommend direct services, but did presume that the recommended program, supported by consultation, would address Child's occupational therapy needs. (NT 162; P-9 p. 7.)

PLACEMENT

57. On March 10, 2009, Head Start decided to refer Child to partial hospitalization, due to Child's behavior at Head Start. From March 11, 2009 until admission to partial hospitalization on March 25, 2009, Child was at home. On March 23, 2009, a psychiatrist at a partial hospitalization program recommended admission to the partial hospitalization program as the least restrictive appropriate environment, due to risk of further deterioration. (P-7 p. 4-5, P-33 p. 52, 102-103.)

58. Head Start continued to offer family support services to the Parent while Child was enrolled in the partial hospitalization program. Head Start also provided some monitoring of the Child at the partial hospitalization program. (P-33 p. 58, 66-71, 101-102.)

59. The IU provided speech and language and occupational therapy services to the Child while in the partial hospitalization program, beginning in March 2009. (NT 404-407.)

60. On May 12, 2009, a psychologist at the partial hospitalization program recommended continued partial hospitalization placement and psychiatric care, re-assessment of adaptive behavior, updated periodic hearing and vision evaluations, and therapy. (P-8.)

61. On May 19, 2009, the IU called Parent to invite Parent to an IEP team meeting on May 26, 2009. Parent declined to attend, returning the invitation form on or about May 27, 2009. (P-10.)

62. The IU offered an early intervention IEP dated May 26, 2009 showing placement in a separate school for children with disabilities. The IEP was forwarded to Parent with a NOREP in English even though the Parent has limited English language ability and communicates primarily in [another language]. (NT 416-418; P-12.)

63. On May 26, 2009, the IU sent a NOREP to Parent recommending continued placement in the partial hospitalization program with early intervention services to increase overall communication skills and increase attention and focus. (P-11.)

64. Child was discharged from partial hospitalization in September 2009 when Child began kindergarten at the local school district. (P-20, 33 p. 67.)

FAPE – IEP AND SERVICES PROVIDED IN PARTIAL HOSPITAL SETTING

65. The IU did not report progress monitoring on any IEP goals while Child was in partial hospitalization prior to the initial IEP meeting in May 2009, for purposes of establishing present levels of performance. Progress monitoring was scheduled to be reported after the Student's transition to kindergarten and was not reported from May until September 2009. (NT 350-356, 359-365, 408-409, 422-423, 502, 670-677, 685-687, 690-691, 729-730, 748-749, 753-755, 762.)

66. The IU provided minimal interventions while Child was in partial hospital program for purposes of avoiding interference with the medical and behavioral services being provided. (NT 626-631, 658-663, 694-696, 706-707.)

67. The IU provided two weekly sessions of speech language therapy and two weekly sessions of occupational therapy to Child, one half hour each, from March 2009 to the end of July 2009. Speech language services until April 2009 consisted of rapport-building rather than instruction. (NT 658-663, 727-729, 753-756.)

68. A special education teacher provided kindergarten readiness teaching to Child once per week for one half hour while Child was in partial hospitalization. (NT 695-699; P-12.)

69. Services provided to Child in partial hospitalization were in English. (NT 750.)

FAPE – COGNITIVE IMPAIRMENTS

70. The IEP dated May 26, 2009 provided one goal that addressed attention and following directions, which did not proceed from baseline data. Specially designed instruction included prompting by classroom staff positioned near the Child, use of highly motivating materials, and use of behavioral strategies including rewards and consequences. (NT 683; P-12 p. 9.)

71. The May 2009 IEP did not address academic readiness skills. (NT 680-681; P-12.)

FAPE – BEHAVIOR

72. Beginning in February 2009, Child exhibited severely challenging behaviors in the Head Start classroom. (P-33 p. 101-107.)

73. The IEP dated May 26, 2009 indicated that the partial hospitalization program would provide assistance to Parent in behavior techniques and strategies. (P-12 p. 5.)

74. The IEP dated May 26, 2009 indicated that Child displayed behaviors that impede learning. These included aggressive and sometimes dangerous behavior toward a sibling, the Parent and peers in school settings. These problematic behaviors continued to be a concern until Child's discharge from the partial hospitalization program in August 2009. (P-12 p. 6; P-15.)

75. The IEP dated May 26, 2009 offered a goal for transitioning to new activities without frustration and aggressive behavior. However, the goal was not based upon baseline data and thus was not measureable. Specially designed instruction included verbal and visual cueing warning of transition points and positive reinforcement. (NT 678-680; P-12 p. 7.)

76. By August 2009, Child had demonstrated progress in reducing the frequency of aggressive behaviors toward adults and peers. (P-17.)

77. In September and October 2009, Child displayed aggressive behaviors in kindergarten class, including hitting and kicking peers, and refusal to follow directions. Child required one-to-one teacher assistance for all academic tasks. (P-20.)

FAPE – SPEECH AND LANGUAGE

78. Head Start wrote goals emphasizing language development. (P-33 p. 18 to 20.)

79. The IEP dated May 26, 2009 indicated that the Child presented with limited English proficiency and with communication needs. (P-12 p. 6.)

80. The IEP dated May 26, 2009 offered a goal for using words, signs or gestures to communicate with adults and peers. Specially designed instruction included use of a picture communication system. (P-12 p. 8.)

81. The IEP dated May 26, 2009 did not offer explicit, measureable goals related to learning letter-sound relationships, developing age appropriate vocabulary, or social use of language. (NT 649-651, 681-683, 747-748, 758-759; P-12.)

82. By November 2009, Child still could not communicate verbally and demonstrated frustration when unable to communicate. Child was still severely delayed in receptive and expressive language, scoring at eighteen to twenty-seven months on an infant-toddler language scale, and 3 ½ years on an articulation scale. Inability to communicate was found to be Child's major psychological stressor. Child qualified for speech and language therapy services. (P-17, 20.)

SERVICES FOR TRANSITION TO KINDERGARTEN AGE

83. On February 23, 2009 during an initial meeting with Parent, Head Start staff advised Parent of the need to begin transition to kindergarten and request an evaluation by the local school district. Informational materials concerning transition were provided to Parent at that time. (P-33 p. 106.)

84. The IEP dated May 26, 2009 indicated that the Child would transition to kindergarten age within one year. (P-12 p. 6, 12.)

85. The IEP dated May 26, 2009 offered to provide information on transition to the Parent, including registration procedures, an interagency meeting with the prospective school district and the Parent, and provision of a permission to evaluate to the district. The IEP also provided for an opportunity for Parent to visit prospective placements within the district "if appropriate." (P-12 p. 12-13.)

86. The IEP dated May 26, 2009 provided for listing successful strategies and adaptations prior to transition. (P-12 p. 12.)

87. The transitional information in English was sent through Child's back pack to Parent because Parent did not attend the IEP meeting in May 2009. This was done shortly after the May IEP meeting. (NT 632-634, 769-772.)

88. The IU provided a form indicating intent to register with the local school district and providing consent to evaluate for special education. The Parent returned this form to the IU dated August 3, 2009. (P-13.)

89. The IU forwarded documentation to the local district upon receipt of the parent's signed intent to register form. (NT 434-435.)

90. Parent enrolled Child in the local school district before August 3, 2009. (P-14.)

91. Child began in public school kindergarten in the regular education environment. Child did not do well in that setting and Parent requested an evaluation. (P-19.)

ESY SERVICES

92. There was no evidence that Child regressed or had difficulty with recoupment during the three week long breaks in schedule that are part of the IU calendar. (NT 631-634.)

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.[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 evidence[3] that the other party failed to fulfill its legal obligations as alleged in the due process Complaint Notice. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006)

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

In the present matter, based upon the above rules, the burden of persuasion rests upon the Parents, who initiated the due process proceeding. If the Parents fail to produce a preponderance of the evidence in support of their claim, or if the evidence is in "equipoise", the Parents cannot prevail under the IDEA.[4]

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[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 (which in this matter is the hearing officer).

[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.

[4] I apply this rule to section 504 issues as well, for two reasons. First, the general rule applicable in administrative cases in Pennsylvania is the same as that stated in Schaeffer: the party requesting relief has the burden of persuasion.

CHILD FIND

The IDEA requires the Commonwealth to make a FAPE available to every child between the ages of three and five who has a disability and requires special education and related services. 20 U.S.C. §1412 (a)(3), 1419(b)(2); 34 C.F.R. §300.8(b), 300.111(b)(developmental delay as a definition of disability if state authorizes it); 34 C.F.R. §300.804 (state eligibility if FAPE made available to children aged 3 through 5). The Commonwealth has authorized provision of services to eligible young children who are found to have developmental delays. 22 Pa. Code §14.101 (definitions of developmental delay and developmental areas).

State regulations define the child find obligation in early intervention. Local educational agencies delegated responsibility for this state obligation must locate and identify eligible young children "thought to be eligible." 22 Pa. Code §14.152(a). The regulations do not require identification of each and every disability category as part of child find obligation.

While the IU therefore was obligated to identify the Child to the extent of eligibility for services, this requirement is not stated so broadly as to require specific determinations as to precise diagnostic categories or comprehensive identification of functioning deficits as part of child find. In this conclusion I am influenced by 20 U.S.C. §1412((3)(B); 34 CFR 300.11(d)(rule of construction). That section of the law states that child find does not require classification by disability as long as child is identified as a child with a disability, i.e., as eligible.

Because the IU identified the Child as eligible immediately upon notice that Child was thought to be eligible, I find no violation of its child find obligation. (FF 1-10.) However, I will address the question of the appropriateness of its omission to review diagnostic data according to the IDEA rules regarding evaluation.

EVALUATION

The IDEA in Part B prescribes detailed standards for evaluating children with disabilities. 20 U.S.C. §1414. These standards apply to evaluations of eligible young children. 34 C.F.R. §300.122 (requiring adherence to Part B evaluation standards for all children with disabilities); 34 C.F.R. §300.8(b)(defining children with disabilities to include eligible young children); 22 Pa.Code 14.153 (recognizing applicability of Part B evaluation standards.)

State regulations provide specific additional requirements. Evaluations must "be sufficient in scope and depth to investigate information relevant to the young child's suspected disability, including physical development, cognitive and sensory development, learning problems, learning strengths and educational need, communication development, social and emotional development, self-help skills and health considerations, as well as an assessment of the family's perceived strengths and needs which will enhance the child's development." 22 Pa. Code §14.153(2). Developmental delay may be determined through the use of one instrument 22 Pa. Code §14.101(defining developmental delay at subparagraph (i)).

I conclude that the evaluation provided by the IU to the Child in this matter was inappropriate under the IDEA and under state regulations. It was not sufficient in scope or depth. It did not include an appropriate review of existing data. 34 C.F.R. §300.305(a). It did not utilize a variety of instruments and strategies in order to address all areas of suspected disability. 20 U.S.C. §1414(b). Ibid. Its findings were based upon single instruments, and these were not administered in a way that reasonably assured that these instruments were administered in a valid and reliable way. Ibid. It did not include observation of the Child in the Child's natural learning environment. 34 C.F.R. §300.310(a). Testing was not administered in the Child's native language as required by 34 C.F.R. §300.304(c)(1)(ii) and 34 C.F.R. §300.29

(native language defined as language of parent or language used in the home). The evaluation was not the product of a multidisciplinary team. 22 Pa. Code §14.153(2).

The evaluation was not appropriate in scope to investigate information relevant to the Child's cognitive and sensory development, learning problems, or learning strengths and educational need. The record is preponderant that the IU failed to review existing cognitive data in reports of psychological testing known to it. (FF 11-17, 22- 27, 28-32, 35-39, 41-42, 45-50.) It is not clear that the IU knew about psychological testing done in [the other country] – though its purported ignorance was due as much to its failure to adequately accumulate all relevant documentation from the programs there. Nevertheless, psychological testing was done at the partial hospitalization program while the evaluation was taking place and nothing in the record suggests any excuse for the IU's failure to seek out this possible cognitive functioning data. Similarly, the IU failed to inquire as to the existence of cognitive test data available at the counseling center where the Child received services. Nor did the IU do its own cognitive testing. (FF 31.) Its rationale for not doing so – that it was being done at the partial hospital program – is belied by the fact that the IU never sought to obtain any such testing.

The evaluation was not appropriate in scope or depth to investigate the Child's communication needs and deficits. This area of need was known and was obviously serious, since the Child was not using language at all. (FF 1.) Yet the IU evaluator utilized only one instrument to assess language needs, and did not review documents from previous evaluations. (FF 40-50.) The evaluator did not investigate the Child's functioning at the Head Start, partial hospitalization or counseling services. Ibid.

The occupational therapy evaluation was similarly superficial. The evaluator used a single, non-standardized instrument to establish developmental delays. (FF 52.) Again, existing

documentation was not reviewed. (FF 53.) Although the screening instrument indicated more than 25 percent delay in two realms of functioning, the evaluator did not recommend services. (FF 55, 56.)

Only three instruments were used in the entire evaluation. Each was used for a single area of assessment; multiple instruments were not addressed to the same area of concern. (FF 19.) These instruments were not all normed or validated. (FF 21.) They were not all administered in the Child's native language. (FF 21, 31, 43, 52.) Some were administered through an interpreter under circumstances that did not assure that the interpretation did not invalidate the results. Ibid. The Child was never observed in a learning environment –whether that be the home or the programs in which the Child was receiving services. (FF 19, 38, 46.) There was no consultation with the Parent about the results of the evaluation; thus, the evaluation was a product of the IU staff, not of a properly constituted multidisciplinary team. (FF 24.)

I listened for and did not hear a cogent reason for the IU's failure to obtain and review existing data from other programs, for its failure to do a simple translation of [redacted] language documents such as evaluations and educational plans, and for its failure even to address the Child's cognitive functioning in its evaluation. The law may not require the IU to do a diagnosis in its evaluation, and it does not require classification per se. However, it does require comprehensive, in depth evaluation according to the standards set forth in the IDEA and state regulations, so that educational planning can address all of the Child's educational needs. This was not done, and the evaluation is inappropriate.

PLACEMENT

Parent seems to concede that the IU had no duty to remove the Child from the partial hospitalization program. As the IU states, this was a medical placement, not an educational one,

and was out of the control of the IU. (FF 57-64.) The Parent argues that the IU should have suggested that the Child be placed in a less restrictive setting. However, there is not a preponderance of evidence that a less restrictive placement was appropriate. Therefore I conclude that the IU did not fail to offer an appropriate placement.

FAILURE TO PROVIDE A FAPE

I conclude that the IU failed to offer or provide appropriate special educational services to the Child. Its IEP was based upon an inappropriately comprehensive or searching evaluation, thus raising a strong inference that the programming did not appropriately address all of the Child's educational needs. See, 22 Pa. Code §14.154 (IEP "shall be based on and be responsive to the evaluation … .) This in itself is strong evidence of inappropriateness. However, the record is preponderant that the actual educational plan and services were inadequate.

The IEP goals did not address all of the Child's known educational needs. The goals were not based upon appropriate baseline data, nor were they measureable. The services actually delivered did not address appropriately the Child's two primary known educational needs, the Child's behaviors that impeded learning and the Child's severe delays in communication abilities. The record is preponderant that the Child did not gain any educational benefit from the minimal services provided.

The IEP offered in May 2009 was inappropriate. The goals addressed communication, attention and behavior, but did not address all of the Child's needs. (FF 70, 71, 75, 80, 81.) There were not baselines of behavior, so the goals were not measureable. (FF 65.) The record is preponderant that the IU left programming largely to the partial hospitalization program and actually restricted itself from providing more than a few hours per week of programming. (FF

66-68.) Only one hour per week was provided for speech and language therapy. Only one half hour per week was provided to address all of the Child's academic needs.

The record is preponderant that the Child did not make progress in communication, or motor skills. (FF 82, 91.) Although some progress in behavior was reported, the very fact that the Child remained in that highly restrictive setting demonstrates the paucity of any progress made. (FF 74, 76, 77.) Moreover, there is no evidence that the IU or the partial hospital program addressed the Child's difficulties with transition between activities; indeed, the record shows that this behavioral issue continued to impede learning, because the same behaviors that led to removal from Head Start in March reemerged in September when the Child transitioned to kindergarten. (FF 77.) Therefore, I find by a preponderance of evidence that the IU failed to appropriately address the Child's behavioral barriers to education.

The IU argues that the primary reason for partial hospitalization was behavioral difficulties and that it was therefore absolved of responsibility to address Child's behaviors through early intervention services. I respectfully disagree. The law makes it clear that the IU remains responsible for addressing all education-related needs of the child regardless of location of services. There is no doubt that the Child's behaviors were a substantial barrier to educational benefit, because they had led to removal from the Head Start program. The IU remained responsible to program for behaviors that interfered with learning.

TRANSITION TO KINDERGARTEN

22 Pa. Code sec. 14.154(e) provides that, for children within one year of transition to a program for school age students, the IEP must contain "goals and objectives that address the transition process." The May 2009 IEP contains such goals and objectives. The evidence is not

preponderant that the IU failed to transition the Child. There is ample evidence that the transition planning did occur. There was preponderant evidence that the IU did send documentation to the Parent and followed up to assure that it was received. (FF 83-91.) Although this documentation was in English, there was evidence that the Child's grandmother was able to and often did translate for the Parent, with whom Grandmother lived. Thus, the record as a whole raises the inference that the Parent knew of the need to enroll Child in the local district and seek evaluation, and that the IU provided a transition plan that could have been implemented. The record is clear that the Parent did not take advantage of these services, and that the Child was enrolled in the local school district in August, too late for obtaining an evaluation from the district prior to the start of the school year. (FF 90.)

There was no evidence from District as to what services if any were provided from the beginning of the school year until Dec. 18. If none were provided, I cannot speculate that it was because the IU failed to plan transition or to communicate, in the face of contrary, credible evidence. Therefore, I will not award any compensatory education for that period.

EXTENDED SCHOOL YEAR SERVICES

No evidence was provided that the Child needed ESY services based upon either regression or difficulty with recoupment. (FF 92.) Thus Parent did not bear Parent's burden of establishing a preponderance, and I will not conclude that the lack of ESY services was inappropriate.

CREDIBILITY

I give less weight to the testimony of the Parent with regard to the details of Parent's interactions with the IU personnel. I find that Parent's testimony was somewhat contradictory and also was contradicted by other credible testimony with regard to the amount of documentation that Parent provided to the IU and the details of what was said and when. (NT 846-894.) I do not find a lack of credibility, however. Rather I attribute these contradictions to the passage of time and the vagaries of human memory.

I also give very limited weight to the testimony of the speech and language evaluator, whose testimony was characterized more by a lack of memory that by actual memory for the events at issue here. The evaluator's lapses of memory were so numerous that I was constrained to question the reliability of that witness' entire testimony.

I give credence to the remaining witnesses. On the whole I found the other IU witnesses to be forthright and without overt self serving motivation.

COMPENSATORY EDUCATION

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

Compensatory education is an appropriate remedy where a local educational agency (LEA) knows, or should know, that a child's educational program is not appropriate or that he or

she is receiving only trivial educational benefit, and the LEA fails to remedy the problem. B.C., 906 A.2d at 648; M.C. v. Central Regional School District, 81 F.3d 389 (3d Cir. 1996). Such an award compensates the child for the period of time of deprivation of special education services, excluding the time reasonably required for an LEA to correct the deficiency. Id.

Here, the relevant period is from the first date on which the IU had notice of the Child's potential eligibility for services, February 23, 2009, to the date on which the Child received an evaluation from the local school district, December 18, 2009. I conclude that the IU failed to provide a FAPE during this period of time, and that this failure merits substantial compensation. The record does not provide any guidance as to the amount of services that would have been appropriate for the Child, but it does show preponderantly that the Child was receiving daily services from partial hospitalization that addressed at least partially the Child's behavioral issues. In view of this and the Child's profound needs for intervention, especially in the areas of communication, occupational therapy, behavior and readiness for kindergarten, and the almost complete failure of the IU to address those educational needs, I award one half day of compensatory education for every day on which the IU was open as shown on its published calendar for the period May 8, 2009 to August 2009.

I accord a reasonable period for discovery and provision of services. Here, although the IU had sixty calendar days to produce an evaluation, it also had notice that there was an existing IEP from [another country], thus placing the IU on notice that it should continue the services set forth in that document. I conclude that the IU took immediate action to initiate its evaluation and provide those services that it could discern from the [redacted] language IEP. Balancing these equitable considerations, and considering the unsettled placement of the Child during the sixty day evaluation period, I accord the full period to the IU in mitigation of the compensatory

education award. Therefore, compensatory education will be due to the Child beginning on May 8, 2009.

CONCLUSION

I conclude that the IU failed to provide an appropriate evaluation and FAPE to the Child. Therefore, I award compensatory education to the Child. Any claims regarding issues that are not specifically addressed by this decision and order are denied and dismissed.

ORDER

1. The IU did not fail to perform its Child Find obligations during the period of time beginning March 30, 2009 to December 18, 2009, by failing to identify the Child as a child with a disability due to diagnoses of Intellectual Disability and Autism, scattered cognitive functioning, sensory integration issues, auditory processing issues, a gap between achievement and cognitive ability or behaviors that impede learning.

2. The IU failed to provide an appropriate educational evaluation during the period of time beginning February 23, 2009 to the first day of the 2009-2010 school year of the school district in which the Child is now enrolled, by failing to evaluate appropriately the Child's suspected disabilities and educational needs due to diagnoses or suspected diagnoses of Intellectual Disability and Autism, scattered cognitive functioning, sensory integration issues, auditory processing issues, a gap between achievement and cognitive ability and behaviors that impede learning.

3. The IU did not fail to offer an appropriate placement to the Child.

4. The IU failed to offer appropriate educational services during the period of time beginning February 23, 2009 to the first day of the 2009-2010 school year of the school district in which the Child is now enrolled, by failing to address all of the Child's educational needs appropriately.

5. The IU did not fail to offer appropriate transitional services for the Child's transition to school age.

6. The IU did not fail to offer appropriate extended school year services to Child.

7. The hearing officer will not order an IEE based on equitable considerations or based on a present need for evaluation.

8. The IU is hereby ordered to provide compensatory education to the Student in the amount of one half program day of compensatory education for every day on which the IU was open and providing programming, as shown on its published calendar for the period May 8, 2009 to the first day of the 2009-2010 school year of the school district in which the Child is now enrolled.

9. These hours shall take the form of appropriate developmental, remedial or enriching instruction or services that further the Child's attainment of age appropriate skills in all educationally relevant domains. These hours must be in addition to the then-current IEP and may not be used to supplant the IEP. These hours may occur after school, on weekends and/or during the summer months, when convenient for the Child and the family, and may be utilized after the Child attains 21 years of age. The cost for these hours shall not exceed the hourly cost of salaries and fringe benefits for qualified professionals providing similar services at the rates commonly paid by the IU or its contractors.

William F. Culleton, Jr. Esq.

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

June 11, 2011