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: R.P.

Date of Birth: [redacted]

ODR No. 01919-10-11-AS

CLOSED HEARING

Parties to the Hearing:	Representative:
Parent[s]	Benjamin D. Geffen, Esquire Public Interest Law Center of Philadelphia 1709 Benjamin Franklin Parkway, 2d Floor Philadelphia, PA 19103
School District of Philadelphia 440 North Broad Street, Suite 313 Philadelphia, PA 19130	Heather L. Matejik, Esquire Office of General Counsel 440 North Broad Street, Suite 313 Philadelphia, PA 19130
Dates of Hearing:	March 11, 2011; April 5, 2011; May 16, 2011
Record Closed:	June 13, 2011
Date of Decision:	June 28, 2011
Hearing Officer:	William F. Culleton, Jr., Esquire

INTRODUCTION AND PROCEDURAL HISTORY

Student is an eligible resident of the School District of Philadelphia (District), and attended a District elementary school at all relevant times. (NT 12-14.) Student is identified with Other Health Impairment due to Attention Deficit Hyperactivity Disorder (ADHD), pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA). Ibid. The Parent requested due process alleging that the District had failed to comply with its obligations under the IDEA and section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (section 504), specifically alleging Child Find violations, failure to provide a free appropriate public education (FAPE) to Student, and failure to include Parent in the planning process for an Individualized Education Program (IEP).[1] The District asserts that it has evaluated Student timely and appropriately, and offered a FAPE with full participation of the Parent.

The hearing was conducted in three sessions and the record closed upon receipt of written summations. I conclude that the District has complied with its legal obligations to Student and Parent, and no compensatory education will be ordered.

ISSUES

1. Do the IDEA limitation of action provisions bar Parent's complaints about District action or inaction from October 1, 2007[2] to December 30, 2008[3], due to failure to request due process within two years of Parent's knowledge or notice during that period of time?

[1] Parent requested an independent educational evaluation and prospective relief; however, the parties reached settlement on these issues during the course of the due process hearings, and I will not reach them as they are moot. (NT 17.)

[2] Parent's counsel specified this as the beginning of the period for which Parent was requesting relief, presumably based upon the date of the first section 504 plan offered to Parent for Student. (NT 310; S-14 p. 1.)

[3] The end point of this period is two years prior to the date upon which Parent actually filed for due process alleging failure to identify and provide a FAPE. The IDEA limitation period did not bar Parent from complaining of any District action or inaction occurring after that date because the complaint, filed on December 30, 2010, was filed within two years of Parent's knowledge or notice of any such event.

2. Prior to June 20, 2009[4], did the District fail to comply with its Child Find obligations under either the IDEA or section 504, inter alia by failing to evaluate Student properly, failing to provide appropriate educational services, or denying participation by Parent?

3. During the period prior to and including March 11, 2011, did the District fail to provide a FAPE to Student under either the IDEA or section 504, with regard to reading, writing, mathematics, behavior impeding learning, or attention?

4. Did the District fail to allow Parent to participate appropriately in the educational planning process for Student during the period from October 1, 2007 to March 11, 2011?

5. Should the hearing officer order the District to provide compensatory education to Student for all or any part of the period prior to March 11, 2011?

FINDINGS OF FACT

LIMITATION OF ACTION

1. In 2005, Parent received procedural safeguards from District personnel. (NT 198-199, 202-203; S-31, 43.)

2. District personnel met with Parent on October 5, 2007 to discuss Student's behavior and strategies to assist Student in class. (NT 246-248; S-29 p. 4.)

3. On October 16, 2007, District personnel and Parent entered into a service agreement pursuant to section 504, which provided accommodations at school due to ADHD, including preferential seating, peer tutor to assist with organizing materials and copying assignments, opportunities for physical movement, agenda book for communication with Parent, and behavioral intervention. Teachers also provided supplemental books and extended time. (NT 43-46, 277-278; S-22, 35.)

4. The District personnel did not provide Parent with a copy of procedural safeguards at the meeting in October 2007 when the section 504 plan was discussed. Parent was unaware that the IDEA and section 504 limited the time within which a Parent could request due process. (NT 122-133, 185-187, 214-215; P-26.)

5. District personnel did not hold an informal conference with parent within ten days after Parent received the initial section 504 plan. (NT 210-212.)

6. As of October 2007, Parent was aware that Parent could file for due process if dissatisfied with the services offered by the District to the Student. (NT 186-187, 198-203; S-31.)

[4] This is the date upon which the District provided to Parent the evaluation report identifying the Student under the IDEA. (S-13 p. 1.)

7. District officials notified Parent by telephone and written notice of Student's disciplinary violations on several occasions between February 2008 and September 16, 2008, (NT 45, 48-53, 55-56, 91-94, 91-101, 105-110, 178-179; S-1 p. 25-34.)

8. As of April 30, 2008, Parent was dissatisfied with the accommodations provided to Student in school. (NT 56, 63-65, 68-69; S-26.)

9. As of April 30, 2008, Parent was aware that the law provides recourse for Parental dissatisfaction with District services for children with disabilities, and had been referred to an education law service. (NT 56-60, 88-89; S-26 p. 4.)

10. Parent made attempts to discuss Student's needs with District personnel prior to December 30, 2008, and District personnel did speak with Parent about Student's needs and school accommodations prior to November 2008. (NT 100-101, 171, 173, 175, 177, 180-182, 188-189, 192-195, 226-236, 250; S-18.)

11. District staff represented to Parent that the section 504 accommodation plan was being followed; however, one element of that plan, the peer tutor, was not being followed consistently. Although there was no formal behavior chart, there was documentation of behavior and feedback to parent on Student's behavior. In some classes, there was no agenda book, but there was a daily report. (NT 115-116, 213, 224-225, 280-283, 286, 291-292, 566-568, 580-583.)

12. District staff told parent that the section 504 plan would expire in one year. (NT 242.)

13. In November and December 2008, Parent suffered two strokes that required hospitalization and inpatient rehabilitation, with subsequent speech disability for about six months. (NT 71-73; P-22 p. 1.)

14. Subsequent to Parent's strokes, Student's aunt assisted Parent with Student's care. (NT 391-393; P-22.)

15. On or about April 1, 2009, Parent conveyed a letter to District personnel, indicating an intention to request due process, and expressing dissatisfaction with the District's response to Student's needs as a child with a disability during the 2007-2008 and 2008-2009 school years, specifically with regard to failure to identify Student under the IDEA, failure to provide appropriate accommodations to Student, and failure to address Student's needs with regard to behavior and organization. (NT 58-60, 78-89; S-16.)

CHILD FIND

16. Student was diagnosed with ADHD in 2003. (S-41 p. 2.)

17. District personnel evaluated Student in 2005 and found Student not to be a child with a disability. (S-41 p. 2.)

18. Student's grades were passing in the 2007-2008 school year; Student was performing at or near grade level in reading, writing and mathematics. (S-28, 41.)

19. In the 2008-2009 school year, Student experienced persistent academic and behavioral difficulties from the first marking period. The 504 service agreement was revised by District personnel to provide accommodations for seating, chunking tasks, copying and note taking. A behavior contract was in effect at this time. (S-13.)

20. After receiving the written request from Parent on or about April 1, 2009, District personnel conveyed a Permission to Evaluate form to Parent on or about April 17. Parent returned the form with signature dated April 24, 2009. (NT 709-710, 713; S-15, P-18.)

21. In May and June 2009, the District evaluated Student and found Student to be achieving below grade level, with deficits in reading and writing fluency, vocabulary and mathematics. Student was found to need special education services to address inattention, organization and fluency deficits, as well as behavior control. The District offered a proposed evaluation report, identifying Student with Other Health Impairment, dated June 2, 2009, and delivered the report to Parent on June 20, 2009. (S-11, 13.)

22. The District offered to discuss the proposed evaluation report with Parent at an IEP meeting convened in July 2009, but Parent arrived over two hours late for the meeting and did not want to discuss it. (NT 492-496, 501-505, 511-513, 643, 649, 669-670.)

FAPE

23. From the beginning of the 2008-2009 school year to March 11, 2011, Student exhibited behaviors that interfered with learning, including aggressive and defiant behaviors that led to suspensions and missed school work, frequent inattention and off-task behavior, disorganization and failing to turn in assignments and being disruptive. These behaviors became more problematic after January 1, 2010. (NT 288-289, 390-392, 411; S-1 p. 1 to 27, S-3, S-13 p. 1, S-25 p. 2, S-30.)

24. In the first marking period of the 2008-2009 school year, District personnel attempted to discuss Student's performance with Parent but Parent was uncooperative. (NT 422-430.)

25. In the 2010-2011 school year, classroom interventions were ineffective to address Student's behaviors and poor organization and study skills. (S-7, S-25 p. 2-3, S-28 p. 3-4.)

26. The District offered an IEP, based upon the June 2009 evaluation report, providing for supplemental learning support. Goals addressed vocabulary, mathematics operations, and on-task behavior. Specially designed instruction included additional time for assignments, graphic organizers, simplified directions, manipulatives, chunking assignments, cooperative groups, calculators, decoding and reading of mathematics assignments, allowing oral response, positive reinforcement, choice of activities and repetition. (S-11.)

27. In July 2009, the District offered an amended IEP that included objectives addressing writing fluency, fractions in science class, making change in a store and decision making. Specially designed instruction was added, including a daily report or communication book, use of a squeeze ball, and study carrel. Related services were added in the form of one weekly counseling session as requested. (NT 516-527; S-12.)

28. In July 2009, Parent refused to sign the offered IEP. Regular education interventions continued to be provided through CSAP Tier II, including small group instruction for reading, vocabulary list, daily report to Parent, extended day, remedial mathematics program, preferential seating, repetition of directions, peer support and alternate texts. (NT 376-381, 398-399, 414-416, 419, 546, 588-589, 591-600, 613-616, 629-630; S-7.)

29. Parent continued to fail or refuse to cooperate with District personnel in the 2009-2010 and 2010-2011 school years. Parent never signed the offered IEP. Parent began refusing to sign any documents sent to Parent by District personnel, and referring all such inquiries to Parent's new attorneys. (NT 516-530, 552-555, 560-563, 570-580, 614-615, 617-629, 633, 638-641, 647, 682-683, 792-795; S-1.)

PARTICIPATION OF PARENT

30. From October 2007 through March 2011, Parent routinely entered the main school building of Student's elementary school without asking for accommodations due to mobility impairment. (NT 190-192, 358-362, 407-409, 595, 602, 705-707.)

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.[5] 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

[5] 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).

relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence[6] 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.[7]

LIMITATION OF ACTION[8]

The IDEA, 20 U.S.C. 1415(f)(3)(C), provides:

> (C) Timeline for requesting hearing
>
> A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint … .

[6] 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.

[7] I apply this rule to section 504 issues as well. In general, the proponent of a proposition must bear the burden of its proof. In re Morrison - Wesley, 946 A.2d 789, 797 (Pa. Cmwlth. 2008); Schaffer, above.

[8] While the bulk of Parent's claims that are subject to a limitations analysis are brought under section 504, I apply an IDEA analysis to the limitations issue for these claims as well. Since IDEA provides the most closely analogous limitation period, the IDEA's limitation period applies to section 504 claims. P.P. v. West Chester Area School Dist., 585 F.3d 727 (3d Cir. 2009).

This section provides a two year "look forward" limitations period for filing a due process complaint notice, which begins when the filing party "knew or should have known" of the events giving rise to the claim asserted in the complaint notice. Therefore, to establish its affirmative defense, the agency must prove the above stated "date" of parental knowledge or notice – the "knew or should have known" (KOSHK) date. See J.L. v. Ambridge Area School District, 2008 WL 2798306, *9-10 (W.D. Pa. 2008)(burden on movant to establish IDEA limitation of action as affirmative defense). If the District can prove that Parent failed to file for due process within two years of the KOSHK date, Parent is precluded from receiving a hearing on any issues as to which Parent waited too long to file.

1. What Constitutes Knowledge or Notice

The IDEA is specific as to what parental knowledge or notice begins the two year limitation period. The statute uses the word "action". 20 U.S.C. 1415(f)(3)(C). The "action" referred to is that which "forms the basis of the complaint". Ibid. Reading this language in context with the operative subsections of IDEA section 1415, I conclude that this word "action" refers to the statutory clause found in the provisions for prior written notice: "initiate or change … the identification, evaluation, or educational placement, or the provision of a free appropriate public education to the child." 20 U.S.C. §1415(b)(3)(agency initiation or change requiring written prior notice); 20 U.S.C. §1415(c)(1)(A), (B)(characterizing agency initiations or changes as "action[s]"); 20 U.S.C. §1415(b)(6)(A)(agency actions subject to complaint and request for due process); 20 U.S.C. §1415(b)(6)(B)("alleged action" subject to due process as read in pari materia with 20 U.S.C. §1415(b)(6)(A)). The regulations similarly equate the "actions" requiring prior written notice, 34 C.F.R. §300.503, with those that can be the subject of a due process complaint. 34 C.F.R. §300.507.

Thus, I conclude that the limitation period begins to run on the date on which the parents had knowledge or notice that the agency either initiated or changed – or failed to initiate or change – its identification, evaluation, placement or provision of FAPE to the child. Conversely, I find no language in the statute that suggests that the limitation period begins to run only when parents discover other elements of their formal "cause of action" such as the illegality of any agency actions. Thus, I do not subscribe to the view held by others, including esteemed colleagues, that the IDEA's statutory concept of knowledge or notice is coextensive with the traditional common law notion of "discovery". See generally, Vitallo v. Cabot Corporation, 399 F.3d 536, 538 (3rd Cir. 2005).

In the present matter, the evidence is preponderant that, from October 1, 2007 to December 30, 2008 (the disputed period of time for limitations purposes)[9], Parent knew or should have known what services the District was providing to Student to address Student's needs, and that those services were unsatisfactory.[10] Parent admitted to discussing Student's needs and the District's services with District personnel on numerous occasions during this period of time. (FF 1-3, 7, 10.) District witnesses confirmed that meetings and conversations took place, and that numerous written notices were sent home to Parent. (FF 10.) Thus, Parent was aware of the District's actions and inactions regarding Student during that period of time.

[9] The end point of this period is two years prior to the date on which Parent actually filed for due process alleging failure to identify and provide a FAPE, as noted above.

[10] Parent argues that Parent had no knowledge of a violation of section 504, or of the existence of a limitation period for Parent's claims. (NT 78-79, 214.) This is not the legal test. IDEA requires only knowledge or notice of the District's action or inaction that forms the subject of the due process complaint, as discussed above. Although the failure to provide information as to the limitation period in the form of procedural safeguards may in some circumstances prevent a parent from filing in a timely fashion, thus triggering the operation of the exception for failure to provide information, I conclude that it did not prevent Parent from filing timely in this matter, because Parent was aware of Parent's right to file for due process within the disputed period of time. (FF 6, 9.) Parent also knew about the right to file for due process and obtained legal representation well within the two year statutory period allowed by law to preserve Parent's claims arising between October 1, 2007 and December 30, 2008, (FF 15); Parent would have had between October 1, 2009 and December 30, 2008 to file a due process request for any District action or inaction of which Parent knew or should have known during the disputed period.

Consequently, for every day during the above period of time, the KOSHK date for Student was identical to the date on which the District allegedly failed to identify Student or provide Student with a FAPE. For each of these days, the record demonstrates that Parent failed to file a request for due process until more than two years after that KOSHK date. Thus, Parent's claims for all of those dates are barred by the IDEA limitation period, unless Parent can prove that one of the two exceptions to the IDEA limitation period applies. I conclude that neither exception applies.

2. Exceptions for Misrepresentation and Withholding of Information

The IDEA limitation period is subject to only two explicit exceptions, set forth at 20 U.S.C. §1415(f)(3)(D):

> (D) Exceptions to the timeline
> The timeline described in subparagraph (C) shall not apply to a parent if the parent was prevented from requesting the hearing due to—
>
> (i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or
> (ii) the local educational agency's withholding of information from the parent that was required under this subchapter to be provided to the parent.

Like parental knowledge and notice, the application of these exceptions requires a "highly factual inquiry." P.P. v. West Chester Area School Dist., 557 F.Supp.2d 648, 660, aff'd, 585 F.3d 727 (3d Cir. 2009). Once the agency has proven that the Parents failed to file for due process for more than two years after knowledge or notice of the relevant agency actions, the Parents must assert facts in avoidance of the limitation period. J.L. v. Ambridge Area School District, 2008 WL 2798306, *9-10 (W.D. Pa. 2008).

While parents seeking the application of these statutory exceptions are required to prove agency behavior such as misrepresentations or withholding, they must also show that such

behavior "prevented" them from filing for due process. School District of Philadelphia v. Deborah A., 2009 WL 778321 at *4, aff"d, 2011 WL 1289145 (3d Cir. 2011). Thus, the exceptions will not apply if there is proof that Parents could not have been misled or dissuaded from filing timely, due to any alleged misrepresentations or withholding of information. See, e.g., El Paso Independent School Dist. v. Richard R., 567 F. Supp. 2d 918, 945 (W.D. Tex. 2008), vac. in part on other grounds, 591 F. 3d 417 (5th Cir. 2009) (provision of procedural safeguards notice may defeat assertion of exception).

I conclude by a preponderance of the evidence that the Parent has failed to show any misrepresentation or failure to provide information that prevented Parent from filing in a timely manner. (FF 4, 5, 11, 12.) As noted above, Parent was in frequent communication with District personnel regarding the Student, and freely expressed dissatisfaction with District services. Although there was some evidence that procedural safeguards were not provided at every juncture of the educational planning process, this did not prevent Parent from seeking due process. (FF 4.) Parent did receive procedural safeguards at some point while Student was at the elementary school, (FF 1); the record shows preponderantly that Parent knew that due process was available during the period in dispute. (FF 6, 9, 15.) Parent knew to seek legal counsel during this period and even communicated to the District the intention to request due process within the time allowed by the IDEA for filing with regard to District actions or inactions that occurred during the disputed period. (FF 15.) Parent not only was advised by counsel but also discussed Parent's rights with medical service providers familiar with special education, and those providers referred Parent to counsel. (FF 9.)

In reaching this conclusion, I weigh the testimony of Parent on the extent of Parent's knowledge of the available legal recourse. Parent's testimony under oath on this point was

contradictory, and its reliability is reduced. Thus, I give it reduced weight. Given the documentary evidence strongly indicating Parent's understanding of the availability of due process well within the two years in which the IDEA would have permitted Parent to file for the disputed period of time, I find that the record is preponderant that Parent was aware of the available legal recourse and failed to exercise it.

Parent also argued that Parent's ability to file within two years for the disputed period was hampered by two strokes suffered during that period. (FF 13, 14.) I find to the contrary. The record is preponderant that, after suffering those strokes, and before the disputed period ended, Parent knew of Parent's dissatisfaction, knew of the availability of due process, and nevertheless failed to request due process until after that disputed period. (FF 6, 8.) Thus, the Parent's unfortunate and damaging medical event did not prevent Parent from requesting due process in a timely fashion. Any period of disability suffered as a result of these medical injuries would not toll the limitation period, because common law equitable tolling is not available under the IDEA. P.P. v. West Chester Area School Dist., 585 F.3d above at 736 (reasoning that "tolling principles that affect the application of state statutes of limitations would presumably not affect the IDEA statute of limitations, with its express exceptions to the limitations period.")

CHILD FIND

The District is obligated to identify, locate and evaluate all children with disabilities living within its boundaries. 20 U.S.C. §1412(a)(3)(A). Parent argues that the District failed to identify Student in a timely fashion between December 30, 2008, the beginning of the period allowed by the IDEA limitation period, and June 20, 2009, when the District identified the Student. Parent also alleges that there were procedural deficiencies in the evaluation process that

constituted a Child Find violation. (FF 20.) I conclude that these claims are not supported by a preponderance of evidence and I therefore deny these claims.

Contrary to Parent's characterization, District personnel were not asleep at the switch as Student advanced through the elementary grades. Student was in the District's regular education screening and differentiation program, called CSAP, from first grade on, and this program requires review and evaluation of the effectiveness of its regular education interventions. (FF 2, 3, 28.) The District evaluated Student in 2005 and found Student to be ineligible for special education, though Student remained in the CSAP program. (FF 1.) When Student's performance fell off, the District responded by providing Student with a section 504 service agreement for the 2007-2008 school year, with further accommodations. (FF 3.) The evidence shows that the Student's marks were average to good in that school year, so there is no evidence of any red flags that would have alerted the District to the need for more intervention. (FF 18.)

Those red flags appeared during the 2008-2009 school year, but the record is ambiguous as to when they appeared. (FF 19.) Student's behavior was problematic in the first marking period, but not dramatically so; rather, behavioral incidents became more prominent in frequency and intensity after January 1, 2009 – after Parent suffered from two debilitating strokes. (FF 23.) This was also after Student had received failing marks for the first marking period – an unusually complete record of failure for a Student who was used to success at school, and for a Parent who demanded it. I conclude that the District was on notice that the Student was in need of greater intervention after the first report card, in November and December 2008. At that point, the District's personnel should have moved to evaluate the Student: Student was known to have a disability recognized by the IDEA, and now the District was on notice that Student's progress in school was seriously compromised. Given the Student's previous success with the existing

supports – CSAP and the 504 accommodations – I find that the District was on notice that student needed more intervention when the poor marks were followed by an escalation of behaviors that interfered with Student's own learning, by the end of January 2009.

By a preponderance of the evidence, I conclude that the District did react to Student's declining achievement in the 2008-2009 school year. In addition to numerous attempts to consult with Parent, District personnel revised the section 504 plan to provide for greater supports. (FF 19.) Unfortunately, these steps did not succeed, and Student continued to fall behind. By April, Parent demanded an evaluation, and the District proceeded to perform one. (FF 20-22.) In light of this sequence of events, I find no District failure to comply with its Child Find obligations.

Contrary to Parent's argument, there is no evidence that the Parent made more than one request for evaluation in writing, as required by Pennsylvania law, 22 Pa. Code §14.123(c), during the relevant period allowed by the IDEA limitations provision. Parent made one written request in April 2009, near the end of a school year in which the Student had exhibited serious academic and behavioral decline. There was some indirect and unreliable hearsay evidence that Parent made oral requests for evaluation prior to this time, (S-16 p. 1, S-25 p. 6, 7, S-26, S-29 p. 3); however, I find that the record is not preponderant that the Parent made such requests during the period allowed by the IDEA limitation provisions, such that the District's personnel were obligated to provide a Permission to Evaluate form, 22 Pa. Code §14.123(c). Given this record, I cannot conclude that the District failed to investigate Student's eligibility for special education in a timely fashion.

Parent argues that the evaluation in June 2009, that was performed in response to Parent's written request, was not an adequate response because, 1) the Permission to Evaluate was sent to

Parent more than ten days after receipt of the Parent's letter requesting an evaluation; and 2) the evaluation was never finalized. (FF 20, 21.) While these procedural violations are supported by a preponderance of the evidence, I do not conclude that these procedural violations vitiate the District's evaluation for purposes of its Child Find obligation. The District's evaluation would have been delayed only about seven days because its Permission to Evaluate was sent to Parent late; yet, the evaluation was completed within the regulatory timeframe of sixty days from receipt of permission. Thus, the procedural violation did not deny any identifiable substantive rights. The failure to finalize the evaluation (by discussing it with Parent and getting it signed) was due to the timing of the evaluation request, that led to an IEP meeting in the summer to discuss it, the intervention of counsel, and the Parent's lateness at the meeting scheduled to finalize the evaluation. (FF 22.) The District offered to identify the Student and provided a draft IEP. Thus it substantially performed its Child Find obligation to this Student.

FAPE

The IDEA requires that a state receiving federal education funding provide a "free appropriate public education" (FAPE) to disabled children. 20 U.S.C. §1412(a)(1), 20 U.S.C. §1401(9). 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). In order to properly provide FAPE, the child's IEP must specify educational instruction designed to meet his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. Board of Education v. Rowley, 458 U.S. 176, 181-82, 102 S.Ct. 3034, 1038, 73 L.Ed.2d 690 (1982); Oberti v. Board of Education, 995 F.2d 1204, 1213 (3d Cir. 1993). An eligible student is denied FAPE if his program is not likely to produce progress, or if the program affords the child only a "trivial" or "de minimis" educational benefit. M.C. v. Central Regional School District, 81 F.3d 389, 396 (3rd Cir. 1996), cert. den. 117 S. Ct. 176 (1996); Polk v. Central Susquehanna Intermediate Unit 16, 853 F. 2d 171 (3rd Cir. 1988).

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

The law requires only that the plan and its execution were reasonably calculated to provide meaningful benefit. Carlisle Area School v. Scott P., 62 F.3d 520, (3d Cir. 1995), cert. den. 517 U.S. 1135, 116 S.Ct. 1419, 134 L.Ed.2d 544(1996)(appropriateness is to be judged prospectively, so that lack of progress does not in and of itself render an IEP inappropriate.) Its

appropriateness must be determined as of the time it was made, and the reasonableness of the school district's offered program should be judged only on the basis of the evidence known to the school district at the time at which the offer was made. D.S. v. Bayonne Board of Education, 602 F.3d 553, 564-65 (3d Cir. 2010).

The evidence is preponderant that the Student's academic progress declined precipitously, beginning in the first marking period of the 2008-2009 school year, and continuing through March 11, 2011, the first hearing date in this matter. There is no doubt that the Student's attention problems and consequent challenging behaviors contributed greatly to this decline, becoming somewhat challenging in the first marking period of the 2008-2009 school year, and escalating markedly after January 1, 2009. Thus, the record makes clear – and it is undisputed – that the Student failed to receive meaningful educational benefit during this period of time.

It does not follow, however, that the District failed to comply with the law. It is clear that the IDEA requires the District to offer and implement an educational plan that is reasonably calculated to provide meaningful educational benefit to a child with a disability; however, in this case the District was prevented from doing so.

As discussed above, the District moved to modify its interventions when it became clear that they were not working. It subsequently evaluated Student, identified Student, and offered a placement of supplemental learning support. (FF 26-29.) This offer came at the end of the school year, and by then, Parent was dealing with the District through retained private counsel, as was and is Parent's right. These factors led to a meeting scheduled in July 2009, at which the District was prepared to both offer its evaluation report and offer both placement and program to address the Student's problems in school. However, Parent arrived at the meeting over two and

one half hours late, and parent and counsel declined to discuss the evaluation and proposed IEP, preferring to focus on other matters of concern between the parties. The parties agreed to schedule another IEP meeting in September 2009, but they were never able to find a common date for the meeting, despite repeated efforts by District personnel. (FF 22, 28.) After this, Parent became increasingly uncooperative, to the point of refusing to sign routine documents and resorting to hostile and angry language. (FF 29.)

Thus, Parent never approved either the evaluation or the proposed IEP. Legally, the District was unable to provide special education services. 34 C.F.R. §300.300(b)(3). Thus blocked from intervening in an appropriate way, District personnel continued to provide CSAP interventions similar to those in the section 504 plan, which continued to be inadequate.[11] Under these circumstances, I cannot conclude that the Student's lack of progress was due to the District's unwillingness to comply with the law. On the contrary, I conclude that the District offered to provide special education services that were reasonably calculated to provide meaningful educational benefit to the Student.

In reaching this conclusion, I have weighed the testimony of the various witnesses. I have found the District's witnesses, the principal, special education director and teachers[12], to be truthful and reliable. I have noted their forthright admissions to flaws in the procedures applied to this matter, and have found their testimony to be consistent with the documentary record. Regarding material facts, including Parent's lack of cooperation in the 2009-2010 and 2010-2011 school years, Parent corroborated their testimony. In contrast, the Parent's testimony was at

[11] The record was unclear as to whether the section 504 plan itself was continued after parent refused to sign the offered IEP. Consequently, the evidence is at best in "equipoise" and the Parent has failed to carry Parent's burden to prove a violation in this regard.

[12] One teacher also served as an administrator in the last school year. The Parent sought to impeach this witness' credibility by introducing a witness to deny that Parent had used unseemly language toward the teacher-administrator. However, the witness did no more than deny any memory of such unseemly language. I did not find this to be such a direct contradiction as to call into question the teacher-administrator's credibility.

times self-contradictory and equivocating. I noted a tendency to overstate the facts. In key respects relating to the Parent's claims, especially regarding Child Find, the Parent asserted a lack of memory for material transactions – in particular, whether or not Parent ever received a copy of the proposed evaluation report as recorded in the document and consistent with the testimony of District witnesses. In sum, while I credit Parent's overall dedication to Student's wellbeing, I accord less weight to Parent's testimony due to the tendency to embellish and equivocate.

DENIAL OF PARENTAL PARTICIPATION IN EDUCATIONAL PLANNING

Parent argues that the District denied Parent the opportunity to participate in Student's educational planning, as guaranteed by the IDEA. A child is denied FAPE if procedural inadequacies "significantly impeded the parent['s] opportunity to participate in the decision making process." 20 U.S.C. § 1415(f)(3)(E)(ii)(II); see also Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 529 (2007) ("IDEA includes provisions conveying rights to parents as well as to children."). Parent argues that the District denied the opportunity to participate by failing to offer to Parent the opportunity to meet in a [redacted] accessible location for the IEP meeting in the summer of 2009 and other meetings. Parent testified that the two strokes that Parent suffered in November 2008 left parent mobility impaired and unable to attend meetings in the main school building attended by Student, while there was an accessible location nearby.

While this argument is plausible on its face, the record is more than preponderant that Parent never asked for such accommodations. (FF 30.) Moreover, Parent attended meetings at the non-accommodated site after the strokes. There is no evidence that District personnel refused such accommodation. Thus, I conclude that the District's failure to offer a different

location on its own motion did not deny Parent any opportunity to participate in educational planning.[13]

COMPENSATORY EDUCATION

Compensatory education is an equitable remedy, and I must balance the equities in determining the amount of relief. 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. M.C. v. Central Regional School District, 81 F.3d 389 (3d Cir. 1996). Here, I conclude that the District did not fail to remedy the problem; on the contrary, it was obstructed from doing so by Parent's lack of cooperation. Thus, both on legal and equitable grounds, I will not award no compensatory education to Student for the relevant period permitted by the IDEA.

CONCLUSION

I conclude that the IDEA limits the time period for which Parent is entitled to complain to the relevant period of December 30, 2008 to March 11, 2011. Furthermore, I conclude that , during this relevant period of time, the District has not failed to identify Student in a timely fashion, nor has it failed to offer a FAPE. Any failure to address Student's lack of achievement during that period of time is due to parental obstruction; consequently, no compensatory

[13] Parent also argues that the District prevented Parental participation by failing to provide a ten day informal conference to discuss the 2007 section 504 service agreement. The record is preponderant that Parent had numerous informal conversations about the Student's progress after October 2007; thus, I conclude that this alleged procedural default could not have deprived Parent of the participation in educational planning that is Parent's right.

education will be awarded. Any claims regarding issues that are not specifically addressed by this decision and order are denied and dismissed.

ORDER

1. The IDEA limitation of action provisions bar Parent's complaints about District action or inaction from October 1, 2007 to December 30, 2008, due to failure to request due process within two years of Parent's knowledge or notice during that period of time.

2. Prior to June 20, 2009, the District did not fail to comply with its Child Find obligations under either the IDEA or section 504, inter alia by failing to evaluate Student properly, failing to provide appropriate educational services, or denying participation by Parent.

3. During the period prior to and including March 11, 2011, the District did not fail to provide a FAPE to Student under either the IDEA or section 504, with regard to reading, writing, mathematics, behavior impeding learning, or attention.

4. The District did not fail to allow Parent to participate appropriately in the educational planning process for Student during the period from October 1, 2007 to March 11, 2011.

5. The hearing officer will not order the District to provide compensatory education to Student for all or any part of the period prior to March 11, 2011.

William F. Culleton, Jr. Esq.

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

June 28, 2011