

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

DUE PROCESS HEARING

Name of Student: M.S.

ODR #13375/12-13-KE

Date of Birth:
[redacted]

Dates of Hearing:
April 30, 2013
June 24, 2013
June 25, 2013

CLOSED HEARING

Parties to the Hearing:
Parents

Representative:
Jennifer Sang, Esquire
8 Penn Center
1628 JFK Boulevard
Philadelphia, PA 19103

Downingtown Area School District
540 Trestle Place
Downingtown, PA19335

Sharon Montanye, Esquire
Sweet, Stevens, Katz & Williams
331 E. Butler Avenue
New Britain, PA 18601

Date Record Closed :

July 30, 2013

Date of Decision:

August 11, 2013

Hearing Officer:

Linda M. Valentini, Psy.D., CHO
Certified Hearing Official

Background

Student¹ is a teen-aged student who resides in the Downingtown Area School District [District] but dis-enrolled from the District's schools and at the time of the hearing attended a cyber-charter school. Student is eligible for special education pursuant to the Individuals with Disabilities Education Act [IDEA] under the current classifications of learning disabled and other health impaired, and is consequently a protected handicapped individual under Section 504 of the Rehabilitation Act of 1973 [Section 504] as well as the federal and state regulations implementing those statutes.

This matter concerns a due process request brought by the Parents [Parents] who allege that in various ways the District denied Student a free, appropriate public education [FAPE] and who are for this reason seeking compensatory education services for Student, and reimbursement for private evaluations they obtained. The District maintains that during the periods Student was enrolled and attending school, FAPE was provided.

For the reasons set forth below I find for the District.

Issues

1. Did the School District deny Student a Free Appropriate Public Education during the periods of enrollment beginning on January 3rd, 2011 through to the most recent withdrawal from the district? Specifically,
 - a. Did the District fail to give Student an appropriate comprehensive evaluation in the areas of speech/ language, occupational therapy, autism spectrum disorder, and/or behavior;² and/or
 - b. Did the District unilaterally and inappropriately remove speech and language therapy from Student's IEP without a discussion by the IEP team; and/or
 - c. Did the District fail to provide Student with an IEP that provided appropriate academic goals; appropriate specially designed instruction to address issues of anxiety, attention deficits, and/or social delays^{3, 4}; and/or
 - d. Should the District have conducted an FBA rather than filing for truancy against the Parents, and should the FBA have then resulted in an

¹ This decision is written without further reference to the Student's name or gender, and as far as is possible, other singular characteristics have been removed to provide privacy.

² Assistive technology evaluation was also included in Parents' statement of the issues at the start of the hearing, but will not be addressed in this decision as slight mention of this area was made subsequently.

³ Transition planning was also included in Parents' statement of the issues at the start of the hearing, but will not be addressed in this decision as slight mention of this area was made subsequently.

⁴ Speech/language appeared in this area of the issues as well but will be addressed under the heading 1 [b].

attendance plan that included adjustments such as smaller class size;
and/or

- e. Did the District inappropriately deny Student access to instruction, specifically, homebound instruction?
2. If the District denied Student FAPE for any or all the designated periods of enrollment in any or all the enumerated ways, is Student entitled to compensatory education, and if so in what form and in what amount?
3. Should the District be required to reimburse the Parents for the private evaluations they obtained?

Stipulations

With regard to the Section 504 claims, the parties stipulated that:

Student is disabled under the act.

Student is otherwise qualified to participate in school activities.

The District receives federal financial assistance.

Additionally, the parties stipulated that:

Exhibit P-41 is a service log from a named therapist from Pediatric Services, and contains information related to Student's speech and language services.

All emails contained in the parties' exhibit binders are authentic.

Student is a resident of the District.

Student's birthdate is [redacted for privacy]

Findings of Fact

Background

1. Student is a resident of the District who was identified as eligible for special education in 3rd grade, and remains eligible for special education under the current classifications of Other Health Impaired [OHI] due to Attention Deficit Hyperactivity Disorder [ADHD] and Specific Learning Disability [SLD] in reading, written expression and mathematics. [S-5, P-43]
2. During the time the hearing was held, Student was in the 9th grade and attending a cyber-charter school. [NT 84, 382]

After uninterrupted enrollment in District schools from Kindergarten through 5th grade, as of 6th grade Parents⁵ began a pattern of withdrawing Student from the District and then re-enrolling Student in the District. Student was withdrawn from the District as of 12/4/09 in the middle of 6th grade; re-enrolled in the District as of 8/30/10 at the start of 7th grade; withdrawn from the District as of 1/12/11 in the middle of 7th grade; re-enrolled in the District as of 5/9/11 before the end of 7th grade; and withdrawn from the District as of 6/8/12 towards the very end of 8th grade. The pattern is District to Cyber-Charter [A], back to District, to Cyber-Charter [A], back to District, to Cyber-Charter [B]⁶. The Parents turned to cyber-charter schools as a way to coax Student into attending school and because non-attendance was putting Student's skills behind. [NT 420-421, 450, 464-466, S-17, P-2, P-5, P-28]

Evaluation

3. By mid-October of Student's 8th grade year, concerns about attendance problems again began to arise and the District proposed that Student receive a full comprehensive re-evaluation; the Parents indicated their consent by signing the Permission to Re-Evaluate form. [NT 286; S-5]
4. For purposes of Student's re-evaluation the District psychologist utilized the Wechsler Intelligence Scales for Children Fourth Edition [WISC-IV] to assess cognitive functioning, the Wechsler Individual Achievement Test Third Edition [WIAT-III] to assess academic achievement, the Bender Visual-Motor Gestalt Test Second Edition to assess visual-perceptual-motor integration, the Behavior Rating Inventory of Executive Functioning [BRIEF] to assess organizational and other executive skills, and four separate measures of behavior/emotional/social functioning – the Behavior Assessment Scales for Children Second Edition [BASC-II], the KOVACS Children's Depression Inventory, the Revised Children's Manifest Anxiety Scale Second Edition, and the Pierce-Harris Self Concept Scale. [S-5]
5. A speech/language evaluation was provided as part of the District's re-evaluation. [S-7]
6. The Re-evaluation Report was completed on December 15, 2011 and a copy was sent to the Parents. [NT 533; S-5, S-7, HO-3]
7. The evaluation results indicated that Student continued to be eligible for special education; Student's classifications were Other Health Impairment [ADHD] and Specific Learning Disabilities [reading, written expression and mathematics]. [S-5, S-6, S-7]

⁵ The term Parents is generally used in this decision as both parents attended the hearing and jointly requested the hearing. Although Student's mother engaged in most of the interactions with the District she acted on behalf of both parents.

⁶ Student was enrolled in two different cyber-charter schools, here designated as A and B.

8. In addition to the extensive battery of psychological tests administered as part of the re-evaluation, the District psychologist recommended a psychiatric evaluation to explore concerns of panic attacks and depression that were reported by the Parents but not seen in the school environment. [NT 157; S-5]
9. The evaluating psychiatrist met with Student individually and with Student's mother individually, met with relevant school staff, and reviewed Student's records. [S-6]
10. The psychiatrist was informed that at home Student spends a good deal of time in Student's bedroom, and has to be encouraged to come out and participate in family and other types of social activities. [S-6]
11. The psychiatrist was informed that when Student stays home from school Student often sleeps the entire day. [S-6]
12. The evaluating psychiatrist noted that the District was providing Student with a significant number of accommodations without which there was a risk of failing 8th grade. [S-6]
13. The psychiatric report was completed on January 6, 2012. The psychiatrist recommended: that Student be expected to attend school every day and if Student is absent a proper excuse should be obtained; that Student participate in a truancy prevention program; that Student receive intensive mental health system related in-home interventions to address truancy; that the family receive mental health system related family-based services that were deemed to be medically necessary for Student. [S-6]
14. A private psychologist later engaged by the Parents to provide an evaluation endorsed the recommendations that the psychiatrist had made. [NT 900]
15. Although it had provided a comprehensive re-evaluation, the District took into consideration new input obtained by the Parents. On March 26, 2012 the Parents presented the District with a Clinic Visit Note dated February 16, 2012 generated by DuPont Nemours which indicated "Asperger's Syndrome" as Reason for Visit and Pervasive Developmental Disorder as one of eight diagnoses.^{7, 8} The

⁷Asperger's Disorder and Pervasive Developmental Disorder are on the autistic spectrum according to the Diagnostic and Statistical Manual of Mental Disorders Fourth Edition [DSM-IV] which was replaced in May 2013 by the DSM-5 which notes only Autistic Spectrum Disorder.

⁸ The full report from Nemours [HO-2], obtained during the hearing at the hearing officer's request, is a detailed neurological evaluation and *inter alia* notes that Student has "characteristics of pervasive developmental delay". **It is not clear if the Parents ever received a copy of the full report prior to their picking it up at the physician's office on the last day of the hearing; it is certain that the District did not receive it.** The full report was not presented to the District at the March IEP meeting; the document presented was an incomplete Clinic Visit Note. [S-10] .Nemours did not conduct formal testing directly with Student to support an autism spectrum diagnosis, and a standardized inventory [CARS, GARS, Mayes Checklist] was not utilized. The neurologist conducted the evaluation according to standard procedures for a thorough neurological examination, and not using psychological testing is not a flaw; testing as a follow-

District immediately issued a Permission to Reevaluate to conduct the Autism Diagnostic Observation Schedule [ADOS]⁹, and the Parents immediately provided consent. [NT 102-104, 175; S-10]

16. On May 5, 2012, the Parents, in consultation with their child/family lay advocate, withdrew permission for the District to administer ADOS testing because they were concerned about examiner qualifications¹⁰ and concerned that other psychologists would be observing. [NT 135-139; S-14, P-29]
17. The Parents have never since agreed to have the District conduct ADOS testing, even though the District psychologist explained the qualifications of the examiner and the testing procedures to be used in detail. [NT 139, 356]
18. The Parents also revoked consent for the District to contact or speak with Nemours regarding the autism spectrum reference. [NT 348; P-29]

Speech/Language

19. Student arrived back in the District in May 2011 at the end of 7th grade with an IEP from the cyber-charter school; the District implemented this IEP to the end of the school year. The IEP team met in June 2011, one month after Student's re-enrollment, to draft an IEP for the 8th grade school year. In the new IEP, speech therapy was reduced from the two 30-minute sessions weekly that the cyber-charter's IEP provided, to one 30-minute session weekly. The Parents approved this change as per a signed NOREP. [S-3, S-4]
20. For purposes of Student's re-evaluation initiated in October 2011, the assigned speech/language pathologist¹¹ administered a standardized formal comprehensive measure of expressive and receptive language, the Clinical Evaluation of Language Fundamentals Fourth Edition [CELF-4]. With the exception of one subtest all Student's subtests and index scores fell into the Average Range. [NT 691; S-7]
21. In addition to conducting formal testing with a normed instrument, the District's speech/language pathologist obtained input from Student's teachers and Student's Parents. Neither teachers nor Parents reported any specific concerns about Student's speech or language skills. [S-7]

up to the neurologist's examination is necessary for educational and mental health treatment planning. [NT 961; HO-2]

⁹ Considered the current "gold standard" assessment for autism.

¹⁰ The origins of this concern are unclear as administration of the ADOS requires specific training.

¹¹ The District contracts with PTS, an independent agency which employs certified speech/language pathologists.

22. Through speech/language therapy provided pursuant to the IEP, Student had mastered both speech/language IEP goals. [NT 707-711; S-7]
23. As Student had met the IEP speech/language goals, informants had no concerns, and standardized testing revealed average range functioning across the areas tested, the District exited Student from speech/language therapy. The Parents consented to this change and signed the NOREP. [S-7, S-8]
24. Both the child/family lay advocate and the private psychologist acknowledged that Student was not receiving speech and language therapy services during the 2012-2013 enrollment in cyber-school following the final disenrollment from the District. [NT 122, 952]

IEPs

25. Student's mother is certified as a teacher in regular education and special education; she is working towards her Master's Degree in Education. She is currently employed by a cyber-charter school¹² as a family coach which involves home visits, small group teaching, tutoring, and creating and overseeing IEPs. [NT 382-383, 518]
26. When Student re-enrolled in the District in May 2011 near the end of 7th grade Student's pendent cyber school IEP called for itinerant level learning support services and speech/language services. The District implemented this IEP to the end of the school year. [S-3; S-17]
27. The June 7, 2011 IEP was crafted for 8th grade. Under this IEP Student received individual direct instruction from a certified special education teacher twice per 6-day cycle, and speech/language therapy for 30 minutes per week. The Parents approved the IEP. [S-4]
28. Following the December 2011/January 2012 re-evaluation which had included cognitive, achievement, visual-motor, executive functioning, speech/language, behavioral/social emotional and psychiatric components, the IEP team met on January 11, 2012 to develop an appropriate program and placement. [S-8]
29. Under the January 2012 IEP revision Student received direct instruction in reading, written expression and math during the curriculum support period which was increased to four days in a 6-day cycle to be delivered in a small group [7 students] setting. The IEP team determined that this support would be in a small group setting rather than one-to-one to allow for social interactions with peers. [NT 239-244; S-8]

¹² Not the cyber-charter school in which Student was enrolled at the time of this hearing.

30. The IEP team developed goals to address reading, written expression, math and socialization; the goals included baselines and the means for progress monitoring. [S-8]
31. The IEP addressed academic, executive functioning and social/emotional areas through program modifications and specially designed instruction¹³ as follows: attendance monitoring and protocol for work completion, increased wait time for responses, requiring an answer other than “I don’t know”, utilization of the 5-Step writing process, access to computer for in-class writing assignments, assistance in making and checking study aids, preferential seating, visual and verbal prompts when inattentive, reviewing and clarifying directions, assistance in chunking/monitoring assignments, waiver of spelling when spelling is not the primary object of assignment, access to clean copy of teachers’ notes upon request, preview of vocabulary to accommodate for decoding issues, use of calculator unless math unit focuses on learning to calculate, prompting to show all math work, reminders to highlight important parts of word problems, circling of operational sign when doing math problems, extended testing time up to double the time allotted, testing in a separate location to reduce distractions and to allow for questions to be read aloud to Student, word banks with no extra choices for fill-in-the-blank assignments, matching items of no more than 10 items in the set, reduction from four to three choices on multiple choice questions, and formulas provided when needed to compute answers. [S-8]
32. The private psychologist engaged by the Parents to evaluate Student believes that the SDIs offered in the IEP made sense if Student were in school to use them. [NT 892, 894]
33. The Parents approved the Notice of Recommended Educational Placement [NOREP] in agreement with the January 2012 IEP. [S-8]
34. On February 21, 2012 the IEP was revised to include eligibility for Extended School Year [ESY] services specifically to address reading goals. Curb-to-curb transportation was to be provided. Student’s mother endorsed the provisions of this IEP through her initials, 2/21/12. [P-10]
35. On March 26, 2012 another IEP revision meeting was held to increase curriculum support to daily [6 times per cycle]; the individual setting was reinstated. The Parents participated and approved the IEP revision. [NT 104, 244; S-11]

¹³ In an evaluation at Nemours on February 16, 2012 Student told the evaluator that Student “hates the additional support and cannot stand school” and “does not like working with tutors”. [HO-2]

36. Two subsequent IEPs were created – dated June 27, 2012 and August 15, 2012 - after Student had dis-enrolled from the District in the event that Student would re-enroll for the 2012-2013 school year. [S-15; S-18]¹⁴

School Attendance

37. Although December 26, 2011 begins the relevant period in this matter¹⁵, after the winter break Student was absent for all school days up to dis-enrollment on January 12, 2011. After Student re-enrolled on May 9, 2011 Student was absent 5 days from re-enrollment until the end of the school year. In the first part of the 2011-2012 school year absences triggered the District's seeking permission to conduct a re-evaluation, and became more numerous in the second part of the year, with Student being absent a total of 97.5 days for the 8th grade year before again dis-enrolling on June 8, 2012. Student was permitted to attend the District's Summer School 2012 for credit completion. Student did not re-enroll for the 2012-2013 school year. [S-12, S-17]
38. On October 11, 2011, as per an IEP provision, the District began the first part of the Functional Behavior Assessment [FBA] process by interviewing pertinent school staff. The FBA was not able to be completed due to Student's absences. When the December 2011/January 2012 re-evaluation was being conducted the District's psychologist had to call the Parents to be sure Student would be attending on planned testing days. [NT 97-98, 363; S-5, S-8]
39. The District did not attempt to conduct an FBA in the home environment due to previous experiences with parental resistance that a counseling agency working with the District had encountered when attempting to provide services in the home setting around truancy prevention issues with Student's sibling. The District decided to attempt other interventions through an attendance plan. [NT 380, 1024-1025]
40. The private psychologist testified that Student's FBA should be conducted partially in the home to see where the problem is occurring and to see what consequences are reinforcing the school refusal behavior. [NT 902-903]
41. By Parents' report to the District and to various evaluators, Student has experienced generalized anxiety manifesting in somatization since kindergarten; the anxiety reportedly extended to the area of school. [NT 388-393]

¹⁴ These IEPs were created for the 2012-2013 school year if the Parents chose to re-enroll Student in the District. As such, they were not implemented since Student had been dis-enrolled as of June 8, 2012. The appropriateness of these IEPs is not at issue here as they were never implemented and not challenged in the hearing.

¹⁵ Parents filed their original Complaint on December 26, 2012 and an Amended Complaint on January 3, 2013. Because of the winter break, the difference between the two dates is immaterial.

42. Although the Parents reported that Student experiences anxiety, no one on school staff during the timeframe covered in this matter has seen Student appearing anxious except on one occasion. The private psychologist acknowledged that the Parents were the primary observers of Student's anxiety. The teachers had a plan in place were Student to express anxiety. If Student had exhibited anxiety in school an IEP goal would have been created to address it. [NT 157, 269, 279, 936]
43. Throughout the relevant timeframe the District staff and the family continuously communicated about concerns as they arose. [S-29]
44. The February 2012 evaluation from Nemours notes that Student has "unusual sleep habits, often going to bed at 10:00 or 11:00 pm or playing video games well into the morning" and is "usually tired during the day". [HO-2]
45. The IEP team created three different attendance plans in an effort to increase Student's attendance – January 12, 2012, March 26, 2012 and June 27, 2012. [S-18]
46. Pursuant to the psychiatric evaluation of January 2012, which diagnosed Student *inter alia* with an Adjustment Disorder, the District recommended an Intensive Outpatient Program called "The Light Program" [two to three small group therapy sessions for children with difficulties adjusting to middle school] and wraparound services [school and/or home-based behavioral health supports which could have been in place in the mornings when it was time for Student to leave for school]. [NT 194, 223, 398-399, 401, 494; S-6; S-18]
47. The Parents discontinued Student's participation in the IOP after 1½ weeks because the scheduling interfered with Student's reading class.¹⁶ [NT 399]
48. The IEP team made revisions to the IEP to address Student's absences. The District provided individual instruction in areas of need, then changed to small group instruction to encourage socialization. The District attempted to encourage Student's school attendance by offering rewards and by not penalizing Student for assignments turned in late. Teachers and staff took assignments to the guidance department when Student was absent so that work could be sent home and completed. [NT 157, 393, 429, 576, 638; S-11]
49. In order to establish attendance, the District tried exposing Student to gradually longer periods of time in school, but when it came time for Student to attend full days Student again stopped attending. [NT 163-164]

¹⁶ The Parents reported they pursued outpatient therapy for Student and a new medication was prescribed. [NT 516]

50. At the March 26, 2012 IEP meeting which included the child/family advocate, the IEP team again addressed the problem of Student's attendance and revised the IEP by generating another Attendance Plan. The Parents approved the revisions through a signed NOREP. [NT 90-93, 118; S-11, P-16]
51. This Attendance Plan provided the step of Parents calling the assistant principal when Student was refusing to leave the home. However, the Parents only implemented this step of the attendance plan on two occasions. Both times when the assistant principal was called, Student came to school. On the one occasion when the assistant principal came to the home, Student entered school within 30 minutes of the assistant principal's visit. After that visit, the Parents discontinued this intervention. [NT 417, 493-494, 517, 610-611; S-18, P-16]
52. Although the Attendance Plan called for the child/family advocate to telephone Student each night regarding attendance she called only once when Student had attended and did not make further calls to reinforce the behavior. Student resumed having illegal absences through to the end of the school year. [NT 128-131; P-16]
53. The Parents' efforts to get the Student into school comprised escorting Student into school on only six occasions in two years; of those six occasions, two were for scheduled appointments with the school psychologist for testing, and others were for the psychiatric evaluation and PSSA testing. [NT 485-486]
54. Parents reported that they pursued wraparound services. Although the wraparound agency offered an appointment in the summer, the Parents did not follow through with this service.¹⁷ [NT 493; P-29]
55. Before attendance issues became severe, Student earned B's in a regular education co-taught English class during the first and second marking periods of the 8th grade year. The teacher reported Student regularly raised a hand in class to volunteer to participate. [NT 200, 270, 568-570, 574]
56. When Student was in school Student had unprompted age-appropriate peer interactions and Student's social skills were no different than those of same aged peers. When Student attended, Student had friends in school, participated, and sat with a group of friends at lunch. [164-165, 270, 574]
57. Student attended afterschool activities such as a middle school basketball game. [NT. 614-615]
58. At the June 27, 2012 IEP meeting a third Attendance Plan was created which included counseling as well as incentives for attendance. However, Student left

¹⁷Services through an agency had previously been cancelled due to a lack of cooperation from the family. [NT 402, 493, 629-630, 967, 1024-1025]

the District so this third Attendance Plan was not able to be implemented. [NT 158-159, 165, 501, 503; S-12, S-18, P-29]

59. At the June 27, 2012 IEP meeting, the District recommended that Student be retained in 8th grade for the 2012-2013 school year due to absenteeism. However, despite having been dis-enrolled from the District in early June 2012, the District permitted Student to participate in the District's summer 2012 summer school program¹⁸ in order to accomplish credit completion and avoid retention in 8th grade. Student attended 19 out of 20 days¹⁹; completed all grade level assignments, including those involving reading, with minimal assistance; interacted appropriately with the teacher [who had been Student's English teacher during the academic year]; and formed relationships with unfamiliar peers. Student's academic and social functioning in summer school was identical to that demonstrated when Student was present during the school year. [NT 99, 447- 449, 501-503, 524-528, 549, 565-569, 590-592; S-9]
60. The summer school program offered smaller classes, shortened hours, relaxed rules about food and gum in class, and instruction from one of the teachers from the regular academic year. With the exception of the relaxed rules, all other elements noted were offered at some time during the regular school year in order to promote attendance. [NT 448, 524-525, 565-566, 590-593]
61. Although Student had dis-enrolled from the District on August 15, 2012 the District revised the IEP in the event that Student should re-enroll, adding functional skills class two times per cycle along with curriculum support for writing two times per cycle and curriculum support for study skills two times per cycle. Additional goals were added to address and anxiety should it become manifest. This IEP was not implemented as Student had dis-enrolled from the District. [NT 165-166; S-15]
62. On August 14, 2012, in addition to agreeing to a variety of new testing the Parents requested, and agreeing that it would pay the IU to do the testing, the District sought the Parents' consent to do a an assessment that would include a home visit by a Board Certified Behavior Analyst. [S-14]
63. The Parents were cited for truancy violations for the Student, and despite legal representation, were found guilty before a magistrate and fined. [NT 513, 605; S-18]

Homebound Instruction

64. Based on recommendations from the January 2012 psychiatric evaluation that the Student should be required to attend school, in January and in March 2012 the

¹⁸ Student was eligible for Extended School Year [ESY] services as per the March 2012 IEP. [S-11]

¹⁹ Incentives for attendance were not repeating 8th grade and being rewarded with a special family trip.

District put in place and revised two²⁰ different attendance plans to help facilitate Student's attendance along with other supports and services as described in the IEP. [S-6, S-8, S-18]

65. The Parents submitted a form from Student's pediatrician, dated February 29, 2012, on which the pediatrician noted under Description of Disability, "Patient with longstanding history of anxiety disorder, ADHD, PDD being followed by psychologist and neurologist". The handwritten form notes that Student will be homebound for 8 weeks; the number "8" appears to be a correction and has the physician's initials, JJ, printed alongside it. However, in the computer-generated encounter note the physician entered, "filled out form for homebound schooling for 2 weeks". [NT 408-409; S-11, P-13]
66. The pediatrician's request for homebound instruction based on emotional illness was not made by a psychiatrist and was therefore denied by the District. The printed form states, "The signature of a psychiatrist is necessary if homebound instruction is requested for emotional and mental disabilities". [NT 206, 409; S-11]
67. A psychiatric note dated April 17, 2012 appears to be an initial evaluation based on a first visit. The note contains Chief Complaint, History of Present Illness, Past Psychiatric History with Current Medicines, Past Medical History, Allergies, Drug History, Family History, Personal and Social History, Mental Status Examination, Laboratory Data, Assessment, Side Effects of Medication Discussed with Patient and Recommendations. [P-13]
68. Subsequent notes written by the psychiatrist entered onto a form marked Progress Note. These handwritten²¹ notes are dated April 26 [excerpt: parent came alone without patient, concerned about medication side effects, signed form for in home school], April 30, 2012 [excerpt: patient seen for follow up, was in no major distress, still feeling somewhat tired/down, still some off and on anxiety, restless/fidgety], June 12, 2012 [excerpt: patient seen for follow up, in no major distress, said is doing well, is not feeling down or depressed, somewhat fidgety, restless, being homeschooled]. [P-13]
69. Pursuant to the April 26, 2012 session with Student's mother alone, the psychiatrist signed a request for homebound instruction for four weeks indicating under Description of Disability, "patient has ongoing anxiety with difficulty concentrating and is struggling with reading" and noted under Prognosis, "guarded unless there are special accommodations". [P-13]
70. The District denied the request, explaining to the Parents that homebound instruction would be inappropriate because rather than addressing Student's

²⁰ The third attendance plan was created in June 2012 after Student had been dis-enrolled and therefore was not implemented. As Student attended all but one day of summer school, it was not necessary to implement the plan over the summer.

²¹ The notes are semi-legible.

reported anxiety through implementation of the IEP and an attendance plan it would enable Student's anxiety about school, if it existed, to continue and perhaps to increase.²² [NT 202, 213-214, 409-410; P-29]

71. The private psychologist testified that the home is not an appropriate educational setting for Student, and that as a professional he would have limited Student's remaining at home to no more than "a few days" and also opined that "a day or two" is essentially too long for a student to be allowed to remain out of school. [NT 972]
72. The private psychologist testified that if a student received a medical diagnosis of anxiety he would "absolutely not" allow the student to stay home. [NT 978]
73. The private psychologist testified that if a student had a diagnosis of autism he would have "the same response" [as to the question about an anxiety diagnosis] i.e., the student should not be allowed to stay home. [NT 979]

Independent Evaluations

74. The Parents received and reviewed the Re-evaluation Report created by the District, including the speech/language evaluation and the psychiatric evaluation, participated in the IEP meeting that crafted an IEP based on the re-evaluation, and approved that IEP. The Parents did not object to the components of the re-evaluation until a year and a half later when they requested the due process hearing. [NT 533-535; S-8]
75. On July 10, 2012, the Parent requested that Student again be evaluated, this time by the Intermediate Unit, to determine academic levels in reading and comprehension, written and expressive language, executive functioning ability, auditory processing deficits, processing speed, sensory integration dysfunction, anxiety levels, and assistive technology as well as the ADOS. On August 14, 2012, the District responded that it would fund the Intermediate Unit's conducting of these evaluations. [S-14]
76. The Parents did not respond to the District's offer until February 21, 2013, after they had obtained the independent reports for which they seek reimbursement. Although the Parents were working with a trained lay advocate, and the District agreed to fund these IU evaluations in August 2012 after Student had been disenrolled, the Parents represented that they assumed that the District would not pay for these evaluations since Student had been withdrawn from the District. [NT 134; P-35, P-36, P-39]

²² District personnel erroneously explained that special education students were ineligible for "homebound instruction," that "instruction in the home," was for special education students, and that "instruction in the home" was an IEP Team decision. [P-29]

77. The occupational therapy evaluation and the assistive technology assessment were completed in May 2013. [NT 425; S-14, P-39]
78. The Parents engaged a private speech/language pathologist to assess Student. The private speech/language evaluator utilized the Comprehensive Assessment of Spoken Language [CASL] and the Listening Comprehension Test Adolescent Version. She also took a language sample. Her testing was done after Student had been out of the District for over six months doing coursework through a cyber-charter school and not socializing with peers in a school setting. The CASL testing results comported with the District's CELF-4 testing results, showing average range functioning overall. [NT 697, 760-762; S-7, P-35]
79. Although the private speech/language pathologist recommended speech/language therapy for Student, she did not seek out or consider any teacher input from either Student's current cyber-school or teachers who instructed Student in the District to ascertain how Student communicated functionally in a school setting, whether bricks-and-mortar or cyber-school. She likewise did not speak with the speech/language professionals who evaluated student and provided speech/language therapy under District auspices. [NT 699, 800]
80. The private speech/language evaluator testified that if she had input from teachers that did not indicate communication problems, then she would find a student non-eligible for speech/language services. [NT 806-807]
81. The private speech/language therapist testified that she did not understand the IEP goals. [NT 787]
82. The psychologist who conducted the private evaluation did not speak with anyone in the District and could not observe Student in school because Student was enrolled in a cyber-charter school. [NT 950-951, 959-960]
83. In drawing conclusions about the appropriateness of Student's IEPs, other than his direct evaluation of Student, the private psychologist relied solely on input from the Parents and a record review. [NT 951]
84. The private psychologist was not aware that Student's sibling also had truancy issues, but he was aware that there was significant stress in the home regarding the children. [NT 965-968]
85. The psychologist who conducted the private psychoeducational evaluation acknowledged using some outdated assessments, and all assessment instruments the private psychologist used were abbreviated versions or screening versions of the various instruments. [864, 870]
86. The private psychologist chose abbreviated test instruments because he perceived a lack of interest by the Student to participate, whereas the District

psychologist was able to administer a wide array of full-length assessment measures. [NT 870]

87. The private psychologist disagreed with Student's classification as having a specific learning disability, attributing Student's lowered performance on some measures to be a function of Student's not attending school. [NT 883-885; P-34]
88. Although the private psychologist did not use the ADOS, which the District had previously sought to administer, he used several recognized instruments to support a classification of autism, and conducted a records review and direct observation of Student. [NT 881-882, 959-962; P-37]
89. The District did not use the findings from either private report in developing IEPs for Student, as both evaluations were completed approximately seven months after Student had dis-enrolled from the District. The District's last two IEPs, in July and in August 2012, were completed over six months prior to the conducting of the independent evaluations. The independent evaluations were completed after the Parents had filed their due process complaint. [NT 127, 950; P-35, P-36]

Legal Basis

Burden of Proof: The burden of proof, generally, consists of two elements: the burden of production [which party presents its evidence first] and the burden of persuasion [which party's evidence outweighs the other party's evidence in the judgment of the fact finder, in this case the hearing officer]. In special education due process hearings, the burden of persuasion lies with the party asking for the hearing. If the parties provide evidence that is equally balanced, or in "equipoise", then the party asking for the hearing cannot prevail, having failed to present weightier evidence than the other party. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006); *Ridley S.D. v. M.R.*, 680 F.3d 260 (3rd Cir. 2012). In this case the Parents asked for the hearing and thus assumed the burden of proof.

Credibility: During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses". *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003); See also generally *David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009).

The District's witnesses provided testimony that was consistent with documentary evidence, and I found them to be credible. Notably there did seem to be some misunderstanding about the difference between homebound instruction and instruction in the home and the District should consult its legal counsel to be absolutely certain that the terms are clearly understood as they are frequently misunderstood by LEAs as well as parents. In this case the confusion did not affect the outcome of this decision.

As the Parents bore the burden of persuasion, their witnesses' credibility will be examined in more detail as follows:

The Parents offered a child and family advocate who has a master's degree in special education but who, while having taught learning disabled children in Great Britain, has never taught in the United States. The witness has completed a series of classes designed to train and certify lay advocates. The advocate testified as a fact witness. This witness met Student a couple of times, went to one IEP meeting, and telephoned Student once. She had no direct knowledge of any fact relevant to this matter and therefore her ability to supply evidence of weight for Parents' case was minimal.

Student's mother testified. The fact that her children have chronic histories of truancy, and that the Parents would not permit a home FBA for one of Student's siblings, is relevant to the credibility of her testimony about her efforts to get Student to school and undermines her asserting that the District should have done other things, for example a home-based FBA, to get the Student to go to school. Although the mother testified confidently and in detail, her testimony contained many rationalizations, for example, why the Parents did or did not follow through with recommendations regarding promoting Student's attendance, having Student participate in the IOP, and having ADOS testing. It is also noted that when responding to inventories about Student's behavior the mother's negative responses were higher than expected even in the clinical population, leading to the need to examine those scores and use them cautiously. Although the private psychologist testified that he accepted these scores because mother was responding according to what she witnessed, the fact that these instruments were given after the due process hearing had been requested may have influenced responses. [NT 876-881] It is also of concern that despite reports of ongoing anxiety manifested in the home, in recent years Student seems to have only begun seeing a psychiatrist as of mid-April 2012. When balanced against testimony from other witnesses, including the private psychologist and the child/family advocate, the mother's representations were given lesser weight. This finding in no way diminishes the fact that Student's mother is deeply concerned about her child, who presents significant challenges in the family,

The private speech/language pathologist testified. Her credentials were excellent and she was easily qualified as an expert. Given her history of employment in public school settings, it was surprising that she did not seek direct input from Student's previous teachers in the District, and the value of her recommendations for speech/language in-school therapy for 90 minutes per week was thereby diminished. Obtaining direct input from teachers who knew Student while Student was participating in the bricks-and-mortar educational setting would be very important, as the witness saw Student for only

two or three hours, over six months after Student left the District, and during that six months had no interaction with peers in a school setting. Also of concern was this witness's statement that she would recommend speech/language therapy based on a lower score of one subtest of one assessment instrument. In the District's favor, although she did not clearly make the point, the witness seemed to be saying that the SDI's contained in Student's IEPs for 8th grade would address needs she was identifying in the areas of receptive language skills.

The private psychologist testified. Although he is a certified school psychologist as well as a licensed psychologist he does not work within the public school system, but rather with one Approved Private School in Pennsylvania, with another agency dealing with individuals on the autistic spectrum and with private specialized school in a neighboring state; he also conducts evaluations to ascertain whether students qualify for mental health funded wraparound services. He has a substantial background working with children on the autistic spectrum. Although he did not administer the ADOS, he did explore with some recognized instruments and through record review and clinical observation whether Student qualifies for a diagnosis on the autistic spectrum. Given his experience in the area, and having found no evidence in the record to counter his opinion, I accept his conclusion that Student is on the autistic spectrum. This diagnosis is a very important piece of what needs to be considered for Student's special education classification and educational programming going forward. That having been said, it is likely that had the District been allowed to administer the ADOS as it planned to do once it was given the Nemours Clinic Visit Note, the District itself would have come to the same conclusion as this witness. The private psychologist's discussion of Student's truancy issues was informative, as were his speculations about what might work to get Student back to school on a regular basis. A few minor points of difficulty with this witness's presentation are noted, for example that he seemed to shape his opinion about the length of time a student should be allowed to stay home from "a few days" to "four weeks" over the course of his testimony, and his use of some outdated test versions and acknowledging significant typographical errors on his report. These points of difficulty did not detract from his credibility and I gave his testimony considerable weight.

Evaluations: The Individuals with Disabilities Education Act as Reauthorized by Congress December 2004, 20 U.S.C. Section 600 *et seq.* [IDEA] and Pennsylvania Special Education Regulations at 22 PA Code § 14 *et seq.* and their respective implementing regulations require states to identify, locate, and evaluate all potentially disabled children, including those who may be "advancing from grade to grade." 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a), (c)(1); *G.D. v. Wissahickon School District*, 2011 WL 2411098 (E.D.Pa 2011) at *6. The Pennsylvania statute and regulations track the federal requirements. 22 Pa. Code §§ 14.121–14.125. With respect to the necessary evaluation, the IDEA requires districts to conduct a "full and individual initial evaluation" ...using "a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent that may assist in determining whether the child is a child with a disability." 20 U.S.C §1414(a)(1)(A), (b)(2)(A)(i). The IDEA requires utilization of assessment tools and strategies aimed at enabling the child to participate in the "general education

curriculum” and “determining an appropriate educational program” for the child. 20 U.S.C. §1414(b)(3)(A)(ii). Assessments and other evaluation materials must “include those tailored to assess specific areas of educational need ...” 34 C.F.R. §300.304(c)(2). A district may “not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability”. 20 U.S.C. §1414 (b)(2)(B), 34 C.F.R. §300.304(b)(2). The purpose of the evaluation is to obtain “accurate information on what the child knows and can do academically, developmentally and functionally ...” 20 U.S.C. §1414(b)(3)(A)(ii).

Although the IDEA obligates a local educational agency to conduct a “full and individual initial evaluation ...” there is less specificity regarding re-evaluation. 34 C.F.R. §§ 300.304 – 300.305. As part of any re-evaluation, the IEP team and appropriate professionals, with “input from the child’s parents,” must “identify what additional data, if any, are needed to determine ... [t]he present levels of academic achievement and related developmental needs of the child ...” 20 U.S.C. §1414(c)(1)(B)(ii); 34 C.F.R. §300.305(a)(2). Evaluation procedures must be sufficient to “assist in determining ... [t]he content of the child’s IEP. 34 C.F.R. §300.304(b)(1). See also *Brett S. v. West Chester Area School District*, No. 04-5598 (E.D. Pa., March 13, 2006). If additional data from testing is utilized in a re-evaluation, then that portion of the re-evaluation must comport with the requirements set forth in 20 U.S.C. §1414(b)(2)(C); 34 C.F.R. §300.304(b)(3) [instruments must be technically sound] and 20 U.S.C. §1414(b)(3)(A); 34 C.F.R. §300.304(c)(1) [instruments must be valid and reliable for the purpose for which they are used, be administered by trained and knowledgeable personnel and be administered in accordance with the applicable instructions of the publisher].

In conducting an evaluation or a re-evaluation, a district must utilize information provided by the parent that may assist in the evaluation including a review of relevant records, evaluations or other information provided by the parents. 20 U.S.C. §1414(b)(2)(A); 20 U.S.C. §1414(c)(1)(A)(i); 34 C.F.R. §300.305(a)(1)(i); 34 C.F.R. §300.305(a)(1)(i). If the parent obtains an independent educational evaluation at public expense or shares with the public agency an evaluation obtained at private expense, the results of the evaluation must be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child. 34 C.F.R. 300.503(c). The persons who review assessment information and complete the report must be qualified professionals who, with the parent, determine the educational needs of the child. 34 CFR § 300.306.

The agency must also review classroom based assessments, state assessments and observations of the child. 20 U.S.C. §1414(c)(1)(A)(ii),(iii); 34 C.F.R. §300.305(a)(1). Observations must include those of teachers and related services providers. 20 U.S.C. §1414(c)(1)(A)(iii); 34 C.F.R. §300.305(a)(1)(iii).

FAPE/IEP: Having been evaluated and found eligible for special education, Student is entitled by the federal IDEA and Pennsylvania Special Education Regulations to receive a free appropriate public education [FAPE]. FAPE is defined in part as: individualized to

meet the educational or early intervention needs of the student; reasonably calculated to yield meaningful educational or early intervention benefit and student or student progress; and provided in conformity with an Individualized Educational Program [IEP].

The IEP for each student with a disability must include a statement of the student's present levels of educational performance; a statement of measurable annual goals, including benchmarks or short-term objectives, related to meeting the student's needs that result from the student's disability to enable the student to be involved in and progress in the general curriculum and meeting the student's other educational needs that result from the student's disability; a statement of the special education and related services and supplementary aids and services to be provided to the student...and a statement of the program modifications or supports for school personnel that will be provided for the student to advance appropriately toward attaining the annual goals (and) to be involved and progress in the general curriculum...and to be educated and participate with other students with disabilities and nondisabled students; an explanation of the extent, if any, to which the student will not participate with nondisabled students in the regular class... 34 CFR §300.347(a)(1) through (4).

The IEP must be “reasonably calculated” at the time it was created to enable the student to receive “meaningful educational benefit”, a principle established by over 30 years of case law. *Board of Education v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982); *Rose by Rose v. Chester County Intermediate Unit*, 24 IDELR 61 (E.D. PA. 1996); *T.R. v. Kingwood Township Bd. of Educ.*, 205 F.3d 572, 577 (3d Cir. 2000) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182, 184 (3d Cir. 1988); *Shore Reg'l High Sch. Bd. of Ed. v. P.S.*, 381 F.3d 194, 198 (3d Cir. 2004) (quoting *Polk*); *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3rd Cir. 2009); *Chambers v. Sch. Dist. of Phila. Bd. of Educ.*, 587 F.3d 176, 182 (3d Cir.2009); *Rachel G. v. Downingtown Area Sch. Dist*, WL 2682741 (E.D. PA. July 8, 2011) *aff'd*, 2013 U.S. App. LEXIS 11091 (3d Cir. 2013).

An eligible student is denied FAPE if the IEP is not likely to produce progress, or if the program affords the student only a “trivial” or “*de minimis*” educational benefit. *M.C. v. Central Regional School District*, 81 F.3d 389, 396 (3rd Cir. 1996); *Polk*. The Third Circuit explains that while an “appropriate” education must “provide ‘significant learning’ and confer ‘meaningful benefit,’” it “need not maximize the potential of a disabled student.” *Ridgewood*, 172 F.3d at 247 (3d Cir. 1999); *Molly L v. Lower Merion School District*, 194 F. Supp. 2d 422 (E.D.PA 2002). An IEP must provide a “basic floor of opportunity”. There is no requirement to provide the “optimal level of services.” *Mary Courtney T. v. School District of Philadelphia*; *Carlisle Area School District v. Scott P.*, 62 F.3d 520, 532 (3d Cir. 1995), *cert. den.* 517 U.S. 1135, 116 S.Ct. 1419, 134 L.Ed.2d 544 (1996). What the statute guarantees is an “appropriate” education, “not one that provides everything that might be thought desirable by ‘loving parents.’” *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989). Citing *Carlisle*, Pennsylvania’s federal court in the Eastern District noted, [LEAs] “need not provide the optimal level of services, or even a level that would confer additional benefits, since the IEP required by the IDEA represents only a basic floor of opportunity.” *S. v. Wissahickon*

Sch. Dist., 2008 WL 2876567, at *7 (E.D.Pa., July 24, 2008).). The U.S. District Court for the Middle District of Pennsylvania has noted, ‘the standard is virtually minimal, indeed, “modest.”’ *I.H. ex rel. D.S. v. Cumberland Valley Sch. Dist.*, 1:11-CV-574, 2012 WL 2979038 at 27 (M.D. Pa. July 20, 2012). The law requires only that the plan was reasonably calculated to provide meaningful benefit at the time it was created.

Compensatory Education: Compensatory education is an equitable “remedy designed to require school districts to belatedly pay expenses that [they] should have paid all along.” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 249 (3rd Cir. 2009) (internal quotation marks and citation omitted). Compensatory education is intended to assure that an eligible child is restored to the position s/he would have occupied had a violation not occurred. *Ferren C. v. School District of Philadelphia*, 612 F.3d 712, 718 (3rd Cir. 2010), citing *Reid v. District of Columbia*, 401 F3d 516, 518 (D.C. Cir. 2005); *B.C. v. Penn Manor Sch. Dist.*, 805 A.2d 642 (Pa. Commw. 2006).

Homebound Instruction²³: Section 1329 of the Pennsylvania School Code provides for the excusal of students from compulsory attendance requirements, 24 P.S. § 13-1329, *as amended*, Public School Code of 1949. Therein, it provides that:

The board of school directors of any school district may, upon certification by any licensed practitioner of the healing arts or upon any other satisfactory being furnished to it, showing that any child or children are prevented from attending school, or from application to study, on account of any mental, physical, or other urgent reasons, excuse such child or children from attending school as required by the provisions of this act, but the term “urgent reasons” shall be strictly construed and shall not permit of irregular attendance. In every such case, such action by the board of school directors shall not be final until the approval of the Department of Public Instruction has been obtained. Every principal or teacher in any public, private or other school may, for reasons enumerated above, excuse any child during temporary periods. *Id.* The regulations of the State Board of Education flesh out the procedures for the implementation of this section of the School Code. Specifically, Title 22 of the Pennsylvania Code, Section 11.5 provides, in the event of a temporary excusal from school due to illness or other urgent reasons:

(a) A principal or teacher may, upon receipt of satisfactory evidence of mental, physical or other urgent reasons, excuse a student for nonattendance during a

²³ “Homebound instruction” should not be, but often is, confused with “instruction in the home”, although they are two distinctly different concepts. “Homebound instruction” can be given to regular education students or special education students for the reasons listed in this section, whereas “instruction in the home” is a special education placement and is recognized as a very restrictive placement option on the continuum of alternative placements for students with disabilities. It is reserved solely for students whose needs require full-time special education services and programs outside a school setting for the entire day. 34 CFR §300.551(b) (CFR §300.26(a) (1).

temporary period, but the term “urgent reasons” shall be strictly construed and does not permit irregular attendance. A school district shall adopt rules and procedures governing temporary excusals that may be granted by principals and teachers under this section. Temporary excusals may not exceed 3 months.

(b) A school district, area vocational technical school, charter or independent school may provide students temporarily excused under this section with homebound instruction for a period not to exceed 3 months. A school district, area vocational technical school, charter or independent school may request approval from the Department to extend the provision of homebound instruction, which shall be reevaluated every 3 months. When a student receives homebound instruction, the student may be counted for attendance purposes as if in school. A school district shall be reimbursed for homebound instruction provided to a student under section 2510.1 of the Public School Code of 1949 (24 P. S. § 25-2510.1).

(c) A school district shall adopt policies that describe the instructional services that are available to students who have been excused under this section. The policies must include statements that define the responsibilities of both the district and the student with regard to these instructional services. 22 Pa. Code § 11.5.

Independent Educational Evaluation: If parents disagree with an evaluation by a school district, the parents may request an IEE at public expense. 34 C.F.R. §300.502. The school district must respond in one of two ways, either grant the parents’ request and proceed with an IEE at public expense or file a special education due process hearing request to defend the appropriateness of its evaluation. 34 C.F.R. §300.502(b)(1-2). The hearing officer must determine whether or not the District’s evaluation was appropriate. 34 C.F.R. §300.502(b)(2)(i); §300.502(b)(3). In making this determination, the hearing officer applies the legal requirements for appropriate evaluations set forth in the IDEA and its implementing regulations at 20 U.S.C. §1414; 34 C.F.R. §300.15; 34 C.F.R. §§300.301 through 311. Disagreement with the conclusion reached in an evaluation report or re-evaluation report does not justify an IEE. 20 USC §1414(b) &(c). If the hearing officer decides that the school district's evaluation is appropriate, the parents still have a right to an independent educational evaluation, but not at public expense. 34 C.F.R. § 300.300.502(b)(3).

Discussion

Did the District fail to give Student an appropriate comprehensive evaluation in the areas of speech/ language, occupational therapy, autism spectrum disorder, and/or behavior?

Although the IDEA provides very specific requirements for an initial evaluation of a student who is being considered for special education eligibility, there is much less specificity regarding re-evaluation. The IDEA does provide that as part of a re-

evaluation, the IEP team and appropriate professionals, with input from the child's parents, must identify what additional data, if any, are needed to determine the present levels of academic achievement and related developmental needs of the child and re-evaluation procedures must be sufficient to assist in determining the content of the child's IEP. However, the IDEA also provides that if additional data from testing is utilized in a re-evaluation, then that portion of the re-evaluation must comport with the requirements set forth regarding an initial evaluation.

In this case, the District with the consent of the Parents conducted a full and comprehensive re-evaluation of Student. The District used nationally normed assessments of cognitive ability, achievement levels, visual-perceptual-motor integration, organizational and other executive functioning skills, speech/language abilities and behavior/emotional/social functioning. In addition the District conducted a psychiatric evaluation. The information generated from the re-evaluation was sufficient to determine the content of Student's IEP.

A psychiatrist experienced in conducting evaluations on behalf of school districts and families evaluated Student directly, interviewed school personnel, received input from the Parents and reviewed educational records. His evaluation did not yield a diagnosis of an autism spectrum disorder. Although a great deal of Monday morning quarterbacking [useful in forming a clinical diagnosis but not favored when deciding IDEA legal issues] was provided by the Parents' private psychologist evaluator, the first documented indication of a possible autism spectrum disorder in any District record or privately obtained record appeared in the Nemours Clinic Visit Note of February 16, 2012. The Parents shared this note with the District over one month later, at the March 26, 2012 IEP meeting. The District immediately took steps to explore whether Student qualified for an IDEA classification of autism, issuing a permission form to the Parents who agreed at the time. Unfortunately the Parents withdrew their consent for the ADOS and also revoked permission for the District to contact Nemours. The District cannot be faulted for not doing what the Parents prevented it from doing.

There was no indication at the time Student was re-evaluated that needs in the area of occupational therapy, including sensory integration, were present. In the context of positing an autism spectrum disorder the private psychologist explained why an occupational therapy evaluation would be useful. At Parents' request in August 2012, even though Student had again dis-enrolled from the District, the District agreed to fund an occupational therapy evaluation through the Intermediate Unit. Parents did not accept the offer at the time, and an occupational therapy evaluation was not conducted until May 2013 after this hearing had begun.

The District sought to conduct an FBA to examine school refusal and attendance-related behaviors, but Student was not present in school enough days for the FBA to be completed. Moreover, relying on its past experience with the Parents when dealing with a siblings' truancy issues, the District did not immediately seek to perform an in-home FBA, although this request was made in August 2012. This will be discussed further below.

Based on the available information it had at the time, the District did not fail to appropriately re-evaluate Student and did not deny Student FAPE in this regard.

Did the District unilaterally and inappropriately remove speech and language therapy from Student's IEP without a discussion by the IEP team?

When Student re-enrolled in the District in May 2011 late in 7th grade, the District implemented the cyber-charter school's IEP provision of 60 minutes per week of speech/language therapy until the end of the school year. At an IEP meeting conducted in June 2011 for the coming 8th grade school year, the District proposed a reduction in speech/language services to 30 minutes per week. The Parents were present at that meeting and were not prevented from having input. Given that the mother is certified in special education, develops/monitors IEPs in her job with a cyber-charter school, and is working on her Master's Degree in Education, the Parents were not naïve with regard to special education services and their rights as parents. The Parents approved the June 2011 IEP through signing a NOREP.

Student received the weekly 30-minutes of speech/language services for the first half of the 2011-2012 school year. Once Student was re-evaluated through a nationally normed standardized comprehensive speech/language assessment and found to be scoring in the average range in all areas with the exception of one subtest, and IEP goals were reviewed and found to be met, and teacher/parent input sought with no concerning reports forthcoming, the District recommended that speech/language therapy be removed from Student's IEP. The IEP team met, the service was removed, and the Parents approved the IEP through signing another NOREP. Again, the Parents were not naïve in the area of special education.

Once IEP goals are met there is no reason to continue providing a specific service when teachers do not report speech/language difficulties in school. The District's removal of speech/language as a supportive service was appropriate, was not done without the consent of the Parents, and did not deny Student FAPE.

Did the District fail to provide Student with an IEP that provided appropriate academic goals; appropriate specially designed instruction to address issues of anxiety, attention deficits, and/or social delays?

Only the June 2011 IEP, the January 2012 IEP and the March 26, 2012 IEP are directly relevant to this decision. The February 21, 2012 IEP solely concerned ESY, and the June 27, 2012 IEP and the August 15, 2012 IEP were not able to be implemented.

Student's dis-enrollment and re-enrollment presented the District with a moving target, and it is likely that starting back to school in May 2011, late in 7th grade, Student required some time to acclimate to being back in a bricks-and-mortar educational environment. The IDEA requires that an IEP be reasonably calculated at the time it was created to confer meaningful educational benefit. Case law has described the requirements for an IEP to satisfy the IDEA as "modest". A careful reading of each of the relevant IEPs reveals that each contains the elements the statute demands and more than adequately fulfills the requirements for appropriateness.

The IEPs include a statement of Student's present levels of educational performance; a statement of measurable annual goals; a statement of the special education and related services and supplementary aids and services to be provided to Student, and a statement of the program modifications or supports for school personnel that will be provided for Student to advance appropriately toward attaining the annual goals (and) to be involved and progress in the general curriculum while being educated to the greatest extent possible with nondisabled students. The IEP team, which included knowledgeable Parents, developed a comprehensive set of Specially Designed Instructions and program modifications to address Student's needs. The IEP teams in January 2012 and in March 2012 created specific plans to promote Student's attendance.

The IEPs provided Student with appropriate academic goals and appropriate specially designed instruction to address issues around attention deficits, organizational deficits, and schoolwork-related anxiety. Interestingly, considering Student's coming in and out of the District and having to reconnect with the population of peers, Student did not exhibit deficits in socialization in school that drew notice; as such separate provisions in this area were not necessary.

Anxiety reported to be present at home was not manifested in the school setting, therefore no specific IEP goals were created, although in-school therapeutic supports were offered and home-based therapeutic supports were recommended. Nevertheless, certain of the SDIs and program modifications could be expected to alleviate anxiety around work completion. These included: increased wait time for responses, assistance in making and checking study aids, reviewing and clarifying directions, assistance in chunking and monitoring assignments, access to a clean copy of teachers' notes upon request, preview of vocabulary to accommodate for decoding issues, use of calculator unless math the unit focused on learning to calculate, extended testing time up to double the time allotted, testing in a separate location to reduce distractions and to allow for questions to be read aloud to Student, word banks with no extra choices for fill-in-the-blank assignments, matching items of no more than 10 items in the set, reduction from four to three choices on multiple choice questions, and formulas provided when needed to compute answers.

Student's IEPs were appropriate and reasonably calculated to provide meaningful educational benefit. Student's IEPs provided FAPE.

Should the District have conducted an FBA rather than filing for truancy against the Parents, and should the FBA have then resulted in an attendance plan that included adjustments such as smaller class size?

The District began, but because of chronic attendance issues, could not complete, an FBA in the school setting. The District did not immediately seek to conduct an FBA in the home setting because the family had previously not cooperated with a counseling agency seeking to work with the District to provide in-home services to address truancy issues with one of Student's siblings. The District was reasonable in its belief that the Parents would not be receptive to an in-home FBA, and decided to try other measures first. A recent United States Eastern District of Pennsylvania court ruling affirmed a hearing officer's decision that a Student was not deprived of FAPE in conducting an

evaluation because the preponderance of the evidence does not suggest [parent] would have consented to evaluation. *Xykirra C. v. Sch. Dist. of Phila.*, 2013 WL 1915656 at *5 (E.D. Pa May 8, 2013).

The District offered a variety of interventions to help Student attend school, prior to filing a truancy petition against the Parents. The interventions included an in-school Intensive Outpatient Program called “The Light Program” that provided two to three small group therapy sessions for children with difficulties adjusting to middle school, recommendations for in-home wraparound services, individual and small group instruction in areas of academic need, offering rewards, not penalizing Student for assignments turned in late, exposing Student to gradually longer periods of time in school, and having the Parents call the assistant principal when Student was refusing to leave the home. Although the Parents initially cooperated with the District’s efforts, eventually they stopped supporting or following through with each one of the interventions.

Before filing the truancy petition against the Parents, the District tried to work with Student and the family within the areas of its influence; only after these efforts failed did the District move the problem up to the higher authority of the court. The magistrate found convincing evidence that the Parents were liable for Student’s absences and imposed a fine.

The District’s handling of Student’s excessive truancy was appropriate and did not represent a denial of FAPE.

Did the District inappropriately deny Student access to instruction, specifically, homebound instruction?

The Pennsylvania School Code provides that the board of school directors of any school district *may*, upon certification by any licensed practitioner of the healing arts or upon any other satisfactory reason being furnished to it, excuse a student from attending school for *urgent reasons*, but the term “urgent reasons” shall be strictly construed and shall not permit irregular attendance. The provisions are very clear in two regards: first, a school entity has discretion whether or not to excuse a student from school attendance; and, second, the reason for such an excusal must be urgent and not related to irregular attendance.

The psychiatric evaluation conducted in January 2012 resulted in the recommendation that Student be required to attend school. The Parents’ presenting the District with a physician’s note on April 26th that requested a four-week period of homebound instruction appears to have been a very thinly disguised attempt to salvage the school year so Student would not incur additional days of truancy and/or have to repeat 8th grade. The statute provided above regarding Homebound Instruction consistently uses the term “may” in reference to a District’s providing homebound instruction. A literal reading of the language clearly leads to the conclusion that even though a physician’s note is required, there is no automatic requirement for a District to grant the request. Given Student’s chronic and excessive truancy despite various interventions, the District was well within its rights, and in fact showed wise judgment, when denying the request.

There is not a scintilla of support for the proposition that four weeks of staying home with the District's blessing would then promote Student's willing return to school.

Student's success in attending summer school provides some information about what may be effective in getting Student to school and two theories present themselves. Looking at the reward/consequence paradigm [which the District favors], the Parents provided the carrot [a trip to an amusement park] and the District provided the stick [retention in 8th grade]. Looking at the environmental modification paradigm [which the Parents favor], time limited commitment, smaller class size and relaxed rules may have been the reasons for Student's success. Whether the key was one set of motivators over the other, or both, what is evident is that Student can attend school successfully and does not require homebound instruction given appropriate incentives and supports.

The District's denial of the request for homebound instruction was appropriate and was not a denial of FAPE.

If the District denied Student FAPE for any or all the designated periods of enrollment in any or all the enumerated ways, is Student entitled to compensatory education, and if so in what form and in what amount?

The District did not deny Student FAPE, so therefore Student is not entitled to compensatory education.

Should the District be required to reimburse the Parents for the private evaluations they obtained?

A district may be required to reimburse parents for private evaluations if the parents disagree with the district's evaluations and the district's evaluations are found to be inappropriate. There can be occasions when reimbursement is also appropriate if the private evaluation provided a substantial source of new information on which a district relied to craft its IEP.

In the current matter, the Parents did not signal their disagreement with the District's psychoeducational or speech/language evaluations when they were completed as part of the re-evaluation process. It was not until the due process complaint had already been filed that the Parents commissioned the private evaluations. Even if the Parents had timely disagreed with the District evaluations, done over one year prior to the private evaluations, they would not be entitled to reimbursement as the District's evaluations were appropriate.

Although the private psychologist provided persuasive evidence to support the presence of an autistic spectrum disorder, especially in light of the full neurological evaluation done at Nemours obtained during the hearing at my request, his evaluation cannot be reimbursed because the Parents prevented the District from conducting its own inquiry into this classification. As soon as the Parents belatedly, at the end of March 2012 presented the District with the mid-February 2012 Nemours Clinic Visit Note, the District sought consent to perform the ADOS, characterized by the private psychologist as a "robust" assessment tool to determine whether a child is on the autistic spectrum.

The Parents consented but then withdrew their consent, and also withdrew consent for the District to contact Nemours. The IDEA's provision for reimbursement for private evaluations would be sorely misused if Parents could deny a district permission to perform an evaluation and then obtain a private evaluation and be given reimbursement.

Order

It is hereby ordered that:

1. The School District provided Student with FAPE in all areas addressed in this hearing:

The District provided Student with an appropriate comprehensive evaluation.

The District's exiting Student from speech/language therapy was appropriate.

The District provided Student with appropriate IEPs.

The District did not commit a procedural or substantive error when it filed for truancy against Student's Parents.

The District did not inappropriately deny Student homebound instruction.

2. Student is not entitled to compensatory education.
3. The District is not required to reimburse the Parents for the private evaluations they obtained.

Any claims not specifically addressed by this decision and order are denied and dismissed.

August 11, 2013

Date

Linda M. Valentini, Psy.D., CHO

Linda M. Valentini, Psy.D., CHO
Special Education Hearing Officer
NAHO Certified Hearing Official