

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: Z.H.

Date of Birth: [redacted]

ODR Nos. 13647-12-13-AS; 13882-12-13-AS

CLOSED HEARING

Parties to the Hearing:

Representative:

Parents

Pro Se

Central Dauphin School District
600 Rutherford Road
Harrisburg, PA 17109-5227

Christopher J. Conrad, Esquire
Marshall, Dennehey, Warner
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Dates of Hearing:

May 23, 2013; August 7, 2013

Record Closed:

August 16, 2013

Date of Decision:

August 24, 2013

Hearing Officer:

William F. Culleton, Jr., Esq.

INTRODUCTION AND PROCEDURAL HISTORY

The student named in the title page of this decision (Student) is an eligible resident of the school district named in the title page of this decision (District), and attends a District middle school. (NT 8-10.) Student is identified as a child with a disability pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA), in the categories of Autism, Mental Retardation (in Pennsylvania called Intellectual Disability) and Speech or Language Impairment. (NT 8-10.)

Parents named in the title page of this decision (Parents)¹ requested due process alleging that the District failed to provide Student with a free appropriate public education (FAPE). Parents requested compensatory education for the period from January 6, 2012 to May 23, 2013² and an order for changes in programming to ensure provision of a FAPE for the 2013-2014 school year. The District subsequently filed a request for due process to defend its evaluation in the face of a parental request (made to the District after the Parents filed their due process request) for an independent educational evaluation at public expense (IEE).

I heard both matters together for the sake of efficient resolution of the parties' intertwined disputes, and the matter was concluded in two hearing sessions. The record closed upon receipt of written summations.

¹ Reference to Parents in the plural refers to both parents. Reference to Parent in the singular refers to Student's Mother, who conducted most of the transactions reviewed here.

² The parties stipulated that this would be the period subject to review in this matter, during which I will consider whether or not any act or omission of the District denied a FAPE to which Student was entitled under the IDEA. (NT 10.)

ISSUES

1. Did the District fail to offer or provide Student with a FAPE from January 6, 2012 to May 23, 2013?
2. Was the District's re-evaluation dated April 19, 2013, appropriate under the IDEA?
3. Should the hearing officer order the District to provide compensatory education to Student for all or any part of the period from January 6, 2012 to May 23, 2013?
4. Should the hearing officer order the District to provide an IEE at public expense?
5. Should the hearing officer order the District to provide services for the 2013-2014 school year?

FINDINGS OF FACT

1. Student is diagnosed with a rare congenital condition that can affect Student's cognitive ability and IQ scores. The condition is characterized by significant developmental delays in the grade school years with atypical improvements in cognitive ability, IQ scores and school performance during the middle school years. On a measure of adaptive functioning, Student's functioning was described as being in the extremely low range, which is below 99% of same age peers. (NT 16-19; S 1 p. 7.)
2. Student demonstrated regression and recoupment problems after extended breaks in programming, thus requiring Extended School Year Services (ESY). (S 5.)
3. Student graduated to a District middle school supplemental autistic support placement in the beginning of sixth grade, the 2011-2012 school year, and continued in supplemental autistic support for seventh grade (the 2012-2013 school year). The District offered to continue the supplemental autistic support placement for the eighth grade year (2013-2014). (NT 23; S 1, 3, 5, 8, 9, 15, 21.)
4. In sixth grade, Student received 90 minutes of research based reading instruction per day, including 60 minutes devoted to phonics and decoding, and 30 minutes devoted to computer based instruction. (NT 33; S 1, 8.)
5. In sixth grade, Student received 60 minutes of mathematics instruction per day, including direct instruction by the teacher, review with a para-educator, and computer based practice. (NT 33; S 1, 8.)

6. In sixth grade, Student received 40-80 minutes of speech and language instruction, devoted to articulation, language skills including vocabulary building, and social conversational skills. (S 1, S 5 p. 8, S 8.)
7. The District also provided private tutoring to Student as a form of compensatory education owed pursuant to a previous settlement agreement. This included summer tutoring in the summer of 2012 for seven weeks, about 3 to 4 hours per week in reading and the same hours for mathematics. (NT 28-31, 276.)
8. The 4-21-11 IEP goal was 50 words correct per minute at second grade, 80% mastery level. The 5-14-12 IEP goal was 65 words correct per minute at second grade level, 66.66% mastery level. (S 1, 2, 8.)
9. The District offered to include in the June 2013 IEP a reading fluency goal that was unchanged from previous reading fluency goals. (S 8, 21.)
10. The 4-21-11 reading comprehension goal increased the kinds of “wh” and “how” questions to be answered independently and in writing at the second grade level. (5-14-12 IEP). (S 1, 8.)
11. Student’s functional academic calendar skills goal from earlier IEPs was removed from the 5-14-12 IEP, because Student mastered the calendar IEP goal. While Student attained only part of the writing personal and emergency information goal, the personal information goal was removed from the 5-14-12 IEP. The 5-14-12 IEP goal for telling time was increased to independence and the goal for making purchases remained the same, but was made measureable. (S 1, 2, 8.)
12. Student’s mathematics computation goal changed from adding and subtracting 2 and 3 digit numbers with or without regrouping (4-21-11 IEP) to adding and subtracting 3 and 4 digit numbers including decimals with regrouping (5-14-12 IEP). (S 1, 2, 8.)
13. During the relevant period, a one-to-one behavioral aide was with Student pursuant to a positive behavioral support plan (PBSP). (NT 34-35; S 5 p. 23, 35.)
14. During the relevant period, the Student’s IEPs noted behaviors that interfere with learning. The May 2012 IEP and subsequent IEPs during the relevant period included a positive behavior support plan and a behavior regulation goal of seeking help when upset. It also included “possible use” of an explicit teaching curriculum for emotional self-regulation. By June 2012, District personnel had provided the explicit teaching curriculum with positive results during one incident. (S 8, 10, 15, 21; P 2.)
15. From May 2012 to June 2013, the IEP included a positive behavior support plan, a behavior goal and SDI to address Student’s emotional and behavior regulation skills. The teachers utilized the emotional regulation curriculum in prompting Student to pause and reflect when frustrated or upset during several brief incidents in class. (NT 348; S 8, 10, 15, 21; P 2.)
16. During the relevant period, the District offered ESY services. (S 5, 8, 15.)

17. Parents disagreed with the May 2012 IEP, based upon the belief that Student's minimal progress demonstrated a failure by the District to follow Student's IEPs. However, Parents signed the Notice of Recommended Educational Placement (NOREP) in agreement in August 2012. (S 9, 12.)
18. In seventh grade, Student was placed in the autistic support classroom, which had three to four students and three District personnel, as well as behavioral health agency workers assigned to individual students, one of which was assigned to Student. Student received group instruction, not one on one instruction, but the instruction was direct and explicit. (NT 92-9227-229, 246-247, 252-254.)
19. The IEP did not call for one to one instruction during the relevant period. (S 8, 14, 15, 21.)
20. In seventh grade, in November 2012, the Parent consented to amend the IEP to include the results of a sensory evaluation and additional specially designed instruction and modifications recommended as a result of the sensory evaluation. (S 14.)
21. At a meeting with Parent in December 2012, District personnel agreed to investigate different reading programs for Student. (NT 182.)
22. In February 2013, the IEP was amended to add SDI for "chunking" work assignments and allowing Student breaks by sitting alone at Student's desk. The District agreed to change the reading program to the Houghton Mifflin program for comprehension, and to use it with the Read Naturally program for reading fluency, at Parent request. The District agreed to change the mathematics program to SRA Math for second grade, at Parent request. (NT 190, 193; S 15.)
23. In March 2013, the District changed reading program used to instruct Student, from second grade level SRA Corrective Reading and first grade level Read Naturally to the Houghton-Mifflin Series at the second grade level. The instruction for the new program was delivered one to one, rather than in small groups as previously done. (NT 199, 222-224, 256; S 18.)
24. In March 2013, the District changed the mathematics program used to instruct Student, from SRA Connecting Math Series to SRA Real Math Series. The instruction for the new program was delivered one to one, rather than in small groups as previously done. (NT 201, 256; S 18.)
25. In June 2013, the District offered an IEP to Parents that continued Student's placement at the supplemental level of support, continued 90 minutes of research based reading instruction addressing both phonics and comprehension, continued one hour of research based reading instruction, and continued 80 minutes per week of speech and language instruction. The IEP offered new SDI and modifications, including wait time, community based instruction opportunities, sending home reading lessons for extra practice, pre-teaching of vocabulary, and weekly progress monitoring. (S 21.)

26. The District offered to include in the June 2013 IEP a functional academic goal for reading comprehension; this goal was unchanged from previous reading comprehension goals, even though the method of progress monitoring for reading comprehension had changed in March 2013. An additional goal was added, utilizing a MAZE reading comprehension passage for progress monitoring. (S 8, 21.)
27. The District offered to include in the June 2013 IEP a mathematics computation goal that was unchanged from previous mathematics computation goals. (S 8, 21.)
28. The District offered to include in the June 2013 IEP a functional academic goal for telling time at five minute intervals with 80% accuracy on four of five trials; this goal was unchanged from previous time telling goals. (S 8, 21.)
29. The District offered to include in the June 2013 IEP a functional academic goal for making change for purchases; this goal was unchanged from previous money skills goals. (S 8, 21.)
30. After an FBA in April 2013, showing low incidence and duration of targeted classroom behaviors, the District removed the designation for behaviors that interfere with learning from the June 2013 offered IEP, and eliminated the behavior support plan. It included SDI to address emotional and behavioral regulation. (NT 216-219, 243; S 8, 10, 15, 21; P 2.)
31. The Student's autistic support teacher returned progress monitoring data to Parent as close as possible to weekly, but not weekly, as required by the IEP. The teacher reported to parent daily concerning Student's reading, mathematics and writing instruction, as well as concerning Student's behavior. (NT 209, 212-213.)

Progress – Elementary School

32. Student made academic progress during fourth and fifth grades at a District elementary school full time autistic support placement. (NT 22-23, 53-71; P 4, S 7 p. 4.)
33. On the Pennsylvania State Alternative Assessment for fourth grade, administered in Spring of 2010, Student demonstrated “emerging” skills in reading, mathematics and science. In Spring of 2011 administration of the Level C PASA test, grades five to six, Student demonstrated “novice” skills in reading and mathematics. (S 7.)

Progress - Reading

34. From the beginning of sixth grade until January 2012, Student advanced from grade level 2 to 2.5 in the Reading Naturally series [which] addressed a variety of reading skills. Student made progress with Student's goals while in sixth grade. (NT 124-128; S 1 p. 3, S 4, S 7 p. 4, S 10.)
35. From the beginning of sixth grade until January 2012, Student progressed in reading fluency from 29 words correct per minute (wcpm) on a cold read at the 1.5 grade level to 35 wcpm on a cold read at the 2.0 grade level, based upon curriculum based assessments.

Student's reading comprehension (answering "wh" questions) improved from a rubric score of 3 of 5 to a score of 4 of 5. (S 1 p. 3, 4, S 4.)

36. In January 2012, the District's teacher, who had taught Student at an earlier grade, administered a developmental inventory (Brigance Inventory of Skills) to student as part of a District re-evaluation that was issued to Parent ultimately on April 20, 2012. On this instrument, the Student demonstrated a basic sight word vocabulary of 364/400 words. Student read orally at 42 words correct per minute, at a lower second grade level (91% accuracy); Student read 34 words correct per minute, at an upper second grade level (79% accuracy). (NT 54-56, 71-79; S 7.)
37. From January 2012 to June 2012, Student demonstrated increased wcpm performance, reading up to 42 wcpm on a second grade story reading probe, and 26 wcpm on a word fluency probe. In reading comprehension, Student continued to answer "wh" questions in 4 out of five opportunities with support. (S 5 p. 6, S 7.)
38. By June 2012, Student was answering "wh" and "how" questions with 95% accuracy in 4 of 5 opportunities with verbal prompting and cues. (S 10.)
39. Student maintained the sixth grade level of fluency as a result of tutoring provided to Student over the summer for seven weeks at about three to four hours per week. (NT 274, 276.)
40. In seventh grade, Student's measured word reading fluency declined in the first three months of the school year, then slowly rose over the remainder of the year. By November 2012, Student's wcpm averaged 35 in story reading, with a high of 46 wcpm. In word reading, Student's wcpm was 26 on average, with a high of 30 wcpm. By April 2013, Student was reading at 42 wcpm in story or passage reading at a second grade level, and 27 wcpm in sight word reading. (NT 249-251; S 13, 18, 20; P 3, 4.)
41. In seventh grade, Student's measured reading comprehension declined in the first three months of the school year, then slowly rose over the remainder of the year. By November 2012, Student's performance in answering "wh" and "how" questions was measured at 59% accuracy with prompts. In April 2013, Student's reading comprehension was measured differently, according to multiple choice comprehension questions based upon a second grade story. Student answered questions with 64% accuracy. (NT 249-251; S 13; P 3, 4.)
42. Student's teacher was of the opinion that Student made progress in reading during seventh grade. (NT 250-251.)
43. It can take time for a student to show progress after switching to a new reading program. (NT 100-106.)

Progress - Mathematics

44. From the beginning of sixth grade until January 2012, Student made little progress in functional mathematics. By January 2012, Student was able to add three digit numbers

with regrouping and subtract three digit numbers without regrouping, with prompting and without demonstrating mastery. (S 1 p. 4, S-4, S 7 p. 5.)

45. Student performed at a low first grade level on the Brigance Inventory questions addressing mathematics. Student did not demonstrate mastery of problem solving, number recognition or naming, addition, subtraction, telling time, recognition of money name values, recognizing basic geometric shapes or measurement. (S 7.)
46. Student's performance on the Brigance inventory may have been below Student's ability because of the amount of time required for the inventory at each sitting, and because of a cast on Student's writing arm that inhibited writing answers to questions for an instrument that relies significantly on writing. (NT 54-56, 71-79; S 7.)
47. By March 2012, Student had made no measureable progress in adding three digit numbers, but had progressed to subtracting three digit numbers with borrowing with 80% accuracy. However, this achievement was inconsistent, and Student required significant supports. Student was learning to multiply using fingers and with supports. (S 5 p. 7.)
48. By June 2012, Student demonstrated the ability to add 4 digits by four digits with multiple regrouping at 85% accuracy and subtract two digits by two digits with borrowing at 81% accuracy. (S 10.)
49. In the June 2012 sixth grade level PASA test, Student scored at a "novice" level (below proficient) in reading on an assessment with a simple text of no more than 10 words in length, supported by teacher hints and prompts. (S 11.)
50. Student scored at a "novice" level (below proficient) in mathematics in a test of counting money or other items up to 19, placing sets in order, adding or subtracting single digit numbers, reading time to fifteen minute intervals, identifying sizes of items by measurement, sorting items, identifying equations for word problems and recognizing number patterns, supported by teacher hints and prompts and use of a calculator. (S 11.)
51. In seventh grade, by November 2012, Student's accuracy in addition of 3 and 4 digit numbers with regrouping was measured at 67%. In subtraction of two and three digit numbers with borrowing, accuracy was measured at 66%. (S 13; P 3.)
52. By April 2013, Student was adding 2 to 3 digit numbers with and without regrouping at a 56% accuracy level, and 3 and 4 digit numbers with regrouping at 53% accuracy. Student was subtracting two digit numbers with and without borrowing at a 69% accuracy level. (S 18, 20.)
53. Student's teacher was of the opinion that Student made progress in mathematics during seventh grade. (NT 250-251.)

Progress – Functional Calendar, Money, Telling Time and Writing Essential Information

54. In January 2012, Student could identify the days of the week, the number of days in a week, and the number of days in a month. Student could identify holidays. Student continued to have difficulty with two week equivalences. (S1, S 4.)
55. By March 2012, Student had mastered Student's functional calendar skills IEP goal. (S 5 p. 7.)
56. From the beginning of sixth grade until January 2012, Student progressed in functional purchasing and money skills. Student learned a "one more" concept with 100% accuracy. Student was able to identify how much money would be needed to make a purchase, but needed support to actually make purchases. (S 1, S 4.)
57. By March 2012, Student was learning to make purchases, but had not mastered counting money and making change. By June 2012, Student was able to pay the correct amount for purchases up to \$25.00 using the "dollar up" method, with 90% accuracy. Student was introduced to making change with coins in May 2012. (S 5 p. 7, S 10, 13.)
58. By November 2012, Student was able to maintain a 90% accuracy level in counting money to make purchases, and was demonstrating 59% accuracy in making change with coins in order to make a purchase. By April 2013, Student was able to count change, including coins, with 48% accuracy, with prompting. (S 13, 20; P 3.)
59. In January 2012, Student was learning to tell time to five minute intervals, and demonstrated difficulty telling the correct hour. (S 4.)
60. By March 2012, Student demonstrated the ability to tell time to the five minute interval with 70% accuracy, and with supports, and by June 2012, Student demonstrated ability to tell time to five minute intervals with 78% accuracy. (NT 249-251; S 5 p. 7, S 10; P 3.)
61. In seventh grade, by November 2012, Student's ability to tell time regressed to 59% accuracy with significant prompting, practice and review. Progress reports increased to 64% accuracy in April 2013, with prompting. (S 13, 20.)
62. In January 2012, Student was able to write name, address, phone number and signature legibly, with a cast on the hand due to a broken bone. (S 4.)
63. Student made progress in sixth grade in the speech and language skills taught by the speech and language pathologist. (NT 164.)

Behavior

64. During the relevant period of time, January 6, 2012 to May 23, 2013, Student exhibited inappropriate and sometimes dangerous behaviors at home. At least some of these behaviors were responses to concerns not generated at school, although some were generated by events at school, including remarks made by teachers that upset Student, an incident [with a peer], and an incident in which an aide took Student from gym class early to change for keyboarding instruction. (NT 19-21, 221; S 18; P 2 p. 21, P 3.)

65. During the relevant period, Student demonstrated some escape and attention seeking behaviors in school; however, these behaviors occurred at a very low rate, with limited duration, and they did not interfere with Student's learning. (S 16, 19, 21; P 2.)
66. In seventh grade, by November 2012, Student had demonstrated the skill of talking to the teacher when emotionally upset, with prompting. By April 2013, Student was exhibiting this skill in about one of every three opportunities. (S 13; P 2.)

Evaluation

67. The District provided an evaluation report to Parents on April 20, 2012. The multidisciplinary team recommended continued IDEA classification of Student with Mental Retardation, Autism and Speech or Language Impairment. The evaluation report noted continuing educational needs in functional mathematics, including time and money; mathematics computation; reading fluency and comprehension; writing a cursive signature; speech intelligibility; and social language skills. (S 7.)
68. Parent signed a permission to evaluate form on February 4, 2013. The form recommended the gathering of behavioral information. (NT 189; P 6.)
69. In February 2013, the District's qualified behavior specialist conducted a functional behavioral assessment, addressing six behaviors of concern that were occurring in school at a low rate of incidence. The assessment was based upon previous knowledge of Student, interviews with Parent and school staff, record review and research based (ABC) data collection by the teacher and other District teaching personnel in February and March for approximately one week. Both frequency and duration data were assessed and reported. (NT 211-212, 311-312, 369-370, 381-382; S 16, 17, 19.)
70. The autistic support teacher was qualified to collect the data requested by the behavior specialist, and the specialist met with the teacher to explain the process. All staff in the classroom were trained and qualified to collect the data. (NT 341-343.)
71. The teacher collected data on additional behaviors in addition to those designated for the FBA, and the behavior specialist included that data in the report of the FBA. (NT 235-237; S 16, 17.)
72. Parents were not at the meeting of school personnel during which the precise behaviors of concern were formulated; however, Parents had provided input at the February IEP meeting during which they signed the permission to evaluate form. The Parents returned the parental input form in April 2013, shortly before the re-evaluation report was issued. (NT 195-197; S 16.)
73. The District provided a re-evaluation report to Parents on April 19, 2013, more than 60 days after Parent signed the permission to evaluate form. The report incorporated the results of the FBA, and retained the IDEA classifications of mental retardation, autism and speech or language impairment. (NT 241; S 18; P 3 p. 25.)
74. Parent disagreed with the April 19, 2013 re-evaluation. (S-18.)

75. Parent orally requested an independent educational reevaluation by means of an FBA at a meeting in April 2013. Parent repeated this request in May at a meeting, and was told to reduce it to writing. Parent sent a written request on May 8, 2013. (P 3.)

DISCUSSION AND CONCLUSIONS OF LAW

BURDEN OF PROOF

The burden of proof is composed of two considerations: the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact (which in this matter is the hearing officer).³ In Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence⁴ that the other party failed to fulfill its legal obligations as alleged in the due process complaint. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006).

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

In this matter, the District requested due process and the burden of proof is allocated to the District. The District bears the burden of persuasion that its re-evaluation was appropriate and that Parent is not entitled to an IEE. If the District fails to produce a preponderance of

³ 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.

⁴ 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.

evidence in support of its claim, or if the evidence is in “equipoise”, then the District cannot prevail under the IDEA.

FREE APPROPRIATE PUBLIC EDUCATION

The IDEA requires that a state receiving federal education funding provide a “free appropriate public education” (FAPE) to disabled children. 20 U.S.C. §1412(a)(1), 20 U.S.C. §1401(9). School districts provide a FAPE by designing and administering a program of individualized instruction that is set forth in an Individualized Education Plan (“IEP”). 20 U.S.C. § 1414(d). The IEP must be “reasonably calculated” to enable the child to receive “meaningful educational benefits” in light of the student’s “intellectual potential.” Shore Reg’l High Sch. Bd. of Ed. v. P.S., 381 F.3d 194, 198 (3d Cir. 2004) (quoting Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 182-85 (3d Cir.1988)); Mary Courtney T. v. School District of Philadelphia, 575 F.3d 235, 240 (3rd Cir. 2009), see Souderton Area School Dist. v. J.H., Slip. Op. No. 09-1759, 2009 WL 3683786 (3d Cir. 2009).

“Meaningful benefit” means that an eligible child’s program affords him or her the opportunity for “significant learning.” Ridgewood Board of Education v. N.E., 172 F.3d 238, 247 (3d Cir. 1999). “[T]he provision of merely more than a trivial educational benefit” is insufficient. Ridley Sch. Dist. v. MR, 680 F.3d 260, 269 (3d Cir. 2012) (quoting L.E. v. Ramsey Bd. of Educ., 435 F.3d 384, 390 (3d Cir.2006)). In order to provide FAPE, the child’s IEP must specify educational instruction designed to meet his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. Board of Education v. Rowley, 458 U.S. 176, 181-82, 102 S.Ct. 3034, 1038, 73 L.Ed.2d 690 (1982); Oberti v. Board of Education, 995 F.2d 1204, 1213 (3d Cir. 1993). An eligible student is denied

FAPE if his or her program is not likely to produce progress. M.C. v. Central Regional School District, 81 F.3d 389, 396 (3rd Cir. 1996), cert. den. 117 S. Ct. 176 (1996); Polk v. Central Susquehanna Intermediate Unit 16, 853 F. 2d 171 (3rd Cir. 1988).

A school district is not necessarily required to provide the best possible program to a student, or to maximize the student's potential. Ridley Sch. Dist. v. MR, 680 F.3d 260, 269 (3d Cir. 2012). An IEP is not required to incorporate every program that parents desire for their child. Ibid. Rather, an IEP must provide a "basic floor of opportunity" for the child. Mary Courtney T. v. School District of Philadelphia, 575 F.3d at 251; Carlisle Area School District v. Scott P., 62 F.3d 520, 532 (3d Cir. 1995).

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

Whether the IEP meets the above test must be judged in light of the IDEA's mandate that an IEP must address all of a student's educational needs. 20 U.S.C. § 1414(d)(1)(A)(i)(I)(bb). 34 C.F.R. §300.320(a)(2). Whether a FAPE has been offered must be judged in light of the child's unique constellation of educational needs, Board of Education v. Rowley, 458 U.S. 176, 181-82, 102 S.Ct. 3034, 1038, 73 L.Ed.2d 690 (1982), and the child's intellectual potential, Shore Reg'l High Sch. Bd. of Ed. v. P.S., 381 F.3d 194, 198 (3d Cir. 2004).

Pursuant to the above legal definition of FAPE, I conclude that the District offered and provided a FAPE to Student during the relevant period. Parents do not contest that Student's placement in supplemental autistic support was appropriate. They do not suggest that this placement failed to offer Student the least restrictive environment appropriate to Student's needs. Parents do not argue that the IEP as written failed to address Student's unique constellation of needs appropriately.

At the beginning of the relevant period, the evidence shows preponderantly that the District provided Student with reading and mathematics programs that were explicit, multisensory and direct, within a very small group setting that was capable of providing these programs with fidelity. It assigned qualified special education teachers to deliver the instruction.⁵ The District provided goals that addressed all of the areas that Parents identified in their due process complaint as not properly addressed, as well as other areas such as speech and language needs. It provided SDI and related services addressing these needs, and addressing other needs, such as sensory and occupational therapy needs. It monitored Student's performance in these programs and reported on that progress⁶.

⁵ Parents sought to show that the seventh grade teacher was not adequately qualified, because the teacher was entering the teacher's first year of teaching an autistic support classroom. They noted that District administrators provided support to the teacher, apparently seeking to raise an inference that the teacher was not performing adequately. However, there is not a scintilla of reliable evidence to this effect; support was available to all of the District's special education teachers who taught resource room-like programs for special needs students. Contrary to Parents' implication, the evidence is preponderant that the District took measures to assure that its teachers were able to address the challenges of their assignments. Although I note that the teacher had no post-graduate degree, the teacher did have the requisite state certification, and there is no other evidence of lack of training to support Parents' assertions.

⁶ Parents argued that progress reporting was insufficient because weekly reports were late and reading fluency data were contradictory. However, the evidence showed that the fluency data simply reflected Student's performance under different, clearly defined circumstances: cold (first time) reads, hot (previously rehearsed) reads, story reading and reading of lists of words. The varying numbers reflected Student's varying performance under these differing circumstances, not any flaw in the data themselves. In addition, the nature of the probes used for progress monitoring changed over time, as the District – at Parents' request - changed the reading programs used to teach Student.

Further, the District made numerous changes in the applicable IEPs, pursuant to the Parents' repeated requests to change reading and mathematics programs. Similarly, it conducted several IEP meetings at Parents' request, attempting to accommodate Parents' numerous concerns, and it re-evaluated Student twice in two years, again at Parents' request. Thus, the District demonstrated a willingness to be flexible in its planning for the Student, and to respond to Parents' concerns, in order to make sure that it addressed Student's unique needs.

There was no evidence that these efforts were not reasonably calculated to provide Student with meaningful educational benefits. Student had a history of making progress in small group settings like those offered during the relevant period. On the record before me, the explicit programs for reading and mathematics, as well as the programs offered to teach pragmatic skills such as telling time and counting money, were appropriate to address Student's unique learning style.

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

The law is clear that the appropriateness of an IEP must be judged as of the time that it was created, as discussed above. It follows that a student's lack of progress subsequent to the creation of the IEP cannot be evidence itself that the IEP or its implementation was inappropriate. Without a showing of something more, such as a flaw in the IEP that should have been corrected, or a failure to implement the IEP as offered, even evidence of no progress is insufficient to prove a failure to provide a FAPE. See Carlisle Area Sch. Dist. v. Scott P., 62

F.3d 520, 534 (3d Cir. 1995)(stating that the ultimate success or failure of an IEP that addresses all educational needs cannot retroactively render it inappropriate).

On the record as a whole, I cannot conclude by a preponderance of the evidence that the Student failed to make meaningful progress during the relevant period. There was preponderant evidence that Student made progress in a significant number of academic areas during the second half of sixth grade, and in seventh grade. Both teachers credibly testified to that effect, based upon their day to day observation of Student's performance in the autistic support class. Although progress data appeared to show some stagnation or regression in reading fluency in seventh grade, the data support the seventh grade teacher's opinion that Student made progress overall.⁷

In sixth grade, Student demonstrated progress over the previous year's scores for reading fluency and comprehension skills⁸, and Student's teacher unequivocally reported progress. The data also shows progress in mathematics adding and subtracting in sixth grade. In functional mathematics, Student mastered calendar skills by March, and improved in counting money and telling time. These indicators of academic progress are only part of the Student's educational program; Student also was being taught expressive language skills including articulation, and

⁷ Student's reduced cognitive ability and slow pace indicate that a pattern of improvement and regression can be expected. Moreover, there was evidence that the rapid changing of reading and mathematics programs during the relevant period – at Parents' request - could have depressed Student's progress monitoring scores, because it requires time to see improvement when a new program is implemented. Given these circumstances, I give some weight to the seventh grade teacher's subjective impression that Student made meaningful gains during seventh grade.

⁸ Parent argues that higher reading achievement scores on a developmental test, the Brigance, establish a baseline from which Student did not progress in sixth grade; however, Parent offered no expert evidence to show that those scores are valid and reliable for the purpose of Parent's argument. While the data thus are mixed on this issue, I conclude that the evidence is preponderant that Student made progress, based upon both the data and the teacher's subjective but well-informed and credible opinion.

fine motor skills including writing. Thus, Student's academic progress in sixth grade was meaningful.⁹

Seventh grade data indicate either a lack of progress or regression in most academic areas. Reading fluency and comprehension data indicate that Student regressed in the first half of the year, then rebounded in the second half to approximately the level of achievement reflected in the sixth grade end of year data. Seventh grade data showed sporadic attainment of fluency rates above those measured in the previous year, without mastery.

These data were the product of reading programs that were changed repeatedly at Parents' request over a one and one half year period. There was evidence that, when a child's reading program changes, it takes time for progress to be reflected in the data. The comprehension probes changed in the Spring; the data were not comparable to those derived in sixth grade. Thus, the data do not clearly prove a lack of progress in reading.

The judgment of the Student's teacher is that Student did make progress. This is based upon the teacher's day to day observation of Student's performance in a very small class with only three to four students in it. I give this opinion some weight in light of the changes that Student experienced in seventh grade that could have affected the fluency and comprehension data. Thus, at best, the evidence is in equipoise as to whether or not Student made meaningful progress in reading in seventh grade. As explained above, the Parents thus failed to bear their

⁹ In weighing the evidence of meaningful progress, I give importance to the fact that Student's intellectual potential during the relevant period was low based upon Student's cognitive limitations, so that small increments of progress are more meaningful for Student than they would be for children with higher cognitive potential. Parents contended that Student's unique neurological condition makes likely extraordinary gains in the middle school years. Student's gains in years previous to the relevant period suggested that about one year's growth in one year could be expected if this unusual aspect of the neurological condition were operative. However, the record did not support any inference that this effect was operative, as no expert medical evidence was introduced to this effect. There was no evidence that Student's ability was increasing in sixth and seventh grade. Thus, Student's much slower growth in sixth and seventh grade was not proven to be due to inappropriate programming, but could have been due to numerous extraneous factors.

burden of persuasion that the Student failed to make meaningful progress in reading in seventh grade.

In mathematics, progress data indicate that Student did not make progress or regressed, because Student's accuracy rate for adding three and four digit numbers with or without regrouping declined.¹⁰ Although the teacher opined that Student made progress, and there was a change in programming in March, on balance I conclude that the Student failed to make meaningful progress in mathematics in seventh grade. Nevertheless, the Parents failed to prove any facts indicating that the mathematics program offered to Student was deficient, either as offered in the IEP, or as implemented by the teacher. Thus, a lack of progress in mathematics alone does not prove a failure to provide a FAPE, as more fully discussed above.

In seventh grade functional academic skills, Student was learning to count coins, while maintaining previously attained skills in counting whole dollar amounts. Student was able to count coins with some accuracy, but did not attain mastery of this skill. Thus, there is some data to support the teacher's opinion that Student made academic progress in this area. Although Student's achievement in counting coins seems small, Student's modest improvement was consistent with Student's previous slow pace of learning in functional skills.

In telling time, Student's accuracy data declined. Thus, the data indicate some regression in this skill.

In sum, the record as a whole indicates that Student made some progress in academics in seventh grade, although that progress was tempered by reduced progress data in most academic areas. I conclude that Parents shown a lack of meaningful educational progress in most academic areas, but have not proven a lack of progress in all academics. However, this alone

¹⁰ This is in the context of previous slow or flat growth in mathematics skills. Clearly, this was a very challenging area for Student.

does not prove by a preponderance of the evidence that the District failed to provide appropriate special educational programming, because there is no evidence that Student's program was inappropriate or that it was implemented inappropriately.

Parents argue that the District failed to provide "direct instruction" as provided in the IEP's SDI. Parents interpreted this to mean "one to one" instruction. However, the testimony made it clear that the term "direct instruction" as used in the Student's SDI in the IEP does not mean "one to one" instruction; rather it refers to explicit instruction through a specially designed curriculum and a specially designed instructional method. This can be delivered in small group or "one to one" configurations. There was no evidence that the District offered "one to one" instruction for Student. The term "one to one" does not appear in any of the IEP documents that governed Student's educational program during the relevant period. I conclude that the District did not fail to deliver a promised SDI, namely "one to one" instruction, because it was never promised.¹¹

Parents argue that the Student was able to progress or at least maintain the existing reading fluency level with one to one instruction during the summer of 2012, and that this shows that one to one instruction would have provided Student with a meaningful opportunity to make progress in reading. The instruction was provided for seven weeks, about 3 to 4 hours per week. However, I conclude that this experience does not prove what the Parents assert. The progress data were developed by the teacher for week to week monitoring purposes, and were not shown preponderantly to be comparable to the District's progress monitoring data. Moreover, the tutoring was not for the purpose of advancing Student's reading fluency levels; thus, the teachers

¹¹ There is little evidence as to whether or not Parents understood this at the time of the implementation of each of the IEPs. However, given the extensive and detailed participation of Parent in Student's education during the relevant period, I find it unlikely that Parent did not understand at any point during this period that the term "direct" did not mean "one to one".

in the regular school year teach differently than the tutor during the summer, as they are required to address a much wider variety of skills, all at the same time, for purposes of increasing Student's achievement. I conclude that the Student's maintenance of fluency levels during summer tutoring does not imply that one to one teaching in the regular school year would have yielded greater progress in reading fluency. It does not prove preponderantly that the District's offer of a very small group modality for "direct instruction" in seventh grade was not reasonably calculated to provide an opportunity for meaningful educational benefit in the area of reading.

In their summation, Parents raised the argument that the District's program was not in the least restrictive environment because an educational paraprofessional failed to maintain an appropriate distance from Student and because the paraprofessional scribed classroom assignments inappropriately for Student. The paraprofessional denied the allegations, which were based entirely upon Student's report as recounted by Parent.¹² Obviously these allegations were hearsay and not inherently reliable. They are not corroborated. Therefore, I cannot rely upon them as substantive evidence that Student was deprived of the benefit of inclusion in regular education due to inappropriate delivery of supplemental supports and services in the inclusion setting.

Parent also asserted two incidents that Parent believed were emblematic of inappropriate behavior toward Student by the seventh grade teacher and the paraprofessional. Parent sought to establish the inference that these professionals' inappropriate behavior caused Student to experience emotional distress that caused Student's lack of progress in many academic areas

¹² Parent also alleged that this paraprofessional inappropriately touched another student and pulled a chair out from under a student. Parent stated that the former allegation was based upon Parent's own observation; however, Parent stated this in summation and not under oath. The District had no opportunity to cross examine Parent on this statement. Thus, I do not give it any weight. The latter allegation was based upon Student's uncorroborated hearsay statement, which does not constitute substantive evidence and again I give it no weight. Additionally, Parent asserted that the paraprofessional's denial of the allegations impeaches the paraprofessional's credibility; however, since the contradictory facts are not proven, they do not affect the paraprofessional's credibility.

during seventh grade. I conclude that Parent failed to prove that both incidents happened; thus, Parents created no inference that the Student's educational program was inappropriate.

Parent asserted that the seventh grade teacher spoke to Student inappropriately in class and made joking statements that Student could not understand, thus raising Student's anxiety and interfering with Student's progress. Like the allegations against the paraprofessional, this allegation was based upon statements by Student that were uncorroborated hearsay and to which I accord no weight. Thus, Parent has failed to prove these allegations of inappropriate implementation of Student's educational program.¹³

Parent introduced considerable documentary evidence to the effect that the Student was exhibiting behaviors in school that interfered with Student's learning, and that this was the reason for Student's asserted lack of sufficient progress in sixth and seventh grade. Student's IEP documents recognized behaviors that interfered with learning throughout the relevant period, except for the last IEP in June 2013, which removed this designation. Parent introduced daily home-school journal entries by the Student's teacher in seventh grade that indicated a number of incidents of avoidance behavior, including putting Student's head down on the desk or non-responsiveness or refusal to work on assigned tasks. There also was evidence that once Student struck a wall in school during the relevant period. Finally, Parent testified at length to the numerous incidents of Student's dangerous behavior at home, including assaulting Parent, self-injurious acts and destruction of property. Student had a home program of services by the local behavioral health agency, and Parents placed Student in protective medical settings more than once due to these behaviors.

¹³ Similarly, Parent attempted to raise an inference of inappropriate delivery of services from an incident [with a peer]. While the record shows that the incident happened, there was no evidence from which I could conclude that it was due to inappropriate supervision of peers or inappropriate programming.

The District introduced considerable credible testimony from teachers and a behavior specialist, corroborated with contemporary documentary evidence, to show that the Student's in-school behaviors occurred only a small percentage of the time, and that most incidents of such behaviors were of short duration. Every IEP had a behavior intervention plan that included an ABC analysis of the behavior, essentially constituting an FBA.¹⁴ The evidence showed that the teachers were able to deal with the behaviors in a positive and educational way, utilizing and reinforcing a curriculum for emotional and behavioral self-regulation that was taught to Student explicitly.

Weighing the evidence, I conclude that the Parents failed to prove by a preponderance that the District failed to address Student's behavioral needs appropriately, or that these behaviors affected Student's educational progress. The teachers' testimony and that of the behavior specialist was credible and corroborated by contemporaneous documentation. The Parent's own exhibit showed that the behaviors for the most part did not disrupt the classroom and were of short duration. They were relatively low incidence in proportion to the amount of time available for instruction. The documents showed that the teachers responded to them positively and appropriately. Any reports by Student to the contrary were uncorroborated hearsay and entitled to no weight. I conclude that the District's handling of Student's behaviors was not inappropriate and did not cause a lack of academic progress.

APPROPRIATENESS OF EVALUATION

The IDEA sets forth two purposes of the required evaluation: to determine whether or not a child is a child with a disability as defined in the law, and to "determine the educational

¹⁴ The behavior specialist testified that the FBA can take many forms and that its inclusion in a behavior plan in this way did not violate best practices.

needs of such child” 20 U.S.C. §1414(a)(1)(C)(i). In this case, Parents challenge an FBA conducted at their request in February through April 2013, for the sole purpose of addressing Student’s educational needs.

Parents assert, first of all, that the District delivered the re-evaluation report embodying the FBA more than 60 days after they signed the permission to evaluate form. This is admitted and constitutes a procedural violation of the IDEA and Pennsylvania Chapter 14, which set a 60 day time frame for re-evaluations. I find no evidence that this procedural violation caused either a substantive denial of a FAPE or a substantive denial of Parents’ right to participate in the evaluation process. The delay was about two weeks. Meanwhile, the District was implementing substantial changes to the Student’s reading and mathematics programs that had been instituted at Parents’ request. There is no evidence that any needed changes in programming were delayed due to the two week delay in delivery of the re-evaluation, or that it caused the District to ignore any requests for programming by the Parents. In fact, the result of the FBA was that the behaviors were not interfering with Student’s education and therefore that a positive behavior plan was not legally required, although prevailing interventions would be continued through the SDI in the IEP. Thus, the delay in the re-evaluation did not result in any delay in needed behavioral programming.

Parents next argue that the FBA was conducted inappropriately, in that the behaviors of concern were formulated without parental input at a meeting among staff only, and that the parental input form was delivered to them after the FBA report was finished at a time when the results were predetermined. While these procedural lapses do indeed bespeak a failure to give due weight to the parental input required in any re-evaluation, 20 U.S.C. §1414(b)(2)(A), they did not substantively undercut the FBA’s comprehensiveness, because the FBA was started only

after an IEP meeting in which Parents discussed their concerns about Student's behavior and why they wanted the FBA, and because the behavior specialist who conducted the FBA reviewed numerous documents in the record, including home-school journals depicting Student's behavior in school and Parents' reports of the aftermath at home. Moreover, the FBA relied upon teacher input to develop the behaviors to be analyzed; this is appropriate because the target behaviors were in-school behaviors that would be best known to teachers who observed Student every day.

Parents argue that the data on which the FBA was based were incorrect in that they understated the frequency and duration of Student's negative behaviors. They argued that the one week period of observation was too short, and that the teacher who took the data was inexperienced and unqualified to take the data. The Parent testified that the teacher had habitually underreported Student's behaviors to Parent.

I find no reliable evidence to support these criticisms. The behavior specialist's testimony made clear that the data collection complied with appropriate standards for an FBA. The behavior specialist was well qualified to conduct the FBA, and the specialist trained the teacher, already a certified special education teacher, to take the data in this case. The specialist knew that the other classroom staff who took data were qualified and experienced in doing so. The only evidence that the teacher had underreported behavioral data was uncorroborated hearsay and thus was not substantive evidence. One observation in which District administrators observed two instances of Student's avoidance behaviors does not refute the extensive data compiled in the FBA based on much more extensive observation. In conclusion, the Parents failed to prove that the FBA was inappropriate, or that the re-evaluation that embodied it was inappropriate.

Finally, Parents argued that the FBA should have taken into consideration Student's behavior at home. They proposed that events at school were causing Student's very dangerous, disruptive and traumatic behaviors at home, and that the FBA should have analyzed the in-school "triggers" that caused these outbursts at home. While the gravity of these concerns cannot be overstated, I conclude that there is no evidence to show that these concerns were related to Student's performance at school; therefore, the District was not obligated under the IDEA to address behaviors at home on the record before me. Moreover, the methodology of the FBA would not have permitted such an analysis in the context of an FBA related to in-school behaviors.

CREDIBILITY

I found that the District witnesses were credible and reliable. I found no material contradictions between the District witnesses' testimony and the rest of the record. I found that the witnesses were careful in their responses and seemed to try to respond to the questions fairly.

I have analyzed Parent's testimony above. I found it unreliable to the extent that it constituted uncorroborated hearsay.

CONCLUSION

I conclude on this record that the District did not fail to offer a FAPE to Student, nor did it fail to implement the offered program appropriately. On this record, the evidence of lack of progress in some academic areas in seventh grade is not preponderant evidence of a failure to provide Student with a FAPE. Consequently, I will not order the District to provide Student with compensatory education and I see no reason to order it to provide any services prospectively.

I further conclude that the 2013 FBA was appropriate and that the re-evaluation embodying it was appropriate. Therefore, Parents are not entitled to an independent educational evaluation at public expense, and I will not order it. Parent is, as always, entitled to obtain an independent educational evaluation at private expense, and the District will be required by law to consider its results if and when presented.

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

ORDER

1. The District did not fail to offer or provide Student with a FAPE from January 6, 2012 to May 23, 2013.
2. The District's re-evaluation dated April 19, 2013, was appropriate under the IDEA.
3. The hearing officer does not order the District to provide compensatory education to Student for all or any part of the period from January 6, 2012 to May 23, 2013.
4. The hearing officer does not order the District to provide an IEE at public expense.
5. The hearing officer does not order the District to provide services for the 2013-2014 school year.

William F. Culleton, Jr. Esq.

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

August 24, 2013