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: T.W.
Date of Birth: [redacted]
ODR No. 14391-13-14-KE
CLOSED HEARING

Parties to the Hearing:	Representatives:
Parent[s]	Danielle M. Karcich, Esquire Glenn P. Callahan, Esquire Barbara Gotthelf, Esquire McCarter and English, LLP BNY Mellon Bank Center 1735 Market Street, Suite 700 Philadelphia, PA 19103 Sonja D. Kerr, Esquire Public Interest Law Center 1709 Benjamin Franklin Pkwy, 2d Fl. Philadelphia, PA 19103
School District of Philadelphia 440 North Broad Street, Suite 313 Philadelphia, PA 19130	Sarah Davis, Esquire Fox Rothschild, L.L.P. 10 Sentry Parkway, Suite 200 P.O. Box 3001 Blue Bell, PA 19422-3001
Dates of Hearing:	November 27, 2013; January 8, 2014
Record Closed:	January 31, 2014
Date of Decision:	February 26, 2014
Hearing Officer:	William F. Culleton, Jr., Esquire

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). (NT 36.) Student is identified with Specific Learning Disability pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA) and Pa. Code Chapter 14. (NT 36.)

The District requested due process, asking the hearing officer to declare that its evaluation dated September 24, 2013, was appropriate, thus relieving the District of its obligation under the IDEA to provide Parent with an Independent Educational Evaluation (IEE), which Parent had requested. The District amended its complaint[1] to add a request for a declaratory order that its Individualized Education Program (IEP), offered on October 11, 2013, constituted an offer of a free appropriate public education (FAPE).

The hearing was completed in two sessions, and the record closed upon receipt of written summations. I conclude that the District's evaluation was appropriate despite a procedural violation, that Parent is not entitled to an IEE, and that the District's offered IEP constituted an offer of a FAPE.

ISSUES[2]

1. Was the District's evaluation dated September 24, 2013, appropriate?
2. Is the Parent entitled to an IEE at public expense?
3. Did the District's proposed IEP offer Student a free appropriate public education[3]?

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[1] Parent did not contest the amendment procedurally, though Parent did move to dismiss the amended claims; I reserved decision on the motions to dismiss. This decision addresses all issues raised in the Parents' motions.

[2] In her written summation, Parent asks the hearing officer, if within his jurisdiction, to order the District to conduct "formal" classroom observations as a matter of course in all IDEA evaluations. I decline to enter such an order because the Parent has not filed a complaint before me requesting any equitable or other relief. 20 U.S.C. §1415(f)(3)(b)(precluding issues not raised in complaint).

[3] At the outset of the hearing, I made clear that this issue is very limited, based upon the limited nature of the District's request. The District requests only that I enter an order providing a declaration that the District's proposed

FINDINGS OF FACT

1. Student attended a private charter school for kindergarten, first, second and part of the third grade, prior to January 2013, when Student was enrolled in a District elementary school. (NT 49 - 50; S 2, S 3.)

2. Between January 2013 and March 2013, Student was placed in the District's Response to Instruction and Intervention (RTII) program to determine Student's educational needs. (NT 50, 203-206, 261; S 2.)

3. On March 13, 2013, the District issued a permission to evaluate to Parent, and on May 3, 2013, Parent returned the signed permission form consenting to an initial evaluation by the District. (NT 50; S 2.)

4. Parent has a disability that affects Parent's ability to read. (NT 16 - 31.)

5. The District school psychologist evaluated Student. The psychologist is certified in Pennsylvania as a school psychologist and is qualified by training and experience. (NT 61 - 65.)

6. The District's school psychologist reviewed Student's educational file as part of the initial evaluation. This information included Student's attendance records for about one half year of attendance at the District's school, and one previous year of attendance in a cyber charter school prior to Student's enrollment with the District. Documentation included hearing and vision screening results, report card grades, a standardized reading achievement test, a standardized mathematics achievement test, a curriculum based assessment of reading, benchmark testing and PSSA testing and enrollment documents. (NT 65, 69, 100-103; S 3.)

7. The District school psychologist requested that Parent provide written input about Student's history, but Parent did not return the requested forms. In September 2013, the psychologist interviewed Parent by telephone, soliciting the information that had been requested through the written forms. Parent indicated that Student needed help with reading and mathematics. (NT 70, 75-76; S 3.)

8. The District school psychologist conducted cognitive testing, achievement testing and testing for visual motor integration. All testing was conducted under standardized conditions, and the results were deemed to be valid estimates of Student's functioning. (NT 70, 73, 97-98, 134, 137-138; S 3.)

9. The District school psychologist considered a report from Student's third grade teacher. The teacher reported that Student was working at a beginning of 1st grade level in reading. The teacher also reported that Student could not take any of the 3rd grade level tests because Student's skills were so low. The teacher reported that Student made some growth in reading, but that it was not substantial. (S 3.)

IEP constituted an offer of a FAPE. The District did not request authorization to provide counseling to Student contrary to Parent's objection, nor did it request an order that Student receive counseling contrary to Parent's objection. I have not considered any such orders, and do not order either of those things now. (NT 48-49.)

10. The District school psychologist did not conduct a formal classroom observation. The psychologist relied instead on his observations of Student during about two hours of testing, and reported those observations in detail. The psychologist reported that, during testing, Student displayed appropriate motivation and effort, and did not display any problems with distraction, behavior, or bizarre or unusual thinking. (NT 83-84; S 3.)

11. Parent reported that Student had a history of mood disorder. Parent also reported that several other family members had experienced learning or adjustment difficulties, requiring family therapy through a behavioral health service. (S 3.)

12. The District psychologist requested Student's teacher to return a behavior inventory form from the Behavior Assessment System for Children, 2nd edition (BASC-2). The psychologist also requested that Parent return such a form, but Parent did not return the form. (NT 216; S 3.)

13. The Student's teacher responses indicated some degree of emotional, social and educational difficulty, resulting in inconsistent performance in the classroom. The teacher ratings indicated problems with attention, learning, atypicality, social skills, study skills and communication. The ratings also indicated possible symptoms of depression and withdrawal. The psychologist noted that validity indices on the BASC-2 suggested that the teacher's inventory responses should be interpreted with caution. (S 3.)

14. The District's psychologist concluded that Student's achievement was significantly discrepant from Student's cognitive ability, and that Student had a significant degree of need for specially designed instruction. The psychologist recommended classification of Student with specific learning disability. (NT 105-106; S 3.)

15. The District's psychologist recommended placement in learning support with specially designed instruction. He recommended research based reading and mathematics interventions, with instruction to increase Student's sight vocabulary and overall reading comprehension skills. He also recommended instruction to increase Student's knowledge of basic mathematics operations. (S 3.)

16. By notice dated September 20, 2013, the District forwarded the psychologist's report to Parent and invited Parent to a meeting scheduled for September 26, 2013, to review the evaluation report from the District and to prepare an IEP. (NT 171; S 4.)

17. The District issued its initial evaluation report on September 26, 2013, classifying Student as a child with a specific learning disability. (NT 36, 51, 171, 209; S 4, 5.)

18. Based on the number of days in the District's summer break, the evaluation report was issued at least 9 days past the deadline of 60 days required by the IDEA. (NT 151, 221.)

19. The District's director of special education directed the Student's school to provide an IEP earlier than 30 days from issuance of the evaluation report, so that the District's offer of special education services would not be late due to the lateness of the evaluation report. (NT 152-153.)

20. The District's evaluation report incorporated all of the psychologist's evaluation. It included the results of a diagnostic reading assessment, a standardized reading assessment and curriculum based assessments of reading and mathematics. All assessments were conducted by qualified professionals. (NT 74, 84-86, 199-203, 211-220, 256-258, 317-319, 337-339, 348; S 5.)

21. The District's evaluation report included data from hearing and vision screening, indicating that Student had passed both screenings. (NT 72.)

22. The District's evaluation report did not include a speech and language evaluation. (S 5.)

23. The multidisciplinary team did not conduct a formal classroom observation for the evaluation report. This was due in part to the fact that the evaluation report was being delivered more than sixty days after receipt of the permission to evaluate. (NT 115-116, 120-122, 243; S 5.)

24. Observations by the classroom teacher can provide the multidisciplinary team with information from an individual who sees the student frequently and over a long period of time; a formal observation does not provide this kind of information. A formal observation can provide data from a separate individual who can observe the student's interaction with the teacher on a more objective basis. (NT 120-122, 174-189, 313-314.)

25. Failure to conduct a formal observation did not affect the ability of the multidisciplinary team to reach a decision on Student's eligibility, or to make recommendations regard to the specially designed instruction and accommodations needed to address Student's educational needs. (NT 95, 174-189, 224-225, 243-247, 341-342.)

26. The District's evaluation report included recommendations from Student's teachers, which indicated classroom observations. These recommendations indicated that Student's classroom behavior is cooperative and motivated. Teachers reported that Student often needs directions repeated and relies upon other students to model tasks when Student is unsure or misses information. Teachers also indicated that Student was, at the time of the evaluation report, beginning to become more assertive and ask for help or clarification; however, teachers indicated that Student often might not even know how to ask for clarification. Teachers noted that Student was observant in the classroom. Some of these observations were discussed at the meeting on September 26. (NT 163-165, 217, 222, 243-247, 267, 334-335, 340; S 5.)

27. Student's teachers reported that Student had made slight gains since enrollment in the District. In reading, Student had progressed from a reading level assessed at early grade 1 to a level assessed at mid-grade 1. The evaluation report included specific lesson numbers from the Reading Mastery program, grade 1, indicating Student's specific progress in that curriculum. (S 5.)

28. The District's evaluation report classified Student with specific learning disability. It recommended a placement of supplemental learning support in all strands of literacy and mathematics. It recommended research based direct instruction for both literacy and math skills. The report also recommended soliciting Parent's voluntary provision of

current developmental, medical, mental health and other background information. (NT 107-108; S 5.)

29. The District's evaluation report noted gaps in Student's educational history and profile, indicating a possible lack of appropriate instruction in reading and mathematics. (S 5.)

30. The multidisciplinary team met on September 26, 2013, and Parent attended along with Parent's attorneys. At the meeting, District personnel reviewed the psychologist's report and the evaluation report. (NT 216-217; S 7.)

31. Scores from subtests on the standardized reading achievement test and one score from the behavior inventory returned by the teacher were reviewed during the September 26 meeting, along with oral reports of observations of Student's classroom behavior with respect to attention and understanding directions. These raised questions about Student's language processing. (NT 109, 154-159, 225- 228, 243-244, 272-273; S 5, 8.)

32. In response to observational data provided during the September 26 meeting, the District requested additional testing, in order to address additional suspected disabilities with regard to attention and executive function. (NT 109, 155-159, 165, 226-227, 243, 345; S 8.)

33. During the meeting, District personnel requested that Parent fill out and return informal questionnaires regarding Student's history and the formal behavior inventory. Parent expressed concern that the initial evaluation did not include a formal classroom observation and a speech and language assessment. (NT 155-159, 165, 345; S 8.)

34. On September 30, Parent returned the informal questionnaire regarding Student's history and parental observations of Student's behavior. Parent did not return medical history and developmental history forms. (NT 161; S 9.)

35. On October 4, 2013, the District invited Parent to a meeting for purposes of drafting an IEP. The meeting convened on October 10, 2013. (S 10.)

36. Parent was present for the IEP meeting on October 10, along with counsel. Parent, through counsel, requested permission to make an audio tape of the meeting. The District personnel declined this request, based upon District policy against recording IEP meetings without prior determination that recording was necessary in order to accommodate parental disability. When the District declined to tape the IEP meeting, Parent withdrew from the meeting. The rest of the IEP team, consisting of District personnel only, completed the meeting and sent the IEP to the Parent. (NT 232-233, 251-252, 254.)

37. On October 11, 2013, the District issued an IEP and Notice of Recommended Educational Placement (NOREP) for Student, placing Student in supplemental learning support and providing related services in the form of individual school-based counseling in the classroom for 30 minutes per month. (NT 234-236; S 13.)

38. Student was placed into a co-taught inclusion setting with supplementary aids and services. (NT 275-276; S 13.)

39. The IEP contained detailed present levels of academic achievement, reporting Student's performance levels in both reading and mathematics. The IEP also included a description of Student's classroom behavior and developmental and adaptive functioning. (S 13.)

40. The IEP present levels reflect that Student's social and behavior skills are developmentally age appropriate. (S 13.)

41. The District's IEP provided for accommodation in state and local assessments. (S 13.)

42. The IEP offered goals addressing reading vocabulary, comprehension strategies, words correct per minute, essay writing, self-advocacy, numeration and place value and mathematics problem-solving. (NT 283-295; S 13.)

43. The IEP offered specially designed instruction for reading including a research based reading intervention program, small group testing, simplified directions, small group instructional setting, extended time, graphic organizers, pre-reading activities, assistive technology and chunking. (NT 258-264, 280-281, 286; S 13.)

44. The IEP offered specially designed instruction for writing including small group setting and visual-graphic organizers. (S 13.)

45. The IEP offered specially designed instruction for self-advocacy including role-playing activities in the regular education classroom. (S 13.)

46. The IEP offered specially designed instruction for mathematics including extended time, small group setting, simplified directions, small group testing, mathematics vocabulary word bank and assistive technology. (S 13.)

47. On October 15, 2013, Parent's attorney requested that the District provide Student with an independent educational evaluation (IEE) at public expense. The letter requesting the IEE indicated that the purpose for evaluation would be to identify Student with a specific learning disability. It indicated disagreement with the District's evaluation report because the evaluation did not include any classroom observation, did not take into account Student's family history, and did not advert to Student's repeat of a grade. (S 14.)

48. On October 15, 2013, the District issued its NOREP, declining to provide an IEE at public expense, citing as its reason the fact that the District evaluation report had found Student eligible as a student with a specific learning disability. (S 15.)

49. On October 17, 2013, the District filed a request for due process to defend the appropriateness of its evaluation report. (S 1.)

50. On October 31, 2013, the District amended its due process complaint to assert its request for a declaration that the IEP offered in October, 2013, constituted an offer of a FAPE. (P 13.)

51. On October 28, 2013, Parent's counsel conveyed Parent's consent to special education services with conditions. Parent withheld consent to the provision of counseling services to Student, and indicated acceptance of the remainder of services because Student needed

help in reading and mathematics. Parent indicated that Parent considered the proposed IEP better than nothing. (S 17.)

52. The District implemented all of the services offered in the IEP, except for counseling, which was not implemented, due to Parent's withholding of consent for this service. (NT 310.)

53. Student made some progress in the first three months of fourth grade in the areas of vocabulary development, reading grade level, and numeration and place value. (NT 278-300.)

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).[4] In Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence[5] 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

[4] 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.

[5] 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. See, Comm. v. Williams, 532 Pa. 265, 284-286 (1992). Weight is based upon the persuasiveness of the evidence, not simply quantity. Comm. v. Walsh, 2013 Pa. Commw. Unpub. LEXIS 164.

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 the District's evaluation is appropriate and that its IEP constituted an offer of a FAPE. If the District fails to produce a preponderance of evidence in support of the District's claims, or if the evidence is in "equipoise", then the District cannot prevail.

APPROPRIATENESS OF EVALUATION

Both federal law and state standards govern whether or not the District's evaluation was appropriate. The IDEA sets forth two purposes of the required evaluation: to determine whether or not a Student is a Student with a disability as defined in the law, and to "determine the educational needs of such Student … ." 20 U.S.C. §1414(a)(1)(C)(i). The IDEA regulations prescribe in detail the procedures to be used in order to fulfill these purposes. 34 C.F.R. §§300.301 to 300.311. Courts have approved evaluations based upon compliance with these procedures alone. See, e.g., Eric H. v. Judson Independent School District, 2002 U.S. Dist. Lexis 20646 (W.D. Texas 2002). In addition to the above requirements, Pennsylvania regulations provide special requirements for assessment of suspected specific learning disability. 14 Pa.Code §14.125. The evidence is preponderant that the District complied with both federal and state procedural requirements, with one exception, addressed below.

The September 2013 evaluation at issue here was sufficiently comprehensive to determine whether or not Student suffered from a disability as defined in the law, as well as to identify all of Student's educational needs, based upon the information available to the District

at the time of the evaluation. The District's multidisciplinary team (MDT) considered all areas related to Student's suspected disabilities, which encompassed reading, mathematics and emotional/behavioral functioning. A qualified school psychologist and two qualified special education teachers administered standardized cognitive and achievement testing that addressed Student's receptive and expressive language skills, and also addressed Student's visual perception, motoric expression, short-term visual memory, and visual-motor functioning. These personnel administered specific tests targeting reading, spelling and mathematics skills. The psychologist also utilized a standardized behavior inventory that elicits data addressing the child's emotional and behavioral functioning. By a preponderance of the evidence, I conclude that the evaluator and multidisciplinary team addressed all areas of suspected disability, 20 U.S.C. §1414(b)(3)(B); 34 C.F.R. §300.304(c)(4).

Evaluation procedures must include the use of "a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information … ." 20 U.S.C. §1414(b)(2)(A), 34 C.F.R. §300.304(b). The agency may not use "any single measure or assessment" as a basis for determining eligibility and the appropriate educational program for the Student. 20 U.S.C. §1414(b)(2)(B), 34 C.F.R. §300.304(b)(2).

Here, the evidence is preponderant that the District met this standard. The District's strategies in the September 2013 evaluation at issue here included review of documents, interviews with Parent, clinical observations of and interactions with the Student, and teacher observations in addition to a variety of standardized and curriculum based measures of Student's functioning and achievement. The school psychologist addressed emotional and behavioral functioning through a standardized behavior inventory, Parent interview and clinical interview, as well as through informal questionnaires to teachers, and follow-up interviews with them.

The agency must utilize information provided by the parent that may assist in the evaluation. 20 U.S.C. §1414(b)(2)(A). This must include evaluations or other information provided by the parents. 20 U.S.C. §1414(c)(1)(A)(i), 34 C.F.R. §300.305(a)(1)(i). Part of any evaluation must be a review of relevant records provided by the parents. 34 C.F.R. §300.305(a)(1)(i). The parent must participate in the determination as to whether or not the Student is a Student with a disability. 34 C.F.R. §300.306(a)(1).

The record is preponderant that the MDT solicited parental input. District personnel reviewed documents and requested that Parent fill out the behavior inventory. The District's psychologist conducted a follow-up telephone interview with Parent.

The Parent does not challenge the District's selection of testing instruments or their administration. 20 U.S.C. §1414(b)(2)(C), 34 C.F.R. §300.304(b)(3); 20 U.S.C. §1414(b)(3)(A)(iii), 34 C.F.R. §300.304(c)(1)(iii); 20 U.S.C. §1414(b)(3)(A)(v), 34 C.F.R. §300.304(c)(1)(v). The evaluators were trained and knowledgeable. 20 U.S.C. §1414(b)(3)(A)(iv), 34 C.F.R. §300.304(c)(1)(iv).

Parent argues that the evaluation was inappropriate because the MDT, meeting in September 2013 to review and discuss the evaluation, decided to seek additional data, including a speech and language assessment, Parent's responses to the behavior inventory form, a test of executive functions, and a classroom observation. Parent asserts that this was done to obviate the need for an IEE, and argues that the team knew that its evaluation was inappropriate. I conclude that the evidence is preponderantly contrary to Parent's argument.

The evidence is preponderant that on September 26, 2013, the team discussed teacher observations of Student during instruction, and concluded that those observations might indicate attention, language processing or executive function difficulties. Therefore, the team decided to

request additional assessments to address those concerns – concerns that the team itself identified, and that had not been identified at the time of the evaluation.

Parent raised the absence of a speech and language assessment and the absence of an observation at the meeting. However, this does not demonstrate that the team's decision to do further assessments was an admission that the evaluation was inappropriate. The testimony shows that the team acceded to the Parent's requests in part because team discussion of teacher observations indicated that further testing was appropriate, and in part in order to cooperate with Parent by considering Parent's concerns. Moreover, Parent's request for an IEE came in a letter dated October 15, well after the team decided to seek additional data.

In sum, I conclude that the District's evaluation was appropriately comprehensive based upon the District's knowledge at the time of the evaluation. I also find, with the exception discussed below, that the District's evaluation complied with the procedural requirements of the IDEA. Therefore, the evidence is preponderant that the evaluation was appropriate.

"FORMAL" OBSERVATION

Parent argues in response to the District's due process complaint that the District's evaluation was inappropriate because it violated the purported requirement of the IDEA that the evaluation must include a "formal" observation of Student in Student's classroom. Parent relies upon both the IDEA itself and the regulations that implement the IDEA.[6]

The IDEA, at 20 U.S.C. §1414 (c)(1) provides:

[6] Parent also cites judicial authority for the asserted "formal" observation requirement; however, I conclude that Parent's cited cases do not support the argument. In particular, M.Z. v. Bethlehem Area School District, 521 Fed. Appx. 74, cert. den. Bethlehem Area Sch. Dist. v. D.Z., 134 S. Ct. 479, 187 L. Ed. 2d 318, 2013 U.S. LEXIS 7594, 82 U.S.L.W. 3234 (2013) does not hold that an evaluation without "formal" observation is inappropriate; rather, the court simply relied upon a hearing officer's finding of inappropriateness based upon multiple factors, including lack of observation. The opinion does not specify whether or not the hearing officer had concluded that the IDEA requires "formal" classroom observation.

> As part of an initial evaluation (if appropriate) and as part of any reevaluation under this section, the IEP Team and other qualified professionals, as appropriate, shall –
> (A) review existing evaluation data on the child, including –
>
> (i) evaluations and information provided by the parents of the child;
> (ii) current classroom-based, local, or State assessments, and classroom-based observations; and
> (iii) observations by teachers and related services providers… .

Parents point out that this language distinguishes between "classroom-based observations" and observations by teachers and other providers. Parent argues that this implies a requirement that "classroom-based observations" be different from – and in addition to - observations of teachers made in the course of teaching the student. From this implication, Parent infers that "classroom-based observations" must be "formal".

The statutory section quoted above is inapposite. By its terms it requires only that the District's evaluators review any observation data "existing" at the time of the evaluation, and only "if appropriate". Plainly, this language does not mandate the creation of such data through the conduct of a "formal"[7] classroom observation. I have found no statutory language creating such a requirement, and counsel have not directed me to any such language.

The regulations implementing IDEA mirror the above language at 34 C.F.R. §300.305. In addition, Parents point to 34 C.F.R. §300.310(a), which requires the District to "ensure that the child is observed [in the classroom] to document … academic performance and behavior in the areas of difficulty." This section of the regulation is included under a heading, "Additional Procedures for Identifying Children With Specific Learning Disabilities". Thus, it applies the obligation of observation of the child for evaluation purposes only to evaluations seeking to determine whether or not the child has a specific learning disability.

[7] This term is Parents' alone; it is not found anywhere in either the statute or the regulations.

The regulation at 34 C.F.R. §300.310(b) further articulates this requirement:

> (b) the group described in section 300.306 (a) (1), in determining whether a child has a specific learning disability, must decide to-
>
> (1) use information from an observation in routine classroom instruction and monitoring of the child's performance that was done before the child was referred for an evaluation; or
>
> (2) have at least one member of the group … conduct an observation of the child's academic performance in the regular classroom … .

This section of the regulation does require "observation" of the child in the classroom for purposes of determining whether or not the child should be classified with specific learning disability. However, this section does not by its terms require either a "formal" observation or an observation by someone other than the child's teacher, as Parents argue. Rather, the regulation is couched in much more general terms, requiring that the District "ensure that the child is observed", 34 C.F.R. §300.310(a).

Subsection b of this section allows the evaluating team to elect between two forms of observation. 34 C.F.R. §300.310(b). One permissible choice is to "[u]se information from an observation in routine classroom instruction and monitoring of the child's performance", 34 C.F.R. §300.310(b)(1). The other choice appears to be that which Parent argues is not a choice, but an inflexible mandate: to have a member of the evaluating team "conduct an observation of the child's academic performance in the regular classroom …", 34 C.F.R. §300.310(b)(2).

Thus, the plain language of the pertinent section of the IDEA implementing regulations appears to permit the District to rely upon previous teacher observations in the classroom as part of the evaluation for determining whether or not to identify the child with specific learning

disability. Contrary to Parent' argument, the regulation does not require the District to conduct a formal observation through someone other than the child's teacher as part of such an evaluation.[8]

The historical development of the regulation reinforces this view. In revising the previous section requiring observation for suspected specific learning disability after the amendment of the IDEA in 2004, the Office of Special Education and Rehabilitative Services (OSERS) proposed explicitly to require that a member of the evaluating group, "other than the child's current teacher", observe the child, the learning environment, and the regular classroom setting. 70 Fed. Register 35782, 35865 (2005). In response to critical comments, OSERS removed this explicit requirement in favor of the more general language quoted above. 71 Fed. Register 46540, 46659-46660 (2005). Thus, the regulatory body deliberately loosened the mandate that it had proposed. The original proposal had resembled the mandate that the Parent argues for in this matter. Thus, the history of the regulatory provision suggests an intention not to require local educational agencies to conduct "formal" observations in every instance. [9]

Even if we assume for the sake of argument that the regulations contemplate a mandatory "formal" observation by someone other than the child's teacher, the District's failure to conduct such an observation does not render the evaluation at issue here inappropriate. The IDEA, at section 1415(f)(3)(E), requires that a hearing officer's decision "shall be made on substantive grounds based on a determination of whether the child received a free appropriate public

[8] Conceivably, the distinction in 34 C.F.R. §300.305 between "classroom based observations" and teacher observations might inform construction of 34 C.F.R. §300.310 in such a way as to require "formal" observation. Yet, the term "classroom-based observations", used in section 300.305, is not used in section 300.310. Thus, the distinction set forth in the former section of the regulations, upon which Parents so heavily lean, does not assist in construction of the latter more pertinent section of the regulations.

[9] There is language in the OSERS comments (cited above) to the final regulation that suggests that OSERS had in mind a more "formal" observation. However, I conclude that this language in the comments does not limit the scope of the discretion that Districts have under the regulation to rely upon observation data from other than formal observations. The OSERS comments are ambiguous at best, and Federal Register comments do not have the force of law. On the other hand, the regulatory language, which does have the force of law, clearly permits the use of previous observations, including those of teachers, and it does not clearly require those observations to have been obtained through "formal" observation sessions. I have found no subsequent OSERS guidance on this point, nor have the parties directed me to any additional administrative guidance.

education." 20 U.S.C. §1415(f)(3)(E)(i). When educational agencies violate the procedural requirements of the IDEA, the hearing officer is required to determine whether or not such procedural violations met any of three criteria that the statute provides as a test of whether or not the agency has committed a substantive violation requiring a remedial order:

> (ii) PROCEDURAL ISSUES. – In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies –
>
> (I) impeded the child's right to a free appropriate public education;
> (II) significantly impeded the parents' opportunity to participate in the decisionmaking process …; or
> (III) caused a deprivation of educational benefits.

20 U.S.C. §1415(f)(3)(E)(ii). Thus, I must make a finding whether or not the District's failure to include a formal observation in its evaluation of Student – assuming for argument that it is a procedural violation – constituted a deprivation of a FAPE as defined in this section. See Ford v. Long Beach Unified School District, 291 F.3d 1086, 1089 (9th Cir. 2002)(under previous regulation requiring classroom observation, violation was procedural and did not affect the validity of the evaluation).

The record is preponderant that, while a "formal" observation can be expected to provide information of a different nature than that provided by teachers' reports of their observations, the evaluation team nevertheless was provided significant observational data through teachers' written responses to informal questionnaires, teachers' responses to formal behavior inventory questions, and teachers' discussions with the District psychologist and with other members of the evaluation team. Therefore, I conclude that there is no record basis to believe that a "formal" observation by non-teachers was necessary to provide a valid or appropriate evaluation. There is

no evidence that the District's omission to conduct a "formal" observation impeded Student's right to a FAPE, significantly impeded Parent's participation in decision-making, or deprived Student of any educational benefits. Given this conclusion, the Parent's argument that the evaluation was inappropriate must fail. The District has provided preponderant evidence that its evaluation was appropriate.[10]

EVALUATION DELIVERED LATE

Parent argues that the District's evaluation was delivered after the expiration of the timeline for initial evaluations specified by the IDEA, and therefore was inappropriate. There is no question that the evaluation was late; District witnesses all agreed, although they admitted to a much smaller degree of tardiness than Parent claims.[11]

As noted above, a procedural violation such as this is remediable only when it results in a denial of a FAPE to the child, interferes with the Parent's ability to participate in educational planning, or deprives the child of educational benefit. 20 U.S.C. §1415(f)(3)(E)(ii). Here, the District provided preponderant evidence that it provided the Student's IEP earlier than would have been required under the IDEA, so that it's lateness in providing the evaluation would not delay the services that the District had found appropriate for the Student. Thus it has proved that

[10] Consequently, I need not reach the other issue raised by Parent in this context: that a district cannot cure an inappropriate evaluation by conducting further data-gathering or additional assessments, once a parent has requested an IEE. Since the evaluation was not inappropriate, the District's later offer to conduct a formal observation was not an attempt to end-run the Parent's right to an IEE under the IDEA, because such a right did not arise in the circumstances of this matter, and because Parent had not requested an IEE at the time that the District sought permission to conduct an observation.

[11] Parent claims that the evaluation was delivered late by months, because the Parent's permission to evaluate was delivered in writing in May 2013; Parent argues that the evaluation does was due within 60 days – sometime in July 2013. Parent is incorrect in this assertion. The IDEA sets a 60 calendar day time frame for delivery of an initial evaluation; however there is an exception to this timeframe if the state establishes a different timeframe. 20 U.S.C. §1414(a)(1)(C)(i)(I). Chapter 14 of the Pennsylvania code establishes a different timeframe for initial evaluations. 14 Pa. Code §14.123(b)(calendar days during summer break not counted for timeline). OSEP guidance in Letter to Reyes, 59 IDELR 49 (April 11, 2012) is not to the contrary. Therefore I accept the District's factually uncontested and therefore preponderant evidence that the evaluation was delivered only a few days late.

its procedural violation has not resulted in a substantive deprivation to the Student. The record is preponderant that the delay did not interfere with Parent's ability to participate in educational planning.[12] Accordingly, I will not enter a remedial order with regard to this procedural violation, but I urge the District's Director of Special Education to review this matter to assure that the District complies with IDEA evaluation timelines in the future.

JURISDICTION TO PROVIDE A DECLARATION REGARDING WHETHER OR NOT THE IEP WAS AN OFFER OF A FAPE

Parent challenges the hearing officer's jurisdiction to provide a declaratory order regarding whether or not the District offered Student a FAPE through its IEP offered in October 2013. I conclude that the IDEA vests jurisdiction in the administrative hearing officer to provide such a declaratory order. The IDEA requires each state to provide "[a]n opportunity for any party to present a complaint … with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child … ." 20 U.S.C. §1415(b)(6)(A). This broad language ("any matter relating to [FAPE]") encompasses what the District has requested me to do here. Given the hearing officer's broad equitable remedial authority, I conclude that it is within the hearing officer's authority to issue a declaratory order with regard to whether or not the District offered Student a FAPE. Swope v. Central York School District, 796 F. Supp. 2d 592 (W.D. Pa. 2011)(declaratory relief is within the equitable remedies available under the IDEA through the administrative process); accord, D.F. v. Red Lion Area School District, 2011 U.S. Dist. LEXIS

[12] The parties made much of an incident in which the Parent requested accommodation of an IEP meeting by taping the meeting. The District declined to permit the taping, and Parent thereupon left the meeting. The meeting continued without Parent, and the Parent did not participate in any other team meetings. Notwithstanding these events, this issue is not before me. Parent has not requested an administrative decision on the appropriateness of the District's declining to permit taping of the IEP meeting, because Parent has not filed a request for due process. It suffices to say that this incident was not caused by any procedural violations with regard to the District's evaluation.

151970 (M.D. Pa. 2011); Hesling v. Avon Grove School District, 428 F. Supp. 2d 262, 273 (E.D. Pa. 2006). Therefore, I do not accept Parent's assertion that I lack authority to enter the order requested by the District.

Parent argues that the IDEA and its regulations deprive the hearing officer of jurisdiction to enter a declaratory order as to whether or not the District's offer of an IEP constituted an offer of a FAPE. Parent relies upon 20 U.S.C. § 1414 (a)(1)(D)(ii)(III)(aa), which provides that a local education agency is not to be considered in violation of the IDEA's FAPE requirement where a parent refuses consent to the receipt of special education and related services.

This provision is not relevant to the present situation. The provision deals with a situation where a local education agency does not provide a special education service that it considers necessary, because the parent has refused consent for that service. Thus, it is the agency's failure to provide the service that is addressed by the statutory provision upon which Parent relies. If a parent refuses special education services, the statute relieves the local education agency of any liability for not providing those services. Here, the District is not asking whether or not its decision not to provide counseling services, despite the recommendations of the IEP team, constitutes a denial of a FAPE. Rather, it is asking whether or not the offer that it made in the IEP proposed on October 11, 2013, constitutes an offer of a FAPE.

Parent also cites 34 C.F.R. § 300.300(d)(3), which forbids a local education agency from denying a service to a child based upon a parent's refusal to consent to a different service. This provision also is inapposite. The District is not denying any service that it offered in its proposed IEP; clearly, it is not withholding any service from Student on the basis of Parent's refusal to consent to counseling services. On the contrary, the District simply acceded to Parent's wishes, by providing the services offered in the IEP, except for the counseling services.

Parent argues that this hearing officer's declaratory decision regarding whether or not the offered IEP constitutes an offer of a FAPE will have a practical effect of pressuring Parent to accept the counseling services. The record in this matter plainly demonstrates the contrary. Parent asserted her non-consent, and when the District amended its complaint to request an administrative declaration regarding the issue, Parent, through counsel, responded with evidence and legal argument to resist the District's request. There is no evidence of a chilling effect in these proceedings. There is no evidence that the burden of responding to the District's request for due process put any pressure on Parent at all to accept counseling – especially here, where the District immediately took the position (maintained throughout this matter) that it would honor Parent's refusal of counseling. Parent's argument to the policy ramifications of a hearing officer's decision of this issue is not compelling. It is my responsibility to decide the issue before me by applying existing law to the facts of the case. It is not my responsibility to parse the public policy ramifications of what I consider the law to require.

THE OFFERED IEP CONSTITUTED AN OFFER OF A FAPE

The IDEA requires that a state receiving federal education funding provide a "free appropriate public education" (FAPE) to disabled children. 20 U.S.C. §1412(a)(1), 20 U.S.C. §1401(9). School districts provide a FAPE by designing and administering a program of individualized instruction that is set forth in an Individualized Education Plan ("IEP"). 20 U.S.C. § 1414(d). The IEP must be "reasonably calculated" to enable the child to receive "meaningful educational benefits" in light of the student's "intellectual potential." Shore Reg'l High Sch. Bd. of Ed. v. P.S., 381 F.3d 194, 198 (3d Cir. 2004) (quoting Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 182-85 (3d Cir.1988)); Mary Courtney T. v.

School District of Philadelphia, 575 F.3d 235, 240 (3rd Cir. 2009), see Souderton Area School Dist. v. J.H., Slip. Op. No. 09-1759, 2009 WL 3683786 (3d Cir. 2009).

"Meaningful benefit" means that an eligible child's program affords him or her the opportunity for "significant learning." Ridgewood Board of Education v. N.E., 172 F.3d 238, 247 (3d Cir. 1999). "[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).

The only evidence regarding the appropriateness of the IEP is the document itself and the testimony of various District personnel, including administrators and teachers, that the IEP constituted an offer of a FAPE. I have reviewed all of this evidence and I am satisfied that the IEP was reasonably calculated to provide Student with meaningful educational benefit. I note that the IEP sets forth Student's present levels of academic and functional performance in detail, and offers goals, accommodations and specially designed instruction that address the areas of need that the evaluation report identified. Student is placed in supplemental learning support, and there was uncontested evidence that this placement at Student's school would address Student's reading and mathematics needs with research based educational programs. Student was placed into a co-taught inclusion setting with supplementary aids and services, thus assuring placement in the least restrictive setting. Student's emotional and behavioral needs were addressed through the offer of counseling as a related service. Thus the evidence is preponderant that the District's IEP offered Student a FAPE.

CREDIBILITY

I found all witnesses to be credible and reliable.

CONCLUSION

In sum, I conclude that the District's evaluation was appropriate, and that Parent therefore is not entitled to an IEE at public expense. I also conclude that the IEP that the District offered to the Student in October 2013 constituted an offer of a FAPE.

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

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows:

1. The District's evaluation dated September 24, 2013 was appropriate.

2. The Parent is not entitled to an IEE at public expense.

3. The District's proposed IEP offered to Student on October 11, 2013 constituted an offer of a FAPE.

It is **FURTHER ORDERED** that any claims that are encompassed in this captioned matter and not specifically addressed by this decision and order are denied and dismissed.

William F. Culleton, Jr. Esq.

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

February 26, 2014