Pennsylvania

Special Education Hearing Officer

DECISION
Child's Name: D. F.

Date of Birth: [redacted]

Dates of Hearing: 12/10/2014, 12/22/2014, 1/28/2015, 1/30/2015 and 2/13/2015

CLOSED HEARING

ODR File No. 15359-14-15-AS

Parties to the Hearing:	Representative:
Parents Parent[s]	Parent Attorney Judith Gran Esq. Freeman Carolla Reisman & Gran LLC 19 Chestnut Street Haddonfield, NJ 08033
Local Education Agency Red Lion Area School District 696 Delta Road Red Lion, PA 17356-9185	LEA Attorney Brooke Say Esq. Stock and Leader/Susquehanna Commerce Center East Suite E 600, 221 West Philadelphia Street York, PA 17401-2994
Date Record Closed:	February 24, 2015
Date of Decision:	March 9, 2015
Hearing Officer:	William Culleton Esq., CHO

INTRODUCTION AND PROCEDURAL HISTORY

Student[1] is an eligible child with a disability pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA), and a qualified individual with a disability protected by the Rehabilitation Act of 1973, 29 U.S.C. §794 (section 504), and the Americans with Disabilities Act (ADA)[2], 42 U.S.C. §12131. (J 1 ¶ 2, 4.)[3] Student lives within the respondent District. (J 1 ¶ 1.) Student is identified under the IDEA as a child with a disability of Deaf-blindness, 34 C.F.R. §300.8(c)(2). (J 1 ¶3.)

Parents assert that the District failed to offer or provide an appropriate re-evaluation as required by the IDEA, and failed to offer or provide a free appropriate public education (FAPE) to Student from September 5, 2012 to February 13, 2015. Parents claim that the District failed to provide a re-evaluation when it knew that Student's educational needs had changed, and failed to change the services that it was offering to address the Student's changing needs appropriately. Parents seek compensatory education and prospective relief. The District denies these allegations and asserts that Parents obstructed its timely efforts to provide both appropriate re-evaluation and appropriate services.

The hearing was completed in five sessions. I conclude that the District violated the IDEA's procedural requirements for timely and comprehensive evaluation, as implemented by Chapter 14 of the Pennsylvania Code. I further conclude that the District did not deprive Student of a FAPE,

[1] Student, Parents and the respondent School are named in the title page of this decision; personal references to the parties are omitted in order to guard Student's confidentiality. Because the Student's mother engaged in many transactions with the School, she is referred to below as "Parent" in the singular.

[2] I assert jurisdiction over the ADA claims and decide them here only insofar as they are "derivative" claims that assert issues and request relief that is identical with the issues and relief requests advanced pursuant to the IDEA and section 504. 22 Pa. Code §14.102(a)(2)(xxx) (expressly incorporating 34 C.F.R. §300.516, including subsection (e) of that regulation); Batchelor v. Rose Tree Media Sch. Dist., 2013 U.S. Dist. Lexis 44250 (E.D. Pa. 2013); Swope v. Central York Sch. Dist., 796 F.Supp.2d 592, 600-602 (M.D. Pa. 2011).

[3] The Parties submitted, and I admitted into evidence, 48 Joint Stipulations of Fact, which are contained in a six page exhibit marked "J 1". Specific stipulations are designated by paragraph number.

but offered and implemented a FAPE during the relevant period of time. I decline to order compensatory education, and I order the District to issue NOREPs for instruction in the home, an FBA to be conducted in the home instructional setting, and a comprehensive evaluation of Student's unique needs.

ISSUES

1. Did the District offer and/or provide Student with an appropriate re-evaluation from September 5, 2012[4] to February 13, 2015[5]?

2. Did the District offer and/or provide Student with a FAPE from September 5, 2012 to February 13, 2015?

3. Should the hearing officer order the District to provide compensatory education to Student for all or any part of the period from September 5, 2012 to February 13, 2015?

4. Should the hearing officer order the District to provide an appropriate re-evaluation to Student, specifying either the questions to be addressed or the qualifications of evaluators to participate in the evaluation?

FINDINGS OF FACT

THE STUDENT

1. Student is late teen-aged and, if in school, would be in the 11th grade. (NT 25, 26.)

2. Student is not in school, and has not been in school since September 7, 2012. (NT 39, 298, 312; J 5 ¶34; S 21.)

3. Student has a medical history of severe to profound bilateral sensorineural hearing loss, cortical vision impairment, hydrocephalus, kidney failure, and a seizure disorder. These disorders were caused by meningitis, which Student contracted at age 6 months. (S 20, 21.)

4. At approximately age 7 months, surgeons inserted a shunt in Student's head to drain excess liquid; the shunt remains in place. At age 16 to18 months, Student was fitted with a cochlear implant on the left side, with which Student can sense sounds. (NT 249; S 20, 21.)

[4] This date is selected by parents, apparently in conformity to the IDEA's two-year statute of limitations period.
[5] This is the date of the final hearing session in this matter.

5. Student can utilize residual hearing with the aid of the cochlear implant. In 2005, Student was able to respond to Parent's oral request to kiss her purely based upon residual hearing with no visual or tactile prompts. (S 21.)

6. Student's history by parental report indicates the ability to utilize three word sentences and demonstrate communication skills at 4 years of age, such as expressing a vocabulary of 25 signs, voicing utterances as expressive communication, answering questions and recognizing words aurally and translating them into signs. By age nine, Student reportedly had a sign vocabulary of 90 signs. (S 21.)

7. By 2011, Student's visual impairment was largely resolved, so that, with training, Student could use vision for most tasks. (S 20, 21.)

8. Parents presented audiogram reports to the District, dated December 5, 2011, based upon audiological testing performed by the hospital at which Student had been fitted for the cochlear implant. These audiogram reports indicated that, utilizing the cochlear implant, Student was able to hear speech tones at normal decibel levels. (NT 728-739; S 14, 20, 21; P 17.)

9. The audiograms were not complete or reliable because they did not provide decibel levels for three consecutive tones in the continuum. (NT 728-739.)

10. In May 2012, the District performed testing of the effectiveness of the cochlear implant, utilizing an assessment considered to be reliable in the field of deaf-blindness. This assessment yielded contradictory data showing that Student was not responding to speech sounds as a typical hearing person would have done. (NT 593-594, 728-743; S 21.)

11. By December 2012, additional District assessments of Student's auditory skills indicated that Student did not localize sound; Student's ability to modify Student's own speech was only emerging at that time; and Student's ability to respond to sound at increasing distances was also only emerging. (S 21.)

12. Student, utilizing the cochlear implant, can detect speech sounds in the normal decibel and tone ranges of human speech; however, Student does not yet know how to derive meaning from all of the sounds that Student detects. (NT 779-786; P 58.)

13. District assessment of Student's communication skills as of December 2012 indicated that Student functioned in the earliest stages of communications seen in typically developing individuals. Student most often used body movements, vocalizations, facial expressions and simple gestures, such as tugging on people, to communicate. Student's use of language was assessed to be emerging from a pre-symbolic developmental stage. (S 21.)

14. Student's cortical vision impairment is caused by neurological damage, not by damage to the eye itself. Student's diagnosis suggests the possibility of gradual improvement of vision over time. As of the spring of 2012, Student's visual resolution was assessed in the highest phase of an assessment scale that the District administered. In school, Student was using

vision and tactile input to gather information most of the time. Student did not use these senses simultaneously, and Student's visual motor skills were inconsistent. (S 16, 21.)

15. As of the spring of 2012, Student's ability to navigate in the school setting was limited. Student was able to navigate short, familiar routes with minimal prompting. Nevertheless, for safety, it was necessary to shadow Student at a distance of approximately 6 feet, and Student required assistance to navigate certain stairways. Student preferred to navigate while in contact with another person, who would function as a guide. Student bumped into objects if they were below Student's waist. Student was able to use a cane for navigation, but preferred not to use it in school. (S 16, 21.)

16. As of the spring of 2012, Student demonstrated increased ability to use pictures without tactile elements for academic learning and assessment. Student required an environment with bright lighting and high contrast for this purpose. (S 16, 21.)

17. Student does not utilize braille. Student was able to recognize some letters and letter combinations, utilizing an enlarged print. Text was adapted to an accessible level of English, employing short sentences. (S 16, 21.)

18. While Student was in school prior to December 2011, Student demonstrated improved functional visual sense, by utilizing vision either alone or prior to utilizing the tactile sense when engaged in educational activities. In particular, Student became more skilled in participating in assessments utilizing vision to make choices from a selection of pictures on a table. (NT 1252-1254; P 20; S 16, 99.)

19. Student's primary means of receptive language communication in school was to receive tactile sign. This was delivered one-on-one by an educator sitting at close proximity and making tactile signs in the palm of Student's hand. (NT 726-728, 1254-1257; S 16, 20, 21.)

20. Student's primary languages are spoken English and Pidgin Signed English (conceptual signed English). Student would utilize (either receptively or expressively) the manual vocabulary of American Sign Language or similar signs, but they would be expressed in English word order and syntax. (NT 701-705; S 16, 20.)

21. Student does not utilize American Sign Language. In school, Student demonstrated knowledge of between 34 and 123 signs and sign phrases and was learning up to 182 additional signs and sign phrases; Student’s intervener reported subjectively that Student had a receptive understanding of a much greater number of signs and/or sign phrases. (NT 743-744; S 16; P 20.)

22. Student's modes of receptive communication include auditory and oral language, finger spelling, gestures, tactile, pidgin signed English, pictures, objects, demonstrations and modeling. Student does not use residual hearing consistently in school. Student’s primary receptive communication mode in school is tactile sign. (NT 727-728; P 20; S 16.)

23. Student's modes of expressive communication include finger spelling (which is at an "emerging" level), gestures, oral utterances and vocalizations, tactile or tangible symbols, modified signs, sign approximations, coactive signing, pidgin signed English, pictures, objects and demonstrations. Student produced some signs in a visual mode. (NT 1243-1252; P 20.)

24. Student exhibits deficits in adaptive functioning, including a lack of independence in dressing and undressing; a lack of independence in requesting and utilizing bathroom breaks; and continued need for prompting during lunch breaks, arrival and dismissal routines, and shopping trips. (P 20.)

25. Student's development of concepts was believed not to be at a level commensurate with that of same age or same grade peers. Student was working on learning to label concrete and semi-concrete concepts. Student was assessed in academic subjects by utilizing "WH" questions with four or fewer prompts. In speech therapy sessions, Student worked on imitation of sounds and vocalizing. Student required prompts to follow a sequence of preparation, and continued to be inconsistent. (P 20.)

26. Student was able to comply with routine requests in transition from one activity to the next, using a schedule book. (S 16; P 20.)

27. Student exhibited behaviors that impeded learning, including loud vocalizations and self-stimulatory behaviors that disrupted the class and required brief removal from class; hitting and biting self; Student banging Student's head on objects; pinching others; banging on tables, tipping tables; attempting to throw things; and walking or running ahead of others. (NT 1007-1011, 1048-1051; P 31.)

28. Student was not able to follow conversations in a group; Student relied upon the intervener to mediate conversations one-on-one, and in this way Student approximated participation in groups in school. (S 16.)

DISTRICT'S SERVICES TO STUDENT

29. Student attended a school for the blind in another state from 2002 to 2004. From 2004 to 2006, Student attended a program developed by Student's Parents. From 2006 to September 2012, Student attended District elementary, middle and high schools. (S 21.)

30. Through a Notice of Recommended Educational Placement (NOREP) dated December 14, 2011, Student was placed in Supplemental Deaf and Hard of Hearing Support. Student was to be instructed in Student's neighborhood District high school. (P 20; S 80, 153.)

31. Student's presently offered IEP is the annual IEP dated December 24, 2011, and was sent to Parents after ten IEP meetings spanning the time period of April 2010 to December 2011. The IEP was expected to be operative from December 2011 to December 2012. (NT 547,574; S 143; P 20.)

32. Student was instructed for the majority of the school day in the District's regular education classrooms for science, social studies, history, language arts, English, health, culinary arts, mathematics and electives, utilizing a modified curriculum aligned with Student's grade level curriculum. (P 20.)

33. The intervener in the general education classrooms would utilize tactile signs to communicate with Student, but not always simultaneously with voice, as that would be disruptive to the class. Simultaneous signs and voice would be used in small group situations at the intervener's discretion, and sometimes the intervener would convey exactly what the teacher was saying, for example, when the teacher was giving instructions. (NT 704-708, 1241.)

34. Student was instructed for part of the school day in a resource room setting, receiving direct instruction pre-teaching and re-teaching of skills. The resource room is a specialized setting operated by the local Intermediate Unit (IU) for students who are both visually and hearing impaired. (NT 566-567, 682-683, 1120-1121; P 20.)

35. The IU program was staffed with appropriately trained supervisors and educators. (NT 260, 667-680, 972-973, 1044-1047, 1263-1264; S 37.)

36. An educational staff member called an "intervener" attended Student throughout the school day and provided assistance and accommodation for both visual deficits and hearing deficits with regard to communication, social interaction and daily living tasks. (NT 437-438, 684-692, 696-698; P 20.)

37. The intervener's role was to convey the essence or the modified version of what the teacher was saying, providing tactile equivalents for visually conveyed aspects of sign language syntax and context that the Student would not notice due to the Student's visual impairment. The intervener did not provide strict interpretation of what the speaker was saying. (NT 575-586, 595-597, 604-606, 684-692; S 16, 20.)

38. Student also received direct instruction using total communication from a teacher of the deaf and hard of hearing and a teacher of the visually impaired. This included research based instruction in reading, and instruction and other academic skills. (NT 439, 602-603, 692-696, 1199; P 20.)

39. Student received Blind-Visually Impaired Support and Deaf and Hard of Hearing Support. (P 20.)

40. Student received audiological services, Orientation and Mobility training, vision support for adapting materials, speech and language consultation, occupational therapy consult, physical therapy consult; and post-secondary transition instruction and services. (NT 439; P 20.)

41. Parent forwarded audiograms from Student's private audiologist to the District in 2007 and 2009. Parents did not agree to audiological testing by the IU audiologist, proposed for purposes of a functional hearing evaluation. (P 5, 11; S 5, 7, 41.)

42. The District also provided assistive technology, including keyboard, touch screen, switches, light box, iPad and CCTV. (P 20.)

43. The District also provided a sensory diet, including proprioceptive and vestibular and activities. The District also assessed Student's sensory needs as part of a re-evaluation draft proposed in December 2012. (P 20; S 34.)

44. Student's IEP included a positive behavior support plan, which specified antecedent preventive strategies, replacement behavior and reinforcements or consequences. (P 20.)

45. Student's IEP included a communication plan. The plan called for delivery of the general education curriculum through the use of a trained intervener. (P 20.)

46. Student received specially designed instruction addressing goals that addressed the elements of visual efficiency training. (NT 1257-1262.)

47. Student's IEP provided for supports to school personnel, including team consultation with regular education teachers; training of interveners; and consultation with a psychologist who was an expert in addressing inclusion needs and behavior of deaf-blind individuals (Consultant). (NT 440, 772; P 20.)

48. The Consultant visited the Student's program and spoke with staff about once every three months and was available by telephone and email. (J 1 ¶8.)

49. The IEP team found Student eligible for and offered extended school year services for the summer of the IEP year. (P 20.)

50. The December 2011 IEP was based upon extensive input from Parents. (NT 441-442, 449-453, 562-563; P 20; S 20.)

51. In the 2010-2011 and 2011-2012 school years, the IU program's teachers took steps toward providing auditory training to address Student's use of residual hearing, by requesting audiological testing and other information, and by using the implant assessment stimuli to teach student the idea of mimicking speech sounds, in preparation for seeking a functional hearing assessment. (NT 741-748; 776-786.)

52. The IU teachers were proceeding slowly toward providing auditory training because the Student's IEP required a full range of direct teaching, leaving limited time to address auditory training, and the teachers did not have information from the hospital where the cochlear implant had been fitted. (NT 776-786.)

53. Student's participation in mathematics class reduced the amount of time available for important instruction in the deaf-bind resource room, such as pre-teaching and re-teaching, and teaching functional skills. (NT 1122-1124, 1200-1202; S 41.)

54. Student's participation in junior high school mathematics classes provided Student with little academic benefit, because Student had not mastered basic mathematics operations such as adding and subtracting. Functional mathematics could have been taught more efficiently in the resource room. (NT 1123-1124.)

55. The District provided a re-evaluation report for Student dated December 3, 2012. (S 21.)

56. The District's last re-evaluation report for Student was reviewed on February 21, 2013. (S 20.)

EPISODES AND DISTRICT RESPONSE

57. In January or February 2011 and in April 2011, an intervener from the IU program observed a behavior that seemed to be new for the Student. Student would reach out and hold the intervener's arm, tilt Student's head upward and squint or wince. This behavior was reported once or twice in the spring of 2011. The behavior was reported to the head of the IU program. Staff were instructed to start making a record of such occurrences; however, at this point, staff were unable to identify any patterns from the two to three occurrences. (NT 709-710, 1172-1173, 1230-1231; J 1 ¶12; S 35.)

58. In the fall of 2011, Student's circumstances at home and at school changed. Student's assigned intervener left the IU position; this intervener had been assigned to Student for several years. A trained substitute intervener was assigned for about one month; then a new permanent intervener was assigned. In addition, there was a new classroom assistant in Student's program. At about the same time, Student's family home was being remodeled, which can be disorienting for a person with visual impairment. (NT 720-721.)

59. In the fall of 2011, the behavior changed and became more frequent; the Student gripped the staff member's arm more tightly and the Student seemed to wince. In December, Student began to void urine when exhibiting this behavior. After an episode, Student would not be able to participate in instruction while Student recuperated. (NT 709-712, 1121, 1173; S 166.)

60. Staff began to send Student to the school nurse after these episodes when the voiding started. (NT 709-713.)

61. Student did not have sufficient language ability to inform staff what was wrong. (NT 714.)

62. In the fall of 2011, IU and District staff began to identify a "chain of behaviors" that often occurred near each other in time, which became defined as "episodes". The behaviors

exhibited an escalatory pattern. The most frequent behaviors in these "episodes" were bending over or dropping to Student's knees; wincing; becoming flushed in the face and developing goose-bumps on the neck and arms; assuming a fetal position; covering or rubbing the right eye; and exhibiting a look of pain and extreme distress, in which Student looked like Student was about to cry, but did not generate tears. Often, these episodes were accompanied by voiding of urine. Episodes lasted ten to thirty seconds; afterwards, Student would lose all color from the face and become lethargic or disoriented. Sometimes this was accompanied by a high pitched, squealing vocalization or hitting self. (NT 264, 295-297, 1049; S 163; P 31; J 1 ¶27.)

63. In the fall of 2011, staff assigned to Student tried to determine the range of possible causes of this behavior, including possible attempt to communicate and possible medical causes. (NT 714-716.)

64. Parents started to see episodes at home in or about December 2011. Parents continued to see episodes until 2014. The frequency of episodes reduced from January 2012 on, and after Student left school the frequency reduced to zero or very few, then increased to about once per month in 2013 and 2014. (NT 296-299.)

65. Staff began to take data on the episodes in fall 2011, and continued taking data throughout the school year. The data included dates, times, locations and descriptions of the episodes; and due to staffing changes at this time, the data was incomplete for part of the period in which data was taken. (NT 716, 722, 790-792, 1146-1147, 1230-1238, 1307; J 1 ¶13, 18; S 35, 78, 166; P 31.)

66. School staff reported about forty episodes from August 2011 to December 2011. From January 2012 to the end of May 2012, staff reported about sixty-six episodes. (S 166.)

67. Staff spoke about the episodes to the Consultant and to the Parents. The Consultant suggested that the Student's shunt could be part of the cause of the episodes. (NT 719-721; S 41.)

68. Parents had for several years expressed dissatisfaction with the use of interveners in the general education classroom for Student, preferring translation of what the teacher said in class, on a more nearly word-for-word basis. (S 20, 21.)

69. Parent spoke with the school nurse, who advised seeing the family's neurologist. (J 1 ¶14.)

70. On or about January 4, 2012, Parents took Student to their primary care physician and then to their pediatric neurologist at the hospital where the shunt had been provided and Student's seizure disorder had been treated. The neurologist ruled out a physical cause of the episodes. (NT 299-302.)

71. On January 5, 2012, Parents informed the Supervisor that the neurologist ruled out a physical cause of the episodes. Parents also stated that they would forward the report when received. Parents also stated that they would consent to the District getting its own medical

opinion on the cause of the episodes, and requested a Permission to Evaluate form in the event that the District did not accept the family neurologist's rule out of physical cause. (NT 304-305; J 1 ¶15; P 22.)

72. On January 8, 2012, the Supervisor accepted the family neurologist's rule out of physical cause, indicating anticipation that the neurologist's report would be "share[d] … with the team… ." The Supervisor indicated an intention to proceed with behavioral assessment of the episodes. (J 1 ¶16.)

73. Parent understands that episodes would be inconsistent with a seizure event if they occurred only in one environment, such as at school, or if they were accompanied by simultaneous complex motor movements. (NT 302.)

74. The pediatric neurologist did not provide a report; there was a summary of the visit, examination and diagnostic conclusions. When the Supervisor asked for it, Parents refused to provide it, because they objected to allowing the Supervisor to summarize the information for the next re-evaluation report. (NT 302-304.)

75. Parents provided the report to the Consultant. (NT 302-304; P 31.)

76. In January 2012, Parents requested a Functional Behavioral Assessment (FBA), addressing Student's episodes. (NT 263; S 45; J 1 ¶23.)

77. On January 18, 2012, the District proposed an evaluation of Student's expressive language, in response to advice from the Consultant. (S 84.)

78. On January 25, 2012, the District issued a Permission to Re-Evaluate for an FBA and an expressive language evaluation. Parents returned this within a month, giving consent. (S 150; J 1 ¶24.)

79. In February 2012, without warning, and immediately following an episode, Student struck Student's head on the floor with force. Student leaned back and appeared to try to do it again, but the intervener physically prevented Student from repeating that behavior. The teacher who witnessed it was concerned for Student's health and safety as a result. Student missed the next two days of school after this incident. (NT 1004-1008, 1031-1032, 1040; S 214; J 1 ¶22.)

80. On March 7, 2012, the Supervisor requested that the Consultant provide a "comprehensive" FBA, addressing Student's episodes and other behaviors that Student was exhibiting at the time, as well as any other behaviors that the consultant should deem appropriate. The Supervisor set a deadline of March 29, 2012, and asked the Consultant to observe Student in the school, home and community environments. The Supervisor asked the Consultant to interview teachers, intervener and Parents, and to review records. (S 45.)

81. The Supervisor's March 7, 2012 request specifically asked the consultant to address the question of whether or not the episodes or other behaviors were caused by the use of an

intervener in class, rather than more closely word-for-word translation of what the teacher said. (S 45.)

82. On April 1, 2012, the District's consultant issued a Functional Behavioral Assessment (FBA). The consultant indicated that the data collected thus far was sufficient to develop hypotheses as to the function of Student's "episodes" and other behavior of concern, but that additional data needed to be collected. The FBA recommended that data include greater detail on antecedent conditions and on consequences, as well as intensity of the behavior itself. (NT 791-792, 798-799; P 31; J 1 ¶25.)

83. The FBA hypothesized that one antecedent of the episodes was significant stress and anxiety over a fear of losing control of the environment. The Consultant specifically mentioned several staffing changes in the fall of 2011 that could have caused this fear and anxiety or stress in Student. (P 31.)

84. The FBA also pointed out that the episodes were being reinforced, and that staff response – including immediate removal to the nurse's office - may have been the reinforcer. The FBA recommended considering changing the staff responses, including delaying response. (P 31.)

85. The FBA assessed Student's self-injurious behavior, offenses toward others and self-stimulatory behavior. It recommended changes in data keeping on these behaviors. It also hypothesized that staff response provided no incentive or reinforcement to motivate Student to change these behaviors. (P 31.)

86. Overall, the FBA concluded that current behavioral support strategies were not working. It recommended substantial changes in the District and IU behavior interventions, including developing a visual behavior feedback system connected to a redesigned token economy system with earnable rewards for reducing behaviors of concern; direct instruction that such behaviors are not appropriate, and that good behavior will be rewarded tangibly; continuing efforts to teach Student words for emotions so that eventually Student could substitute words for behaviors; reduction and structuring of sensory activities; raised expectations for Student's independence and behavior; increasing choices for Student to give a sense of control over the environment; reduction of adult attention in favor of peer coaching and social relationship building; direct instruction of social and independent skills; "experimentation with" FM systems as part of an effort to define Student's sensory capacities and expand the use of hearing and vision; expanding the list of known reinforcers; establishing natural consequences for behaviors of concern; and behavioral rehearsals, similar to social stories. (P 31; J 1 ¶30.)

87. The FBA also recommended further consideration and development of a way to identify "slow triggers" for behaviors of concern, particularly episodes. These were defined as rumination or obsessive thought patterns. (NT 1073-1074, 1221, 1309; P 31.)

88. While the FBA addressed, both directly and indirectly, many of the questions that the District had posed in its March 7, 2012 letter to the Consultant, it did not explicitly answer

all of those questions. The FBA indicated that assigning a function to complex behavior would need to be a process of testing hypotheses, and that the data did not support specific answers to the District's March 7 questions. (P 31.)

89. The FBA did not include observations of Student in the home and community; no explanation was given for this. (NT 134-137, 1080-1081; P 31.)

90. The FBA did not include an expressive language evaluation. (P 31.)

91. Parents met with school staff to discuss the FBA on April 17, 2012; District or IU representatives gave Parents a functional assessment of Student's communication modes on that date. This does not purport to be an expressive language evaluation, but it addresses Student's different modes of expression. (NT 801-802; J 1 ¶29; P 34; S 16.)

92. In April 2012, the Student's school team produced an Expressive Signs Inventory. The school team also conducted ongoing progress monitoring for Student's expressive language. These were assessments of Student's expressive language. (NT 802-805, 850-855, 1043-1036; S 17, S 18.)

93. From May 2012 to December 2012, there were meetings within the school program, as well as with Parents, attempting without success to develop a Positive Behavior Support Plan and to implement the recommendations in the FBA. Some changes were made in the Student's program to attempt to implement the recommendations of the FBA. (NT 1296-1297; J 1 ¶31; S 38, 41.)

94. IU staff expected the consultant to send a new form for data collection, but the consultant did not send the form until June. (NT 791-792, 798-799.)

95. Staff were recording data on the form sent by the Consultant in the summer ESY setting and in September 2012, although there were issues of consistency of definition and issues concerning who would be responsible for recording a given episode if two team members witnessed one. (NT 950, 1228-1229; P 41; S 170.)

96. Student's teacher of the visually impaired, who was also Student's orientation and mobility instructor, did not feel that the episodes rendered Student unsafe on stairs, because the instructor believed that she could intervene if necessary to assure Student's safety in the event of an episode. The instructor was able to do this without physically touching Student, thus maintaining Student's opportunity to navigate stairs independently. (NT 1149-1150.)

97. Student's teachers instructed Student on the signs for emotions, such as "stressed", "angry" and "happy." The teachers taught the words at times when Student appeared to be experiencing those emotions, then expanded the repertoire to two word phrases. Student learned to spontaneously express emotions inconsistently. (NT 1163-1166.)

98. In July 2012, during an ESY class, Student exhibited an episode in which Student stopped breathing and Student's lips turned blue. (NT 722-726.)

99. Due to Parents' safety concerns, including concern that the episodes might have a physical component, at Parents' request the District provided a registered nurse to attend Student during ESY classes in the summer of 2012. The nurse also attended Student during the first ten days of school in August and September 2012. At the same time, Parents requested an evaluation to address the root causes of the episodes. (J 1 ¶32, 33; S 41; 104.)

100. In July 2012, Parents advised the District that they now thought that the cause of the episodes might be seizures. Parents had Student seen by a doctor after the ESY incident in July 2012. (S 105, 107-110.)

101. On August 27, 2012, the District issued a permission to re-evaluate form for a neurological evaluation to find the etiology of the episodes; and testing for Student's auditory acuity, speech reception/awareness, impedance, and any other auditory areas deemed necessary by the audiologist. (J 1 ¶36; S 180.)

102. By email message dated August 30, 2012, Parents responded ambiguously as to the request for consent to the medical evaluation – although Parents were consenting - and refused the request for audiological evaluation. (S 181.)

103. In September 2012, School team members were taking data that were altered to address the hypotheses in the FBA. (S 47.)

104. Data indicated that the majority of episodes occurred during downtime or in the deaf-blind resource room (where Student's downtime was programmed to occur), or on the bus. Fewer episodes occurred in the general education classrooms. It was hypothesized that the episodes were generated at least in part by "slow triggers". (NT 1221, 1309.)

105. In September 2012, Student experienced five episodes in ten days. On September 7, 2012, Student held Student's breath for about 30 seconds, and experienced the longest known episode. (J 1 ¶35.)

106. Parents withdrew Student from school on September 7, 2012, after only ten school days, due to concerns for Student's safety. (J 1 ¶34.)

107. In September 2012, the parties attempted to arrange a neurological examination by a pediatric neurologist at the hospital where Student's was provided; however, that doctor declined to provide a second opinion when advised of the January 2012 rule out of physical causes by the Student's neurologist. (S 121, 189; NT 308, 469-472.)

108. In November 2012, the District commenced truancy proceedings against Parents; these proceedings were resolved ultimately in September 2013 on an appeal by Parents, in which a judge of the Court of Common Pleas acquitted Parents of criminal charges based upon a failure of the state to prove that Parents knew that there was no valid medical excuse for Student's absence. (J 1 ¶38-43; P 57.)

109. In December 2012, the District assessed Student's sensory needs through questionnaires answered by the school-based team. (J 1 ¶45.)

110. In December 2012, The District proposed changes to Student's previous IEP to revise goals in accordance with Consultant and school staff recommendations. (S 148, 149.)

111. In January 2013, the Consultant recommended specific changes to Student's program to address some of the Consultant's recommendations in the FBA and some of Parents' concerns. (S 42.)

112. In February 2013, the IEP team met to discuss an IEP for Student. The team agreed that Student needed a comprehensive re-evaluation including evaluations by specialists in several different fields, including medicine, psychology, sensory integration, deaf-blindness and behavior. (NT 1215-1218; S 157, 158.)

113. From March 2013 to July 2014, the District and the IU engaged in an extensive search for evaluators for Student. (S 185.)

114. The District offered ESY services for Student for the summer of 2013. (NT 519-520, 524; S 157.)

115. In April 2013, The District made an effort to retain a psychologist to evaluate Student; this psychologist had expertise in deaf-blindness and had evaluated Student once before. A dispute arose between the psychologist and Parents regarding the breadth of the psychologist's release and informed consent form, and the Parents could not reach agreement with the psychologist concerning the scope of the release. District did not retain the psychologist. (S 187; P 52.)

116. In June 2013, Parents declined an offer of ESY services due to the unresolved etiology of the episodes. (S 158.)

117. In June through September, 2013, the District and Parents made efforts to explore the option of sending Student to an inpatient setting for a comprehensive evaluation; this effort was abandoned after it became clear that the expense would be prohibitive (approximately $400,000.00) and that insurance would not be available to pay the cost. In addition, the consultant recommended against the inpatient evaluation. (J 1 ¶46-48.)

118. In September 2013, the District offered to provide Student with homebound educational services, but Parents refused. (NT 525; S 198.)

119. On January 31, 2014, the District wrote to Parents, expressing a willingness to provide homebound instruction to Student contingent on qualification through a doctor's note and parental cooperation. (P 59.)

120. In October 2014, the District sent a list of potential evaluators to Parents, pursuant to the resolution process in this matter. The list was divided into categories of expertise, and included pediatric neurologists, psychologists, a behavior specialist, communication specialists, experts in sensory needs evaluation, deaf-blindness experts, and an audiologist. (S 182.)

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).[6] 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[7] 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

[6] 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.

[7] 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 Parents requested due process and the burden of proof is allocated to the Parents. The Parents bear the burden of persuasion that the District failed to provide Student with an appropriate and timely re-evaluation, and failed to provide Parents with a FAPE. If the Parents fail to produce a preponderance of evidence in support of their claims, or if the evidence is in "equipoise", then the Parents cannot prevail under the IDEA.

DISTRICT'S OBLIGATION TO RE-EVALUATE

Under the IDEA, a local education agency is required to conduct a re-evaluation of an eligible child at least once every three years. 34 C.F.R. §300.303((b)(2). It must re-evaluate also if it "determines that the educational or related services needs … of the child warrant a re-evaluation" or "if the child's parent requests a re-evaluation." 20 U.S.C. §1414(a)(2); 34 C.F.R. §300.303. This obligation arises for determinations regarding both academic and functional performance. 20 U.S.C. §1414(a)(2)(A)(i); 34 C.F.R. §300.303(a)(1). Any such re-evaluation must assess the child "in all areas related to the suspected disability", including health, vision, hearing and "communicative status". 20 U.S.C. §1414(a)(2)(A); 34 C.F.R. §300.303(a); 20 U.S.C. §1414(b)(3)(B); 34 C.F.R. §300.304(c)(4). The re-evaluation must be "sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified." 34 C.F.R. §300.304(c)(6).

The Commonwealth of Pennsylvania has promulgated regulations to implement the IDEA in Chapter 14 of the Pennsylvania Code. 22 Pa. Code §14.101,102. These regulations require a

local educational agency to produce a re-evaluation report within a time line of sixty calendar days from receipt of written parental consent. 22 Pa. Code § 14.123(b), 124(b).

THE DISTRICT DID NOT OFFER OR PROVIDE TO STUDENT A TIMELY, COMPREHENSIVE RE-EVALUATION UNDER THE IDEA DURING PART OF THE PERIOD OF TIME SPECIFIED FOR DECISION IN THIS MATTER

The period of time about which I am asked to decide whether an appropriate evaluation was offered or provided (relevant period) begins on September 5, 2012, two days before Parents removed Student from school on September 7, 2012. While I have considered events prior to the relevant period, my only charge is to decide whether the District offered or provided an appropriate evaluation from the beginning of the relevant period until the date of the last hearing session.

The District's last re-evaluation report is dated December 3, 2012. Therefore, I do not find that the District failed to provide a re-evaluation within three years of the previous re-evaluation, as required by the IDEA.

It remains to be determined whether or not the District, during the relevant period, was obligated to conduct a re-evaluation due to its own determination that the Student's needs required re-evaluation or due to parental request. I conclude that the District failed to fulfill this obligation during part of the relevant period, because it allowed its process for planning re-evaluation to prevent the accomplishment thereof. I further conclude that this failure did not result in a denial of a FAPE or in a denial or significant hindrance to parental participation. 20 U.S.C. §1415(f)(2)(E)(ii). Therefore, I will order the District to conduct a re-evaluation on a specified time frame, 20 U.S.C. §1415(f)(2)(E)(iii), but I will not order it to provide compensatory education to Student.

By the beginning of the relevant period of time, the District had received and accepted Parents' assertion that Student's neurologist had ruled out physical causes of the episodes. It had

thereupon retained the Consultant to evaluate the episodes as a behavior chain and to identify the function of these behaviors, as well as to revisit Student's ongoing self-injurious, aggressive-to-others and self-stimulatory behaviors. The Consultant had reviewed the note of the Student's pediatric neurologist and accepted that physician's ruling out of physical cause for the episodes. The Consultant had gathered data from various sources and had issued an FBA. The IU staff had been taking data on episodes and other behaviors, and, as a result of the FBA and the Consultant's recommendations, staff had altered their data gathering to add more detail on antecedents and consequences, as well as to add data on intensity and duration. The Consultant had posited a behavioral hypothesis on the function of the behavior, that it was an expression of internal anxiety and fear due to changes in the environment. The Consultant had worked with the school team to develop a plan to test the hypothesis, with the intention of continuing the process of testing hypotheses until an appropriate intervention could be determined.

The record is preponderant that all of these evaluative steps directed toward the episodes and other behaviors of concern were accomplished in accordance with the research-based methodologies of Applied Behavior Analysis. Consultant was an expert in behavior analysis and intervention, and it was reasonable for the District to rely upon Consultant's assertion that his methods were educationally and psychologically appropriate. The FBA addressed all of the behaviors of prioritized concern, and was based upon data taken over several months, classroom observation, and discussions with Student's teachers. The Consultant had reviewed relevant documents. Thus, the report and recommendations, as set forth in the Consultant's report in this record, possess indicia of reliability and appropriateness. I conclude that the District's reliance upon these recommendations was reasonable.

Parents criticize the Consultant's work and report on several grounds. First, they argue that it did not answer the central question put to the Consultant: what was the behavioral function of the episodes? Second, they note that the report did not answer all of the District's questions that were detailed in the March 7, 2012 letter retaining the Consultant to perform the FBA. Third, they point out that the school team's data, taken over months of time, did not provide sufficient detail to permit the Consultant to find the function of the episodes. Fourth, they point out that the Consultant did not observe Student in the community or in Student's home, as the District had requested, and that the Consultant did not explain why he had not done this. I conclude that these criticisms, separately and taken as a whole, do not impeach the appropriateness of the District's reliance upon the Consultant's FBA.

There is no evidence that suggests that the Consultant can be faulted for not determining the function of the episodes definitively. He explained that the FBA process is not necessarily capable of providing a definitive determination of function; rather, it is a process of generating and then testing hypotheses about function, based upon sometimes continuous data gathering, and based sometimes on changes in the data gathered. The ultimate purpose is to design interventions that will reduce unwanted behaviors and encourage more appropriate replacement behaviors. Thus, based on the record in this matter, Parents' criticism is misplaced; it would require the FBA to do something that it is not necessarily designed to do. Therefore, the evidence is preponderant that, by the beginning of the relevant period, the District's reliance upon the FBA was not unreasonable or inappropriate.

Similarly, the evidence shows that not all of the District's questions were appropriate for answering through the FBA process. Some went to programming, and those questions, as the Consultant's report pointed out, were more appropriately answered in the process of designing

appropriate interventions – the creation of a Positive Behavior Support Plan. The Consultant made extensive recommendations for interventions, and proceeded to the design of interventions in the weeks following the issuing of the report. I see no reason that the District should have questioned this advice or this way of proceeding within the relevant period.

The record is preponderant that the data collected over the first several months of the appearance of episodes was inadequate to support a hypothesis of function. However, the District's responsibility in this regard is not within the issues stated for this due process decision. This data gathering happened long before the relevant period commenced, and was corrected by the time that the relevant period started.

Finally, I conclude that the Consultant's failure to observe the Student in the community and at home, as requested by the District, does not detract from the District's reliance upon the FBA, on this record. There is no evidence that such observations are required for the validity or utility of an FBA in the circumstances of this matter. Therefore, the District was not remiss in relying upon the FBA despite this omission.

While I conclude, based upon this record, that the District's evaluative efforts were appropriate at the start of the relevant period, I also conclude that the District's efforts were not comprehensive. At this point, they were limited to an FBA addressing behaviors, an evaluation of expressive language, and an evaluation of Student's sensory needs. While these evaluations were proceeding, the District determined that a more comprehensive evaluation was necessary.

In July, 2012, Student experienced an alarming incident, probably an episode, in which Student stopped breathing for an extended period of time, either involuntarily or voluntarily, and Student's lips turned blue. This behavior was repeated in September 2012. By July 2012, however, Parents had reversed their previous position that the episodes were not due to physical cause, and

had asserted that the episodes were possibly seizure activity; alternatively they began to maintain that, regardless of etiology, the episodes were escalating to the point of causing physical harm to Student. Within weeks, in August 2012, the District issued a PTRR for a neurological examination to determine the etiology of the episodes. The District coupled this with a request for consent for an audiological evaluation by a District-selected "educational" audiologist. Parents responded ambiguously, but seemed on balance to be consenting to the neurological evaluation. They declined to consent to the requested audiological evaluation.

While all this occurred prior to the relevant period, the question remains, what did the District do about the neurological evaluation and when did it do it? The record shows that the District proceeded to schedule an evaluation, but, due to a number of apparently random misfortunes, none was ever conducted. In part, the process over the ensuing years contributed to this failure to evaluate neurologically.

The Consultant had recommended a consensus process for all educational decision-making for the Student. This appeared to be consistent with a previous hearing officer order. Consequently, the District, adhering to this constraint upon its discretion, even with the Parents' written consent, made every effort to work with Parents to identify and schedule an evaluation. Numerous evaluators were identified and several were tried, all with seemingly random impediments arising to prevent accomplishment of the evaluation that both parties desired. As time went on, the parties identified new needs for evaluation, so that it became the parties' goal to have a comprehensive evaluation performed. Due to the Student's rare confluence of disabilities, the professionals with corresponding expertise were also relatively rare, and most were outside the state. This led to complex scheduling problems. Consequently, no evaluation, neurological or otherwise, has been scheduled.

It goes without saying that the District did not perform the neurological evaluation that it had determined to be needed within sixty days of its receipt of Parents' written consent. Nor did it ever perform the comprehensive evaluation that it later determined to be necessary. Thus, the evaluation was not timely or appropriately comprehensive. The same can be said of the multiple evaluations that the parties determined to be needed subsequent to October 2012. I cannot but conclude that this state of affairs constitutes a procedural violation of the IDEA and its implementing regulations including Chapter 14 of the Pennsylvania Code. Thus, I conclude that, during the relevant time, the District failed to offer and provide an appropriate and timely evaluation within the requirements of the IDEA and its implementing regulations.

PROVISION OF FREE APPROPRIATE PUBLIC EDUCATION

During all of this time, and particularly during the relevant time period in which the District failed to provide an appropriate and timely evaluation, the Student was not in school. Thus, Parents argue that the procedural failure to evaluate appropriately was also a failure to offer or deliver a FAPE. I conclude that the record does not support this assertion preponderantly, because the District offered an appropriate program and placement during the relevant time, and the Parents chose not to accept the District's offer, through no default of the District's. [8]

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

[8] Although the District procedurally failed to provide a timely comprehensive evaluation during this time, this is not in and of itself a substantive violation depriving Student or Parents of a FAPE. See, 20 U.S.C. §1415(f)(3)(E). Therefore, I have weighed the evidence to determine whether or not the District's failure to offer a comprehensive re-evaluation in the relevant period caused it to deny Student a FAPE, and I conclude that the District, even without the re-evaluation that both parties seemed to want, but failed to accomplish, nevertheless offered appropriate services to Student. Moreover, the absence of an evaluation did not cause a denial of all services, as Parents seem to assert – rather, Parents chose to keep Student from school, thus preventing the provision of services, as discussed below.

individualized instruction that is set forth in an Individualized Education Plan ("IEP"). 20 U.S.C. § 1414(d). The IEP must be "reasonably calculated" to enable the child to receive "meaningful educational benefits" in light of the student's "intellectual potential." Shore Reg'l High Sch. Bd. of Ed. v. P.S., 381 F.3d 194, 198 (3d Cir. 2004) (quoting Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 182-85 (3d Cir.1988)); Mary Courtney T. v. School District of Philadelphia, 575 F.3d 235, 240 (3rd Cir. 2009), see Souderton Area School Dist. v. J.H., Slip. Op. No. 09-1759, 2009 WL 3683786 (3d Cir. 2009).

"Meaningful benefit" means that an eligible child's program affords him or her the opportunity for "significant learning." Ridgewood Board of Education v. N.E., 172 F.3d 238, 247 (3d Cir. 1999). In order to 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, or if the program affords the child only a "trivial" or "de minimis" educational benefit. M.C. v. Central Regional School District, 81 F.3d 389, 396 (3rd Cir. 1996), cert. den. 117 S. Ct. 176 (1996); Polk v. Central Susquehanna Intermediate Unit 16, 853 F. 2d 171 (3rd Cir. 1988).

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 at which it was made, and the reasonableness of the school 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); D.C. v. Mount Olive Twp. Bd. Of Educ., 2014 U.S. Dist. LEXIS 45788 (D.N.J. 2014).

THE DISTRICT OFFERED AND PROVIDED A FAPE DURING THE PERIOD OF TIME SPECIFIED FOR DECISION IN THIS MATTER

As the relevant period began on September 5, 2012, I can reach a conclusion about delivery of a FAPE with regard to only two days. Thus, the primary focus of this decision is on whether or not the District was offering a FAPE to Student during the relevant period of time; that decision also answers the question about delivery of FAPE, in the District's favor. To determine these issues, it is necessary to consider the time prior to September 5, 2012, in order to see whether or not the last offered IEP was appropriate, and whether or not the District's programming was reasonably calculated to deliver a FAPE in the event that Student should return to school. I conclude that the District's offered services were reasonably calculated to provide a FAPE during the relevant period.

Student's deaf-blindness put Student in a very small class of children with disabilities and dictated programming that would be specially designed for Student in almost every aspect of the curriculum and the service delivery system. Student needed the District, through its IU-based program, to communicate using Student's unique array of sensory modalities. Student needed

thorough modification of every aspect of the curriculum. Student needed accommodations at all times to enable Student to access social interaction, learn emotional self-regulation, learn to control Student's inappropriate and sometimes dangerous behaviors, and to engage in ordinary activities, such as navigating the school building or engaging in physical play in physical education classes or recess periods.

I conclude, based upon a preponderance of the evidence, that the District, through its IU-based program for deaf-blind students, offered to address all of the above needs appropriately during the relevant period. The District provided a specialized program for deaf-blind students, staffed with uniquely and strongly qualified educators who operated as a team, combining expertise in teaching deaf and hard of hearing children with expertise in teaching children with vision impairments. Staff communicated with Student through a combination of modalities called "total communication", which includes tactile, visual and oral language, tailored to Student's emerging understanding of English syntax. Student received the majority of Student's academic education in regular education classrooms, with a curriculum that was modified on an ongoing basis by a team of educators; thus, Student received the social and developmental benefits of participating in school with typical peers, along with access to the Student's grade-level curriculum, as modified. Student received support from a resource room, which provided pre-teaching and re-teaching of the regular-education curriculum, direct instruction in reading and social skills, and sensory and rest breaks needed because of the stress of Student's efforts to participate in school despite profound and extensive sensory deficits. Teachers also addressed developmental and post-secondary transitional needs, as well as self-care skills, in the resource room setting.

I conclude that these services, in place when Parents removed Student from school, and repeatedly offered through IEP revisions, NOREPS, IEP team discussions and email messages, were reasonably calculated to provide Student with the opportunity for meaningful learning. The record does show that Student was learning in a broad range of the curriculum, including academic skills, communication skills, social skills and self-care skills.

Parents argue that the record shows regression in communication and academic, social and self-help skills during the time in which Student was in school, prior to the relevant period; they argue that this proves that the offered services were not reasonably calculated to provide a FAPE when reiterated during the relevant period when Student was out of school. I find that the record is mixed in this regard, and that Parents have failed to prove by a preponderance of the evidence that the Student did not make meaningful progress while in school. Therefore, Parents have failed to prove that, on this account, the District's offered program was not reasonably calculated to deliver a FAPE during the relevant period.

Parents argue that the District's program did not appropriately address Student's behaviors, including the episodes, which unquestionably impeded Student's learning and which, Parents argue, caused such risk to Student's safety and health that the Parents were forced to remove Student from school, thus depriving Student of all education for over two years. Parents' argument is based largely upon the District's handling of the episodes prior to the beginning of the relevant period; however, an examination of the District's programming as of the beginning of the relevant period refutes this argument.

Months before the start of the relevant period, Parents had communicated to the District that a pediatric neurologist had ruled out any physical cause of the episodes. The District had retained the Consultant and had obtained a functional behavioral assessment of the episodes and

Student's self-injurious behavior, inappropriate aggressive behavior towards others, and self-stimulatory behavior. The Consultant had recommended additional assessments of expressive communication and the District had conducted such assessments. In addition, the school team assessed Student's sensory needs.

The Consultant had conducted several meetings with the purpose of providing a Positive Behavior Support Plan for Student, based upon the FBA. The District had offered some modifications to the outstanding IEP, and had offered to completely revamp the Student's educational program.

The District, through its Consultant's multiple meetings with the IEP team and the school based team, was making reasonable efforts to develop a behavior management system based upon the research-based principles of applied behavior analysis. This included an expanded listing of motivators, and establishment of a token economy system for Student, with incentives clearly communicated to Student through a visually appropriate red/yellow/green method, and continuing data collection on episodes and other behaviors. The District was planning to continually assess the episodes, and other behaviors, developing and testing hypotheses as to function through a systematic and research based methodology.

In addition, the District was offering to reduce the amount of time spent in mathematics class. It offered to devote that time to increased time spent in providing direct instruction for pragmatic mathematics skills; post secondary transitional skills; emotional self-awareness and language to communicate it; recognizing appropriate behavior in school; and recognizing appropriate behavior in social situations. This offered direct instruction would address not only Student's need to learn replacement behaviors for Student's inappropriate behaviors, but also Parents' desires for more intensive academic instruction.

I conclude that these offered changes, combined with the existing IEP that had been reviewed in numerous IEP meetings, provided an offer that was reasonably calculated to provide Student with a FAPE. It might be argued that these offers were not reduced to NOREPs and IEP changes; however, I conclude that, at most, any such failure was a procedural one. The District assiduously included Parents every step of the way, at least offering them the opportunity to participate in a consensus-based process, upon which the Consultant insisted. Parents knew what was being offered, regardless of the form of the offer; thus, there was no denial of a FAPE based upon the form in which the proposed changes were being offered.

Parents argue that these offered program changes were for nothing because the District had failed during the period prior to the relevant period to get to the bottom of the cause of the episodes, and to develop interventions to eliminate Student's sometimes dangerous behaviors that impeded learning. Parents argue that, at the beginning of the relevant period, the District did not know the cause of the episodes, and that they were escalating in both frequency and dangerous concomitant behaviors (such as holding breath or interruption of breathing causing a risk of death or injury and such as Student banging Student's head on the floor). Parents assert that, in the absence of a determined etiology, they were forced to remove Student for safety reasons, thus depriving Student of all educational benefit, and proving that the District's program failed to offer or deliver a FAPE.

I find this argument unavailing for two reasons. First, the District's offered or provided services during the relevant period must be based upon what the District knows at the time in question. Second, Parents' decision to remove Student does not prove preponderantly that the program was itself unsafe.

During the relevant period, the District did not know that the episodes were of physical origin; in fact, this is not known to the present date. Thus, it was not required to program for

prevention of a physically caused behavior chain. Nevertheless, the record shows that the District stood ready to and did provide protective staffing – a registered nurse to attend Student – to address the possibility of a physical cause of the episodes. Thus, the District's lack of knowledge of the etiology of the episodes did not prevent it from providing reasonably protective services.

Parents argue that, regardless of the etiology of the episodes, the District knew that the episodes could escalate into dangerous self-harming behaviors. While this is true, the evidence is preponderant that the District was offering programming specifically designed to intervene in the escalatory tendencies of Student, both during episodes and in other possibly dangerous behaviors. Therefore, I conclude that the District offered during the relevant period to address the episodes and other behaviors in a way that was reasonably calculated to safely deliver a FAPE.

Parents' removal of Student in September 2012 does not prove preponderantly that the District's program was unsafe. While their decision was entirely within their discretion, and no one would second-guess the difficult judgment that they made at that time, the issue for this hearing officer is not the appropriateness of keeping Student out of school in the circumstances. This was decided by the Court of Common Pleas in the truancy case, which found that Parents reasonably believed that there was a valid medical reason for keeping Student home.

Nevertheless, Parents' judgment, which I do not question, does not prove preponderantly that the program itself was unsafe. Understandably, Parents made their decision on September 7, 2012, without the benefit of a medical opinion. In fact, they did not ever produce evidence of a medical judgment that the school program was unsafe. In January 2012, the Student's pediatric neurologist, who on this record was in the best position to opine on the safety of Student attending school, had recommended exactly what the District was doing at the time of Student's removal (at least by Parent's report and admission): allow Student to attend school and develop behavioral

interventions to address the episodes. Parents did not produce an opinion that Student should be out of school until March 2013, when they obtained a one-page doctor's letter to that effect. This doctor carefully avoided opining that it was unsafe for Student to be in school; rather, the doctor stated only that not attending school was in Student's "best interest" due the risks of "difficulties" with Student's shunt and cochlear implant if Student should bang Student's head during an episode. This carefully nuanced opinion letter from a single doctor does not rise to the level of preponderant evidence that the District was offering an unsafe program.

On the contrary, I note that head banging was a common behavior of Student throughout Student's tenure with the District, and it never before had been seen as a source of danger or risk or "difficulty" requiring removal from school. Even when the Student engaged in the most concerning and frankly frightening head banging incident in February 2012, neither the educational staff nor the Parents thought it necessary to remove Student from school. While the head-banging incident was possibly an escalation of the Student's historic head banging behavior, the District was taking reasonable steps to address this possibility and attenuate the risk, as discussed above.

The incidents that precipitated Student's removal from school were the cessation of breathing incidents, the second of which occurred in September 2012. In assigning weight to the March 2013 doctor's note, I consider that this letter did not even mention those incidents. Also, the District had already provided a registered nurse to attend Student, evidencing its willingness to provide substantial staff coverage to address these behaviors. Taking all of these facts into consideration, I conclude that the record is not preponderant that the District's program was so unsafe as to deprive Student of a FAPE during the relevant time.

In conclusion, Parents have failed to prove by a preponderance of the evidence that the District failed to offer or provide a FAPE during the relevant time. Therefore, I will not order the District to provide compensatory education for all or any part of that time period.

DISTRICT OBLIGATIONS UNDER SECTION 504 AND THE ADA

Parents do not assert that the District failed to meet a standard under these laws that is higher than that imposed by the IDEA, and I reach no such conclusion. In this matter, the FAPE standard of the IDEA is identical with that required under section 504 and to the extent of any derivative claim, the ADA; under all of these laws, the District was obligated to evaluate appropriately and to offer and deliver appropriate access to its curriculum consistent with Student's needs. Therefore, I conclude that the same analysis applies in this matter under all three laws. As the District offered and delivered a FAPE under the IDEA, it did not discriminate against Student under section 504 and, derivatively, under the ADA.

PROSPECTIVE RELIEF

Parents request that this hearing officer order prospectively that the District perform a comprehensive educational evaluation that will permit Student to return to school. In the exercise of my statutory authority under the IDEA, 20 U.S.C. §1415(f)(3)(E)(iii), as well as my equitable authority, I will order the District to perform a comprehensive evaluation of Student, and to provide educational services to Student in the meantime.

CREDIBILITY

It is the responsibility of the hearing officer to determine the credibility of witnesses. 22 PA. Code §14.162 (requiring findings of fact); A.S. v. Office for Dispute Resolution, 88 A.3d 256, 266 (Pa. Commw. 2014)(it is within the province of the hearing officer to make credibility determinations and weigh the evidence in order to make the required findings of fact). In this matter, I found the witnesses to be credible and reliable.

CONCLUSION

I conclude that the District failed to provide an appropriate and timely comprehensive evaluation of Student within the time required in Pennsylvania regulations. I conclude that the District did not fail to offer or provide a FAPE to Student. I do not order the provision of compensatory education services. I do order the District to provide a comprehensive educational evaluation and to provide services needed to permit Student's return to school.

ORDER

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

1. Within five days of the date of this order, the District shall convey a NOREP to Parents offering to provide special education instruction in the home to Student for a period of ninety days, or until Student returns to school, commencing within fifteen days of this order. The offered services shall include the following:

    a. The offer shall be contingent upon Parents' return of the NOREP form with signature indicating consent to special education instruction in the home, as set forth herein, within ten days of the date of this order.

    b. The offer shall include provision of five hours per day of special education to Student, based upon and governed by the December 2012 IEP for Student, as modified in the discretion of the District for purposes of instruction in the home.

    c. The offer shall include provision of such services by one or more certified special education teachers, qualified to provide special education services to individuals with dual hearing and visual impairments, selected by the District at its sole discretion.

    d. Any such teachers shall be trained and competent in total communication, including tactile sign language.

    e. The offer shall include provision of a medically trained staff person to accompany the teacher, selected in the sole discretion of the District; this staff person shall be certified in providing first aid, shall be competent to deal with cardiopulmonary emergencies, and shall be trained to intervene appropriately to block dangerous self-injurious behaviors and behaviors that constitute dangerous offenses against others.

    f. The offer shall provide that, at Parents' election, the instruction may be provided at a location outside the home, as long as the teacher or teachers agree that any such alternate location is suitable for instruction.

2. Within five days of the date of this order, the District shall convey a NOREP to Parents offering to conduct a functional behavioral assessment (FBA), utilizing a board certified behavior analyst (BCBA) selected by Parents, and provide a report to Parents within twenty-five days of the date of this order.

a. The offer shall be contingent upon Parents' return of the NOREP form with signature indicating consent to the FBA, as set forth herein, within ten days of the date of this order.

b. The offer shall provide that the BCBA will conduct the FBA during instruction in the home setting, or in the alternate setting as provided above.

c. The offer shall provide that if the Parents' selected BCBA is unavailable within the timeframe set forth herein, the District shall select the BCBA in its sole discretion.

d. The offer shall provide that, within thirty days of the date of this order, the District shall convene an IEP meeting to create a Positive Behavior Support Plan for the instruction in the home, to be implemented within thirty-five days of the date of this order.

3. Within five days of the date of this order, the District shall convey a NOREP to Parents offering to conduct a comprehensive psychoeducational and physical re-evaluation as follows:

a. The offer shall be contingent upon Parents' return of the NOREP form with signature indicating consent to the evaluation, as set forth herein, within ten days of the date of this order.

b. The offer shall provide that the re-evaluation report shall be issued within seventy days of the date of this order.

c. The offer shall provide that the re-evaluation will include a thorough medical evaluation of Student's physical health and functions, including but not limited to gastro-intestinal and neurological evaluations.

d. The offer shall provide that the re-evaluation will address the question of the etiology of the episodes.

e. The offer shall provide that the re-evaluation will include, but not be limited to, the following:

i. An audiological evaluation including a functional audiological evaluation conducted by an educational audiologist selected by Parents, or if unavailable within the timeframe of the offer, by the District;

ii. A speech and language evaluation, including an evaluation of Student's receptive and expressive language, and of Student's various modes of communication;

iii. A comprehensive evaluation of Student's vision, sufficient to inform a plan to provide visual efficiency training;

iv. Developmental and psychosocial evaluations;

v. A comprehensive psychoeducational evaluation by a certified school psychologist;

vi. An occupational therapy evaluation, including a sensory integration evaluation;

vii. A physical therapy evaluation.

f. The offer shall provide that the evaluation will be conducted by professionals qualified to evaluate Student's unique needs in the listed areas, selected by the Parents within twenty days of the date of this order, or if unavailable, selected by the District in its sole discretion within forty days of the date of this order.

g. The offer shall provide that, upon receipt of the re-evaluation report, the District will convene an IEP meeting within fifteen days of receipt of the re-evaluation report, to plan for Student's transition back to Student's high school within forty-five days of receipt of the re-evaluation report, the conduct of an FBA immediately upon Student's transition back to school, and the creation of an IEP for the coming IEP year.

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

March 9, 2015