

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

Child's Name: L.M.
Date of Birth: [redacted]

CLOSED HEARING
ODR File No. 15466-14-15 KE

Parties to the Hearing:

Parents
Parent[s]

Local Education Agency
Lakeland School District
1355 Lakeland Drive
Scott Township, PA 18433-9801

Date Record Closed:

Dates of Hearing:

Date of Decision:

Hearing Officer:

Representative:

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December 18, 2015

1/29/2015, 9/9/2015, 9/10/2015,
9/11/2015, 11/6/2015, 11/13/2015

December 31, 2015

Cathy A. Skidmore, M.Ed., J.D.

INTRODUCTION AND PROCEDURAL HISTORY

The student (hereafter Student)¹ is a pre-teenaged student in the Lakeland School District (District) who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).² Student's Parents filed a due process complaint against the District asserting that it denied Student a free, appropriate public education (FAPE) under the IDEA and Section 504 of the Rehabilitation Act of 1973,³ as well as the federal and state regulations implementing those statutes. The case proceeded to a due process hearing convening over several sessions,⁴ at which the parties presented evidence in support of their respective positions. The Parents sought to establish that the District failed to timely identify and evaluate all of Student's disabilities under the IDEA, and further failed to provide appropriate programming to address all of Student's needs; they sought compensatory education and a directive to revise the IEP as remedies. The District maintained that its special education program, as offered and implemented, was appropriate for Student in all respects.

For the reasons set forth below, I find in favor of the Parents with respect to a portion of their claims and in favor of the District on others.

ISSUES

1. Whether the District properly evaluated Student and identified all of Student's

¹ In the interest of confidentiality and privacy, Student's name and gender, and other potentially identifiable information, are not used in the body of this decision. References to the Parents are used to mean both Parents as well as when it appears that Student's mother, who was the more active participant throughout the time period in question, was acting on behalf of both Parents.

² 20 U.S.C. §§ 1400-1482.

³ 29 U.S.C. § 794.

⁴ There was a significant delay between the first and subsequent hearing sessions for a variety of reasons including the availability of the parties, counsel, and important witnesses; additionally, no testimony was presented during two scheduled hearing sessions. References to the evidence of record will be made as follows: Notes of Testimony (N.T.), Parent Exhibits (P), and School District Exhibits (S).

- disabilities under the IDEA;
2. Whether the District provided an appropriate educational program to Student from September 2011 to the present;⁵
 3. If the District did not timely identify and/or program appropriately for Student, is Student entitled to compensatory education and in what form and amount;
 4. Whether the hearing officer should order the District to revise Student's IEP and/or conduct further evaluations of Student?

FINDINGS OF FACT

1. Student is a pre-teenaged child who is a resident of the District, currently attending one of its elementary schools. Student is eligible for special education on the basis of a Speech/Language Impairment. (N.T. 36)
2. Student began therapy at an outside counseling center in January 2010 following a referral by Student's physician. At the time, Student was not following directions and was exhibiting difficult behavior including impulsivity. (P-1)
3. The Parents observe Student to struggle with understandable speech and articulation as well as word meanings and handwriting. They also observe Student to fidget and to express frustration and anxiety. (N.T. 756-61, 774-75, 781-82, 801-02)

School Age Programming 2010-11 and 2011-12 School Years

4. The Parents first registered Student in the District in May 2010. As part of registration, the Parents indicated that Student had been provided with speech/language support, as well as behavioral support services at home. They also noted that Student had been diagnosed with Attention-Deficit/Hyperactivity Disorder (ADHD). (N.T. 762; S-1)
5. The District conducted an evaluation of Student in the fall of 2010 due to articulation concerns and parental concerns with Student having difficulty focusing on tasks. An Evaluation Report (ER) issued in November 2010. The ER summarized assessment of Student's production of speech sounds and language competence (Test of Language Development, Fourth Edition (TOLD-4)).⁶ Student exhibited errors in articulation with respect to several speech sounds, earning a score in the poor range, but obtained average

⁵ The Parents previously filed a Due Process Complaint against the District and the parties indicated that they had a tolling agreement as they arranged for Independent Educational Evaluations. (N.T. 29) The time period October 10, 2013 through October 8, 2014 was accordingly removed from consideration of any award of compensatory education. (*Id.*; *See also* Parents' Closing Argument at 1; District Closing Argument at 1)

⁶ The November 2010 ER erroneously refers to the TOLD as the Second Edition (S-2 p. 3), but the test protocol (P-25 pp. 1-19) evidences the correct (Fourth) Edition; it also incorrectly describes Student's performance on the TOLD-4 articulation subtest which was in the poor range (N.T.119-21). This ER also does not include all of the TOLD-4 subtests.

to above average scores on other TOLD-4 subtests. Student was determined to be eligible for special education on the basis of a speech/language impairment. (P-25 pp. 1-19; S-2)

6. An Individualized Education Program (IEP) was developed in November 2010 with three annual goals for speech/language services to be provided weekly. The goals, for vocabulary, auditory comprehension, expressive language, and articulation, did not contain baselines; and there was no information on Student's present levels for any academic area or speech/language abilities. The special education program was itinerant speech/language support. (N.T. 139-43; P-21)
7. In January 2011, the Parents asked for assessment of Student's cognitive abilities, and gave consent to a District evaluation. (N.T. 763-64; P-20)
8. The District issued a new ER in March 2011. This evaluation included input from the Parents, including Student's diagnoses of ADHD and Oppositional Defiant Disorder (ODD) and medications; a classroom observation; and teacher recommendations for addressing noncompliance, impulsivity, and signs of being nervous. Cognitive assessment (Stanford-Binet – Fifth Edition) yielded average scores across Subtests, Factor Indexes, and IQ scores obtained (FSIQ 96). Achievement testing (Woodcock Johnson Tests of Achievement – Third Edition (WJ-III-ACH)) reflected average scores across Subtests and Clusters. (S-3)
9. Student's teachers and the Parents also completed rating scales (Behavior Assessment System for Children – Second Edition (BASC-2)). Teacher scales reflected at-risk concern with social skills, leadership, and functional communication and on the Adaptive Skills Composite; parental scales (one or both) reflected clinically significant concerns with attention problems and functional communication, and at-risk concerns with hyperactivity, atypicality, leadership, and on the Adaptive Skills Composite. This ER concluded that Student did not have a disability and was not in need of specially designed instruction. (S-3)
10. Student was in first grade during the 2011-12 school year. Student was considered to be an average Student by the first grade teacher and earned grades of A and Satisfactory in all subjects. (N.T. 429-30; S-34 pp. 1, 5)
11. A new IEP was developed for Student in November 2011. This IEP provided a brief summary of Student's present levels of academic achievement and functional performance, noting that Student needed weekly speech/language services to address articulation, language processing, and language development. Annual goals for vocabulary, auditory comprehension, expressive language, and articulation were the same as in the 2010 IEP, except that new goals were added to address additional vocabulary skills. The goals did not include baselines or otherwise provide Student's then-current levels in those skills. Student would be provided weekly small group sessions of itinerant speech/language support. The Parents approved the Notice of Recommended Educational Placement (NOREP). (N.T. 139-43; S-4)

12. In December 2011, the Parents asked that Student be evaluated by a reading specialist. (N.T. 766-67; P-3)

2012-13 School Year

13. Student was in second grade during the 2012-13 school year. There were 21 students in the class. Students participated in a morning meeting in addition to reading, language, mathematics, science, and social studies classes in addition to special classes. Student was considered to be an average to high average student by the second grade teacher. Student earned all A, B, Outstanding, and Satisfactory grades. (N.T. 593-604, 607; S-34 pp. 1, 6)
14. Student was evaluated again in the fall of 2012 and the District issued a new ER. Parent input included concerns with Student's articulation. The TOLD-4 and the Arizona Articulation Proficiency Scale, Third Revision (Arizona-3) were administered at that time. Student's TOLD-4 scores were at or below the 25th percentile on all but one of the TOLD-4 subtests, and at the 2nd percentile on the Arizona-3 yielding a severe impairment rating; the Speech/Language Pathologist noted that Student's speech was "intelligible with careful listening." (S-8 p. 5) A continuation of itinerant speech/language therapy was recommended to address weak vocabulary skills, understanding syntax, and articulation. (S-8)
15. A new IEP was developed in November 2012. Present levels of academic achievement and functional performance reflected that Student was meeting academic expectations but continued to need speech/language support; progress on those goals was summarized. Annual goals and short term objectives addressed relational vocabulary, understanding of syntax, and articulation, similar to those in the prior IEP but with increased expectations. As in the prior IEP, this document lacked baselines and present levels. Student would continue with weekly individual or small group sessions as itinerant speech/language Support. (N.T. 147-48, 150-52; S-9)
16. In December 2012, the Parents asked that Student be evaluated for difficulties with reading comprehension. Student's teachers did not share those concerns. The Parents met with the District school psychologist and the participants agreed to obtain additional information from Student's private counselor and consider a Section 504 Plan rather than evaluate Student further for special education. (N.T. 511-18, 564-66, 568-69, 572-75, 581-82; S-10, S-11, S-12)
17. The Parents gave consent to a Section 504 evaluation, and the District conducted a Section 504 eligibility determination finalized on February 22, 2013. The Parents also agreed to the District's conclusion that Student was not eligible for a Section 504 Plan. (N.T. 519, 563; S-14, S-15)
18. In mid-May 2013, Student was injured in an apparent fall during recess. Student was brought to the nurse's office, and the Parents and an ambulance were called. Student sustained scratches and bruising as a result of the injury; Student was upset and appeared lethargic. A teacher took photographs of Student's bruising and scratches. After one of

the Parents and ambulance arrived, Student was transported for medical treatment. (N.T. 96-98, 100-01, 103-04, 108-09, 277-79, 288-89, 297-98, 305, 359-61, 363, 439-42, 447-49, 454-55, 808-10, 813; P-7; S-17)

19. Student had a medical excuse for the rest of the school year and did not return to school. Student was absent a total of 34.5 days during the 2012-13 school year. (N.T. 817; S-18, S-56)

2013-14 School Year

20. Student was in third grade during the 2013-14 school year. There were 22 students in the class. Students had mathematics, reading, science, social studies classes in addition to special classes. Student was screened for Title I reading but did not qualify. Student was considered to be a very good student by the third grade teacher, and earned final grades of A, B, Outstanding, and Satisfactory. (N.T. 621-32, 638-40; S-34 p. 8)
21. A new IEP was developed for Student in November 2013. Student's present levels of academic achievement and functional performance were summarized, and progress toward the speech/language goals was also included. Annual goals with baselines addressed relational vocabulary, understanding syntax, and articulation; because Student had not met the speech/language goals from the prior IEP, all remained the same. Student would continue with weekly individual or small group sessions as itinerant speech/language support. The Parents approved the NOREP "pending the results of [an] IEE" (S-19 p. 24). (N.T. 154-60; S-19)
22. Student scored in the proficient range on the mathematics and reading portions of the Pennsylvania System of School Assessment (PSSA) in the spring of 2014. (S-39)

Independent Educational Evaluations (IEEs)

23. Two IEEs of Student were conducted in the spring of 2014, one by a certified audiologist for speech/language, and one by a licensed and certified school psychologist. Both issued reports. (384-85; S-20, S-21)
24. The Speech/Language IEE, issued in June 2014, reflected parental concerns with reading comprehension, as well as receptive, expressive, and pragmatic language and articulation. Student's hearing was normal, while poor speech intelligibility was noted. Student demonstrated weaknesses with auditory processing and expressive language, and a possible ultra-high frequency hearing loss was also suggested. Recommendations from this evaluator were for continued speech/language therapy to include listening skills; preferential seating; use of inflection, intonation, and good articulation; chunking of instructions; frequent checks for understanding; structure and routine throughout the school day; minimal distractions; and review of Student's assignment book for completeness. (S-20)
25. The psychoeducational IEE was conducted by a private school psychologist in February and March 2014 with a report issued in August 2014. The IEE included parental and

teacher input and a classroom observation in addition to assessments of cognitive ability, achievement, executive functioning, social skills, and behavior. (S-21)

26. Parent input into the IEE reflected concerns with Student's reading comprehension ability, distractibility, and lack of focus and attention, as well as problematic behaviors (including impulsivity, failure to comply with directions, and aggression) and signs of anxiety. (S-21 pp. 2-3)
27. Teacher input into the IEE was generally positive, and no academic or behavior concerns were reported with the exception of Student's tendency to respond too quickly to questions, and one teacher observed that Student often fidgeted when seated. Two teachers noted that Student talked less than peers of Student's gender, but that Student exhibited typical social interaction skills. (S-21 pp. 5-7)
28. Student obtained an average General Intellectual Ability score on the Woodcock Johnson Tests of Cognitive Abilities – Third Edition (WJ-III-COG) with average to high average scores on all subtests and clusters, with further assessment of attention and concentration also within the average range. On the WJ-III-ACH, Student's scores on all subtests and clusters were similarly in or above the average range. There was no discrepancy between Student's ability and achievement including Broad Reading Skills. (S-21 pp. 10-13, 16-17, 18-22)
29. Assessment of Student's executive functioning through rating scales revealed no concerns by the teacher with respect to behavioral, emotional, or cognitive difficulties, although Student could exhibit difficulty with compliance and anger management. The results of the rating scales completed by the Parents, however, suggested significant concerns with Student's functioning. (S-21 pp. 13-16)
30. The BASC-2 yielded information from Student, one of the Parents, and a teacher. The teacher's ratings reflected no significant behavioral or emotional difficulties. Student's mother's ratings indicated clinically significant and at risk concerns in all domains. The evaluator noted that the Student's and Parent versions of these scales must be viewed with caution due to potential invalidity in responses. (S-21 pp. 22-26)
31. Student's teacher and one of the Parents completed the Conners Third Edition Rating Scale Long Form to obtain information related to ADHD. Results indicated parental concerns in many areas including inattention, hyperactivity/impulsivity, learning problems, and defiance/aggression. The teacher's rating scales yielded all average scores reflecting none of these same concerns, and did not support ADHD. (S-21 pp. 26-27)
32. Evaluation of Student's social skills, problem behaviors, emotional functioning, and adaptive behavior revealed numerous concerns of the Parents (with some measures interpreted cautiously due to possible invalidity of parental and student responses); by contrast, the teacher reported few concerns (the most significant of which suggested very low health and safety awareness skills). The private evaluator explained that Student "exhibits significant and problematic behavior within the home environment, [but] this

behavior is not observed within the educational context” (S-21 p. 44); the observations between home and school were markedly different. (N.T. 525-28; S-21 pp. 28-39, 43-44)

33. Despite Student’s diagnoses of ADHD, ODD, and mood disorder, and based on Student’s functioning at school, the independent psychologist concluded that Student did not need specially designed instruction on the basis of Emotional Disturbance, Other Health Impairment, or a Specific Learning Disability. He did make a number of recommendations for Student’s programming, however, to include continued speech/language therapy, accommodations to address inattention, and monitoring of Student’s emotional, behavioral, and executive functioning; and supported the recommendations of the independent speech/language evaluation. (N.T. 386-90, 412-13; S-21)

2014-15 and 2015-16 School Years

34. Student was in fourth grade during the 2014-15 school year. Again there were 22 students in the class. Students had classes in mathematics, history, reading, science, and social studies classes in addition to special classes; Student did have Title I reading services that year. Student was considered to be a very good student by the fourth grade teacher, who also noted Student’s improvement in self-correcting articulation errors over the course of the school year. Student’s final grades ranged from A+ to C (despite a D+ average in reading/language arts in October), or Outstanding or Satisfactory. (N.T. 660-70, 672, 678, 691-92, 697-99, 783; P-12, P-15; S-57)
35. The Parents gave consent to the District to conduct a reevaluation following receipt of the IEE reports. The District issued a Reevaluation Report (RR) dated September 30, 2014 that summarized the IEEs. The RR reflected that Student remained eligible for special education on the basis of a Speech/Language Impairment and made a number of recommendations for Student’s educational program, including continuation of itinerant speech/language support, accommodations to address inattention, and monitoring of Student’s adaptive skill development. The multidisciplinary team agreed with the IEEs that Student was not eligible for special education on the bases of Emotional Disturbance, Other Health Impairment, or Specific Learning Disability. (N.T. 519-21, 530-31; S-23, S-24)
36. Student’s IEP was revised following completion of the RR in October 2014. Student’s present levels of academic achievement and functional performance were summarized, including results of the IEEs. Progress toward the speech/language goals was also provided. Annual goals were revised, addressing continued articulation needs and further weaknesses with grammar and syntax as well as vocabulary, and included baselines. Program modifications/specially designed instruction were added to address attention, preferential seating, and need for comprehension checks. Student would continue with weekly individual or small group sessions as itinerant speech/language support. (N.T. 219-20, 521-22; S-27, S-30)
37. On the spring 2015 PSSA, Student scored in the Basic range for English/Language Arts, in the Below Basic range for Mathematics, and in the Proficient range for Science.

Student's fourth grade teacher was not concerned with Student's PSSA scores because of changes to the test; she observed that the PSSA scores declined for many students as a result. (N.T. 673-75; P-34)

38. For the beginning of Student's fifth grade year, Student was missing ten minutes of reading class for speech/language Therapy; as of November 11, 2015, the time of the therapy changed so that Student no longer missed any portion of reading class. (N.T. 719-20, 829-30)
39. Student's IEP team convened again in October 2015. Student's present levels of academic achievement and functional performance were briefly summarized and progress toward the speech/language goals was provided. Annual goals with baselines addressed articulation and vocabulary including listening skills. No program modifications/specially designed instruction were included other than speech/language services. Student would continue with weekly individual or small group sessions as itinerant speech/language Support. (S-50)

General Speech/Language Ability and Programming

40. Oral language development can be a predictor of reading (including reading comprehension) and written language skills. (N.T. 396, 574, 726-27)
41. Student's speech/language impairment does affect Student in the classroom due to speech intelligibility. Student's teachers provide cues to speak more slowly and to articulate correctly, and to repeat what Student has said. The Parents at times also need to ask Student to slow down when speaking. (N.T. 257, 768)
42. All of Student's teachers were able to understand Student's speech, despite some articulation weaknesses, and observed Student to be well-behaved. None of Student's teachers referred Student to the Child Study Team. (N.T. 342-43, 351-52, 451-52, 550, 610-11, 613-15, 634-36, 670, 672-73, 675)
43. In District's Speech/Language Pathologist uses a high level of repetition with Student and provides developmentally appropriate materials. She employs research-based strategies when working with Student. (N.T. 227-28)
44. Progress reporting on the November 2012 IEP goals indicated improvement but did not provide baseline performance to allow comparison of speech/language ability and skills. Student did not meet any of the November 2012 goals by the time the November 2013 was developed. (N.T. 154-50; P-26)
45. Progress reporting on the November 2013 and October 2014 IEP goals reflected improvement compared to baseline performance in relational vocabulary, understanding syntax, and articulation, but Student continued to demonstrate difficulty with articulation. Speech intelligibility and articulation continued to be an area of difficulty continuing into the fall of 2015. (S-26, S-43, S-52)

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

Generally speaking, the burden of proof consists of two elements: the burden of production and the burden of persuasion. At the outset, it is important to recognize that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case rests with the Parents who requested this hearing. Nevertheless, application of this principle determines which party prevails only in cases where the evidence is evenly balanced or in “equipoise.” The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position. In reviewing the record, the testimony of every witness, and the content of each exhibit, were thoroughly considered, as were the parties’ Closing Arguments.

Hearing officers, as fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer found each of the witnesses to provide generally credible testimony that was given to the best of their respective recollections, despite some variance in some accounts particularly with respect to the May 14, 2013 incident. The Parents are clearly devoted, loving parents who have a perception of Student that varies widely from that of the District professionals who have worked with Student, as explained more fully below. All of the District personnel presented as dedicated professionals with genuine concern for Student and Student’s education. It is a testament to the parties that

they continue to meet and work collaboratively toward Student’s current educational program despite their opposing positions at the hearing.

IDEA Principles

The IDEA and state and federal regulations impose an obligation on local education agencies, including school districts, to locate, identify, and evaluate children with disabilities who need special education and related services. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a); *see also* 22 Pa. Code §§ 14.121-14.125. *Ridgewood v. Board of Education*, 172 F.3d 238, 253 (3d Cir. 1995). This obligation is commonly referred to as “Child Find.” Districts are required to fulfill the child find obligation within a reasonable time. *W.B. v. Matula*, 67 F.3d 584 (3d Cir. 1995). In other words, school districts are required to identify a student eligible for special education services within a reasonable time after notice of behavior that suggests a disability. *D.K. v. Abington School District*, 696 F.3d 233, 249 (3d Cir. 2012). School districts are not, however, required to identify a disability “at the earliest possible moment.” *Id.* (citation omitted).

The IDEA defines a “child with a disability” as a child who has been evaluated and identified with one of a number of specific classifications and who, “by reason thereof, needs special education and related services.” 34 C.F.R. § 300.8(a); *see also* 20 U.S.C. § 1401. Those classifications or categories are “intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as ‘emotional disturbance’), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities.” 20 U.S.C.A. § 1401(3)(A); *see also* 34 C.F.R. § 300.8(a). The test is two-pronged. A child who meets criteria for one of the IDEA classifications must also demonstrate a need,

because of the disability, for special education. “Special education” means specially designed instruction that is designed to meet the child’s individual learning needs. 34 C.F.R. § 300.39(a).

More specifically,

Specially designed instruction means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction—

(i) To address the unique needs of the child that result from the child’s disability; and

(ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.

34 C.F.R. § 300.39(b)(3).

The IDEA further requires the states to provide a “free appropriate public education” (FAPE) to a student who qualifies for special education services. 20 U.S.C. §1412. In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that this requirement is met by providing personalized instruction and support services to permit the child to benefit educationally from the instruction, providing the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase “free appropriate public education” to require “significant learning” and “meaningful benefit” under the IDEA. *Ridgewood v. Board of Education*, 172 F.3d 238, 247 (3d Cir. 1995). Local education agencies, including school districts, meet the obligation of providing FAPE to eligible students through development and implementation of an IEP, which is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). Substantively, the IEP must be responsive to the child’s identified educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324. However, the IEP need

not “provide ‘the optimal level of services,’ or incorporate every program requested by the child's parents.” *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3d Cir. 2012). The standard is not maximization of the child’s potential. *Rowley, supra*, at 198. However, it is important to recognize that an appropriate education encompasses all domains, including behavioral, social, and emotional. *Breanne C. v. Southern York County School District*, 732 F.Supp.2d 474, 483 (M.D. Pa. 2010) (citing *M.C. v. Central Regional School District*, 81 F.3d 389, 394 (3d Cir. 1996)). Furthermore, a denial of FAPE may be found based on a procedural violation of the IDEA if the LEA denied or impeded the child’s right to FAPE or interfered with a parent’s ability to meaningfully participate in FAPE decisions. 20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a).

The Parents’ Claims

The first issue is whether the District properly evaluated Student and identified all of Student’s disabilities. The law imposes certain requirements on local education agencies to ensure that sufficient and accurate information about the child is obtained in conducting an evaluation. Specifically, an evaluation must include a variety of assessment tools to determine whether the child has a disability and to aid in the development of an IEP; no single assessment may be the determining criterion. 20 U.S.C. § 1414(b); 34 C.F.R. §§ 300.304(b). The 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,” and utilize “[a]ssessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child[.]” 34 C.F.R. §§ 304(c)(6) and (c)(7); *see also* 20 U.S.C. § 1414(b)(3).

The Parents contend that the District failed to properly assess Student's executive functioning and weaknesses in reading comprehension. It is rather surprising that the initial ER did not include any assessment of Student's reported attention difficulties in light of the referral question and Student's known ADHD diagnosis; and that initial ER was, quite simply, a cursory examination of Student's speech/language abilities. Nevertheless, that document did provide information on which Student's speech/language impairment and IDEA eligibility could be based. Further, the record does not suggest that Student's teachers had any concerns with Student's attention at school in the fall of 2010; and, indeed, the District's subsequent ER just a few months later (and still prior to the start of the time period at issue) included teacher rating scales indicating that attention was not a difficulty exhibited at school. While that ER inconsistently concluded that Student did not have a disability, ignoring the previously recognized speech/language impairment, there is no question that Student continued with speech/language therapy pursuant to the existing IEP. Thus, this procedural irregularity did not impede the provision of FAPE to Student.

Similarly, the Parents' ongoing concerns with reading comprehension was not shared by Student's teachers with the exception of a near-failing grade halfway through the first quarter of the 2014-15 school year (P-12) that did not continue to the end of that quarter, or into subsequent quarters. Nor does a single standardized test result (including Student's performance on the 2015 PSSA) indicate a disability;⁷ this is the reason that multiple assessments must be used in evaluating children for IDEA eligibility. While it does not appear that the District conducted a reading evaluation as requested by the Parents in December 2011, I also find that this procedural error was not a denial of FAPE.

⁷ I reach this conclusion even independent of Exhibit A to the District's Closing Argument.

A conclusion that the District appropriately identified Student's disabilities is further supported by the comprehensive IEEs completed in 2014. With respect to Student's psychoeducational profile, the private school psychologist did not conclude that Student was eligible for special education on any basis other than a speech/language impairment. The report of the psychoeducational IEE is very instructive, and his testimony was quite persuasive, that Student presents very differently at home than Student does at school with respect to social, emotional, and behavioral functioning. The private school psychologist's report provides details about these differences throughout, including the validity of the information provided to him in completing his IEE. Clearly Student's inconsistent presentations across the home and school environments are the core of the parties' disagreement in this matter, and provide a logical explanation for their contradictory perspectives on Student's educational strengths and needs. The divergent presentations certainly supports the private school psychologist's recommendation for monitoring by the IEP team in the future. However, the purpose of the District's evaluations, as well as the IEEs, was to determine disability manifestations at school. The Parents' claim that the District failed in this regard must be rejected.

Nevertheless, the private school psychologist made a number of recommendations for Student's program that, surprisingly, are omitted from the most recent IEP. While it is clear the private evaluators did not identify their suggestions as mandatory, their recommendations surely deserve specific consideration by the IEP team. This is particularly concerning since many of the recommendations were included in the October 2014 IEP, and there is no evidence of record to explain why the program modifications/specially designed instruction were no longer appropriate for Student in the fall of 2015. The IEP team will therefore be directed to reconvene to consider anew each of the recommendations in the two IEEs, and specifically discuss a plan to

include (1) promotion of skill development of Student's adaptive/functional skill weaknesses (functional academic, health and safety, and leisure time skills); and (2) monitoring, on an annual basis, Student's emotional, behavioral, and executive skill functioning.

The second issue is whether the District provided appropriate programming for Student. Based on the foregoing, this section of the discussion will be limited to speech/language services for the time period in question (September 2011 to the present).

There was a substantial amount of evidence presented about the two administrations of the TOLD-4 and whether the scores could be compared to indicate progress or regression. (N.T. 129-31, 186-87, 535-40, 731-37, 742-43) What is uncontroverted from the record as a whole, regardless of the weight placed on a comparison of those scores, is that Student demonstrated a continued need for special education to address the speech/language impairment in the fall of 2012, and had fallen further behind Student's same-age peers in that area of skill development. These needs include articulation, which is a part of Student's disability and, unfortunately, will likely continue to be inconsistent for at least some period of time, and may never be wholly eliminated. (N.T. 185-86, 223, 246-47, 727-28) But, the IDEA does not require LEAs to eliminate a child's disability; rather, school districts must provide appropriate programming in light of the identified needs.

In this case, the record supports a conclusion that the District provided appropriate speech/language services for a portion of the time period in question but not for all. The November 2010 IEP contained goals for vocabulary, auditory comprehension, expressive language, and articulation, but did not contain baselines or other present level information. Although progress was reported to be made, without baselines there is no way to ascertain whether Student did make progress or to objectively understand how much progress was made.

Further, the fact that Student did not meet *any* of those goals by the time of the November 2011 IEP development strongly suggests that the goals were not realistic for Student, and/or that Student's progress was less than meaningful and that programming changes should have been considered. The absence of baselines continued through the November 2011 and November 2012 IEPs.⁸ It was not until November 2013, when Student had once again failed to achieve any of the prior year's speech/language goals, that baselines were provided so that one could understand how Student was or was not making progress. The absence of understandable progress measurement prior to November 2013, coupled with Student consistently failing to meet the speech/language goals, warrants a finding that the District's speech/language programming for Student did not provide FAPE from September 2011 through the development of the November 2013 IEP.

The November 2013 and October 2014 IEPs do not reflect the same concerns. Baselines were included, and the IEP goals addressed continued speech/language needs, including articulation, that grew progressively more demanding as Student gained skills. Student continued to excel academically, and the impact of speech/language weaknesses were not evidenced beyond articulation in the classroom. Further, by October 2014 when the IEP team had the recommendations of the IEEs, the majority of those suggestions were incorporated into the program through the speech/language goals as well as the program modifications and items of specially designed instruction. While the IEP team will be directed to reconvene to address two of those recommendations, I cannot conclude that their absence to date constitutes a denial of FAPE since they were suggestions phrased in terms of possible benefit to, and monitoring of,

⁸ This conclusion is evident even without consideration of the import of the TOLD-4 scores in the fall 2012, which are but one consideration in evaluating the effectiveness of Student's speech/language services. The portions of the TOLD-4 manual that describe its use for this purpose (*see* P-39; S-60) do not contravene this important special education principle.

Student. For all of these reasons, the program from November 2013 forward was appropriate.

Lastly, the Parents claim that the District's actions in handling the May 2013 incident resulted in Student missing the remainder of the school year as further denial of FAPE. The circumstances on that date were unquestionably traumatic to the Parents, to Student, and to all of the District personnel involved. The testimony surrounding the incident was, understandably, quite emotional, and it is very likely that the witnesses' sensitivity to the events on that date affected their recall some 2½ years later. However, there is nothing in the record to suggest that any action or inaction by the District on that date caused any denial of FAPE to Student, and I must reject this contention.

Remedies

In addition to the directive for the IEP team to reconvene, the above determinations lead to the next issue, the Parents' request for compensatory education. It is well settled that compensatory education is an appropriate remedy where a school district knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only trivial educational benefit, and the district fails to remedy the problem. *M.C., supra*. Such an award compensates the child for the period of time of deprivation of special education services, excluding the time reasonably required for a school district to correct the deficiency. *Id.* In addition to this "hour for hour" approach, some courts have endorsed a scheme that awards the "amount of compensatory education reasonably calculated to bring him to the position that he would have occupied but for the school district's failure to provide a FAPE." *B.C. v. Penn Manor School District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006) (awarding compensatory education in a case involving a gifted student); *see also Ferren C. v. School District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010) (quoting *Reid v. District of Columbia*, 401 F.3d

516, 518 (D.C.Cir.2005) (explaining that compensatory education “should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA.”)). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

Because of the denial of FAPE with respect to speech/language services for a portion of the time period in question, Student shall be awarded a total of 47 hours of speech/language therapy services to account for the period of the deprivation (35 minutes per week as provided by the relevant IEPs beginning in mid-September 2011 through mid-November 2013, rounded up to the next whole hour)⁹. Although the Parents suggest that a significant award of compensatory education is warranted since language impacts a student throughout the school day, the record as a whole, including the psychoeducational IEE, reflects that Student has performed quite well at school in all areas, with the exception of identified speech/language needs.

The hours of compensatory education are subject to the following conditions and limitations. Student’s Parents may decide how the hours of compensatory education are spent. The compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product or device that furthers Student’s speech/language skills and needs. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the District through Student’s IEP to assure meaningful educational progress. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student

⁹ Compensatory education is remedial in nature; thus, the amount of speech/language therapy that is reflected in the November 2010 and November 2011 IEPs, rather than the slightly lower amount in the November 2012 IEP, is the basis for the award. Further, while recognizing that the tolling agreement excluded a portion of the 2013-14 school year, the most recent IEPs express the amount of speech/language services in terms of hours per year, thereby suggesting that adherence to weekly allotments is not necessary. For the same reasons, the time period when Student was not able to attend school at the end of the 2012-13 school year is also not excluded.

and the Parents. The hours of compensatory education may be used at any time from the present until Student turns age fourteen (14).

There are financial limits on the parents' discretion in selecting the compensatory education; the costs to the District of providing the awarded hours of compensatory education must not exceed the full cost of the services that were denied. Full costs are the average of the hourly salaries and fringe benefits that were paid to the District Speech/Language Pathologist who provided those related services to Student during the period of the denial of FAPE,

CONCLUSION

Based on the foregoing findings of fact and for all of the above reasons, this hearing officer concludes that the District did not fail to properly evaluate Student or identify qualifying disabilities, but that it did deny Student FAPE in the area of speech/language services for a portion of the time period in question. Student will be awarded an amount of compensatory education, and the IEP team will be directed to reconvene for specific purposes.

ORDER

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

1. The District shall provide Student with 47 hours of compensatory education to address Student's speech/language needs. The compensatory education is subject to the conditions and limitations set forth above with respect to the discretion of the Parents and financial limitations.
2. The District shall, within 20 calendar days of the date of this Order, convene a meeting of the IEP team, including the Parents, to revise Student's IEP to include the program modifications/specially designed instruction made part of the October 2014 IEP and any others determined to be appropriate, and specifically to add the following:

- a. A plan to promote development of Student's adaptive skill weaknesses (functional academic, health and safety, and leisure time skills); and
 - b. A plan to monitor, on an annual basis, Student's emotional, behavioral, and executive skill functioning.
3. Nothing in this Order precludes the parties from mutually agreeing to alter any of the directives regarding the IEP meeting and timelines, the IEP content, or the form of compensatory education, set forth in this decision and order.

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

Cathy A. Skidmore

Cathy A. Skidmore
HEARING OFFICER

Dated: December 31, 2015