

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: C. G.

Date of Birth: [redacted]

Dates of Hearing: 10/5/2015, 11/3/2015, 11/23/2015, and 1/13/2016

Closed HEARING

ODR File No. 16753-15-16

Parties to the Hearing:

Representative:

Parents
Parent[s]

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Date Record Closed:
Date of Decision:

February 5, 2016
February, 26, 2016

Hearing Officer:

Charles W. Jelley Esq. LL.M.

INTRODUCTION AND PROCEDURAL HISTORY

The Student, (Student)¹ is an elementary age student in the School District (District) who the Parties agree is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).² The Student's Parents filed a due process complaint against the District asserting a denial of a Free Appropriate Public Education (FAPE) under the IDEA, and state regulations implementing the IDEA.

The case proceeded to a due process hearing convening over several sessions, at which the parties presented evidence in support of their respective positions. The Parents sought to establish that the District failed to provide appropriate programming to address all of Student's unique needs; they now seek compensatory education for the 2013-2014, 2014-2015 2015-2016 school years.

The Parents also made a claim for tuition reimbursement for a prospective placement in a private school for the remainder of 2015-2016 school year (J#1, p.4).³ The District maintains that its special education program, as designed, offered and implemented was at all times appropriate for the Student in all respects.

On September 11, 2015, the District filed an Answer to the Complaint denying the Student's claim for compensatory education and prospective tuition reimbursement (SD # 2).⁴ For the reasons set forth below, I find in favor of the District. The District provided the Student with a FAPE for the 2013-2014, 2014-2015 and the 2015-2016 school years. The Parents' claims for compensatory education are denied, as is the claim for a prospective placement in a private school.

ISSUES

1. Whether the District provided a Free Appropriate Public Education to

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 at all times was acting on behalf of both Parents.

² 20 U.S.C. §§ 1400-1482.

³ Abbreviations are as follows for Notes of Testimony (NT p.). Parent Exhibits (P# p.) and Joint Exhibits (J# p.). The Parties submitted 73 Joint Exhibits, the Parent submitted nine, all Exhibits were received into evidence each was carefully reviewed and considered in this Decision.

⁴ The testimony of every witness, and the content of each exhibit, was reviewed and considered in issuing this decision, regardless of whether there is a citation to particular testimony of a witness or to an exhibit. The Parties' written closing arguments were likewise carefully considered.

Student from September 2013-2014 school year?

2. Whether the District provided a Free Appropriate Public Education to Student from September 2014-2015 school year?
3. Whether the District provided a Free Appropriate Public Education to Student from September 2015-2016 school year?
4. Whether the Hearing Officer should order the District to pay for a private placement for the remainder of the 2015-2016 school year?

Findings of Fact

Medical Concerns

1. In 2011, when the Student was in Kindergarten, at the age of six, the Student had surgery to remove right Para hippocampal subcortical white matter lesions. At the same time a right temporal lobe lesionectomy was performed. These procedures affected the portion of the Student's brain that controls, processing, executive function, language, memory, and visual spatial relations (NT pp.30-31, NT pp.383-385).
2. Prior to and after the surgery and the Student's neurological condition Epilepsy, which at times adversely affects the Student's math, written expression, visual processing, visual motor skills, working memory, executive function, psychomotor speed, social skills, speech, and language (NT pp.30-31, NT pp.383-385).
3. At times, the anti-seizure medication results in slow thought processing speed (N.T. pp.30-31, NT pp.383-385).
4. Over the years, in an effort to control the Student's Other Health Impairment (OHI) of Epilepsy, the Student has taken and continues to take multiple medications (NT p.30, p.122).
5. At times, as a consequence of the Epilepsy the Student has difficulty remembering math facts and sequencing events and tasks requiring more than two or three step directions (NT p.35-36, pp.42-43).
6. Prior to November of 2015, the Student has not had a seizure in three years (NT p.122-123, NT p. 520, J#47).
7. In November 2015, the Parents provided updated supplemental testimony that the frequency of the Student's seizures returned, however, they appear to be under control after medical follow-up and medication change (NT pp.524-26, NT pp.533-34).

8. The Student has not experienced a seizure in school (NT p.12, NT p.363).
9. The District has agreed to administer the emergency medication of Diastat in school. Diastat has never been needed in school (NT p.122).
10. The School Nurse reviews the Student's Seizure Action Plan with all teachers (NT pp.364-366). During evacuation drills, consistent with the Seizure Action Plan the Nurse carries a bag of supplies to support the Student in the event of a seizure (NT p.366).

The Student's First Assessment

11. As part of the Student's first assessment, the District administered the Wechsler Preschool and Primary Scale of Intelligence 3rd Edition (WPPSI-III) and the Kauffman Test of Educational Achievement 2nd Edition (KTEA-II). On the WPPSI-III, the Student scored in the Average range with a Standard Verbal Score of 100, in the nonverbal domain the Student had a Standard Score (SS) of 108 (J# 19, pp.2-3).
12. On the KTEA II the Student earned a Below Average SS of 83 in Math Concepts, a Below Average SS of 83 in Letter and Word Recognition, a Below Average SS of 83 in Reading Comprehension, an Average SS of 90 in Math Concepts and Applications, a Below Average SS of 80 in Math Computation, a Below Average SS of 82 in Reading, and, a Below Average SS of 84 in Mathematics (J# 19, pp.8-9).
13. On the Test of Early Written Language Fourth Edition (TEWL-2), the Student's SS of 80 placed [Student] at the 9th percentile in the Below Average range (J# 19, p.10). The Student earned a SS of 107 on the Goldman Fristoe Test of Articulation (GFTA-2) placing [Student] in the Average range (J# 19, p.4). The Student's scores on the Clinical Evaluation of Language Fundamentals Fourth Edition (CELF-4) a general measure of language ability, were improved from when compared to previous assessments (J# 19, p.10-12).
14. When the Student's Phonological Awareness, a measure of knowledge of sound structure of language and the ability to manipulate sounds, was assessed, the Student earned a subtest raw score of 65, which indicated that the Student achieved criterion for the Student's age (J# 19, p.12).
15. The Student's Occupational Therapy (OT) assessment scores revealed a slight variance in the size of the numbers printed, fine motor difficulties, and Manual Dexterity weaknesses, and, Visual Perception weaknesses. The OT recommended that Student receive 30 sessions for 30-minutes of OT services each school year (J# 19, pp. 13-14).

16. As part of the 2012 assessment, the District administered a Functional Behavior Assessment (FBA). The school guidance counselor and the psychologist observed the Student, on five (5) different occasions. The observers did not report any weaknesses or problems interacting with peers (J# 19, p.14-19).
17. The Parents and three teachers completed the Behavior Assessment System for Children Second Edition (BASC-2) rating scale (J# 19, p.19-20). The Parents' ratings resulted in scores demonstrating nine "At Risk" areas, one score at the "Clinically Significant" level; while the two teachers, on the other hand, gave the Student "At Risk" scores on two measures, while the third teacher disagreed with the others and gave the Student one "At Risk" score in the area of Somatization (J# 19, p.19-20). The Team concluded that the Somatization scores reflected the Student's "frequent" trips to the school nurse (J# 19, p.20). The Team also concluded that the Student does experience some "anxiety" regarding school, but the anxiety passes once Student is in the classroom (J# 19, p.20). The Team recommended that the nurse visits be monitored to "ensure that it does not become a means to escape or avoid non-preferred tasks" (J# 19, p.20).
18. On the Dynamic Indicators of Basic Early Literacy Skills (DIBELS), the Student's Kindergarten Scores ranged from Proficient to Below Basic (J# 19, p.3). The Student had similar scores when the DIBELS was repeated in 1st Grade (J# 19, p.3).
19. During 1st Grade, the Student scored "Proficient" to "Below Basic" when assessed with the District's Reading and Writing curriculum-based assessment (J# 19, p.4).
20. The Student's classroom reading assessments were in the "Average" range (J# 19, pp.4-5).
21. The Evaluation Team concluded the Student was a child with an "Other Health Impairment-Epilepsy-and a Speech or Language Impairment" who required specially designed instruction and OT (J# 19, pp.20-21). The Team concluded the results of the Functional Behavior Assessment did not reveal any behaviors that impeded learning (J# 19, p.21).

The 2nd Grade IEP

22. On May 13, 2013, the IEP team met to revise the Student's program for the remainder of 2nd grade and for the beginning of the 3rd grade school year (J# 33).
23. The May 2013 IEP Present Levels of Academic Achievement and Functional Performance (PLAAFP), rely on diagnostic assessment test scores of Phonological Awareness assessment, from May of 2012 and September of 2012 (J# 33, p.6). When reviewed the Student's Raw Scores, Percentile Rankings, and Standard Scores in all seven areas went down (J#33, p.5). For example, in Rhyming the Student's SS dropped from 111, placing [Student] at the 83rdile, to a SS of 71 at the 6thile (J# 19, p.20). When the Student was in 2nd Grade, the District also administered a Slosson Diagnostic Screener on this test the Student earned a Grade Equivalency Score of 1.8 in Math Concepts, a score of 2.1 in Problem Solving and a Score of 1.2 in Calculations (J# 19, p.20). The present level also included test results from the Sonday Multisensory Reading and Spelling Test, scores from September and December of 2nd Grade, scores from the Scott Foresman Reading Street Program, the Everyday Math curriculum, a classroom based Writing assessments in four (4) areas, benchmarks DIBELS scores, Speech and Language results, and, a summary of [Student's] participation in OT (J# 33, pp 4-11).
24. The Math Goal focused on counting money up to \$ 5.00 dollars with 80% accuracy (J# 33, p.18). The Goal notes a "Baseline" of 0% using dollars and coins (J# 33, p.18).
25. The next Goal targeted using a daily schedule with the notation the Student "is not able to do this at this time" (J# 33, p.18).
26. The third Goal targeted Writing with a baseline of "2 paragraphs with teacher assistance" (J# 33, p.19).
27. The fourth Goal is a Speech Language goal, that includes a baseline of "interprets by summarizing back to the therapist basic 3 step directions 67%; answering questions-83%" (J# 33, p.20).
28. The fifth Goal addresses addition and subtraction with regrouping and solving problems with a baseline of 56% (J# 33, p.22). This goal also had a short-term instructional objective of solving "two (2) digit addition and subtraction problems with regrouping noting a 0% baseline on the Slosson (J# 33, p.22).
29. The IEP provides for 26 different forms of Specially Designed Instruction (SDIs) (J# 33, pp.22-25). The IEP also provided for staff training on Epilepsy Awareness, and the related services of Speech Therapy for 30 minutes per

session 2 times each month, and 30 OT sessions per school year for 30 minutes each session (J# 33, pp. 26-27).

30. On page 29 of the IEP, it states the Student spends 94% of the time in the regular education classroom (J# 33, p.30). In addition, on page 29 the IEP describes the Student's "Amount of Special Education as Full-Time: Special education supports and services in the IEP are provided by special education personnel for 80% or more of the school day" (J# 33, p. 29).
31. On the same day as the IEP conference, the District gave the Parents a Notice of Recommended Educational Placement (NOREP) explaining the options considered and the proposed placement (J# 34, pp.1-3). On page 2, of the Notice of Recommended Education Placement (NOREP) the proposed placement is "Full time Learning Support Speech/Language Support" (J# 34, p.2).

The 3rd and 4th Grade IEPs

32. On April 22, 2014, the IEP Team met and updated the present levels in Writing and Spelling noting two new assessments. On the Test of Written Spelling, the Student earned a SS of 81 placing [Student] in the "Average Range." While on the Total Written Words assessment, on five probes the Student's spring scores were 20 total written word (tww), 20 tww, 21 tww, 22 tww, and 16 tww. The expected range for an average 3rd Grade student is between 22 and 47 total words per minute (J#38, p.6).
33. Benchmark writing scores using one 2nd grade rubric and three 3rd Grade rubrics, reported scores ranging from 7/20 to 12/20 (J# 38, p.6). In the content area of Math on the 4Sight assessment, the Student scored "Below Basic" (J# 38, p. 7). As for the Goal of counting money was considered mastered in January (J# 38, p. 7).
34. On the Slosson-Diagnostic Math Screener, the Student earned a SS of 87 in Concepts, a SS of 76 in Problem Solving, a SS of 93 in Calculations resulting in a Total SS of 85 (J# 38, p.8). The IEP notes the Average score range is from 90-110 (J# 38, p.8).
35. The PLAAFP also noted scores ranging from 70% to 95% levels of success in Speech (J# 38, p. 9). The frequency of OT services remained the same at 60 minutes per month (J# 38, p. 9).
36. The Writing goal criterion for success required the Student to earn a 10/20 points using a grade level rubric on three consecutive samples. The Student's Writing Goal reported a baseline of 7/20 (J# 38, p. 17).

37. The Goal required the Student to follow three step basic and complex oral directions with a level of 90% accuracy on three consecutive trials reported a baseline of 70% “Independent” and 94% with one repetition (J# 38, p. 17).
38. The Speech Goal reported a baseline of 87% in recalling information noting 90% accuracy over 3 consecutive trails as the expected level of mastery (J# 38, p. 18).
39. The IEP added a new goal in Math expecting the Student to solve single step word problems requiring the Student to perform mixed operations of addition, subtraction, and multiplication to 75% accuracy on 3 out of 4 assessments (J# 38, p. 19).
40. The IEP added cursive writing as a new Goal, no baseline data is reported (J# 38, p. 19).
41. The next Goal required the Student to score 75% in grade level secure math content. The Student’s baseline data ranged from a low of 34% to a high of 87% (J# 38, p. 20).
42. At the beginning of the 3rd Grade school year, on September 16, 2013, the IEP Team met and determined that no revisions were necessary to the May 2013 IEP (J# 36, pp.1-2).
43. On March 10, 2014, the Parent and the Special Education teacher met and determined the Student had mastered the Math goal; a new goal was included, when the teacher and the Parent agreed the IEP team did not have to meet (J# 37, p.1, Exhibit J#38 pp.7-9).

The 4th Grade IEP

44. The 4th grade special education teacher co-taught the Students’ writing class, where she provided small group instruction to the Student with up to 8 other students, in an adjoining class, and direct instruction during the class. The special education teacher also provided additional small group instruction during the daily 30-minute intervention and extension period (NT p.172-174).
45. To support the Student’s development of written expression, the special education teacher also, loaded the graphic organizer and writing expression supports into the Google Docs (NT pp.661-63).
46. The 4th grade special education teacher encouraged the Student to use the Google Chrome Book, laptop in writing class and projects (NT pp.176-177).
47. The special education teachers did not observe the Student being anxious, or bullied (NT pp.176-180).

48. The 4th grade special education teacher co-taught the Student's math class where she provided small group instruction, to the Student in a group with eight other students, using multisensory instruction techniques and Power Instruction teaching strategies (NT pp.173-176).
49. The 4th grade special education teacher continues to improve the use of enhanced digital graphic organizer including font color changes to support the Student's learning (NT pp.661-63).
50. During 4th grade the first 15 to 20 minutes of writing instruction, started in a regular environment with about 22 students, and the second part, about 40-45 minutes, was pull-out in a group of 9 students in an adjoining, quiet classroom (NT p.175, NT p.206-207).
51. In 4th grade, the first 10 minutes in Math involved reviewing homework, if the Student was not able to complete homework, the teacher and the Student would work with a small group to review the work (NT p18, NT p.195-196:18).
52. During 4th grade, the Student received an additional 30 minutes of math instruction and reinforcement during the Instruction Enhancement (IE) period (NT p.207-208).
53. During 4th grade the special education teacher provided weekly updates to the Parents on what was instructed each week and what was about to be instructed for the next week (NT pp.200-201).
54. The Parents contend that discipline records are proof that Student has "significant difficulty with interactions with [Student's] peers." (NT p.18, NT pp.125:12-16).
55. The staff testified the Student misbehavior is otherwise age and developmentally appropriate (NT p.18, NT pp.125:12-16).
56. When the Student was reevaluated, the Student did not demonstrate behavioral, social, or emotional problems (J#42 p.4; NT p.181:6-23, NT pp.181-182).
57. The Parents contend bullying occurred for a few weeks, during 4th Grade but then ended abruptly when the other students were placed in separate groups (NT p.125-126). Since that time, the Student has not been bullied in school (NT p.545, NT p.563, NT p.548).
58. The District staff did not witness any bullying (NT pp.136-137, NT p.150, NT p.178, NT pp.213-214).
59. But for a few acts of misconduct, the Student is typical, and socially appropriate with peers (NT pp.213-214, NT p.544). The Student acts socially appropriate in school, both during instruction and while engaging with friends at lunch and on the playground (NT pp.179-180, NT pp.215-216, NT p.688). The FBA evaluator did not observe any inappropriate peer interactions NT p.683).
60. The Student has appropriate social language skills, the Student is able to express thoughts to others and can understand social language, such as body language and implied meaning, expressed by others (NT pp.604-05).

61. In 4th Grade, Student participated in Friendship Group from February 2015 through April 2015 (NT p.573, NT p.595). The Friendship Group started based on an across-the-board fourth grade need (NT p 596).
62. To address the peer issues and social concerns the Student meets with the Guidance counselor to debrief, after inappropriate interactions with peers (NT p.106; NT p.563; NT p.583, NT p.588, NT p.594).
63. In 4th Grade the math instruction was direct and hands-on, involving music, movement, mnemonics, visuals, and using multiplication chart, and calculator (NT pp.173-174).
64. The teachers used Everyday Math, a spiraling and re-teaching curriculum (NT p.175).
65. The IEP included 24 forms of SDI [(J# 38, pp.19-24), Speech Therapy for 30 minutes per session, 1 individual session/month, and OT for 30 minutes 20 times a school year (J# 38, p. 24). The IEP also included Epilepsy Awareness training for all staff that encounters the Student (J# 38, p. 25).
66. The Level of Support in the IEP listed the Level of Intervention as “Supplemental” noting that the Student will encounter special education personnel for up to 20% of the school day. Section VIII A of the IEP provides the Student is in regular class 92% of the school day (J# 38, p. 28). The NOREP given to the Parents at the IEP Conference reports the Level of Intervention as “Supplemental” (J# 39, p. 2).
67. Beginning in 4th Grade, the Parents and staff agreed to limit the Student’s homework to no more than 30 minutes per night (NT at 186:3-187:19; Exhibit J-43).
68. Parents have the discretion to prioritize homework according to what they believe to be most important (NT pp.186 and pp187).
69. Student’s grades are not lowered when Student does not turn in all homework assignments (NT pp.187:4-5; NT at 232:7-21).
70. Even though the Student’s homework is limited to 30 minutes per night, the Student has a difficult time in completing homework (J##60-62).
71. The Student started using a Chromebook as an Assistive Technology (AT) support in 4th Grade, NT pp.60; p.82; NT pp.176-177:9; p.209; J#43 p.29).
72. The Student uses, the Chromebook to complete written expression assignments, The Student also uses the Chromebook to complete reading comprehension assignments (NT p.611).
73. Previously, in 3rd Grade, the Student began to use an iPod with “reading street stories recorded on them so that [Student] could pre-listen and pre-read on the weekend so that [Student] would be prepared for class when they read it as a whole group in school,” (NT p.60, NT p. 210).

74. AT supports included a computer-assisted program for math called Fast ForWord in 1st Grade, (NT p.61, J#11), the use of a calculator (NT p.173, p.195) and the use of a Chrome Book laptop and assorted software since 4th Grade (NT p.173, p.195, J#43, pp.25-31). The frequency, duration and the location of the AT support are listed in the IEP (NT p.173, p.195, J#43, pp.25-31).
75. The staff testified the Student did not display social skill deficits in school that needed a specific SDI intervention (NT p.58).

The 4th Grade Reevaluation Report

76. On October 14, 2014, the District issued a Permission to Evaluate (PTE) the Parent signed and returned the Permission to Evaluate (PTE) on October 15, 2014 (J# 40, p.2).
77. In December of 2014, when the Student was in 4th Grade the District psychologist prepared a Reevaluation Report (RR). The RR noted the following areas of need, math basic concepts, operation, application, and problem solving and writing-expressing thoughts, organization, sentence structure, and conventions (J#42, p.4).
78. To assess the Student's ability the District administered the Woodcock Johnson Test of Cognitive Ability Fourth Edition (WJ IV). On this measure, the Student earned a full scale Intelligence Quotient SS of 87, placing the Student at the 20th percentile rank, in the Low Average range (J#42, p.4).
79. The Student earned an Average SS in the following subtests Oral Vocabulary, Verbal Attention, Phonological Processing, Story Recall, and Visualization (J#42, p.9).
80. On the Woodcock Johnson Test of Achievement Fourth Edition (WJ IV ACH), the Student scored "Low" in Calculation, Applied Problems, and "Low Average" in Writing Samples all other scores on the 10 other areas assessed were in the "Average Range" (J#43, p.12).
81. On the Test of Written Language (TOWL) Fourth Edition, the Student scored "Average" on Contextual Conventions, Story Composition, and Spontaneous Writing (J#42, p.13).
82. On December 12, 2014, the District completed the Reevaluation Report (RR) (J#42).
83. To assess the Student's achievement the District administered the Woodcock Johnson Test of Achievement Fourth Edition (WJ IV ACH). The Student's SS ranged from 71 to 108, a score of 100 is an average score. Out of the 14

- Achievement measurements, the Student scored Average on 10 subtests, Low Average on one subtest and, Low on three subtests. The Student's SS in Writing Samples was in the Low Average range (SS 88), while Mathematics, Calculation, and Applied Problems SS were also in the Low range (SS from 71-78) (J#42, p. 12).
84. The Low Math score "suggests" the Student is "significantly below average when compared to other students [Student's] age" (J#42, p. 14).
 85. The Low Average Writing Score notes the Student was not able to earn full credit as many of the prompts were "incomplete sentences" provided "limited content" or did not provide an "appropriate response to the prompt" (J# 42, p. 12).
 86. The Student's Test of Written Language Fourth Edition SS of 93 is in the Low Average range (J#42, p.15).
 87. As part of the RR the Parents and two of the Student's teachers, completed the Behavior Rating Inventory of Executive Function (BRIEF) (J#42, p.15). The BRIEF reports scores as T scores, T scores of 65 or higher indicate "potential clinical significance" (J# 42, p. 15).
 88. Results of the BRIEF indicate the teacher and the Parent agree the Student demonstrates significant concerns with working memory executive functioning ability to hold information in mind, for the purpose of completing a task, encoding information, or generating goal plans, and, formulating a sequential plan to achieve goals or complete school projects (J# 42, p. 17). The Parent and the teacher also agreed the Student displayed significant problems in anticipating future events, setting goals, and taking steps to carry out goals (J# 42, p. 17). The Parent rated the Student Low in [Student's] ability to make transitions while the teachers, on the other hand, did not note a difficulty (J#42, p. 17).
 89. To assess the Student's Social, Emotional and Behavioral development the District administered the Behavior Assessment System for Children Second Edition (BASC -2) Parent (PRS) and Teacher Rating Scales (TRS) (J#42, p.18). A BASC T Score of 70 and above is considered clinically significant (J#42, p. 18).
 90. The teacher's BASC-2 scores indicate that several of the Student's scores are in the "At Risk" range (J# 42, p. 20). In the area of adaptive behavior, the teachers placed the Student's Social Skills, Leadership Skills, and Study Skills in the "At Risk" range, while at the same time placed "Anxiety" ratings at the "Low Risk" level (J#42, p. 20).
 91. The Parents however gave the Student's several BASC ratings at the "Clinically Significant" level (J# 42, p.20). Parents reported the student is "At Risk" for

Depression and Withdrawal, indicating a tendency to evade others to avoid social contacts (J#42, p.20). The Parent is concerned that the Student is anxious to attend school and is using trips to the nurse to escape or avoid stressful situations (J#42, p.20, J#71).

92. The Speech Therapist administered the CELF-4 (J#42, p.21). The Student's CELF-4 subtest scores for Concepts and Following Directions Recalling Sentences places Student in the "Average Range" (J#42, p.22). The Student scored Above "Average" in the subtest of Formulated Sentences, "Average" on Word Classes, Expressive Vocabulary, Understanding Spoken Paragraphs, and Expressive Language (J#42, p.22).
93. The Student's Core Language, Receptive Language, Expressive Language and Language Content Index and Language Memory scores fell in the "Average Range" (J# 42, p. 25-27; NT p133). The Speech Therapist also administered the Comprehensive Assessment of Spoken Language (CASL).
94. The Students' scores on the Antonyms, Syntax Construction, Paragraph Comprehension, Grammatical Morphemes, Nonliteral Language, Inferences, and Grammaticality Judgment scores were in the average range. The Student's Synonyms and Sentence Completion scores were "Above Average" range (J# 42, pp. 27-28). All of the CASL Composite Scores Indexes were in the "Average" to Above Average" range " (J# 42, p. 29-31). The evaluator concluded the Student "presents with pragmatic language skills in the "Average Range" " (J# 42, p. 33; NT p.133).
95. The Speech Therapist testified that after assessing the Student's speech and pragmatic language skills, reviewing progress, test scores, and observing the Student, in class she recommended to the Team that the Student no longer needed Speech or Language Services (NT pp.137-141).
96. The Speech Therapist did however recommend that the staff continue to implement the Speech related Specially Designed Instruction (NT p.139-140).
97. The Occupational Therapist (OT) repeated the "Print Tool," the Motor-Free Visual Perception Test (MVPT), the Bruininks-Oseretsky Test of Motor Proficiency (BOT II) yielding a "Raw Score of 32" with an "Age Equivalent" score of 8 years 6 months (J#42, pp.34-35).
98. The Occupational Therapist administered the Handwriting Without Tears, the Handwriting Speed Assessment, the Motor-Free Visual Perception Test (MFVT), and the Bruininks-Oseretsky Test of Motor Proficiency (J#42, p.34). Four out of four measures were in the Below Average Range, which resulted in the therapist recommending the Student receive 20, 30 minute session per

calendar year to address motor proficiency skills influencing success in school (J#42, pp.34-35).

99. The Multi-Disciplinary Evaluation Team concluded that the Student was an exceptional youngster with an Other Health Impairment of Epilepsy, mild-moderate Diplegia Cerebral Palsy, with reported diagnoses of Autism Spectrum Disorder, Neurodevelopmental Delay, and PTSD (J#42, p.36). Based on the results of the Speech/Language assessment the Team concluded the Student no longer qualified for Speech/Language Support (J#42, pp.36-37).
100. On February 23, 2015, the District revised the IEP. The new IEP included Goals in the area of writing, solving multi-step problems, typing, and math, along with 30 SDI supports (J#43, J# 53). The IEP also include Seizure Alert Training, and, Occupational Therapy (J#43).
101. On February 23, 2015, the District gave the Parents a NOREP/PWN noting the refusal to provide Speech/Language Support. The Parents rather than approve the recommendation asked for another meeting (J#44).
102. On March 17, 2015, the District reissued a NOREP/PWN removing the Speech/Language Supports the Parent approved the action (J#46, p.3).

The Private Evaluations

103. On June 1, 2015, the private Speech evaluator provided the Parents with the results of the Student's Independent Speech and Language Evaluation (J#52). The evaluator reviewed the private neurologist's report, the District's December 2014 RR, the January 2015 IEP (J#52).
104. On the Phonological Awareness Test-2, the Student received T scores,⁵ below the 25th percentile, indicating Student is a candidate for specific instruction in the follow areas: Segmentation, Isolation, Deletion, Phonemes, and Decoding (J#52, p.17). The evaluator recommended the Student improve functional receptive language skills, semantic relationships, language organization, verbal and written, improve reasoning and inferential skills, pragmatic language skills and situational awareness in social situations to increase the ability to recognize and interpret information (J#52, p.12-23).

⁵ T scores tell individuals how far their score is from the mean. T scores have a mean of 50 and a standard deviation of 10. Therefore, if a student's raw score was converted to a T score and their T score was 70 it would in turn mean that their score was 20 points above the mean.

<https://www.aca267.k12.ia.us/assessment/different-types-of-data-and-scores/z-scores-and-t-scores/>

105. The evaluator administered the CELF-5, on October 24, 2014, February 20, 2015, and on April 25, 2015, the Student's Scaled Scores ranged from 7 to 10 (J#71, p.7). Seven out of eight scores were in the "Average" range (J#71, pp.7).
106. On August 28, 2015, the Parents' attorney provided the District with a report from a neurologist recommending, the Student attend a private school, receive OT, and supports and modification to address the Student's Specific Learning Disability, (Math, Written Expression, Executive Function, Dyspraxia and ADHD (J# 56, p.10).
107. Over the course of three days, a private neuropsychologist administered a battery of 21 different assessments (J#71, pp.13-21, J#51). The results of the assessment are comparable to the District's evaluation no new IDEA disability test scores or results were provided.
108. The neuropsychologist concluded the Student had a Math Disorder, a Disorder of Written Expression, an Anxiety Disorder Not Otherwise Specified and Attention Deficit Hyperactive Disorder, Combined subtype (AD/HD) (J#51, p.11).
109. The neuropsychologist evaluator recommended the Student enroll in a program "geared to children with learning disabilities in the context of solid intellectual skills" (J#71, pp.19-20; J#51). The evaluator also recommended a small student to teacher ratio, in a multimodal setting. The evaluator noted the program should address the Student's Math, Written Expression, Memory, Problem Solving, Executive Functioning skills, and, Planning/Organization skills (J#71, pp.19-20; J#51).
110. Upon receipt of the reports the IEP team met and then proceeded to update the Specially Designed Instruction (SDIs) to address the Student's Executive Functioning deficits (NT pp.433-435, J#43, pp.26-30).
111. The school psychologist testified that she could not reconcile the IEE evaluator's Written Expression conclusions because the report did not provide any SS. (NT p.439). After reviewing the Student's SS in Math and Writing, the school psychologist did not agree with the private evaluator's conclusion, that the Student also qualified as a student with a Specific Learning Disability affecting one or more basic psychologically processes in Math or Writing (NT pp.441-447).
112. The IEE also recommended the Student receive community based Provider 50 Wraparound Services, of counseling and involvement in a planned social skills group (J# 56, p.10-11).
113. The Speech Therapist attended a July 9, 2015, IEP meeting to discuss the Parent's private speech evaluation (NT p.141, J#44, J#52). The Speech

Therapist testified that the private speech evaluator did not contact the School about the evaluation, used the same previously administered assessment tools, obtained the same or similar results, did not summarize the test scores, and used a Parent checklist to assess the Student's pragmatic language skills (NT pp. 140-145).

114. At the conclusion of the IEP meeting, after reviewing the private reports, the District members of the IEP team concluded the Student did not need speech or language services (NT pp.143-144; J#46).
115. The Speech Therapist also disagreed with the Parent's neurologist report that the Student had an Expressive Language needs or Apraxia. The Speech Therapist also disagreed with the neuropsychologist report and the private speech and language evaluation that the student needed speech services (NT pp.145-148, J#52, J#61, NT p.149, NT p.156, NT pp.160-164).
116. On July 10, 2015, after receipt of the two Independent Evaluations the District issued PWN and Request for Consent to conduct further assessment (J#54).
117. On July 17, 2015 the District issue a NOREP/PWN proposing to provide the Student small group instruction in math and writing class with instructional support in a co-taught reading class (J#55, p.3).

The November 2015 Reevaluation Report and the 5th Grade IEP

118. On November 17, 2015, the District issued another RR consolidating all of the existing data (#71). The November RR included a Functional Behavior Assessment (J#71, pp.58-62).
119. The November RR included the results of the second Functional Behavior Assessment (FBA) reviewing concerns of anxiety and task avoidance. The FBA evaluator focused on the behavior of visiting the nurse to avoid class work. (J#71, pp.59-62, J#51).
120. The evaluator concluded the Student does not over use access to the bathroom or the nurse to avoid class (J#71, pp.59-60; J#51; NT p.670).
121. As part of the second FBA data collection process, the evaluator spoke to Student's mother, among others, to confirm the Parent specific behaviors of concern (NT p.684).
122. FBA evaluator did not assess the Parent's concern of anxiety before school (NT pp.685-686).
123. The FBA evaluator concluded the Student did not demonstrate escape or avoidance behaviors, and did not need a Positive Behavior Support Plan (PBSP) (NT p.670, J#71 pp.58-62).

124. Although the Parents reported concerns with restroom requests, none of the teachers reported any concern about frequency of the Student's restroom requests (NT at 693).
125. The nurse's log provided anecdotal statements describing the nurse visits (NT p.671). Several of the visits were for treating every day occurrences (NT p. 689, P#9).
126. The FBA evaluator learned the Nurse visits occurred at the same time of the day, however, during baseline, the Student abruptly stopped going to the nurse after Parents spoke to Student about the frequency of the requests (NT at 673, p.700).
127. Exhibit J#73, is a combined NOREP/PWN and a December 9, 2015, IEP. The NOREP/PWN propose the action of providing the Student with special education in the area of math, with additional SDIs to address fatigue, anxiousness, speech, writing, and executive functioning (J#73, p.2).
128. Based upon the November 17, 2015, RR and the December RR the NOREP/PWN and the IEP discontinued written expression as a goal; however, the SDIs remained in the IEP for assistance in spelling, punctuation grammar (J#73, p.22).
129. The Parent approved NOREP/PWN on December 15, 2015, discontinuing the writing goal (J#73, p.3).
130. The December 2015, IEP includes a goal, with several short term instructional objectives, for solving mixed operation math problems, a math goal to solve algorithms through computations issuing whole numbers and decimals, and an OT goal (J#73, pp.23-29).
131. The IEP contains 35 SDIs' that address modifications like the Student's Seizure Plan, the use of audiobooks, pre-teaching, writing prompts, frequent checking to address executive functioning, the use of graphic organizers (J#29-36).
132. The Cover Sheet to the 5th Grade IEP provides the blueprint of the following individualized services: a Transition Plan from 5th to 6th Grade; Seizure Training and Awareness; First Aid for Seizure training; social skills supports from the school counselor; writing instruction during the IE class; 30 minutes of direct instruction every day to remediate Math weaknesses; modified spelling list; teacher notes; and, strategies to address Executive Functioning skills (J#73, pp.4-8).
133. As part of the writing process, the Student uses a five-point strategy to solve word problems that requires Student to underline key points, circle numbers, and place a box around key words (NT p.335).

134. Prior to the December 2015 IEP change, the staff prompted the Student to use the Chromebook to produce a final written piece, but not for completing the graphic organizer and pre-final items (NT pp.261-262, NT p.643, N.T. pp.649-650).
135. During 4th and 5th grade direct instruction occurred in the regular education environment for about 20 students, with the Student occasionally being pulled for small group instruction with three to five students (NT p.16,p.205).
136. The Student received additional writing instruction during IE period (NT p.207-08).
137. The 4th and 5th grade special and regular education teachers use a variety of multi-sensory techniques, including varied group sizes, breaks, direct and self-directed instruction, with needed repetition and organizers (NT pp.623-25, p.629 and 630).
138. In 4th and 5th Grade, the teachers use a defined writing process to produce five to seven paragraphs writing projects (NT at 625-27). The “writing process,” includes prewriting, idea generation, graphic organizers, first draft, peer- and self-editing and revision, and final copy (NT p.174, NT pp.176-77, NT p.209).
139. Writing to a final piece can take up to a week and “is a long process” (NT 261-266, NT p.643, NT pp.637, J# 72). The teacher and para-educator provide individualized support as each circulates among students in the regular and special education classrooms (NT p.641, p.651).The amount of one-on-one attention depends on the task (NT p.656), and increases when the teacher becomes aware of Parent reports of difficulties (NT p.657).
140. The special education teachers use graphic organizers with color enhancements to support the Student’s executive function needs (NT p.642, J#72, p.4, NT pp. 646-47, NT p.657, J#72 p.7, NT pp.662-63).
141. The 5th grade special education teacher testified that the Student made progress in math (NT pp. 265-269).
142. The Student currently has a “B” in Language Arts, and an “A” in Math based on the same quality and mostly the same quantity of work, subject to the agreed upon modifications, required for all other students (NT p.608, J#71, p.36).
143. The Student’s spelling list is modified like other 5th Grade students (NT pp.262-266, NT p. 612).
144. The December 2015 IEP, provides summative, formative, end of unit assessments, and grade-level benchmark test results to measure and track progress (J#43 pp.1-11).

145. When the 5th grade special education teacher administered the 4Sight, to assess the Student's baseline reading skills, the Student earned a score of 97%, which is Proficient at the 5th Grade level (NT p.285).
146. The 5th Grade SDIs address the Student's Executive Function needs. For example, the 5th grade special education teacher regularly asked the Student to repeat single and multiple step directions (J#73, pp. 29-39).
147. The December 2015 IEP, provides summative, formative (including end of unit assessments) and grade-level benchmark test results to measure progress (J#43 pp.1-11).
148. Like the November 2015 RR, the December 2015 IEP, proposed eliminating writing as an area of unique need (J#73, p.22).
149. The Student uses the Chromebook to answer cold read comprehension questions (NT pp.647, NT p.649).
150. The December 2015 IEP notes continues with use of the Chromebook, in writing, the use of graphic organizers, spelling packets, and BookShare to address reading support, manual and visual fatigue as well as the use of was added to the Chromebook (J#73, p.11, NT p.661).
151. The IEP calls for the Student's to receive BookShare, Learning Ally, the Chromebook, along with FASTT Math, as a technology tools to assist in the Student's learning (NT p.277).
152. When the Student's reading choices are not in the BookShare library, the Student is given the option to select another book. When the Student selects another book, and the book is not available in BookShare, the Mother works with the Student to complete [Student's] reading assignments (NT pp.276-277). The Book Share library does not include the reading books the Student uses and is not a useful support (NT p.276-277).
153. After the December 2015 IEP changed the SDI related to Chromebook, Student used the Chromebook for each step in the writing process (NT pp.661-63).

The Student's Progress Monitoring Reports

154. Exhibits 64 through 67 describe and summarize the Student's progress from 1st Grade through 4th Grade (J## 64-67).
155. Exhibit J#64 contains the progress monitoring that occurred during Kindergarten, 1st grade and 2nd Grade. The progress monitoring established a baseline, tracked changes in the Student's learning, in the following areas: ability to identify numbers; count independently by 5's, 10's to 100; subtracting single

digits; sight word identification; letter sound identification; constant-vowel constant sounding; written expression; production of the /th/ sound; following oral directions; copying sentences; dressing skills; and, using classroom tools to cut, trace and color forms (J#63). In all areas, the child improved from baseline testing (J#63).

156. Exhibit J#65 the 3rd Grade progress monitoring report contains the continuous progress monitoring of the goals and objectives that occurred during end of 2nd grade and 3rd Grade. The progress monitoring established a new baseline, tracked additional changes in the Student's learning in the following areas: ability to identify numbers; count independently by 5's, 10's to 100; subtracting single digits; sight word identification; letter sound identification; constant-vowel constant sounding; written expression; production of the /th/ sound; following oral directions; copying sentences; dressing skills; and, using classroom tools to cut, trace and color forms (J#65). In all areas, the child improved from baseline testing (J#65).
157. The 3rd Grade Progress Monitoring report also states the Student mastered the skill of counting money up to five dollars (J#65, 2 p.24). The 3rd Grade Progress Monitoring report states the Student mastered the skill of identifying and following a schedule (J#65, p.25).
158. Exhibit J#66 the 4th Grade progress monitoring report contains the formative, summative, benchmark testing results along with continuous progress monitoring of the goals and objectives that occurred during 2nd grade. The progress monitoring established a new baseline, tracked additional changes in the Student's learning in the following areas: writing three five to seven sentence paragraphs using a grade level rubric; follow three step directions; recall and summarize information; solve single step work problems; write Student's name in cursive; solve single step word problems; and, earn a score of 75% in grade level math (J#66).

Applicable Legal Principles and Discussion

Burden of Proof

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. The burden of persuasion lies with the party asking for the hearing. If the parties provide evidence that is equally balanced, or in "equipoise," then the party asking for the hearing cannot prevail, having failed to present weightier evidence than the other party. *Schaffer v. Weast*, 546 U.S. 49, 62

(2005); *Ridley S.D. v. M.R.*, 680 F.3d 260 (3^d Cir. 2012). In this case, the Parents asked for the hearing and thus bore the burden of proof. As the evidence was equally balanced, the *Schaffer* analysis was applied.

Credibility

During a due process hearing the Hearing Officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion, and conclusions of law. Hearing Officers have the plenary responsibility to make “express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses.” *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003).⁶ All witnesses appeared to be testifying honestly and to the best of their recollections. There were no instances of conflicting testimony where a credibility determination was needed to establish a fact. Some witnesses were however more persuasive on some points, than others.

Free Appropriate Public Education

The IDEA requires that a state receiving federal education funding provide a “free appropriate public education” (FAPE) to disabled children. 20 USC §1412(a)(1), 20 USC §1401(9). FAPE is “special education and related services” at public expense, that meet state standards, provide an appropriate education, and are delivered in accordance with an individualized education program (IEP). 20 USC §1401(9).

School districts must provide a FAPE by designing, implementing and administering a program of individualized instruction that is set forth in an IEP. 20 USC §1414(d). The IEP must be “reasonably calculated” to enable the child to receive “meaningful educational benefits” and “significant learning” in light of the student's “intellectual potential.” *Shore Reg'l High Sch. Bd. of Ed. v. P.S.*, 381 F.3d 194, 198 (3^d Cir. 2004). “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 (3^d Cir. 1999). In order to provide a FAPE, the child’s IEP must specify specially designed instruction to meet the child’s unique needs and must be accompanied by such supplemental or related services as are necessary to permit the child to benefit from the instruction. *Board of Education v. Rowley*, 458 U.S. 176, 181-182 (1982). 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*”

⁶ *David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *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)

educational benefit. *M.C. v. Central Regional School District*, 81 F.3d 389, 396 (3d Cir. 1996).

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, aid, or service 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 appropriateness of the program is judged prospectively; therefore, the 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 program should be judged only on the basis of the evidence known to the school district at the time at which the offer was made. *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010); *D.C. v. Mount Olive Twp. Bd. Of Educ.*, 2014 U.S. Dist. LEXIS 45788 (D.N.J. 2014).

Elements of an IEP and Progress Monitoring

The IEP is the blueprint that must describe the strengths of the child, the concerns of the parents for advancing the education of their child; the results of the initial or most recent evaluation of the child; and the academic, developmental, and, functional needs of the child. 34 CFR 300.324 (a)(1). Each IEP must contain: "A statement of the child's present levels of academic achievement and functional performance, including (i) how the child's disability affects the child's involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children) 34 CFR §300.320(a)(1). Next, the IEP must describe goal statements that are measurable and include academic and functional skills designed to meet the Student's needs that result from the child's disability so that the child is involved in and makes progress in the general education curriculum.

Goals must also meet the child's other educational needs that result from the child's disability 34 CFR §300.320 (a)(2). Annual goals are statements that describe what a child can reasonably be expected to accomplish within a 12-month period in the child's special education program. *Letter to Butler*, 213 IDELR 118 (OSERS 1988). The description of annual goals should be specific enough to allow the district to determine whether the student made progress, and at the same time make clear what specific skills the child must learn in order to achieve those goals. *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010); 64 Fed. Reg. 12,471 (1999). IEP

teams must write goals in a way that allows for an objective measurement of the child's progress toward achieving the annual goals. 71 Fed. Reg. 46,662 (2006).

Each IEP must include a description of (i) how the child's progress toward meeting the annual goals ... will be measured; and (ii) when periodic reports on the progress the child is making toward meeting the annual goals either through the use of quarterly or other periodic reports, at the same time the District issues report cards 34 CFR §300.320 (a)(3). Progress monitoring is critical when determining whether the Student is receiving an educational benefit 34 CFR §300.320 (a)(3). The IDEA encourages IEP teams to review and revise the student's IEP whenever it believes that a change in the IEP may be necessary in order to ensure FAPE. *Notice of Interpretation*, Appendix A to 34 CFR Part 300, Question 20 (1999 regulations).

When a student with a disability is participating in the general curriculum, good report card grades suggest an inference that the student has received FAPE. *Rowley*, 458 U.S. 181-182. In *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010) the court reversed a decision that the student's good grades established a receipt of a FAPE. In *D.S.* the Court pointed out that *Rowley* addressed a student's performance in the general education classroom. "Our reading of *Rowley* leads us to believe that when ... high grades are achieved in classes with only special education students set apart from the regular classes of a public school system, the grades are of less significance than grades obtained in regular classrooms." *Id.*

The IDEA requires each IEP to include a statement of the special education and related services, supplementary aids and services, and a statement of the program modifications or supports for school personnel that will be provided to enable the child to advance appropriately toward attaining the annual goals. 34 CFR §300.320 (a)(4). The IEP must state the projected date for the beginning of the services and modifications described in 34 CFR §300.320 (a)(4), along with the anticipated frequency, location, and duration of those services and modifications. 34 CFR §300.329(a)(7).

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 appropriately addressing his or her disability, or that the child is receiving only trivial educational benefit, and the district fails to remedy the problem. *M.C. v. Central Regional School District*, 81 F.3d 389 (3d Cir. 1996). 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. *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.”). In *G.L. v. Ligonier Valley School District Authority*, 802 F.3d 601, 625 (3d Cir. 2015) the court endorsed a “make whole” remedy that provides appropriate relief “to whatever extent necessary to make up for the child’s lost progress and to restore the child to the educational path he or she would have traveled but for the deprivation.”

Harassment and Bullying

In a 2014 *Dear Colleague Letter* the Office of Special Education Programs (OSEP) advised Districts that bullying of a student with a disability that results in the student not receiving meaningful educational benefit constitutes a denial of FAPE under the IDEA that must be remedied." *Dear Colleague Letter: Responding to Bullying of Students with Disabilities*, 64 IDELR 115 (OCR 2014) (stating that the obligation to respond to bullying and ensure the student continues to receive FAPE exists regardless of whether the bullying is based on a disability); *Shore Regional High School Board of Education v. P.S.*, 41 IDELR 234 (3d Cir. 2004)(bullying can cause a denial of a FAPE). In this matter, the Parent asserts that the Student’s peer engaged in bullying that ultimately caused Student to become anxious. (Parent Closing, pp.22-24).

Procedural Violation as a denial of a FAPE

A purely procedural violation of the IDEA can result in prospective injunctive relief to ensure future compliance with IDEA procedures, not compensatory relief, or tuition reimbursement. *C.H. v. Cape Henlopen Sch. Dist.*, 606 F.3d 59, 66 (3d Cir.2010). A procedural violation may rise to a substantive violation justifying compensatory education or tuition reimbursement, but only where plaintiffs can show that procedural defects caused such substantial harm that a FAPE was denied. *Id.* at 66-67. To prove such substantive harm, Parents must prove by a preponderance of the evidence that "procedural inadequacies (i) [i]mpeded the child's right to a FAPE, (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of the educational benefit." *id.* (quoting 34 C.F.R. § 300.513(a)(2)); *see also Rodrigues v. Fort Lee Bd. of Educ.*, 458 Fed.Appx. 124, 127 (3d Cir.2011) (not precedential) *N.M. ex rel. M.M. v. Sch. Dist. of Philadelphia*, 394 Fed.Appx. 920, 923 (3d Cir. 2010) (not precedential).

Simple non-compliance with IDEA procedures is not enough to find a lack of FAPE. "A child is denied a FAPE only when [a] procedural violation [of the IDEA] results in the loss of educational opportunity or seriously infringes the parents' opportunity to participate in the IEP formation process." *R.B. ex rel. F.B. v. Napa Valley Unified Sch. Dist.*, 496 F.3d 932, 940 (9th Cir. 2007); *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 860 (6th Cir. 2004); *L.R. v. Manheim Twp. Sch. Dist.*, 2008 U.S. Dist. LEXIS 23966 (E.D. PA 2008). When no substantive harm occurs, an "IDEA procedural error may be held harmless." *R.B.*, 496 F.3d 940; *Bernardsville Board of Education v. J.H.* 42 F.3d 149 (3d Cir. 1994); *Battle v. Commonwealth*, 629 F.2d 269 (3d Cir. 1980); *David P. v. Lower Merion S.D.*, 1998 U.S. Dis. LEXIS 15160 (E.D. Pa. 1998); 34 C.F.R. §300.320. If the parents have not been denied the opportunity for meaningful participation and the student has not suffered any loss of educational opportunity, then the student may have received FAPE regardless of procedural violations. Accordingly, not all procedural violations give rise to a denial of a FAPE.

Analysis and Conclusions of Law

The 2013-2014 IEP

The Student's IEP team met in May of 2013, when the Student was exiting 2nd Grade and again in September of 2013 to review and revise the Student's goals SDIs, related services when the Student was promoted to 3rd Grade (J##34, 36, 37). The District issued a NOREP/PWN placing the Student in a Learning Support and Speech/Language Support program (J#34). The IEPs was based upon the results of the March 2012 RR (J#33, p.29, J#34, p.2).

The IEP team included the Parent, the special education teacher, a regular education teacher, the school counselor, and the Speech Therapist (J#33, p.2). The IEP included present levels in the need areas of Speech, Math, Reading, Writing, OT, a Seizure Action Plan, staff training on seizure management and noted the need for adult supervision to support the Student's Epilepsy when traveling in and around the school (J#33, pp.5-12).

The present levels included, benchmark assessments, curriculum based assessments, and diagnostic assessments, about the Student's performance in the co-taught 2nd Grade classroom for Reading Written Language, and Math (J#33, pp5-12). Overall, the goals were measurable, and quarterly progress reports were provided in compliance with the Act.

The progress monitoring demonstrates when the subject of the goal did not change, the student's criteria for performance changed thereby creating the

opportunity for learning and improvement. For example, in March of 2014, the Student's goal of counting money up to \$5.00 was mastered (J#65, p.24). That same month, the goal of identifying the next event on a schedule was mastered (J#65, p.25). When it came to following three step oral direction, the Student's initial baseline score of 74% improved in March when the directions were repeated one time thereby leading to the Student's score increased to 94% (J#65 p.28).

The Student made gains in Written Expression. Using the 3rd Grade rubric the Student regularly earned between 7/20 point to 12/20 points, the projected growth rate was 13/20, these improvements, though modest, demonstrate the Student made gains, showed improvement and benefited from the specially designed instruction (J#65, pp.64-65). The Student's Math progress is modest but trending in the upward direction. Accordingly, for the 2013-2014 school the Student made meaningful progress.

The 2014-2015 and the 2015-2016 IEPs

In April of 2014, approaching the end of 3rd Grade the IEP team met and summarized the Student's academic performance in the curriculum, on diagnostic assessments, on benchmark skills, in [Student's] OT and Speech classes (J#38 pp6-10). In Writing, the IEP notes, the Student improved from the baseline score (J#66, p.18). On the goal to follow three-step directions, the Student improved Student's score when asked to perform independently and when responding with one repetition (J#66, p.19.). Similar gains were documented in Recalling Information, and Cursive Writing (J#66, p.20, p.22). Accordingly, the District met it responsibility under the Act.

The Student continued making gains in 2015-2016. After the District reviewed and considered the private IEE evaluations, they modified the SDI, they increased the emphasis on the Student's Executive Functioning skills, the Student mastered the Speech goal, the Student mastered the Writing goal, the District conducted the FBA, the District added additional SDIs to address Speech, Writing, and Executive Functioning, and, the District provided additional Math instruction. The Parent received PWN of each action and approved each action. Accordingly, the District met it responsibility under the Act.

Conclusion

First, Parents assert that all of the IEPs lack clear and accurate methods for evaluating the Student to ascertain whether the Student made meaningful educational progress over a given period. Second, they find the IEPs to be too vague in a number of

respects, insufficient in terms of addressing areas like Executive Functioning, Speech, and Written Expression, as well in the stated goals, and the nature of the specially designed instruction and related service of Assistive Technology. Third, Parents maintain that the IEPs did not offer services of sufficient length, frequency, content, or intensity of services to address the Student's emotional or social skills needs connected to school anxiety and bullying.

Upon the record before me, as set forth above, I conclude that, although any one of the weaknesses Parents' have pointed to could -- in some circumstances -- result in a legally inadequate IEP, here the IEPs offered to Student were reasonably calculated to permit significant learning and to provide the Student with meaningful educational benefits in light of the Student's intellectual potential, as required by *Rowley*, as applied in *MC, Polk, D.S., Carlisle.*; see also *T.R. ex rel. N.R. v. Kingwood Twp. Bd. of Educ.*, 205 F.3d 572, 577 (3d Cir. 2000) interpreting *Rowley*; *J.N., et. al. v. South Western Sch. Dist.*, Civ. A. 14-0974, 2015 WL 5512291 (M.D. Pa. Sept. 15, 2015); *J.D. v. New York City Department of Education*, Civ. A. 14-9424, 2015 WL 7288647, 115 LRP 53991 (S.D. N.Y. Nov. 17, 2015).

The Student was evaluated, at frequent intervals by the learning support teacher, the regular education teacher, and the therapist, in a number of different ways, including formative, summative, and diagnostic testing, like the CELF-4, the CASL, the Slosson, the 4Sight, along with classroom quizzes and homework. Each IEP contained detailed and specific information as to the Student's "present levels" of achievement, particularly detailing the Student's skills. This information was used to design an appropriate program going forward, even if it was not information ideally designed to provide a consistent picture of Student. As the Student was promoted and made progress, the levels of achievement, relative to the standard for a child of Student's age, slipped between grades, when that occurred the IEP team attempted to adjust to the Student's then current needs.

Nevertheless, the Student gradually learned and at times mastered new material. As "the level of work" increased and executive functioning became more of an issue the District considered and incorporated new SDIs into the IEP from the public and private sources.

None of the private evaluators testified that the Student did not make any progress. None of the private evaluators contacted the District, observed the child in the school, or reviewed the Student's complete educational record. At times, the IEE reports used assessment and diagnostic criteria not regularly applied in schools. The IEE evaluators did not offer any opinions as to IEP design errors or implementation flaws or failures that interfered with the Student's learning or access to the general

education curriculum. While the progress was not satisfactory to the Student's Parents, or to the private evaluators this assessment does not appear to be justified based upon this record. The special education teacher, the Speech Therapist and the school psychologist were more persuasive than the Parent's witnesses in describing how the Student learned, benefited from each IEP goal, SDI, and related service.

Parents have taken the position that the inadequacy of the District's IEP is shown in the fact that the Student is anxious, had peer relation issues or the AT services are incomplete and insufficient, however, the Parents did not establish that at the time each IEP was designed these alleged flaws denied a FAPE.

The 2015 FBA, like the previous 2012 FBA, analyzed the Student's nurse visits to determine whether the visits are escape or avoidance related issues that impede the Student's learning or is a new disability associated with anxiety. On both occasions, the staff acknowledged the Student might be anxious, however, each time they opined, that once the Student arrived and got into the flow the anxiety dissipated. The omission of the FBA evaluator's observation of the Student, at the beginning of the day, was an unfortunate oversight; however, this omission does not rise to a denial of FAPE, under these facts. To the extent it was an error it did not impede the child or the Parents' FAPE rights.

The Parents did not prove the Student did not make meaningful benefit absent the AT support. In fact, the November RR team and the December IEP team determined that the Student's written expression skill set was no longer a unique need. When presented with a NOREP/PWN about the termination of the Written Expression Goal the Parents agreed to a new IEP with Written Expression SDIs, rather than direct instruction in the writing process. It is axiomatic, that if the goal is mastered and the needs are met the failure to provide the AT support, for that goal, did not deny a FAPE.

In July of 2015, the District considered the Parents IEE reports and revised the Student's SDI. When anxiety became a concern, the District conducted an FBA. When bullying was, a concern the guidance counselor debriefed the Student. When Speech services was a threshold eligibility issue, the District reviewed its assessments and then agreed to continue to implement the Speech SDIs. When writing was, a concern the District further defined the written process. To address the Executive Functioning issue the District increased the frequency, format, and intensity of the graphic organizers and the use of the Chromebook. When math was, an issue the District revised the IEP and provided additional instruction. While the District response to the AT supports was lacking, at times, the procedural error of not

providing certain BookShare supports did not interfere with the provision of a FAPE tantamount to a denial.

More importantly, Parents have not shown what the expected rate of meaningful progress is for the Student, an intelligent child, who had brain surgery and takes medication that affects the Student's memory, concentration, processing speed and executive functioning. Even to the extent that Parents have shown Student's rate of progress was slow, Parents have not demonstrated that the slow rate of learning was the result of vague IEP goals, or inadequate testing, or the other weaknesses of which they now complain. The teachers testified that they implemented the SDIs to accommodate the Student's rate of learning, Processing Speed, and Executive Functioning. In any event, the Student's progress, while slow, at times was meaningful.

In sum, the weaknesses in the IEP which Parents have pointed out are not so serious that they prevented the Student from receiving FAPE. In fact, the IEPs do not appear vague, nor do they seem to exclude necessary goals or services. On the contrary, they are relatively detailed, though not as detailed as the independent evaluators' reports would suggest, they do however appear to have been thoughtfully designed to benefit the Student. It is entirely possible that an IEP written by the private evaluators would be better than the School District's, and would set forth a more productive curriculum. However, the IDEA does not ask the public schools to guarantee the very best. *T.R.*, at 205 F.3d 577.

In this case, the School District has met the standard required of it by the IDEA for this reason, I find in favor of the District. The Parents' claim for compensatory education for each year at issue is denied. The Parents' claim for a prospective placement is denied.

ORDER

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

1. The Parents' claim of a denial of a FAPE and relief of compensatory education for the 2013-2014 school year is denied.
2. The Parents' claim of a denial of a FAPE and relief of compensatory education for the 2014-2015 school year is denied.

3. The Parents' claim of a denial of a FAPE and relief of compensatory education for the 2015-2016 school year is denied.
4. The Parents' claim for a prospective placement for the 2015-2016 school year is denied.

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

Dated: February 26, 2016

[Charles W. Jelley Esq. LL.M.](#)
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HEARING OFFICER