

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

DUE PROCESS HEARING

Name of Child: P.C.

ODR #17101 / 15-16 KE

Date of Birth:
[redacted]

Dates of Hearing:
January 19, 2016
March 1, 2016
March 23, 2016
April 29, 2016

CLOSED HEARING

Parties to the Hearing:
Parent[s]

Representative:
Michael Connelly, Esquire
McAndrews Law Offices
30 Cassatt Avenue
Berwyn, PA 19380

West Chester Area School District
829 Paoli Pike
West Chester, PA 19380

David Painter, Esquire
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Date Record Closed:

May 24, 2016

Date of Decision:

June 10, 2016

Hearing Officer:

Linda M. Valentini, Psy.D., CHO
Certified Hearing Official

Background

Student¹ is a pre-teen-aged eligible student who has been enrolled in the District since the beginning of 1st grade. Student receives special education programming under the Individuals with Disabilities Education Act [IDEA]² and Pennsylvania Chapter 14. Student's current eligibility classifications are Visual Impairment (amblyopia, estrophia, retinopathy, nystagmus and strabismus) and Other Health Impairment (ADHD). Student is also a qualified handicapped person / protected handicapped student under §504 of the Rehabilitation Act of 1973 and Chapter 15 of the Pennsylvania Code³.

The Parents asked for this hearing, alleging that the District failed to offer Student a free, appropriate public education (FAPE) from December 1, 2013 to the present, and are seeking compensatory education, reimbursement for an independent educational evaluation (IEE), and an appropriate program going forward.

The testimony of every witness, the content of each exhibit, as well as the parties' written closing statements, were reviewed and considered in issuing this decision, regardless of whether there is a citation to particular testimony of a witness or to an exhibit. For the reasons set forth below, I find in favor of the District.

Issues

1. Did the District deny Student a free, appropriate public education (FAPE) from December 2013 to the present?
2. If the District denied Student FAPE, is Student entitled to compensatory education and if so in what form and amount?
3. Should the District be required to reimburse the Parents for the IEE they obtained for Student?

Findings of Fact

Background

1. Student [was] born at 26 weeks gestation weighing 1 lb. 12 oz. Student experienced an intraventricular hemorrhage ("brain bleed") with associated hydrocephalus which was initially drained and then required a shunt at 9 months of age. Student spent almost a year in the NICU, being the last of the [multiple birth] infants to come home. [NT 23; S-7, S-14, S-25, S-50]

¹ This decision is written without further reference to the Student's name or gender, and as far as is possible, other singular characteristics have been removed to provide privacy.

² 20 U.S.C. §§ 1400-1482.

³ 29 U.S.C. § 794; 22 Pa. Code §§ 15.1 – 15.11.

2. Student attends a District elementary school and receives special education programming. Student's current eligibility classifications are Visual Impairment (amblyopia, estrophia, retinopathy, nystagmus and strabismus) and Other Health Impairment (ADHD). [NT 23; S-7, S-25, S-50]
3. The Parent⁴ describes Student as smart and funny. She noted that Student will volunteer and does self-chosen tasks quickly. Student perseveres, doesn't get frustrated, and will work very hard if it's something Student wants to do. Student loves praise, and loves to do well. [NT 24]
4. The Parent notes that Student's weaknesses include difficulties with executive functioning, not being proactive, stubbornness at times, poor motor planning and perhaps a lack of social skills. [NT 24]
5. When residing in another state Student received early intervention services followed by school-age special education learning support in kindergarten. Programming in kindergarten included push-in services delivered in the regular education classroom, as well as pull-out direct instruction for reading. Student also received physical therapy, occupational therapy, speech/language therapy and vision therapy. [NT 23-25; S-7]
6. Student moved to Pennsylvania for the start of 1st grade. The District evaluated Student on 11-14-2011, a few months into first grade. On the Wechsler Intelligence Scale for Children Fourth Edition (WISC-IV) Student received a Full Scale IQ of 88 (Low Average Range⁵) with Index scores as follows: Verbal Comprehension 89 (Low Average Range), Perceptual Reasoning 104 (Average Range), Working Memory 88 (Low Average Range), and Processing Speed 80 (Low Average Range). The General Ability Index, which corrects for the influence of the more static and pervasive neurological factors associated with memory and processing was 96 (Average Range). [S-7]
7. Scores on academic achievement testing with the Woodcock Johnson Tests of Achievement Third Edition (WJ-III) were as follows: Letter-Word Identification 112 (High Average Range), Passage Comprehension 110 (High Average Range), Spelling 114 (High Average Range), Writing Samples 110 (High Average Range), Math Calculation 97 (Average Range), and Applied Problems 117 (High Average Range). [S-7]
8. Student was highly motivated during cognitive testing, but a tendency toward perfectionism hindered performance on a paper and pencil task. On the achievement

⁴ Although it is understood that both Parents requested the hearing, only the mother attended and mother handled the majority of the correspondence with the District. Therefore for the most part the singular 'Parent' is used in this decision.

⁵ Ranges are a better but not perfect representation of ability than are numerical scores as explained in detail in the District's written closing statement wherein District counsel provided a detailed explanation of confidence interval and standard error of measurement at the hearing officer's request. However, it should also be noted that one point can make a difference between one range designation and another, for example, the Verbal Comprehension score of 89 (Low Average) is one point shy of the Average Range 90-109, whereas the Processing Speed score of 80 is one point over the Borderline Range of 70-79.

testing Student attempted to bargain with the evaluator for fewer tests or fewer test items. [S-7]

9. Following the evaluation Student received vision therapy and physical therapy as well as regular education reading support; these services carried over to 2nd grade. [NT 25; S-7]
10. Toward the end of second grade the Parents requested and the District agreed to fund a private independent evaluation. The report of May 17, 2013 noted that on the Woodcock-Johnson Tests of Cognitive Ability (WJ-III) Student's General Intellectual Ability was 93 (Average Range), with Verbal Ability 91 (Average Range), Thinking Ability 99 (Average Range), and Cognitive Efficiency 96 (Average Range). [S-14]
11. On the Woodcock-Johnson Tests of Achievement Third Edition (WJ-III ACH) (abbreviated for purposes of comparison with previous scores) Student achieved as follows: Letter-Word Identification 109 (Average Range), Passage Comprehension 91 (Average Range), Spelling 120 (Superior Range), Writing Samples 117 (High Average Range), Math Calculation 99 (Average Range), and Applied Problems 99 (Average Range). [S-7, S-14]
12. Although the private evaluator opined that Student should be classified as having a specific learning disability neither the cognitive and achievement data from her evaluation nor the same data from the previous evaluation support this recommendation. Student's achievement scores were largely at or above Student's cognitive scores on her testing as well as the District's earlier testing. [S-7; S-14]
13. The private evaluator diagnosed Student with a cognitive disorder and opined that Student's difficulties with attention, reasoning, processing speed and memory would increasingly impact Student's performance "where the expectation of these skills not only increase, but also are inherent within the academic tasks and expectations." [NT 496-497; S-14]
14. Prior to the beginning of third grade, the Parents also obtained an evaluation by a developmental pediatrician at a local hospital for children. The pediatrician agreed with the independent evaluator's diagnosis of cognitive disorder considering it to be "part of a static encephalopathy⁶ as it also includes motor, executive and attentional components." [S-18]
15. The developmental pediatrician noted deficits in "underlying processing (weak working memory and slow processing speed, likely both in visual and auditory channels)" and in executive functioning (initiating, planning, organizing, using past experience to guide future behavior) and opined that these deficits were "likely playing important, perhaps the most important, roles in academic struggles". The developmental pediatrician

⁶ *Static encephalopathy* refers to chronic nonprogressive brain disorders in children. Peggy C. Ferry, MD, *Am J Dis Child*. 1993;147(6):696. (Referenced in the Journal of the American Medical Association Pediatrics, June 1, 1993).

concluded that Student is “at great risk for increasing academic and social problems as information needs to be ‘connected’ in more complex ways.” [S-18]

16. Student received medication for ADHD from second grade through to some portion of fourth grade. The Parent did not notice a benefit to the medication, however Student’s learning support teacher in second and third grades did notice a difference. [NT 50-52, 164]

Third Grade: Relevant Period Begins December 1, 2013 (2013-2014)

17. Student’s third grade regular education teacher and learning support teacher reviewed Student’s previous evaluations and IEPs prior to the start of school to prepare them to work with the Student. [NT 92-94, 163-165]
18. Student received special education programming in the regular education third grade classroom. Push-in support was provided by the learning support teacher and an instructional assistant in the areas of math, writing, reading, science and social studies. [NT 30-31, 101, 103, 168-169, 175, 181-182]
19. Student also received reading instruction from a reading specialist four periods per week for thirty minutes per period. [NT 34, 99-100, 115-116, 180; S-27]
20. The second grade IEP which was in effect for only the first few weeks of third grade was created on 11-28-2012 but was revised throughout 2nd grade on 12-20-2012, 1-22-2012, 2-13-2013, 4-4-2013, 4-12-2013, and 4-29-2013. The IEP for most of third grade was developed on 9-25-2013. [S-11, S-17, S-22]
21. The District reevaluated Student and issued a report on 11-6-2013. Formal cognitive testing and testing with the WJ-III was not repeated for purposes of this evaluation given that there had just been a private independent evaluation six months earlier. [S-14, S-25]
22. Recommendations for services and SDI based on the 11-6-2013 reevaluation included continuation of physical therapy for motor skills, continuation of occupational therapy for organization and motor planning, continuation of speech and language therapy for speech fluency, extended time for processing speed, increased reinforcement and repetitions, small group reading comprehension instruction for inferential skills, scaffolding of instruction and alternatives to copying notes from the board. [S-25]
23. Student’s IEP was revised on 12-6-2013. Needs were listed as processing speed, organization, reading comprehension, inferential thinking, concept formation, sustained attention, vision services, motor planning, higher level coordination, dysfluency, vocal volume, hand dexterity and upper body strength. [P-6, S-27]
24. In mid-third grade, while Student still received language arts and reading instruction in the regular education classroom, Student’s instruction for reading comprehension skills was provided by the learning support teacher in pull-out sessions. The third grade teacher and the learning support teacher met weekly to discuss Student’s progress and strategies. [NT 37, 115-118, 121, 137-138, 179, 182; S-27]

25. Student experienced difficulty getting started with writing projects and took a long time to finish them. Most tasks requiring long-term planning were writing projects or group projects. Student received graphic organizers, modeling and support from the classroom teacher and classroom assistant. Student also received support and assistance with writing from the learning support teacher. [NT 96, 127-128, 131, 168-169]
26. Student received vision support services, occupational therapy, physical therapy, speech/language therapy, reading instruction from the reading specialist and social skills support from the guidance counselor. [S-27]
27. Student received speech/language therapy to address speech fluency shaping strategies for stuttering. The speech/language therapist observed Student in the classroom and worked with teachers on fluency shaping strategies to use with Student. [NT 576-581; S-27]
28. During speech/language therapy the speech/language therapist incorporated work on inferencing skills into Student's fluency strategy sessions. [NT 581-582]
29. Social skills were not impaired in second grade. In third grade Student demonstrated social skills in the classroom such as having conversations with peers, active participation in class, and presenting ideas to the class. The teacher noted, "Everybody loved [Student] in [the] classroom and, you know, they would call [Student] their friend." [NT 132, 158-159, 194, 205; S-14]
30. Nevertheless, due to parental concerns Student received social skills instruction from the guidance counselor and a special education teacher. Student participated in "Lunch Bunch" and in a "game club" to address social skills needs. [NT 33-34, 176, 185, 195-196]
31. Additionally, the regular education third grade classroom to which Student was assigned had push-in whole class social skills instruction once per week and used the *Social Thinking* curriculum by Michelle Garcia-Winner. [NT 264-266, 279]
32. Student's learning support teacher found Student to be actively engaged and blending in well with peers in the regular education third grade classroom. [NT 191]
33. Student's IEP team reconvened on 2-4-2014 to address Parent concerns which included the belief that Student's test, quiz, and report card grades did not accurately reflect Student's true level of academic ability and that Student was unable to complete all assigned homework. The Parent noted that deficits in executive functioning, reading comprehension, math, speech, vision, occupational therapy, motor planning, physical therapy and social skills caused great concern for Student's "current and future academic success". [S-32]

34. Study and organization skills instruction was embedded in the third grade curriculum, aiding in developing executive functioning. [NT 139-140, 193]
35. Student received study guides from the regular education teacher; the learning support teacher would make sure Student was following them. [NT 101, 149-150; P-6]
36. Student had a checklist on Student's desk to help with organizing the order of tasks. [NT 170]
37. Student was persistent with tasks in the regular education classroom and initiated requests to the learning support teacher to finish tasks Student had not completed in class. [NT 201-203]
38. The learning support teacher monitored Student's morning routine to get ready and get organized for the day. Student's learning support teacher and the instructional assistant assisted with Student's on-task behavior. [NT 68-69, 169-170; S-27]
39. The learning support teacher also provided assistance to Student in the morning in writing down homework assignments. She worked with Student to make sure Student understood the homework. [NT 169-170]
40. Student's IEP was revised again on 5-21-2014 to review the results from a re-testing with the Woodcock Johnson Tests of Achievement. Reading fluency and math fluency goals were added to the IEP in the May 2014 revision. [NT 186-187, 189; S-35]
41. At home, Student was having trouble completing homework. The Parent was not sure whether Student's difficulty with homework was due to Student's not wanting to do it, not able to do it, [or] a combination. [P-6]
42. The Parent again expressed concerns that Student's report card grades were not an accurate reflection of Student's skills and that Student's grades were "inflated." The Parent believed Student's grades should demonstrate academic abilities. [NT 38-39, 43, 70, 79]
43. Student's third grade teacher testified that Student's grades were based on Student's work product with the benefit of the supports to which Student was entitled under Student's IEP. [NT 146-147, 150-151, 156-157]
44. The third grade teacher maintained frequent contact with Student's Parent. [NT 151-152; P-6]
45. Student's accommodations and specially designed instruction in all Student's IEPs were implemented during third grade. [NT 194-195]
46. On May 21, 2104 at the end of the third grade year the Woodcock-Johnson III Normative Update Tests of Achievement were administered. Student scored as follows: Brief

Achievement 109 (Average Range), Broad Reading 98 (Average Range), Broad Math 97 (Average Range), Broad Written Language 113 (High Average Range), Brief Reading 99 (Average Range), Basic Reading Skills 105 (Average Range), Brief Math 98 (Average Range), Math Calculation Skills 95 (Average Range), Brief Writing 116 (High Average Range), Written Expression 103 (Average Range), Academic Skills 111 (High Average Range), Academic Fluency 95 (Average Range), Academic Applications 96 (Average Range). [S-35]

47. For purposes of comparison with the two previous WJ-III achievement administrations: Individual subtests were: Letter-Word Identification 106 (Average Range), Passage Comprehension 91 (Average Range), Spelling 121 (Superior Range), Writing Samples 102 (Average Range), Math Calculation 98 (Average Range), and Applied Problems 99 (Average Range). [S-7, S-14, S-35]

4th Grade (2014-2015)

48. Student's fourth grade regular education teacher and the learning support teacher who would be instructing Student for fourth and fifth grades reviewed Student's evaluations and IEPs prior to the beginning of the fourth grade year. [NT 213, 305-306]
49. The third grade IEP which was in effect for only a few weeks of fourth grade was created on 9-25-13 but revised on 12-6-13, 1-9-14, 2-4-14, 3-4-14, and 5-21-14. Student's IEP for fourth grade was developed on 9-17-2014. Needs were processing speed, organization, reading comprehension, math, inferential thinking, concept formation, sustained attention, vision services, motor planning, high level coordination, dysfluency, vocal volume, and dexterity/hand and upper body strength. [S-35, S-39]
50. The 9-14-14 IEP included goals for reading comprehension for inferential and critical response questions, reading fluency, math fact fluency, math concepts and applications, task completion, physical therapy for strength, balance and coordination, speech/language for fluency and occupational therapy. [S-39]
51. As of the 9-14-14 IEP meeting the IEP team determined there was not a need for direct instruction in social skills or study skills. Student worked well with peer partners in the classroom and Student was included in groups. The IEP team did not believe it was necessary to conduct a functional assessment of behavior. [NT 217-218, 323, 382; S-39]
52. Student began fourth grade receiving spelling, writing, social studies, and science instruction in the regular education fourth grade classroom. Student received math instruction with push-in support from the learning support teacher in a co-teaching model and also received push-in support for science and social studies. Student received reading instruction in a pull-out setting. After about six weeks Student's math instruction was changed to pull-out instruction in the learning support classroom. [NT 215-216, 221-222, 320; S-35]
53. Student's learning support teacher provided Student with the pull-out instruction in reading and received regular consultation from the reading specialist. She observed that

if Student attempted to read faster, reading comprehension suffered. [NT 319, 359-360, 366-368]

54. Student's math instruction was switched from the regular education class co-teaching inclusion format to pull-out instruction in the learning support classroom so that the pace and the content could be better individualized to Student's needs. [NT 242-244, 308]
55. Student's regular education teacher and Student's learning support teacher discussed Student's performance on a daily basis. [NT 229]
56. Student continued to receive occupational therapy, physical therapy, and speech and language therapy in pull-out sessions as well as consultative vision services including in-class observation of Student. [S-35]
57. The use of technology to support instruction was infused throughout the classroom during fourth grade. The technology devices and applications in the classroom met Student's instructional needs. Assistive technology needs were not raised in IEP team meetings during fourth grade. [NT 239-241, 356-357; S-39]
58. Beginning at the end of the first marking period Student participated in a "game club" facilitated by a special education teacher for social skills support. [NT 225, 264-265]
59. Student interacted well with peers throughout fourth grade and consistently offered assistance to peers in the classroom. [NT 239]
60. The Parent continued to express concerns about homework completion. Student's IEP called for limiting homework to no more than one hour. [NT 223-224]
61. Student's IEP in fourth grade included a plan to assist Student in becoming more independent with homework completion. [NT 246-247; S-39]
62. The Parent noticed no change in executive functioning at home and saw Student as more "prompt-dependent" at home. [NT 64]
63. The IEP team modified Student's IEP goal expectation to no more than two prompts because of the increased difficulty level of tasks in fourth grade. [NT 220-221]
64. Student's teacher provided Student with task organization and chunking strategies. Student was able to gauge work pace needed on a task when given fifteen minutes to complete it, but had more difficulty with regulating the time it took to complete a task requiring forty-five minutes or more. [NT 245-246, 249, 254]
65. Student's IEP was revised on 3-23-2015 following a functional assessment of behavior ("FBA"). The behavior of interest for the FBA was described as "off-task" behavior consisting of manipulating objects unrelated to the task, orienting body away from instruction, engaging in activities unrelated to the task, requesting to leave the classroom

during instruction, non-performance of a requested task and not completing work to criteria. [S-42, S-55]

66. The function of the off-task behavior was hypothesized as escape from non-preferred tasks and attention/access to preferred items. The IEP team adjusted the Student's IEP in response to the FBA so that prompting was done nonverbally [NT 227-228, 248; S-42, S-55]
67. Student's regular education teacher and the learning support teacher coordinated a behavior incentive system for Student. [NT 249-251; S-39]
68. Student responded to redirection from the teacher when Student was off-task. [NT 258].
69. Student had less difficulty with attention and needed fewer prompts in the smaller, structured learning support classroom than in the regular education classroom. [NT 375-376; S-48]
70. Student's IEP accommodations and specially designed instruction were implemented during fourth grade. [NT 231]
71. Student's fourth grade teacher had regular communication with Student's parents. [NT 259-260]
72. Student's report card grades were not modified for Student. Student's grades are reflective of Student's work product. [NT 233, 359, 434]
73. Student's final fourth grade report card grades ranged from 82 (Social Studies) to 89 (Science). S-49.
74. At the end of fourth grade the Parents commissioned a second independent evaluation with a different evaluator. As noted in her report of 7-5-15, the evaluator found Student to have deficits associated with extreme prematurity and the intraventricular hemorrhage, specifically deficits in attention, executive functioning, information processing, and motor skills. The evaluator noted these deficits were similar to those identified in the previous independent evaluation. [NT 56-57; S-43; S-50]
75. Student achieved the following achievement standard scores on the Woodcock-Johnson Fourth Edition [WJ-IV]⁷ norm-referenced standardized testing (abbreviated for comparison with earlier administrations: Broad Reading 85 (Low Average), Broad Math 92 (Average Range), Broad Written Language 93 (Average Range); Letter-Word

⁷ The private evaluator acknowledged in testimony that due to the Flynn effect it is difficult to compare scores of a later edition of a test with an earlier version of a test. [NT 550-551] The "Flynn effect" refers to the observed rise over time in standardized intelligence test scores, documented by Flynn (1984). The Flynn effect implies that an individual will likely attain a higher score on an earlier version of a test than on the current version.

Identification 93 (Average Range), Passage Comprehension 83 (Low Average Range), Spelling 111 (High Average Range), Writing Samples 92 (Average Range), Math Calculation 99 (Average Range), and Applied Problems 92 (Average Range). [S-7, S-14, S-50]

76. Student's information processing speed, associated as noted by the previous independent evaluator and the developmental pediatrician with Student's extreme prematurity and the intraventricular hemorrhage affected Student's fluency: Reading Fluency 83, Math Fluency 85, and a very low Writing Fluency score of 69. The latter score is an 'outlier' from that evaluation and all previous evaluations and is therefore suspect. [S-50]
77. The independent evaluator made numerous references to Student's interfering behaviors during testing across all three sessions. Student displayed inattentive behaviors, low frustration tolerance, low stamina and other interfering behaviors that suggest that rather than representing Student's best achievement levels the reported test scores were adversely affected by Student's behavior in the context of that particular testing. The private evaluator acknowledged the influence that executive dysfunction deficits could exert over performance. This is likely particularly true of the writing fluency subtest, as aside from motivational factors in testing, in class Student could write but took a long time to get started and a long time to finish. [NT 532-533; S-50]
78. In addition to Student's previous diagnoses of Visual Impairment, Other Health Impairment, Executive Dysfunction and Cognitive Disorder the independent evaluator also diagnosed Student with Specific Learning Disabilities in reading, written expression, and mathematics as well as Speech/Language Impairment. Given that the achievement scores were commensurate with Student's cognitive level the diagnoses of specific learning disabilities were surprising. [S-50]
79. The second private evaluator recommended that Student receive direct instruction using research-based strategies and programming in the areas of reading and reading comprehension, executive functioning, and social skills. [S-50]
80. The Parents provided the District with a copy of the second private evaluation report and on July 30, 2015 the District reconvened the IEP team with the private evaluator in attendance to consider the results of the evaluation. [NT 57; S-52]
81. The IEP team added two organization goals and a social skills goal to Student's IEP. One organization goal called for Student to write assignments in a planner and place required materials for homework in Student's backpack. A second organization goal called for Student to organize Student's desk. The social skills goal addressed conversation skills. [S-52]

Fifth Grade (2015-2016)

82. Student's regular education fifth grade teacher was a member of the IEP team that reviewed the second private evaluation report and received input from the private evaluator. [NT 429-430, 463; S-52, S-68]

83. Student's learning support teacher reviewed the second private evaluation report prior to the beginning of fifth grade. [NT 333-334; S-52]
84. In the current fifth grade school year Student receives word study, science, social studies, special area and writing instruction in the regular education classroom. Student receives push-in support in the regular education classroom for science and social studies. Student receives reading and math instruction in the learning support classroom. [NT 418-423, 430-432; S-56]
85. Student's regular education teacher collaborates with Student's learning support teacher regarding reading and math. [NT 445-446]
86. The fourth grade IEP which was in effect for only a few weeks of fifth grade was created on 9-7-14 but revised on 3-23-15, 4-9-15 and 7-30-15. Student's IEP for the current 5th grade school year was created on 9-16-15 and revised on 12-3-15. Needs were accommodations for slow processing speed; support with organization of materials and work space; direct instruction in inferential reading comprehension; direct instruction in math fact fluency and math concepts; accommodations to assist with concept formation; accommodations to support sustaining attention; consultative vision services; speech therapy for dysfluency; and improve[ment of] core strength, balance and coordination. Goals addressed these needs and specially designed instruction supported Student in attaining the goals. [S-52, S-56, S-69]
87. Student's regular education teacher has not observed Student to need behavior or social skills interventions in the regular classroom. [NT 440-441]
88. The private evaluator had recommended social skills instruction. Based on observation and data collection the IEP team determined that Student did not require a social skills goal for conversation skills. Nevertheless a special education teacher provided Student with social skills instruction. The social skills instruction included small group sessions and individualized support and intervention in naturally occurring situations and with peer interactions in the classroom. [NT 267-269, 272-275, 279-282, 384; S-50. S-52, S-69]
89. The Parent again expressed concerns regarding Student's completion of homework. [NT 350-352; P-8]
90. Student receives organizational skills instruction in a small group once a week for thirty minutes. Student demonstrates independence in writing down assignments and made progress on organizational skills in fifth grade. [NT 269-270, 284-285, 288-289; S-70]
91. The regular education teacher instructs Student on how to be organized, independent and responsible for work, assignments and belongings and the steps for completing tasks. [NT 425-427]

92. Student's fifth grade learning support teacher makes sure Student correctly writes down homework assignments. [NT 343-344]
93. Student's regular education teacher collaborates daily with the special education teacher who works with Student on organizational skills. [NT 434-435, 448]
94. Student's teachers collaborate to determine the kind of tasks that result in having to use more prompts or fewer prompts with Student. [NT 389]
95. Student's learning support teacher did not have concerns about Student adhering to time limits in her learning support classroom. [NT 350]
96. Student's learning support teacher uses an engaging behavioral incentive program to work on organizational skills. [NT 288, 292, 425]
97. Student's speech/language therapist who has worked with Student since second grade did not observe problems with word retrieval or comprehension of instructions in the classroom, although Student might occasionally miss instruction due to attention issues. Given Student's attention issues it is difficult to differentiate auditory processing from inattention. [NT 584-585, 613, 622. 622]
98. Student's special education teachers and speech/language therapist collaborated on developing instruction for non-literal language skills. Student's speech/language therapist notes that Student does not present with a need for social pragmatic language instruction. [NT 587-589, 614-615, 618]
99. The private evaluator acknowledged during testimony that Student's difficulties with attention, retrieval and following directions during her testing session affected the results from her assessment of Student's language. [NT 526]
100. Student received an assistive technology consultation. Student's use of assistive technology currently consists of a computer for writing, Typing Pal to practice fluency, and Book Share for higher reading level books. Student did not need Book Share in fourth grade because of the reading level of the books used. NT 335-336, 377-379; S-56, S-66]
101. Student's IEP accommodations and supports are being implemented in fifth grade. [NT 432-434, 436-438]
102. When the private evaluator observed Student in the learning support classroom, she observed Student to follow along with the teacher's instruction, to initiate tasks, to self-correct, to describe strategies, to volunteer regularly and to demonstrate focus, attention and active engagement. She also observed the teacher to use scaffolding, repetition, prompting, modeling, individualized instruction, humor, visual cues, mnemonics, and redirection. [S-50]

103. After her record review, gathering of anecdotal information, standardized testing and in-school observation the private evaluator concluded that Student “is performing remarkably well given the nature and severity of [Student’s] medical history.” [NT 519-520; S-50]

Legal Basis and Discussion

Burden of Proof: The burden of proof, generally, consists of two elements: the burden of production [which party presents its evidence first] and the burden of persuasion [which party’s evidence outweighs the other party’s evidence in the judgment of the fact finder, in this case the hearing officer]. 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); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006); *Ridley S.D. v. M.R.*, 680 F.3d 260 (3rd Cir. 2012). In this case therefore the Parent asked for the hearing and thus bore the burden of proof. As the evidence was not equally balanced the Schaffer analysis was not 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); *see also generally 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). There were no significant problems with the testimony of any of the witnesses that would alter my overall findings. The Parent is a caring and concerned mother, and is to be commended for her persistence in monitoring her child’s educational programming, especially in light of her caring for [the children]. The District witnesses presented as dedicated and experienced professionals who clearly are going more than the extra mile to provide Student with an appropriate education and to address the Parent’s concerns as they arise. The private evaluator’s testimony overall presented no major credibility issues, although professional minds may differ on some points of data interpretation.

FAPE: Special education issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 (“IDEIA” or “IDEA 2004” or “IDEA”), which took effect on July 1, 2005, and amends the Individuals with Disabilities Education Act (“IDEA”). 20 U.S.C. § 1400 *et seq.* (as amended, 2004). “Special education” is defined as specially designed instruction...to meet the unique needs of a child with a disability. ‘Specially designed instruction’ means adapting, as appropriate to the needs of an eligible child ...the content, methodology, or delivery of instruction to meet the unique needs of the child that result from the child’s disability and to ensure access of the child to the general curriculum so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children. C.F.R. §300.26

In *Board of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034, 3051 (1982), the U.S. Supreme Court articulated for the first time the IDEA standard for ascertaining the appropriateness of a district's efforts to educate a student. It found that whether a district has met its IDEA obligation to a student is based upon whether "the individualized educational program developed through the Act's procedures is reasonably calculated to enable the child to receive educational benefits." Benefits to the child must be 'meaningful', and meaningful educational benefit must relate to the child's potential. See *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572 (3rd Cir. 2000); *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999); *S.H. v. Newark*, 336 F.3d 260 (3rd Cir. 2003) (district must show that its proposed IEP will provide a child with meaningful educational benefit).

However, a school district is not required to maximize a child's opportunity; rather it must provide a basic floor of opportunity. See *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290 (7th Cir.), cert. denied, 488 U.S. 925 (1988). In a homespun and frequently paraphrased statement, the court in *Doe v. Tullahoma City Schools* accepted a School District's argument that it was only required to "...provide the educational equivalent of a serviceable Chevrolet to every handicapped student." and that "...the Board is not required to provide a Cadillac..." *Doe ex rel. Doe v. Bd. of Ed. of Tullahoma City Sch.*, 9 F.3d 455, 459-460 (6th Cir. 1993)

The Third Circuit has adopted this minimal standard for educational benefit, and has refined it to mean that more than "trivial" or "*de minimis*" benefit is required. See *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 1179 (3d Cir. 1998), cert. denied 488 U.S. 1030 (1989). See also *Carlisle Area School v. Scott P.*, 62 F.3d 520, 533-34 (3d Cir. 1995), quoting *Rowley*, 458 U.S. at 201; (School districts "need not provide the optimal level of services, or even a level that would confirm additional benefits, since the IEP required by IDEA represents only a "basic floor of opportunity"). It is well-established that an eligible student is not entitled to the best possible program, to the type of program preferred by a parent, or to a guaranteed outcome in terms of a specific level of achievement, as noted in several recent federal district court decisions. See, e.g., *J. L. v. North Penn School District*, 2011 WL 601621 (E.D. Pa. 2011) Thus, what the statute guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving parents.'" *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

Compensatory Education: Compensatory education is an appropriate remedy where an LEA knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only a trivial educational benefit, and the LEA fails to remedy the problem. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996); *Ridgewood Education v. N.E.*, 172 F.3d. 238, 250 (3d. Cir. 1999).

Discussion

Student started out life in a severely compromised situation. [At the multiple birth] Student weighed 1 lb. 12 oz. and experienced an intraventricular hemorrhage ("brain bleed") with associated hydrocephalus. Student spent almost a year in the NICU [before Student was able to]

come home. Student required early intervention services and school-age special education services from kindergarten onward. In addition to specially designed instruction in the academic areas Student has received vision therapy, speech/language therapy, occupational therapy, and physical therapy. Student has also received group and direct instruction in executive functioning skills, and group instruction/practice in social skills.

A developmental pediatrician practicing in a world-renowned hospital for children endorsed a diagnosis of 'cognitive disorder' considering it to be "part of a static encephalopathy as it also includes motor, executive and attentional components." The developmental pediatrician noted deficits in "underlying processing (weak working memory and slow processing speed, likely both in visual and auditory channels)" and in executive functioning (initiating, planning, organizing, using past experience to guide future behavior) and opined that these deficits were "likely playing important, perhaps the most important, roles in academic struggles". The developmental pediatrician concluded that Student is "at great risk for increasing academic and social problems as information needs to be 'connected' in more complex ways." As the District's work with Student has amply demonstrated, special education cannot be expected to cure underlying neurological issues such as memory and processing speed, but special education can help Student to learn in spite of these static issues.

The Parent has consistently questioned Student's grades in school, implying that they were inflated because of the extra help and accommodations Student receives. It stands to reason that since Student's IEP called for numerous accommodations and specially designed instructional approaches, Student may be doing better on tests, quizzes, and assignments than Student would without these accommodations and special education services. However, the undeniable fact is that Student is scoring in the broadly average range, against unfavorable odds and in some instances exceeding Student's tested cognitive level, on nationally normed standardized testing that is devoid of any deviation of protocol outside the testing manuals. Truly in Student's case, the 'proof of the pudding' is seen in Student's ranking against a national sample of same-age peers.

The Parent also consistently raises the concern that Student does not do homework independently and takes a long time completing home assignments; in this regard Student does better in the school setting. Although the disparity between settings is multi-determined, I must suppose that during homework time Student finds many distractions in the company of [same-age siblings], and also that, given mother's description, this smart and funny and persistent child may have learned that eventually someone is bound to provide an answer if the question is asked for a long enough time.

In light of Student's adverse pre-, peri- and post- natal circumstances, it is not only surprising that Student's cognitive functioning is within the broadly average range (low average to average) but it is especially surprising that on repeated administrations of a standardized, nationally normed academic achievement test Student is scoring commensurate with and in some areas above Student's cognitive level, with one single outlying very low score over a four year span of test administrations. It is a tribute to the Parent's early and ongoing advocacy, and to the District's five years of educational programming, that Student demonstrates every evidence of making the most of Student's assets while compensating as far as currently possible for Student's

deficits. I completely agree with the opinion of the private evaluator that Student “is performing remarkably well given the nature and severity of [Student’s] medical history.”

Conclusion

The Parents have not met their burden of proof in this matter. I have no grounds upon which to find that Student was deprived of meaningful educational benefit as that standard has been defined in case law, and therefore no compensatory education is due. Additionally I find that the private evaluation the Parents obtained did not provide any new information about Student’s cognitive levels, academic achievement, or needs in the area of related services and therefore deny reimbursement.

Section 504: With respect to any Section 504 claims, I note that the obligation to provide FAPE is substantively the same under Section 504 and under the IDEA. *Ridgewood, supra*, at 253; *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa.Comm. 2005). Therefore, having reached all of the above conclusions with respect to the IDEA, the same determinations are made with respect to a denial of FAPE under Section 504. There is, therefore, no need to address Section 504 separately.

Order

It is hereby ordered that:

1. The District did not deny Student a free, appropriate public education (FAPE) from December 2013 to the present.
2. As there has been no denial of FAPE, Student is not entitled to compensatory education.
3. The District is not required to reimburse the Parents for the IEE they obtained for Student.

Any claims not specifically addressed by this decision and order are denied and dismissed.

June 10, 2016
Date

Linda M. Valentini, Psy.D., CHO

Linda M. Valentini, Psy.D., CHO
Special Education Hearing Officer
NAHO Certified Hearing Official