

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: S. W.

Date of Birth: [redacted]

ODR No. 18276-1617-KE

CLOSED HEARING

Parties to the Hearing:

Parent[s]

Abington School District
970 Highland Avenue
Abington, PA 19001-4535

Dates of Hearing:

Date of Decision:

Hearing Officer:

Representative:

Debra B. Weidman, Esquire
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November 22, 2016; December 2,
2016; December 9, 2016

February 14, 2017

William F. Culleton, Jr., Esquire, CHO

INTRODUCTION AND PROCEDURAL HISTORY

The child named in this matter (Student)¹ is an eligible student of the school district named in this matter (District). Student, of elementary school age, is identified under the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA) as a child with the disability Other Health Impairment.

Student's mother (Parent) filed this due process request pursuant to the IDEA and section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (section 504), asserting that the District failed to provide Student with a free appropriate public education (FAPE) during Student's first and second grade years (2014-2015 and 2015-2016 school years)(relevant period). Parent requested compensatory education for those years. The District asserts that it provided a FAPE at all relevant times.

The hearing was completed in three sessions. I have determined the credibility of all witnesses and I have considered and weighed all of the evidence of record. I conclude that the District provided appropriate services during the relevant period and I decline to order any relief.

ISSUES

1. Did the District provide an appropriately comprehensive evaluation of Student when necessary to ensure that it would address all of Student's needs for special education services?
2. Did the District place Student in an appropriate setting?
3. When Student began school at the District, did the District appropriately implement an individualized educational program (IEP) from the previous school district?
4. Did the District offer and provide an appropriate IEP to Student during the Student's first and second grade years?

¹ Student, Parent and the respondent School are named in the title page of this decision; personal references to the parties are omitted in order to guard Student's confidentiality.

5. Should the hearing officer order the District to provide Student with compensatory education on account of all or part of the period from the beginning of school in 2014 to the last day of school in 2016, or any other services?

FINDINGS OF FACT

INFORMATION AVAILABLE TO DISTRICT UPON STUDENT'S ENROLLMENT

1. Student's father passed away prior to Parent's move into the District. Student had a history of treatment for emotional needs stemming from the loss of Student's father. (NT 90-91.)
2. On August 25, 2014, Parent and District met for an IEP meeting. At or before the meeting, Parent provided the District with a copy of Student's IEP from Student's previous school district. (NT 84-85; P 2.)
3. The previous school district IEP referred to a re-evaluation report dated May 6, 2013, more than one year prior to Parent's first meeting with the District. The present levels section of the previous district's IEP provided most of the information that had been reported by the 2013 evaluation report. (P 2, 3.)
4. Student was not due for the three year re-evaluation until May 6, 2016. (P 2, 3.)
5. The previous IEP noted that Student had been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD), Oppositional Defiant Disorder (ODD), and Disruptive Behavior Disorder. (P 2.)
6. The previous IEP Special Considerations section acknowledged that Student exhibited behaviors impeding learning. It further characterized these behaviors as affecting safety and persisting despite implementation of informal behavior change strategies. (P 2.)
7. The previous IEP Special Considerations section noted that Student's behaviors included difficulty maintaining attention to task, including lack of focus and attention, getting up out of Student's seat, noncompliance and escape behaviors. Student's behaviors were reported to include refusal, banging the table, crumpling paper, obsessive erasing, interrupting instruction, and physical aggression toward teachers and peers. (P 2.)
8. During the previous school year, Student had been on grade level in mathematics. Student had been below grade level in reading. (P 2.)
9. The previous IEP recognized a need for small group instruction in a highly structured setting to help Student manage Student's behaviors, attention difficulties and academic performance; however, it placed student in general education for all but one period per day. (P 2.)
10. The previous IEP noted that Student needed to learn to apply letter sound knowledge to blending sounds within words in order to read words, and to build decoding and text fluency skills. It recommended explicit instruction for reading in a special education classroom. (P 2.)

11. The previous IEP recognized a need for a research-based reading and writing intervention program. (P 2)
12. The previous IEP recognized a need for social skills training. (P 2.)
13. The previous IEP noted that Student's frequent lateness and absences had contributed to Student's poor grades and progress during the previous school year. (P 2.)
14. The previous IEP did not reflect that the 2013 evaluation report had obtained scores on a diagnostic instrument that indicated emotional disturbance (although the evaluation report did not recommend identification with emotional disturbance). (P 2, 3.)
15. The previous district had issued both a Functional Behavioral Assessment (FBA) and a Positive Behavior Support Plan (PBSP). (P 2.)
16. The District, in offering special education services during Student's first and second grade years, did not have and did not review the previous district's 2013 re-evaluation report, FBA or PBSP. (NT 664-673.)

FIRST GRADE: ADOPTION OF PREVIOUS DISTRICT'S IEP WITH REVISIONS

17. At the outset of the August 2014 IEP meeting, Parent made it clear that she would not accept an emotional support placement because she did not want Student to be segregated from typically developing children. (NT 53-54, 85-86.)
18. At the August 2014 IEP meeting, Parent and the District agreed to retain Student in first grade, due to Student's many absences during first grade in the previous district and consequent lack of access to the first grade curriculum. (NT 623-625; P 2; S 4.)
19. At the meeting, the IEP team agreed to provide the placement that had been provided in the previous school district: itinerant learning support. (NT 90; P 2.)
20. At the meeting, the IEP team agreed to implement the previous school district's IEP with revisions so that it could be implemented in the District's schools. District personnel marked the Parent's offered copy of the previous District's IEP by hand, striking or altering certain provisions. This revision served as the District's adopted IEP from the beginning of the school year until the District issued its first IEP later in the school year. (NT 40-41, 90; P 1, 2.)
21. The District did not commence its own FBA or PBSP pursuant to the previous district's recognition of behaviors impeding learning. (NT 51-52; P 2.)
22. In its hand-marked revision of the previous district's IEP, the District did not alter the Special Considerations section that acknowledged behaviors interfering with learning. (P 2.)
23. The District decided to address Student's inappropriate behaviors and social skills needs through goals and specially designed instruction, including individualizing the first grade

classroom behavior system, counseling availability and check-ins and check-outs with Student regarding Student's behavior daily. (NT 95-98, 256-264.)

24. The District agreed to implement the goal from the previous IEP (along with related specially designed instruction) addressing Student's refusal and oppositional behavior, as well as attentional needs. This goal did not require progress monitoring of the number of prompts needed to obtain Student's compliance. (NT 46-50; P 2.)
25. The District agreed to implement the previous IEP's goal (and related specially designed instruction) addressing Student's aggressive and disruptive behavior by shaping Student's behavior to utilize language instead of acting out. (NT 46-47; P 2.)
26. The District agreed to implement the specially designed instruction section of the previous IEP that included provision of social stories. Social stories were to be utilized as appropriate during interventions by the special education teacher in response to inappropriate behavior. (NT 96-97; P 2.)
27. The District struck from its adopted IEP the related services section of the previous IEP that provided school based counseling. However, it did not strike the specially designed instruction section of the previous IEP that provided for counseling. (P 2.)
28. Counseling was available to Student as needed. (NT 96-97.)
29. The building principal assigned to Student a special education teacher who has a master's degree in special education, Pennsylvania certification and extensive experience. This teacher was assigned to Student for first and second grade. (NT 279-283, 291-292; S 66.)
30. The District assigned to Student a regular education teacher who is fully qualified to teach Student and has a master's degree in education, Pennsylvania certifications in both regular and special education, and extensive experience. The principal believed that this teacher was particularly skilled with children who exhibit behavioral difficulties and skilled at collaboration with colleagues to deliver instruction to special education students. This teacher provided a multi-sensory environment. (NT 411-412, 626-629; S 66.)
31. The District agreed to implement the measurable reading goal from the previous IEP, which included a benchmark for encoding. (NT 46-47; P 2.)
32. The District agreed to implement the specially designed instruction addressing Student's reading and writing needs from the previous IEP. (NT 46-47; P 2.)
33. The District agreed to implement the specially designed instruction addressing Student's attention needs as well as accommodations (for Student's delayed reading achievement) in mathematics and other major subjects. (NT 48-50; P 2.)
34. The District adopted the specially designed instruction addressing Student's reading and writing needs from the previous IEP. (NT 46-47; P 2.)
35. From the previous IEP, the District adopted the specially designed instruction addressing Student's attention needs as well as accommodations (for Student's delayed reading achievement) in mathematics and other major subjects. (NT 48-50; P 2.)

36. On or about September 3, 2014, the District sent Parent a Notice of Recommended Educational Placement/Prior Written Notice form (NOREP) proposing to adopt the prior district's IEP for Student "with modifications to be implemented in [a] School District school building." (NT 40; P 3.)
37. Parent accepted the revised IEP offered by the District. (P 1.)

FIRST GRADE: IMPLEMENTATION OF ADOPTED IEP

38. Student's special education teacher consulted with Student's first grade classroom teacher to individualize the classroom behavior management plan for Student; the special education teacher also managed data gathering and recording. (NT 279-283, 417-418; S 66.)
39. Student's principal, special education teacher and regular education teacher addressed Student's behaviors through a class wide positive behavior management system that was individualized by a trial and error selection of motivators or rewards, and reward tracking instruments that utilized images appealing to Student, such as a race car. The teachers changed motivators and tracking instruments repeatedly to try to utilize the most effective motivators for Student. (NT 66, 70, 99-103, 211-242, 247-249, 285-289, 328-329, 422-424, 631-636; P 8, 9, 10, 11, 12, 20; S 13, 18; S 10.)
40. District personnel did not believe that an FBA was needed for first grade because they felt capable of identifying behaviors of concern and addressing them positively through the class wide behavior management system as individualized for Student, as well as through IEP goals and specially designed instruction. (NT 105-106, 249-251, 293-294, 325, 385, 674-677.)
41. District personnel also utilized check-ins with Student in the beginning and end of the day to help Student become self-aware of Student's behavior and its impact on Student's attainment of rewards. (NT 66.)
42. Student's first grade teachers kept records regarding Student's compliance with directions, based upon teacher reports of incidents. Teachers did not record the numbers of prompts needed to obtain Student's compliance in every instance, nor did they collect such data on a daily basis for all periods of the day. (NT 263-264, 309-315, 389, 394, 398-401; S 13.)
43. Student's first grade regular education teacher kept data on the Student's goal for replacing aggression with words. (NT 394-395.)
44. Student's special education and regular education teachers utilized social stories in addressing Student's social skills needs. (NT 293-294, 387.)
45. In addition, Student's special education teacher addressed Student's social skills needs through the regular education curriculum, as well as through specially designed instruction, including visual reminders and counseling during check-ins and check-outs. (NT 67-68, 293-297, 428.)

46. Student's special education teacher kept data on starting and finishing work that was relied upon as a measurement of Student's attention difficulties. The special education teacher compiled data by interviewing teachers at the end of each day, and inquiring specifically about problem behaviors exhibited during the day. (NT 255-256, 309-315; S 13.)
47. Student's special education teacher implemented the previous district's IEP, as revised by the District in August 2014, in the special education classroom, one period per day, by providing Student with explicit teaching of reading utilizing a modified curriculum. (NT 242-246, 290-292; P 2.)

FIRST GRADE: DISTRICT'S MARCH 2015 IEP OFFER AND IMPLEMENTATION

48. In March 2015, the District convened Student's annual IEP meeting and made revisions to the IEP. It removed the reading goal as Student had mastered the goal and now was on grade level in reading. It provided measurable goals for writing fluency; following classroom rules and directions; initiation and completion of assignments; keeping hands to self; and using kind, appropriate language toward others. The behavior goals were formulated with attention to updated progress information. (NT 104-105, 333; P 11; S 20.)
49. The March 2015 IEP goal for compliance with teacher directives was designed to be measured by the number of instances in which more than two prompts were required to obtain Student's compliance. (S 20.)
50. Until the end of Student's first grade year, Student's special education teacher continued to utilize the data collection form and system that had been used at the beginning of first grade, marking instances in which more than two prompts were needed with check marks. (NT 398-400; S 13.)
51. The March 2015 IEP continued the check-in/check-out procedure and positive behavior system, as well as modifications addressing Student's attention and writing needs. (NT 106-109, 246; P 11.)
52. District personnel implemented the March 2015 IEP's specially designed instruction. (NT 334.)
53. The March 2015 IEP continued Student's placement in itinerant learning support, with all but 45 minutes per week provided in regular education settings. The 45 minutes per week were in the special education classroom with the assigned special education teacher, working on the writing fluency goal. (NT 109-111, 245-246, 291-292; P 11.)
54. Parent indicated her desire to have District educators address Student's behaviors through directing appropriate behaviors and removing privileges when Student did not follow the directions. District educators indicated to parent that they did not agree with this approach and would continue to give Student choices of pro-social behaviors and provide incentives and positive reinforcement for Student's appropriate choices. (NT 113-114.)
55. The March 2015 IEP did not offer explicit social skills instruction, although specially designed instruction concerning teacher discussions of Student's behavior addressed behaviors involving social interaction. (NT 127-128; P 11.)

STUDENT'S PROGRESS IN FIRST GRADE

56. During first grade, Student received disciplinary write-ups nine times. These reflect the most serious disciplinary or behavioral incidents. Four of these write-ups occurred in September and October 2014, the first two months of school. Four occurred in the next four months, November 2014 through February 2015. Three occurred in the final four months, March through June 2015. These write-ups reflect a decreasing rate of disciplinary incidents reported over the course of Student's first grade year. (NT 637; P 8.)
57. In first grade, Student's behaviors continued, both in the classroom and in less structured settings, and the frequency varied within the year. Nevertheless, they decreased in overall frequency during first grade. Student made progress in utilizing skills taught during first grade that aimed at reducing inappropriate behaviors. (NT 64, 97-100, 130, 210-215, 317-323, 335, 376, 407-410, 430-431, 444-445, 637-638, 644, 680-681, 694; P 8, 9, 12, 17; S 10, 16, 20, 21.)
58. Student did not miss a significant amount of time due to removal from the classroom; inappropriate behaviors did not interfere with Student's ability to be present in the regular education classroom as substantially necessary to access the curriculum. (NT 302-303, 402, 404-406, 430-433, 686-687.)
59. In first grade, Student made academic progress in the classroom; Student made progress in reading, mathematics and writing, although Student's progress in writing was weaker. (NT 63-64, 110-112, 291-292, 326-327, 681, 687-688; P 11; S 16, 20.)

SECOND GRADE: IMPLEMENTATION OF THE MARCH 2015 IEP

60. In second grade, Student was assigned to the classroom of a regular education teacher who had a master's degree in reading and Pennsylvania certification in school leadership. The teacher had been teaching in the District for about fourteen years. The principal believed that this teacher would be a good assignment for Student because the teacher, as part of the faculty of the school, had already developed a trusting relationship with Student while Student was in first grade, and also because the teacher provides a relatively structured classroom that would help to manage Student's attention needs and off-task behaviors. (NT 490-491, 646.)
61. Student's regular education teacher implemented Student's March 2015 IEP from the beginning of Student's second grade year. (NT 451-453, 459-460, 465-470, 475-480, 486-487, 499-504, 511.)
62. In second grade, Student participated in a formal social skills instructional program provided at the District by a contracting agency. (NT 297-298.)
63. Student's special education teacher provided one period per week of explicit instruction in writing, pursuant to the March 2015 IEP. (NT 291-292; P 11.)

64. Student's second grade regular education teacher employed a class-wide behavior management system similar to that which the first grade teacher employed. The system utilized individualized incentives for Student to earn rewards. As in first grade, the system was individualized in consultation with Student's assigned special education teacher. (NT 494-495, 499.)
65. Throughout Student's second grade year, Student's special education and regular education teachers utilized a record-keeping system that measured Student's ability to follow directions, use kind words and report conflict to the teacher, and avoid physical aggression toward others. The system recorded time periods during the school day in which Student was able to engage in these appropriate behaviors when prompted no more than two times, and marked periods in which Student failed to do so, or required more than two prompts to attain compliance. Data was collected regarding non-structured times and special classes prior to February. The form used for this purpose was changed in February to record this data explicitly for non-structured times and special classes. (NT 260, 367, 476-477, 500; S 39.)
66. Throughout the second grade year, Student's special education teacher obtained her data on Student's behavior by interviewing the regular education teacher daily. The regular education teacher received reports from aides responsible for lunch and other unstructured areas, and from specials teachers. Frequently such reports were oral and given at the end of the day for all special education students, including Student. (NT 359-361.)

SECOND GRADE: INCREASED BEHAVIORS AND INTERVENTION; ACADEMIC PROGRESS

67. In October and November of Student's second grade year, there was an increase in the rate of referrals for serious disciplinary infractions and in Student's non-disciplinary inappropriate behaviors. (NT 68-69; P 8, 12.)
68. The majority of Student's increased inappropriate behaviors in second grade occurred in less structured areas of school, such as hallways, lunch areas and recess areas, as well as in "specials" classes, such as music and library, which tended to be less structured than the core academic and special education classrooms. Student's inappropriate behaviors continued in the classroom, but Student's regular education teacher was able to maintain Student's participation in the curriculum through prompting, close proximity and implementing the specially designed instruction set forth in Student's IEP. (NT 117-118, 336-333, 647, 651-653; S 30 pp. 7-8.)
69. During this period, Student maintained satisfactory grade-level academic progress. (NT 74, 485, 512; P 12.)
70. Student's special education and regular education teachers sought consultation from the "core team" of the school, which consists of the principal, curriculum specialist, school psychologist and reading specialist. (NT 337-338, 647; S 27.)

SECOND GRADE: NOVEMBER IEP MEETING AND REVISION

71. In November 2015, the District convened an IEP meeting due to increased behavioral incidents. (NT 68-69; P 8, 12.)
72. At the November 2015 meeting, the IEP team amended the IEP to add information and data concerning Student's increased behaviors in the Present Levels of Functional Performance and to reflect changes in reinforcement strategies. (P 12.)
73. The IEP included an updated summary of parental concerns. (P 12.)
74. The IEP team did not amend the IEP to state that Student's behaviors were impeding learning. (P 12.)
75. At the November 2015 IEP meeting, District personnel offered to conduct a re-evaluation of Student; Parent withheld consent pending consultation with her lawyer. (NT 115-116, 339-342; P 12, 14.)

SECOND GRADE: INTERVENTION UNDER REVISED IEP

76. While waiting for consent to a re-evaluation, Student's teachers increased their observation of Student's behavior in less structured settings, counseled staff in these settings as to the appropriate response to inappropriate behavior, and assigned instructional assistants to attend Student in specials classes. (NT 342-344.)
77. During this time, the teachers and principal introduced new motivators in the form of time spent with preferred staff. (NT 654-655.)
78. Student's regular education teacher was on leave from the end of November 2015 to the end of January 2016. During that period, a substitute teacher was assigned to Student's classroom. The principal took measures to inform that teacher of Student's needs and provide support for that teacher with regard to addressing Student's needs. (NT 656-657.)
79. Student's special education and regular education teachers also revised the data gathering form to provide better data on the antecedents of Student's behavior. (459-461; S 24, 39.)
80. In February, Student's teachers again altered the data gathering form that they were using to track Student's behavior difficulties, in order to better record data from specials classes and unstructured areas. (NT 346-349; S 39 pp. 34-35.)

SECOND GRADE: STUDENT'S BEHAVIOR AND ACADEMICS

81. In second grade, Student was written up for disciplinary violations 8 times. Three of these occurred in October and November. None occurred in December. Two occurred in January. None occurred in February and March. Two occurred in April and one occurred in May. None occurred in June. Thus, the rate of disciplinary referrals was reduced over the rate from the previous year, and declined overall. (P 8.)

82. From December to mid-March, teacher-kept data showed that Student's behavior pertaining to IEP goals improved, except for a period in January and February, when Student's behaviors remained unacceptably high. These increased behaviors were due in large part to the fact that Student's regular education teacher was on leave in January and a substitute teacher was teaching Student for most of the day in January. (NT 73-75, 350-353, 471-475; P 13, 14; S 39, 52.)
83. From mid-March to June 2016, Student's behaviors outside of the classroom remained problematic, but Student's off task and refusal behaviors inside the classroom were managed in such a way as to permit Student to make academic, developmental and social progress. (NT 357-358, 372-373, 507-512, 514-520; S 44, 58.)
84. From December 2015 to mid-March 2016, Student continued to perform well in academics, although Student was below benchmark in reading fluency. (NT 503; P 13.)

SECOND GRADE: PARENT'S CONSENT TO RE-EVALUATION

85. On March 17, 2016, by email message, Parent indicated her consent to the District's proposal to re-evaluate Student. At the March 22, 2016 IEP meeting, Parent signed the form for consenting to the proposed re-evaluation. (NT 115-116; S 49; P 13.)

SECOND GRADE: MARCH ANNUAL IEP MEETING AND IEP REVISIONS

86. The District convened Student's annual IEP meeting on March 22, 2016, and revised Student's IEP. (NT 587-S 51.)
87. The March 22, 2016 IEP reinstated a reading goal directed to words correct per minute, in which Student was achieving less than the benchmark for second grade. (P 13.)
88. The March 2016 IEP retained one behavior goal for following directions and completing assignments. This indirectly addressed Student's needs with regard to time on task. It also indirectly addressed Student's behaviors maintained by escape from unwanted tasks. (NT 78-79, 461-463, 465-471; P 13.)
89. The March 2016 IEP contained no goals for writing and mathematics, although it did include specially designed instruction addressing writing and mathematics reasoning. (P 13.)

SECOND GRADE: BEHAVIOR AND ACADEMIC PERFORMANCE AFTER MARCH IEP MEETING

90. From March 22, 2016, to the end of the school year, Student's educators perceived that inappropriate behaviors increased in unstructured settings. (NT 74-75, 122-124, 645-646; P 13, 14; S 58 pp. 10-11.)

91. From March 22, 2016, to the end of the school year, Student maintained satisfactory grade-level academic progress, remaining at proficient or advanced levels in all subjects. (NT 73-74, 123; P 14; S 40, 58.)

DISTRICT'S MAY 2016 RE-EVALUATION OF STUDENT

92. In May 2016, the District's school psychologist performed a re-evaluation of Student, consisting of a review of records, classroom and recess observations that included a structured observation tool (with quantitative analysis of a student's time on task in the classroom as compared with peers' time on task), and a clinical interview, as well as observations of Student during testing. The psychologist also performed cognitive and achievement testing, as well as scoring Parent's and a teacher's responses to two standardized behavior inventories addressing Student's behavior, emotional, social and developmental needs, as well as attentional needs. (P 14.)
93. The May 2016 re-evaluation included a Functional Behavioral Assessment (FBA). The FBA concluded that Student's off-task and aggressive behaviors were being maintained by impulsive, task-avoidant and attention-seeking functions. (P 14.)
94. The May 2016 re-evaluation concluded that Student was functioning in the average to low average range academically, which was consistent with Student's tested cognitive potential. Student's performance within the curriculum was proficient to advanced in all academic areas. (P 14.)
95. The May 2016 re-evaluation concluded that Student's inappropriate behaviors were affecting Student's educational progress. (P14.)
96. The May 2016 re-evaluation concluded that Student remained a child with the IDEA-defined disability of Other Health Impairment in need of special education services. It identified educational needs in written expression; reading comprehension; following directions; initiating and completing tasks; attention to task and off-task passive behaviors; and aggressive behavior including unkind words and unsafe hands. (P 14.)
97. The May 2016 re-evaluation recommended consideration of supplemental aids and services in regular education; specially designed instruction for reading comprehension and written expression; specially designed instruction in the form of social skill instruction, as well as other modifications and accommodations; and a positive behavior support plan (PBSP). (P 14.)
98. The May 2016 re-evaluation ruled out specific learning disability due to the absence of a severe discrepancy between ability and achievement scores. The re-evaluation also ruled out emotional disturbance as defined in the IDEA. (P 14.)

JUNE 2016 IEP

99. On June 10, 2016, the District provided a draft IEP to Parent at a meeting on the same date. The IEP acknowledged that Student's inappropriate behaviors were affecting education. (P 15.)
100. The June 2016 IEP placed Student in Itinerant Learning Support, with all classes taken in the general education classroom, and instruction in the special education classroom twice per week, 45 minutes per session, for communication arts, including reading comprehension and fluency, as well as written expression; and once per week, 30 minutes per session, for social skills instruction. (P 15.)
101. The June 2016 IEP provided measurable goals addressing reading comprehension; initiating and completing assignments; and oral reading fluency. (P 15.)
102. The June 2016 IEP provided specially designed instruction, modifications and accommodations addressing Student's needs regarding behaviors; attention to task; organization; task initiation and completion; testing accommodations; hyperactivity; reading, written expression; and social skills, including 30 minutes per week of social skills instruction in a special education classroom setting. (P 15.)
103. The June 2016 IEP included a PBSP addressing the four behaviors of concern identified in the FBA. The PBSP included additional measurable behavior goals addressing time on task; compliance with teacher directions; using kind, respectful language toward others; and not invading peers' personal space. The plan also provided for incentives through a classroom behavior system. (NT 355-356; P 15.)

SECOND GRADE PROGRESS

104. In second grade, Student made significant progress academically and functioned at grade level in core academic areas, despite below average performance in reading and sentence composition. (NT 356-358, 512; S 40, 45, 47, 55, 58.)
105. In second grade, Student made significant progress in behavior, despite continued difficulties that decreased over time. (NT 357-358, 372-373, 507-511; S 44, 58.)

CREDIBILITY

106. In testimony, Parent repeatedly exaggerated the extent to which she received telephone calls and other messages from school personnel regarding Student's behavior in school. (NT 148-149, 174-175, 177, 178-180, 191-194, 200 line 19, 302, 316-317, 331-332, 424-425, 505, 638-639; S 14.)
107. In testimony, Parent exaggerated the extent to which Student was out of the classroom due to behaviors. (NT 148-149, 167-171, 639-640.)

108. In testimony, Parent exaggerated the amount of documentation that she had provided to District personnel at the August 2014 meeting. (NT 161-165, 664-673.)
109. Parent's responses to the parental input form and other parental input regarding Student's behavior at home were self-contradictory in that Parent reported no problems at home and also reported that Student may have behaviors that Student is unable to control. (P 14 pp. 2-3.)
110. Parent's responses to a behavior inventory that assesses attention issues were inconsistent, as reported in the validity index of the inventory. (P 14.)

DISCUSSION AND CONCLUSIONS OF LAW

BURDEN OF PROOF

The burden of proof is composed of two considerations, the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact.² In Schaffer v. Weast, 546 U.S. 49, 126 S. Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence³ that the moving party is entitled to the relief requested in the Complaint Notice. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006).

This rule can decide the issue when neither side produces a preponderance of evidence – when the evidence on each side has equal weight, which the Supreme Court in Schaffer called

² The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact (which in this matter is the hearing officer).

³A “preponderance” of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. See, Comm. v. Williams, 532 Pa. 265, 284-286 (1992). Weight is based upon the persuasiveness of the evidence, not simply quantity. Comm. v. Walsh, 2013 Pa. Commw. Unpub. LEXIS 164.

“equipoise”. On the other hand, whenever the evidence is preponderant (i.e., there is weightier evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. See Schaffer, above.

In the present matter, based upon the above rules, the burden of persuasion rests upon the Parent, who initiated the due process proceeding. If the Parent fails to produce a preponderance of the evidence in support of Parent’s claim, or if the evidence is in “equipoise”, the Parent cannot prevail under the IDEA.

CREDIBILITY

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

Due to Parent’s repeated exaggerations in this record, I find that Parent’s testimony was not reliable⁴. I find that Parent repeatedly exaggerated under oath as to the frequency of messages received from District personnel about Student’s behavior; indeed, Parent admitted such exaggeration when pressed under cross examination. In addition, Parent exaggerated other facts under oath, submitted self-contradictory parental input to the District’s school psychologist, and was flagged by a standardized reliability algorithm for her responses to a behavior inventory. Under these circumstances, I accord Parent’s testimony little weight.

⁴ I choose the word “reliable” rather than “credible” because I do not need to – and do not – reach a conclusion as to Parent’s intent in exaggerating, or even whether or not Parent was conscious of this tendency. It suffices that Parent’s repeated exaggerations rendered her testimony of little weight.

Similarly, I reviewed the testimony and documentary record with regard to the reliability of the other witnesses, all of whom were either current or retired District personnel who had dealt with Student. I find these District witnesses to have been credible and reliable, with one minor exception.

I accord slightly reduced weight to the testimony of one teacher. Parent's counsel on cross examination was able to show some facial conflicts between record exhibits and certain statements of this teacher. Nevertheless, the teacher was able to explain how the apparent contradictions could be harmonized. At most, these contradictions show two or three incidental generalizations that do not square with prior generalizations made in the IEPs. Weighed against this teacher's overall reliability and experienced judgment, these contradictions, even if not harmonized with the exhibits, do not vitiate the overall credibility of this witness' testimony.

THE DISTRICT DID NOT FAIL TO PROVIDE TIMELY, APPROPRIATE EVALUATIONS

Parent challenges the District's offer and provision of FAPE on grounds that it was based upon faulty evaluations. I conclude that the preponderance of the evidence is to the contrary. There is no evidence to suggest that the District failed to gather comprehensive information on Student's educational needs at the time of Student's entry into the District's elementary school.

The IDEA does not require an evaluation at the time of a previously identified child's entry into a new school district. An initial evaluation is required before the initial provision of services, 34 C.F.R. §300.301(a), or upon proper parental request. 34 C.F.R. §300.301(b). Similarly, a re-evaluation must be provided upon parental request; every three years; or if the receiving school district "determines that the educational or related services needs ... of the child warrant a re-evaluation" 34 C.F.R. §300.303. A re-evaluation must be "sufficiently

comprehensive to identify all of the child’s special education and related services needs”
34 C.F.R. §300.304(c)(6).

The District was Not Obligated to Perform An FBA Based Upon Language in the Previous District’s IEP

Based upon what the District knew on August 25, 2014, the District complied with the above legal requirements. This was not an initial evaluation for purposes of initiating special education services. Rather, Parent and Student were new residents of the District, and Student was already eligible for and receiving services under the previous district’s IEP, which Parent brought to the meeting. The IEP showed that the Student was not due for the three-year re-evaluation required by 34 C.F.R. §300.303 until May 6, 2016. Parent did not request a re-evaluation at the August 2014 meeting. Therefore, the only relevant section of the regulations cited above is 34 C.F.R. §300.303(a)(1), which provides that a re-evaluation is required when the public agency determines that the child’s needs “warrant” re-evaluation.

Here, the District determined that re-evaluation was not warranted at the time of the August 2014 IEP meeting, and it was within its discretion to make that determination under the IDEA. There is no evidence to suggest that this decision was inappropriate.

Parent argues that the District was required to commence an FBA after the meeting, because the previous district had determined that the Student displayed behaviors that interfered with learning. However, nothing in the IDEA required an evaluation at that time, as discussed above. Moreover, districts receiving students with IEPs from previous districts within the state have no duty under the IDEA to do anything other than provide a FAPE in consultation with the child’s parents, and provide services comparable to those set forth in the previous district’s IEP, until the receiving district develops, adopts and implements a new IEP. 34 C.F.R.

§300.323(e). The IDEA does not require the receiving district to perform any kind of new evaluation on account of its receiving the new student.

However, Chapter 14 of the Pennsylvania regulations implementing the IDEA, 22 Pa. Code §14.133, creates an obligation to perform an FBA under certain circumstances. That section provides, by way of defining “Positive Behavior Support Plan”, that a PBSP is required for students with disabilities “who require specific intervention to address behavior that interferes with learning.” Ibid. Under this section of the Pennsylvania regulations, a PBSP must be based upon an FBA; therefore, this state regulation requires a district to perform an FBA when it checks the box in the Special Considerations section of an IEP acknowledging that Student’s behaviors interfered with learning.

The Student entered the District with an IEP in which the Special Considerations box was checked at the time of the issuance of that IEP by the previous district. The previous district had conducted an FBA, but had done so in its own school environment; moreover, the District did not have that FBA on hand. Under such circumstances, does the Pennsylvania regulation require the receiving district to conduct a second FBA? I conclude that it does not require a second FBA.

The plain language of 22 Pa. Code §14.133 does not contemplate the situation in the present case. I conclude that it requires an FBA only where the responsible district determines that the child’s behavior interferes with learning. While the previous district made such a determination, it did so for the previous school year. The record here is preponderant that the District did not make such determination prospectively for Student’s upcoming year in first grade in the District’s school. Therefore it was not obligated to perform an FBA.

In this case the IEP team decided that a PBSP was not necessary based upon what they knew at the time. There is no evidence that Parent disagreed at the time, nor is there any evidence that this determination by the team was inappropriate. Parent signed the NOREP that expressly provided that the previous district's IEP would be modified to enable it to be implemented in the District's schools. The evidence is preponderant that the plan was to utilize the existing behavior intervention system in the school to which Student was assigned, and that there was no controversy that this system would be utilized in lieu of the PBSP previously provided in the previous district. As the previous PBSP would not be implemented, no FBA was required under the Pennsylvania Chapter 14 regulation.

This was what the parties actually decided to do at the time. Yet Parent now suggests that the District somehow became obligated to perform an FBA because it "adopted" the previous district's IEP including the checked box in the Special Considerations section, triggering a Chapter 14 obligation to perform an FBA. I conclude that at most the District committed an error as it revised the previous district's IEP, by failing to cross out the previous district's Special Considerations findings regarding behavior. This drafting error did not vitiate the plain intent of the parties to utilize the District's behavior modification systems in lieu of the PBSP promulgated by the previous district. To the extent that the District "adopted" parts of the previous district's IEP, it did so only with revisions⁵, one of which was the decision to use its behavior management systems in the first instance. Therefore, Parent's argument, based upon a mechanical interpretation of the words in the IEP, must yield to the real decisions that were made at the August 25, 2014 IEP meeting.

⁵ The IDEA regulation does provide for a situation in which the receiving district "[a]dopts" the previous district's IEP. 34 C.F.R. §300.323(e)(1). I conclude, based upon the entire record in this matter, that the District did not "adopt" the previous IEP within the meaning of this sub-section.

The District was Not Obligated to Perform An FBA During Student's First Grade Year

Parent's written summation seems to suggest that the Student's continuing behavior difficulties in first grade demonstrate that the District failed to evaluate Student properly, in that the District failed to conduct an FBA during that school year. There is no legal basis for this argument, and Parent introduced no evidence to support her argument that the District's omission to conduct an FBA during first grade was inappropriate.

Although the IDEA requires a district to conduct an FBA in certain cases involving a change of placement due to violation of a school code of conduct, 34 C.F.R. §300.530, there is no general requirement to conduct an FBA due to behavioral difficulties. Moreover, as noted above, Pennsylvania Chapter 14 requires an FBA only where the district finds behaviors that impede learning, and in this matter, the District did not find that to be the case in first grade. Thus, Parent's argument is no more than a disagreement with the methodology utilized by Student's very experienced educational team to gather information on Student's behaviors. Nothing in the IDEA or Chapter 14 divested them of the discretion to utilize the methodology that they deemed to be appropriate. Leighty v. Laurel School Dist., 457 F. Supp. 2d 546 (W.D. Pa. 2006)(IDEA does not deprive educators of the right to apply their professional judgement).

As to Student's second grade year, the District did offer to perform a full educational evaluation, including an FBA, in November, after it noted an increase in Student's negative behaviors during October of second grade⁶. Parent delayed returning the consent form, thus delaying the FBA until April and May of that school year. In these circumstances, Parent cannot be heard to complain that the District failed to properly evaluate Student in second grade.

⁶ Allowing a reasonable period for discovery that the District's behavior control systems were not sufficiently effective in second grade, G.L. v. Ligonier Valley Sch. Dist. Auth., 802 F.3d 601, 618-619 (3d Cir. 2015), I conclude that this offer was timely.

In sum, the District was not obligated by the IDEA or by the Pennsylvania Chapter 14 regulations to conduct an FBA, based upon what it knew at the August 25, 2014 IEP meeting. Nor did the IDEA or state regulations obligate the Student's teachers to utilize an FBA during first grade. When the District offered to evaluate in Student's second grade year, Parent delayed the evaluation and the FBA by delaying her return of the permission form. Therefore, the District did not fail to provide Student with appropriate evaluations during the relevant period.

THE DISTRICT OFFERED AND PROVIDED AN APPROPRIATE PLACEMENT FOR STUDENT'S FIRST AND SECOND GRADE YEARS

The record is preponderant that the District offered and provided Student with an appropriate placement during the relevant period. The District cooperated with Parent's desire for a least restrictive placement. The District provided an itinerant placement to address Student's academic needs. The Student made academic progress. Therefore, Parent has failed to show that the placement was inappropriate during the relevant period.

Based upon what the District knew at the August 2014 IEP meeting, the District offered an appropriate placement. At that meeting, Parent made it clear that she would insist upon a placement in the least restrictive environment. The Student's IEP from the previous district placed Student in itinerant learning support, and the District provided the same placement. The District provided Student with one period per day in the learning support classroom with the assigned special education teacher to address Student's delayed achievement in reading and writing skills. Faced with Parent's adamant rejection of emotional support for Student, and reasonably believing that its regular education classrooms could address Student's behaviors appropriately through individualization of its classroom and schoolwide behavior modification systems, the District

appropriately decided to address Student’s attention struggles and negative behavior in the regular education setting.

Parent failed to introduce preponderant evidence that this placement was inappropriate based upon what the District knew of Student in August 2014. Parent failed to introduce preponderant evidence that District became aware of anything indicating a need for a more restrictive placement during the relevant period of time. On the contrary, Student made academic progress during the relevant period, and the evidence is preponderant that Student made progress in regulating Student’s behavior as well in first grade, and was able to access the curriculum in second grade despite an increase in inappropriate behaviors in less structured school settings. Therefore, the record is preponderant that the District offered and provided an appropriate placement.

THE DISTRICT OFFERED AND PROVIDED A FAPE FOR STUDENT’S FIRST AND SECOND GRADE YEARS

The IDEA requires that a state receiving federal education funding provide a “free appropriate public education” (FAPE) to disabled children. 20 U.S.C. §1412(a)(1), 20 U.S.C. §1401(9). This means that a child’s IEP must be “reasonably calculated” to enable the child to receive “meaningful educational benefits” in light of the student’s “intellectual potential.” Shore Reg’l High Sch. Bd. of Ed. v. P.S. 381 F.3d 194, 198 (3d Cir. 2004) (quoting Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 182-85 (3d Cir. 1988)); Mary Courtney T. v. School District of Philadelphia, 575 F.3d 235, 240 (3d Cir. 2009), see Souderton Area School Dist. v. J.H., Slip. Op. No. 09-1759, 2009 WL 3683786 (3d Cir. 2009).

“Meaningful benefit” means that an eligible child’s program affords him or her the opportunity for “significant learning.” Ridgewood Board of Education v. N.E., 172 F.3d 238, 247

(3d Cir. 1999). An eligible student is denied FAPE if his or her program is not likely to produce progress, or if the program affords the child only a “trivial” or “de minimis” educational benefit. M.C. v. Central Regional School District, 81 F.3d 389, 396 (3rd Cir. 1996), cert. den. 117 S. Ct. 176 (1996); Polk v. Central Susquehanna Intermediate Unit 16, 853 F. 2d 171 (3rd Cir. 1988).

A school district is not necessarily required to provide the best possible program to a student, or to maximize the student’s potential. Ridley Sch. Dist. v. MR, 680 F.3d 260, 269 (3d Cir. 2012). An IEP is not required to incorporate every program that parents desire for their child. Ibid. Rather, an IEP must provide a “basic floor of opportunity” for the child. Mary Courtney T. v. School District of Philadelphia, 575 F.3d at 251; Carlisle Area School District v. Scott P., 62 F.3d 520, 532 (3d Cir. 1995).

The law requires only that the program and its execution were reasonably calculated to provide meaningful benefit. Carlisle Area School v. Scott P., 62 F.3d 520 (3d Cir. 1995), cert. den. 517 U.S. 1135, 116 S. Ct. 1419, 134 L.Ed.2d 544(1996)(appropriateness is to be judged prospectively, so that lack of progress does not in and of itself render an IEP inappropriate.) Its appropriateness must be determined as of the time at which it was made, and the reasonableness of the 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).

Parent asserts that the District failed to implement appropriately the IEP from the previous district prior to offering its own IEP in March of Student’s first grade year, thus denying Student a FAPE during that period of first grade. Parent asserts that the March 2015 IEP did not offer a

FAPE, and that the District failed to provide services constituting a FAPE during the remainder of that year and during all of Student's second grade year. I conclude that Parent has failed to provide a preponderance of the evidence in support of these claims.

Implementation of the Previous District's IEP in First Grade

I conclude that the District's initial offer of services was appropriate in light of what the District knew in August 2014. Carlisle Area School v. Scott P., 62 F.3d above. Its offer to implement a revised version of the previous district's IEP was appropriate and was reasonably calculated to provide Student with meaningful educational benefits. The previous district's IEP disclosed that Student had been diagnosed medically with attention and behavioral difficulties, including hyperactivity and oppositional behavior. The IEP also disclosed that Student needed small group, explicit instruction in reading and writing skills, to address a delay in Student's achievement in these areas relative to Student's same grade peers. It indicated a need for specially designed instruction to address Student's inappropriate and sometimes aggressive behaviors, and a need for specially designed instruction to address Student's social skills. The evidence is preponderant that the District appropriately addressed these needs in accordance with its revision of the previous district's IEP that had been provided to the District in or before the August 2014 IEP meeting.

The District agreed to implement much of the previous district's IEP. It provided the same placement. It provided daily learning support classes for reading and writing. It agreed to implement a previously provided goal for reading and encoding. It agreed to implement a previous goal for following directions and one for using kind words instead of aggressive actions, in interacting with peers and teachers. It agreed to implement the previously provided modifications

and specially designed instruction in the regular education classroom, addressing Student's attention and behavior difficulties, and modifying instruction in mathematics and other core subjects by providing, for example, that mathematics questions be read to Student. It agreed to utilize social stories in providing Student with counseling and instruction in proper social behavior⁷.

The District revised the previous IEP and provided additional services to address the needs disclosed in that IEP. The District assigned Student to a school with a principal, special education teacher and regular education teacher who had master's degrees and extensive experience with special education; the principal believed that placing Student with the assigned teachers would give Student an appropriate level of support. The revised IEP provided Student with check-in time in the morning and check-out time in the afternoon, provided by the special education teacher to support Student with Student's attention, organization and behavioral difficulties. The regular education behavior systems were individualized by exploring what kinds of things or activities would motivate Student and by modifying the selected motivators as time went on.

The record is preponderant that the District's staff provided the above services appropriately. Staff credibly testified that they delivered the specially designed instruction as agreed, and monitored Student's progress on the agreed goals. While Parent elicited evidence of imperfections in the delivery of these services, I conclude that any such imperfections did not substantially reduce the benefit that Student received from the services as delivered.

Although Student's behaviors did not extinguish, nor did Student's attention needs abate, the record proves preponderantly that Student received meaningful academic benefit from the

⁷ Parent argues that the District's removal of counseling as a related service contributed to a failure to provide a FAPE. I conclude to the contrary. The record shows preponderantly that the District addressed Student's emotional, behavioral and social skills needs through implementation of specially designed instruction offered in the IEP. That these services were not provided in the form of a related service does not render these services inappropriate.

District's services during first grade. Student's grades were good, reflecting achievement at either the proficient or the advanced level in core subjects. By the end of first grade, Student was achieving at grade level. This included reading, in which Student made rapid progress during first grade; by March, Student had mastered Student's IEP goal for reading.

Although the record is close regarding Student's benefit from the District's services regarding behavior and social skills, I conclude that the evidence is preponderant that Student received meaningful benefit in these areas of need. Student's teachers and principal, all of whom were intimately involved with Student's program throughout the first grade year, all testified credibly that Student actually made progress in first grade with regard to Student's off-task, escape-motivated and aggressive behaviors. Their impressions were subjective, but they pointed to extensive data in support of their conclusions. In addition, the teachers were able to describe in detail what they observed on a day to day basis to demonstrate how Student was learning the skills of social engagement and behavior self-regulation for which the teachers and Student had worked all year. I found these subjective impressions of highly experienced educators to be persuasive and reliable, even though there were flaws in the data used to support these impressions.

Student's special education teacher kept detailed records during the year on the number and nature of behavioral incidents involving Student. This teacher's data were based on interviews with the regular education teacher, who kept her own records daily. The teachers noted blocks of time during the day in which Student exhibited inappropriate or aggressive behaviors. From these records, the teacher derived specific data on the number of time periods in which behaviors occurred, and conversely the number in which behaviors did not occur. The special education teacher was able to report these data for the March 2015 annual IEP team meeting, and they are reflected in the IEP.

Parent was able to show that there were flaws in the teacher's data gathering methodology. This methodology relied upon the accuracy of the regular education teacher's recollection of events during the day, and it did not purport to rely upon a moment-by-moment recording of behaviors, or even a time-sampling system as is often used in FBA observations. Moreover, the regular education teacher's original record was not kept, but was sent home, and in this case those original records were not available for purposes of reviewing the accuracy of the special education teacher's records, because Parent had not returned most of them as requested.

Nevertheless, an imperfect system⁸ of record keeping retains evidentiary weight despite its flaws. Indeed, every system has flaws, and all systems are subject to a degree of error. While I do not accord the teachers' data determinative weight, I conclude that they have some weight and thus support the teachers' credible opinions that Student made behavioral progress during first grade. In addition, I place weight upon the Student's disciplinary records that show a clear reduction in such referrals over the school year.

Parent argues that the District's services were inappropriate because they were not guided by the more precise behavioral records and analysis that an FBA would have provided⁹. On the present record, I conclude that the District's choice not to conduct an FBA during the school year did not render their services inappropriate. The District addressed Student's behaviors through manipulation of motivators, a high degree of direct support, and the ongoing, frequent

⁸ I use the word "imperfect" in a very limited sense. Any system, including the one used here, is imperfect in that it captures as data only on a portion of the behaviors being scrutinized. While in theory a more "perfect" system could have been employed, greater perfection would have required additional time and attention of the teacher, and possibly more personnel in the milieu. In this case, the educators' selection of a system was inherently a balancing of the need for sufficient data to support appropriate behavioral interventions for Student, against the need to avoid interfering with the myriad additional needs of the classroom. I conclude that the educators' choices reached an appropriate balance in this matter, while sufficiently supporting appropriate behavioral interventions for Student.

⁹ Parent makes an analogous argument regarding the District's failure to obtain Student's psychiatric records and the fact that the previous district never sent its records to the District. I conclude that the consequent lack of data did not result in a failure to address Student's needs appropriately.

collaboration of the special education and regular education teachers. Parent did not show that the District's services failed to address Student's behaviors appropriately within the standards of the IDEA. Parent also failed to show that an FBA-guided program would have addressed Student's behaviors differently or would have addressed different aspects of Student's behaviors. In short, the District's professional choice not to utilize an FBA during Student's first grade was not inappropriate on this record.

Parent argues that the Student's behaviors were so prevalent that they led to numerous instances in which Student was removed from the classroom or sent to the learning support classroom or the principal's office. District personnel uniformly and credibly denied this allegation. The record does not support it preponderantly, especially since Student's performance was proficient or advanced across the board, showing that Student's access to the curriculum permitted meaningful academic benefit.

Offer And Provision Of FAPE From March 2015 To The End Of Student's First Grade School Year

The record is preponderant that the District offered an appropriate IEP in March 2015, and that it implemented the offered services appropriately to provide Student with meaningful benefit in first grade. The offered IEP continued some of the services previously implemented through the previous district's IEP. These included placement and specially designed instruction. The new IEP also continued utilizing the classroom/schoolwide behavior system, daily check-ins and check-outs with the special education teacher, and the data collection system regarding attention to task and behavior. In addition, the IEP made changes to the offered services based upon the District's greater knowledge of Student's needs after working with the Student over time.

The IEP was changed based upon Student's academic progress in reading and teachers' data on Student's behaviors. Student had mastered the previous reading goal, so that goal was removed from the IEP. Student was at grade level, so direct learning support time was reduced to one period per week. However, the IEP team had been able to work with Student to address Student's weaknesses in writing, which seemed based upon a perfectionistic approach that impacted fluency. The team decided to address these weaknesses by providing direct instruction in written expression during the weekly learning support period, and the IEP provided a goal for written fluency.

The IEP team also redesigned¹⁰ and expanded the goals addressing attention and behavior by providing goals for following directions, initiating and completing assignments, keeping hands to self, and using appropriate language toward others. Pursuant to the new behavior goals, the special education teacher began to note periods in which more than the goal-designated number of prompts were required to obtain Student's compliance. Although the new IEP abandoned or revised some interventions, others were added; in sum, the changes were reasonable in light of the District's first grade experience with Student.

The evidence is preponderant that Student continued to make progress after the March IEP team meeting. Student continued to make academic progress, as Student's academic progress monitoring and marks attest. Student's behavior at the end of first grade was improved over Student's behavior at the beginning of first grade, despite a pattern of progress and regression that was not unexpected in view of Student's emotional and behavioral needs.

In sum, I conclude that Student made meaningful progress in both academics and behavior during first grade. I also conclude that Student's development of social skills advanced, insofar as

¹⁰ Parent suggests that somehow this revision eliminated a previous behavior goal. I conclude to the contrary. Although the goals were drafted differently, the evidence is preponderant that the same behavioral needs were being addressed.

the emergence of those skills had been undermined by aggressive behaviors toward peers that the District was ameliorating successfully. Student received meaningful educational benefit in all areas of need during first grade, despite the persistence of inappropriate behaviors that waxed and waned during that school year.

Offer and Provision of FAPE in Second Grade

I conclude, based upon a preponderance of the evidence, that the District offered and provided a FAPE to Student in Student's second grade year. Throughout Student's second grade year, Student exhibited an increased level of behaviors, predominantly in less structured areas outside the regular education classroom, and the District implemented several interventions to try to deal with those behaviors, despite a lengthy parental delay in consenting to a recommended educational re-evaluation. Throughout the year, Student continued to make educational progress, although as Student advanced in the second grade curriculum, weaknesses in reading and writing re-emerged, indicating a need for more robust special education intervention. As new needs emerged, the District repeatedly intervened in a timely fashion, except to the extent that some behavioral interventions were delayed by Parent's withholding of consent. Therefore, I conclude that the District did not fail to offer and provide appropriate special education services throughout the year as needs became evident.

The record is preponderant that the District's educators implemented Student's March 2015 IEP from the beginning of the second grade year until November, when it convened an IEP team meeting in response to a significant increase in Student's inappropriate behaviors. The evidence is preponderant that Student received meaningful educational benefit during that period of time, despite the increase in inappropriate behaviors.

Parent seems to suggest that this increase in behaviors in October and November 2015 indicts the entire panoply of services that the District had provided in first grade and continued providing in second grade. This argument runs contrary to the well-established principle that a district is not a guarantor of success. A special education program need only be reasonably calculated to provide meaningful benefit, as discussed above. Subsequent difficulties alone do not prove that the calculation was inappropriate. Moreover, a child of tender years can be expected to display changes in behavior as the challenges of school increase from first to second grade, especially where, as here, the child is struggling with multiple diagnosed emotional difficulties. Thus, I conclude that the increase in Student's behaviors in October and November 2015 does not contradict my conclusion that District's program was appropriate in first grade and from the beginning of the school year to the November 2015 IEP meeting.

In the November 2015 IEP meeting, the District offered to conduct a full educational evaluation, including an FBA. Parent did not consent to the offered educational evaluation until March 2016; thus, the District was unable to assess more precisely the functions and antecedents for Student's increased behaviors for over 90 days. Nevertheless, the District's educators did what they could to intervene and address the spike in Student's inappropriate behaviors.

During that period, District educators sought the advice of the school's core team, whose function was to assist teachers in their interventions in the regular education program. The teachers introduced new motivators for Student within the classroom and school-wide behavior modification system. Teachers increased their observation of Student's behavior in unstructured areas. They consulted more with the educational aides in the lunch and recess areas, as well as with teachers in specials classes, in which behaviors were problematic. They revised their data gathering to try to pinpoint the locations of most increased behaviors. Thus, while awaiting

Parent's consent to re-evaluation (including an FBA), the teachers intervened in multiple ways to address Student's inappropriate behaviors. I conclude that this effort was reasonably calculated to address Student's behavioral and academic needs during the period between November 2015 and March 2016, given what the educators were able to know about those needs in the absence of a re-evaluation.

During this period, Student's disciplinary referrals continued to decline, and data showed some progress on Student's IEP behavior goals. Nevertheless, Student's inappropriate behaviors increased in January and February, due primarily to the absence of Student's regular education teacher, who was on maternity leave, and the presence of a substitute teacher. Student's regular education teacher, who was qualified to offer the opinion, explained that it is not uncommon to see a spike in behaviors with a substitute teacher, and it takes some time to bring such increased behaviors under control once the regular teacher returns. Thus, this spike in behaviors does not negate an overall trend in Student's behavior from November to March, in which there was some progress on behavioral goals, despite an increased level of behavioral difficulty in less structured areas.

During this period of time, Student's reading fluency fell below the second grade benchmark. There is no evidence suggesting that this was due to deficiencies in District programming. I conclude that it was due to the new challenge of a second grade curriculum, which exposed Student's weakness in reading fluency.

In March 2016, the District convened Student's annual IEP team meeting, and the team made further changes to the IEP, in order to address academic and behavioral concerns that had arisen during Student's second grade year. The IEP was revised to add a goal addressing reading fluency. In the absence of the re-evaluation and FBA that had been offered previously, and based

upon Student's improved classroom behavior, the District revised the IEP to provide one behavior goal for following directions and completing assignments. This goal addressed Student's needs with regard to attention and organization, and also indirectly addressed Student's needs with regard to avoiding unwanted tasks. Specially designed instruction offered supports and accommodations addressing writing and mathematics reasoning, in which Student had shown a need for support, despite Student's overall grade level performance in mathematics.

Parent argues that this IEP was inadequate to address Student's continuing needs with regard to behaviors in less structured areas, the spike in inappropriate behaviors during January and February, and Student's weaknesses in some academic skills needed for the second grade curriculum. I disagree, taking into account all the circumstances.

The relevant circumstances include Student's progress in first grade and the beginning of second grade. The record is preponderant that Student had made good progress academically in first grade, and had functioned at the proficient level or above in the first grade curriculum. Student's weakness in reading had been remediated, as Student had mastered the goal in that skill area. In the Fall of second grade, Student continued to maintain acceptable performance at the second grade level. This background gave the District no reason to anticipate a need for intervention in reading or mathematics.

It was only later in second grade (which is often when curricula typically begin to challenge a grade school student) that Student began to fall behind in reading skills, and show some need for support in mathematics reasoning. By March, the District responded, altering the IEP to address these developments. Based upon this record, I conclude that this was a reasonably timely response, especially since the District was waiting for parental consent to re-evaluate during this entire period.

The District remained in this state of uncertainty while the re-evaluation was conducted in April and May 2016, consent having been obtained at last in March. Therefore, I reach the same conclusion as to the appropriateness of its interventions in that period as I reach regarding the previous months spent waiting for consent. During this time, the record shows that Student's inappropriate behaviors continued to be a problem in less structured areas, and that Student continued to make academic progress and perform acceptably in the second grade regular education classroom. I conclude that the District was addressing these needs appropriately in view of its knowledge of the problems while it awaited the results of the re-evaluation.

The re-evaluation was completed in May and it confirmed that Student's attention, organization and emotional difficulties were the source of Student's educational need for supports. It concluded that Student was achieving academically at a level consistent with Student's cognitive ability, and that Student continued to achieve within the second grade curriculum. The re-evaluation recommended increased time in the learning support room to provide explicit instruction in reading comprehension, written expression and social skills.

In June, the District convened an IEP team meeting and revised the IEP to add goals, add time in learning support, and add specially designed instruction and accommodations consistent with the recommendations of the re-evaluation report. Thus, the District responded in timely fashion to the educational needs revealed in the re-evaluation report.

Parent suggests that the re-evaluation report's recommendations confirm her argument that the District's services were inadequate during second grade. In particular, Parent makes much of the finding that Student's behaviors were interfering with Student's learning, confirmed by the consequent revision of the IEP in June to acknowledge this by checking the box in the Special Considerations section. While Student's behaviors did not interfere with Student's academic

achievement during second grade, Parent argues that the Student's behavioral regulation and social skills were impacted and that these skills are part of the curriculum. Thus, Parent asserts that the District was remiss in not recognizing this earlier and in not commencing an FBA.

Parent's argument has some force. Student's behaviors, declining in first grade but increasing again in second grade, interfered with Student's ability to develop social skills and improved social relationships. District educators indicated that they chose whether or not to check the box in Special Considerations, depending upon whether or not an FBA was needed. While the language of the regulation is not crystal clear on this point, it appears to literally require an FBA whenever behavior requires intervention, rather than requiring acknowledgement of such behavior only when educators feel that an FBA is necessary. It would appear on this record that the Student's behaviors in second grade were severe enough that the March IEP should have acknowledged interference with learning.

Nevertheless, the record demonstrates preponderantly that this was no more than a procedural violation. As I discuss above, the only consequence of such a violation would have been to fail to provide the FBA and PBSP required by the Pennsylvania regulation. Yet the District offered a re-evaluation, to include an FBA, in November, shortly after Student's behaviors had unexpectedly increased. Thus, even if the District inappropriately failed to check the box in Special Considerations, that failure did not result in a denial of an FBA and subsequent PBSP. Parent's delay in providing consent prevented the District from proceeding with those services, even though they were offered in timely fashion. Therefore, a procedural failure in the period November 2015 through June 2016 did not result in a deprivation of FAPE as required by IDEA regulations, 34 C.F.R. §300.513(a)(2)(hearing officer ruling on procedural violation must be based upon a

substantive denial of FAPE – either impeding child’s right to FAPE; impeding Parent’s participation in educational planning; or deprivation of educational benefit).

In sum, I conclude that the District did not fail to provide Student with a FAPE, including appropriate IEPs, during Student’s second grade year. It responded to changes in Student’s behavior and to the exposure of weaknesses in Student’s academic skills in timely fashion as those educational needs became apparent to District educators. While it did not eliminate Student’s inappropriate behaviors, this is not required under the IDEA. The District intervened with Student repeatedly and appropriately during Student’s second grade, despite Parent’s delay in providing consent to the District’s recommended re-evaluation.

CONCLUSION

I conclude that the District evaluated Student appropriately to the extent that it had proper parental consent to re-evaluation. It offered and provided an appropriate placement for Student. It appropriately implemented the previous district’s IEP with revisions that enabled its educators to address Student’s needs appropriately in first grade. It provided Student with appropriate IEPs in first and second grade, and it provided Student with FAPE during that relevant period of time. Consequently, I decline to order the District to provide compensatory education services to Student.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, the requests for relief are hereby DENIED and DISMISSED. It is FURTHER ORDERED that any claims that are encompassed in this captioned matter and not specifically addressed by this decision and order are denied and dismissed.

William F. Culleton, Jr. Esq.

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

February 14, 2017