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.H.

Date of Birth: [Redacted]

ODR No. 2120-11-12-AS
ODR No. 2552-11-12-AS
ODR No. 2652-11-12-AS

CLOSED HEARING

Parties to the Hearing:	Representative:
Parent	Elizabeth Kapo, Esquire 2123 Pinehurst Road Bethlehem PA 18018
Pennsylvania Virtual Charter School 1 West Main Street, Suite 400 Norristown, PA 19401	Nicole D. Snyder, Esquire Latsha Davis Yohe & McKenna, P.C. 350 Eagleview Boulevard, Suite 100 Exton, PA 19341
Dates of Hearings:	January 27, 2012; February 7, 2012; March 5, 2012; March 12, 2012
Record Closed:	April 19, 2012
Date of Decision:	May 5, 2012
Hearing Officer:	William F. Culleton, Jr., Esquire, CHO

INTRODUCTION AND PROCEDURAL HISTORY

The child named in the title page of this decision (Student) is enrolled in the school named in the title page of this decision (School). (NT 19-20.) In these three matters, which were heard together and which are decided together in this decision, the School brings No. 2120 pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA), and the Pennsylvania Code, 22 Pa. Code §14.151 et seq. The School requests an order authorizing an evaluation notwithstanding the refusal of Student's parent, named on the title page of this decision (Parent), to consent to such evaluation.

Parent brings Nos. 2552 and 2652 pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA), the Pennsylvania Code, 22 Pa. Code §14.151 et seq., and section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (section 504). Parent requests compensatory education for Student, asserting that the School failed to offer or provide a free appropriate public education (FAPE), and requests that the hearing officer order the School to provide all services in the Student's home, removing Student from an Intermediate Unit Multiple Disabilities Support classroom to which Students is assigned at present for half day sessions. Parent also asserts retaliation and discrimination on account of disability.

The hearing was concluded in four sessions, and the records were combined for all three matters. The record closed upon receipt of written summations.

ISSUES

1. Should the hearing officer authorize the School to conduct a pediatric neurological evaluation of the Student in the absence of parental consent?

2. Did the School provide an appropriate placement to Student during the relevant period, from January 1, 2010 until February 7, 2012, and was the Intermediate Unit's multiple disabilities classroom an appropriate setting for Student?

3. Did the School fail to offer or provide a FAPE to Student during the relevant period?

4. Did the School fail to provide a FAPE to Student during the relevant period by denying or limiting Parent's access to observe the Student's program?

5. Did the School discriminate against Student on account of disability, contrary to its obligations under section 504?

6. Did the School retaliate against Student for Parent's filing of a Complaint Notice under the IDEA and section 504?

7. Should the hearing officer order the School to provide compensatory education to Student for all or part of the relevant period?

8. Should the hearing officer order the School to provide all services within Student's home?

FINDINGS OF FACT

1. Student is identified as a child with multiple disabilities. Student's needs are severe and various, including the areas of speech and language, physical therapy, occupational therapy, sensory, and functional academics. Student is non-verbal. (NT 222-225, 331.)

2. Student has physical impairments including a seizure disorder, with seizures occurring daily and sometimes several times per day. The seizures in the last few years have not been of the grand mal type. (NT 225, 536.)

3. During seizures, Student does not exhibit any protective responses to keep from falling or striking Student's face on the desk. (NT 85-86.)

4. Student's seizure activity has decreased in frequency, and has not changed in duration or intensity since May 2010. (NT 97-98, 186-188, 193-195, 312, 349, 352-354, 430-431, 491494-495.)

5. The first notation of a seizure in the 2011-2012 school year was dated in October 2011. (NT 353-354.)

6. Student's fatigue and sleepiness have not changed since May 2010. (NT 101, 186, 262, 36; J-78, 79, 81, 111.)

7. Student has a long history of frequent absences, attributed to Student's multiple disabilities and their effect on Student's health. Student's absences and lateness increased from the 2010-2011 school year to the 2011-2012 school year. Most of the absences were excused and many were excused for sickness, hospitalizations or medical appointments. (NT 79, 160, 162-163, 203, 258, 265-266, 274, 364-374, 400-408, 497-502; P-33.)

8. Student enrolled in the School in September 2004. Parent enrolled Student in anticipation of a highly flexible approach to accommodating Student's disabilities and needs for therapy and education. (NT 549.)

9. In May 2010, the School issued a NOREP to change the Student's placement to half days at a multiple disabilities support classroom at a school setting, operated by the IU. (NT 142.)

10. In September 2011, the School issued consent forms requesting Parent's consent for School officials to obtain and share medical information with Student's doctors. Parent did not provide such permission. (J-153.)

11. The School issued a Permission to Evaluate for a pediatric neurological evaluation on September 22, 2011. (NT 373, 517.)

12. Student is seen currently by a private pediatric neurologist. (NT 374-375, 492-493.)

AUTHORIZATION OF EVALUATION IN ABSENCE OF PARENTAL CONSENT

13. The IU personnel and Student's therapists are familiar with Student's seizure activity through years of first-hand experience with Student; they take steps to ensure Student's safety. IU staff and therapists know how to respond to Student's seizures and program after the seizures. (NT 100, 278, 291, 297, 312, 344, 348, 452-454.)

14. The teachers and therapists assigned to Student did not need a neurological evaluation in order to provide safe, appropriate services to Student. (NT 96, 105, 187, 283, 398-399, 423-426, 432-433, 446-447, 455, 688; J-59, 69, 86, 89, 93, 128, 159, 266, 884.)

15. Parent has not permitted School personnel and therapists to obtain medical information that they wanted to obtain concerning Student's seizures and medical condition. Parent has permitted extensive educational and functional assessment of Student. Parent has complied with the School's demand for a seizure protocol signed by a physician. (NT 107-109, 131-132, 167, 227-228, 445-446; J-91, J-95, 141, 145.)

16. The School issued a permission to evaluate form to Parent in March 2011, which requested a list of evaluations and assessments, and the Parent agreed to all of them. The School did not request permission to perform or obtain a neurological evaluation. (NT 261; J-91.)

17. Educational officials wanted the evaluation in response to Parent's requests for changes in Student's program. (NT 230, 257, 260, 265, 300, 309, 318, 336-337.)

18. The School issued a re-evaluation report in April 2011, which assessed Student's cognitive, academic, functional, communication, visual, sensory, social, behavioral, fine motor and gross motor skills without the benefit of a neurological evaluation. The evaluation report did not call for additional information, because the multidisciplinary team concluded that the School was able to provide appropriate programming without additional information, and because there was sufficient information available to draft an IEP. (NT 102-104, 195, 261, 373; J-95.)

19. The School requested a neuropsychological evaluation in addition to a neurological evaluation. Some or all of the information the School wants to obtain about Student's cognitive functioning and seizures could be obtained through the neuropsychological evaluation. (NT 260-261, 316-317.)

20. Medical information on Student's physical disabilities, including the causes and nature of Student's seizures, would assist Student's physical therapist, occupational therapist and teachers to optimize program planning, treatment planning and goal development, as well as safety and delivery of services on a day to day basis. (NT 80, 87-88, 91-92, 117, 119, 121-122, 130, 173-175.)

21. Parent was expected to be with Student at all times while Student is engaged in the curriculum at home. (NT 139.)

22. Recently, Student has developed a habit of continuous, rapid eye blinking that stops Student's activities in therapy until the eye blinking stops. There is no evidence as to the cause of this behavior; it is not linked temporally to Student's seizures. (NT 276.)

23. Additional evaluation such as that requested by the District could in certain circumstances negatively affect a child's behavior. (NT 449.)

APPROPRIATENESS OF PLACEMENT, LOCATION OF SERVICES IN INTERMEDIATE UNIT MULTIPLE DISABILITIES SUPPORT CLASSROOM AND OFFER AND PROVISION OF A FAPE,

24. The Student's special education teacher at the School has been assigned to teach Student since 2004. The teacher taught life skills to a class through the internet medium; however, Student did not participate in that class. The teacher coached Parent to teach life skills to Student through the medium of weekly conference calls and some visits and meetings face to face. Life skills included ambulation. The teacher was not part of Student's IEP team. (NT 116, 127-132, 135, 141.)

25. The curriculum used by the teacher was self-developed from research based sources but not published. (NT 1791-1792.)

26. The School's special education teacher attempted to teach Parent how to employ special education techniques in teaching Student life skills. (NT 141.)

27. The cyber school model is inappropriate for learning that requires use of concrete objects rather than images, since the cyber school is accessed only through computer images. On line learning is ineffective for the bulk of Student's learning needs (NT 1246, 1711-1712, 1662-1663.)

28. The student was not being educated through the on-line model, even with the modifications that the School instituted. The modifications were not sufficient to provide an opportunity for learning. (NT 1274-1277.)

29. Student made some progress in therapy services delivered at the home. (NT 1254, 1468.)

30. The School did not provide or attempt other alternatives, such as placing staff in the home to assist parent in accessing the virtual classroom, having a third party work in the home daily with Student to provide coaching in the virtual format. (NT 1275 to 1279, 1376-1380.)

31. The School made a decision to enroll Student in a multiple disabilities support class for half days in order to deliver more comprehensive and effective educational services. Student began in this class on May 25, 2010. It was anticipated that this placement would grow into a full time program. (NT 781, 786, 1728.)

32. In May 2009, the School provided an IEP with placement in full time multiple disabilities support. The IEP called for a personal care assistant available for four hours per school day; speech and language therapy; occupational therapy; physical therapy; adaptive physical education; music therapy, vision services, audiological services and transportation. The IEP offered goals for adapted physical education, sound therapy, mobility, vision, eye contact and attention, functional communication, speech, grasp patterns, arousal, self feeding, fine motor tasks, gross motor skills, using assistive technology and music therapy. The IEP offered assistive technology and specially designed instruction. An IEP with similar services was offered in 2010. (J-13, 47.)

33. The Student's IEP had no functional academic goals until April 2011. (NT 1016-1017.)

34. Student attends class but is given an individualized program of one to one instruction and therapy that precludes all of the group activities that are available to other members of the class. Student is separated for many of the instructional and therapy activities by a barrier within the classroom. Effectively there is minimal inclusion. (NT 1714-1715, 1737.)

35. This lack of exposure to group activities at the IU is caused by the half day schedule, Parent's insistence upon an inflexible schedule of activities, many of which are therapy sessions, Student's absenteeism, and Parent's refusal to allow Student to engage in community activities. (NT 829, 855-859, 1056-1058, 1626-1627, 1715-1726; J-140.)

36. In the multiple disabilities class, the curriculum has multiple levels to permit individualization, but the teacher did not specially design the curriculum to address Student's unique learning needs. The Student works better with choices of two but the teacher continued to present choices of three. (NT 777-780, 1017 to 1019, 1041-1043, 1493-1494; J-73 p. 1, J-85 p. 1, J-270; P-35 p. 11, 12, 14, 59.)

37. The curriculum uses a prompting technique that includes a form of prompt, called "no-no", that is not research based. The teacher had been trained in errorless technique, but the curriculum called for a contrary approach. The supervisor of special education had the teacher retrained, and in April of the 2010-2011 school year, the teacher began using errorless teaching. (NT 789-794, 992-995; 915, 1024, 1038-1043, 1222-1225, 1240; J-111 p. 69-74, J-270; P-12, P-26.)

38. The one to one aide whom the School assigned to Student was not using appropriate prompting technique and had to be retrained at the direction of the supervisor of special education. (NT 896-897, 1222-1225, 1240, 1686.)

39. Sensory input was provided irregularly in response to Student's behaviors, thus inadvertently reinforcing unwanted behaviors. The input should have been on a schedule. There was no behavior plan to specify a schedule and assure consistency among staff. (NT 1216-1217, 1221, 1212-1213.)

40. In a series of assistive technology meetings with IU staff, the Parent requested changes in the sizes of pictures used as assistive technology in the curriculum. The IU vision therapist believed that the sizes used were appropriate. The Parent produced a letter from Student's optometrist and vision therapist recommending a larger size of picture, and the IU requested the numerical measurements taken in the course of the optometrist's evaluation. These were never delivered, and the IU did not change the sizes of the pictures until sometime in the 2011-2012 school year. The pictures were enlarged. (NT 794-805, 1284-1290; J-115, P-48.)

41. The IU vision specialist is a certified teacher of the visually impaired with six years' experience at the IU. (NT 270.)

42. The IU did not initiate or conduct a functional behavioral assessment of the behaviors that impeded Student's learning. The IU did not believe that an FBA was necessary, because its staff already knew the functions of Student's behaviors and it considered them not to be neurologically based, but to be reinforced behaviors. In 2011, it requested permission to do an FBA, but the Parent refused to give consent. (NT 897-908.)

43. The Student made minimal progress in the curriculum, and progress was not measured by standardized testing. (NT 780-782, 1017-1022, 1041-1043, 1050, 1053; J-73, J-85, J-263, J-310.)

44. Student has improved in toileting skills since September 2010. (NT 508-510.)

45. Since 2008, Student has made observable progress in ambulation, sitting strength, sensory regulation, fine motor skills, lip closure, oral motor skills, visually localizing objects, and awareness of the environment. (NT 927-936; J-276.)

46. Student used a wheelchair more in the school than at home. (NT 1518-1520.)

47. In April 2011, the School provided an IEP with placement in full time multiple disabilities support. The IEP called for a personal care assistant available full time; speech and language therapy; occupational therapy; physical therapy; adaptive physical education; music therapy, vision services and transportation. The IEP offered goals for functional academics, adapted physical education, mobility, vision, eye contact and attention, use of hands, functional communication, grasp patterns, fine motor tasks for play and computer use, gross motor skills, using assistive technology and leisure skills. The IEP offered assistive technology and specially designed instruction. A similar program is offered currently. (J-100, 136, 304.)

PARENTAL ACCESS TO OBSERVE INTERMEDIATE UNIT PROGRAM/ PROCEDURAL VIOLATIONS

48. The IU sent home voluminous data to Parent on a monthly and daily basis. (NT 1055; J-78, 85, 86, 170, 264-267, 310.)

49. The IU placed restriction on Parent's access to observe the multiple disabilities program. (NT 861-867, 914, 1691; J-217.)

50. Parent and the IU have experienced numerous difficulties with scheduling IEP meetings to which Parent was invited. (NT 518-519.)

51. Use of eye gaze for communication was added to the IEP without Parent's participation. (1525-1526.)

RETALIATION

52. Parent filed for due process in July 2011. (NT 7.)

53. Then School did not require a medical evaluation for confirm any of Student's diagnoses, until in September 2011 it requested permission to do a neurological evaluation. (NT 547-548; J-95.)

COMPENSATORY EDUCATION

54. The School did not provide special education or related services during Student's excused absences from IU programming. The IU staffing pattern does not allow it to make up sessions missed because of Student's absences. (NT 264, 408, 505, 909; P-51[1].)

[1] This document was stipulated into evidence. It is the Parent's calculation of the number of hours of service that the Student missed due to absences, snow days, holidays and exclusion from school due to Parent's non-compliance with requirements of the IU and School. The School did not contest these figures.

55. The School's policy has been to make up services missed due to missed appointments, and many sessions were made up. (NT 1258, 1293-1296; J-171.)

56. Student has missed appointments for reasons that were not established as medical at the time the services were missed. (NT 1454; HO-1.)

57. Parent has a history of refusing services when Parent deemed them inappropriate or ineffective. (NT 1338.)

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 evidence[3] 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 "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.

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[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).

[3] A "preponderance" of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. Dispute Resolution Manual §810.

In the present matter, based upon the above rules, the burden of persuasion rests upon the School with regard to No. 2120, in which the School seeks an order overriding the Parent's non-consent to an evaluation; the burden rests upon the Parent with regard to Nos. 2552 and 2652, in which the Parent seeks various forms of relief against the School. If either party fails to produce a preponderance of the evidence in support of that party's claim, or if the evidence is in "equipoise", then the party with the burden of persuasion cannot prevail under the IDEA.

AUTHORIZATION OF EVALUATION IN ABSENCE OF PARENTAL CONSENT

Local educational agencies are required to conduct re-evaluations every three years and when needed in order to determine a student's educational needs and needs for programming. 34 C.F.R. §300.303, 300.305(a). The IDEA requires an agency to evaluate to the extent "needed" in order to: 1) identify the child as a child with a disability; 2) determine the child's educational and developmental needs; 3) establish present levels of academic achievement; 4) determine whether or not the Child needs special education and related services; and 5) determine whether any changes are needed in programming to enable the child to meet IEP goals or participate in general education. 20 U.S.C. §1414(a)(1)(C); 1414(b)(A); 1414(c)(1). I conclude that the IDEA requires evaluation or re-evaluation only for as limited list of specific purposes and only when "needed" in order to fulfill those purposes; it does not require an agency to evaluate whenever it sees a benefit in doing so, or whenever its staff or administration desire additional information in support of their efforts to educate the child.

The agency must obtain the parent's informed consent before conducting either an initial evaluation or a re-evaluation. 20 U.S.C. §1414(a)(1)(D); §1414 (c)(3). When a parent withholds consent for an evaluation or re-evaluation, the local education agency may request due process and seek an order authorizing it to evaluate or re-evaluate without parental consent. 20 U.S.C. §1414(a)(1)(D)(ii); 34 C.F.R. §300.300(a), (c). The decision is an application of the hearing officer's equitable authority, and rests within the hearing officer's sound discretion. See, e.g., G.B. v. San Ramon Valley Unified Sch. Dist., 51 IDELR 35 (N.D. Cal. 2008).

I conclude that the Parent's privacy concerns have substantial weight under the IDEA, because the IDEA prohibits a local education agency from proceeding with an evaluation without parental consent. Thus, Congress expressed deference to family privacy through the plain language of the IDEA. This value must be balanced against the importance of appropriate evaluation in guiding the provision of special education and related services. (FF 23.)

I conclude that the IDEA's protection of family privacy would be meaningless if it could be overridden based upon any evidence of utility, desirability or agency preference. There must be something more – either a very specific reason why the evaluation is needed, closely linked to a factual determination that is necessary for the provision of appropriate services, or a compelling overall justification – before a hearing officer could be authorized to override parental non-consent. Otherwise the Parent's right to say no to a request for permission to evaluate would have little meaning.

On the record as a whole, I conclude that the IDEA does not require the School to conduct a neurological evaluation of the Student, because the School has demonstrated that it

is able to provide appropriate services without such an evaluation. Thus such an evaluation is not needed[4] within the meaning of the IDEA. Perhaps predictably, all of the School's witnesses, who worked for either the School or the IU, testified that medical information about Student's seizures - such as would be provided by a pediatric neurological examination – would assist them in providing improved teaching and related services to Student.[5] (FF 13.) However, none would state that such information would be necessary for educational or safety reasons[6]. (FF 14.) All averred that they had been providing, and would be able to provide, appropriate services to Student without such information. Thus, the record is preponderant that the pediatric neurological examination requested by the School is not necessary in order to provide meaningful educational opportunity to the Student.

Short of absolute necessity, I also did not find evidence of a compelling need for the evaluation requested. The testimony, taken as a whole, forged no specific link between the neurological information requested and specific pedagogical or related services needs[7]. (FF

[4] The District cites my decision in ODR No. 1453-10-11-JS, suggesting that the evaluation sought by the agency in that case is similar to this matter. I disagree. In that matter, as the decision shows, the record led to a conclusion that the evaluation sought by the agency was "necessary" and "needed" with the meaning of the IDEA. Here, I reach the opposite conclusion based upon the evidence before me. Similarly, the School's reliance upon Shelby s. v. Conroe Independent Sch. Dist., 454 F.3d 450 (5th Cir. 2006) is unavailing. In that case, the court repeatedly noted that the requested evaluation had been necessary to the evaluation of the child.

[5] I assessed the reliability of the District's witnesses on this issue. I found that they were credible, but also that they were straining to support the School's position in this matter, since it was plain that there was no basis to believe that the evaluation would be necessary for the provision of a FAPE.

[6] The School presented an expert, a pediatrician, who testified that a neurological examination would be necessary in the exercise of good medical practice for a child with a seizure disorder. (NT 31-67.) I give little weight to this opinion because the witness was addressing medical practice standards, not educational practice standards, and because the Student is seen by a neurologist subsequent to numerous neurological examinations. The issue here is not whether or not the Student needs a neurological examination, but whether or not the School is entitled to have neurological information about the Student in the absence of parental consent.

[7] Student displayed behaviors, such as closing the eyes, trying to move away, rolling the eyes or looking up and being non-responsive, that slowed the pace of therapy and instruction by interrupting it. There was some discussion about whether or not a functional behavioral assessment of these behaviors could be fruitful without a neurological examination to rule out behaviors being the product of internal stimuli, rather than environment or behavioral reinforcers. However, the evidence was mixed, because one of Student's occupational therapists had clearly determined that the behaviors were the product of reinforcement, and had devised successful strategies to limit the interference that those behaviors caused. (NT 427-428, 922-923.) Parent's expert witness testified that the behaviors were for avoidance of tasks. Thus, the evidence is not preponderant that the School

20.) The justifications were set in general, almost universal terms, referring to program planning, being able to respond to medication side effects, or vague allusions to safety without any specific evidence of hazard or risk[8]. (NT 228-229.)

The evidence further undercut the need for the evaluation because the School and the IU had been delivering special education and related services to Student for years (the School, since 2004 and the IU, since 2010), yet the witnesses all agreed that those services had been delivered appropriately, and without the sought after neurological data. (FF 14, 15, 19, 21.) The most recent educational evaluation could have indicated the need for such data, but did not do so. (FF 16, 18.) Circumstantially, it appeared that the perception of a need for such data had arisen only recently. (FF 17, 19, 22.)

Although the School attempted to explain this by an increase in absences and lateness, the evidence showed that the increase could have been due to extraneous injuries or illnesses; the record was preponderant that the clear majority of the more recent absences were due to accidents, illnesses or medication difficulties – not due to a change in seizure activity. (FF 7- 12.) Indeed, the record is preponderant that the Student's seizure activity has been unchanged or reduced since at least May 2010. (FF 1-6.) The School's director of special education admitted that the permission to evaluate form was issued after only two or three weeks of the current school year, and that the increase in absences giving rise to legitimate concern had occurred after the pediatric neurological evaluation had been

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would be unable to do a meaningful functional behavioral assessment without a neurological evaluation. No witness testified that a neurological evaluation was necessary or needed in order to deal appropriately with Student's behaviors and provide a FAPE.

[8] One School witness stated that a therapist had been injured while providing services to Student. I give no weight to this statement because there was no detail to this assertion – no date, place, name and no description of the injury or how it occurred.

requested. (FF 11.) The first notation of a seizure in the 2011 school year was dated after the request for evaluation had been made. (FF 5.)

The importance of the need for this information is further undercut by the testimony of the IU supervisor of special education. This witness indicated that the rationale for requesting the evaluation was that the Parent was complaining that the educational program was inappropriate. (FF 17.) The evaluation was seen as an appropriate quid pro quo for the School's and the IU's being willing to make additional changes; all of this was set in a background of difficult relationships with the Parent and the School and IU going beyond their legal obligations and even beyond clinical and educational judgment to provide changes and accommodations in the program at Parent's insistence. (FF 8, 10, 15, 16, 19, 24, 26, 31.)

I give reduced weight to the testimony of the physical therapist regarding the Student's increased absences as that relates to the need for a pediatric neurological evaluation. The therapist's mention of the absences implied contextually that the absences might have been due to increased seizure activity or more serious complications of seizure activity – thus necessitating a pediatric neurological evaluation to respond to the educational interference from increased absences. However, the therapist admitted that the therapist did not know the reasons for the absences, thus vitiating increased absences as one of the therapist's reasons for needing the evaluation.

I also give reduced weight to the testimony of School witnesses on this issue and the issue of the necessity of neurological evaluation for purposes of a functional behavioral assessment. The testimony was rife with self-contradictions.

My conclusion in this matter is not intended to be an endorsement of the Parent's position of refusal to provide medical information. Indeed I urge the Parent to reconsider and

permit the educational and therapy staff access to Student's current medical providers so that the staff can perform their professional duties. Conversely, while I find no compelling need for the requested evaluation, I do not mean to suggest that the School's request for more medical information is unreasonable – in fact I find their attempts to secure additional medical information to be very reasonable and appropriate. My only disagreement with School officials and staff is with the approach that they assert here. I conclude that they do not have the legal right to override parental non-consent in the circumstances of this case. It is my fervent hope that the Parent will reconsider and find a way to help these educators get at least some of the medical information that they are requesting.

APPROPRIATENESS OF PLACEMENT, SETTING AND PROVISION OF A FAPE

The IDEA requires that a state receiving federal education funding provide a "free appropriate public education" (FAPE) to disabled children. 20 U.S.C. §1412(a)(1), 20 U.S.C. §1401(9). School districts provide a FAPE by designing and administering a program of individualized instruction that is set forth in an Individualized Education Plan ("IEP"). 20 U.S.C. § 1414(d). The IEP must be "reasonably calculated" to enable the child to receive "meaningful educational benefits" in light of the student's "intellectual potential." Shore Reg'l High Sch. Bd. of Ed. v. P.S., 381 F.3d 194, 198 (3d Cir. 2004) (quoting Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 182-85 (3d Cir.1988)); Mary Courtney T. v. School District of Philadelphia, 575 F.3d 235, 240 (3rd Cir. 2009), see Souderton Area School Dist. v. J.H., Slip. Op. No. 09-1759, 2009 WL 3683786 (3d Cir. 2009).

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

238, 247 (3d Cir. 1999). In order to properly provide FAPE, the child's IEP must specify educational instruction designed to meet his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. Board of Education v. Rowley, 458 U.S. 176, 181-82, 102 S.Ct. 3034, 1038, 73 L.Ed.2d 690 (1982); Oberti v. Board of Education, 995 F.2d 1204, 1213 (3d Cir. 1993). An eligible student is denied FAPE if his 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).

Under the Supreme Court's interpretation of the IDEA in Rowley and other relevant cases, however, a school district is not necessarily required to provide the best possible program to a student, or to maximize the student's potential. Rather, an IEP must provide a "basic floor of opportunity" – it is not required to provide the "optimal level of services." Mary Courtney T. v. School District of Philadelphia, 575 F.3d at 251; Carlisle Area School District v. Scott P., 62 F.3d 520, 532 (3d Cir. 1995).

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

I find that the program provided by the School during the relevant period failed to provide Student with a FAPE. The School's virtual education format was not reasonably calculated to provide Student with an opportunity for meaningful educational benefit. (FF 24, 25, 27.) The School recognized this and attempted to remedy the deficiency by authorizing its life skills teacher to collaborate with Parent and design a program in which the Parent would serve, not just as a learning coach consistent with the cyber-charter school model, but as the Student's teacher or teacher's aide, providing direct instruction and training to Student on a daily basis. (FF 26, 28.) The teacher's role was to speak with Parent on the telephone weekly and meet occasionally at the home in order to instruct and train the Parent in how to teach Student various functional skills. There was no functional academic curriculum for Student. (FF 33.) Related services were provided in the home or by appointment. (FF 32.)

Student did not make meaningful progress during the relevant period from January 1, 2010 until Student was removed from this placement in May 2010. (FF 29.) There is some evidence that Student benefitted minimally from the therapy services that the School funded; however, there was no progress in academic and functional skills outside of the areas addressed by related services. Thus there was minimal progress in fine and motor skills and communication skills, but no progress in functional academic skills, social skills, or behavioral skills. Weighing this evidence, along with the evidence that Student's program was fundamentally inappropriate, and that the School's approach to remedy this deficiency was inadequate, I conclude by a preponderance of the evidence that the School failed to provide Student with a FAPE from January 1, 2010 to May 2010 when Student left the placement.

The School makes much of Student's absenteeism, and the record is preponderant that Student was absent a great deal and late a great deal during the relevant period. However, the evidence is not preponderant that this absenteeism was due to willful refusal by the Parent to make Student available for instruction. On the contrary, I conclude that most of Student's absences were due to illness, injury, necessary doctors' appointments and being indisposed due to the effect of medications and Student's multiple disabilities.

In May 2010, Student was enrolled in a center based multiple disabilities classroom operated by the local IU through a contract with the IU. (FF 31, 32.) This classroom was located in a local school through a contract between the IU and that school[9]. The governing IEP provided for placement in full time multiple disabilities support, located for half days in the IU multiple disabilities classroom, with one to one aide for one half days[10], speech therapy, occupational therapy, physical therapy, music therapy, adapted physical education, vision and audiological services and transportation. (FF 32.) Goals and specially designed instruction were provided to address communication, motor and physical skills, vision skills, and use of assistive technology. Ibid. There were no functional academic goals. Ibid.

The program provided to the Student was not appropriate during the relevant period.[11] The program did not provide instruction in functional academics until the IEP was

[9] There was much testimony about the demand of that school to have a seizure protocol in place that was signed by a physician. Parent at first refused to provide such a protocol, since it had not been required of Parent previously. However, after the School requested due process regarding this issue, the parties reached an agreement, and the Parent provided a seizure protocol signed by a physician, which was accepted by the local school hosting the IU's multiple disabilities classroom. Because this issue was resolved by agreement, it is moot, and I decline to issue any order regarding this issue in the current matters.

[10] The record is preponderant that the School actually provided the aide's services for full days during the relevant period. (FF 32, 34.)

[11] Parent asserts that the School provided an inadequate program of Extended School Year services (ESY) because the ESY program was only five weeks, implying that the Student needed more than five weeks of summer programming in order to maintain gains made during the regular school year. There is insufficient evidence to show that that this was inappropriate. There is no evidence that Student needed more ESY days, and the record shows that there were no data indicating regression or recoupment problems attributable to

revised in April 2011. (FF 33.) Student was provided one to one services during the entire half day in class, behind a barrier. (FF 34.) Student was not included in the group activities of the class. (FF 34, 35.) The curriculum for this class was partially research based, and although it could have been individualized through specially designed instruction for Student, it was not individualized to address Student's relatively low level of achievement and functioning. (FF 36, 37.) The teacher and Student's one to one aide used inappropriate prompting techniques that interfered with Student's progress. (FF 37, 38.) Student exhibited behaviors that impeded learning, primarily withdrawal from contact or communication with the instructor, and the teacher and aide used inappropriate sensory techniques that had the effect of reinforcing the behaviors. (FF 39.)

The Student's optometrist and vision therapist recommended that the program enlarge pictures being used in one to one instruction to a specified size, based upon the optometrist's examination of Student and professional judgment. (FF 40.) IU administration decided not to accept this recommendation; administrators insisted that the optometrist provide the numerical details of the examination to the IU's teacher of the visually impaired, who is less qualified than the optometrist to interpret any such data. (FF 41.) The Parent sent another letter with greater detail about the examination and recommendation, but no data. (FF 40.) The IU continued to insist on more data, eventually requesting permission to conduct its own evaluation. (FF 40.) This delayed enlargement of the pictures for most of the relevant period; in consequence, the assistive technology was at the very least less effective for instructional purposes than it should have been.

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length of hiatus between instructional sessions. (NT 1300.) Thus, Parent has not carried Parent's burden to prove that the School's provision of ESY was inappropriate.

The School and the IU did not conduct a functional behavioral assessment, in spite of the fact that they recognized in the governing IEPs that the Student was displaying behaviors that interfered with learning. (FF 42.) Nevertheless, I conclude that the IU staff and therapists had recognized and effectively dealt with these behaviors without the benefit of an FBA or Positive Behavior Support Plan. (FF 13, 14, 42.) Thus, I agree with the School that the absence of an FBA was not in itself inappropriate from the standpoint of providing a FAPE.

The evidence is preponderant that the Student did not make meaningful progress during that part of the relevant period in which the Student was enrolled in the IU program. (FF 43-46.) As with the part of the relevant period before enrollment in the IU program, the Student did make some progress in motor skills and communication, but did not progress in functional academics, behavior or social skills. As the re-evaluation reports identified all of these areas as needs, and the IEPs called for programming to address all of them, (FF 32, 47), I conclude that the School failed in its IDEA obligation to address all of Student's educational needs, and therefore failed to provide Student with a FAPE.

While the School argues that Parent obstructed its efforts to provide a FAPE in the IU program, and that Student's absenteeism seriously interfered with its efforts to educate the Student, I do not find that these problems were the primary cause of Student's lack of progress. Rather, I find that there were fundamental flaws in the design and implementation of the educational program, and that these were the cause of Student's failure to progress.

The location of the programming for one half days in the IU classroom was a fundamental flaw in the plan. The Student's absenteeism made this location of services especially difficult for Parent to support, given the demands on Parent's schedule arising

from Student's complex and frequently changing medical needs. While the School was right to try to provide a less restrictive setting to enable Student to learn from inclusion experiences with other children, this laudable effort failed, because Student was virtually isolated from other children due to absenteeism, a rigid and intense schedule of one to one instruction and therapies, and the limits of a half day schedule. While it was hoped that the placement would evolve into a full day program – that would have permitted Student to participate more in group activities with other children – it is plain that such a plan at this point would face daunting challenges of broken trust, mutual grievances among the parties, and the constant interference of Student's absenteeism.

The preponderance of the evidence proves that the delivery of services during the relevant period was fundamentally flawed due to failure to individualize, inappropriate utilization of prompting and sensory methodologies, poor coordination with the one to one aide and use of inappropriate pictures for instruction, as noted above. The student's minimal progress confirms this flaw in implementation of the IEP. That the Student was unavailable for instruction on many occasions does not fully explain the lack of progress, nor does it absolve the School of its duty to provide a FAPE. The IDEA obligated the School to deal with medically caused absences by making up services, or by reconfiguring the services.

I give weight to the fact that the School did not try – and apparently did not consider – an alternative available to it on the continuum of services: instruction in the home. (FF 30.) The Parent wanted some kind of home placement. The Student had shown some penchant to make progress with services configured in the home. Locating services in the home would permit more flexible scheduling to address the Student's unpredictable and frequent illnesses and needs for medical care. The cyber school model provides for community based activities

that could provided some degree of inclusion and socialization. There is no evidence that this alternative was given serious consideration before Student was placed in the IU program. It should have been considered more thoroughly. That it is not offered or considered now also adds to the weight of the evidence of inappropriateness of the program offered to Student.

PROCEDURAL DENIAL OF A FAPE

I find little evidence that the School failed to comport with its procedural obligations to Parent. Its staff corresponded with Parent almost daily, informing Parent of programming plans and of Student's participation in the program. (FF 48.) Progress was monitored and reported. The record is preponderant that the School went to exceptional lengths to respond to Parent's demands and to make changes that the Parent desired.

One technique of communication appears to have been added to the program without notice and parental participation in the decision. (FF 51.) I conclude that the IDEA does not preclude such changes in programming. Educators are experts in their respective fields and nothing in the IDEA prevents them from exercising their judgment on a day to day basis in order to deliver the best educational services they can to children. I find no legal rule against such discretionary changes in technique.

Parent complains that the School unreasonably restricted parent's access to the IU classroom for observation purposes. (FF 49.) I respectfully disagree. The evidence is preponderant that the limitations on access that the School imposed were reasonable.

The record is preponderant that, far from failing to include Parent in decision making, the School has complied with its IDEA obligation to include the Parent in the IEP team planning process.

RETALIATION

There is no explicit IDEA guarantee against retaliation. Such claims are cognizable, however, under section 504. 34 C.F.R. §104.61; 34 C.F.R. §100.7(e)(prohibiting intimidation, threatening or coercion for purpose of interfering with exercise of section 504 rights) To show retaliation under section 504, Parent must show that Parent exercised a right to enforce section 504 rights, that the School took action that would deter an ordinary person from exercising such rights, and that the School's action was taken because Parent exercised the right to enforce section 504. Lauren W. ex rel. Jean W. v. DeFlaminis, 480 F.3d 259, 267 (3d Cir. 2007). Causation can be proven by evidence of temporal proximity, but it can be disproved by evidence that the School's action would have been taken if the Parent had not filed for due process under section 504.

I conclude that the School's insistence upon a pediatric neurological evaluation and a visual evaluation regarding the size of pictures used in instruction was not retaliation under section 504.[12] The Parent does show that the School took these positions either contemporaneously with or shortly after the Parent's filing for due process. (FF 11, 40.) Thus, the temporal analysis raises an inference of causation under Lauren W. Nevertheless, the record also shows that the Parent and School had been at cross purposes for months before the School took its position requiring evaluations, and that it took this position

[12] It is unclear whether or not Parent also asserts a claim for retaliation under the IDEA. Without deciding whether or not such a claim can be made under the IDEA, I conclude that the section 504 analysis under the Lauren W. case would provide an appropriate analysis and would dictate the same conclusion under the IDEA.

because it believed that the Parent should cooperate more with the School, especially with regard to disclosing medical information. (FF 17.) The Student's unpredictable and frequent absences, and the fact that Student was experiencing frequent seizures in school, make such concerns reasonable.

Thus, I find that the rationale advanced by the School, while insufficient under the IDEA, was not unreasonable in the circumstances and not pretextual. I further conclude that the School took its position in response to the circumstances and Parent's restrictions on its access to medical information, not in response to the Parent's filing for due process.

SECTION 504 FAPE

The Rehabilitation Act of 1973, section 504, provides:

> No otherwise qualified individual with a disability … shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance … .

29 U.S.C. §794. Federal regulations implement this prohibition in school districts receiving federal financial assistance. 34 C.F.R. §104 et seq. These regulations require school districts to provide a FAPE to qualified handicapped children, but that obligation is defined differently than under the IDEA. Districts must provide "regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons are met and (ii) are based upon adherence to procedures that satisfy" the procedural requirements of the Act. 34 C.F.R. §104.33.

I find that there is no difference between Parent's IDEA and section 504 claims. Thus, the School's failures to comply with the IDEA also constitute a failure to provide a FAPE under section 504. As to the areas in which I find no IDEA violation, there is no evidence that the District's actions alternatively failed to provide Student with a section 504 FAPE, for example by depriving Student of equal benefit from the School's services based upon Student's disabilities.

COMPENSATORY EDUCATION

I will order the School to provide compensatory education in the exercise of my equitable remedial authority. In considering the equities, I will provide the School with a reasonable period for remediation for each of its deficient programs. As to the inappropriate home based program, the School should have been on notice that it was not appropriate within sixty days of its commencement, or in July 2004. Thus, the equities do not require a grace period for remediation from the beginning of the relevant period, January 1, 2010, until the beginning of Student's attendance in the IU program on May 25, 2010. Therefore, I will order compensatory education services for each of the days on which the School was in session between those two dates. I will not award full days of compensatory education, however. Rather, I will award two hours of compensatory education for each day. This is in consideration of the evidence that Student at that time was receiving therapy services from the School that were providing some benefit to Student.

Regarding the Student's enrollment in the IU classroom from May 25, 2010 until the end of the relevant period, February 7, 2012, I will allow a sixty day equitable period for discovery and remediation, not including the summer months, assuming a summer period

beginning on June 1, 2010 and ending September 1, 2010[13]. Therefore, I will order the provision of compensatory education for every day on which the School was in session from October 25, 2010 until February 7, 2012. Because Student gained some benefit from services provided at home during the school day, I will not order compensatory education for those hours. Because, Student derived some benefit from therapy services provided during the four hour class time during school days, I will order only two hours per school day of compensatory education.

Parent asserts that the School failed to provide make up hours for related services during the relevant period. There is evidence that the IU had a policy by which it did not make up services that were scheduled during the four hour class day. However, the School presented evidence that many of the individual service providers did in fact make up services missed due to Student's absences, presumably during non-class hours. Parent asserted a summary of the hours missed; however, the School asserted, and it was confirmed by a stipulation, that the Student had missed appointments for medical reasons as to which there was no documentation of a doctor's appointment.

I conclude that the School should have made up all hours missed due to Student absences to the extent that the Student's absence was caused by illness or doctors' appointments that could not have been scheduled at non-school hours. Parent provided no evidence as to why the Student's doctor appointments had to be scheduled during school hours and in conflict with either classes or scheduled therapy sessions. Parent did indicate that Student often was ill unexpectedly and sometimes without explanation. However, the

[13] Parent argues that the District provided inadequate ESY services and thus denied a FAPE in that respect. I do not count the summer of 2010 as a time for discovery and remediation because ESY services are not for purposes of educational progress; thus, I consider it inequitable to charge the District with discovery of deficiencies during ESY sessions.

record does not corroborate this assertion or the number of times on which these unpredictable absences occurred. Thus, I conclude that the record is in equipoise on this issue – meaning that I cannot find a clear preponderance of evidence one way or another. Since the parent bears the burden of proof that the absences were unavoidable, and has failed to provide a preponderance of evidence as to which absences were unavoidable, the Parent cannot prevail under the legal standards discussed above. This claim for compensatory education regarding missed services due to absences is therefore denied.

PROSPECTIVE RELIEF

I have concluded that neither the on-line modality for delivery of services nor the IU classroom for one half days was appropriate. Therefore, I will enter an order for prospective relief, requiring the IEP team to meet and provide an IEP for delivery of special educational services through a placement of instruction in the home. This will require that the School provide an appropriately trained educator in the home daily on all school days, for the full school day, to ensure that the Student has appropriate instruction.

CONCLUSION

I conclude that the hearing officer will not override Parent's non-consent and will not order a pediatric neurological evaluation. I further conclude that the School failed to provide an appropriate program and placement during the relevant period. I award compensatory education and prospective relief. Any claims regarding issues that are not specifically addressed by this decision and order are denied and dismissed.

ORDER

1. The hearing officer will not authorize the School to conduct a pediatric neurological evaluation of the Student in the absence of parental consent.

2. The School failed to provide an appropriate placement to Student during the relevant period, from January 1, 2010 until February 7, 2012, and the Intermediate Unit's multiple disabilities classroom was not an appropriate setting for Student.

3. The School failed to offer or provide a FAPE to Student during the relevant period.

4. The School did not fail to provide a FAPE to Student during the relevant period by denying or limiting Parent's access to observe the Student's program.

5. The School discriminated against Student on account of disability, contrary to its obligations under section 504, only to the extent that it failed to provide a FAPE under IDEA as ordered herein.

6. The School did not retaliate against Student for Parent's filing of a Complaint Notice under the IDEA and section 504.

7. The District is hereby ordered to provide hours of compensatory education to the Student, calculated as follows:

   a. From January 1, 2010 until May 25, 2010, two hours per day for every day on which the School was in session.

   b. From October 25, 2010 until February 7, 2012, two hours per day for every day on which the School was in session.

8. The compensatory education ordered herein shall take the form of appropriate developmental, remedial or enriching instruction or services that further the Student's attainment of educational benefit. Compensatory education may occur after school, on weekends and/or during the summer months, when convenient for the student and the family, and may be utilized after the Student attains 21 years of age. Compensatory education must be in addition to the then-current IEP and may not be used to supplant the IEP. The hourly cost for compensatory education shall not exceed the hourly cost of salaries and fringe benefits for qualified professionals providing similar services at the rates commonly paid by the District.

9. Within twenty days of the receipt of this order, the Student's IEP team shall convene and plan and offer an IEP based upon a placement of instruction in the home. Related services shall include an appropriately trained educational professional located in the Student's home full time on every school day. This professional shall provide appropriate special education to Student, coordinate all related services, and support the provision of community education and socialization services to Student. The IEP team

shall ensure provision of an appropriate research based curriculum to Student, delivered by competent, appropriately trained staff, that is individualized to address Student's unique educational needs.

William F. Culleton, Jr. Esq.

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

May 5, 2012