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: F.C.

Date of Birth: [Redacted]

ODR No. 2636-11-12-KE

CLOSED HEARING

Parties to the Hearing:	Representative:
Parent	Dean M. Beer, Esquire McAndrews Law Offices 30 Cassatt Avenue Berwyn, PA 19312
School District of Philadelphia 440 North Broad Street, Suite 313 Philadelphia, PA 19130	Judith Baskin, Esquire Office of General Counsel 440 North Broad Street, Suite 313 Philadelphia, PA 19130
Dates of Hearings:	February 27, 2012; March 30, 2012
Record Closed:	April 20, 2012
Date of Decision:	April 30, 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 an eligible resident of the school district named in the title page of this decision (District). (NT 11-13.) The Student's parent, named on the title page of this decision (Parent) requests compensatory education for Student, asserting that, during the relevant period between August 15, 2009 and September 6, 2011, the District's applicable re-evaluations failed to identify all of Student's educational needs, the District failed to place Student in an appropriate placement, and the District failed to provide Student with a free appropriate public education (FAPE) 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). (NT 36-41.) The District denies these allegations and asserts that Parent obstructed its evaluations by limiting contact with Student's private therapist.

The hearing was concluded in two sessions, and the record was combined with the record for a companion matter also decided today, involving Student's sibling[1]. The record closed upon receipt of written summations.

ISSUES

1. Did the District appropriately re-evaluate Student with regard to identification of Student's educational needs, for purposes of programming during the relevant period of August 15, 2009 to September 6, 2011?

2. Did the District provide an appropriate placement to Student during the relevant period?

[1] A combined transcript ("NT") was taken of testimony combined for both matters. Separate exhibit books were provided and separate exhibits were admitted into evidence for each sibling.

3. Did the District offer and provide a free appropriate public education to Student during the relevant period?

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

FINDINGS OF FACT

1. Student is identified as a child with a disability and the District recommends Student's classification with Specific Learning Disability and Other Health Impairment. (NT 200-201, 226; S-7, 21.)

2. Student has orthopedic impairments and Student requires [redacted] to navigate the school setting. One to one assistance and transportation accommodations were provided to Student prior to March 2010 through Student's IEP. (NT 217, 451-452; S-21.)

3. Student had multiple physical disabilities that led to a high rate of absences throughout Student's elementary school career. (P-3.)

4. Although recommended in evaluation reports and re-evaluation reports, Student did not have a section 504 service plan to deal with Student's orthopedic impairments. (NT 227.)

5. The elementary school to which Student was assigned did not have an elevator. For the 2011-2012 school year, Student was promoted to a grade whose classes were on the second floor of the school building. School officials were concerned that it would be unsafe for Student to attempt to navigate stairs in order to get to Student's classes on the second floor of the building. (NT 178-180, 217; S-19 p. 73.)

6. In June 2009, Parent signed a permission to re-evaluate Student and provided input on a parental input form. Also in June 2009, the District issued its re-evaluation report finding that Student continued to be a child with the disability classified as Specific Learning Disability. The report recommended "the maximum level of services available", including a scientifically based program of reading instruction, and "special attention" to Student's mathematics skills. (NT 196; S-5, S-6, 9.)

7. In June 2009, the District offered to Student an Individualized Education Program (IEP) that provided for placement in supplemental learning support, with Parent's consent. (NT 200; S-7, S-10.)

8. The June 2009 IEP proposed that the Student spend less than five hours per week in a special education program outside the regular classroom, despite the placement in supplemental learning support. No supplementary aids and services were provided to support Student's academic progress when the Student should be in general education, which amounted to all but less than one hour per day. (S-10.)

9. The IEP provided measureable goals for acquisition of reading vocabulary, reading comprehension, mathematics operations, and measurement. Although one goal nominally addressed reading fluency along with reading comprehension, the fluency aspect of the goal was not measureable. A writing goal was offered that was not measureable. (NT 199-200; S-10.)

10. The June 2009 IEP provided for one to one assistance in transitioning, testing accommodations, and reading modifications for general education courses, such as specials. (NT 199-200; S-10.)

11. The IEP found Student ineligible for Extended School Year services. (NT 199-200; S-10.)

12. In March 2010, Student witnessed an incident in which Parent became involved in an altercation with a police officer; Parent had been arrested and confined for more than thirty hours. (NT 116-117; S-17 p. 13, S-19 p. 94.)

13. Student's psychiatrist sent a recommendation that Student needed to remain home due to illness, due to reported anxiety regarding contact with police officers and returning to school. In March 2010, the District approved Student for homebound services. The District continued the services based upon an administrative decision until the end of the 2009-2010 school year. (NT 46-49; S-17.)

14. Prior to the 2010-2011 school year, the District's school nurse in charge of approving homebound services reviewed a request by the Student's psychiatrist to extend homebound services, and in September and December 2010, the District renewed approval for homebound services for Student. It is unusual for the District to renew homebound services. (NT 49-56, 106-107; S-19 p. 1, P-9.)

15. Homebound instruction is intended to be a temporary accommodation for students unable to attend school; typically, it provides two hours per week of teaching services for a period of ninety days, renewable upon receipt of a doctor's referral, and at the discretion of the District. (NT 105-106, 144; S-12, 18 p. 2, P-9.)

16. While on homebound instruction, Student did not receive a FAPE. (NT 144, 183-184, 190-193, 233; S-8, 12, 21.)

17. From the beginning of homebound instruction, Parent restricted the District nurse's access to therapists and the psychiatrist providing psychiatric care to Student, by insisting that any conversation with the therapists be conducted with Parent present. When a conversation occurred, Parent interfered with the District nurse's ability to discuss Student's return to school with the therapist. (NT 107-110, 114-116; S-18.)

18. Parent did not cooperate with the efforts of District personnel to schedule IEP meetings for Student while Student was on homebound instruction. Special education was not provided while Student was on homebound instruction, although District policy requires it to be provided. (NT 194; S-20, P-9.)

19. In January 2011, the District nurse in charge of evaluating requests for homebound services consulted with personnel with the Department of Education and was advised to consider re-evaluation of Student. In April 2011, after receiving a second email with the same advice, the nurse advised District personnel that a re-evaluation would be appropriate at that time. (S-19 p. 23, 46-48.)

20. In February and April 2011, a private evaluator, who is a certified school psychologist and a neuropsychologist, performed a private neuropsychological evaluation for Student. (P-3.)

21. In February 2011, the Parent submitted a physician referral for continued homebound services. The treating psychiatrist recommended homebound educational services due to the Student's anxiety. (NT 62-63.)

22. The District orally requested additional information from the behavioral health agency that provided the psychiatrist's services to Student. Parent prevented District from obtaining needed information. District personnel did not request a psychiatric re-evaluation. (NT 64-66, 69, 91, 114-116.)

23. The District's nurse in charge of approving requests for homebound services believed that the Student was capable of returning to school with supports and accommodations. The nurse did not refer Student for evaluation under the IDEA or under section 504. (NT 67.)

24. On March 31, 2011, the District denied the request for homebound services and terminated homebound, because there was not enough information in the doctor's referral to indicate why Student's had not progressed sufficiently under the psychiatrist's care to be able to return to school at least for partial days, and because the information available did not show a plan for Student's return. (NT 63-65, 69, 168; S-12, 18.)

25. The District planned for a transition of Student back to school, including supports in school, evaluation and a meeting after Student should return. (NT 124-129, 133, 193-194, 202-203; S-3 p. 2, S-13.)

26. Parent was not consulted in preparation of the transition plan for Student. (NT 231-232.)

27. District personnel advised Parent that there was no appeal from the District's denial of homebound services. (NT 100-101; S-12.)

28. Parent kept Student home and did not send Student back to school, from March 31, 2009 until September 6, 2011, when Parent enrolled Student in a cyber charter school. Student did not receive any educational services from March 31, 2011 until September 6, 2011. (NT 202; S-12, S-19 p. 56-57.)

29. The District initiated truancy proceedings against Student in May 2011, and the court ordered Student to return to school in May 2011. (NT 112, 114; S-19 p. 49-50, 54-55; S-14.)

30. In June 2011, Parent received the private neuropsychological Evaluation report from the evaluation begun in February 2011. The report diagnosed Student with Mild Mental Retardation (now called Intellectual Impairment), and ADHD, Inattentive Type. Adaptive functioning was in a very low range that was consistent with Student's cognitive functioning. The private evaluator reported executive function and attention deficits, as well as deficits in language skills and executive functions. (P-3.)

31. The evaluator found that Student's very low academic skills were consistent with Student's cognitive skills, which tested in very low ranges on most sub-tests and assessments. The report concluded that Student had made "very little progress from year to year" in the District's schools. There were significant deficits in reading, mathematics and writing. (P-3.)

32. The private evaluator recommended intensive, individualized instruction in every area of academic need, specific goals for receptive and expressive language, fine motor skill development, reading, mathematics and written expression, as well as numerous SDI, including direct, explicit teaching of key concepts and vocabulary in all subjects, and direct explicit teaching in mathematics. The report also recommended the employment of assistive technology. (P-3.)

33. In June 2011, the District invited Parent to an IEP meeting. (S-19 p. 58-60

34. Pursuant to a release requested on June 29, 2011 and signed by Parent on July 8, 2011, District personnel were able to obtain the private neuropsychological report in July, and they requested information from the behavioral health agency that provided treatment services to Student, all for purposes of re-evaluation. (NT 265-267, 351-354; S-17, 21, P-4.)

35. The District received a psychosocial evaluation from the behavioral services agency in August 2011. The District's school psychologist reviewed the psychosocial evaluation in July 2011, and requested and received a permission to evaluate from Parent in July 2011. (NT 260-262, 265-266; S-21.)

36. The psychosocial evaluation from the behavioral health agency did not support a need for homebound services. (NT 121.)

37. The District's evaluator was given the impression that Parent was sensitive to any communication that might exceed Parent's permission as given to the District, and that permission had been limited to review of records and did not include conversations with staff the behavioral health agency. (NT 260-262, 265-266; S-19 p. 75-79, S-21.)

38. The District's psychologist is both certified as a school psychologist in Pennsylvania and licensed as a clinical psychologist in Pennsylvania, has a Ph.D. in educational psychology, and has 20 years' experience as a school psychologist. (NT 254-256.)

39. The District issued a re-evaluation report in August 2011. The report was based upon the private evaluator's test scores, which the District deemed sufficient and accepted for purposes of the report. The evaluator also reviewed Student's special education file at the District, and spoke with a former teacher, who was the special education liaison. The District's evaluator did not speak to or obtain information from Student's homebound instructors, although some effort was made during the summer of 2011 to obtain recommendations from one of the homebound instructors. (NT 254-256, 263, 300, 323-324, 332-334, 407-8, 415-418; S-21.)

40. The District's evaluator disagreed with the diagnoses in the behavioral health service's psychosocial report, including an acute anxiety disorder that by clinical definition cannot continue beyond four weeks. The District evaluator also disagreed with the diagnosis given by the private evaluator of mental retardation (now called intellectual disability). However, the evaluator did not find that the reasons that had been given for homebound services were clinically inappropriate. (NT 275-284, 339; S-21.)

41. The District's evaluator concluded that the data did not support an educational classification of intellectual disability because many of the Student's scores in the testing by the behavioral health agency fell within the average or low-average range; the District evaluator concluded that such scores were inconsistent with a diagnosis of intellectual disability. The private evaluator also had failed to report consideration of the potential effect of emotional difficulties and medication on Student's cognitive scores. (NT 284-291; S-21.)

42. Based upon the District's review of the private neuropsychological evaluation report, the private behavioral health agency's psychosocial report, and the documentation of Student's treatment and psychiatric assessment by the behavioral health agency, the District classified Student with Specific Learning Disability, finding a significant discrepancy between ability and performance in academic areas of functioning. (NT 292-295; S-21.)

43. The District re-evaluation report recommended supplemental learning support. It also recommended giving consideration to an increase in Student's level of learning support, so as to maximize Student's time in small group instruction; supports for Student with regard to emotional functioning, including school counselor services; consultation with OT and PT personnel; coordination with outside treatment providers; and a behavior assessment and plan to deal with attention needs. (NT 292-295; S-21.)

44. The District recommended accommodation for Student's orthopedic impairments. (NT 296; S-21.)

45. The District's school psychologist did not consider or recommend speech and language services for Student. (NT 344; S-21.)

46. After reviewing additional documents from the behavioral health agency, the District recommended accommodations for Student's emotional needs, including transitional supports such as one to one transitioning support and [redacted] for transportation. (NT 349.)

47. In June 2010, and September 2011, the District offered IEPs, but the Parent did not attend the IEP meetings as invited in order to discuss the IEPs. Placement was identical to that offered in 2009 and, in the June 2010 IEP, specially designed instruction (SDI) was virtually identical. Student was found not eligible for ESY services in both IEPs. (NT 420-428; S-11, 22.)

48. In 2011, staff at Student's school were under the impression that Parent had been banned from going onto school property. (NT 458; S-19 p. 73.)

49. The District found that Student was not eligible for Extended School Year services because there was no evidence of regression and recoupment issues and because Student was not severely cognitively impaired. (NT 452-453, 456-457.)

50. The June 2010 IEP reflected "minimal" progress in reading skills, from K.1 to 1.1 assessed levels. The IEP offered measureable goals for acquiring vocabulary and for reading comprehension that were based upon slightly higher base lines than had been utilized in the 2009 IEP. The writing goal was identical to that offered in the previous IEP and was not measureable. (S-11, P-3.)

51. The June 2010 IEP reflected "minimal" progress in mathematics skills, from middle of first grade to late in first grade according to the present levels reported. The IEP offered measureable goals for computation problems and measurement, but not for word problems. (S-11, P-3.)

52. In August, 2011, the District transferred Student to another school that District personnel considered more accessible for Student because it has an elevator. (S-15, S-19 p. 87-99.)

53. The Parent requested homebound instruction for Student for the 2011-2012 school year. The District denied this request. (NT 96; S-18 p. 13, S-19 p. 81-86, 99.)

54. On September 6, 2011, Parent advised the District that Student had been accepted into a cyber charter school. This was verified on September 14, 2011. (S-16, P-7.)

55. The September 2011 IEP was drafted in reference to the 2011 re-evaluation report. (NT 420-428.)

56. Although current curriculum based data on Student's academic functioning was not available, the IEP offered redrafted, apparently measureable goals, conditioned on obtaining updated base line data, for reading and mathematics. A writing goal was

offered that did not appear to be measureable because it did not identify the writing skills assessed or the rubrics to be used. New SDI was offered also. (S-22.)

57. None of the IEPs offered by the District provided for increased small group instruction; none specified direct, explicit instruction in all areas of academic functioning. None recommended utilizing phonemically-based approaches, although the District did offer "research based intervention program" for reading and mathematics, to be provided in "regular education Classroom." The 2010 and September 2011 offered IEPs indicate that Student will spend 100% of the school day in the regular education classroom; however, no academic supplementary aids and services are offered beyond new SDI providing decoding and reading for written work in classes other than language arts classes, simplified directions and providing accommodations for testing, including extended time. One accommodation for mathematics was use of a calculator. None of the IEPs recommended assessment for speech and language services, OT services or PT services. (S-22.)

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

[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).

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.

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.

LEGAL STANDARD FOR DETERMINING APPROPRIATENESS OF EVALUATION

The hearing officer must determine whether or not the IU's evaluation was appropriate. 34 C.F.R. §300.507. In making this determination, the hearing officer applies the legal requirements for appropriate evaluations set forth in the IDEA and its implementing regulations at 20 U.S.C. §1414; 34 C.F.R. §300.15; and 34 C.F.R. §300.301 through 311.

The IDEA obligates a local educational agency to conduct a "full and individual initial evaluation … ." 20 U.S.C. §1414(a)(1)(A). The Act sets forth two purposes of the required evaluation: to determine whether a child is a child with a disability as defined in the law, and to "determine the educational needs of such child … ." 20 U.S.C. §1414(a)(1)(C)(i). In 20 U.S.C. §1414(b)(1)(A)(ii) and (B), the Act requires utilization of assessment tools and

[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.

strategies aimed at enabling the child to participate in the "general education curriculum" and "determining an appropriate educational program" for the child. The purpose of assessment tools and materials is to obtain "accurate information on what the child knows and can do academically, developmentally and functionally … ." 20 U.S.C. §1414(b)(3)(A)(ii).

The 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). Evaluation procedures must be sufficient to "assist in determining … [t]he content of the child's IEP." 34 C.F.R. §300.304(b)(1). Brett S. v. West Chester Area School District, No. 04-5598 (E.D. Pa., March 13, 2006), at 25.

The child must be "assessed in all areas of suspected disability." 20 U.S.C. §1414(b)(3)(B). The regulation implementing this statutory requirement adds that this includes "social and emotional status … ." 34 C.F.R. §300.304(c)(4). Assessments and other evaluation materials must "include those tailored to assess specific areas of educational need … ." 34 C.F.R. §300.304(c)(2). The purpose of assessment tools and materials is to obtain "accurate information on what the child knows and can do academically, developmentally and functionally … ." 20 U.S.C. §1414(b)(3)(A)(ii). Selected instruments should "assess the relative contribution of cognitive and behavioral factors … ." 20 U.S.C. §1414(b)(2)(C).

The Pennsylvania Code requires essentially the same breadth of inquiry in an evaluation of a suspected eligible young child. The relevant sections states:

> Evaluations shall be sufficient in scope and depth to investigate information relevant to the young child's suspected disability, including physical development, cognitive and sensory development, learning problems, learning strengths and educational need, communication development, social and emotional development, self-help skills and health considerations, as well as an assessment of the family's

> perceived strengths and needs which will enhance the child's development.

22 Pa. Code §14.153(2).

The IDEA requires the local educational agency to conform to specified procedures in order to be deemed appropriate. Courts have approved evaluations based upon compliance with these procedures alone. See, e.g., Eric H. v. Judson Independent School District, 2002 U. S. Dist. Lexis 20646 (W.D. Texas 2002). These procedures must include the use of "a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information … ." 20 U.S.C. §1414(b)(2)(A); 34 C.F.R. §300.304(b). The agency may not use "any single measure or assessment" as a basis for determining eligibility and the appropriate educational program for the child. 20 U.S.C. §1414(b)(2)(B); 34 C.F.R. §300.304(b)(2).

The agency must utilize information provided by the parent that may assist in the evaluation. 20 U.S.C. §1414(b)(2)(A). This must include evaluations or other information provided by the parents. 20 U.S.C. §1414(c)(1)(A)(i); 34 C.F.R. §300.305(a)(1)(i). Part of any evaluation must be a review of relevant records provided by the parents. 34 C.F.R. §300.305(a)(1)(i). The parent must participate in the determination as to whether or not the child is a child with a disability. 34 C.F.R. §300.306(a)(1).

The agency must review classroom based assessments, state assessments and observations of the child. 20 U.S.C. §1414(c)(1)(A)(ii),(iii); 34 C.F.R. §300.305(a)(1). Observations must include those of teachers and related services providers. 20 U.S.C. §1414(c)(1)(A)(iii); 34 C.F.R. §300.305(a)(1)(iii).

The agency must use technically sound testing instruments. 20 U.S.C. §1414(b)(2)(C); 34 C.F.R. §300.304(b)(3). All such instruments must be valid and reliable

for the purpose for which they are used, be administered by trained and knowledgeable personnel and be administered in accordance with the applicable instructions of the publisher. 20 U.S.C. §1414(b)(3)(A); 34 C.F.R. §300.304(c)(1).

APPROPRIATENESS OF EVALUATION

I conclude that the District's re-evaluation of August 2011 meets the above standards. It was sufficiently comprehensive to identify all of the Student's special education and related services needs. It also met the IDEA's procedural requirements.

The scope of the re-evaluation was sufficiently comprehensive, as proven by a preponderance of the evidence. The evaluator accepted recent, privately obtained testing by a qualified neuropsychologist, and the testing scores addressed a broad range of Student's functioning, including cognitive, language, perceptual-motor, simultaneous processing, processing speed, cognitive fluency, memory, executive functions and attention. (FF 30-32.) The private evaluator also assessed Student's academic functioning in all areas, and with specificity and individualized assessment strategies. (FF 31.) The re-evaluation also encompassed adaptive functioning and emotional functioning, thus addressing all areas of suspected disability. (FF 30.)

The evidence is preponderant that the District's re-evaluation, including the acceptance of the private neuropsychological and agency psychosocial evaluations, complied with the procedural requirements of the IDEA. The evaluators upon which the District's report relied utilized a variety of assessment tools and strategies, including an array of cognitive and achievement tests, seeking input from teachers and the Parent, seeking input from the behavioral health agency as to Student's emotional functioning, and review of

records, some of which were based upon recent observation of Student. (FF 30, 31, 34, 35, 42.) Thus, the District fulfilled its legal obligation to utilize a variety of instruments and strategies in the evaluation, its obligation to review classroom based assessments to the extent available, and its obligation to utilize parental input and teacher input. The latter two forms of data were constrained by Parent's lack of cooperation, not by any default on the part of the District's evaluator. (FF 39.)

The record shows that the District's school psychologist did not consider or recommend speech and language services for Student, even though the data indicated weakness in receptive language skills. However, there was ample evidence in the private neuropsychologist's report to prove that this was considered by that private evaluator, and that evaluator did not recommend speech and language therapy as a related service for Student. (FF 30-32.) This report was available to the IEP team for its consideration of whether speech and language therapy as a related service would be appropriate for Student. Given the complexity and variability of Student's reported receptive language performance, a weakness in that area by itself does not prove that speech and language services were the appropriate educational response. Thus, the evidence was not preponderant that the Student needed speech and language services.

Parent also argues that the Student's programming for the relevant period from August 15, 2009 to August 2011 was governed by an inappropriate evaluation, provided by the District on June 5, 2009, resulting in the denial of a FAPE. (FF 6.) Parent asserts that this evaluation was deficient in that it failed to assess all of Student's educational needs. I note that this evaluation report recommended that Student receive the "maximum level of services available." (FF 6.) It also recommended a "scientifically based program of reading

instruction … ." (FF 6.) The report relied upon a variety of instruments and tests and took into consideration parental and teacher input, classroom based assessments and a review of school records. (FF 6.) Thus, though much less searching and informative than the private neuropsychological report obtained by Parent in June 2011, the District's 2009 evaluation appears to be of similar, adequate breadth. I find that this evaluation was adequate to consider all of Student's needs at the time at which it was provided.

Parent argues that the evaluation failed to include an Occupational Therapy or Physical Therapy evaluation, despite the fact that Student suffered from an orthopedic disability. While this is facially of concern, there was no evidence as to the reasonableness of the omission of these evaluations at the time of that evaluation. Thus, the evidence is not preponderant that the evaluation failed to address all suspected disabilities.

There was much evidence about the District's educational classification of Specific Learning Disability, as opposed to Intellectual Disability, which the private neuropsychological diagnosed. A review of all relevant District and private evaluation reports shows that the question was a close one, upon which reasonable psychologists could differ. The District's school psychologists were well qualified to make this judgment, and the 2011 evaluator testified credibly at the hearing to a professional rationale for the classification chosen. (FF 38, 40.) I defer to that professional's reasonable exercise of professional judgment as to the appropriate classification on the facts before the District. See, 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 judgment). On this record, the evidence is preponderant that the District's classification was appropriate under the law.

FAILURE TO OFFER OR PROVIDE 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 conclude that, during the relevant time period, the District failed to offer or provide Student with a reasonable opportunity to receive meaningful educational benefit, for five reasons.

First, the evidence is preponderant that from August 2009 until March 2010, the District failed to offer or provide a program of services that met the recommendation of its own re-evaluation. That re-evaluation had noted minimal progress in prior years of schooling with the District. (FF 6.) It recommended the "maximum" services for this Student, including a scientifically based program of reading instruction. (FF 6.) Ten days later, the District proposed a placement of supplemental learning support, with a program

called "Project Read." (FF 7.) There is no evidence in the record explaining what this program was, or whether or not it was research based. There is no evidence that it resembled an Orton-Gillingham type of curriculum, which is what the private neuropsychologist recommended.[4] (P-3 p. 28.) Thus, the evidence is preponderant that that the District did not follow the recommendations of its own evaluation report to provide maximal services including a specialized, research based reading curriculum in light of Student's failure to make meaningful progress prior to the date of that report.

Second, the June 2009 IEP indicated that the Student spent less than five hours per week in a special education program, despite the placement in supplemental learning support. (FF 8.) For a child with broad and profound difficulties in every area of learning – in reading, mathematics writing, self-organization, attention and executive functions - this small amount of time in special education classrooms was facially inadequate unless accompanied by some evidence of substantial supplementary aids and services to show that the inclusion of this Student for all but less than an hour per day was reasonably calculated to provide a reasonable opportunity for meaningful educational gain. There were few if any supplementary aids and services provided for the general education setting. Thus, the IEPs failed to provide Student with the "maximum" services available to the District to address Student's serious and multifarious disabilities affecting learning. (FF 9, 10.)

[4] The private neurological revaluation report was submitted without testimony and without objection by the District. It clearly has weight to show what information was conveyed to the District – thus, to show of what facts the District was on notice. However, it has more relevance in this matter, because the District adopted that report as the foundation for much of its own re-evaluation report for Student in 2011. The District's evaluator testified that the evaluator did not question the extensive testing and test scores furnished in the private report, and there is no evidence suggesting a reason to question the appropriateness of the report's recommendations. I do not by this conclusion suggest that the District was bound by every single private recommendation made in order to provide a FAPE. Nevertheless, I conclude that the extensive SDI proposed in the private report, in contrast to the minimal SDI offered in the District's IEPs, raises a strong inference that the District's offered programming was inadequate. Taken with all of the other evidence on FAPE in this matter, this inference is part of a preponderance of evidence that the District's offered IEPs failed to offer a FAPE.

Third, the evidence is preponderant that the District failed to convene the Student's IEP team to determine what if any special education services should have been provided to Student while on homebound instruction, contrary to its own policy regarding programming for special education students in homebound instruction. (FF 12-16, 18.) While the evidence also shows that the Parent was uncooperative at that time and failed to respond to invitations to participate, this did not absolve the District of its duty to provide a FAPE to the Student. The District at least should have offered appropriate special education services while Student was on homebound instruction, but this record shows preponderantly that the District did not even consider doing so. The District did not provide the IEP to the homebound instructors, and did not provide special education or FAPE to Student during homebound instruction, by its own admission. Given the Student's profound and extensive disabilities, ordinary homebound instruction offered no hope of progress, and therefore fell far short of the statutory definition of a FAPE.

Fourth, the IEPs offered to Student were meager at best. They offered some appropriate goals for reading and mathematics, but their writing goals as written were not measureable. (FF 7-10, 47-48, 50-51, 56, 57.) Their offer of specially designed instruction fell far short of the lengthy list of SDI and accommodations called for in the private neuropsychological report given in 2011. (FF 7-10, 47-48, 50-51, 56, 57.) The evidence is preponderant that the District never conducted progress monitoring on the IEP goals. (FF 7-10, 47-48, 50-51, 56, 57.) Nor can the District suggest that the private evaluator's recommendations were based on information not available to the District when it drafted IEPs in 2009 and 2010. The June 2009 re-evaluation detected the same needs, though without the same level of specificity, and recommended "maximum" effort to meet these

needs. Thus, I conclude that the District knew enough to offer far more than it offered in 2009 and 2010.[5]

Fifth, and not surprisingly, the evidence is preponderant that the Student did not make meaningful progress during the relevant period. (FF 6, 30-32, 50, 51.) All of the IEPs reviewed in this matter contain present levels information and data that confirm that the Student fell farther and farther behind Student's same age and same grade peers during the relevant period. While some progress was noted, it was measured in the tiniest of increments, and I conclude, as did the private evaluator, that any such progress was de minimis.[6] (FF 31.)

COMPENSATORY EDUCATION

The record is preponderant that the Student received only de minimis educational benefit from August 15, 2009 until March 31, 2011. Thus, for all school days on which Student was present at school, I will award compensatory education. For these days, I will order almost full days of compensatory education. I will discount one hour per day for the benefit Student received from social contact with Student's peers, which all the evidence indicates was a benefit to Student. Thus, assuming a school day of five and one-half hours per day (based upon S-9, PENNDATA figures at page 29), I will award four and one half hours per day of compensatory education for every day on which Student's elementary

[5] There was evidence that the District failed to consult with Parent regarding a re-entry plan from homebound instruction to school. (FF 24-28, 52, 53.) However, the record is preponderant that this was due to the Parent's lack of cooperation, not any District unwillingness to follow IDEA procedures for parental participation. The District should have proceeded without Parent if Parent refused to attend the meetings. 34 C.F.R. §300.322(d).

[6] On the day on which Student was terminated from homebound instruction, Student was invited to return to school. The District was aware of the need for and would have provided a transition plan for this return. Parent refused to bring the Student back to school. Thus from that point, Parent obstructed the District from providing a FAPE to Student. From then until the end of the relevant period, I cannot equitably order the District to provide compensatory education to Student. Any other remaining issues regarding this period of time are moot.

school was in session, minus any days on which Student was absent, whether excused or unexcused, from August 15, 2009 until Student was placed on homebound instruction on March 2010.

As to the period of homebound instruction, I have concluded that the District denied Student a FAPE for that entire period, insofar as the District failed to provide special education to Student for the two hours per week of homebound sessions that it authorized. I make no finding as to the propriety of allowing Student to remain on homebound instruction beyond the ninety days originally approved; to so would exceed my jurisdiction, as the decision to allow homebound services is not a decision governed by the IDEA, and therefore is not within my jurisdiction. Moreover, it would be inequitable to allow more compensatory education than two hours per day during the period of homebound instruction, because the Parent's behavior made it clear that Parent wanted Student home from school, and Parent went to great lengths to prevent the District from returning Student to school earlier than it eventually did. (FF 17, 18, 21, 27, 28, 29.) Therefore, I order the District to provide Student with two hours per week of compensatory education for every week in which the Student's school was in session, from the first day of homebound instruction in March 2010 until March 31, 2011, when the District terminated homebound services and the Parent refused to bring the Student to school as invited.

CONCLUSION

I conclude that the District's evaluations were appropriate under the IDEA and section 504, and that the District failed to offer or provide student with a FAPE during the periods described above. I order the District to provide student with compensatory education

as provided below. Any claims regarding issues that are not specifically addressed by this decision and order are denied and dismissed.[7]

[7] In testimony, there were references to the District's denial of ESY services. (FF 57.) This was not an issue that was formulated at the beginning of the hearing as one that would be decided by the hearing officer; moreover, there was insufficient evidence to determine whether or not the denial of ESY services was appropriate. Therefore, this issue is not considered in this decision.

ORDER

1. The District appropriately re-evaluated Student with regard to identification of Student's educational needs, for purposes of programming during the relevant period of August 15, 2009 to September 6, 2011.

2. The District failed to offer or provide an appropriate placement to Student during the relevant period.

3. The District failed to offer or provide a free appropriate public education to Student during the relevant period.

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

> a. From August 15, 2009 to the first day on which Student was on homebound instruction in March 2010, four and one half hours per day for every day on which Student's school was in session, minus every day on which Student was absent.
>
> b. From the first day on which Student was on homebound instruction in March 2010 until March 31, 2011, two hours per week for every week in which the Student's school was in session.

5. 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.

William F. Culleton, Jr. Esq.

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

April 30, 2012