

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

Student's Name: M.L.

Date of Birth: [redacted]

ODR No. 3225-11-12-KE

CLOSED HEARING

Parties to the Hearing:

Parent

Representative:

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30 Cassatt Avenue
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Marple Newtown School District
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Dates of Hearing:

July 31, 2012; August 8, 2012;
August 13, 2012; August 14, 2012;
September 24, 2012; October 10,
2012

Record Closed:

November 16, 2012

Date of Decision:

December 1, 2012

Hearing Officer:

William F. Culleton, Jr., Esq., CHO

INTRODUCTION AND PROCEDURAL HISTORY

The Student 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.) The District has identified Student with Specific Learning Disability and Emotional Disturbance. (NT 10-11.) Parent asserts that the District has failed to provide the Student with a free appropriate public education (FAPE), as required by the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA). (NT 18-36.) Parent seeks compensatory education and the hearing officer specified a relevant period beginning June 1, 2010 until July 31, 2012, with no objection. (NT 61.) The District asserts that it offered and provided a FAPE in light of what it knew about Student's disabilities during the relevant period of time. (NT 37-52.)

The hearing was concluded in six sessions. The parties submitted written summations, and the record closed upon receipt of those summations.

ISSUES

1. Did the District fail to offer or provide a FAPE to Student during the relevant period from June 1, 2010 until July 31, 2012?
2. Should the hearing officer order the District to provide compensatory education for all or part of the relevant period?

FINDINGS OF FACT

1. Student transferred into the District from [another school district] with an Individualized Education Program (IEP) in the beginning of the 2009-2010 school year; Student was in third grade when Student started school in the District. (NT 65-72, 71; P-90. S-1.)

2. When enrolled with the District in 2009, Student's full scale IQ was in the High Average Range. Student was diagnosed with Attention Deficit Hyperactivity Disorder with changeable moods and anxiety. The [other school district] had classified Student with Other Health Impairment and Specific Learning Disability in reading and writing. (S-1, 35.)
3. Parent informed the District at the time of enrollment that Student was receiving special education services through an IEP while in the [other school district], and was taking medications for a mood disorder. Parent provided the District with copies of Student's Initial Evaluation Report dated February 2008, a Functional Behavioral Assessment (FBA) dated March 2009, a draft FBA dated June 2009, an IEP summary and full IEP from the SDP dated March 2009, and progress monitoring reports. These documents disclosed a history of behavioral problems that impeded learning, including hyperactivity, attention problems, noncompliance, elopement and consequent disruption of instruction. The draft FBA from the [other school district] indicated that Student had experienced negative feelings due to Student's specific learning disability. (NT 71-76; S-1, S-29, P-65, 66, 67, 68, 69, 70.)
4. The District was on notice during the 2009-2010 school year, and remained on notice throughout Student's tenure, that Student was being medicated for either a mood disorder or anxiety and was receiving medical care for it, including medication. (NT 338-339, 341-343, 381, 405-406, 448-451, 842-843, 846-853; S-1, 11, 29, 34 p. 6, 35, 55, P-92 p. 85.)
5. While various medical professionals had considered a diagnosis of bipolar disorder, the Parent was not aware of such a diagnosis, and the District did not conclude that Student was diagnosed with this form of affective disorder, before 2012. (NT 522, 838.)
6. Throughout Student's tenure with the District, Parent provided the District with copies of medical records and cooperated with District requests for information about Student's mental and emotional difficulties. (NT 318-319.)
7. The District provided special education services to Student from the first day of school. After some discussion, the District provided Student with Wilson programming for reading some time after the first day of school. (NT 76-79.)
8. During the 2009-2010 school year, the District provided counseling services to Student regarding Student's emotional and behavioral needs. This was delivered by a District specialist in non-guidance counseling, a board certified Diplomate in social work. (NT 77, 89, 1242-1243.)
9. The District requested permission to re-evaluate Student in October 2009, Parent consented, and the District produced a re-evaluation report dated November 23, 2009. (S-2, 3.)

10. In the Fall of 2009, District staff brought to Parent's attention disturbing statements and drawings by Student that raised concerns in the District staff. (NT 77, 84-86.)
11. For the 2009 re-evaluation, Parent reported that Student exhibited symptoms of Attention Deficit Hyperactivity Disorder (ADHD), unwanted behaviors including temper tantrums, mood changes, fighting and impulsiveness, and difficulties in reading, spelling and writing. Parent reported a history of hospitalization and psychotherapy, Student's resistance to going to school, destructiveness, temper tantrums, anger outbursts, frequent fighting, fearfulness, low frustration tolerance, and mood changes. (NT 81-83; S-3, S-96, 97.)
12. The re-evaluation concluded that the Student's behaviors were due only to adjustment difficulties. It found that the behaviors had subsided during the first weeks of the school year. It recommended continued school counseling and monitoring of Student's behaviors, with intervention in the future if the behaviors should be evident for a prolonged period of time. The IEP from the [other school district] provided a goal for behavior, but the District did not offer one. There was no Positive Behavior Support Plan (PBSP). (NT 98, 112-113, 1361; S-3, 5, 7.)
13. The 2009 re-evaluation found that Student functioned in the low average or borderline range in academic achievement, including reading, writing and mathematics; this achievement was significantly discrepant with Student's high average cognitive ability. In addition, Student's performance on standardized achievement tests was impeded due to attention difficulties. The re-evaluation classified Student with Specific Learning Disability and Other Health Impairment. The re-evaluation recommended a structured phonics based reading program, instruction to improve reading comprehension, counseling, and monitoring of behavior. (S-3.)
14. The District offered an IEP in December 2009. It provided for supplemental learning support in the neighborhood school for reading and language arts, counseling twice a week for thirty minutes per session. It offered goals for reading fluency and comprehension, decoding, encoding, and paragraph writing. Specially designed instruction (SDI) or accommodations included review of mathematics concepts, facts and vocabulary, small group instruction for reading and language arts, a phonetic based, multisensory, sequential reading program, a research based reading program to build decoding and encoding skills, modified assignments and assessments, assistive technology to address auditory and phonological awareness skills, and modified delivery of instructions. (NT 106-108; S-7.)
15. Student was amenable to instruction in a one to one setting through the use of positive instructional techniques. (NT 582-584, 1226, 1531-1532.)
16. The District provided Wilson instruction to address decoding and encoding skills four times per week. (NT 108; S-7.)

17. The December 2009 IEP did not offer occupational therapy (OT), despite Student's illegible handwriting. (NT 125-129; S-16, S-17 p. 5.)
18. Student displayed social difficulties in the 2009-2010 school year that were addressed explicitly in counseling sessions, but not in explicit social skills classes. (NT 100-103; S-7.)
19. In December 2009, Student engaged in four instances of misconduct [redacted]. (S-11.)
20. Parent signed the Notice of Recommended Educational Placement (NOREP) on January 6, 2010, for the program recommended in the December 2009 IEP. (NT 116-118; S-8.)
21. In March 2010, Student had an outburst [redacted]. There was no systematic response by District personnel. (NT 529-536, 547-548, 649-654, 746-748, 1335-1337, 1345-1349, 961-964; P-92 p. 24.)
22. The counselor, who had been seeing Student twice per week, reduced the time to once per week, due to caseload and scheduling issues, and the guidance counselor at the neighborhood school started seeing Student one day per week. There was no coordination between the two counselors, no common planning, and the specialist counselor was not aware of all of the Student's behavioral incidents in the 2009-2010 school year. (NT 529-536, 1348-1349, 1361-1373, 1491; P-92 p. 14.)
23. In June 2010, the District offered OT services to Student, one hour per month in small group, as well as OT consultation to the teacher, a goal and SDI. There were no progress reports. The therapist worked on both cursive writing and printing with Student. (NT 163; S-16, 17, 19.)
24. The District offered Extended School Year (ESY) services for the summer of 2010, for language arts. Wilson training was included. (NT 121-124; S-14, 15.)
25. At the beginning of the 2010-2011 school year, the District's specialist counselor knew that Student would present significant behavioral problems and conveyed that to the new special education teacher. (NT 1368-1369; P-92 p. 40.)
26. After about two months during the fall of 2010, the Wilson instructor reduced Student's time from four times per week, as previously agreed in an IEP meeting, to three times per week, without notifying Parent of providing a NOREP to change service levels. (NT 141-144, 362-363.)
27. The teacher did not provide progress reports expressly stating Student's progress in the Wilson program; however, progress was reported on Student's achievement in decoding and encoding in December 2010. (NT 140-141 204, 1025-1027, 1043; S-20, 59 p. 12.)

28. Parent expressed concerns about Student's achievement in Mathematics at the December 2010 IEP meeting, but District personnel at the meeting recommended no special education intervention at that time. Curriculum based assessments indicated passing and average range achievement. Mathematics support was provided during a free period. (NT 160-162; S-19.)
29. Student's behavior began to deteriorate after about one month to six weeks of the 2010-2011 school year. Student became physically resistant to going to school. Student began acting out more in school [redacted]. School staff recommended that Parent keep Student home from school if Student was too upset. Student received disciplinary actions including suspensions. Student's behavior continued to interfere with Student's educational progress until February 2012 when Parent removed Student from the neighborhood school. (NT 148-156, 164-172, 181-183, 193, 197, 216, 268-271, 292-300, 353-354, 360-361, 366-368, 374-375, 431-434, 835-837, 1408, 1545-1546; S-19, 34, 35 p. 3, 9, 10, S-64 p. 72-77.)
30. The District offered an IEP in December 2010 that placed Student in supplemental learning support for language arts in the neighborhood school, daily. The District offered OT for sixty minutes per month and counseling once per week for 30 minutes, a reduction of thirty minutes per week from the previous IEP. (S-19.)
31. The December 2010 IEP offered goals for legible cursive writing, decoding of second grade words, encoding of words at an unspecified grade level, fluency and comprehension combined at the second grade level, as measured by a percentage of accuracy, unspecified as to whether that measurement was to be for fluency or comprehension. The IEP also offered a goal for written expression and a goal for "accuracy" of attention, participation and understanding of concepts in mathematics, science and social studies. (S-19.)
32. The December 2010 IEP goal for legible writing was new and did not proceed from a baseline. There was no progress monitoring until July 2011. By then, Student was able to complete some cursive writing tasks at a 90% legibility level. (NT 162-163; S-19, 20, 36.)
33. The December 2010 IEP goal for decoding did not proceed from a baseline in either the goal or the present levels. The goal was to decode second grade level words at 90%, whereas the December 2009 IEP decoding goal was to decode second grade words at 80%. (S-7, 19.)
34. Student was decoding first grade words by December 2010; decoding of second grade words was not measured by December 10, 2010.
35. The December 2010 IEP goal for encoding appears to proceed from present levels data on spelling marks for an unspecified time period. (S-19.)
36. The December 2010 IEP goal for fluency was unclear, and did not proceed from the Directed Reading Assessment (DRA) scores in the present levels. (S-19.)

37. The December 2010 IEP goal for comprehension was designed to bring Student's reading comprehension from an instructional level in the beginning to mid second grade level to an end second grade level. (S-19.)
38. The December 2010 IEP goal for written expression did not proceed from a baseline and did not specify the grade level of the Pennsylvania Writing Rubric to be attained. (S-19.)
39. SDI and accommodations included chunking, repetition and restating of directions, support for organization, accommodations in general education classes, copying and adapted paper for writing legibility, small group instruction, review and repetition. The SDI specified that the counselor would address social and emotional needs. (S-19.)
40. The December 2010 IEP did not acknowledge that Student's behaviors were impeding Student's learning or that of others. No change of placement was considered, although the District had an emotional support program in one of its schools for elementary grade students. No FBA or PBSP was offered. However, a crisis management plan was incorporated into the IEP for instances when Student lost control of emotions or behavior, and the counselor addressed skills pertaining to emotional self-regulation during weekly sessions. (NT 1402, 1504-5; S-19.)
41. The counseling services offered to Student during the 2010-2011 school year were inadequate. (NT 1311-1313, 1359, 1390-1397; P-92 p. 82.)
42. Parent was unaware of the definition or purpose of an FBA. (NT 357-358.)
43. After the winter break, in response to Parent's request, the District provided a one to one educational aide for non-classroom times at school. (NT 178.)
44. In February 2011, in response to Parent's request (made upon the advice of a friend), and after a number of problematic behavioral incidents, the District agreed to conduct an FBA. (NT 164-172; S-22, 23.)
45. In February 2011, the District approved Student for ESY services with goals for decoding, encoding, reading fluency, reading comprehension legible writing and mathematics. In a NOREP in March 2010, the District offered ESY for one hour per day for reading and writing and one hour per week of OT services. The NOREP was amended in April 2011 to add mathematics instruction for an unspecified time. Mathematics instruction was not provided to Student during the summer ESY program. (NT 181, 187; S-23, 26, 38.)
46. On February 22, 2011, the District sought permission to re-evaluate Student, but Parent did not return the permission signed until May 2011. (NT 175-177; S-24.)
47. Student was hospitalized [redacted] in early March 2011; the district was on notice of this [redacted]. Student returned to school and the District continued to provide a

one to one educational aide for non-classroom times at school. (NT 175-177, 292-299; S-25, 31, 61 p. 2, 15, S-62 p. 7.)

48. In the Spring of 2011, District personnel did not follow up on medical information despite having a release from Parent to do so. (NT 783-785, 1182-1184; S-25, P-92 p. 69.)
49. The District offered a revised IEP dated May 17, 2011, which recognized that Student's behaviors were impeding learning and which included an FBA. Behaviors of concern included crying, fighting, and refusing to transition. [Redacted.] The District's expert counselor was not consulted regarding the behaviors to be assessed. Over a six day observation period, the District behavior specialist did not observe the behaviors of concern; therefore, the specialist did not recommend a behavior support plan to address these behaviors. Instead, the specialist recommended a PBSP that would focus on identification and management of emotions, identifying when Student should need help, and appropriately asking for assistance. The specialist also recommended reducing the level of verbal prompting in academic and other settings to reduce Student's dependence upon prompting. (NT 1413 to 1415; 1566-1569; S-31.)
50. The District implemented the recommended PBSP, which consisted of daily, class-by-class Student reporting of an emotional inventory indicating Student's feelings during class on a three choice scale. This was to be compared to teacher ratings for each class and reported to Parent daily. The PBSP also included a token system [redacted]. (S-31, 35, 59 p. 17-30.)
51. The PBSP implemented by the District was not effective to reduce the behaviors of Student that interfered with Student's educational progress. (NT 366-368, 383, 388-91, 1008-1011; S-34, P-92 p. 289.)
52. Student was exhibiting social skills difficulties in the Fall of 2011. The March 2010 FBA recommended explicit social skills training, but it was not provided to Student. (NT 189-190, 216-218; S-31 p. 9.)
53. The District conducted a re-evaluation at the end of the 2010-2011 school year. The report, dated July 21, 2011, included administration of the WIAT-III achievement test. The scores when compared and contrasted with the WIAT-II scores in the 2009 re-evaluation show continued below average achievement in word reading and a reduction from average to below average achievement in reading comprehension. Student's numerical operations continued to be in the average range. Oral reading fluency and reading comprehension were below average for a third grade level text. Writing achievement was also below average for spelling and sentence composition. Overall performance in mathematics was average, with a below average score in subtraction fluency. (S-3, 35.)
54. Teachers reported that Student was making steady, adequate or limited progress in reading, writing and mathematics. (S-35.)

55. The July 2011 re-evaluation elicited reports of emotional distress and social difficulties. Different behavior inventories yielded varying indications of severity, from clinical significance to mildly elevated. (S-35.)
56. The July 2011 re-evaluation recognized that Student was suffering from an emotional disorder that impeded Student's learning and issued an additional educational classification of Emotional Disorder. It recommended emotional support through counseling services, monitoring during unstructured school hours, morning check-ins, teacher-parent communication regarding Student's mood on a daily basis and social skills training. (S-35.)
57. Social skills training as recommended was not offered to Student in the summer of 2011. (NT 196, 395-396, 892-895; P-90.)
58. An educational aide was provided at Parents' insistence during unstructured times in order to help Student with social interactions with peers and protect Student from aggression by peers. School officials suggested that Parent look for a private school setting because the aide's presence with Student was exacerbating the aggression from peers and Student's consequent anxiety and depression. (NT 324, 383-387, 403-404, 409-410.)
59. At the beginning of the 2011-2012 school year, the District began providing the aide during classes in addition to unstructured time. (NT 1198.)
60. From the first day of school in 2011 until September 26, 2011, the District failed to provide Wilson programming and an educational aide during unstructured times as required by the IEP. After that period, these services were provided. (NT 200-204, 237-240; S-64 p. 134.)
61. Assistive technology was offered by the SDI in the October 2011 IEP; two SDIs were not implemented consistently – use of a computer keyboard and use of fidget toys in the general education class. (NT 213-215; S-41, S-59 p. 20.)
62. In the 2011-2012 school year, Student struggled every night with homework, and Parent needed to sit with Student to make sure Student finished the homework. Sometimes Student's resistance was so great that Parent finished the homework for Student. (NT 219-224; S-64 p. 131.)
63. Student struggled with mathematics in the 2011-2012 school year. (NT 224-225.)
64. In the 2011-2012 school year, a special education teacher assigned to Student repeatedly spoke to Student in a way that contributed to Student's growing frustration, anxiety and feelings of inadequacy. The teacher failed to follow the SDI in the IEP. (NT 227-230, 240-257, 308-311, 394-395; P-75, S-62 p. 6.)
65. In October 2011, Student began assisting in [another class]; this work brought Student significant satisfaction, helped Student's self esteem, and served as a

motivator for behavior management. However, Student quit the assignment [redacted]. (NT 231-232, 240-257; S-64 p. 108.)

66. Student's behaviors impeded Student's learning in all settings, including the Wilson instruction. (NT 475, 494.)
67. Parent removed Student from the neighborhood school on or about February 5, 2012. Student was placed on homebound instruction at the request of Student's psychiatrist in February 2012, but homebound services, including Wilson teaching, were not delivered in full until March 2012, due to scheduling difficulties and Student's two hospitalizations in February and March 2012 [redacted]. By April 13, Student was scheduled to receive Wilson teaching for reading three times per week, 90 minutes per session, and mathematics instruction three times per week, 75 minutes per session. Not going to school exacerbated Student's symptoms of depression and anxiety. (NT 271-272, 276, 603-606; S-53, 62 p. 10, 64 p. 9, 31, P-80, 81, 82, 90.)
68. The District provided Student with ten hours per week of tutoring in language arts, reading, mathematics, social studies and science from February 2012 to April 2012. (NT 1214, 1221.)
69. During the second half of the 2011-2012 school year, the District offered 33 sessions of Wilson instruction, to be provided in the homebound setting. Because of illness, Student was unable to meaningfully participate in 26 sessions. (NT 472, 481.)
70. In February 2012, Student's neighborhood school was not an appropriate placement; a private placement in a therapeutic day school - with small class size and explicit, research based instruction in reading, writing and mathematics - was an appropriate placement option for Student. The District and Parent explored possible private placements for Student, without any commitment by the District, but the District did not offer to place Student in any available program that would combine therapeutic and educational services. When Parent selected a private school, the District offered to pay the tuition in lieu of FAPE if Parent would release all previous claims. (NT 261-283, 595-596, 867-869, 884, 899-900, 904-906, 911-912; S-64 p. 52 to 66, P-90.)
71. From November 2009 until April 2012, Student's standardized academic achievement scores regressed in reading decoding, reading comprehension and spelling. Student also regressed in mathematics problem solving. Regression was most significant in reading comprehension, spelling and mathematics problem solving scores. Comparative scores disclosed no academic progress in reading or mathematics. (NT 857-867, 882-883, 909-911, 1150-1156; P-90.)
72. From the middle of the 2010-2011 school year to the end of the 2011-2012 school year, Student made no progress in reading decoding, encoding or fluency, as measured by progress in mastering the successive levels of the Wilson reading program. (NT 470, 477, 496, 683, 1035-1038, 1070, 1192-1194; S-17.)

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.¹ 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 evidence² 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 Parents, who initiated the due process proceeding. If the Parents fail to produce a

¹ 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).

² 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.

preponderance of the evidence in support of Parents' claims, or if the evidence is in "equipoise", the Parents cannot prevail.

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 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 or her program is not likely to produce progress, or if the program

affords the child only a “trivial” or “de minimis” educational benefit. M.C. v. Central Regional School District, 81 F.3d 389, 396 (3rd Cir. 1996), cert. den. 117 S. Ct. 176 (1996); Polk v. Central Susquehanna Intermediate Unit 16, 853 F. 2d 171 (3rd Cir. 1988).

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).

PROVISION OF A FAPE TO STUDENT

The evidence is preponderant that the District failed to provide special education interventions that were reasonably calculated to provide Student with meaningful educational benefit. Prior to the period of time under consideration, the Parent gave the District adequate notice that Student had a history of mood disorder and problematic

behaviors. Student's behavior at the school raised red flags by March of 2010 that intervention was needed. Throughout the 2010-2011 school year, Student's behavior escalated, interfering with educational progress, yet the District's response was belated and inadequate. Social skills needs were given little attention. Achievement measures showed little to no progress in three years in the areas of reading, spelling and mathematics problem solving.

At the Student's enrollment, the Parent disclosed a history of mood disorder for which medication was being administered, negative feelings about school performance, and behavior that impeded learning in the previous school district. (FF 1-3.) During the 2009-2010 school year, Parent orally disclosed to District personnel that the Student was being medicated for the purpose of addressing a mood disorder. (FF 4-6.) Parent disclosed in a behavior questionnaire that Student was receiving psychotherapy and had a history of mood changes, aggression and numerous unwanted behaviors. (FF-11.)

Student's behavior during the 2009-2010 school raised a red flag to District personnel that Student needed intervention in order to benefit from instruction. In the Fall of 2009, Student made statements and drawings that raised concern among school staff. (FF 10.) By March, 2010, there had been a substantial number of behavioral incidents that interfered with learning, including at least one incident involving serious violence and a frank loss of all emotional regulation. (FF 21.) District witnesses admitted that the behavioral incident in March did alert staff that that Student's behavior was interfering with education, and that something needed to be done. (FF 25.) I conclude that the District was on notice that Student was suffering from a mood disorder that was causing behaviors that interfered with learning by the end of the 2009-2010 school year.

However, the record shows preponderantly that the District's staff failed to address Student's problematic behaviors through the IEP at that point.³ The governing IEP and the fourth grade IEP were not changed to reflect that Student's behaviors were an impediment. (FF 40.) No FBA was provided until February 2011. (FF 44.) Due to scheduling issues, the District reduced the weekly sessions with its specialist counselor from two sessions per week to one session per week; the neighborhood school's guidance counselor assumed the second weekly session, but the two assigned counselors failed to coordinate their interventions with Student. (FF 26, 41.) Within six weeks of the first day of the 2010-2011 school year – Student's fourth grade year - the Student's behavior was severe enough as to deprive Student of meaningful educational benefit. (FF 29.)

A preponderance of the evidence shows that the District failed to respond, even at this point. The December 2010 IEP did not recognize that behaviors were interfering with Student's education. (FF 40.) No FBA was ordered until Parent advocated for one in February 2011. (FF 44.) When the FBA was conducted, none of the behaviors of concern were observed, and despite substantial reports of [problematic behaviors], the FBA failed to address these behaviors. (FF 49.) Instead, it addressed a behavior of putting the head on the desk and refusing to work. Ibid. It recommended a behavioral intervention aimed at teaching Student to recognize Student's emotions on an ongoing basis during the school day. Ibid.

³ Until March 2010, the record shows that the Student was assigned to a general education teacher who employed an appropriate classroom behavior management plan that seemed to be successful with Student – although Student's IEPs suggest that Student still was making little if any educational progress. In addition, the District had provided a specialist counselor who dealt with emotional and behavioral issues in two sessions with Student per week. While these sessions did address what the counselor perceived to be an adjustment difficulty for Student, due to a change of school districts and family problems, the counselor was not aware of any of Student's behavioral problems in the 2009-2010 school year, except for the March incident.

This behavior plan was implemented, but nothing was done to address the behaviors that increasingly interfered with education. (FF 50.) Consequently, these interventions were not effective in controlling Student's interfering behaviors, which continued throughout the year. (FF 51.)

Beginning in the Fall of 2011, it was recognized that Student was experiencing social problems at school. (FF 52.) Re-evaluations recognized educational needs in the areas of social skills, and recommended provision of explicit teaching through research based social skills programs. (FF 55, 57.) The District never implemented these recommendations. Ibid. While the specialist counselor addressed social skills in weekly sessions, the counselor readily admitted at this hearing that there was not enough time in those sessions to provide appropriate social skills teaching. (FF 41.)

Student's IEP contained goals for reading, spelling, writing and mathematics, but those goals were not measurable as written, and progress monitoring was not based upon baseline data. (FF 30-39.) The District did provide Wilson training to Student, but there was no progress monitoring. (FF 27.) There were delays in initiating programming in the 2010-2011 and 2011-2012 school years. (FF 60.) The Wilson teacher at one point reduced the hours provided per week in response to a perception that Student was frustrated in the sessions; however, the teacher did this without notifying Parent, and without changing the IEP. (FF 26.)

A preponderance of the evidence proves that the Student did not make meaningful academic progress during the period from the date of enrollment to the last day of school in June 2012. Standardized tests in 2011 indicated a regression in scores for reading, as did similar testing by a private evaluator in 2012 for reading, spelling and mathematics problem

solving. (FF 53, 71.) These results indicate that Student at best was not closing the gap between Student and peers as Student progressed from grade to grade, and at worst was regressing. I conclude that this is not meaningful progress in light of Student's cognitive ability and IQ scores. (FF 2.)

The Wilson teachers' testimony supports the conclusion that Student did not make meaningful progress in reading and spelling⁴. The District's Wilson teacher for the 2010-2011 and 2011-2012 school years offered the opinion that Student's progress was substantial, extending into Wilson's level four material; however, a contractor, whose testimony I give greater weight because of greater independence, testified that Student had not mastered level four material, and had to start over at level three, where Student had started years before. (FF 72.) Thus, Student did not make meaningful progress within the Wilson system.

Teachers reported some progress, and I weighed that evidence against the above evidence. (FF 54.) While I found the teachers credible, their teaching was heavily supported, as were their curriculum based assessments. There was evidence that the one to one aide provided too much support, and that Parent had completed homework assignments for Student when the daily struggle with Student to do homework became overwhelming. (FF 43, 49, 58, 59, 62.) Thus, I accord less weight to their testimony of progress than I accord to the objective evidence of standardized achievement scores and the more objective evidence of mastered Wilson levels.

⁴ PSSA scores of Below Basic in reading also support the conclusion that Student did not make meaningful progress in reading. (S-10, 28.)

The District argues that Student's behaviors, and their interference with Student's educational progress, were caused by internal stimulus that was not amenable to educational intervention. The District argues that Student's behaviors that interfered with learning were symptoms of a bipolar disorder, a serious mental disturbance. It is the District's assertion that this condition produced rapid and unpredictable changes in mood, with consequent loss of focus, disruption of Student's participation in education, disruption of memory and retention, and in severe episodes, physical absence. While there is some evidence to support the District's argument, the record does not support its conclusion that there was nothing that the District could have done.

The record does not show that Student was definitively diagnosed with bipolar disorder; rather, what Parent knew, from the Student's enrollment in 2009 through Student's placement on homebound status in February 2012, was that Student was diagnosed with a mood disorder – a term that encompasses a variety of affective disorders. It was not known in 2009 or in 2012 that all of Student's behavior was solely the result of responding to internal stimulus, because the medical reports did not definitively pinpoint the nature of Student's mood disorder. (FF 5.)

The District was on notice of this imprecise medical data. (FF 4.) Given that the District was on notice of a mood disorder, I conclude that it was incumbent upon the District to make an effective and prompt inquiry into its nature and then to address the behaviors that were interfering with education.

I cannot accept the District's invitation to attribute Student's lack of meaningful progress to internal stimuli in the face of which the District was helpless to intervene. As noted above, the record does not support the premise that the Student's mood disorder was

entirely internally generated. The District's own administrator, a psychologist by profession, admitted that even bipolar disorder can be addressed through cognitive and behavioral approaches other than medication. (NT 582-584.) There was evidence that some of Student's behaviors were associated with a relationship with another student. There was evidence that tutors and teachers were able to control Student's behaviors through positive motivational techniques, and that many of Student's behavioral problems arose in the general education setting. (FF 12, 15, 29.) Moreover, the record does not show that nothing could be done, because the District failed to take actions in a timely fashion, its efforts were not directed appropriately to the behaviors of concern, and the interventions that it eventually implemented were not reasonably calculated to get Student's serious interfering behaviors under control. On the record as a whole, I conclude that the District failed to show that nothing could be done, because it failed to take appropriate action to test that very thesis.

The District also argues that Student's lack of progress should be evaluated against Student's severe emotional and behavioral deficits – that these psychiatric impediments to learning are part of the equation in determining a student's "potential" against which to measure whether or not the student's progress was "meaningful". This argument too must fail because the District did not establish that Student's mood disorder and behavior were not amenable to intervention by the school; thus, they cannot be said to be a limiting factor in the estimation of this bright child's underlying potential. To so conclude would be to negate the obligation to accommodate disabilities.

COMPENSATORY EDUCATION

The record does not support the conclusion that Student's behaviors were interfering with education to the extent of preventing Student's receipt of meaningful educational opportunity until six weeks from the first day of school in the 2010-2011 school year. I conclude that the District was on notice that Student was in need of intervention months before that date; thus, I do not accord the equitable discovery and remediation period for compensatory education, and I will award compensatory education from that date.

At the other end of the relevant period, from the beginning of homebound services on February 5, 2012, I do not find that the District failed to provide appropriate services. (FF 67-69.) The Parent requested homebound due to Student's escalating mood and behavior disorder and a doctor's note that Parent presented to the District. There were delays due to scheduling problems, but these were not caused by the District; the Parent was seeking a schedule to meet complex needs for Student, and the District provided a tutor earlier than March, only to find that the tutor's schedule did match Student's needs as indicated by Parent. The quantity and quality of the homebound services were not deficient on this record, although Student missed a great deal of scheduled tutoring due to health concerns and two hospitalizations. In the circumstances, I will not order compensatory education for this period of time.

As to the quality of the ordered compensatory education, Parent requests an order that can be utilized by Parent in Parent's discretion; I conclude that this can be best accomplished by ordering an hour for hour order. In determining such an order, I utilize equitable reasoning to consider whether or not a full day of compensatory education would

be appropriate.⁵ I conclude that the record supports a full day of compensatory education in this matter, because Student's lack of meaningful progress in all subjects was due to behaviors interfering with learning, which also impacted Student's growth in social skills.

I have considered the evidence regarding ESY programming in the summers of 2011 and 2012, and find it insufficient to prove a failure to provide appropriate ESY services. (FF 24, 45.) Therefore I will not order compensatory education for ESY.

CREDIBILITY

In reaching this conclusion I considered the credibility and reliability of the evidence given by witnesses in the matter. I found Parent to be credible and reliable, and relied upon Parent's testimony. I accorded greater weight to the homebound reading teacher's estimate of Student's progress in reading decoding, encoding and fluency than to that of the District's reading specialist, because the homebound teacher was more independent, and because the data were consistent with that testimony. I found all other witnesses to be reliable, although I accorded varying weight to their testimony, based upon the manner of answering questions and consistency with the record.

I also considered the weight to be accorded to Parents' expert, whose testimony I found to be credible and reliable.

CONCLUSION

I conclude that the District failed to offer or provide a FAPE to Student from the first day of the seventh week of school in the 2010-2011 school year to February 5, 2012, not

⁵ This will be 6.5 hours per day. (S-41.)

including summer sessions for ESY. I therefore order the District to provide compensatory education services to Student according to the order entered herein. Any claims regarding issues that are not specifically addressed by this decision and order are denied and dismissed.

ORDER

1. The [Redacted] School District failed to offer or provide a FAPE to Student from the first day of the seventh week of the 2010-2011 school year until February 5, 2012.
2. The District is hereby ordered to provide compensatory education to Student in the form of hours of remedial or enriching educational services intended to further the goals of the Student's current or future IEPs or intended to otherwise assist Student in overcoming the effects of Student's disabilities.
3. The number of hours of such compensatory services will be 6.5 hours for every school day from the first day of the seventh week of the 2010-2011 school year until February 5, 2012.
4. Selection of compensatory education services shall be at Parent's sole discretion. Compensatory services may occur after school hours, on weekends and/or during the summer months when convenient for Student and Parent. The hours of compensatory education, or fund for compensatory education services/products/devices, should the District choose to create such fund, may be used at any time from the present to Student's 21st birthday.

William F. Culleton, Jr. Esq.

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

December 1, 2012