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Pennsylvania

Special Education Hearing Officer

DECISION

Student's Name: M.R.

Date of Birth: [redacted]

ODR No. 3326-11-12-AS

CLOSED HEARING

Parties to the Hearing:

Representative:

Parents

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Dates of Hearing:

October 15, 2012; October 17, 2012;
November 20, 2012; January 7, 2013;
January 15, 2013; January 23, 2013;
February 5, 2013

Record Closed:

February 25, 2013

Date of Decision:

March 12, 2013

Hearing Officer:

William F. Culleton, Jr., Esquire

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), and attends a District elementary school. (NT 9.) Student is identified as a child with a disability pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA), in the categories of Emotional Disturbance, Specific Learning Disability and Other Health Impairment. (NT 9-10.)

Parents named in the title page of this decision (Parents)¹ requested due process alleging that the District failed to re-evaluate Student appropriately in March 2012, requesting an order for an Independent Educational Evaluation (IEE) at public expense, to include a neuropsychological evaluation, a speech and language evaluation and a functional behavioral assessment (FBA). Parents also allege that the District failed to provide Student with a FAPE from the beginning of Student's first grade year in 2003 to date.

I bifurcated the matter, because there was a request for an independent educational evaluation and for prospective relief, and I deemed it important to reach those issues as soon as possible. Thus, the issues raised for final decision at this time are the challenge to the March 15, 2012 re-evaluation and request for an IEE, as well as the claim that the District failed to provide Student with a FAPE from June 27, 2010² to the last day of hearings. (NT 45.)

The hearing was completed in seven sessions. The record for the first part of the bifurcated hearings closed upon receipt of written summations. The attached order is final for purposes of appeal. All other issues will be assigned a new case number.

¹ Reference to Parents in the plural refers to both parents. Reference to Parent in the singular refers to Student's Mother, who conducted most of the transactions reviewed here.

² This is the date that is two years prior to filing; under the IDEA limitations sections, Parents' due process request appropriately encompass District actions or inactions after this date.

ISSUES

1. Was the District's re-evaluation dated March 15, 2012, appropriate under the IDEA?
2. Did the District fail to offer or provide Student with a FAPE from June 27, 2010 to February 5, 2013?
3. Should the hearing officer order the District to provide an IEE at public expense, including a neuropsychological, speech and language or functional behavioral assessment, or any other assessment?
4. Should the hearing officer order the District to provide compensatory education to Student for all or any part of the period from June 27, 2010 to February 5, 2013?
5. Should the hearing officer order the District to provide any additional services for the 2012-2013 school year?

FINDINGS OF FACT

1. The District identified Student as a child with a disability in 2004 when Student was in first grade. Throughout Student's school career, from first to tenth grade, Student has struggled to read, spell and write; Student has experienced acute embarrassment due to Student's lower than grade level reading. (NT 2012-2014; P-7; S-39.)
2. Student's handwriting is very poor, characterized by misspellings and poor formation of letters; Student's writing appears to be that of a much younger child, and is embarrassing to Student. (NT 2015-2017.)
3. The District performed a re-evaluation of Student in May 2007, when Student was in fourth grade. The evaluation identified Student with Specific Learning Disability and Other Health Impairment, noting below grade achievement in reading and writing, skill deficits in mathematics related to reading difficulties, attention difficulties and decreased fine motor speed and coordination. The report noted that Student needed support with decoding and sight word recognition, and a maximum amount of assistance throughout the writing process. (S-14.)
4. The evaluation recommended specially designed instruction (SDI) including additional time and second chances for tests, chunking assignments and directions, frequent check-ins, study guides, preferential seating, modified format for assessments, support with note taking, word processing and provision of multiplication tables. (S-14.)
5. The District approved an Individualized Education Program (IEP) produced by the IEP team in May 2007, to be effective until May 2008. The IEP placed Student in resource learning support, four hours per day in the resource room. The IEP provided goals for

reading fluency, accuracy, decoding and comprehension; written expression and conventions; spelling; mathematics computation, reasoning, operations, fluency and problem solving; and copying and keyboarding speed. The IEP provided for all recommended SDI except second chance learning and multiplication tables, and included a positive behavior management system and organization supports. (S-16.)

6. The District approved an IEP produced by the IEP team in May 2009, to be effective until May 2010. The IEP placed Student in supplemental learning support, two hours per day or less in the resource room. The IEP provided goals for reading fluency, accuracy, decoding and comprehension, as well as sight word recognition; written expression; and mathematics computation and application. The IEP provided for all recommended SDI except preferential seating and multiplication tables, and included positive reinforcement, organization supports and access to a counselor for one hour per month. (S-36.)
7. The District performed a re-evaluation of Student in August 2009, when Student was a rising seventh grader. The evaluation identified Student with Specific Learning Disability and Other Health Impairment, noting weaknesses in phonological awareness, phonological memory and rapid naming skills, broad written language skills, and mathematics process and application skills. The evaluation also noted behavior concerns across settings related to Attention Deficit Hyperactivity Disorder (ADHD), elevated concerns related to executive function processes, and at risk status for emotionality, including anxiety and depression. The evaluation found that Student's intellectual ability was in the average to above average range. (S-39.)
8. The 2009 re-evaluation included review of: cognitive testing scores from 2004; teacher input regarding reading, writing, mathematics, science and social studies; curriculum based assessments, classroom grades and classroom performance scores; and reports from occupational therapy for handwriting and keyboard fluency. (S-36)
9. The 2009 re-evaluation included parental input. (NT 2109-2111; S-39.)
10. The school psychologist who performed the 2009 re-evaluation conducted a classroom observation and reported clinical observations during testing. (S-39.)
11. The psychologist conducted cognitive testing with two different instruments, including tests that differed from those utilized in previous evaluations and re-evaluations. (S-39.)
12. The 2009 re-evaluation included a separate assessment of phonological processing. The results confirmed Student's low average phonological awareness skills, low to low average phonological memory skills, and low rapid naming skills. (S-39.)
13. The 2009 re-evaluation included standardized achievement testing that measured sight word reading and nonsense word decoding in the low range, and low to low average reading comprehension when reading aloud. Mathematics calculation and numerical operations measured in the average to high average range. Student's spelling, writing fluency and overall writing were measured to be a significant academic weakness, discrepant with cognitive ability. (S-39.)

14. The 2009 re-evaluation included administration of two behavior rating scales based on reports by Student's learning support teacher and Student's father. The scores indicated clinically significant behavioral problems related to attention and hyperactivity, and at-risk problems related to emotionality. Scores on an inventory that helps to assess executive functions indicated elevated concerns. (S-39.)
15. The 2009 re-evaluation included an FBA. The FBA focused on behaviors of lying and work refusal and recommended continuation of IEP strategies to address skill deficits. (S-39.)
16. The 2009 re-evaluation recommended specially designed instruction for reading, writing and mathematics, as well as in general education classes; recommendations included study skills instruction, small group instruction and guided organization systems. The re-evaluation also recommended accommodations including extended time, reduced quantity of work, chunking assignments, reduced copying activity, proximity seating, restated and rephrased directions, extra time on tasks and increased wait time for responses. It recommended access to counseling and provision of a teacher contact person. (S-39.)
17. The District approved an IEP produced by the IEP team in August 2009, to be effective until August 2010. The IEP placed Student in supplemental learning support, about two to two and one half hours per day in the resource room for reading, writing and mathematics. The IEP provided goals for vocabulary, word recognition, fluency and comprehension; written expression; mathematics computation and application; and reducing lying and work refusal behaviors. The IEP included a behavioral intervention plan. The IEP provided for the same SDI as had been offered in the May 2009 IEP, adding an opportunity to participate in a staff run support group. It provided for consultation occupational therapy, one unit per month. (S-41.)
18. The August 2009 IEP asserted that Student's baseline instructional level for reading decoding, fluency and comprehension was at a fifth grade level. The reading-related goals posited growth from a fifth grade instructional level to a sixth grade instructional level. (S-41.)
19. The August 2009 IEP did not offer a goal or specially designed instruction expressly addressing Student's decoding weakness. (S-41.)
20. The District approved a revision to the August 2009 IEP, produced by the IEP team in January 2010, adding a homework and agenda book incentive plan to the SDI. (S-52.)
21. The District approved a revision to the August 2009 IEP, produced by the IEP team in February 2010, to be effective until August 2010. The revision replaced the August 2009 vocabulary and reading-related goals, the writing goal and the behavior goal with goals for reading decoding, fluency and comprehension. It retained the August 2009 mathematics goal. It called for a scientifically researched direct instruction reading program. It offered ESY services to address the revised reading-related goals, one hour per week for eight weeks. (S-45.)

22. All but one of the February 2010 IEP reading-related goals did not state a baseline, but implied a baseline to be established in the researched direct instruction program to be provided. The present levels section quoted from the August 2009 IEP's baselines of fifth grade instructional level. The February 2010 fluency goal was based upon second grade reading materials. (S-45.)
23. From February 2010 to June 2010, the District provided the Corrective Reading program for direct instruction in decoding, fluency and comprehension. Corrective Reading is research supported, addresses the five areas of reading as recommended by the National Reading panel, and is recommended as an appropriate program for students with phonemic, decoding, encoding, fluency and automaticity difficulties. Nevertheless, the program has not yet been validated through an independent validation study utilizing a control group. (NT 817-819; S-48; P-24.)
24. Parent repeatedly has asked District officials to provide Student with different explicit teaching programs for reading because Parent believed that the programs being used did not work for Student. (NT 2124- 2125, 2177-2178.)
25. In seventh grade (2009-2010 school year), Student developed a problematic behavior of lying, especially when criticized, and making exaggerated claims about self in social situations; this behavior interfered with Student's social relationships and emotional health. This behavior continued to be problematic throughout eighth and ninth grades (2010-2011 and 2011-2012 school years). Parents provided Student with behavioral and emotional counseling privately to address these difficulties. (NT 2021-2025, 2035-2038, 2063-2065.)
26. The District approved an IEP produced by the IEP team in June 2010, to be effective until June 2011. The IEP placed Student in supplemental learning support, about two to two and one half hours per day in the resource room for reading, writing and mathematics. The IEP provided updated present levels with curriculum based assessments, grades and PSSA scores. Qualitative Reading Inventory (QRI) scores indicated that Student was instructional at fifth grade in word identification and fourth grade in fluency and comprehension. Saxon Math scores indicated uneven achievement in operations, computation, concepts and reasoning. Present levels indicated that Student's writing was not viable beyond short answers and supported writing of paragraphs. PSSA scores from fourth through sixth grades in mathematics and writing were basic, and reading scores were below basic. (S-48.)
27. The June 2010 IEP did not recognize behaviors that impede learning. (S-48.)
28. The June 2010 IEP provided the same goals for reading decoding, fluency and comprehension, by reference to the Corrective Reading program, as were provided in the February 2010 IEP. It also retained the August 2009 and February 2010 mathematics goal. The IEP did not address behaviors or emotional needs directly in the listing of needs or the goals, but it did identify social skills as a need and provide access to a staff run support group. The IEP provided for the same SDI as had been offered in the

February 2010 IEP. It provided for consultation occupational therapy, one unit per month, and ESY services. It did not contain a behavioral intervention plan. (S-41.)

29. Student finished seventh grade at level 7/6 Saxon Math, progressing through the curriculum with passing scores. (S-50.)
30. Student finished seventh grade at the beginning of level B1 in Corrective Reading Decoding, with passing grades at level A; and at level B1 in Corrective Reading Comprehension, with passing grades. Student met and exceeded the fluency goal with second grade reading material. (S-50.)
31. Student's PSSA score in reading in April 2010 was below basic. (S-57.)
32. The District approved a revision to the June 2010 IEP, produced by the IEP team in November 2010, adding two writing goals. (S-52.)
33. In eighth grade, the District provided direct, structured, sequential and multisensory instruction in basic reading and encoding skills through the Corrective Reading program. This was delivered in small group by a qualified teacher, with some one-to-one instruction, for about 45 minutes per day. (NT 901-912.)
34. The District approved a revision to the June 2010 IEP, produced by the IEP team in January 2011, adding test modifications for PSSA and other assessments. The IEP reflected recognition of educational needs in language fluency, reading, mathematics, social skills and writing grammar, organization and development. (S-52.)
35. In November 2010, Student was instructed on grade level in Saxon Math, with passing grades. Student's fluency was at the 75th percentile when measured against second graders. (S-55.)
36. In February 2011, Student was not reaching the IEP goals for writing errors in grammar, usage, number of sentences or mechanics. Little progress was reported. (S-55.)
37. Due in part to Student's problematic social skills and behaviors of lying and bragging, Student's peers repeatedly harassed Student during Student's eighth grade year (2010-2011 school year). Parent notified appropriate District personnel about this several times during the year. (NT 2030-2031, 2033-2035.)
38. During Student's eighth grade year, Parent notified appropriate District personnel that Student was receiving private counseling due to Student's behaviors and emotional difficulties. (NT 2038-2039.)
39. At the end of eighth grade, in May 2011, (QRI) scores indicated that Student was instructional at fourth grade and frustrational at fifth grade in word identification and independent at an Upper Middle School level in reading comprehension. The reading teacher reported an instructional level at the high school level when material is read to the Student. On a different curriculum based assessment, "Easy CBM", Student scored about 50% at an eighth grade level in reading comprehension, and in reading fluency was

considered to be at an instructional level at fourth grade, between the 10th and 20th percentiles compared to fourth grade students. By the end of eighth grade, Student had completed Corrective Reading level B1 for decoding and comprehension; Student was considered able to enter Correctional Reading level B2 at the beginning of ninth grade, for both decoding and comprehension. (NT 901, 918-921; S-57.)

40. Although progress reporting for eighth grade suggested growth in reading fluency from a second grade level to a fourth grade level, seventh grade QRI scores indicated that Student was instructional at a fourth grade level in reading fluency. (S-57.)
41. Although QRI scores in January 2011 and November 2011 suggested multiple years of growth in comprehension, scores of another curriculum based assessment, "Easy CBM", contradicted the QRI scores, showing only 50% and 45% comprehension scores at grade eight, while the QRI was reported at the upper middle school level at an independent level. (NT 927-931; S-52, 60.)
42. Student made some progress in writing in eighth grade (2010-2011 school year). (NT 2016, 2029-2030; S-57.)
43. Student was being instructed in mathematics at grade level in eighth grade, although scores were variable on curriculum based measures. (S-57.)
44. Student did not receive occupational therapy services during eighth grade. (S-57.)
45. The District approved an IEP produced by the IEP team in June 2011, to be effective until June 2012. The IEP placed Student in supplemental learning support, about two to two and one half hours per day in the resource room for reading, writing and social studies. Student was to be included in regular education with supportive services for ninth grade. The June 2011 IEP provided two writing goals addressing grammar, usage, organization and development, with grade level baselines; and two reading goals addressing word reading, fluency and comprehension, and calling for research based reading instruction. Word reading and fluency were to be at fourth grade level baselines; comprehension was to be at eighth grade instructional level with look-backs. Specially Designed Instruction was reduced, eliminating some supports for organization and counseling services. ESY was offered. (S-57.)
46. The June 2011 IEP did not recognize behaviors impeding learning. (S-57.)
47. Prior to the beginning of Student's ninth grade year (2011-2012 school year), Student's case manager offered to provide Student with explicit teaching of social skills to address some of Student's problematic social behaviors. The teaching would be in the autistic support classroom in the presence of peers with autism spectrum disorders, one period per day. (NT 2045-2047; S-60.)
48. In the Fall of 2011, Student was resistive to attending the social skills class, expressing a feeling of embarrassment due to the location and nature of the teaching. (NT 2047- 2049, 2055-2059; S-60.)

49. In November 2011, the District approved a revision to the June 2011 IEP, rescheduling and reducing the hours of social teaching at Parent's request. The revised IEP provided direct teaching of social skills twice per week and a group session with the school guidance counselor once per week. The revision included a new goal for social skills. An educational assistant was assigned to support Student's social interactions during lunchtime. The District added specially designed instruction in the form of grouping with model peers, social skills modeling and lunchtime support for class assignments once per week. (NT 2059-2060; S-60.)
50. In November 2011, Student's Criterion writing scores were slightly lower than those reported in June 2011. Student's words correct per minute probes were below baseline. Student's comprehension probes for the comprehension goal were given at the sixth grade level, rather than at the eighth grade level baseline of the IEP goal. No progress was reported in social skills. Student's teachers reported progress in writing and reading. The revision discontinued occupational therapy services. (S-60.)
51. In December 2011, Student made an indiscrete negative comment that was reported broadly to Student's peers through word of mouth and the internet. Peers interpreted Student's comment as demonstrating a highly inappropriate lack of empathy for another peer who was out of school due to illness. As a result, peers threatened Student with physical harm repeatedly by posting messages through the internet and directly confronting and antagonizing Student, and Student reported that peers [reacted physically toward] Student. Incidents of harassment occurred numerous times over the ensuing months between December 2011 and March 2012. (NT 364, 1135-1140, 2068-2075; S-82 p. 18³.)
52. Parent reported some instances of bullying and cyber-bullying to District officials, who responded that they could not control or intervene with regard to cyber-bullying. (NT 528-539, 2301-2304.)
53. District officials inquired into some of the alleged incidents of harassment or bullying and did not find corroborative evidence; therefore, there was no further follow-up. (NT 486-487, 528-539.)
54. Parent kept Student home from school and asked for homebound instruction, which the District approved; however, Student returned to the neighborhood school with protective measures between January 2012 and March 2012 while waiting for homebound instruction to begin. Peers continued to harass Student during this time period. (NT 2075-2085.)
55. Protective measures included Parent driving Student to school privately and District staff escorting Student to special education classes at times when there was little student

³ I rely upon S-82 p. 18 (physician's letter in support of homebound services) for a limited purpose. It shows that either Student or Parent reported frequent peer harassment before April 2, 2012. These statements were made prior to the commencement of the due process matter, and thus give modest support to the veracity and accuracy of Parent's testimony in this matter. I take no inference from this document directly as to the truth of the matters stated therein.

presence in the hallways, as well as to other locations within the school. (NT 482-486, 2080-2085; S-82.)

56. Progress monitoring data for late January 2012, contrasted with reporting from November 2011, showed that Student made fewer errors in writing on one probe, although Student's total output in words and sentences declined. Writing organization remained at about the same level. Words correct per minute probes remained on fourth grade level reading material and Student's numbers declined. Comprehension scores remained approximately constant on sixth grade reading materials. Student remained in Saxon Math at level 87. Teachers reported progress in writing and reading comprehension. Social skills baseline data were reported for February 2012. (S-62.)
57. In late February 2012, the District approved a revision to the June 2011 IEP, approving Student for and offering one hour per week of ESY, consisting of eight weeks of individual tutoring to the words correct per minute IEP goal. (S-62.)
58. In February 2012, Parent requested that Student be returned to a different school within the District in about one month. The District responded by offering to place Student in a different middle school for the balance of the school year. (NT 2158; S-64, 67.)
59. In March 2012, Parent requested special education services to be provided in Student's home, by way of placement in instruction in the home, but District officials denied the request due to disagreement and concerns about this becoming the pendent placement. There was no progress monitoring on IEP goals for the rest of the school year. (NT 2079-2088; S-67, 68, 81, 100 p. 9.)
60. The District performed a re-evaluation of Student in March 2012, when Student was in ninth grade. The evaluation found that Student's intellectual ability was in the average range. The evaluation identified Student with Emotional Disturbance, Specific Learning Disability and Other Health Impairment, noting educational needs with regard to sight reading, decoding and fluency; spelling and written expression; organization and study skills; social skills; frustration tolerance and impulse control; and coping and problem solving skills. The evaluation also noted long standing issues with lying and peer difficulties, need for support with focus, organization, time management and study skills, and needs for specially designed instruction regarding social skills and coping strategies for internal and external stressors. (S-64.)
61. The 2012 re-evaluation included review of: cognitive scores on multiple instruments and achievement scores from 2009; input from at least three teachers regarding reading, writing, social studies, science and mathematics; curriculum based assessments, classroom grades and classroom performance scores; progress reports on the current IEP; and parental input through two interviews with Parent. (NT 2136, 2149; S-64.)
62. The school psychologist who performed the 2012 re-evaluation conducted interviews with teachers and Student, observed Student during testing and spoke with Student's treating psychiatrist. (S-64.)

63. The 2012 re-evaluation included standardized achievement testing with two different instruments that included measures of word reading, decoding, reading fluency and comprehension, spelling, writing conventions, story composition and spontaneous writing. Scores showed that Student was functioning below average and below expectations for Student's intelligence in reading and writing. Basic sight reading, reading accuracy, phonetic decoding and oral reading skills were scored at the third grade level, well below expectations. Reading comprehension was in the average range, at the 30th percentile. (S-64.)
64. Student's spelling achievement and spontaneous composition achievement were below average. Writing conventions and composition were poor and below average, respectively. (S-64.)
65. The 2012 re-evaluation included administration of four behavior rating scales, student interview and psychiatrist report in order to address the suspected disability category of Emotional disturbance. A general behavior rating inventory was requested of Student, a teacher and Parents; Parents did not return the form due to an oversight but the psychologist interviewed Parent by telephone to obtain related input. The scores, when assessed together, led to a conclusion that Student should be classified with emotional disturbance due to a serious level of emotional disturbance. Scores also enabled the evaluator to rule out social maladjustment. (NT 2139-2140, 2149; S-64.)
66. The 2012 re-evaluation included an FBA. The FBA focused on behaviors of lying and inappropriate comments and produced a hypothesis that Student's behaviors of concern had the function of obtaining peer attention and defending against perceived injury to self esteem. (S-64.)
67. The 2012 re-evaluation identified needs including sight reading, decoding, reading fluency, spelling, written expression, organization, study skills, social skills, frustration tolerance, impulse control, coping and problem solving. The re-evaluation report recommended specially designed instruction in the form of direct, systematic instruction for basic reading and written expression skills. It recommended support for focus, organization, time management, and study skills due to Student's ADHD. It recommended instruction and support for social skills, self-regulation, social communication, conversation and regulation of inappropriate behaviors. It recommended an educational environment designed to monitor, support and limit Student through greater structure, small group instruction, access to staff, close teacher proximity in the classroom, adult close proximity in the lunch room and staggered dismissal between classes. (S-64.)
68. The District approved an IEP produced by the IEP team in April 2012, to be effective until April 2013. The IEP placed Student in supplemental learning support and supplemental emotional support, about three to three and one half hours per day in the resource room for reading, writing and social studies for Student's tenth grade year (2012-2013 school year). Student was to be on homebound instruction to the end of the ninth grade year. The District offered to place Student in a different middle school for the balance of the ninth grade year if not on homebound instruction. Student was to be

included in regular education with supportive services for all other tenth grade services. The District placed Student in a vocational school to learn culinary arts for half of each school day. (NT 2185-2186; S-65.)

69. The April 2012 IEP provided two reading goals addressing word reading, fluency and comprehension; and two writing goals addressing grammar, usage, organization and development, with grade level baselines. The reading goal measured by words correct per minute posited slightly lower fourth grade level baselines than those set in the June 2011 IEP. The reading comprehension goal posited a baseline for a sixth grade reading level text, two grades below the baseline set in the June 2011 IEP. Writing goals were rewritten with regard to baseline and measurement, but addressed essentially the same skills as had been addressed in the June 2011 IEP; the writing conventions goal was set higher than the similar goal set in the June 2011 IEP. (S-65.)
70. The April 2012 IEP offered two goals for social skills, including a self-regulation and truthfulness goal and a social communication goal. (S-65.)
71. The April 2012 IEP offered all of the specially designed instruction provided in the June 2011 IEP as revised. In addition, some accommodations and modifications addressing organization and study skills were reintroduced from previous IEPs, and additional specially designed instruction and modifications were added, including a positive behavior support plan, provision of copies of notes, spelling word practice in the learning support reading class, extra time to organize materials and complete study tools, and meeting with case manager daily. (S-65, 66.)
72. Group counseling was offered, once per week. ESY was offered, one hour per week for six weeks. This is two hours less than was offered in the June 2011 IEP as revised in February 2012. (S-65.)
73. The April 2012 IEP recognized behaviors impeding learning. (S-65.)
74. In May 2012, the District approved a revision to the April 2012 IEP, placing Student at a District high school that does not receive peers from Student's former middle school, and providing transportation to the vocational program and the new high school placement. (S-70.)
75. Student remained on homebound instruction without special education services pursuant to an IEP for the remainder of ninth grade (2011-2012 school year). Homebound teachers did work on decoding, word attack comprehension and writing skills in homebound English sessions, utilizing the Corrective Reading program. (NT 2089-2090; S-65, 81, 83.)
76. In June 2012, Parent through counsel filed a request for due process, including a request for an IEE. The District in response offered to conduct a re-evaluation. Parent declined that offer. (NT 2169-2171; S-78, 103.)

77. Student began attending the District high school to which Student was placed by the April 2012 IEP as revised. Peer harassment continued but at a lower incidence, during Student's tenth grade year. (NT 2183-2191, 2095-2100; S-101.)
78. In September 2012, the District approved revisions to the April 2012 IEP, to be effective until April 2013. The revisions updated present levels, changed Student's transition services, and provided for attendance in co-taught social studies and subsequently in regular education algebra. (S-86 to 88.)
79. In November 2012, the District approved revisions to the April 2012 IEP, to be effective until April 2013. The revisions updated present levels, changed one reading goal and eliminated the self-control goal, and reduced the amount of time to be spent in resource room. (S-86 to 88, 101.)
80. The November 2012 revision to present levels reported that Student had met the reading fluency goal with fourth grade reading materials, although Student had not shown consistent scores set forth in the goal for three consecutive probes. As a result of being deemed to have met the goal, the District offered a new reading fluency and accuracy goal with fifth grade reading materials, and established a baseline. (S-101.)
81. The November 2012 revision to present levels reported that Student showed some progress in reading from September 2012 to November 2012, moving to the next level in Corrective Reading, showing improved reading fluency and accuracy with warm readings, and showing improved comprehension scores. (NT 2187; S-101.)
82. Revised November present levels reported for writing showed limited progress in conventions and organization. (S-101.)
83. Revised November present levels reported that Student met the goal for self-regulation, and the revision eliminated the goal. (NT 2187; S-101.)
84. Student's organizational skills were improved in February 2013. (NT 2018.)
85. The May 2012 IEP, as revised in May, September and November 2012, continues to provide the Corrective Reading program for reading fluency and comprehension. (S-101.)
86. The May 2012 IEP, as revised in May, September and November 2012, does not provide a plan for protecting Student from bullying at Student's present location; however, staff at that school have responded to reports of bullying through a variety of means, including protective measures, counseling of the parties, and visiting consequences on perpetrators. In addition, the District has and had at all relevant times a policy to address bullying; however, the policy prior to October 2012 was ambiguous as to its application to cyber-bullying. (NT 2179-2182; S-101; P-25.)

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 (which in this matter is the hearing officer).⁴ 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 evidence⁵ that the other party failed to fulfill its legal obligations as alleged in the due process complaint. 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 this matter, the District requested due process and the burden of proof is allocated to the District. The District bears the burden of persuasion that its re-evaluation was appropriate and that Parent is not entitled to an IEE. If the District fails to produce a preponderance of evidence in support of its claim, or if the evidence is in “equipoise”, then the District cannot prevail under the IDEA.

⁴ 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.

⁵ 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.

APPROPRIATENESS OF EVALUATION

The IDEA sets forth two purposes of the required evaluation: to determine whether or not 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). The IDEA regulations prescribe in detail the procedures to be used in order to fulfill this requirement. 34 C.F.R. §§300.301 to 300.311.⁶ 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). Here, the evidence is preponderant that this standard has been met. The District’s strategies in the 2012 re-evaluation at issue here (as well as in the 2009 re-evaluation, on which the 2012 re-evaluation relied) included review of documents, interviews with Parent, teachers and Student, clinical observations of Student, standardized testing with multiple instruments evaluating cognitive skill and academic achievement, multiple forms of curriculum based testing, and multiple instruments evaluating behavior, social and emotional needs. The 2012 evaluation especially utilized a variety of behavior rating inventories as well as interview of Student and of Student’s psychiatrist to evaluate Student’s behavior, social functioning and emotional functioning.

⁶ Under the IDEA regulations, re-evaluations must meet the same standards as evaluations, in terms of both the scope of the re-evaluation and the required procedural standards. 34 C.F.R. §300.303. Therefore, I will apply the standards applicable to evaluations, even though the District action in question was a re-evaluation.

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 record is preponderant that the District's evaluator solicited and obtained parental input through review of previous parental input, solicitation of behavior inventories and two telephone interviews with Parent.

The District complied with the legal requirement that the agency review classroom based assessments, state assessments and observations of the child, 20 U.S.C. §1414(c)(1)(ii), (iii), 34 C.F.R. §300.305(a)(1), including observations 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 multidisciplinary team considered grades, classroom assessments of reading and writing, PSSA scores, and progress in the direct reading instruction program, which measures progress by its own prescribed benchmarks.

The agency used technically sound testing instruments, 20 U.S.C. §1414(b)(2)(C), 34 C.F.R. §300.304(b)(3); all instruments used were valid and reliable for the purpose for which they were used, 20 U.S.C. §1414(b)(3)(A)(iii), 34 C.F.R. §300.304(c)(1)(iii), and all were administered in accordance with the applicable instructions of the publisher, 20 U.S.C. §1414(b)(3)(A)(v), 34 C.F.R. §300.304(c)(1)(v). (FF 18.) The evaluator was trained and knowledgeable. 20 U.S.C. §1414(b)(3)(A)(iv), 34 C.F.R. §300.304(c)(1)(iv).

The re-evaluation of the Student was sufficiently comprehensive to determine whether or not Student suffered from a disability as defined in the law, as well as to identify all of

Student's educational needs. The evaluator and the multidisciplinary team considered Student's cognitive functioning, achievement, and emotional, social and behavioral functioning. By a preponderance of the evidence, I conclude that the evaluator and multidisciplinary team addressed all areas of suspected disability, 20 U.S.C. §1414(b)(3)(B); 34 C.F.R. §300.304(c)(4).

Consequently, I conclude that the District's 2012 re-evaluation was appropriate, and therefore Parents are not entitled to an independent educational evaluation at public expense.

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).

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).

Whether the IEP meets this test must be judged in light of the IDEA’s mandate that an IEP must address all of a student’s educational needs. 20 U.S.C. § 1414(d)(1)(A)(i)(I)(bb). 34 C.F.R. §300.320(a)(2). Whether a FAPE has been offered must be judged in light of the child’s unique constellation of educational needs, Board of Education v. Rowley, 458 U.S. 176, 181-82, 102 S.Ct. 3034, 1038, 73 L.Ed.2d 690 (1982), and the child’s intellectual potential, Shore Reg’l High Sch. Bd. of Ed. v. P.S., 381 F.3d 194, 198 (3d Cir. 2004).

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).

Recognizing that the IDEA does not require the best possible services for a child, and that it does not make a school district the guarantor of a student's success, I nevertheless decide that the District in the present matter failed to meet the modest standards of the IDEA, discussed above. I conclude that the District failed to provide appropriate instruction in basic reading and writing skills, failed to provide appropriate intervention for Student's behavioral, social and emotional needs, and failed to appropriately address the bullying of Student by peers, leading to a failure to provide needed special education and related services when Student was placed on homebound instruction for months as a result of the bullying.⁷

BASIC READING AND WRITING

I conclude that the District failed to provide appropriate programming to Student in basic reading and writing for three reasons. First, the District was aware that Student had a long history of failure to make progress in reading and writing, and was in middle school, a relatively late age for learning reading basics and fundamental writing skills. Second, the District's own progress data manifestly demonstrate that Student made either no progress or very limited progress during most of the period under review, from June 27, 2010 to the first day of the 2012-2013 school year, when Student entered tenth grade. Third, the District did not make any material change to its programming for teaching reading basics and writing skills to Student.

⁷ Parents asserted that the District failed to address various other educational needs of Student, including difficulties in mathematics. I conclude that the District did not fail to address any other educational needs of Student. As discussed below, I conclude that the 2012 re-evaluation was comprehensive and disclosed all of Student's educational needs; moreover, I conclude that the District's offered and implemented programs and placements appropriately addressed all of Student's educational needs except those discussed here. In particular, I conclude that the District provided Student with appropriate programming for mathematics skills, as evidenced by Student's meaningful progress in mathematics during the relevant time period under consideration in this matter.

Data Indicating Limited Progress And Below Grade Level Achievement

The record in this matter shows preponderantly that the District was on notice of substantial data suggesting that Student's progress in reading basics and writing was very limited. By June 2010, Student was a rising eighth grader with average intelligence who was rated instructional – not proficient - in reading at a fourth grade level. While the data are mixed concerning Student's reading level at that time, I conclude that curriculum based measures taken together, along with the baselines set in the seventh grade and eighth grade IEPs, preponderantly show that Student had reached an instructional fourth grade level for fluency and comprehension by the end of seventh grade. A fluency goal for seventh grade was premised upon second grade reading materials, and Student met this goal by the end of seventh grade. Standardized testing in 2009 had placed Student's reading in the below average range, discrepant with Student's expected achievement in light of average intelligence. PSSA scores had placed Student in the Below Basic range throughout Student's school career. Parent reported observing no progress in reading, which was a source of great embarrassment to Student.

Similarly, there was little data in the record available to the District that suggested that Student's writing was improving prior to seventh grade. The 2009 re-evaluation had found Student's broad written language skills to be markedly weak and discrepant with average ability. The June 2010 IEP indicated that Student's writing was not viable beyond short answers and supported writing of paragraphs. PSSA scores from fourth through sixth grades in writing indicated a constant basic level of achievement.

Lack of Progress from June 2010 to September 2012

On the record as a whole, I conclude that the Student did not make meaningful progress in reading during the period in question in this matter. Student's PSSA scores remained Below Basic throughout that period. Student's standardized achievement scores in 2009 were below average and discrepant with ability, and when re-evaluated in 2012, Student's achievement remained below average and discrepant. Basic sight reading, reading accuracy, phonetic decoding and oral reading skills were scored at the third grade level in 2012, well below expectations for a student in ninth grade with average intelligence. Reading comprehension was in the lower portion of the average range, at the 30th percentile. Thus, standardized measures showed little to no progress during the period in question.

Curriculum based measures and IEP reading goal baselines indicate a lack of meaningful progress. By the end of seventh grade, Student was instructional for fluency and comprehension at a fourth grade level. Student had met fluency goals on second grade leveled text. Student's word identification was instructional at a fifth grade level. In May 2011, QRI scores indicated that Student was instructional at fourth grade and frustrational at fifth grade in word identification and independent at an Upper Middle School level in reading comprehension. However, on a different curriculum based assessment, "Easy CBM", Student scored about 50% at an eighth grade level in reading comprehension, and in reading fluency was considered to be at an instructional level at fourth grade, between the 10th and 20th percentiles compared to fourth grade students. In November 2011, Student was performing below baseline in fluency and comprehension. By January, fluency was still being measured with fourth grade materials, and comprehension with sixth grade materials. An IEP offered in April 2012 set fluency baselines at

a slightly lower figure, to be measured on fourth grade text; comprehension goals were to be measured at a sixth grade level for this student at the end of ninth grade.

The District's reading teacher testified that, despite the tepid data described above, Student was making substantial progress in reading fluency and comprehension, based largely upon Student's progress in the Corrective Reading program. As reported in progress reports and the teacher's testimony, Student began that program in February of seventh grade at the program's level A, and completed that level by the end of seventh grade. Student entered the program's level B-1, and completed that level by the end of eighth grade. Student continued to progress through level B-2 while in ninth grade. The District argues that this progress in the reading program is sufficient evidence of meaningful progress.

I do not accept this argument. There was no evidence that the Corrective Reading numbers are related to grade level; thus, there is no evidence translating progress within the program to progress in the District's curriculum. Similarly, there was no evidence correlating Corrective Reading scores with standardized measures. Thus, the data indicating progress in the Corrective Reading program does not contradict the substantial data from standardized measures and curriculum based measures that indicated minimal progress in reading fluency and comprehension. On balance, the evidence is preponderant that Student did not make meaningful progress in reading fluency and comprehension skills from June 27, 2010 to the first day of the 2012-2013 school year, when Student entered tenth grade.

Similarly, Student made negligible progress in writing. In June 2010, Student was unable to write more than short answers to questions and short paragraphs with maximum teacher supports. In February 2011, Student was not reaching the IEP goals for writing errors in grammar, usage, number of sentences or mechanics; little progress was reported. By the eighth

grade, some progress was reported by teachers and parent, but Student's writing remained well below grade level. In November 2011, curriculum based measures indicated either no progress or slight regression in writing conventions and organization, and January 2012 measures showed at best mixed results, with no meaningful gains. The 2012 re-evaluation with a standardized instrument showed below average and discrepant achievement in spelling and spontaneous composition; writing conventions were poor and composition was below average.

District Offered Services Did Not Change Materially

My review of the IEPs from the June 2011 IEP with revisions to the April 2012 IEP leads me to conclude that the District did not change its program for reading and writing to address Student's lack of substantial progress in reading and writing from seventh to the end of ninth grade, despite Student's lack of progress. Student remained in a placement of supplemental learning support throughout for reading and writing. Goals in reading were uniformly limited to two goals; reading decoding, sight word reading and automaticity was always measured by fluency probes, and comprehension was measured in the other reading goal through curriculum based measures. The District provided one reading program, Corrective Reading, from February of Student's seventh grade year to the end of ninth grade, despite substantial data indicating that Student's response to that program, while encouraging, had not led to any objective progress in either curriculum based or standardized measures. Other specially designed instruction, modifications and accommodations varied somewhat through the relevant time period, most remained constant from IEP to IEP, and few addressed Student's reading needs.

The District did little to vary its approach to Student's discrepant and below grade writing skills, utilizing the same goals and measures in each IEP, with slight variation in the metric used,

and an eclectic programmatic approach. SDI addressing writing in most IEPs consisted of graphic organizers and use of a computer.

In light of the data indicating lack of progress, and despite the Student's advanced age that would make progress especially difficult for Student, the District failed to increase the amount of time provided for review and repetition of basic reading skills being taught in the Corrective Reading program, direct instruction of vocabulary and spelling, and coordinated reading of literature in conjunction with explicit teaching of basic skills. Corrective Reading remained the same throughout, consistent with the program's protocol, at about 45 minutes per day. The IEP provided for about two to two and one half hours of resource room teaching, divided among Corrective Reading, writing instruction and mathematics instruction. The June 2010 and June 2011 IEPs maintained the same levels of service.

ESY services were not extensive. The seventh and eighth grade revised IEPs provided for eight weeks of ESY for basic reading, one hour per week, for the summers of 2010 and 2011. The April 2012 IEP reduced the amount of ESY services offered for the summer of 2013 to six weeks, one hour per week. I conclude that this level of ESY services was inappropriate for Student, in light of Student's serious decoding, fluency and writing deficits.

In sum, the District was aware that Student was starting the period under consideration with a reading level that was far behind the level of Student's peers, and was aware of data suggesting that Student had been making very slow progress in learning basic reading and writing skills. It did not change the programs it was offering to address the magnitude of the Student's achievement gap in these areas, nor did it change its offerings during the relevant period when data continued to show a lack of meaningful progress in basic reading and writing skills. The data show that minimal progress was made during the time from June 27, 2010 to the

first day of school in the 2012-2013 school year. I conclude that the District failed to provide Student with a FAPE during that period of time.

I conclude that the period of deprivation of a FAPE ended with the first day of school in the 2012-2013 school year, because the data show that the District substantially changed its programming to address the low progress shown above, and that Student began to show progress in basic reading and writing skills. An IEP in April 2012, subsequent to the 2012 re-evaluation, increased the services provided to Student. Special education in resource room was increased by about one hour. Practice in spelling in the resource room was added to the specially designed instruction. However, in November 2012, the amount of time in resource room was decreased below the time assigned in the June 2011 IEP. The IEP team reformulated the reading goals and advanced baselines in light of progress shown in curriculum based measures taken in the Fall of Student's tenth grade year at the District's high school. Corrective Reading was continued, but some objective progress was evident in the present levels. A half day of vocational training was provided at a vocational school that Student wanted to attend as part of Student's post-secondary transition plan. Therefore, balancing these improvements against the reduction of ESY services, I conclude that the April 2012 IEP was reasonably calculated to, and did, provide Student with meaningful progress with regard to reading and writing, starting with the first day of school in the 2012-2013 school year.

BEHAVIOR, SOCIAL SKILLS AND EMOTIONAL NEEDS

Parents argued that the District also failed to provide adequate programming to address Student's problematic behaviors of lying and avoiding work, Student's deficits in social skill, including self-aggrandizement by trying to "top" assertions made by peers, and a general lack of

understanding of social conversation that led to repeated instances of peer rejection and avoidance, and Student's serious emotional needs that began to manifest themselves in seventh grade, and escalated from then until the period after December 2011, when Student suffered episodes of suicidal ideation, depression and withdrawal. I conclude that the evidence is preponderant that the District did not appropriately address these problems during Student's eighth and ninth grade years.

The 2009 re-evaluation noted behavioral and emotional issues related to the Student's longstanding diagnosis of ADHD. The District also did a functional behavioral assessment of lying and avoidance behaviors as part of the 2009 re-evaluation, created a behavior intervention plan and provided an IEP goal related to these behaviors. The behaviors became more prominent in seventh grade. Counseling was made available as part of the IEP specially designed instruction. However, the June 2010 IEP did not recognize or address these behaviors as impeding learning, there was not an FBA or Behavior plan for eighth grade, and the subsequent IEPs largely failed to address these needs. In fact, the June 2011 IEP reduced supports for behavioral needs.

In the first semester of ninth grade, the Student's case manager made an effort to provide social skills instruction to Student, but selected a program that was inappropriate for Student, providing the instruction in an autistic support environment with peers on that spectrum. This was inappropriate because Student was in ninth grade and very sensitive to Student's standing with peers; thus the intervention of Student's increasing social problems and resultant depression and anxiety had the effect of exacerbating those problems instead of helping. I conclude that the intervention effort was belated and ill-conceived and thus was not reasonably calculated to provide meaningful educational benefit.

BULLYING

There was extensive testimony about an incident that occurred in December 2011, when Student was in ninth grade. Student was by then struggling very poor social skills, difficulties regulating Student's own behavior, anxiety and self-esteem issues stemming from difficulties with basic reading and writing, as well as very poor social skills, according to the record. [This incident related to an] inappropriate comment about a peer who was ill, and those who heard it reacted with anger and disdain. [Incidents involving peer reactions] were repeated frequently and continued over a long period of time. Student was afraid, embarrassed and depressed in response to these actions of peers. I conclude that Student was being bullied, and that Student's emotional, educational and physical wellbeing were compromised as a result of this bullying.

I also conclude by a preponderance of the evidence that the District failed to respond to this bullying appropriately during Student's ninth grade. School officials reacted with skepticism, and effectively placed a burden on Student and Parent to substantiate that bullying was occurring. I considered the testimony of the responsible administrators and find that their reasons for skepticism were not sufficient to justify anything but a thorough and continuing response to the repeated incidents that were proven by a preponderance in this record. In particular, the officials took the position, and communicated it to Parent, that cyber-bullying was not within their responsibility, and that they would not investigate it or take action to stop it.

I conclude that, as a result of the bullying, Student was medically unable to attend school. Parent requested homebound status for temporary purposes, and the District approved that service. However, Parent then requested instruction in the home with specially designed instruction and related services, but the District declined to provide such a change in placement.

Thus, from the beginning of homebound services in March 2012 to the end of the school year, Student did not receive the special education services called for in Student's IEP.⁸ Thus, during this time of homebound services, the District failed to provide Student with a FAPE.

The District argues that the homebound services were the choice of parent over District officials' objection, and that they resisted placing Student on instruction in the home because they did not want it to become the pendent placement if parent should file for due process. While their efforts to bring Student back to school are acknowledged, this was in context of uncontrolled bullying, including threats of physical harm, that the District's officials failed to effectively address. Given those circumstances, the District will not be heard to complain that the Parent obstructed provision of special education services. The concern for prolonged placement in a highly restrictive setting, while valid, does not justify denial of otherwise appropriate and needed services.

I find that Student continued to be subject to bullying from the beginning of the 2012-2013 school year to the last day of hearings in this matter, but that it did not deprive Student of a FAPE. The District, at parent's request had placed Student in a high school that did not receive many if any peers from the middle school where the Student had made the inappropriate comment; thus, few peers at the new high school raised the matter with Student. In short, the frequency and intensity of the harassment reduced considerably. Perhaps due in part to District social skills instruction and counseling, Student was able to react less intensely to what comments were made, and was able to continue to make educational progress. Moreover, high school officials intervened effectively and appropriately to incidents as they arose, providing

⁸ Although reading instruction was provided using Corrective Reading, it was not provided as offered in the IEP, and the record does not support a conclusion that it was provided with fidelity.

Student with greater assurance of safety. Thus, I conclude that the deprivation of FAPE did not extend beyond the first day of school in the 2012-2013 school year.

CREDIBILITY

I found the Parent to be a credible and reliable witness. I observed this witness and considered her answers carefully. Her demeanor was not overly adversarial, although at times she jostled with opposing counsel. Parent's essential testimony was corroborated by the record, although there were some contradictions within the testimony itself, all of which were about details of history that were not determinative. The witness' way of answering questions was for the most part open, helpful and willing to concede a point in service of truth.

I found all other witnesses to be credible and reliable, based upon their answers to questions, material consistency with other testimony and the written record, and demeanor. However, I accorded less weight to District personnel with regard to Student's progress, because such testimony was inconsistent with data reported previously.

COMPENSATORY EDUCATION

Compensatory education is an appropriate remedy when a school district has failed to provide a student with a FAPE. Lester H. v. Gilhool, 916 F.2d 865, 781-783 (3d Cir. 1990). I conclude that the District should provide Student with compensatory education; therefore, I must determine the nature and amount of compensatory education to be provided. Compensatory education is an equitable remedy ordered for the purpose of replacing the educational services that should have been provided. Ibid. This can be either an hour by hour compensation or restoration of the student to the position student would have been in if appropriate educational

services had been provided. The record in this matter contains no evidence showing what position the Student would have been in if provided with a FAPE during the relevant time period; therefore, I conclude that compensatory education should be measured on an hourly basis.

With regard to reading and writing, I have concluded that the reading services provided during the relevant period were insufficient to provide Student with meaningful progress. Therefore, I will order the District to provide a number of hours of direct, systematic and sequential reading instruction which is comparable to the number of hours that it provided for in its IEP documents. There is evidence that direct reading instruction was provided for about one hour per day for every school day, and direct writing instruction and spelling practice were provided for an undefined period of time every day. Therefore, I will order the District to provide two hours per school day of direct, structured, sequential and multisensory instruction through a research based program that addresses Student's needs in reading decoding, sight word reading, automaticity and fluency, as well as spelling, writing conventions and writing organization.⁹ In addition, I will order the District to provide one hour per school day of instruction to address Student's needs in behavior regulation and social skills, including social communication.

⁹ My findings and conclusions in this matter do not undercut the likely remedial efficacy of the order for two hours of compensatory education for reading and writing. While the District's provision of more services per day might have been sufficient to provide a FAPE, the converse is not necessarily true. I conclude only that the District might have helped Student obtain meaningful benefits by some material change in the services that it offered, whether that be more instruction time, changing the nature of the program offered, addressing (if indicated) fidelity of delivery, providing greater review and repetition of skills taught explicitly, or some other change dictated by its expertise. On this record, then, two hours of compensatory education services appears to be an appropriate level of remedy.

CONCLUSION

I conclude that: 1) the District's 2012 re-evaluation was appropriate, and therefore Parents are not entitled to an independent educational evaluation at public expense; 2) the District failed to provide Student with a FAPE from June 27, 2010 to the first day of school in the 2012-2013 school year, and compensatory education will be ordered for part of that time; and 3) the program and placement provided by the District from the first day of school in the 2012-2013 school year to the last day of hearings in this matter, February 5, 2013, was reasonably calculated to, and did in fact provide Student with, meaningful educational gain; therefore, I will not enter any order for prospective relief by way of alteration of the placement or program for Student's tenth grade year.

Any claims regarding issues that are encompassed in this captioned matter and not specifically addressed by this decision and order are denied and dismissed.

ORDER

1. The re-evaluation dated March 15, 2012, provided by the School District (District) was appropriate under the IDEA.
2. The District failed to offer and provide Student with a FAPE from June 27, 2010 to the first day of school in the 2012-2013 school year.
3. The hearing officer does not order the District to provide an IEE at public expense.
4. The hearing officer hereby orders the District to provide compensatory education to Student in the form of direct, explicit, sequential and multisensory instruction that addresses Student's current needs with regard to reading decoding, sight word reading, automaticity and fluency, as well as spelling, writing conventions and writing organization. The District shall provide this compensatory education in the amount of two hours for every day in which school was in session, including regularly scheduled District summer ESY programming, from June 27, 2010 to the first day of school in the 2012-2013 school year.

5. The hearing officer hereby orders the District to provide compensatory education to Student in the form of instruction that addresses Student's needs regarding behavior regulation and social skills, including social communication. The District shall provide this compensatory education in the amount of one hour for every day in which school was in session, including regularly scheduled District summer ESY programming, from June 27, 2010 to the first day of school in the 2012-2013 school year.
6. The above services shall be provided by instructors selected by Parents and qualified to provide the services described above. The cost of such services shall be limited to the comparable cost that the District would incur to provide such services through qualified instructors, including salary and fringe benefits. The services may be provided at any time, including after school hours or in the summer, until Student reaches 21 years of age.
7. The hearing officer does not order the District to provide any additional services for the 2012-2013 school year.

William F. Culleton, Jr. Esq.

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

March 12, 2013