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: D.P.

Date of Birth: [redacted]

ODR No. 3432-12-13-KE

CLOSED HEARING

Parties to the Hearing:	Representative:
Parent	Drew Christian, Esquire 801 Monroe Avenue Scranton, PA 18510
North Pocono School District 701 Church Street Moscow, PA 18444	Anne E. Hendricks, Esquire Levin Legal Group 1301 Masons Mill Business Park 1800 Byberry Road Huntingdon Valley, PA 19006
Dates of Hearing:	December 13, 2012; December 14, 2012; January 4, 2013; February 4, 2013; February 25, 2013
Record Closed:	March 26, 2013
Date of Decision:	April 5, 2013
Hearing Officer:	William F. Culleton, Jr., Esquire

INTRODUCTION AND PROCEDURAL HISTORY

The student named in the title page of this decision (Student) is a resident of the school district named in the title page of this decision (District), who attended a District elementary school at times during the period relevant to this matter. (NT 7-8.) The District has declined to identify Student as a child with a disability pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA), but has recognized that Student is a protected handicapped student and has provided Student with a service agreement pursuant to section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (section 504) and chapter 15 of the Pennsylvania Code. (NT 7-8; J 5, 16, 17, 18, 20, 23, 29, 33.)[1]

Parent named in the title page of this decision (Parent)[2] requested due process alleging that the District failed inappropriately to identify Student as a child in need of special education during the relevant time, and failed to provide Student with a free appropriate public education (FAPE) as required by the IDEA and section 504. Parent seeks compensatory education for the period from June 19, 2010 to December 13, 2012[3], an order declaring that Student is a child with a disability under the IDEA, and an order that the District provide Student with an appropriate IEP.

The hearing was completed in five sessions. The record closed upon receipt of written summations.

---

[1] The parties submitted a joint exhibit book, designated herein as "J", and Parents submitted a separate book, designated herein as "P".

[2] References herein to "Parent" in the singular refer to Student's Mother. Although Student's Father joined in this due process complaint and fully endorsed Student's Mother's positions taken in this matter, only Student's Mother participated in the hearing and conducted all of the transactions that are related in evidence. Therefore, I refer to Student's Mother as "Parent" for ease of reference.

[3] Parent's complaint sought compensatory education from June 19, 2010 until such time as appropriate programming should be implemented. (J 1.) However, I decided that there should be an end point to the receipt of evidence, and over Parent's objection, I designated the first day of hearings, December 13, 2012, as the last date for receipt of evidence. (NT 17-20.)

ISSUES

1. Is Student a child with a disability as defined in the IDEA?

2. Did the District fail inappropriately to identify Student as a child with a disability under the IDEA at any time from June 19, 2010 to December 13, 2012?

3. Did the District fail to offer or provide Student with a FAPE from June 19, 2010 to December 13, 2012, to the extent required by the IDEA or section 504?

4. Should the hearing officer order the District to identify Student as a child with a disability under the IDEA?

5. Should the hearing officer order the District to provide compensatory education to Student for all or any part of the period from June 19, 2010 to December 13, 2012?

FINDINGS OF FACT

Student's Medical and Educational History Prior To Seventh Grade

1. Student has been enrolled in the District since kindergarten. From kindergarten through fifth grade, Student did not exhibit any academic, social or behavioral difficulties. Student's achievement every year was average to above average in most areas of the curriculum. (J 32.)

2. In October 2009, when Student was in sixth grade, Parent sought a section 504 service agreement based on a doctor's diagnosis of Post Viral Fatigue Syndrome; the District provided the service agreement. In December 2009, after an unusual number of absences and tardies, Parent provided a recommendation for homebound instruction from Student's primary care physician, based on a diagnosis of Tourette's Syndrome. Student remained on homebound instruction from December to the end of the year. (J 32.)

3. Student presents with a variety of complaints and symptoms, which varies by time and place. Symptoms and complaints include muscular weakness in the trunk requiring frequent breaks to lie down; pain and swelling in the hands, precluding Student from writing frequently or for long periods of time; "brain fog" which interferes with Student's focus and attention; pain in the eyes and headaches; frequent gastro-intestinal problems; difficulties with the feet and legs; sleep disturbance and generalized fatigue. Student also reports significant symptoms of anxiety, physical tics and obsessive and compulsive thoughts and behaviors. (J 32.)

4. Student has received a variety of diagnoses from various doctors and psychologists, including Post Viral Fatigue Syndrome, Dysautonomia, Tourette's Syndrome, Reflex Neurovascular Dystrophy, Obsessive Compulsive Disorder, Over Anxious Disorder, Generalized Anxiety Disorder, Attention Deficit Disorder, and Asthma. (J 32.)

5. Teachers had reported to school personnel that Student was suffering from Tourette's tics, sometimes including major muscular actions with arms or legs, periods of varying lengths where Student could not focus, and slow processing with written material. Teachers also reported that Student's symptoms could be subtle and not apparent to teachers or others spending limited time with Student. (NT 113-114, 237-244; P 2, 5, 7.)

Educational Services And Progress During Seventh Grade (2010-2011 School Year)

6. In August 2010, Parent reported to the District's guidance counselor that Student was diagnosed with Post-Viral Syndrome, Tourette's Syndrome, Dysautonomia and Reflex Neuro-Vascular Dystrophy. Student began the school year attending school, was absent frequently in the early weeks of seventh grade, and then returned to homebound instruction and remained out of school for most of the year. (J 15, 32.)

7. In the August meeting with the guidance counselor, Parent provided a copy of a summary of visit with a rheumatologist at the Children's Hospital of Philadelphia (CHOP), recommending an Individualized Education Program (IEP) at school. Parent informed the guidance counselor that Student experienced various symptoms, including Tourette's tics and pain. (J 10, 15.)

8. Student's teachers reported that Student's school performance was good. Student was referred to a child study team for screening and increased intervention in regular education. (J 15.)

9. On September 23, 2010, the Student's school presented an advocate for people with Tourette's Syndrome at a school assembly [redacted]. (J 15.)

10. On September 23, 2010, Parent requested an IEP and presented a medical note requesting homebound instruction. Parent indicated that Student's pain and tics were becoming too much for Student and that was why Student was being absent more often in September. Parent indicated an intention that Student would attend school as much as possible, possibly attending partial days. (J 15.)

11. The medical note for homebound instruction indicated diagnoses including Tourette's Syndrome, Dysautonomia, Reflux-Neurovascular Dystrophy. Additional medical reports provided to the District by February 2, 2011 included three reports from CHOP referencing diagnoses including anxiety and Obsessive Compulsive Disorder. (J 15.)

12. Student's science teacher for the beginning weeks of school did not report symptoms or indications of physical weakness, pain, difficulties with hands, attention difficulties, anxiety, depression, obsessive thoughts or compulsive behavior. (J 32.)

13. The science teacher did note a possible recurring Tourette's tic. (J 32.)

14. Student's reading teacher saw Student six times without noticing any symptoms or indications of physical weakness, pain, difficulties with hands, Tourette's tics, attention difficulties, anxiety, depression, obsessive thoughts or compulsive behavior, except for some possible Tourette's tics [on one occasion]. (J 32.)

15. Student's mathematics teacher noticed Tourette's tics [on that one occasion]. The Student had complained of tics previously during a quiz. (J 32.)

16. Student's English teacher saw Student for about one week's worth of classes. The teacher observed no identified tics but did see [some specific] movements. The teacher noticed some somatic complaints appearing when the work became more demanding. (J 32.)

17. Student had a section 504 service agreement from the previous year, and the guidance counselor promised that this would be implemented for seventh grade, and updated as necessary. (J 15.)

18. In October 2010, the child study team recommended not to evaluate Student and that the section 504 service plan was sufficient for Student. (J 15.)

19. On October 29, 2010, Parent attended a meeting with District personnel and stated that Student experienced frequent pain, tics [redacted], problems with handwriting and other physical actions, and difficulties with cognition. (J 15.)

20. Parent reiterated the request for an IEP at the meeting on October 29, 2010, and the Tourette's advocate requested an evaluation. On November 2, 2010, the District issued a Permission to Evaluate to Parent; this was signed on November 4, 2010 and marked as received on November 15, 2010. (J 13, 32.)

21. In October, November and December 2010, the District and Parent formulated revisions to the section 504 plan, based in part on recommendations from Student's homebound teacher, that included extended time, computer for writing, reduced writing requirements, scribing, study guides, calculator, elimination of deadlines, second set of textbooks for home use, limited practice problems for homework, homebound paperwork and communication between Parent and teachers. (J 15.)

22. During this time, standardized achievement testing indicated that Student was achieving above average at grade level in reading, writing and mathematics. (J 15.)

23. In December 2010, the homebound teacher reported to the seventh grade guidance counselor that Student experienced slow cognition during tests, distractibility, tics, perfectionism, exacerbation of symptoms due to stress, and significant detrimental effect on education as a result of symptoms. (NT 243-244; P 9.)

24. Parent provided the District with three reports from the Children's Hospital of Philadelphia (CHOP), dated in 2010, showing diagnoses of Dysautonomia and Tourette's syndrome, and noting amplified musculoskeletal pain; a 2012 neuropsychological evaluation with diagnoses of Over Anxious Disorder, Obsessive Compulsive Disorder

and Attention Deficit Disorder; a 2012 psychiatric report obtained by the District diagnosing Generalized Anxiety Disorder and Obsessive Compulsive Disorder; and nine notes from the personal care physician recommending homebound instruction. (NT 50-52; J 32.)

25. The Student's homebound teacher reported observing a wide variety of tics, involving the face, neck and leg, episodes of inability to respond, termed "brain fog", distractibility, and slow performance on assignments. The teacher indicated that increased stress exacerbated symptoms. (J 15.)

26. On February 2, 2011, the District issued an evaluation report, addressing suspected need in the areas of occupational therapy and attention. The evaluation report concluded that Student was not eligible under the IDEA. Assessment reports by the occupational therapist noted decreased trunk strength, fatigue and "brain fog". The report of the school psychologist indicated no test scores supportive of attention deficit disorder or behavior regulation difficulties interfering with education; however, scores were elevated with regard to emotional control. (NT 69-72; J 15.)

27. The District did not issue a further permission to evaluate despite clinically significant test scores in the February evaluation indicating a need for further data. (NT 73-76.)

28. In March 2011, the homebound teacher advised the counselor that Student required extra time for tests including the PSSA test due to cognitive symptoms of "brain fog." (NT 247-249; P 11.)

29. For the remainder of the school year, Student had a section 504 service plan that provided for "intermittent homebound" services, allowing Student to come to school when able, with homebound instruction when Student could not come to school. The plan included adaptations to the curriculum to reduce practice assignments for homework. Homebound instruction was offered for an average of about five hours per week in seventh and eighth grades, and five to ten hours per week in ninth grade. (NT 233, 749-751; J 32, 41, 46 p. 2; P-15.)

Educational Services, Offers And Progress During Eighth Grade (2011-2012 School Year)

30. Student was absent frequently in the early weeks of eighth grade, and then returned to homebound instruction and remained out of school for most of the year. (J 32.)

31. Student's academic progress was slow during eighth grade. (NT 545-547; J 46 p. 21.)

32. The District sought and Parent agreed to a psychiatric evaluation in April and May 2012. (NT 78-80; J 46 p. 21-22.)

33. The District terminated homebound services to Student in May 2012, replacing it with a "courtesy" tutoring service. Section 504 services were restricted to the school location. (NT 539-549; J 46 p. 21-22.)

34. From September 23, 2010 to May 13, 2012, Student's section 504 plans did not provide for emotional support. (J-5, 16-18, 20, 23.)

35. Section 504 plans included adaptations to the delivery of instruction, including extended time, sentence starters for writing assignments, modified use of worksheets to reduce writing needed, limits on homework when Student becomes ill, presentations delivered to teacher 1:1, elimination of deadlines, and dictation, scribing and speech to text software, and altered class schedule to permit breaks for rest due to fatigue. Plans also included special transportation. (J-5, 16-18, 20, 23.)

36. In May 2012, Parent signed a Permission to Evaluate form for an initial evaluation of Student. (J 47.)

Educational Services, Offers And Progress During Ninth Grade (2012-2013 School Year)

37. In August 2012, the District completed an evaluation report. The referral questions were Student's present medical and psychological status, the need for homebound instruction and whether Student should be identified as a child with a disability under the IDEA based upon a private psychological evaluation report. In addition, an Autism spectrum disorder was suspected and the District, following its view of best practice, sought to rule out physical causes of symptoms otherwise supporting emotional disturbance under the IDEA. The evaluation report concluded that Student is not a child with a disability, but did qualify for occupational therapy. (NT 34-35, 134-135, 472-473; J 32.)

38. The evaluator relied upon the teacher reports from the first few days of school in seventh grade, indicating some Student reports and teacher observations related to Tourette's tics. (J 32.)

39. Student's homebound teacher in seventh grade, and in eighth grade from January 2012 through the date of the report in August 2012, also taught Student in fifth grade. This teacher reported observing Student's inability to write or type long passages due to hand pain and swelling. The teacher had seen Student up to five hours per week. The teacher noted that scribing for Student multiplies the time taken on ordinary tasks fourfold. The teacher reported that Student exhibited weakness and pain sitting up in a chair, and needed breaks to lie down or needed to receive instruction lying down on a couch. The teacher reported that Student experienced pain in the eyes and feet, headaches, fatigue requiring short learning sessions and frequent breaks, "brain fog", distractibility stumbling when walking and frequent illnesses that terminate all instruction for days at a time. (NT 62-64, 343; J 32.)

40. Behavior rating questionnaires filled out by Parents and the homebound teacher, deemed valid, resulted in clinically significant scores for all of them in areas labeled as emotional distress, upsetting thoughts, worrying, separation fears, perfectionistic and compulsive behaviors and physical symptoms. All three endorsed behaviors indicating a serious concern regarding generalized anxiety disorder and obsessive-compulsive disorder. Student self-report, deemed valid, resulted in high scores for emotional distress, academic difficulties and physical symptoms. Student report also indicated high scores for

diagnostic categories of major depressive disorder, generalized anxiety disorder and obsessive-compulsive disorder. (NT43-50; J 32.)

41. The District school psychologist discounted the evidence from the inventories concerning possible attention deficit disorder, concluding that symptom counts did not meet the definition of ADD in the psychiatric diagnostic manual, the Diagnostic and Statistical Manual of Mental Disorders, IV-TR. Moreover, cognitive scores from the private neuropsychological report contradicted such a diagnosis. In addition, the symptoms were not found in two of more settings, since the homebound teacher's observations of attention problems occurred in the home, as did Parents' reported observations. No valid school observations were available since Student had been on homebound for most of the past two academic years. (NT 85-86; J 32.)

42. In evaluation sessions, Student reported to the school psychologist that Student experienced recent and repeated episodes of acute tenseness and physical discomfort, later assessed by medical professionals as panic attacks, nervousness when going out of the home that subsides after 15 minutes, an aversion to being in large groups of people due to fear of being sick or injured, and a general over-concern with health and safety issues. (J 32.)

43. In evaluative sessions with the school psychologist, Student reported several ongoing rituals that Student felt compelled to perform, including checking locks and doors, frequent hand washing, turning the light switch from off to on position exactly four times before going to bed at night, and putting pillows and blankets at the foot of the bedroom door upon retiring at night. (J 32.)

44. Student reported ongoing difficulty falling asleep, bouts of wakefulness during the night, and short intervals of sleep. Student reported occasional episodes of vomiting after eating due to Dysautonomia, and a long history of recurrent gastro-intestinal distress. Student reported a variety of somatic symptoms, including recurrent and variable aches and pains, swelling and pain in the hands, dizziness, feeling as though about to pass out, imbalance, fatigue, and sluggishness. (J 32.)

45. The evaluator did not see Student's hands swelling or any evidence of pain in the hands after Student played the guitar for the evaluator for a few minutes on two occasions. Student's hand strength and manual dexterity were deemed to be good. (J 32.)

46. Student reported a desire to return to school for ninth grade, and that Student's teachers did not all follow the accommodations set forth in Student's section 504 service plan. (J 32.)

47. Three rating scales aimed at eliciting evidence of autistic spectrum disorders from the homebound teacher showed no evidence of Student's behavior being on the spectrum. (J 32.)

48. Parent provided the District with three reports from the Children's Hospital of Philadelphia (CHOP), dated in 2010, showing diagnoses of Dysautonomia and Tourette's syndrome, and noting amplified musculoskeletal pain; a 2012 neuropsychological

evaluation with diagnoses of Over Anxious Disorder, Obsessive Compulsive Disorder and Attention Deficit Disorder; a 2012 psychiatric report obtained by the District diagnosing Generalized Anxiety Disorder and Obsessive Compulsive Disorder; and nine notes from the personal care physician recommending homebound instruction. (NT 50-52; J 8, 9, 10, 21, 27, 30, 31, 32; P 15, 18.)

49. Section 504 service plans in 2010, 2011 and 2012 acknowledged that Student was suffering from disabilities diagnosed as Post Viral Syndrome, Tourette's Syndrome, Dysautonomia, and Reflux-Vascular Dystrophy. (J 16, 17, 18, 20, 23; P 4.)

50. The District's school psychologist did not accept any of the reports as establishing the stated diagnoses. The psychologist found the CHOP reports too old and inspecific; disagreed with the neuropsychological report and questioned its factual basis, as well as noting executive functioning scores that conflicted with the diagnosis of attention deficit disorder; discounted the psychiatric report because it was based on an examination by the psychiatrist's physician assistant and not the psychiatrist; and questioned the authenticity of the homebound recommendations. The psychologist considered it best practice to rule out physical causes of Student's symptoms before identifying Student as a child with Emotional Disturbance. The psychologist also questioned whether or not the diagnoses of Tourette's Syndrome and Obsessive Compulsive Disorder were consistent with DSM-IV-TR criteria. (NT 51-57, 80-87, 134-135, 149-151, 172-184, 195-198, 216-217, 298-301; J 28, 32.)

51. The requests for homebound status contained alterations that raised questions as to whether or not Parent had assisted in drafting them or submitted identical forms from year to year. (NT 208-209; J 11, 21, 25, 27.)

52. The school psychologist acknowledges that DSM-IV criteria are not part of the legal test for IDEA disability. (NT 339.)

53. The Supervisor of Pupil Personnel Services directed the school psychologist to obtain the "reports of origin" from all medical providers, to make sure that the reported diagnoses were actually the product of an evaluation and not simply recorded history of diagnoses of unknown origin. (NT 123, 139.)

54. Parent declined to provide additional medical reports, indicating that Parent thought that the District had enough information, and declined to allow the school psychologist to interview freely all of the doctors associated with Student's diagnoses and care. Parent indicated a conditional permission to speak with all medical practitioners, but required to have the questions in advance. The psychologist declined to proceed under those conditions, believing that the conditions would not allow for follow-up questions. Parent was concerned with Student's privacy and fear that questioning would interfere with medical services being provided by the persons interviewed. (NT 146-166, 295.)

55. The psychologist also wanted to inquire into the Parent's administration of an anxiolytic medication as needed and in Parent's discretion, which Parent reported was prescribed on that basis by the personal care physician and administered under that physician's

supervision. The psychologist interpreted that the medication was being given "indiscriminately" although there was no direct evidence to support that concern. The psychologist was concerned that it would be necessary to rule out the effects of the anxiolytic on Student's performance and emotions before classifying Student under any IDEA category. (NT 83-85, 127-131, 146-166, 295.)

56. One report provided by Parent referenced dysgraphia, but there was no other reference to that condition in any other documents given to the District. The psychologist was concerned with gaps in the medical record. This was a significant reason for not identifying Student as a child with a disability. (NT 146-166.)

57. The March 2010 CHOP report listed symptoms of Dysautonomia as including inability to remain upright, chest and other pain, excessive fatigue, dizziness, fainting or near fainting, gastronomic problems, nausea, shortness of breath, anxiety, tremulousness, cognitive impairment, headaches and visual problems. The condition as described in the CHOP report provided to the District often begins suddenly after viral infection or during an adolescent growth spurt. Symptoms vary and often increase with stress. (J 8.)

58. The April 2010 CHOP report noted complaints that Tourette's tics interfere with functioning and notes an observation of facial tics. The report notes that stress exacerbates tics. (J 9.)

59. The private neuropsychological evaluation relied upon twelve tests - including three different tests addressing possible attention deficit disorder and one addressing reported eye pain - clinical interview, observation during testing and history supplied by Parent. (J 26.)

60. Student reported to the private psychologist that Student experienced obsessive thoughts about health concerns, some depressive symptoms of sadness, somatic concerns, some compulsive behavior such as hand washing, difficulties with pain in hands and eyes, attention to task and organization, frequent disruption of activities due to Tourette's tics, difficulty playing instruments when hands hurt, problems with assistive technology provided by the District, and concern that teachers would not understand Student's disorders. (J 26.)

61. Parent provided to the private psychologist a history of asthma, tics from before fifth grade after a vaccination, advancing neuromuscular problems, obsessive and compulsive tendencies, and a family history for anxiety disorders. (J 26.)

62. The private psychologist reported seeing Student for three sessions, observing anxiety, considerable hand pain, difficulty sustaining focus, and fatigue after several hours of testing. (J 26.)

63. The private psychologist's testing revealed significantly abnormal attention difficulties and abnormal fine motor abilities. Behavior inventories supported significant internalization, mood difficulties, anxiety, somatization and inattention that can interfere with learning. (J 26.)

64. The private psychologist noted test scores indicating significantly lower fluency in writing and academic tasks. (J 26.)

65. The private psychologist's report recommended specially designed instruction, counseling, homebound instruction combined with part-time school attendance, with gradual increase to full time attendance, an assistive technology evaluation, and further evaluation of eye functioning. (J 26.)

66. The District's school psychologist observed nine possible instances of Tourette's tics during two evaluation sessions with Student, and four instances of loss of concentration. Student reported anxiety and compulsive behaviors, but did not indicate a link between the two. The psychologist did not observe any signs of unusual mood or affect, or any signs of distress during these sessions. Testing did not provide sufficient basis for the psychologist to diagnose generalized anxiety disorder, and the psychologist considered it necessary to rule out Dysautonomia as a cause of anxiety-like symptoms and reports. (NT 180-185; J 32.)

67. The school psychologist accepted the intelligence and achievement test scores from the private neuropsychological report, which indicated above high average to superior intelligence and average to high average academic achievement. These scores were corroborated by all available curriculum based testing and Student's grades throughout Student's academic career in the District's schools. Scores did not prove a discrepancy indicative of a specific learning disability, in the private evaluator's view; however, the scores did disclose a significant discrepancy between ability and achievement with regard to academic fluency in reading, writing and mathematics, also supported by reports of homebound teachers that tasks took much longer than normal to complete. (NT 101-J 26, 32.)

68. As part of Student's section 504 service plan, the District had provided Student with ten weekly occupational therapy assessment and therapy sessions at District facilities. These sessions had addressed upper body and trunk weakness, sleep disturbance, fatigue, pain management, and difficulty writing (use of computer and speech recognition technologies). Student's trunk and upper body strength improved from poor to fair, but Student continued to demonstrate below average motor proficiency. Sleep patterns and pain continued to be a problem warranting a recommendation of medical intervention. Student stopped attending OT sessions in February 2011 and was absent and unavailable for recommended sessions in eighth grade. (J 32.)

69. The school psychologist concluded that sensory and health related factors did not impede Student's academic development, and Student's reported compulsive rituals, anxiety upon going out, and worries about getting sick were not so intrusive as to interfere with Student's daily routine, academic functioning or social/interpersonal relationships. (J 32.)

70. The report recommended occupational therapy, increased access to guidance counseling, and a transition plan for Student's return to school. An FBA was recommended

conditionally, if Student should exhibit distress that should interfere with Student's academic progress. (NT 90-92; J 32.)

71. The occupational therapist's evaluation report did not discuss the implications of significant discrepancies in the private neuropsychological report between Student's ability and reading, writing and mathematics fluency, corroborated by teacher reports. (NT 68-69, 87-92, 112; J 26, 32; P 2.)

72. The report did not address why Student was missing inordinate amounts of school and remaining on homebound instruction. No Functional Behavioral Assessment was conducted. (NT 35, 40; J 32.)

73. The homebound teacher did not attend the multidisciplinary team meeting for the August 2012 evaluation report. (NT 39.)

74. The Supervisor of Pupil Personnel Services spoke to the Student's personal care physician who told the Director that Student had an affective disorder. The physician did not confirm independently the Student's diagnoses of Tourette's Syndrome and Dysautonomia. (NT 59-60, 489-490.)

75. The District did not seek further evaluations in light of the evaluation report's finding that there was insufficient data to find the existence of a disability, and remaining questions about whether or not there was a discrepancy between ability and achievement in the area of academic fluency. In August 2012, Parent indicated willingness to permit additional testing. (NT 66, 101-110, 172-184, 333, 553-555; J 48.)

76. Student began attending school in ninth grade, but by October was attending only part time and after October Student stopped attending school, unexcused for about three and one half months. The District had rearranged Student's schedule to accommodate a reported need to come in for afternoons for core subjects. (NT 540-543.)

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 evidence[5] 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 Parent requested due process and the burden of proof is allocated to the Parent. The Parent bears the burden of persuasion on all issues. If the Parent fails to produce a preponderance of evidence in support of her claims, or if the evidence is in "equipoise", then the Parent cannot prevail under the IDEA.

IDENTIFICATION

Under the IDEA Child Find requirement, the District has a "continuing obligation ... to identify and evaluate all students who are reasonably suspected of having a disability under the statut[e]." 20 U.S.C. § 1412(a)(3)(A); see P.P. ex rel. Michael P. V. West Chester Area School Dist., 585 F.3d 727 (3d Cir. 2009); Taylor v. Altoona Area Sch. Dist., 737 F. Supp.2d 474, 484

[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.

(W.D. Pa. 2010). Even if parents do not cooperate fully with district efforts to identify a student, it is still the responsibility of the school to identify those children who are in need of the IDEA'S protections. Taylor, 737 above at 484. I conclude that the District failed to meet its obligations for two reasons. First, its evaluation failed to address all of Student's reasonably suspected disabilities. Second, its evaluation failed inappropriately to identify Student as a child with a disability.

A child with a disability is a child who has one of twelve defined disabilities and who needs special education and related services by reason of such disability. 34 C.F.R. §300.8(a)(1). Among the enumerated disabilities are "visual impairment", "serious emotional disturbance", "orthopedic impairment" and "other health impairment", "specific learning disability" and "multiple disabilities". Ibid.

Failure to Seek Additional Data When Needed

The District insisted at hearing that there was not sufficient data to demonstrate that Student suffers from a disability. Yet, as to several disability categories, it failed to pursue additional data in areas where it claimed that it had inadequate information, contrary to the IDEA regulations at 34 C.F.R.§300.305(c). On notice that a private evaluation had performed a screening for possible visual impairment, and recommended a full evaluation for a suspected specific disability involving visual tracking, the District did not follow up after its evaluation in August 2012. Similarly, in view of reports by Student, Parent and homeschool teachers that Student intermittently lost normal use of Student's legs and feet, enduring pain and requiring crutches to ambulate, the District conducted no inquiry into whether or not Student was suffering from an orthopedic impairment. Likewise, in the August 2012 evaluation report, the District

failed to consider whether or not the private evaluation's report of significant discrepancies between Student's ability and Student's academic fluency in reading, writing and mathematics established a specific learning disability. [6] Finally, given the Student's multiple and various diagnoses, the District did not consider whether or not Student should be classified under the IDEA's "multiple disabilities" category.

The psychologist admitted that he did not sufficiently consider the category of orthopedic impairment, 34 C.F.R. §300.8(c)(8). The psychologist left this and any judgment as to identification on account of Student's occupational therapy needs to the judgment of the occupational therapist, who found Student to be in need of occupational therapy services due to orthopedic complaints like joint pain and hand swelling, and balance and fine motor issues. It was not clear whether or not this practitioner considered the orthopedic impairment category when recommending that Student not be classified while also recommending that Student receive occupational therapy services.

The psychologist did not consider one of the referring issues: why Student continued to be on homebound instruction for three years. There was no functional behavioral assessment to explore this issue. The report did not address this issue. Yet, plainly, the Student's failure to attend school is a major problem and an impediment to learning and accessing the curriculum.

For these reasons alone, the evaluation was inappropriate. An evaluation must be sufficiently comprehensive to address all of the child's suspected disabilities. 20 U.S.C. §1414(b)(3)(B); 34 C.F.R. §300.304(c)(4), (6). I conclude that the evaluation failed to address all areas of suspected disability. This in itself is a violation of the District's child find

[6] The school psychologist defended this on grounds that the private achievement scores were suspect due to the possible interference of Student's visual and orthopedic limitations, and that the psychologist was on the fence about this evidence; yet, there was no effort to further evaluate to get to the bottom of the issue.

obligations. D.K. v. Abington Sch. Dist., 696 F.3d 233, 250 (3d Cir. 2009)(a poorly designed and ineffective evaluation does not satisfy child find obligations).

The District's defense was that Parent obstructed the psychologist's efforts to explore all areas of suspected disability and reach a professionally justifiable conclusion. I do not accept this argument. It is based primarily upon the Parent's disagreement with the psychologist's insistence upon a searching inquiry into the origins and validity of Student's medical diagnoses by a variety of physicians over the years. The psychologist argued that such an inquiry was necessary in order to verify the validity of these medical diagnoses and to rule out physical causes of Student's symptoms of IDEA emotional disorder. Parent, citing privacy concerns as well as concern for the potential to drive away Student's doctors[7], declined to allow the psychologist free rein to obtain numerous old medical reports and then interview every doctor who ever treated Student. Parent wanted to review the psychologist's proposed questions before consenting to the interviews.

I conclude that parent's concerns were not unreasonable in light of the record. I conclude that the District had enough information to perform its Child Find obligation and reach a determination of disability. While the District may have had valid reasons to question some particular diagnoses given over the years, there was substantial corroborated evidence of symptoms that were debilitating and consistent with the given diagnoses of Tourette's Syndrome and Dysautonomia. Thus, the District had sufficient information to identify Student with either Emotional Disturbance, Other Health Impairment or both.

The IDEA does not require district evaluators to definitively rule out physical causes of symptoms that otherwise qualify children with emotional disorder. Although the first criterion

[7] The District argued that there is no conceivable reason for this concern; however, the record suggests that this concern was plausible. The record indicates that Parent believed (correctly or not) that the supervisor's call to the Student's pediatrician's office caused consternation in that office.

for emotional disturbance, inability to learn, requires ruling out physical etiology, this factor was not relevant because Student did not display an inability to learn. 34 C.F.R.§300.8(c)(4)(i)(A). Any of the other criteria would support a determination of Emotional Disturbance without ruling out physical etiology. While the District's professional would hold himself to the more clinically based practice standard of ruling out physical etiology, the IDEA does not support that higher standard as a basis to refuse to classify a child. Therefore, the District's insistence on a full inquiry into years of medical diagnoses and doctor visits as a condition of classifying Student was inappropriate.

Moreover, Parent's disagreement with the District's desire to investigate the origins of the medical diagnoses did not prevent the District from conducting its own evaluations at its own expense. Parent was willing to permit additional testing. Thus, the District's failure to follow up on additional needed data was not attributable to Parent's resistance to the proposed inquiry of doctors as evidenced in this record.

The District made much of doctor notes requesting homebound status, and the suspicion that Parent had altered or tampered with them, or submitted identical documents on successive occasions. I find no basis to conclude that these documents were altered or manipulated as suggested. The psychologist's questions about this were not entirely unfounded, but mere questions without answers are no basis on which to discount the documents or the Parent's reports of Student's symptoms, especially where the latter were corroborated by teachers, behavior inventories, physician reports and Student reports.

Identification of a Disability

Further, I conclude that a preponderance of evidence of record proves that the District's finding that Student does not have a disability cognizable under the IDEA was inappropriate, and that the Student does indeed have such a disability, based upon information available to the District, and based on a preponderance of the evidence of record. Student's IDEA disability so interferes with Student's education that Student is in need of specially designed instruction and related services. Therefore, I will order the District to classify Student and formulate an IEP.

The record overwhelmingly shows that the District was wrong when it concluded that Student has no disability. Indeed, the Student has a history of longstanding physical and psychological disabilities, corroborated by various observers, and confirmed by numerous medical diagnoses. Student has exhibited the tics associated with Tourette's Syndrome since age ten, which arose shortly after receiving an inoculation (which the record shows is a recognized etiology for this disease) and results in tics that vary from small movements of the head or face to full body movements. Student also is diagnosed with Dysautonomia, also arising at about the same time of life, which is a condition that aptly describes the various symptoms that Student, Student's Parent, homebound teachers, and other observers have described; these symptoms include debilitating pain, swollen hands, and lapses of attention (dubbed "brain fog" in this record), and sudden onset of dizziness or unstable ambulation. Due to, or perhaps coexistent with, these conditions, Student has been diagnosed with attention deficit disorder and variously named anxiety disorders, as well as the anxiety binding behavioral disorder, obsessive compulsive disorder. All of the symptoms of these disorders are documented in this record through frequent and longstanding Parent reports, Student self-reports, doctors' notes and reports of visits to clinics, a private neuropsychological report, and the reports of teachers over a period

of more than four years. Thus, the District was on notice that Student had one or more of these diagnoses during the time relevant to this decision.

Serious Emotional Disturbance

As noted above, one of the IDEA categories of disability is "serious emotional disturbance". 34 C.F.R.§300.8(a)(1). Emotional Disturbance is defined as:

> A condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects the child's educational performance:
>
> * * *
>
> (C) Inappropriate types of behavior or feelings under normal circumstances.
>
> ***
>
> (D) A tendency to develop physical symptoms or fears associated with personal or school problems.

The evidence is preponderant that the Student suffered "to a marked degree" from Tourette's Syndrome, a psychological condition that causes Student to experience "tics" in multiple forms [redacted]. These tics would afflict Student suddenly in all environments, including the school environment, and were witnessed by teachers and the school psychologist in the school environment. Although the most [significant tics] were not observed at school, the evidence shows that there was little opportunity for them to manifest at school, because Student was in homebound status for most of the time from onset of Tourette's to the date of the August 2012 evaluation. Thus, on balance, the evidence is preponderant that Student suffered from tics associated with Tourette's from the middle of sixth grade to August 2012. The evidence shows that this is a disability that causes inappropriate types of behavior under normal circumstances, within the meaning of the IDEA category of Emotional Disturbance.

In addition, Student suffers from serious anxiety "to a marked degree", especially in school. In fact, the evidence shows that this anxiety caused Student to experience increased pain and decreased stamina, triggered by the demands of school. The cascading effect of anxiety combined with Student's physical disabilities directly caused Student to leave school and remain on homebound status for months at a time during seventh and eighth grades. The evidence is preponderant that the District was at least on notice of these problems of anxiety and escalating pain and fatigue. I conclude that Student thus experienced inappropriate types of feelings under normal circumstances, again within the meaning of the IDEA category of Emotional Disturbance.

Likewise, the evidence is preponderant that Student exhibited a tendency to develop physical symptoms and fears associated with personal or school problems, again satisfying the IDEA category of emotional disturbance. Student's anxiety fits this definition, and the District was on notice that Student also exhibited symptoms of preoccupation with physical symptoms and fear of illness, all of which led Student to develop compulsive, ritualistic behaviors, the combination of which symptoms falls well within the IDEA definition of Emotional Disturbance. Again, the numerous diagnoses of anxiety disorders and obsessive compulsive disorder that resulted from these symptoms show that the symptoms occurred "to a marked degree".

The District's school psychologist discounted Student's self-reports of compulsive behaviors by noting that Student did not indicate that the reported compulsions were "in efforts to offset/prevent feelings of tension, to avert a dreaded event from occurring, or to gain any particular pleasure." By this single omission in Student's oral report, the evaluator dismissed repeated diagnoses by medical and psychological professionals, repeated reports by Student, valid indicators on multiple behavioral inventories, and corroboration by both Student's parents

and a teacher, that Student suffers from obsessive compulsive disorder. I find this conclusion implausible and therefore assign it little weight. Moreover, the underlying cause of compulsive behavior is not a criterion for classification under the IDEA; this criterion may be relevant to a clinical diagnosis, but is not relevant to the legally defined determination to be made in carrying out a district's Child Find obligations.

In declining to classify Student, the District's school psychologist relied heavily upon his own conclusion that the data did not support a diagnosis under the criteria set forth in the DSM-IV-TR[8]. I find that this reduces the weight of the psychologist's opinions in this matter, because DSM-IV diagnosis is not required for classification under the IDEA. Moreover, there is doubt that the psychologist is qualified to render diagnosis or withhold diagnosis under the DSM-IV, since the psychologist is a master's level professional without a license to practice clinical psychology. Thus, the psychologist utilized highly demanding clinical criteria for identification, over and above the criteria stated in the law, which are outside his training and licensure. His decision not to classify Student must be seen in that light, and thus his decisions and opinions on classification are given reduced weight because the record shows that they are based upon medical classification criteria in addition to the IDEA classification criteria.

The record further undercuts the District psychologist's opinions and classification decisions because he relied upon the private neuropsychological evaluation for some diagnostic conclusions but not for others. The psychologist testified that he relied upon the private test results for cognitive and achievement testing; however, he gave no weight to the private

[8] The psychologist denied that he use DSM-IV criteria as a necessary component of identification, saying that he used DSM-IV only as a "guide" to classification under the IDEA. However, his report discounted a substantial weight of evidence from interview, corroboration by other practitioners, psychological tests and inventories used in the field, in concluding that Student does not have ADD or Obsessive Compulsive Disorder, solely because DSM-IV criteria had not been met. Moreover, in listening carefully to his testimony, it was clear to me that the psychologist's educational decisions were highly influenced by his thorough knowledge of DSM-IV criteria. Thus, I conclude that the psychologist's educational classification decisions were not reliable because they were influenced to a great yet not clearly delineated extent by DSM-IV criteria that are not part of the IDEA identification criteria.

psychologist's diagnoses of attention deficit disorder and obsessive compulsive disorder, which were also based in part upon test scores showing high levels of concern in those areas, as well as Student report and Parent's report of history. This illustrates the extent to which the District psychologist felt it necessary to make his own determinations with regard to emotional diagnoses in which the DSM-IV was a predominant concern to him, and how the psychologist's reliance upon the DSM-IV criteria undercuts the reliability of his opinions and ultimate conclusions as to legally prescribed criteria for identification.

Other Health Impairment

In addition to Emotional Disturbance, Student's disabilities also meet the definition of "Other Health Impairment". The IDEA regulations define this as "limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment … due to chronic or acute health problems … ." 34 C.F.R.§300.8(c)(9).

Student's diagnosed condition of Dysautonomia fits this definition. The record shows preponderantly that this condition is a syndrome composed of multiple and variable symptoms, including inability to remain upright, chest and other pain, excessive fatigue, dizziness, fainting or near fainting, gastronomic problems, nausea, shortness of breath, anxiety, tremulousness, cognitive impairment, headaches and visual problems.

Homebound teachers repeatedly described these symptoms as debilitating and interrupting instruction. At times Student could not receive instruction in a seated position, but had to lie down. At times Student simply stopped being able to attend and had to sit or lie quietly for anywhere from fifteen minutes to an hour, thus interrupting teaching for that period of

time. Sometimes, Student experienced pain to the point that Student could not attend. At other times, Student would lose concentration momentarily. At times, Student would be unsteady on Student's feet. I conclude that these symptoms of Student's Dysautonomia constitute an Other Health Impairment within the meaning of the IDEA's definition of disability.

One homebound teacher, who was assigned to Student during the relevant period in May and June of seventh grade and in October through December of eighth grade, directly contradicted the testimony of the other two homebound teachers. This teacher professed to have never seen any of Student's asserted symptoms and to have seen no need for Student to be on homebound instruction. The witness, relating personal observations, implied that Parent closely observed instruction sessions and behaved inappropriately by allowing close contact with Student while the witness was present for instruction purposes.

I accord this witness's testimony less weight than that of the other two homebound teachers, for four reasons. First, on cross examination it was brought out that the witness actually endorsed Student's fatigue and need for scribing, corroborating symptoms reported by the other teachers. Second, this witness was present with Student over a smaller span of time, and thus had less opportunity to observe Student's symptoms, which the record shows were variable in incidence and intensity over time. Third, the witness disclosed a disagreement with Parent that led the witness to quit the assignment, and indicated that the witness was a candidate for a job with the District, thus raising a question of witness's objectivity. Finally, the witness' account was contrary to diametrically opposed accounts that were corroborated by multiple sources.

The District inappropriately ignored the bulk of the evidence of Other Health Impairment. It simply discarded three reports from Children's Hospital of Philadelphia

describing Student's Dysautonomia and Tourette's Syndrome. The District's psychologist, acting at the direction of the Supervisor of Pupil Personnel Services, determined that these reports were not sufficient evidence of disability because they were not the "reports of origin" – that is, they were not the reports that originally disclosed the diagnoses and the basis upon which the diagnoses had been made. When asked to explain why "reports of origin" were needed, the psychologist explained that he had to be sure that the diagnoses reported in the reports of office visits given to the District were not merely parroting diagnoses related to the treating physicians through inaccurate data bases or Parent's oral report[9].

I conclude that this explanation is insufficient, because it is implausible that CHOP would carry for years a false diagnosis for one of its patients. Moreover, the diagnoses were corroborated by the Student's personal care physician in written requests for homebound services; in addition, the District's Director was able to speak to the physician to satisfy any remaining doubts, and could not give a plausible reason for continued doubt of the accuracy of diagnoses carried by a patient at CHOP, except the insinuation that this physician too was unreliable because of irregularities in the homebound request notes.

There was some evidence suggesting that Parent was not a reliable historian, and that this was a reason for the District to be especially careful to establish diagnoses provided to it in written reports or documents. Indeed, Parent in testimony did display some understandable inaccuracy in reporting details of the complex history of Student's various diagnoses and doctor appointments. However, this alone, even if a reasonable concern for the accuracy of medical

[9] The District makes much of the lack of documentation on Dysautonomia, both because neither the original diagnosis report nor any updated reports were delivered to it, despite Parent's agreement to deliver updated reports. The District's emphasis on original diagnostic reports is discussed above. The need for updated reports is overemphasized in my judgment. The record is replete with corroborated reports of many of the debilitating symptoms of Dysautonomia, including thorough reports by the 2012 homebound teacher. Even if Student were not seeing CHOP doctors currently for these symptoms, it would not prove that Student was not experiencing them. The experience of the symptoms is the necessary fact for classification under the IDEA, and the District had sufficient evidence to show current experience of symptoms.

reports, does not plausibly undercut the standing diagnoses of Tourette's Syndrome and Dysautonomia, which are well supported and corroborated in the record.

Adversely Affects Educational Performance

Each of the definitions of disability in the IDEA regulations requires a finding that the disability is so substantial that it adversely affects educational performance. 34 C.F.R.§300.8(c)(4)(i), §300.8(c)(9)(ii). I conclude that the Student's Emotional Disturbance and Other Health Impairment both meet this standard. The most telling evidence is that the Student has been on homebound instruction almost entirely for over three years, because of these impairments. I conclude that this alone is a deprivation of education and an impediment to accessing the curriculum, because Student is not receiving the educational benefit of learning with peers, socializing with them, working collaboratively with them, and discussing material with them, as well as engaging in school-wide educational activities and receiving the learning experience of being taught by a variety of teachers. Student is in the most restrictive environment possible for education, Student's own home, and is not receiving full days of educational services.

The record is preponderant also that the Student is on homebound instruction because of Student's disabilities. Student's homebound teachers have observed Student's symptoms of pain, swelling hands, tics, anxiety and corroborated both Student's and parent's reports that these occur frequently and disrupt Student's learning. Student's fatigue and other physical symptoms are well documented in this record, and they keep Student at home on many days. Thus, there is no doubt that Student is being prevented by Student's disability from accessing the curriculum of the District at Student's grade level.

In Need of Specially Designed Instruction

Finally, as part of the second IDEA test for disability, I conclude that Student is in need of specially designed instruction and related services. Specially designed instruction is defined as:

> [A]dapting, as appropriate to the needs of an eligible child … the content, methodology or delivery of instruction –
> (i) To address the unique needs of the child that result from the child's disability; and
> (ii) To ensure access of the child to the general curriculum, so that the child can meet [agency] educational standards … .

The record is preponderant that the Student's disabilities require adapting at least the methodology or delivery of instruction to Student so that Student can access the full curriculum of the District and meet all District standards. In particular, such adaptation is needed so that Student can participate in the District neighborhood school as much as Student's disabilities will allow. In particular, the evidence shows that Student will need adaptation of instruction and all educational opportunities provided to other students so that Student can receive partial or full days of instruction at home when symptoms do not permit Student's participation in the neighborhood school. Student's roster of classes will need to be adapted so that all classes needed for graduation will be taught at home when Student's symptoms prevent Student from attending classes at school, and the times at which these classes are delivered to Student will have to be adapted to work around sudden onset of symptoms of inattentiveness that block Student's participation in learning. Assistive technology, such as remote broadcast via internet may be needed. Properly certified teachers may have to go to Student's home or other feasible locations to instruct. The pace of instruction may have to be modified as well, and extended school year or extended school week services may be necessary to permit a slower pace of

instruction without causing Student to fall behind the pace of the rest of the class. Assignments may have to be redesigned, as the evidence shows was recommended by private and District evaluators, to lessen unnecessary work-loads. Moreover, assignments may have to be redesigned to enable Student to participate in collaborative projects as part of a class, even when Student's symptoms prevent attendance at school. These modifications and adaptations may require itinerant or supplemental placement in instruction in the home, rather than homebound instruction. I conclude that all of these adaptations meet the IDEA definition of specially designed instruction, in that they adapt the methodology or delivery of instruction.

At the same time, curriculum may have to be adapted to explicitly teach Student skills needed to cope better with the pressures of school work, improve organization (a need identified in the private evaluator report), self-regulate internal anxiety and thus minimize symptoms, allowing Student to be at school more often. Any plan to maximize Student's attendance at school will require a transition plan that is based upon a functional behavioral assessment of Student's decisions about non-attendance, to identify the functions of such behavior and assist in planning a positive behavioral support plan to help Student chose school increasingly in the coming school year. Again, these curricular adaptations meet the IDEA definition of specially designed instruction.

In short, Student is in need of specially designed instruction in order to receive meaningful educational benefit at Student's neighborhood school. In addition, the record shows preponderantly that Student is in need of related services in the form of occupational therapy and guidance counseling. Thus, Student is eligible for Special education as a child with a disability who needs specially designed instruction by reason of Student's disabilities.

The District argues that the Student's needs can all be met with accommodations under section 504. This does not negate that the Student meets the definition of child with a disability under IDEA. The characterization of the above long list of possible needed adaptations of school procedures and methods as accommodations does not detract from the fact that they meet the literal definition of specially designed instruction. Nothing in the IDEA or its regulations suggests a legal distinction between accommodations and specially designed instruction; it follows that an accommodation can also be specially designed instruction.

Moreover, the record undercuts the District's argument that Student's needs can be met with a section 504 service agreement. Preponderantly, the evidence is that Student's needs are not being met, precisely because Student is not classified under the IDEA. Student receives only five to ten hours per week of instruction[10] under regular education "homebound" status; indeed, the status itself is not designed for long term instruction of a child with a disability, and I do not accept the suggestion that five hours per week of instruction is sufficient to provide Student with meaningful educational benefit, let alone, in section 504 terms, equal access to and benefit of all of the educational services that the District offers. Moreover, the District has not implemented the entire section 504 service agreement in the home, by its own admission. Thus, not all accommodations agreed upon by the parties were[11] being delivered to student on homebound status.

[10] One witness, the 2012 homebound teacher indicated that services were provided five hours per week. Another witness, a homebound teacher in seventh and part of eighth grade, testified that services were provided for five to ten hours per week.

[11] The record shows that the District has terminated homebound status and so for months Student has not received any services while not in school. This further illustrates that Student cannot receive meaningful educational benefit in regular education.

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).

I conclude that the District failed to provide Student with a FAPE under both the IDEA and section 504[12] during the relevant periods in seventh, eighth and ninth grades, for reasons

[12] Although Student allegedly reported to Parent that the District failed to implement the 504 plans during the relevant period of time, this evidence was not preponderant. There was credible evidence that District teachers implemented the plans, and I find that that evidence outweighed Parent's testimony on that score. Nevertheless, the plans did not provide the services that Student needed to enable Student to return to school, resulting in Student's

discussed above. The District failed inappropriately to identify Student during those years, although it was on notice that Student was a child with a disability in need of special education and related services. Instead, the District relegated Student to homebound status with a section 504 plan that included an unusually large number of adaptations and accommodations. Student thus received about five hours per week of instruction at home in less than ideal instructional circumstances. Student was deprived of Student's right to education in the least restrictive setting when able, with its many educational benefits including discussion, socialization and collaboration with peers and instruction through a variety of teachers. Student exhibited slow progress during these years, despite an above average to superior tested cognitive ability. On the record as a whole, therefore, the District's failure to comply with its Child Find obligations deprived Student of meaningful educational benefit in seventh and eighth grades.

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

---

inordinately long tenure in homebound instruction. There was no emotional support and there was no behavior support plan to support Student in transitioning to full time education in school. There was no accommodation to enable Student to participate remotely in classes or otherwise participate in collaborative activities with peers. Student was thus deprived of access to and equal benefit from the District's services.

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.

A reasonable period must be accorded for rectification of the problem. M.C. v. Central Regional Sch. Dist., 81 F.3d 389, 397 (3rd Cir. 1996), cert. den. 519 U.S. 866 (1996). In the present matter, I conclude that the District is entitled to a period for rectification within the relevant time period, from the first day of school in 2010 to February 2, 2011, when the District issued its evaluation report[13] that inappropriately failed to identify Student as a child with a disability under the IDEA, while Student was already on homebound instruction. Thereafter, in accordance with my conclusion that the District denied Student a FAPE, I will order appropriate relief in the form of compensatory education. Because the record is devoid of evidence as to the position that Student would have been in if FAPE had been provided, any order for compensatory education will be on an hour by hour basis, with consideration of equitable adjustments.

I take into consideration that Student was at home at Parent request, due to increased symptoms of Student's disabilities; therefore, it cannot be said that the District deprived Student of full days of educational services. Rather, Student was unable to attend school for much of the time during which Student was on homebound instruction. Nevertheless, I have concluded that

[13] In this I take into consideration the Third Circuit's caution in D.K. v. Abington Sch. Dist., 696 F.3d 233, 249 (3d Cir. 2012),in which the Court noted that some disabilities are notoriously hard to diagnose and therefore the failure to diagnose at the earliest possible moment is not per se actionable. Here, the District was on notice before the start of the school year that Student had a disability, yet did not refer Student for evaluation. When pressed for an IEP by Parent in the beginning of the seventh grade school year, the District first referred Student to a screening process called a child study team, which decided not to evaluate. It was not until February of Student's seventh grade year, after Parent's explicit request to evaluate, that an evaluation was produced. By then, I conclude, the District had sufficient evidence to identify Student, but failed to do so. I have allowed this period of over five months of seventh grade as a rectification period in light of the record that the Student's symptoms were variable and sometimes subtle or not detectable, thus requiring more time for recognition, but I conclude that these symptoms should have been recognized by February 2011, when Student was on homebound status because of those symptoms. Nothing in D.K. precludes these conclusions.

the District, as part of the IEP for which Student was eligible, should have adapted the curriculum and methods of delivery of instruction to include Student more in classroom instruction, whether through remote participation or other adapted delivery of services such as discussions with peers and presentations to peers. Curricular adaptation should also have included direct teaching of skill needed by Student to regulate anxiety and fatigue in the school setting. I also have concluded that the District should have provided Student with related services such as emotional support services. Therefore, I will order the District to provide three hours per school day of compensatory education, representing two hours per day of increased participation in classroom activities and one hour per day of either direct teaching of skills needed to overcome Student's anxieties and fatigue in a school setting or related services, including counseling and other emotional supports.

The record shows preponderantly that the Student received about five hours per week of instruction in the home in seventh and eighth grades, and five to ten hours per week in ninth grade. There is no reason in the record to diminish the value of these services to the extent that they were provided. Therefore, compensatory education will be reduced by these amounts of services rendered.

CREDIBILITY

I find that the Parent's testimony was credible and reliable with regard to the central concern that Student suffered symptoms and exhibited behaviors at home qualifying Student for identification under the IDEA, because this testimony was corroborated by credible witness with adequate personal knowledge of Student's day to day behavior. However, I accorded reduced

weight to much of Parent's testimony with regard to details of Student's medical history, due to inconsistencies with the record and Parent's repeated inability to clearly remember the history.

As to Parent's reports of Student's symptoms, the District introduced evidence apparently to show that these were either generated or exaggerated by Student's Parent. I find that the evidence about Parent's behavior and inconsistencies is insufficient to undercut Parent's assertions that Student was in fact suffering from disabilities. Parent's assertions were consistent with the record in that Parent dated the onset of symptoms to late in the sixth grade school year or early in seventh grade. Parent's reports of symptoms were corroborated by Student's responses on behavior and symptom inventories that the District's psychologist determined to be reliable. They were corroborated also by the homebound teacher who spent the most teaching time with Student.

I accorded reduced weight to the school psychologist's testimony for reasons stated above, and I accorded reduced weight to the statements of District teachers to the effect that Student did not exhibit symptoms of Student's disabilities, or did not need specially designed instruction. Most of this testimony was from teachers who saw Student only for the first few days of school in various years (while Student was presumably experiencing less of Student's variable symptoms of fatigue and tension), and who were dealing with the start of the year for a full class of students (thus giving them if anything less opportunity to observe Student's changing and often subtle sings of need).

CONCLUSION

I conclude that the District failed to comply with its obligations under IDEA child find, as a result of which it deprived Student of a FAPE under both the IDEA and section 504. I

will order the District to identify Student as a child with a disability under the categories of Emotional Disturbance and Other Health Impairment, to commence educational planning accordingly, to provide an initial evaluation at public expense, and to provide compensatory education to the Student.

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. Student is a child with a disability as defined in the IDEA.

2. The District failed inappropriately to identify Student as a child with a disability under the IDEA from February 2, 2011 until December 13, 2012.

3. The District failed to offer or provide Student with a FAPE under the IDEA and section 504 from February 2, 2011 to December 13, 2012.

4. I hereby order the District to identify Student as a child with a disability under the categories of Emotional Disturbance and Other Health Impairment. Within twenty days of the date of this decision, the District shall convene an IEP team meeting to develop an interim IEP pending further evaluation.

5. I hereby order the District to provide an independent educational evaluation at public expense, which shall be comprehensive of all suspected disabilities and shall otherwise comply with all of the requirements of the IDEA for initial evaluations, to be delivered within sixty calendar days of the date of this order. The evaluator shall be selected by the Parent at the usual and customary rates paid by the District for educational evaluations of the scope required by this order.

6. Within thirty days of receipt of the independent evaluation ordered herein, the District shall convene an IEP meeting to develop an appropriate IEP for Student in consideration of the independent evaluation ordered herein.

7. I hereby order the District to provide compensatory education to Student in the form of any remedial or educational instruction or service that addresses Student's educational needs with regard to academic achievement at the secondary school level of curriculum, regulation of anxiety, fatigue and emotions in the school setting, behavior control and regulation, or physical, occupational or psychological therapy.

8. The District shall provide this compensatory education in the amount of three hours for every day in which school was in session from February 2, 2011 through December 13, 2012, subtracting from that amount a total representing homebound instruction delivered during that period, calculated as five hours per week from February 2, 2011 to the last day of school in June 2011, five hours per week throughout the 2011-2012 school year, and ten hours per week from the first day of school in the 2012-2013 school year until December 13, 2012.

9. 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.

William F. Culleton, Jr. Esq.

_____

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

April 5, 2013