

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: B.M.

Date of Birth: [redacted]

ODR No. 14715-13-14-KE

CLOSED HEARING

Parties to the Hearing:

Representative:

Parent[s]

Jennifer Lukach Bradley, Esq.
McAndrews Law Offices
30 Cassatt Avenue
Berwyn, PA 19312

Brandywine Heights Area Sch. Dist.
200 West Weiss St.
Topton, PA 19562

Mark W. Cheramie Walz, Esq.
Sweet, Stevens, Katz & Williams, LLP
331 East Butler Avenue
New Britain, PA 18601

Dates of Hearing:

May 6, 2014; May 30, 2014; July 8, 2014

Record Closed:

July 25, 2014

Date of Decision:

August 20, 2014

Hearing Officer:

William F. Culleton, Jr., Esquire

INTRODUCTION AND PROCEDURAL HISTORY

The student in this matter (Student)¹ transitioned to the respondent school district (District)² from early intervention for the 2012-2013 school term, beginning in kindergarten. (NT 10, 58; S 8.) Student is identified with Autism and Speech or Language Impairment pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA). (S 8.) Parents³ requested due process under the IDEA, alleging that the District failed to provide Student with an appropriate evaluation, placement and program in kindergarten and in first grade.⁴ Parents request compensatory education and an order that the District provide an appropriate placement and program for Student's second grade school year. The District asserts that it has provided an appropriate program and placement.

The hearing was completed in three sessions, and the record closed upon receipt of written summations. I conclude that the District failed to provide appropriate services to address Student's educational needs from September 19, 2012 to February 1, 2013, but that it complied with the IDEA with regard to all other issues presented in this matter,

ISSUES

1. Was the District's re-evaluation report dated September 6, 2012, as revised September 12, 2012, appropriate?

¹ Student is named in the title page of this decision; all personal references in this matter are to "Student" in order to guard Student's confidentiality.

² The respondent District is named in the title page of this decision; its identity is withheld from the remainder of the decision in order to guard Student's confidentiality.

³ Both Parents named in the title page of this decision joined in requesting due process, and both participated in many of the IEP and other meetings mentioned in this decision. Therefore Parents are referenced in the plural throughout this decision. However, many of the communications and transactions mentioned here were between Student's Mother and District personnel. Therefore, I reference the Mother as "Parent", in the singular.

⁴ Over the Parents' objection, I determined at the outset of the hearing that I would limit the time frame for decision and decide the appropriateness of the District's actions and inactions as set forth in the issues listed below, within the period beginning on Student's first day of kindergarten on August 26, 2012 and ending on the first day of hearings in this matter, May 6, 2014. (NT 34-35.) I refer to this as the relevant period.

2. Did the District provide Student with an appropriate placement during the relevant period of time from the first day of school in the 2012-2013 school year until May 6, 2014?
3. Did the District provide Student with an appropriate Individualized Education Program (IEP) during the relevant period?
4. Did the District appropriately provide Student with placement in the least restrictive environment during the relevant period?
5. Should the hearing officer order the District to provide compensatory education to Student for all or any part of the relevant period?
6. Should the hearing officer order the District to provide any specific educational programming for the 2014-2015 school year?

FINDINGS OF FACT

1. Student is [an elementary school-aged] resident of the school district, and is a rising second-grader. (NT 10; S 42.)
2. Student was diagnosed with Autism when Student was three years old. A predominant effect of this disability is Student's reduced communication skills. Student was classified as a child with the disability of Autism while in early intervention. (NT 39-40; S 1, 3.)
3. In addition to communication difficulties, Student displayed sensory over-responsiveness while in early intervention programming. This led to behaviors such as running, jumping, crashing into walls, head butting and anxiety attacks. Student responded to the vestibular and proprioceptive input. (S 1.)
4. Student received infant and toddler services at less than one year old, and the services continued to age 3. These services included weekly integrated speech and occupational therapy. (NT 40-42; S 1.)
5. Student received early intervention services, beginning at age 3, provided by the local intermediate unit. Prior to Student's entry into kindergarten, Parents held Student back for an extra year in early intervention services. (NT 40-43; S 1.)
6. Early intervention services included speech therapy, occupational therapy and specialized instruction in a special education setting providing the Verbal Behavior program of instruction. (S 3.)
7. Verbal Behavior is a research based program of instruction, utilized to teach communication skills. It is based upon one-to-one instruction utilizing immediate delivery of reinforcers in response to the child's performance of communication behaviors, and errorless teaching. It focuses upon naming items, requesting items and

other kinds of social communication with a single adult instructor. (NT 255, 621-622, 625-626, 650-678; S 31, 43.)

8. The early intervention individualized education program (IEP), as revised in May 2012, provided that Student would not participate with typically developing peers, because Student was deemed to need specialized staff, higher staff to child ratio, daily opportunities for drill and practice with communication skills, individual and small group instruction, and speech and occupational therapy. (S 3.)
9. While in early intervention, Student's behavior of head butting and striking the head was occurring with significant frequency, but was not considered to be an interference with Student's learning or that of others. Conflicting reports in the present levels section of the 2012 early intervention IEP indicated both that such behavior occurred at times, and that it had ceased. (NT 44-45, 49; S 3.)
10. The early intervention program provided a transition plan, which included sharing early intervention data with the District and discussions between District representatives and Parents before Student started kindergarten. (S 3.)
11. As part of the early intervention transition plan, Student attended a less structured kindergarten level classroom within the specialized early intervention setting. (NT 52; S 3.)
12. Parents attended transition meetings with District representatives in February 2011 and January 2012. (NT 42-52.)
13. At the Parents' transition meeting with District representatives in January 2012, early intervention personnel provided District personnel with current evaluation data and current IEP data as well as progress reports. Parents signed an intention to enroll form for the District, and signed a release so that the District could obtain necessary documentation. District representatives indicated that the District would re-evaluate Student, and would send a permission to evaluate form. (NT 50-52; S 3.)
14. Pursuant to the District's usual practices, the District provided Parent with a permission to re-evaluate form on or about April 24, 2012; this was delivered some days thereafter. Parents conveyed the form to the District with consent to re-evaluate on or about May 10, 2012. (NT 53, 250-252, 509-510; S 2, S 47 p.1.)
15. Student's assigned kindergarten teacher recommended that the District plan for Student's kindergarten program before the start of school. (NT 250.)
16. Pursuant to Parent's requests, District personnel made efforts to accelerate the timetable for completing the re-evaluation pursuant to the permission to evaluate provided to them in May 2012. (NT 53; S 10, 47 p. 1, 2.)
17. District personnel and the District's director of special education considered and rejected the option of placing Student immediately in a specialized autistic support program outside Student's neighborhood school. The director of special education decided to await the recommendations of the District's re-evaluation. (NT 255-256.)

18. Parents attended a transition meeting with representatives of the District on August 15, 2012. At that meeting and in telephone calls and email messages, Student's schedule was discussed, as well as opportunities for inclusion with typical students, transition to regular education settings, specially designed instruction in the kindergarten curriculum, transitions to and from school, and the provision of a one-to-one paraprofessional. (NT 438-446, 258; S 4.)
19. Student was familiar with the physical environment of Student's assigned school building, because Parent had brought Student with parent on many occasions [redacted]. The assigned learning support teacher and other teaching staff met Student ahead of time so that Student could get used to having a relationship with those educators. Student spent about 30 to 45 minutes in the regular education kindergarten classroom, and also spent time in the special education classroom, to get used to the spaces and the materials available. (NT 56, 58, 437-442.)
20. Student began kindergarten in the District on August 26, 2012. (NT 58.)
21. Student entered kindergarten with the early intervention IEP as revised in May 2012. (NT 49; S 3, 6.)
22. On August 29, 2012, Student engaged in the series of aggressive behaviors in the classroom. (NT 67-68; S 47 p. 3; P 1, P 2.)
23. Parents attended a multidisciplinary team meeting on September 7, 2012, to review a reevaluation report provided to Parents on that date. The meeting lasted for over two hours, and participants included Student's advocate, special education teacher, speech pathologist, regular education teacher, principal, school psychologist, behavior specialist consultant, therapeutic support staff, and the director of special education. (NT 61-63; S 6.)

RE-EVALUATION REPORT, SEPTEMBER 7, 2012

24. For purposes of the September 7, 2012 re-evaluation, District was on notice of the following areas of concern to be addressed through the re-evaluation: needs associated with Student's transition to a District kindergarten classroom, the various strengths, weaknesses and behaviors noted in prior early intervention documentation, and concerns expressed by the Parents in transition meetings prior to the issuance of the evaluation report. (NT 46-61; S 1, 3, 6.)
25. The Parents' areas of concern as communicated to District personnel included communication skills, social and play skills, self-help skills, learning readiness skills, gross motor skills, fine motor skills, sensory concerns, and Student's anxiety, stress and behavior in the school setting – including reactions to directions from adults, frustration, distraction, perseveration and ability to transition from one activity to another. (NT 46-61; S 1, 3, 6.)

26. The September 7, 2012 re-evaluation report was based upon input from Parents; review of the early intervention program re-evaluation report conducted in April 2011; review of the early intervention IEP, revised in May 2012; review of early intervention progress reports; input from the early intervention teacher; classroom observations; informal checklists eliciting observations of Student's behaviors; standardized behavior scales and inventories; a speech and language evaluation; and an occupational therapy evaluation. (S 6.)
27. Parents provided extensive information to the school psychologist who conducted the evaluation, including responses to a non-standardized checklist addressing behaviors related to the classification of Autism; standardized adaptive functioning scales; standardized behavior assessment scales; a behavior rating inventory of executive function; and a social responsiveness scale. (NT 65-66; S 6.)
28. Student's early intervention teacher provided extensive information to the school psychologist who conducted the evaluation, including standardized adaptive functioning scales; standardized behavior assessment scales; a behavior rating inventory of executive function; and a social responsiveness scale. (S 6.)
29. The school psychologist who conducted the evaluation observed Student in the classroom setting of the special education program that Student attended through the early intervention provider. (S 6.)
30. The District's speech and language evaluation was based upon three classroom observations by the District's speech and language pathologist in the District's autistic support classroom at Student's assigned elementary school; review of early intervention progress reports; and clinical observations during an attempt to administer a standardized preschool language scale, addressing both auditory comprehension skills and expressive communication skills. (S 6.)
31. The District's occupational therapy evaluation was based upon clinical observation; reports by Student's early intervention teacher; administration of a standardized developmental test of visual-motor integration; and a sensory profile questionnaire completed by Student's early intervention teacher. (S 6.)
32. The September 7, 2012 re-evaluation did not include standardized cognitive and achievement testing; nor did it include classroom based assessments from the early intervention program. The District's school psychologist determined that standardized testing could not be administered to Student due to Student's age and known communication disabilities. Because Student had only recently transitioned to a school setting, classroom assessments, local and/or state assessments were not part of Student's educational record. (S 6.)
33. The September 7, 2012 evaluation report did not include a functional behavior assessment. Functional behavior assessment was not discussed at the September 7, 2012 meeting. (NT 66-67; S 6.)

34. The school psychologist elicited and reported data with regard to the Student's medical and developmental history; history of medical and educational interventions; and history of behavior in the early intervention program. (S 6.)
35. The school psychologist evaluated data with regard to the Student's adaptive and functional skills through administration of standardized adaptive functioning scales, an informal inventory related to Autism related behaviors, behavior rating scales, review of early intervention documents, and classroom observation in the early intervention program. (S 6.)
36. In addition to broader standardized behavior inventories, the school psychologist obtained Parents' responses to an informal checklist that elicited data specific to Autism related behaviors such as social isolation, limited reciprocal interaction, self absorption, socially indiscriminate behavior problems with social skills, perseverative interests and play behaviors, stereotypical and repetitive play, emotional upset caused by change, sensory disturbance, communication impairment, atypical vocalizations or speech, special abilities, mood disturbance and problems with attention and safety; pre-academic skills; social skills. (S 6.)
37. The school psychologist elicited and evaluated data regarding Student's every day behavioral and emotional functioning through review of early intervention documents and administration of a general behavior inventory, the informal Autism related checklist, the adaptive functioning inventory, and the social responsiveness scale, in addition to clinical observation. (S 6.)
38. The school psychologist elicited and evaluated data regarding Student's everyday behavior associated with specific domains of the executive functions, through administration of a standardized executive function related behavior inventory. (S 6.)
39. The school psychologist obtained information regarding Student's academic rate of acquisition and ability to retain and apply learning, through review of documentation from the early intervention program and teacher input. (S 6.)
40. The District's speech and language pathologist elicited and evaluated data regarding Student's receptive and expressive communication skills, including written skills and play skills, through clinical observation and attempting to administer a standardized communication skills inventory. (S 6.)
41. The District's occupational therapist elicited and evaluated data regarding Student's gross motor skills fine motor skills and visual motor skills, through clinical observation and input from Student's early intervention program. (S 6.)
42. The occupational therapist elicited and evaluated data regarding Student's sensory processing, including both sensory avoiding and sensory seeking behaviors, through review of early intervention documents and clinical observation. (S 6.)
43. The September 7, 2012 re-evaluation classified Student with Autism and Speech or Language Impairment under the IDEA. (S 6.)

44. The September 7, 2012 re-evaluation report specifically noted that Student's classroom behavior could be expected to interfere with Student's learning and that of others. The report noted evidence of significant problematic behaviors, including distractibility; aggressive behavior towards peers; a history of head banging (which could return upon transition to kindergarten); irritability; a tendency to be disruptive, intrusive or threatening; poor inhibitory control due to more global behavioral dysregulation; a history of pushing or running into peers in order to engage with them socially; throwing and kicking items in the District classroom; and rocking and perseverative behavior. (S 6.)
45. Although the evaluation report noted some progress as reported in documentation from the early intervention program, it found that Student's functioning was generally low or very low in most areas of adaptive functioning, communication, social functioning and executive function. The evaluation report found that Student's everyday emotional and behavioral functioning was likely to be clinically significant for emotional difficulties and problematic behavior. The report also found a high incidence of behaviors associated with the diagnosis of Autism, and found continuing needs in the areas of fine motor and sensory functioning. Student did not demonstrate pre-academic skills at an age-appropriate level, largely because Student had not received access to pre-academic curriculum while in early intervention. (S 6.)
46. The evaluation report recommended placement in a setting that would provide close supervision and monitoring when transitioning throughout the school day, breaks as needed, and small group instruction. It recommended consideration of a self-contained setting initially. (S 6.)
47. The report suggested areas in which goals could be provided, including the communication, fine motor skills, sensory integration, self-help skills, classroom skills and compliance with structure and direction, play and social skills, attention to task, and appropriate behavior. (S 6.)
48. The evaluation report recommended specially designed instruction and accommodations, including assistance and guidance to work in a small group; utilization of motivators, including an iPad for visual stimulus; accommodation for being overwhelmed and large group setting; more opportunities to have 1-to-1 instruction, with prompting to attend to 1-to-1 adult-guided tasks; specially designed instruction to address adaptive, behavioral emotional and play/social needs; speech and language therapy addressing attention for instruction and direction following, making requests and social/play skills; specially designed instruction four responses to greetings, initiating greetings, asking for help and making verbal requests; consideration of adapted physical education; occupational therapy for 30 minutes per week of direct services, as well as up to 15 minutes per week of consultative time with teachers and school staff, directed to improving fine motor skills, visual motor skills and self-help skills, as well as sensory processing skills in the educational environment. (S 6.)
49. Occupational therapy recommendations included teaching of self-regulation strategies, opportunity for frequent calming sensory activities, preferential seating, alternative seating, using headphones to increase attention to task, opportunities for movement

frequently throughout the day, decreasing distractions where possible, pencil grip trial and slant board trial. (S 6.)

50. The occupational therapy evaluation suggested specific goals for teaching Student to write Student's first and last name from memory; cut along straight and curved lines, including a 6 inch diameter circle; independently don Student's coat, socks and shoes; manipulate simple fasteners such as zippers and large buttons; open snack containers as well as Ziploc bags, and maintain attention to non-preferred tasks. (S 6.)
51. The District provided a final re-evaluation report dated September 12, 2012, sending it home in Student's backpack. (NT 76; S 8.)

KINDERGARTEN (2012-2013 TERM) IEP

52. At the meeting on September 7, 2012, Parents and members of the IEP team discussed the draft re-evaluation report, but did not have time to discuss the creation of the IEP. At that meeting, Parents requested the statutory ten days to review the draft re-evaluation report before proceeding to the IEP meeting. (NT 63, 226; S 7.)
53. On September 10, 2012, District representatives made extensive revisions to a draft IEP. (S 24, 25, 28.)
54. On September 11, 2012, the District invited Parents to a second meeting scheduled for September 19, 2012. (S 7.)
55. Parents expressed their disappointment that the IEP team did not devise a new IEP for Student during the September 7 meeting. Parents, in a letter dated September 12, 2012, noted that there was no new IEP providing for one-to-one services, a plan for prevention of eloping, and a plan for end of day dismissal. Parents also requested provision of an adaptive chair for Student, addressing of Student's communication, and addressing of Student's sensory processing issues. (S 7.)
56. The District addressed the issues of one-to-one services, prevention of eloping and end of day dismissal by September 12, 2012. The District did not address the issue of adaptive chair at that time, but addressed in in the September 19, 2012 IEP. (NT 69-74; S 6, 7, 25.)
57. On September 19, 2012, the District convened an IEP meeting with both Parents. Attendees included the school psychologist, occupational therapist, speech pathologist, the regular education teacher, the special education teacher, Student's behavior specialists and advocate. At the meeting, the District representatives provided Parents with the draft IEP. (NT 80-81; S 25.)
58. The final September 19, 2012 IEP noted in present levels of academic achievement that Student had attained numerous kindergarten readiness skills such as letter identification, counting to 100, expressive and receptive color and shape identification, and Student's name. It contained updated information based on observation and data collection in the kindergarten class with regard to academic skills, readiness skills, attention to task, social

and interaction skills, self-care skills, play skills and communication skills, both functional requesting skills and labeling skills. (S 25.)

59. The September 19, 2012 IEP recognized Student's communication needs and behaviors impeding learning. (S 25.)
60. The September 19, 2012 IEP placed Student in full-time learning support and itinerant speech and language support, in Student's neighborhood school. (NT 76; S 11, 25.)
61. Student's neighborhood school did not have an autistic support classroom, because there were not enough students assigned to that school who needed an autistic support classroom. While the District had staff trained to provide Verbal Behavior programming, this was not offered at the Student's neighborhood school because of the insufficient numbers to justify a Verbal Behavior class. (NT 84, 255-256.)
62. The special education teacher assigned to the learning support classroom had some education about teaching children on the autistic spectrum, and had experience teaching autistic support, but was not a specialist in teaching children on the spectrum. The teacher did consult with other staff who were more experienced with autistic children. (NT 434, 511-515, 522.)
63. The Student's learning support classroom did not offer Verbal Behavior teaching. The learning support teacher consulted with another teacher who was experienced in providing Verbal Behavior teaching, and adopted the learning support teaching program for Student, based on the Verbal Behavior teacher's recommendations. (NT 517, 520.)
64. Student was included in non-academic general education settings, including the schoolyard; however, due to elopement concerns, Student was placed in a fenced-in part of the schoolyard. In order to assure contact with typical peers, peers would be assigned to that fenced in school yard area whenever Student was there. (NT 135-138, 538-539; P 1 p. 26.)
65. The September 19, 2012 IEP provided occupational therapy once per cycle for 30 minutes, speech and language therapy once per cycle for 30 minutes, and a full time paraprofessional. It also provided for teacher consults with the speech therapist and the occupational therapist. The draft IEP also offered ESY services for the summer of 2013. (S 25.)
66. The September 19, 2012 IEP offered goals addressing pre-readiness skills including attending to instruction, remaining seated, completing activities following directions and transition from one task to another; functional language for requesting desired items, and expressing wants, needs, feelings and preferences; social and play skills; using gestures, signs and facial expressions and/or speech to interact with peers throughout the day; legibly writing first and last name from memory; cutting along straight and curved lines; self-dressing and opening snack containers; regulating sensory needs; expressive and receptive language including following commands, labeling and answering questions, as well as identifying vocabulary; and toileting and dressing/undressing. (S 25.)

67. The District's teachers are expected to take data on measureable goals, although they do not always report the data itself in progress reports sent to Parents. (NT 319-322.)
68. The September 19, 2012 IEP offered specially designed instruction in the form of access to an iPad for rewarding purposes; frequent breaks; provision of cues and signals to maintain and regain attention; and behavioral support plan; an accommodation plan to walk Student to and from Student's vehicle. (S 25.)
69. Student's teachers frequently provided written reports to Parents regarding Student's behavior and educational activities. (NT 92-93; P 2-7, 12-15.)
70. The September 19, 2012 IEP provided supports for school personnel including consultation among teachers, including resource room teacher, regular education teacher, occupational therapist and speech and language pathologist. Supports also included teaching peers about Autism and teaching other parents about Autism. (S 25.)
71. The September 19, 2012 IEP provided for inclusion in non-academic regular education settings with supplementary aids and services, for approximately 12% of the school day. The IEP set forth a plan to gradually integrate Student into regular education in special subjects settings, and provided for removal of Student from such settings if Student's behavior should rise to the level of dangerousness to self or others, or disruptiveness to the education of others. If removed from the regular education setting because of such behavior, the IEP provided that Student would be re-integrated into the regular education setting as soon as Student's behavior permitted. (S 25.)
72. At the meetings leading up to the finalization of the September 19, 2012 IEP, Parent had emphasized Parent's concern that Student was likely to attempt to elope from school and return home without supervision. Parents wanted appropriate policies and procedures to be in place in order to prevent this. (NT 86.)
73. The September 19, 2012 IEP provided a positive behavior support plan that included an ABC assessment of Student's behaviors in the school setting, including scripting, running around classroom, lying on the floor, pushing materials from tables onto floor, knocking over toys/furniture, striking own head, and striking adults with Student's head, and running through seated peer groups. This assessment was not based upon systematic data gathering in the elementary school setting or in the previous school setting. The positive behavior support plan provided a hypothesis that such behavior was in order to gain sensory input, or a preferred task, or to escape, or to avoid a task demand, transition, social interaction or large group activity. (NT 84-85; S 25.)
74. The September 19, 2012 IEP positive behavior support plan offered goals and replacement behaviors. (S 25.)
75. The September 19, 2012 IEP positive behavior support plan provided for antecedent strategies including use of visual schedule of Student's day; pictures of different specials shown to Student before leaving for the area of the specials; verbal prompts, reminders, and re-directions; use of a timer and reminding for upcoming transitions; numerous opportunities throughout the day for sensory movement, especially before a large group

activity; positive responding to spontaneous verbal requests; encouraging Student to use functional language; using first/then language to encourage task completion; observing and noting highly motivating reinforcement; and use of the iPad for motivation. (S 25.)

76. The September 19, 2012 IEP positive behavior support plan provided for negative consequences addressing behaviors of concern, including attempting to walk Student away from problematic settings to desired settings; emergency physical interventions in order to prevent escape from the school building or harming self or others; and disciplinary consequences. For non-dangerous, non-disruptive behaviors, planned ignoring was also offered. (S 25.)
77. By letter dated September 18, 2012, Parents requested an independent educational evaluation at public expense. Parents notified the District that they disagreed with the re-evaluation report as revised September 12, 2012. Parents noted that there was no cognitive or achievement testing utilizing standardized non-verbal tests; that there was no functional behavior assessment, that there were no recommendations regarding functional communication, social skills, assistive technology evaluation, executive functioning or sensory diet. Parents noted that the speech and language evaluation did not include formal assessments. (S 9.)
78. The District agreed to an independent educational evaluation by letter dated September 19, 2012. (NT 78; S 10.)
79. Also on September 19, 2012, the District issued a Notice of Recommended Educational Program (NOREP) reflecting placement in full-time learning support. Parents disagreed with the NOREP. Parents requested that the IEP include speech therapy to improve receptive, expressive and pragmatic language and social skills; occupational therapy to work on fine motor, visual motor, sensory processing, self-regulation and self-help deficits; weekly progress reports to Parents; staff and parent training on Autism; a goal to help Student learn about Student's emotions; a progress report after each speech therapy and occupational therapy session; visual and verbal prompting added to specially designed instruction; and further detail on occupational therapy and speech therapy services. (S 11.)
80. In October 2012, the director special education advised Parents that the District had changed all of its schools to a six-day cycle, rather than a weekly schedule. This did not result in a reduction in related services to Student. (NT 109-111, P 8.)
81. In early October 2012, Student exhibited dangerous behavior in the regular education setting that also disrupted the learning of others. Student's regular education teacher, with the assistance of another adult, was unable to control the behavior utilizing prompts and other supports. The adults utilized a restraint procedure reserved for emergencies; in order to escort Student out of the classroom. After that, the adults utilized a wait procedure until Student calmed down. Then Student transitioned to the next activity on Student's schedule. As a result of this incident, the District scheduled a meeting with Parents for October 10, 2012 to discuss the incident. Although Student's special education teacher recommended reduction in the number of school periods in which

Student would be placed in a regular education setting, until Student's maladaptive and disruptive behaviors could be brought under control, this was not discussed at the meeting. (S 17-19; P1 p. 3-10.)

82. On October 9, 2012, District personnel requested Parents to sign a permission to reevaluate so that a functional behavior assessment could be completed by a behavior specialist from the intermediate unit. The District requested the intermediate unit to provide a functional behavior assessment facilitation and support. On November 19, 2012, the intermediate unit agreed to provide assistance. (NT 97-98; S 16, 23.)
83. Due to Parental concerns regarding elopement, District personnel consulted with Parents regarding whether or not Student should be allowed to participate in class trips to community locations and a Halloween parade on school premises. Parent advocated for allowing Student to participate in these trips, and, after considerable communication along the chain of command, Student was allowed to participate, with volunteer assistance from Parent. Student was able to participate successfully. (NT 102-109; P 1 p. 12, 27, P 2 p. 28, P 9.)
84. On October 25, 2012, Student engaged in [redacted] behavior, striking Student's special education teacher [redacted]. The special education teacher was out of work for months, and was replaced by another special education teacher, at first temporarily, but ultimately on a permanent basis. (NT 125-134; S 47; P 1 p. 14.)
85. On November 28, 2012, District representatives convened a meeting to create a functional behavior assessment (FBA). Both Parents attended, as well as the director of special education, Student's advocate and Student's behavioral consultants. At the meeting, this group defined behaviors of concern: "head butt" (where Student strikes Student's own head into peers or adults, or attempts to do so) and "head hit" (where Student hits Student's own forehead with Student's own hands, objects or other persons' hands or arms, or attempts to do so). (NT 305; S 26.)
86. From November 29, 2012 through December 18, 2012, District personnel took data on the two behaviors of concern. Student engaged in head butting an average of 59.8 times per day. Student engaged in head hitting an average of 61.8 times per day. (S 26.)
87. On December 19, 2012, District officials provided an FBA through an amendment to the IEP. The FBA concluded that the function of Student's head butting behaviors was to delay demands, gain preferred activities, gain sensory activity or gain increased adult attention. The function of Student's head hitting behaviors was to gain sensory stimulation and to gain increased adult attention. (S 26.)
88. On December 19, 2012, District officials provided a positive behavior support plan. The plan provided of goal for reducing episodes of head butting by using visual cards to assist with communication, as well as gestural prompts. The plan also provided a goal to decrease episodes of head hitting utilizing the same techniques. It also included a goal to increase Student's use of communication cards or words to communicate Student's angry feelings or to request a short delay and a demand, instead of using head butting. (S 26.)

89. The December 19, 2012 positive behavior support plan provided for specially designed instruction including use of visual cards as communication tools; prompting to communicate rather than engage in behavior of concern; use of social story on tape; use of a visual token board for reinforcement; reduced use of verbal stimulation; increased use of visual for input; use of train sounds and visual for transition; daily visual schedules; visual schedules for specific activities; visual choice board for choosing reinforcers; provision of sensory diet throughout the day; honoring requests for sensory input; and teaching Student to request or choose input using a mirror and match procedure. (S 26.)
90. The December 19, 2012 positive behavior support plan provided for teaching replacement behaviors utilizing pictures or words; using brief delays of demand as consequence for use of replacement behavior; prompting; modeling; repeated modeling; safety measures; and de-escalation. (S 26.)
91. The December 19, 2012 IEP revision added one support for school personnel: consultation with Parents' home program behavior consultants. (S 28.)
92. On February 27, 2013, the IEP team amended the IEP to add a specially designed instruction calling for use of a sensory diet daily, as determined by teacher and Student. (S 29, 36.)
93. In March and April 2013, District personnel took data on reinforcers, approach behaviors and escape behaviors. (S 31; P16.)

PRIVATE EVALUATION

94. In late January 2013, Parent notified the District that the Parents' chosen private evaluator would request to do an in-school observation of Student. (S 47.)
95. On March 27, 2013, the District received a private evaluation report. The private evaluator diagnosed Student medically with Autistic Disorder, Attention Deficit/Hyperactivity Disorder, Combined Type, and Mathematics Disorder. The private evaluator endorsed the educational classification of Student with Autism and a secondary classification of Speech or Language Impairment. (S 32.)
96. The private evaluator identified Student's numerous educational needs, most of which had been identified in the District's September 2012 re-evaluation report. The private report drew attention to neurological explanations of Student's educational disabilities. These included difficulties with visual association learning, organized processing, motor memory, orally produced sounds and sound sequences, fluid reasoning, and sequencing of motor actions. The private evaluator pointed out that the combination of autistic spectrum disorder and attention/hyperactivity symptoms results in a more severe impairment of functioning, especially affecting social processing, adaptive functioning and executive control. (S 32.)

97. The private evaluator recommended a number of interventions that the District was already providing through the IEP, including prioritization of Student's challenging behaviors, in order to allow more thorough assessment and intervention; completion of a functional behavioral analysis by a certified behavior analyst familiar with autistic spectrum disorders; teaching of communication skills, social skills, sensory coping skills; daily routine and schedules; positive behavior supports and behavioral interventions; use of electronic devices for instructional purposes as well as for reward; addressing antecedent strategies for intervention to prevent unwanted behaviors; teaching skills in a natural environment; story-based interventions; use of schedules; and use of "first, then" concepts. (S 32.)
98. The private evaluator criticized the IEP team's placement of Student in full-time learning support; the evaluator recommended placement in full-time autistic support, even if this should require alternative educational placements outside of the District, such as placement in an intermediate unit program or an approved private school. This recommendation was based upon review of the September 2012 IEP. The evaluator inferred that the learning support placement would provide Student with "little or no opportunity for small group instruction." The evaluator concluded that this would result in Student's isolation. (S 32.)
99. The private evaluator recommended placement in an autistic support program for communication, social skills, behavior and mathematics, and participation in general education with one-to-one support for language arts, because Student's language arts skills were at the time comparable to those of many children in kindergarten. (S 32.)
100. The private evaluator recommended evaluation for assistive technology and augmented communication; challenging Student with new materials, such as arrangement of sight words into sentences; emphasis on a visual approach to reading; addressing comprehension needs; and use of multisensory approaches to mathematics instruction. (S 32.)
101. The private evaluator diagnosed Student with a Mathematics Disorder. The evaluator recommended research-based intervention. (S 32.)
102. On May 22, 2013, the District convened an IEP team meeting to review the independent educational evaluation. (NT 140-141; S 33.)

PROGRESS IN KINDERGARTEN (2012-2013 SCHOOL TERM)

103. In kindergarten, Student made significant progress in: attending to an activity for up to 40 minutes with frequent breaks; transitioning to a non-preferred activity with no more than three prompts and with utilization of sensory tools; remaining seated for high interest activities with minimal prompts; completing assigned tasks or following task directions at the table; using functional language to request wanted items; using signs and verbalizations to request wanted items in daily routine; choosing motivators with visual cues; toileting independently including removing clothing; making verbal requests for

items; writing Student's name; opening containers in Ziploc bags at lunch; donning shoes independently and socks with support; donning coat; using the zipper with support; buttoning and unbuttoning; attending to occupational therapy programming with motivators and modification; cutting straight and curved lines; following routine commands; naming objects and pictures; and reduction of head butting behavior. (S 35.)

104. Student did not make significant progress in attending to instruction; remaining seated for morning meeting with the rest of the class; verbalizing Student's feelings and understanding the concept of feelings; initiating play with other peers; independent turn taking; using speech to interact with peers; making eye contact socially; appropriately greeting peers; responding to conversational questions without echoing; expressing anger or need for more time; independently following commands; labeling objects/pictures; answering questions; identifying vocabulary words; and answering questions about age, name, and favorites. (S 35.)

105. Student showed mastery of sequencing numbers, counting by ones to 100, naming the days of the week, and writing numbers from 0 to 20. Student demonstrated good legibility and writing, ability to work independently, ability to take care of materials and clean up properly, ability to write beginning and ending consonant sounds, ability to provide illustrations corresponding with the story, ability to use logical phonetic spelling for unknown words, phonemic awareness skills, writing name correctly, and understanding left to right progression. Student demonstrated pencil grip that met expectations. (S 35.)

106. Student's head butting behaviors in school declined after January 2013. Unfortunately, these behaviors increased at home at about the same time. (P 1; S 35 p. 12-13, 49.)

FIRST GRADE IEP (2013-2014 SCHOOL TERM)

107. On September 10, 2013, the District convened an IEP team meeting and offered a proposed IEP and change of placement. (S 37, 38, 41.) 7, 38, 41.)

108. At Parents' request, the District had assigned Student to a particular regular education teacher. (S 41.)

109. The occupational therapist called Parent on the evening before the meeting in order to review the proposals in the draft IEP. (S 38.)

110. The meeting included Parents, the regular education teacher, the special education teachers, the speech and language therapists, and the school psychologist, as well as the director of special education. (S 41.)

111. After the meeting on September 10, 2013, the District's director of special education made revisions pursuant to the discussion at the meeting. (S 41.)

112. Student's placement was changed from full time learning support to supplemental autistic support (inclusion in general education settings for about 35% of the day), consistent with the recommendation of the private evaluator, because the District was able to provide an autistic support classroom at Student's neighborhood school, due an increase in the number of students assigned to that school who needed an autistic support classroom. (NT 150; S 41.)
113. The new autistic support classroom utilized a research validated instructional verbal behavior methodology, consistent with the recommendation of the private evaluator. The District hired a teacher with autistic support experience who had taken over as Student's learning support teacher for the latter part of Student's kindergarten year. (NT 149-150; S 43, 46.)
114. The new autistic support teacher instituted a "peer buddy" program, in which peers worked with Student to encourage Student to learn appropriate social skills. (NT 150-152; S 40.)
115. The September 10, 2013 IEP recognized that Student continued to have communication needs and behaviors that impeded Student's learning or that of others. (S 41.)
116. The September 10, 2013 IEP offered goals for pronunciation of irregular words; decoding words that begin with a stop sound; adding two single-digit numbers; remaining seated quietly at morning meeting with fewer than five prompts; engaging in parallel play, initiating play and engaging in reciprocal play/turn taking; using word cards or words, communicating anger or request for short delay instead of head butting behavior; independently donning coat, engaging and zipping zipper, buttoning and unbuttoning 4/4 buttons, and snapping 4/4 snaps; attending to non-preferred tasks; independent response to social greetings; using 3-4 word sentences to verbally request wants or needs; initiating social interactions by requesting items or materials, securing eye contact and using Student's name; following novel one step directions; identifying common nouns, actions and feelings utilizing pictures or objects; responding to yes/no and simple who, what, and where questions about pictures; writing Student's name legibly; completing three-step activities; cutting straight and curved lines; and coloring within designated areas. (S 41.)
117. The September 10, 2013 IEP goals addressed all of the skills for which Student had not made progress in kindergarten. (S 41.)
118. The September 10, 2013 IEP provided for specially designed instruction and modifications including walking Student into school in the morning and to the car in the afternoon; use of iPad for antecedent and consequence purposes; use of picture schedules in special education and regular education; small group and individual speech and language instruction; immediate corrective feedback; cueing hierarchy; use of signs and gestures to promote spontaneous fertilization; use of picture cards and objects for vocabulary development; structured social activities; use of iPad for language, vocabulary, and social skill development; consultation with occupational therapist; self-regulation strategies; frequent calming sensory activities; preferential seating; special

chair; use of headphones, slant board; weekly notes sent home regarding occupational therapy; frequent opportunities for movement; decreased distraction; marking seating area for Student with picture or square; sensory diet; frequent breaks; behavior support plan; and role-play and social stories. (NT 469, 489; S 41.)

119. The September 10, 2013 IEP omitted some specially designed instruction and modifications that had been provided to Student during kindergarten year: modeling to encourage social-communicative skills; weekly notes sent home to Parents regarding speech and language progress; use of indirect prompts; limiting speech and restricting screen time; gestures, signs and touch prompts rather than long verbal directives; limiting speech when giving instruction and direction; reducing language; weekly progress probes for each goal worked on during the week; visual and verbal prompting; daily communication log; cueing and signaling to maintain or regain attention; and modified regular education curriculum. (S 41.)
120. The September 10, 2013 IEP continued occupational therapy at the same level, including up to 60 minutes per month of occupational therapy consult with teachers. It increased speech and language therapy to two days per cycle, 30 minutes per session. (S 41.)
121. The September 10, 2013 IEP included review of sensory diet with all relevant staff as part of supports for school personnel. (S 41.)
122. The September 10, 2013 IEP found Student eligible for ESY services. (S 41.)
123. The September 10, 2013 IEP provided for Student to be included in special classes such as art, library, music, gym and computer, as well as non-academic general education settings, such as lunch and assemblies. Supplementary aids and services were provided through one-to-one accompaniment, either by a personal care assistant or the special education teacher. The IEP indicated a plan to gradually phase Student into academic classes in the regular education setting, depending on Student's ability to demonstrate readiness behaviors. During first grade, Student was able to participate in a social studies class. (NT 160; S 41.)
124. The September 10, 2013 IEP provided that, if Student's behaviors became disruptive to Student or peers during inclusion in regular education settings, Student would be escorted back to the autistic support room until such time as Student's behavior should permit Student's return to the general education setting. (S 41.)
125. The September 10, 2013 IEP included positive behavior support plan, which addressed two prioritized unwanted behaviors: head butting and head hitting. The positive behavior support plan offered antecedent strategies including use of visual cards as communication tools to express anger or desire for over time; prompting to utilize communication rather than head butting; use of social stories on tape regarding communication of anger or request for more time; visual token board; reduced verbal stimulation and increased use of visuals; use of train sounds and visual for transition; daily visual schedule; visual schedules for specific activities; visual choice board for

choosing reinforcers; sensory diet; honoring requests for sensory input and denial of sensory input; and use of mirror and match procedure. Positive behavior support plan offered a goal for utilizing picture cards or verbal requests to indicate anger or request for more time as a replacement for head butting behavior. The positive behavior support plan also provided detailed instructions for consequences immediately upon Student's exhibition of behaviors of concern. (S 41.)

126. On March 19, 2014, after a resolution meeting, the District, with Parent permission, modified the IEP without a meeting to add to the list of program modifications and specially designed instruction. The amendment added: opportunity for gross motor activities as part of sensory diet, with reference to attached sensory diet; direct, research validated reading instruction; adaptive math curriculum using touch math strategies (consistent with the recommendation of the private evaluator); small-group social skill activities; opportunity to engage in specified gross motor activities; provision of data from verbal behavior sheets to Parents; equal opportunity to utilize Lenovo tablet; and opportunity to participate in science and social studies classes in regular education, as Student could tolerate. (S 42, 48.)
127. Student's teachers provided written reports to Parents regarding Student's behavior and educational activities. (NT 162; P12-15.)

PROGRESS IN FIRST GRADE (2013-2014 TERM)

128. Student's head butting behaviors decreased significantly during first grade. (NT 164; S 44.)
129. During first grade, District personnel took data on additional behaviors, including aggressive behaviors; self-injurious behaviors; instruction time missed due to scripting; escape behaviors; and refusal to do a task. These behaviors also decreased in first grade. (S 44; P 17, 20.)
130. During first grade, Student's teachers provided data regarding Student's progress on IEP goals. (P 18.)
131. Student made significant progress in sounding out irregular words; understanding, identifying pictures of, and occasionally verbalizing emotion of anger; buttoning and unbuttoning 4/4 and 1/2 inch buttons with prompting; donning coat; engaging and zipping zipper; using 4/4 snaps with prompts; using 3 to 4 word sentences to verbally request wants and needs; following novel one step directions; identifying pictures representing common nouns, actions and feelings; naming pictures of common nouns, actions and feelings; responding to yes/no questions; responding to "what" questions; cutting straight and curved line shapes; coloring within the lines; assembling tasks to look like a model; and obtaining and returning requested materials for projects. (NT 174; S 44, 50.)

132. Student did not make significant progress with regard to: rhyming skills; adding single-digit numbers without touch point prompting; remaining seated in regular education with no more than five prompts; initiating play with peers; engaging in parallel play, reciprocal play and turn taking with peers; communicating anger or request for more time to replace head butting behavior; attending to a non-preferred task for 15 minutes with no more than two verbal redirections; responding to social greetings; initiating social interactions with others; responding to "who" and "where" questions; and legibly writing Student's own name. (S 44.)
133. Student was able to perform on grade level in special subjects, including art, library, music, physical education and technology education. Student mastered first-grade number skills and one first grade geometry skill, as well as copying and extending patterns, naming the days of the week and writing numbers from 0 to 20. (P 19.)

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).⁵ 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 evidence⁶ 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).

⁵ 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.

⁶ 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. See, Comm. v. Williams, 532 Pa. 265, 284-286 (1992). Weight is based upon the persuasiveness of the evidence, not simply quantity. Comm. v. Walsh, 2013 Pa. Commw. Unpub. LEXIS 164.

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, Parents requested due process and the burden of proof is allocated to Parents. Parents bear the burden of persuasion that the District failed to comply with its obligations under the IDEA. If Parents fail to produce a preponderance of evidence in support of Parents’ claims, or if the evidence is in “equipoise”, then Parents cannot prevail.

APPROPRIATENESS OF EVALUATION

Both federal law and state standards govern whether or not the District’s evaluation was appropriate. The IDEA sets forth two purposes of the required evaluation: to determine whether or not a Student is a Student with a disability as defined in the law, and to “determine the educational needs of such Student” 20 U.S.C. §1414(a)(1)(C)(i). The IDEA regulations prescribe in detail the procedures to be used in order to fulfill these purposes. 34 C.F.R. §§300.301 to 300.311. 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). In addition to the above requirements, Pennsylvania regulations provide special requirements for assessment of suspected specific learning disability. 14 Pa.Code §14.125.

The evidence is preponderant that the District complied with both federal and state procedural requirements. Nevertheless, Parents challenged the District's re-evaluation as insufficiently comprehensive.

The record is preponderant to the contrary. A careful reading of the record demonstrates that the re-evaluation addressed Student's diagnosed Autism, attention difficulties, sensory difficulties, both sensory seeking and sensory avoiding, functional and developmental delays and disabilities, and maladaptive behaviors. It was based upon a thorough and extensive review of Student's medical and educational history, extensive parental input, classroom observations in both early intervention and kindergarten, teacher input, multiple assessments directed at the major suspected disabilities and behavioral problems, instruments eliciting data on emotional and social functioning, speech pathologist clinical assessment of communication, and occupational therapist assessment of gross motor, fine motor, visual motor and sensory functioning. Therefore, 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).

Parents argue that the evaluation was not comprehensive because it did not include cognitive or achievement testing. When questioned by Parents' counsel, the District's director of special education seemed to be unaware that it is possible to obtain cognitive scores with a non-verbal child through standardized non-verbal cognitive tests.

This evidence alone does not prove that the evaluation was inadequate. The re-evaluation report explains the lack of standardized cognitive and achievement testing as caused by both Student's communication disabilities and Student's age. There is no further explanation, but it is apparent that the evaluator considered the combination of multiple circumstances in choosing not

to do this kind of testing. The evaluator apparently was unavailable for the hearing, and so was unable to defend this professional decision.

The Student's cognitive functioning was assessed indirectly through the standardized adaptive behavior scales. The record does not show that the conclusions from this testing were inaccurate.

Moreover, the private evaluation conducted less than a year later confirms the District's educational classification; therefore, the evidence, if anything, tends to show that the absence of cognitive and achievement testing of this young child did not detract from the appropriateness of the evaluation. Although the private evaluator medically diagnosed ADHD and a mathematics disability, she did not recommend a classification of specific learning disability. Most of the private evaluator's recommendations, rendered in the Spring of Student's kindergarten year, mirrored what the District was doing or had done. While some recommendations, such as the use of touch mathematics, were new and were adopted by the District, the evidence does not establish preponderantly that the Student would have benefitted from such recommendations any earlier in Student's kindergarten year.

Parents suggested that the District's evaluation was inappropriate because it did not include an evaluation for assistive technology needs. Although this may have been a procedural defect in the evaluation, it did not result in substantive harm. On the contrary, District educators subsequently utilized an array of assistive technology with this Student, for both motivational and instructional purposes.

PROVISION OF FREE APPROPRIATE PUBLIC EDUCATION

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).

A school district is not necessarily required to provide the best possible program to a student, or to maximize the student's potential. Ridley Sch. Dist. v. MR, 680 F.3d 260, 269 (3d Cir. 2012). An IEP is not required to incorporate every program that parents desire for their child. Ibid. Rather, an IEP must provide a "basic floor of opportunity" for the child. Mary Courtney T. v. School District of Philadelphia, 575 F.3d at 251; Carlisle Area School District v. Scott P., 62 F.3d 520, 532 (3d Cir. 1995).

The law requires only that the plan and its execution were reasonably calculated to provide meaningful benefit. Carlisle Area School v. Scott P., 62 F.3d 520 (3d Cir. 1995), cert. den. 517 U.S. 1135, 116 S.Ct. 1419, 134 L.Ed.2d 544(1996)(appropriateness is to be judged prospectively, so that lack of progress does not in and of itself render an IEP inappropriate.) Its appropriateness must be determined as of the time at which 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); D.C. v. Mount Olive Twp. Bd. Of Educ., 2014 U.S. Dist. LEXIS 45788 (D.N.J. 2014).

As the above discussion demonstrates, the District was under an obligation during the relevant time to provide a placement and program that were reasonably calculated to provide meaningful educational benefit. I conclude that the District failed to meet this standard for the first several months of Student's kindergarten year, until February 1, 2013; I conclude that, thereafter, the District met the above legal standard.

The evidence is preponderant that, for two years before Student transitioned to the District's kindergarten program, the District was on notice that Student was likely to be enrolled in its special education kindergarten program, that Student was receiving early intervention

services as a child with the combined disabilities of Autism and Speech or Language Impairment, and that Student had a history of serious maladaptive behaviors that interfered with Student's learning and that of Student's peers. The District was obligated by law to account for Student's needs upon Student's transition to its kindergarten, beginning at least by January 2012, when Parents signed a document indicating their intent to enroll Student in the District, and when District personnel promised to send a permission to evaluate form at a January meeting, in response to Parents' request.

Unaccountably, the District failed to issue the promised permission to evaluate form until late April, 2012; by the time Parent received and returned this form in May, it was too late to complete a re-evaluation, transition plan and IEP before the start of kindergarten in August 2012. Moreover, the District failed to provide appropriately for the likelihood that Student would exhibit a resurgence of maladaptive behaviors – including aggressive and physically assaultive behaviors – upon transition to kindergarten. When asked about this at the hearing, the director of special education could only respond that it was the District's longstanding practice to delay issuing the permission to evaluate form to Parents of incoming kindergarten students until April of the year of enrollment. Whatever internal rationales may exist for this practice, it fails to account for the IDEA's mandate that the District meet the needs of each enrolled disabled child individually. Mere policy or practice is not a sufficient reason to deny such individualization, and I conclude that the delay in sending out the permission to evaluate was inappropriate in the circumstances of this matter.

When the re-evaluation was available on September 7, and revised after meeting with the Parents as of September 12, it did not address Student's problem behaviors appropriately. Although the IEP stated that the Student's behaviors interfered with education, data had not been

taken on these behaviors, nor was there any plan to do so. An “informal” FBA was provided as part of a behavior plan; however, the behavioral assessment jumbled numerous disparate behaviors, poorly defined, into one overall category, and did the same with the functions of those behaviors, rendering the assessment of little value in planning intervention. The resulting intervention plan did not sufficiently target the behaviors of concern to be effective, and its provisions were not the product of sufficient expertise. In the first few months of Student’s tenure at the District, Student’s behavior was not brought under control appropriately.

It is to be noted that the District was in no position to collect data until Student began classes in its kindergarten classroom. Reports from early intervention were conflicting as to the actual incidence of behaviors at the end of that program; at most the District can be charged with knowledge that serious behaviors were a potential, though grave, concern. However, by the time that the District issued its first behavior support plan on September 19, 2012, Student had been in school for more than two weeks, sufficient time to gather data, especially since the Student’s serious behaviors were evident within three days of the start of school. Thus, I conclude that there was no reason to excuse the District’s inappropriate intervention as of September 19, 2012.

In December, after Student seriously injured Student’s own teacher through [redacted] behavior that was extremely frequent throughout the first months of Student’s tenure, the District finally brought in a behavior specialist from the intermediate unit, who conducted a formal FBA. The resulting positive behavior support plan was appropriate. Within months, teachers reported that Student’s targeted behaviors (head butting and head hitting) were reduced to manageable levels that permitted learning, and permitted some inclusion in regular education.

I conclude that the District’s inappropriate delay in providing a data based FBA deprived Student of educational benefit from September 19, 2012 until the first day of February, 2013,

when the record shows that an appropriate behavior support plan began to show positive effects on Student's behavior.

Parent argues that the behavior specialist's decision to focus on Student's most dangerous behaviors, the head butting and hitting behaviors, meant that there was no intervention in Student' other behaviors that were highly disruptive.⁷ Parent points out correctly that the District never conducted another FBA to deal with these behaviors. However, these facts do not lead to the conclusion that the District thus deprived Student of meaningful educational benefits. The record shows that the Student made meaningful progress in many areas, including educational readiness skills and academic skills, during the latter part of the kindergarten year. Thus, the evidence does not prove a substantive deprivation during the time after the two most serious behaviors were addressed with positive effect. I conclude that the failure to do more FBAs was at most a procedural failure, not leading to any remediable deprivation under the IDEA.

I conclude that, once Student's most serious behaviors were effectively addressed, the District provided Student with a FAPE. As noted above, I find that the re-evaluation report of September 2012 was appropriate and identified all of Student's educational needs. After carefully reviewing the kindergarten and first grade IEPs, along with the various revisions during both years, I conclude that the Student's placements and IEPs for both years (with the exception of behavior in the first part of kindergarten as discussed above) addressed all of Student's educational needs in a manner that was reasonably calculated to provide Student with meaningful educational benefit. The placements were essentially consistent with what the re-evaluation recommended; they provided small group special education services, individualized for Student through the provision of specially designed and related services that targeted

⁷ Parents' own expert, the independent evaluator, recommended that the District prioritize the behaviors to be assessed, in order to permit a more cohesive assessment and behavior management plan. (S 32.)

Student's most serious communication, attention, sensory and fine motor disabilities. The IEPs provided appropriate and thorough present levels of functioning, goals that addressed Student's educational needs and were constructed so as to be measurable, and specially designed instruction and modifications that met Student's disabilities in such a way as to permit access to the relevant curricula. Progress data in this record demonstrates by a preponderance of the evidence that the Student made progress that was meaningful in view of Student's profound combination of cognitive disabilities.

This is not to say that the District's educational services were perfect, or even that they offered Student the best possible level of service. Parents, in their diligence, pointed out and pressed for remediation of a number of flaws and failures in the IEPs and in the Student's programs. In many if not most cases, District personnel responded to these complaints by improving the services and doing what Parents reasonably proposed.

The IDEA contemplates such collaboration; it is not evidence of a denial of FAPE. As discussed above, the law requires a reasonable opportunity for meaningful benefit, not the best possible programming. Thus, my conclusion of law in this case is not meant to imply that the educational programs offered to Student were of the highest quality.

PLACEMENT

Parents argue that, from the first day of kindergarten, the District should have provided Student with an autistic support classroom (not learning support), with verbal behavior or similar programming. However, the record shows that the District made a reasonable choice not to place Student in an autistic support classroom in a school other than Student's neighborhood school at that critical transitional time. It was not unreasonable for the District to await the evaluation

report before deciding whether or not to provide Student with a verbal behavior or other specialized educational program.⁸

Meanwhile, contrary to Parents' arguments, the District provided Student with considerable transitional planning, through meetings, telephone calls and email messages. Early on, it provided a one-to-one paraprofessional full time to assist Student. It made special arrangements for Student to see and spend time in the special education and regular education classrooms. It introduced Student to the educators who would be working with Student. It worked with Parent to arrange an acceptable plan for Student's arrival and departure from school.

The re-evaluation did not recommend an autistic support classroom with Verbal Behavior programming; rather, it recommended a self contained, small class setting, with a plan to transition Student to more inclusive setting as Student's readiness skills should permit. The District followed that recommendation, albeit through its existing learning support classroom. While this was not the ideal setting for Student, the District made extensive efforts to provide individualized services to address all of Student's educational needs. Thus, on balance, the record does not support a conclusion that the District's decision not to provide an autistic support program with verbal behavior programming was a denial of a FAPE.

The Parents argue that the District's failure to provide Student with Verbal Behavior or other published, research based instructional programs in kindergarten, and its delayed and interrupted provision of that program in Student's first grade year, was a denial of a FAPE. The IDEA requirement does not go that far. Failure to provide Verbal Behavior or another published

⁸ It may be argued that it was inappropriate that the District had to wait for the re-evaluation, since it was unreasonably late, as discussed above. However, the re-evaluation itself answers that argument, as discussed below: it did not recommend placement outside the neighborhood school, nor did it specify an autistic support classroom with Verbal Behavior. Thus, waiting for a late re-evaluation did not deprive Student of educational benefit.

research based program for an autistic child is not in itself an automatic violation of the IDEA. The IDEA requires use of research based instructional techniques “to the extent practicable”, 34 C.F.R. §300.320(a)(4). Thus, the circumstances of the decision to use or not use a specific published program – or any published program – may be considered under the IDEA. An IEP is not required to incorporate every program that parents desire for their child. Ridley Sch. Dist. v. M.R., 680 F.3d 269 (3d Cir. 2012).

In this matter, the record shows that the District considered Student’s needs carefully and concluded that its existing learning support setting could meet Student’s needs appropriately in kindergarten, when coupled with a one-to-one paralegal, and the numerous specially designed instructional methods and accommodations set forth in the IEP.

Moreover, the circumstances of this decision need to be taken into account. Here, the learning support class was relatively small and the teacher had autistic support teaching experience; moreover, both Parent and the rest of the IEP team agreed that it was a priority to phase in inclusive education for this child as soon as possible. Student’s academic skills were relatively good, although Student’s communication, social and behavioral issues were profound.

Taking all of these factors into consideration, the record does not support a conclusion that it was unreasonable to start Student in Student’s neighborhood school, even though lacking both an autistic support classroom and Verbal Behavior programming. Because the alternative would have been a placement in another school with which both Student and Parents would have been less familiar (with the attendant transitional difficulties for this child on the autistic spectrum), the choice, from the point of view of the child’s opportunity for educational benefit, posed serious difficulties either way. In short, the record does not prove that the choice to stay at

the neighborhood school was not reasonably calculated to provide meaningful educational benefit.

IEP AND SERVICES PROVIDED

As to the provision of Verbal Behavior as a new program in first grade, with some interruptions in the provision of this service, the record does not support a conclusion that the addition of this service was necessary to a provision of a FAPE. Thus, any deficiencies in its provision during first grade did not, on this record, deny Student meaningful educational benefit.

Parents argue that the IEP was inappropriate because it did not address assistive technology “as a special consideration”. However, the IEPs did reflect the use of several assistive technologies, both “high tech” and “low tech”. The IDEA requires no more.

Parents argue that the District’s IEPs, in the sections on specially designed instruction and modifications, failed to incorporate many of the services and modifications set forth in the early intervention IEP. This does not undercut the appropriateness of the District IEPs, especially in a young child. Children of preschool and kindergarten age are developing and changing rapidly. Skills emerge during that time as the children develop. Specially designed instruction and modifications need to be shaped to meet the child’s present needs, and there is no requirement that an IEP hold on to past educational services if they are no longer needed or appropriate. Parents did not provide preponderant evidence that needed SDIs or modifications were denied as Student transitioned to kindergarten.

Parents argue that the IEP goals were inappropriate because they did not contain base lines. Although many of the goal formulations did not contain base lines, most complied with the IDEA because they were measureable. Most of the goals were stated in terms of number of

times or number of prompts, which could be counted. Progress reports for the most part (at least for the initial reports in October and final reports in the Spring of the year) were stated in terms of numerically measured progress. Evidence showed that the District's teachers are expected to take data on measureable goals, although they did not always report the data itself in progress reports sent to Parents. Moreover, the IEPs proceeded from present levels that were extensive and appropriately described Student's present functioning. For a child transitioning to kindergarten, many of the skills addressed by the goals did not have a known base line. For all of these reasons, Parents' arguments regarding the absence of baselines do not convince this trier of fact that the goals were rendered inappropriate.

Parents argue that the failure to provide a formal sensory diet rendered the IEPs inappropriate. However, the IDEA does not require a formal sensory diet. The IEPs showed compliance with the IDEA because they addressed Student's sensory needs appropriately and extensively, in the specially designed instruction and modifications, requiring frequent use of breaks, movement, sensory input and reduction of distracting or discomforting sensory input. The evidence shows that this need was addressed appropriately in the IEPs.

Parents argued that the goals were not revised in the Student's first grade year to account for Student's progress in the newly applied Verbal Behavior program, and to account for changes in Student's behavior. Some of this omission was due to the filing of the due process request. However, on this record, this procedural decision did not prevent the provision of services to Student. Thus, there is no evidence that this resulted in a denial of a FAPE.

Parents argue that Student did not make adequate progress in kindergarten and first grade. They point to evidence that Student's progress was very slow, and that Student was functioning academically at a kindergarten level while in first grade. While this is a serious concern, it does

not prove that the District failed to provide an opportunity for meaningful educational gain. The meaningfulness of educational gain is to be assessed under the IDEA in light of the child's potential. Mary Courtney T. v. School District of Philadelphia, 575 F.3d 235, 240 (3rd Cir. 2009). The record is far more than preponderant that Student in kindergarten and first grade presented with a combination of cognitive disabilities that seriously compromised Student's ability to learn. Based upon this record, appropriate educational services could be expected to result in slow learning and progress. Therefore, at that time, Student's slow learning did not prove inadequate services by a preponderance of the evidence.

LEAST RESTRICTIVE ENVIRONMENT

The IDEA requires states to ensure that children with disabilities will be educated with children who are not disabled, "to the maximum extent appropriate" 20 U.S.C. §1412(a)(5)(A). The United States Court of Appeals for the Third Circuit has construed this language to prohibit local educational agencies from placing a child with disabilities outside of a regular classroom, if educating the child in the regular education classroom, with supplementary aids and support services, can be achieved "satisfactorily." Oberti v. Board of Ed. Of Bor. Of Clementon Sch. Dist., 995 F.2d 1204, 1207 (3d Cir. 1993). Each public agency must assure that a continuum of alternative placements is available, including special classes, resource rooms, supplementary services and special schools. 34 C.F.R. §300.115.⁹ The Court noted a "tension" within the IDEA between the strong congressional policy in favor of inclusion, and the law's mandate that educational services be tailored to meet the unique educational needs of the child. Oberti, 995 F.2d above at 1214.

⁹ This continuum assumes a mandate to educate the child in "the school that he or she would attend if nondisabled." 34 C.F.R. § 300.116(c). State regulations require school districts to ensure that "children with disabilities have access to the general curriculum" 22 Pa. Code § 14.102(a)(ii).

Children with disabilities may not be removed from the regular educational environment unless “the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 20 U.S.C. §1412(a)(5)(A). In determining placement, consideration must be given to any potential harmful effect on the child or on the quality of services that he or she needs” 34 C.F.R. §300.116(d). Removal is not permitted if the sole reason is “needed modifications in the general education curriculum.” 34 C.F.R. §300.116(e).

The Court in Oberti set forth a two part analysis for determining whether or not a local educational agency has complied with the least restrictive environment requirement. First, the court (or in this case the hearing officer) must determine whether or not the child can be educated satisfactorily in the regular education setting with supplementary aids and services. Second, the court must determine whether or not the agency has provided education in the general education setting to the extent feasible, such as inclusion in part of the general education classes and extracurricular and other school activities. Oberti, 995 F.2d above at 1215.

Addressing the first part of the Oberti analysis, the court must consider three things. First, it must determine whether or not the agency has given “serious consideration” to utilizing the full continuum of placements and supplementary aids and services. Id. at 1216. Next, the court must compare and contrast the educational benefits that the child can receive in the regular education and segregated settings, particularly considering the benefits of learning social and communication skills in the general education context. Ibid. Finally, the court must consider the degree to which the child’s behavior in the regular education setting is so disruptive that the child is not benefitting and that the behavior is interfering with the education of the other children in the general education setting. Id. at 1217. The Court emphasized that if supplementary aids and

services would prevent these negative consequences, the determination of a negative effect on peers would not warrant removal from the regular education environment. Ibid.

Applying the Oberti analysis to the stipulated record and exhibits, I first inquire as to whether or not the District gave “serious consideration” to whether Student can be provided with a FAPE “satisfactorily” and “appropriately” while placed entirely in the general education classroom with supplementary aids and services. Such consideration must be more than a perfunctory nod toward the option of full inclusion, as the word “serious” implies. See, Blount v. Lancaster-Lebanon Intermediate Unit, 2003 WL 22988892 (W.D. Pa. 2003).

I conclude that the District complied with the IDEA’s LRE mandate. It gave serious consideration to whether or not placement in general education with supplementary aids and services would be satisfactory, and it concluded, with good reason, that such placement would not be satisfactory. It considered the benefits of inclusion, balanced against the benefits of the special education setting, as well as the potential harm to typical students due to Student’s behaviors. It considered supplementary aids and services and provided them to enable Student to attend special classes in the regular education setting when not unreasonably disruptive or unsafe.

The record shows that Student’s disabilities prevented full inclusion in three ways. First, Student lacked the necessary readiness skills; District officials, corroborated by the IEPs themselves, credibly demonstrated that the Student, in the early months of kindergarten, was unable to attend to instruction, unable to understand and follow oral instructions, unable to sit for 15 minutes, unable to concentrate on a project for an extended period of time, unable to cope with the need for sensory input, and unable to deal with uncomfortable sensory stimuli. Second, Student’s behaviors frequently prevented Student’s access to the curriculum and often interfered

with peers' access as well. These facts are demonstrated preponderantly in this record. Third, Student was not able to be safe without close supervision, due to Student's inability to control impulses and the likelihood that Student would elope from unenclosed settings.

District educators reasonably concluded that these deficits outweighed the benefits of inclusion with typical children in the educational environment, for most purposes. The IEPs provided that Student would not be with typical students for most of the day, and would be in the regular education setting only for special subjects like library, lunch and recess.

The District put in place substantial supplementary aids and services to enable Student to be included in these settings. However, even in these settings, Student's disabilities interfered so seriously that Student sometimes could not remain. In these cases, the IEPs provided that the Student would be returned to the less restrictive setting as soon as Student could be there satisfactorily.

The District's IEPs show that the plan was to improve Student's readiness skills, get Student's behaviors under control, and increase Student's access to general education whenever it could be arranged satisfactorily. The record shows that, later in student's kindergarten year and in first grade, the District gradually increased Student's access to general education, including some academic classes.

Parents suggest that the District was inappropriately reluctant to provide inclusion opportunities for Student. In support of this argument, they point to the District's concerns and responses with regard to anticipating inappropriate behaviors from Student in regular education settings. In particular, they point to the use of a restraint procedure to escort Student from a story reading activity in the library, in October 2012. However, the record shows that the Student's behavior in that situation had escalated to the point of being completely disruptive to the class

and even dangerous. I find no basis to infer from this that the District was reluctant to embrace the IDEA's LRE requirement.

Parents also point to more than one incident in which District personnel appeared to express concerns about the appropriateness of allowing Student to participate in class wide activities that provided opportunities for Student to elope from control of educators and attempt to go home without supervision. This suggested reading of the record ignores the fact that it was Parents who emphasized repeatedly their own concerns about Student's behaviors, and particularly raised serious concerns for Student's safety in light of Parents' concerns about Student's potential for elopement from educational settings. Thus on one hand, parents argue that the District had a legal obligation to be highly vigilant regarding the possibility of elopement; on the other hand, Parents argue that the District was overly sensitive to this concern when it came to class wide activities. Its internal inconsistency renders this reading of the record unconvincing.

CREDIBILITY

It is the responsibility of the hearing officer to determine the credibility of witnesses. I conclude that all of the witnesses were credible.

Parent presented as sincere and vigilant, given Parents' lack of knowledge of educational principles and techniques. However, I found that in many instances, they asserted inaccurate criticisms of the District, demands for additional services, and testimony at the hearing regarding lack of response to valid educational concerns that they had brought up. In many such instances, the evidence is preponderant that the District did in fact respond to such needs and requests, and provide for appropriate educational programming to address such needs and requests. Thus, I

must accord reduced weight to the testimony of Parent with regard to many of the asserted failures of District to respond to legitimate educational needs.

I accord reduced weight to the report of the independent educational evaluation, insofar as it criticizes the Student's placement, because it was based upon outdated information as to District services. I found the District personnel to have been credible witnesses.

COMPENSATORY EDUCATION

Compensatory education is an equitable remedy, designed to provide to the Student the educational services that should have been provided, but were not provided. Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990). In the Third Circuit, it is common to order the District to make up such services on an hour-by-hour basis; however, there is support also for a "make whole" approach. See generally, Ferren C. v. School Dist. of Phila., 612 F.3d 712, 718 (3d Cir. 2010). In this matter, I conclude that compensatory education is an appropriate remedy for the District's failure to address Student's behavioral needs appropriately in the first months of kindergarten. However, the record does not provide a basis for any conclusion as to what level of services would make Student "whole". Therefore, I choose to employ the traditional hour for hour approach. Because Student's problem behaviors were extensive and sometimes dangerous to Student, and because of their documented extreme frequency, I conclude that it is equitable and remedial to order the District to provide full days of compensatory education for the period of time in which Student's behaviors interfered with Student's education. The terms of this compensatory education are set forth in my order, below.

PROSPECTIVE RELIEF

In light of my findings and conclusions, I find no reason to order the District to provide any specific educational service that it was not providing on May 6, 2014. I reach no finding or conclusion regarding any act or omission of the District subsequent to that date.

CONCLUSION

In sum, I conclude that the District failed to provide a FAPE to Student from September 19, 2012 to February 1, 2013. I further conclude that the District provided Student with a FAPE in the least restrictive environment within the meaning of the IDEA from February 1, 2013 to May 6, 2014. I order the District to provide Student with compensatory education as set forth below, and I decline to enter a prospective order for services.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, I hereby **ORDER** as follows:

1. The District's re-evaluation report dated September 6, 2012, as revised September 12, 2012, was appropriate.
2. The District provided Student with an appropriate placement during the relevant period of time from the first day of school in the 2012-2013 school year until May 6, 2014.
3. The District failed to provide Student with an appropriate IEP from September 19, 2012 to February 1, 2013. The District provided Student with an appropriate IEP from February 1, 2013 to May 6, 2014.
4. The District appropriately provided Student with placement in the least restrictive environment during the relevant period.

5. I hereby **ORDER** the District to provide compensatory education to Student in the amount of 6.5 hours for each school day on which school was in session from September 19, 2012 to February 1, 2013.
 - a. The educational services ordered above may take the form of any appropriate developmental, remedial or instructional services, product or device that furthers the goals of the Student's IEP at the time at which the ordered service is rendered. The ordered services shall be in addition to, and shall not be provided in place of, any educational service that is or should be provided by the District pursuant to Student's current IEP at the time at which the ordered service is rendered. Services may occur after school hours, on weekends, or during summer months when convenient for Student or Parents. Services shall be provided at the Parent's election at any time before the end of the 2015-2016 school term.
 - b. The cost of the ordered services may be limited to the comparable cost that the District would incur at the time of service, to provide such services through qualified employees or vendors, including salaries and benefits, or to provide such services by contract.
6. The hearing officer does not order the District to provide any specific educational programming for the 2014-2015 school year.

It is **FURTHER ORDERED** that any claims that are encompassed in this captioned matter and not specifically addressed by this decision and order are denied and dismissed.

William F. Culleton, Jr. Esq.

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

August 20, 2014