

This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

Pennsylvania

Special Education Hearing Officer

DECISION

Child's Name: C.M.

Date of Birth: [redacted]

ODR No. 00782-0910 AS

CLOSED HEARING

Parties to the Hearing:

Representative:

Parent[s]

Drew Christian, Esquire
801 Monroe Avenue
Scranton, PA 18510

Williamsport Area School District
201 West Third Street
Williamsport, PA 17701-6409

Fred A. Holland, Esquire
442 William Street
Williamsport, PA 17701

Date of Resolution Meeting

May 3, 2010

Dates of Hearing:

August 19, 2010, August 20, 2010

Record Closed:

September 16, 2010

Date of Decision:

October 1, 2010

Hearing Officer:

William F. Culleton, Jr., Esquire

INTRODUCTION AND PROCEDURAL HISTORY

Student is an early teen-aged eligible resident of the Williamsport Area School District (District), presently in the eighth grade. (NT 7-10 to 21, 8-17, 13-24 to 14-10.) Student is identified with Autism under the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA). (NT 8-14 to 17.)

Student's Parent filed a Complaint Notice (complaint) requesting due process on March 4, 2010. Parent requests a finding that the District failed to provide a free appropriate public education (FAPE) to the Student during the period from March 4, 2008 until the first hearing session in this matter, August 19, 2010. Parent also requests that I order the District to provide compensatory education for failure to provide appropriate educational services with regard to the Student's educational needs in mathematics, written expression, social skills, socially pragmatic language skills and behavioral control. The District asserts that it provided a FAPE at all relevant times.

The hearing was conducted and concluded in two sessions on August 19 and 20, 2010. Written summations were received on September 16, 2010, and the record closed on that day.

ISSUES

1. During the relevant period, March 4, 2008 to August 19, 2010, did the District fail to provide to Student a FAPE by failing to address Student's individual educational needs with regard to mathematics, written expression, social skills, socially pragmatic language skills and behavioral control?
2. Should the hearing officer order the District to provide compensatory education to the Student for the relevant period?

3. Should the hearing officer order the District to provide an independent educational evaluation at public expense?

FINDINGS OF FACT

1. On and before March 4, 2008, the Student was identified as a child with a disability and the District was providing special education services through an Individualized Education Plan (IEP) dated April 25, 2007 that was in effect at the beginning of the relevant period, March 4, 2008 until August 19, 2010. (S-2.)
2. The April 2007 IEP recognized weaknesses in mathematics operations, including basic facts, computational proficiency, finding equivalent names and solving mathematics stories. It recognized writing weaknesses resulting in below basic achievement in writing organization, production of sentences, and writing process. It recognized behaviors that impede learning, including feelings of stress, inability to adapt to changes, and immature or odd behavior. It noted that the Student tended to avoid social contact. (S-2.)
3. The April 2007 IEP provided goals for writing and mathematics. It also provided several accommodations and modifications, including small group instruction in mathematics and writing, organizational aids, adapted assignments and extended time for tests. (S-2.)
4. The April 2007 IEP placed the Student in itinerant learning support. (S-2.)
5. In November 2007, the District offered to provide speech and language therapy services. (S-4.)
6. In February 2008, the District issued a re-evaluation report, which was supplemented in March 2008. The report was based upon a test of motor proficiency, an instrument for evaluation of handwriting and a test of visual-perceptual skills, as well as informal assessments, including teacher observations. (P-2.)
7. In April 2008, the District offered an IEP that noted behaviors that impede learning, weakness in writing and mathematics and behavioral difficulties that included avoiding social contact. This was finalized and adopted in May 2008 to be effective until May 2009. (P-4, S-11, 12.)
8. The May 2008 IEP provided goals in mathematics fluency, with reference to state curriculum standards, and writing. It included speech and language services as a related service. It determined the Student eligible for extended school year services (ESY). (NT 276-22 to 277-12; P-4, P-5.)

9. In late January, 2009, the Parent requested that a new IEP be delayed so that new evaluations could be completed, including an FBA, a speech and language evaluation and a psychological evaluation. The IEP process was delayed pursuant to this request. (NT 252-24 to 254-15, 301-23 to 307-18.)
10. The Parent declined the District's invitation to meet in April, indicating that she was unable to have her advocate at the meeting due to a scheduling conflict. (NT 305-4 to 9.)
11. The FBA was received in May 2009, and it recommended testing with regard to the Student's weaknesses in mathematics; this testing was done in June 2009. (NT 306-6 to 24.)
12. The speech and language evaluation was not provided to the Parent until the beginning of the 2009-2010 school year. (NT 307-14 to 18.)
13. The Parent declined to participate in an IEP meeting in August 2009 because she had not received all the reports that had been requested and were due. (NT 307-19 to 308-24.)
14. In September 2009 the District issued a re-evaluation report, based upon a norm referenced oral language assessment battery, various achievement tests in reading and mathematics, grades, teacher observations, and the school psychologist's observations during testing. (NT P-15.)
15. The Student made a good effort in the mathematics testing. (NT 283-8 to 290-20.)
16. The Parent declined a District invitation to meet in October 2009 because of a schedule conflict for her advocate. (NT 308-25 to 309-7.)
17. In the 2009-2010 school year, there was no agreed upon IEP being implemented by the District from the beginning of the school year until November 6, 2009. (NT 220-7 to 223-5; P-17.)
18. In November 2009, the District offered an IEP that continued to note behaviors that impede learning, slowness in writing with refusal to complete writing tasks, weakness in numerical operations, below-grade mathematics achievement in seventh grade testing, difficulty in syntax, and difficulty in social skills including social communication. (P-17.)
19. The parties engaged in numerous meetings but never agreed upon an IEP for the Student's 2009-2010 school year. (NT 310-22 to 313-14; S-27.)

MATHEMATICS

20. The May 2008 IEP provided mathematics instruction in the learning support classroom. Mathematics progress was monitored by fluency probes collecting data on digits correct per minute. The assigned teacher did not understand how to properly score the fluency probes; she incorrectly believed that a digit would be correct if the Student correctly identified the digit as written. The teacher did not believe that the IEP called for measurement of any of the four basic calculation skills, adding, subtracting, multiplying or dividing. (NT 34-6 to 40-5, 175-17 to 176-2, 276-22 to 277-12; P-4, 5, 7.)
21. Even when measured properly, fluency goals do not directly address or measure individual skills in computation or mathematics reasoning. (NT 162-2 to 164-3, 166-13 to 24, 173-25 to 174-12, 175-17 to 176-5, 179-7 to 188-5, 191-19 to 202-16; P-17, S-27 p. 79, s-33 p. 12 to 119.)
22. The Student met Student's 2008-2009 fluency goals in February 2010. (NT 190-12 to 14; P-7.)
23. The Student made no educational progress in mathematics during the 2008-2009 school year; Student's STAR diagnostic scores did not improve during that time. (P-5 p. 4, P-17 p. 5.)
24. Achievement testing in mathematics, under standardized conditions that do not permit accommodation, indicated that the Student's skills in mathematics operations were extremely low, and that Student's skills in mathematics reasoning were in the borderline range. (NT 289-11 to 24; P-15.)
25. The September 2009 re-evaluation recommended small group mathematics instruction, including re-teaching and retesting. (P-15.)
26. A draft IEP offered to Parent on or after November 2009 provided for a mathematics goal based upon a "mixed computational probe" that allowed progress monitoring in a form that showed each of the four basic computational operations. It did not provide for a fluency goal. It provided for specially designed instruction including emphasis on multiplication, and placement in supplemental learning support for mathematics. (S-27 p. 72 to 79.)
27. The Student's seventh grade teacher implemented the mathematics goals of the last offered IEP beginning in February 2010. (NT 166-13 to 167-11, 191-10 to 14.)
28. In the 2009-2010 school year, the Student was tested with special education supports; thus, reported progress in mathematics was not comparable to what would be reported through standardized achievement testing. (NT 188-6 to 189-8, 203-19 to 206-20.)

WRITTEN EXPRESSION

29. The February/March 2008 re-evaluation concluded that the Student did not have a disability in fine motor, visual motor or visual perceptual skills, and that occupational therapy was not needed. (P-2.)
30. The May 2008 IEP provided word processing as specially designed instruction (SDI), with consultation on word processing as a related service. The Student did not learn to rely upon word processing. (NT 242-18 to 25; P-4.)
31. In the 2009-2010 school year, the Student's assigned resource room special education teacher utilized the May 2008 IEP writing goal. This goal was not based upon a baseline. There was no up to date achievement data for writing that could serve as a baseline. The Student had deficits in higher order skills required for writing. (NT 221-8 to 231-5; P-5.)
32. The Student's seventh grade teacher relied upon dictation as an accommodation to encourage the Student to write; however, the Student did not have weaknesses in the motor skills necessary to write. (NT 241-20 to 242-2; P-2 to 4.)
33. The first offered November 2009 IEP did not include any goals in writing, and there was no one responsible to provide special education in writing to the Student during the 2009-2010 school year. The Student was in need of special education in writing. (NT 224-15 to 227-1; P-17.)
34. The proposed writing goals in the final draft of the November 2009 IEP offered in 2009 were not implemented, and no progress data were kept. (NT 231-6 to 233-7; S-27 p. 58.)
35. The draft IEP offered to Parent after November 2009 provided for two goals in written expression addressing organization and conventions. It provided for specially designed instruction including use of graphic organizers, allowing oral rather than written responses, retesting and other accommodations, and shortened essay answers. (S-27 p. 72 to 79.)
36. The Student made little progress in writing in the 2008-2009 and 2009-2010 school years. Student never met the goals set out in the IEP drafts offered in those years. (NT 42-6 to 9, 226-20 to 228-1; S-33 p. 420 to 432.)

BEHAVIOR CONTROL

37. The April 2007 IEP incorporated a behavior intervention plan with a goal and two objectives that focused upon independently attending to and completing assignments and reduction of time off task. The IEP discontinued previously existing incentives for avoiding work, by excluding the Student from class due to bad behavior. (NT 75-16 to 22; S-2.)
38. The behavior intervention plan appended to the April 2007 IEP was based upon a functional behavioral assessment. (S-2.)
39. In assessing behavior during the 2008-2009 school year, the District considered private evaluations provided by the Parent and developed in connection with her home program. (NT 309-20 to 310-16; S-6, 8, 10, 18, 29.)
40. The February/March 2008 evaluation concluded that the Student was having difficulty processing sensory stimuli, which could lead to non-typical behavioral, social and emotional responses. (P-2.)
41. The May 2008 IEP appended a new behavior plan, including goals for behavior change in completion of class assignments, whining and displaying tantrums. (P-5.)
42. The Student's behavior deteriorated in the 2008-2009 school year, with serious school disciplinary actions imposed in increasing numbers, including suspensions. In January and May 2009 the Student was suspended for hitting another student. (P-8, 9, 20.)
43. Teacher comments indicated that the Student's inappropriate behavior was interfering with Student's performance in most of Student's classes. (P-15.)
44. In assessing behavior during the 2009-2010 school year, the District considered private evaluations provided by the Parent and developed in connection with a home program. (NT 309-20 to 310-16; S-6, 8, 10, 18, 29.)
45. The Parent had provided a one to one aide during school hours through the Therapeutic Staff Support (TSS) service of a local behavioral health agency. In April 2009, the service was terminated, and it was not available in the 2009-2010 school year. (NT 254-23 to 255-10.)
46. In May 2009, the IEP was revised to add itinerant emotional support services, 45 minutes per week. (P-10, 11.)
47. In November 2009, the IEP team amended the offered behavior intervention plan to change the goals. The new goals included appropriate verbal

communication of feelings and avoidance of whining, remaining on task and attempting to complete school assignments, and compliance with staff instructions. (S-17.)

48. The offered November 2009 IEP provided SDI related to the goals, and increased hours of itinerant emotional support as a related service. (P-17.)
49. The Student's behavior improved in the 2009-2010 school year. Disciplinary actions decreased substantially. The Student made a greater effort in mathematics. Student exhibited some skills in behavior self management. (NT 139-24 to 143-6, 212-3 to 213-17, 218- 15 to 23, 326- 11 to 327-19; P-21.)
50. The draft IEP offered to Parent on or after November 2009 provided for two behavioral goals that focused upon utilizing learned replacement behaviors and compliance with directions. It provided for specially designed instruction including direct instruction in self-management skills and appropriate behaviors, and reinforcement of appropriate behaviors. It provided for itinerant emotional support services as a related service. (S-27 p. 72 to 79.)
51. In the 2009-2010 school year, the Student was tardy with increasing frequency. (NT 258-1 to 5, 313,

SOCIAL SKILLS INCLUDING PRAGMATIC LANGUAGE

52. During the 2008-2009 school year, the District was well aware that the Student had problems with social conversation. This was combined with being bullied and bullying, and these difficulties led to a suicide threat. (NT 44-16 to 45-22, 51-21 to 55-19, 115-14 to 116-4; P-4, 5, 17.)
53. The September 2009 re-evaluation included a language assessment. It found that the Student had good skills with regard to knowledge of words and word combinations, comprehension of complex language, and pragmatic language. It found weaknesses in knowledge and use of grammar, causing conversational weaknesses. It recommended against speech and language services. (P-15.)
54. The District's IEPs offered in April 2008, May 2008 and November 2009 recognized that the Student tends to avoid social contact and displays odd behaviors. The November 2009 drafts articulated in detail the Student's problems with perspective taking, reciprocal conversation and shifting to new topics. (P-4, 5, S-27 p. 6, 45, 63.)
55. From March 2008 to December 2009, the District did not offer any IEP goals or specially designed instruction to address the Student's educational needs with regard to social skills and conversational weaknesses. (NT 109-19 to 111-3; P-4, 5.)

56. The May 2008 IEP did provide for speech and language services through an itinerant emotional support teacher provided by the Intermediate Unit for up to 45 minutes per week. Except for one session with the Student, the bulk of these services were provided in the 2009-2010 school year. (NT 106-14 to 107-3, 100-13 to 101-6, 116-5 to 14; P-5, 10, S-12.)
57. The itinerant teacher made a personal informal assessment and posited goals for the Student; neither the assessment nor the goals were part of the IEP process. (NT 113-18 to 115-13; P-23, 24, 25.)
58. The teacher used materials and rubrics aimed at a broad range of skills, from self-regulation of emotions to communications techniques. (P-24, 25.)
59. The teacher had her own rating system for various goals that were combined in data gathering that she performed, all based upon rubrics and subjective assessments of the Student's cooperation and absorption of the lesson. (NT 143-9 to 145-12, 146-20 to 159-14; P- 23, 24.)
60. The teacher graphed the Student's progress on the combination of skills that she was teaching, based upon her subjective scoring of the sessions she conducted with the Student. These graphs indicated some progress but overall failure to meet the goal. (P-23.)
61. The draft IEP offered to Parent on or after November 2009 provided for a social communication goal that focused upon reciprocal conversation skills. It provided for specially designed instruction including direct instruction in perspective taking and social skills. This IEP draft was not implemented. (NT 234-8 to 235-3; S-27 p. 72 to 79.)
62. The draft IEP offered to Parent on or after November 2009 provided for specially designed instruction including direct instruction in conversational skills. This draft was not implemented. (NT 234-8 to 235-3; S-27 p. 72 to 79.)

DISCUSSION AND CONCLUSIONS OF LAW

BURDEN OF PROOF

The burden of proof is composed of two considerations, the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the

risk of failing to convince the finder of fact.¹ The United States Supreme Court has addressed this issue in the case of an administrative hearing challenging a special education IEP. Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005). There, the Court held that the IDEA does not alter the traditional rule that allocates the burden of persuasion to the party that requests relief from the tribunal.

The Court noted that the burden of persuasion determines the outcome only where the evidence is closely balanced, which the Court termed “equipoise” – that is, where neither party has introduced a preponderance of evidence² to support its contentions. In such unusual circumstances, the burden of persuasion provides the rule for decision, and the party with the burden of persuasion will lose. On the other hand, whenever the evidence is clearly preponderant in favor of one party, that party will prevail. Schaffer, above. Therefore, the burden of proof, and more specifically the burden of persuasion, in this case rests upon Student’s Parent, who initiated the due process proceeding. If the evidence is in “equipoise”, the Parent will not prevail.

FREE APPROPRIATE PUBLIC EDUCATION

Every state must assure that an eligible child receives a Free Appropriate Public Education (FAPE). 20 U.S.C. §1412(a); 34 C.F.R. §300.17. To fulfill this requirement, an IEP must be “reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress.” Board of Education v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982). “Meaningful

¹ The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact (which in this matter is the hearing officer).

² A “preponderance” of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. Dispute Resolution Manual §810.

benefit” means that a student’s program affords the student the opportunity for “significant learning.” Ridgewood Board of Education v. N.E., 172 F.3d 238 (3rd Cir. 1999).

MATHEMATICS

The District argues that there was adequate progress monitoring for the Student’s progress in mathematics. I note that the prevailing evaluations zeroed in on a specific disability in mathematics: operations, in other words, calculation and the basic facts needed to calculate efficiently. (FF 2, 14, 18, 24, 26.) The evaluation indicated problems with mathematics reasoning resulting in an “at risk” categorization of Student’s achievement, but the evaluation reports clearly indicated that the underlying disability was in basic math facts and calculation. (2, 14, 24.) Thus, the District should have focused special education services on this weakness.

The record shows by a preponderance that the District failed to focus on math facts and calculation. It provided one goal, which by its terms is driven by the progress monitoring chosen for mathematics: digits correct per minute. (FF 8.) The record shows that this is a measure of fluency, and the prevailing evaluations show that a lack of fluency was both the effect or symptom of the Student’s lack of basic facts and calculation ability, and the cause of Student’s “at risk” level of achievement in mathematics reasoning. (FF 6, 21.) Thus, I do not conclude that it was inappropriate to have a goal in fluency. I do, however, conclude that it was not sufficient to stop there.

There was no goal directly focused on what the evaluations revealed the problem to be. There was no goal for learning basic mathematics facts. There was none for learning calculation or operations. By consequence, neither of these areas of learning

was measured directly in progress monitoring. Rather, only fluency was measured, and this is at best an indirect measure of global mathematics learning. (FF 21.)

The Parent notes, and I agree, that this focus on a symptom of the deficit in operations also made it impossible to measure progress in learning mathematics reasoning and higher level understanding of mathematics concepts. (FF 20, 21, 22, 23, 24.) While the problem of mathematics operations seemed in 2008 to be the fundamental problem, reasoning issues may also have been present, as demonstrated by the Student's "at risk" achievement in that realm. Using a single goal in fluency with a single measure that directly measures only fluency prevented the IEP team and the Parent from keeping tabs on the Student's ability to learn in the realm of mathematics reasoning, because either operations weaknesses or reasoning weaknesses could have explained Student's performance in fluency. Especially as the Student progressed into more difficult material, I find that it was not adequate to fail to address both realms expressly and measurably.

The Student's fluency did not improve for over a year. (FF 20, 22.) Student's STAR evaluations were flat from May 2008 to November 2009. (FF 23.) Student's fluency did improve marginally, but not substantially. (FF 28.) In short, the District's fluency-based goal and monitoring were proven inadequate by the Student's overall measured performance.

The District presented a witness, the sixth grade teacher, who opined that the Student was performing mathematics operations on a sixth grade level, though inconsistently. I find this evidence to be unreliable for two reasons. First, I question the witness's credibility, and accord less weight to her testimony as a result. The teacher's

demeanor at the hearing visibly communicated a strenuous effort to guess the right answer to help her District, rather than to forthrightly tell her true thoughts as I had instructed her and all the witnesses to do. I attribute this in part to the teacher's obvious inexperience as a witness and perhaps to a self-generated feeling of vulnerability; however, my firm conclusion is that not everything said by this witness was correct, for whatever reason. Thus, I especially cannot credit her opinions or judgments – especially subjective, undocumented judgments about the Student's level of performance, especially when contradicted by multiple objective achievement test results administered on different dates, and when her only rationale is that the Student's testing behavior was inconsistent. (NT61-21 to 67-23; P-22, S-23.)

Similar testimony was offered by the seventh grade teacher, and similarly the teacher contradicted multiple objective measures of achievement based upon her subjective observations in the classroom and her grading of the Student's performance in class. (NT 170-19 to 173-24.) While I accord the seventh grade teacher more weight based upon her clear credibility in testimony, I cannot rest a finding of progress in mathematics on even this teacher's subjective impressions and even her sincere attempt to explain that the objective measures were not indicative of the Student's achievement because of Student's inconsistent testing behavior.

I further discount grades and fluency measurements during the Student's sixth grade. (S-34.) The teacher testified to a fundamental misunderstanding of the meaning of digits correct per minute; she understood it to mean that the Student wrote the digit correctly, rather than that the Student's answer reflected a correct calculation. (FF 20.)

Under these circumstances, I give little weight to the District's evidence purporting to show progress in mathematics during the Student's sixth grade year. (FF 28.)

Similarly, I give little weight to the fluency scores reported for the Student's seventh grade year. (FF 22.) These were taken with accommodation; however, the District's own psychologist testified that fluency must be measured without accommodations to be meaningful. (FF 24, 28.)

WRITTEN EXPRESSION

Although the District offered goals in written expression, it did not address the Student's admitted educational needs in written expression. (FF 36.) Its evaluations ruled out any motor difficulties and still identified problems with conventions and higher order writing skills. (FF 29.) Its response was to offer a goal in writing, not based upon any baseline data, but requiring the Student to produce written materials according to a state authorized rubric. (FF 31.) This goal was never met, yet it was the only goal offered until sometime in 2010. (FF 36.)

The Student's teachers both acknowledged that the Student continued to have deficits in writing; however, their only response was to encourage the Student to use word processing, to allow dictation, and to coax ideas out of the Student one by one. (FF 30, 31, 32.) There was no progress monitoring except for a few rubrics indicating the Student's failure to improve on the prevailing rubric-based goal. (FF 31.) The seventh grade teacher admitted that she had not implemented any IEP during the 2009-2010 school year; thus, she did not work systematically on the Student's written expression needs during that year. (FF 33, 35.)

A preponderance of the evidence compels the conclusion that the Student had needs in the area of written expression, and that these were not addressed through a data driven IEP with goals designed to address the Student's known educational needs. Thus, the Student is entitled to compensatory education.

BEHAVIOR CONTROL

A preponderance of the evidence shows that the District offered and provided appropriate services to address the Student's behaviors. At the beginning of the relevant period, the Student had a behavior plan that required Student's removal from class when Student misbehaved, effectively reinforcing Student's negative behavior by allowing Student to escape work demands. (FF 37.) Upon receipt of a report from a behavior specialist in connection with the student's home program, the District changed its approach to no longer reinforce negative behavior. (FF 39, 41.) It also provided emotional support services on an itinerant basis. (FF 46.) It considered all reports from the home program, including private evaluations. (FF 39, 44.) Its behavior intervention plans were based upon functional behavior analyses. (FF 1, 2, 7, 38, 47.) I conclude that the District offered and provided a program of behavioral support that was reasonably calculated to provide the Student with meaningful educational progress in the area of behavioral control.

The record shows that problems with behavior continue, (FF 42, 43, 50, 51), but that evidence is not of sufficient weight to show that the District's program was inappropriate. For example, the Student's progress was marred by serious disciplinary

violations in the 2008-2009 school year³; yet, the intensity and frequency of these incidents declined in the 2009-2010 school year. (FF 49.) Also, there was evidence that the Therapeutic Staff Support service, which provided an aide to accompany the Student to school every day, terminated in the Spring of 2009 and was not re-initiated in the 2009-2010 school year; at about the same time, the District began providing itinerant emotional support services. (FF 45, 46.) However, there was no evidence that the lack of this service rendered the District's behavior control plan ineffectual. Thus, I do not find that these facts carry sufficient weight to contradict the weight of the evidence in this matter indicating that the District's program was appropriate.

Similarly, in the 2009-2010 school year, the Student began missing school more often through being tardy. (FF 51.) There was little evidence to indicate whether or not lateness was a constant problem throughout the Student's school years. Thus, based upon this record, the apparent emergence of this problem of tardiness cannot be attributed to a deficiency in the District's educational plan and behavior intervention program. On balance, and despite continuing negative behavior, a preponderance of the evidence shows that the District provided an appropriate program to address the Student's behaviors.

SOCIAL SKILLS AND PRAGMATIC SPEECH

Although the District identified the Student's difficulties with social skills, especially social conversation, (FF 2, 5, 7, 14, 18, 53, 54), it failed to provide a carefully

³ The reasonableness of the District's IEP is to be judged as of the time it was offered, not in hindsight. Thus, even if there had not been behavioral progress, the District's plan would have to be judged without reference to its ultimate success.

planned, data driven, coherent educational program for addressing these needs. Its services were not determined or provided through the IEP process. (FF 55, 57.)

There is no doubt that the District's teachers were aware that the Student had weaknesses in social relationships and social communication. (FF 52.) The District was alerted to these needs through the evaluation process, as well. (FF 2, 5, 7, 14, 18, 53, 54.) However, from March 2008 to December 2009, there was no IEP goal or specially designed instruction in the Student's IEP that addressed these needs. (FF 55, 61, 62.) Thus, the District failed to utilize the IEP process to provide a coordinated program to the Student, with the Parent's full participation.

The District did provide explicit teaching services through an itinerant teacher provided by the intermediate unit. (FF 56, 58.) This teacher attempted to address all of the Student's behavioral, social and communication needs in one session per week that averaged forty five minutes. (FF 56, 58.) The teacher selected topics from several books on emotional and social skills development, and provided these in an order that she determined to the Student. (FF 58.) The teacher mixed lessons addressing various skills, both emotional regulation skills and social or communication skills. (FF 58, 60.)

The teacher took subjective notes on the Student's response to the material in each weekly lesson. (FF 59.) These she graphed, without breaking out the specific skills being measured. (FF 59, 60.) The graphs showed that the Student's performance fell below the goals that the teacher had set for the Student. (FF 60.)

In making these findings I rely upon the teacher's testimony, which I find to be sincere. Although the teacher reported that the Student made progress in certain skills that she was teaching, she reported only modest progress, and the data she used do not

appear to be reliable. They are not scientifically designed and rely too much upon subjective evaluation of each lesson or weekly session. (FF 58, 59, 60.)

In sum, I conclude that the District, although it attempted to address the Student's needs in the area of social skills and conversation, did so in an unreliable way. It failed to utilize the IEP process for developing goals and progress monitoring for specific skills. The teaching that it did provide was limited in time and expansive in scope. The teacher's methodology did not provided reliable progress data; thus, the District's program was not data-driven. This deployment of services was not reasonably calculated to provide meaningful educational benefit in the area of social skills and social communication.

PROCEDURAL DEFICIENCY

The record is clear that the District failed to implement an IEP for the 2009-2010 school year. (FF 17.) Although this procedural default was not designated as an issue to be determined in the hearing, the District's failure to implement an IEP for the 2009-2010 school year was thoroughly developed in the record, and thoroughly briefed in written summations. Moreover, it is relevant to my finding that the District failed to provide adequate special education services to the Student in the areas of mathematics, written expression and social skills and communication. The failure to implement an IEP for the entire school year is a serious deviation from the requirements of the IDEA and state educational rules and policy. In this case, the failure to comply with this requirement contributed to a lack of cohesion and purpose in the educational services rendered, as well as a failure to make the services data driven. I find that these deficiencies

contributed substantially to the District's failure to provide services reasonably calculated to provide meaningful educational opportunity.

The District indicated that some of its teachers implemented the 2008-2009 school year IEP during the 2009-2010 school year, in the absence of a new IEP for the 2009-2010 school year. (FF 27.) However, while this was the case with regard to mathematics and behavior control, it was not the case with regard to written expression and social skills including social conversation. Thus, the failure to provide staff with an IEP to implement led to staff ignoring important educational needs of the Student. The 2008-2009 IEP was in no sense a fallback IEP for this Student's teachers.

The District argues that the failure to implement an IEP in the 2009-2010 school year was the fault of the Parent, who delayed the IEP process. (FF 9 to 13, 16 to 19.) While it is true that the Parent requested delays in the process, the initial delays were due to the District's failure to provide all of the assessments for which the Parent had given permission, and which she reasonably believed were important data from which an IEP should be built. (FF 11, 12, 13.) There were delays also due to the Parent's desire to have an advocate assist her at the IEP meetings. (FF 10, 16.) However, the Parent was not unreasonable in wanting to have the advocate present to help her to understand both the complexities of her child's needs and the complexities of the District's legal obligations under the IDEA. Moreover, although I understand that District personnel are always pressured to fulfill their duties to numerous students with special needs, I am skeptical that the District's personnel could not find alternate dates when the Parent was unavailable, to ensure that the planning process would not be extended for a month or

more at every juncture where there was a schedule conflict with the Parent and her advisors.

In making this determination I rely upon the credibility of the Parent. The Parent demonstrated honesty and reliability through demeanor and responses to questions, including a willingness to concede a point and a reluctance to press the Parent's case by exaggerated characterizations of the District's actions.

In sum, I rely in part upon the clear evidence that the IEP was not implemented during the 2009-2010 school year, in finding that the District failed to offer a FAPE. The District had a legal obligation to do so, even if the Parent did not sign a NOREP with approval. I do not accept the suggestion that the Parent was "to blame" for this failure. Rather, it is the obligation of the local educational agency to ensure that there is an IEP in place, offered by way of a prior written notice and implemented by its staff with fidelity. 22 U.S.C. §1401(9)(14), 1412(A)(1)(a), 1415(c); 34 C.F.R. § 300.503. This obligation is not conditioned upon parental agreement with the contents of the IEP. 22 U.S.C. §1412(A)(1)(a). The District failed to do this in the present matter.

COMPENSATORY EDUCATION AND EDUCATIONAL EVALUATION

The Parent requested two forms of equitable relief: compensatory education and an order for an independent educational evaluation at public expense. I will order compensatory education, but not the evaluation, because I believe that the District failed in the implementation of the educational program; its evaluations identified the needs, but it failed to address them.

I will order the District to provide compensatory education to the Student. However, compensatory education is an equitable remedy, and I must balance the equities in determining the amount of relief. In addition, I must consider what relief would be appropriate to restore the Student to the level of attainment that Student would have reached if the District had implemented an appropriate educational program from September 2008 to April 2009. See, B.C. v. Penn Manor School District, 906 A.2d 642 (Pa. Cmwlth. 2006) .

Compensatory education is an appropriate remedy where a school district knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only trivial educational benefit, and the district fails to remedy the problem. B.C., 906 A.2d at 648; M.C. v. Central Regional School District, 81 F.3d 389 (3d Cir. 1996). Such an award compensates the child for the period of time of deprivation of special education services, excluding the time reasonably required for a school district to correct the deficiency. Id. Compensatory education is an equitable remedy. Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990). Thus, I take into account the periods of time in which the District did succeed in providing benefit.

I find that the record is very sparse regarding what would be an appropriate award of compensatory education. It supports an award based upon an hour-for-hour deprivation of educational services, M.C., 81 F.3d supra., and does not support a finding as to the position the Student would have been in if provided with a full year of FAPE, B.C., 906 A.2d supra.

I decline to award compensatory education on a full day basis. There is not a preponderance of evidence supporting such an award. The District did provide some

meaningful educational services to the Student; yet it failed to address all of the Student's educational needs as required by law. While the Student's grades seem to show some achievement, the record shows that the grades were derived under accommodated conditions, and standardized testing shows that the Student failed to make progress in three fundamentally important areas of educational need.

I award compensatory education for failure to provide appropriate special education services with regard to the Student's weaknesses in mathematics, on the basis of one hour per school day. I limit the period of the award to all of sixth grade and that part of seventh grade before the seventh grade mathematics teacher began to implement the new IEP goals that had been offered, but not accepted, by the Parent: the first day of February, 2010. I find that this teacher was both honest in her testimony and skilled in her approach to this Student. Thus, I infer that this teacher provided the Student with a meaningful opportunity for educational benefit in mathematics from February 1, 2010 to the end of the relevant period.

I award compensatory education for failure to provide appropriate special education services with regard to written expression, on the basis of one-half hour per day. The District provided no appropriate services regarding this need during the entire relevant period.

I award compensatory education for failure to provide appropriate special education services with regard to social skills and social conversation, on the basis of two hours per week, or if the District is on a six day cycle, per cycle. This deprivation extended to the entire relevant period.

CONCLUSION

For all of the reasons set forth above, I find that the District failed to provide a FAPE by failing to provide appropriate educational services to the Student with regard to mathematics, written expression and social skills, including social conversation.

Consequently, I award compensatory education as set forth below. I find that the District provided appropriate services with regard to behavior control, and I decline to order an independent educational evaluation at public expense.

ORDER

1. During the relevant period, March 4, 2008 to August 19, 2010, the District failed to provide a FAPE to Student, by failing to address Student's individual educational needs with regard to mathematics, written expression, and social skills, including social conversation. The District provided appropriate educational services with regard to behavior.
2. The District is hereby ordered to pay for compensatory education to the Student in the amount of one and one half hours per school day plus two hours per school week for the period from the beginning of the 2008-2009 school year until February 1, 2010, only while school was in session during that period. In addition, the District is ordered to pay for compensatory education in the amount of one half hour per school day and two hours per school week for the period from February 1, 2010 until August 19, 2010, only while school was in session during that period.
3. The compensatory education ordered herein shall take the form of appropriate developmental, remedial or enriching instruction or services that further the Student's attainment of skills in mathematics, written expression and/or social skills, including social conversation skills. Compensatory education must be in addition to the then-current IEP and may not be used to supplant the IEP. Compensatory education may occur after school, on weekends and/or during the summer months, when convenient for the student and the family, and may be utilized after the Student attains 21 years of age. The hourly cost for compensatory education shall not exceed the hourly cost of salaries and fringe benefits for qualified professionals providing similar services at the rates commonly paid by the District.
4. The hearing officer will not order the District to provide an independent educational evaluation at public expense.

William F. Culleton, Jr. Esq.

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

October 1, 2010