

*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: D.C.

Date of Birth: [redacted]

Dates of Hearing:

November 15, 2013

November 25, 2013

December 20, 2013

January 8, 2014

January 9, 2014

### **OPEN HEARING**

ODR Case #14229-1314KE

Parties to the Hearing:

Parent[s]

Philadelphia School District  
440 North Broad Street  
Philadelphia, PA 19130

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

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February 3, 2014

February 19, 2014

Jake McElligott, Esquire

## **INTRODUCTION AND PROCEDURAL HISTORY**

Student is an elementary school age student residing in the Philadelphia School District (“District”). The parties agree that the student qualifies under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEA”)<sup>1</sup> for specially designed instruction/related services for autism and intellectual disability.

The parent claims that the District failed to provide a free appropriate public education (“FAPE”) to the student for the 2011-2012 and 2012-2013 school years, and the current 2013-2014 school year, including extended school year programming (“ESY”) for the summers 2012 and 2013. Parent also claims that the District has violated its obligations to the student under Section 504 of the Rehabilitation Act of 1973 (“Section 504”).<sup>2</sup> As a result, the parent claims compensatory education for these alleged deprivations.

The District counters that, at all times, it met its obligations to the student under IDEA and Section 504. As such, the District argues that no remedy is owed to the student.

For the reasons set forth below, I find in favor of the parent.

## **ISSUES**

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<sup>1</sup> It is this hearing officer’s preference to cite to the pertinent federal implementing regulations of the IDEA at 34 C.F.R. §§300.1-300.818. *See also* 22 PA Code §§14.101-14.163 wherein Pennsylvania education regulations explicitly adopt most provisions of 34 C.F.R. §§300.1-300.818.

<sup>2</sup> It is this hearing officer’s preference to cite to the pertinent federal implementing regulations of Section 504 at 34 C.F.R. §§104.1-104.61. *See also* 22 PA Code §§15.1-15.11 wherein Pennsylvania education regulations explicitly adopt the provisions of 34 C.F.R. §§104.1-104.61.

Was the student provided with a free appropriate public education for the 2011-2012, 2012-2013, and current 2013-2014 school years?

If not, is parent entitled to compensatory education and/or other remedy?

### **FINDINGS OF FACT**

1. In January 2011, the District requested permission to evaluate the student in anticipation of the student's transition from early intervention services to the District for kindergarten. (School District Exhibit ["S"]-11).
2. In June 2011, the District issued a brief re-evaluation report ("RR") to update its understanding of the student based on assessments administered by a District school psychologist. The RR reported cognitive testing results from pre-kindergarten/early intervention service providers in 2009 and 2010 which supported an identification of the student as intellectually disabled. Parent and teacher assessments of adaptive behavior yielded uniform scores in the extremely low range. Autism rating scales indicated that autism was very likely. The student's behavior led to an inability to complete a visual-motor assessment. (S-12).
3. The June 2011 RR concluded that the student would qualify for special education and related services at the District as a student with autism and intellectual disability. (S-12).
4. On August 31, 2011, the District issued a more comprehensive RR. (Parent's Exhibit ["P"]-10, S-13).
5. The August 2011 RR characterized the student as "untestable" and repeated the cognitive testing from the June 2011 RR. (P-10, S-13).
6. Academically, the August 2011 RR indicated that the student was unable to count and did not know colors/shapes/letters. (P-10, S-13).
7. An observation by a speech and language therapist in the August 2011 RR dated from April 2011 in the early intervention setting indicated that the student had significant behavior difficulties, including biting and hitting when re-directed. (P-10, S-13).

8. The observation reported that the student communicated almost entirely non-verbally, verbally using only an approximation of “squeeze” to indicate a request for deep pressure (part of the student’s sensory diet) and the exact word “go”, described as the student’s only functional word. (P-10, S-13).
9. Teachers in the early intervention program reported that the student required heavy prompting with new tasks or directions, but less prompting once an activity or direction had become routine. The student consistently utilized a picture exchange communication system (“PECS”) to request preferred snack items and activities. (P-10, S-13).
10. The August 2011 RR continued to recommend that the student be identified as a student with autism and an intellectual disability. (P-10, S-13).
11. On August 31, 2011, the same day that it issued the RR, the District issued a notice of recommended educational placement (“NOREP”). (P-9).
12. The August 2011 NOREP recommended that the student be placed in an autism support classroom with the student’s instruction to be guided by the student’s early intervention IEP. The student’s IEP team was to meet and have a new IEP in place by October 9, 2011. (P-9).

#### December 2011 IEP

13. In December 2011, the student’s IEP met and crafted the student’s IEP. (P-12).
14. The December 2011 IEP indicated that the student’s behaviors impeded learning. The District IEP included a behavior support plan, but, as required, a functional behavior assessment was not performed as the basis for the behavior support plan. (P-11, P-12 at page 5).
15. In the December 2011 IEP, the student’s present levels of academic performance for life skills/interpersonal communication are largely copied from the April 2011 speech and language therapist’s observation and early intervention teacher reports. The only updated information in the December 2011 IEP is that the student inconsistently approximates “wah” for water, “juh” for juice, and “p” for pretzel, with reports of intermittent spoken words for “mom”, “dad”, “go”, and “juice”. (P-12 at page 7).
16. The December 2011 IEP replicates an identical paragraph for present levels of academic performance in behavior, in life skills/personal maintenance, and in life skills/functional academics. That paragraph indicates that the student does not consistently stay seated; is working on a pencil grip; engages in controlled scribbling; and has no number concept. (P-12 at page 7).

17. In the December 2011 IEP, the student's present levels of functional performance for life skills/interpersonal communication center on pencil grip and remaining seated. There is no mention of functional speech and language needs. (P-12 at page 7).
18. The present levels of functional performance for behavior indicate that the student resorts to tantrums when denied a preferred course of action, including aggression (lunging, pulling, biting), biting/chewing on the student's own clothing, and disrupting the classroom by running around, knocking over objects, and tearing objects from the walls. (P-12 at page 7).
19. The present levels of functional performance for life skills/personal maintenance indicate that the student cannot independently toilet and cannot use PECS to communicate the need to use the bathroom. (P-12 at page 7).
20. The present levels of functional performance for life skills/functional academics replicates the entry for the life skills/interpersonal communication sub-section. (P-12 at page 7).
21. The December 2011 IEP indicates that the student is not able to participate in the general education kindergarten curriculum and that the student needs to concentrate on academic context skills such as sitting at a desk for work and holding a pencil. (P-12 at page 8).
22. In the December 2011 IEP, in the present levels section dedicated to the student's strengths, the information is related exclusively to use of PECS for communication across all four sub-sections (life skills/interpersonal communication, behavior, life skills/personal maintenance, and life skills/functional academics). (P-12 at pages 8-9).
23. In the December 2011 IEP, in the present levels section dedicated to the student's needs, the information comes verbatim from the August 2011 RR except for the following sentence: "(The student) should continue to work on pre-academic skills in order to continue progressing in...the current setting." (P-12 at page 9).
24. The December 2011 IEP contains seven goals: one for behavior (reducing tantrums), four in speech and language (using PECS for requests/interaction, requesting wants/needs, requesting bathroom use, and producing sound approximations for common items), and two in number sense (recognizing/pairing concrete objects and matching). (P-12 at pages 15-29).
25. The December 2011 IEP contains related services in occupational therapy ("OT"). OT is indicated as a program modification/specially designed instruction for the entire school day for 10 sessions to develop sensory strategies, among

other things, over the chronological year from December 2011 – December 2012. OT is also indicated as a related service for “300 minutes/IEP Term” over December 2011 – December 2012. (P-12 at page 30).

26. The December 2011 IEP contains speech and language services, as a related service, for 120 minutes per week over the course of December 2011 – December 2012. (P-12 at page 30).
27. The December 2011 IEP indicates that the student is eligible for ESY programming, with work to take place in the summer of 2012 on all seven IEP goals. (P-12 at pages 32-35).
28. The December 2011 IEP was issued with a NOREP which was approved by the student’s mother on December 23, 2011. (P-12 at pages 44-45).
29. Over the course of December 2011 – December 2012, under the terms of the December 2011 IEP, the student did not make progress on five of the seven goals: reducing the number of tantrums, increasing word approximations, recognizing/pairing concrete objects, using PECS for indicating needs and wants, and making requests and interacting. (P-12 at pages 48-51, 53-56).
30. Over the course of December 2011 – December 2012, under the terms of the December 2011 IEP, the student made progress on the goal for toileting. Although the student could not consistently indicate with PECS the need to use the toilet, the duration of withholding urination increased over the course of the instructional year and, eventually, the student regularly urinated when placed on the toilet. (P-12 at pages 52, 56).
31. The matching goal could not be introduced. (P-12 at pages 50, 54-55).

#### December 2012 IEP

32. On December 13, 2012, the student’s IEP team met to design the student’s educational programming for the impending instructional year. (P-15).
33. In the December 2012 IEP, the present levels of academic achievement for life skills/interpersonal communication are replicated verbatim from the same section in the December 2011 IEP; some of this wording was replicated verbatim from the District’s initial evaluation process in the spring and summer of 2011. (P-10, P-12, P-13, P-15 at page 7; S-12, S-13).
34. In the December 2012 IEP, the present levels of academic achievement for life skills/functional academics indicate that the student can hold a pencil and trace letters/numbers, can choose between two items, has knowledge of letter/sound recognition, and has counted to four. The student’s “abilities are

- often spontaneous are not (sic) usually performed on ques. (sic)". These functional academics are nowhere evident as part of goal-driven instruction or in the progress monitoring over the prior instructional year. (P-12, P-15 at page 7).
35. In the December 2012 IEP, the present levels of academic achievement labeled in sub-sections as behavior, motor, life skills/personal maintenance, life skills/domestic maintenance, and life skills/recreation & leisure all indicate "see functional academics". (P-15 at page 7).
  36. In the December 2012 IEP, some of the wording in the present levels of functional performance is replicated verbatim from the December 2011 IEP; some of this wording was replicated verbatim from the District's initial evaluation process in the spring and summer of 2011. (P-10, P-12 at pages 7-9, P-13, P-15 at page 7; S-12, S-13).
  37. Other wording in the present levels of functional performance provides useful present-level information regarding the student's functional achievement. (P-15 at page 7-8).
  38. In the December 2012 IEP, the parental concerns were not updated; parental concerns are replicated verbatim from the December 2011 IEP. (P-12 at page 8, P-15 at page 8).
  39. In the December 2012 IEP, some new reports are utilized in the present levels of student's strengths, although much is replicated verbatim from the December 2011 IEP. The entire section in the present levels of student's needs is replicated verbatim from the December 2011 IEP, except for the removal of one sentence dated August 31, 2011 referencing a recommendation from the student's early intervention teachers. (P-12 at pages 7-9, P-15 at page 9).
  40. The December 2012 IEP contains eleven goals: one for behavior (reducing tantrums), five in speech and language (using PECS for requests/interaction, requesting wants/needs, requesting bathroom use, using PECS to order fast food items, matching images of grocery items to the concrete item), one for OT (appropriately opening cafeteria items), two in number sense (item matching and number matching) one in letter recognition (letter matching), and one in social skills (appropriate peer interaction in group games). (P-15 at pages 15-28).
  41. The December 2012 IEP reduced the amount of OT provided to the student. The day-long 10 day-long sessions indicated as a program modification/specially designed instruction in the December 2011 IEP was removed. OT continued to be indicated as a related service for "300 minutes/IEP Term" over December 2012 – December 2013. (P-15 at page 29).

42. The December 2012 IEP continued speech and language services for 120 minutes per week. (P-15 at page 29).
43. The December 2012 IEP indicates that the student is eligible for ESY programming, with work to take place in the summer of 2013 on seven of the eleven IEP goals. (P-15 at pages 31-32).
44. The December 2012 IEP was issued with a NOREP which was approved by the student's mother on December 13, 2012. (P-15 at pages 41-42).
45. Over the course of December 2012 – June 2013, under the terms of the December 2012 IEP, the student did not make progress on eight of the eleven goals: reducing the number of tantrums, matching images, letter matching, number matching, using PECS for indicating needs and wants, making requests and interacting, manipulating lunch packaging, and peer play. (P-15 at pages 44-48, 50-51).
46. Over the course of December 2012 – June 2013, under the terms of the December 2012 IEP, the student made progress on the goal for toileting. Although the student could not consistently indicate with PECS the need to use the toilet, the student would move toward the restroom when necessary and stopped using pull-ups. Toward June 2013, however, there appeared to be regression on this goal, as the student was having more accidents and was again using pull-ups. The regression may have been related to a medication change. (P-15 at pages 49-50, P-21 at page 9).
47. The two goals involving matching grocery images to items and ordering fast food items could not be introduced. (P-15 at pages 44-45, 49).
48. The December 2012 IEP was the last agreed-upon IEP. (P-15).

#### Proposed June 2013 IEP

49. In June 2013, the District issued a RR for the student. (P-21).
50. The June 2013 RR continued to characterize the student as “untestable” and repeated the cognitive testing data obtained in 2010 and 2011. (P-21 at page 7).
51. The June 2013 RR related from teacher input from May 2013 that “(the student) has made minimal academic progress during (the prior two years)” and “minimal progress” overall in the autism support classroom. The student's teacher recommended that a life skills curriculum may be more appropriate for the student. (P-21 at page 9).

52. The June 2013 RR continued to recommend that the student be identified as a student with autism and an intellectual disability. (P-21 at page 11).
53. On June 20, 2013, the student's IEP team met to revise the student's educational programming in light of the June 2013 RR. (S-41).
54. In the June 2013 IEP, the present levels contain less verbatim replication than in the prior two December IEPs. While there is some verbatim replication, there is much more contemporaneous data as of June 2013. (S-41 at pages 7-9).
55. The June 2013 IEP contains nine goals: one for behavior (reducing tantrums), three in speech and language (using PECS for requests/interaction, requesting wants/needs, requesting bathroom use), one for OT (appropriately opening food items), one in picture matching, two in number sense (picture matching and number matching), one in letter recognition (letter matching), and one in social skills (appropriate peer interaction in group games). (S-41 at pages 15-30).
56. The June 2013 IEP continued to indicate OT would be provided as a related service for "300 minutes/IEP Term" over June 2013 – June 2014. (S-41 at page 31).
57. The June 2013 IEP reduced the amount of speech and language as a related service. The student would receive "1200 minutes/IEP Term" over June 2013 – June 2014. The student's December 2011 and December 2012 IEPs called for the student to receive 4320 minutes of speech and language services. (S-41 at page 31).
58. The June 2013 IEP indicates that the student is eligible for ESY programming, with work to take place in the summer of 2013 on six of the nine IEP goals. (P-15 at pages 33-34).
59. The June 2013 IEP recommended a change in the student's placement from autism support to life skills. (S-41 at pages 35-36).
60. The June 2013 IEP was issued with a NOREP. On June 20, 2013, parent indicated that she wished to hold an informal meeting with the District to discuss further the June 2013 IEP. (P-19 at pages 43-45).

#### August 2013 Complaint

61. On August 22, 2013, parent filed the complaint that led to these proceedings. (S-1).

### 2013-2014 School Year

62. The last agreed-upon IEP, the December 2012 IEP, explicitly continued to be in effect through December 12, 2013. It continued to guide the student's instruction through the date the record closed on February 3, 2014. (P-15).
63. In December 2013, the last instance of progress monitoring, on this record, took place for the goals in the December 2012 IEP. Under the terms of the December 2012 IEP, the student did not make progress on seven of the eleven goals: reducing the number of tantrums, matching images, letter matching, number matching, independently making requests and interacting, manipulating food packaging, and peer play. (P-45).
64. Under the terms of the December 2012 IEP, the student exhibited progress on two of the eleven goals: using PECS and word approximations to indicate needs and wants, and toileting. (P-45).
65. The two goals involving matching grocery images to items and ordering fast food items could not be introduced. (P-45).

### ESY Programming

66. The student engaged in ESY programming in the summers of 2012 and 2013. Parent did not carry her burden of proof that implementation of the ESY programming resulted in a denial of FAPE. (P-13, P-16).

### Witness Credibility

67. The student's mother testified credibly. School district witnesses testified credibly as well. Given each of these witness's direct knowledge of and interaction with the student, weight was accorded equally to each witness's testimony. (*See generally* Notes of Testimony ["NT"] at 75- 545, 802-1190).
68. Parent presented an independent expert witness who testified without submitting a written report, basing her opinions and testimony on extensive document review. Although the witness testified credibly, she testified for approximately four hours, testimony that ranged over 250 transcript pages. This sprawling examination made it very difficult to focus on the probative value of the witness's insights and, as such, diminished the effectiveness of the witness's testimony. (NT at 546-801).

## **DISCUSSION AND CONCLUSIONS OF LAW**

To assure that an eligible child receives a free appropriate public education (“FAPE”) (34 C.F.R. §300.17), an IEP must be reasonably calculated to yield meaningful educational benefit to the student. Board of Education v. Rowley, 458 U.S. 176, 187-204 (1982). ‘Meaningful 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 (3<sup>rd</sup> Cir. 1999)), not simply *de minimis* or minimal education progress. (M.C. v. Central Regional School District, 81 F.3d 389 (3<sup>rd</sup> Cir. 1996)).

### Denial of FAPE

The record supports a finding that the District denied the student FAPE.

*December 2011 IEP: Prejudicial Procedural Denial of FAPE.* First, the December 2011 IEP is prejudicially flawed in its provision of OT services as “300 minutes/IEP term” is a denial of FAPE. The delivery of services for “X minutes per IEP term” is prejudicial. It is prejudicially unclear and malleable, especially where a student requires some degree of persistence in the delivery of services, as with this student with autism.

Second, there was no functional behavior assessment performed for the issuance of the December 2011 behavior support plan. By December 2011, the student had been in attendance at the District for approximately four months and had been exhibiting problematic behaviors. But no functional behavior assessment was

performed prior to the drafting of a behavior support plan presented along with the December 2011 IEP. The lack of a functional behavior assessment is a prejudicial procedural flaw in the District's educational programming for the student.

Third, the District, in its NOREP, recommended that a new IEP, designed by the IEP team for delivery at the District, be in place by October 9, 2011. Over two months passed from that date until an IEP was in place on December 23, 2011. This delay was a denial of FAPE for those months.

*December 2011 IEP: Substantive Denial of FAPE.* Substantively, the December 2011 IEP failed to provide the student FAPE in the following regards:

First, the present levels in the December 2011 IEP are prejudicially confusing. Information is misplaced for an adequate understanding of the student's present levels, or seemingly employ simple copy-and-paste for multiple data points, or are not updated in any meaningful way as of December 2011.

Second, by and large, the student failed to make meaningful education progress on most goals in the IEP. One goal was not introduced, and on another (toileting), there was meaningful progress. On the remaining five goals, however, there was no meaningful progress.

*December 2012 IEP: Prejudicial Procedural Denial of FAPE.*

As in the December 2011 IEP, the December 2012 IEP is prejudicially flawed in its provision of OT services as "300 minutes/IEP term". Again, the delivery of services for "X minutes per IEP term" is prejudicial.

*December 2012 IEP: Substantive Denial of FAPE.* Substantively, the December 2012 IEP failed to provide the student FAPE in the following regards:

First, the present levels of performance in the December 2012 IEP are substantively flawed. The vast majority of the content over these pages of the IEP is replicated verbatim from the December 2011 IEP, where the present-levels were already confusing and inappropriate. Simply put, present levels of performance are the starting point for planning. The present-levels are a snapshot of the student at a moment in time, most importantly where the prior IEP leaves off. The present-level section, coming at the very beginning of an IEP document, in effect indicates to the IEP team, and any subsequent reader of the IEP, “this is where [the student] surfaces for us as we gather to design [the student’s] program for the coming year”. Here, the information in December 2012 is at least one year stale, and in some cases the content comes from 21 months prior—the April 2011 speech and language therapist’s/early intervention providers’ observations and input. While there is updated data, it must be parsed out from, and is far outweighed by, the stale, copied-and-pasted data. And even this updated data is, almost uniformly, anecdotal and not related to the goal-driven instruction from the December 2011 IEP as gauged by the December 2012 progress monitoring reported just prior to the December 2012 IEP meeting. In short, the present levels of performance in the December 2012 IEP are wholly unreliable as a starting point for the design of the student’s educational programming.

Second, through June 2013, the student failed to make meaningful education progress on most goals in the December 2012 IEP. Two goals were not introduced. Again, there was meaningful progress on the toileting goal with the regression toward June 2013 seemingly lying outside the District's control. On the remaining eight goals, however, there was no meaningful progress.

Third, through the progress monitoring report of December 2013, the student continued to exhibit a failure to make meaningful education progress on most goals in the December 2012 IEP. While there was more evidence of progress through the fall semester of 2013, the progress monitoring supports the conclusion that the student was denied a FAPE through December 2013.

*June 2013 IEP.* As with the December 2012 and December 2013 IEPs, the June 2013 IEP is prejudicially flawed in its provision of OT services as "300 minutes/IEP term". The delivery of services for "X minutes per IEP term" is prejudicial. In the June 2013 IEP, though, this procedural denial of FAPE is compounded by the delivery of speech and language services in the same manner—"1200 minutes/IEP Term". To repeat, the provision of related services in such a way is prejudicially unclear and malleable. Here, it is especially problematic for a nonverbal student whose communication needs are in the forefront of educational planning.

The procedural denial of FAPE above has a substantive element to it as well. The District inexplicably reduced the student's speech and language services nearly 75%, from the equivalent of 4320 minutes for the period June 2013 – June 2014 (120 minutes per week for 36 instructional weeks) to 1200 minutes. Again, with this

student's mosaic of needs, the provision of (broken down on a more appropriate weekly service schedule) approximately 30 minutes of speech and language services per week is substantively inappropriate. Therefore, the June 2013 IEP is a not an offer of an appropriate program.

These findings as to denial of FAPE are made as to claims of a denial of FAPE under the obligations of both IDEA and Section 504. Accordingly, for all the reasons set forth above, an award of compensatory education will follow to reflect these procedural and substantive denials of FAPE.

#### Compensatory Education

Where a school district has denied a student a FAPE under the terms of the IDEA, compensatory education is an equitable remedy that is available to a claimant when a school district has been found to have denied a student FAPE under the terms of the IDEIA. (Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990); Big Beaver Falls Area Sch. Dist. v. Jackson, 615 A.2d 910 (Pa. Commonw. 1992)). The right to compensatory education accrues from a point where a school district knows or should have known that a student was being denied FAPE. (Ridgewood; M.C.). The U.S Court of Appeals for the Third Circuit has held that a student who is denied FAPE “is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem.” (M.C. at 397).

Here, the nature of the denial of FAPE is a mosaic of prejudicial substantive and procedural acts and omissions by the District throughout the 2011-2012 and 2012-2013 school years, and through the 2013-2014 school year through December 2013. The exact calculation of this award, however, is complicated.

As the student began the 2011-2012 school year, the District indicated that it would utilize the student's IEP from early intervention until October 9, 2011, at which time the IEP team would create a District-centered IEP. The District did have this IEP in place, however, until December 23, 2011. Therefore, 2.5 hours will be awarded per day for every school day from October 9, 2011 through December 22, 2011.<sup>3</sup>

On December 23, 2011, the District had an IEP in place. The procedural and substantive flaws in that IEP, in addition to the near-total lack of progress, support an award of compensatory education. Therefore, 2.25 hours will be awarded per day for every school day from December 23, 2011 through the end of the 2011-2012 school year, the student's kindergarten year.<sup>4</sup>

The student began 1<sup>st</sup> grade for the 2012-2013 school year. The procedural and substantive flaws in that IEP, in addition to the near-total lack of progress, support an award of compensatory education. Therefore, 4.75 hours will be awarded per day for every school day from the outset of the 2012-2013 school year through December 12, 2012.<sup>5</sup>

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<sup>3</sup> A full day of compensatory education amounts to 2.5 hours for a kindergarten student and 5.0 hours for an elementary student in 1<sup>st</sup>-6<sup>th</sup> grades. See 22 PA Code §11.3.

<sup>4</sup> The compensatory education amount is slightly reduced from the 2.5 hours of §11.3 as a reflection the equities related to the progress the student made on the toileting goal.

<sup>5</sup> The compensatory education amount is slightly reduced from the 5.0 hours of §11.3 again as a reflection the equities related to the progress the student continued to make on the toileting goal.

On December 13, 2012, the IEP was revised. The procedural and substantive flaws in that IEP continued, and the student struggled to make any progress outside of the toileting goal. Therefore, 4.75 hours of compensatory education will be awarded for every school day from December 13, 2012 through the end of the 2012-2013 school year.

Finally, the student began 2<sup>nd</sup> grade in the 2013-2014 school year. The student continued to make very little progress, although the December 2013 progress monitoring shows that the student continued to make progress on the toileting goal as well as communicating wants and needs. Therefore, 4.25 hours of compensatory education will be awarded for every school day from outset of the 2013-2014 school year through the last school day in December 2013.

On this record, notwithstanding the prejudicial procedural denials of FAPE, the award of compensatory education rests predominantly on the lack of progress. For that reason, even though the record closed on February 3, 2014, the evidence in the record supports definitive findings as to remedy only through December 2013. Thus, this decision does not reach the merits for any claim after December 2013. Finally, there is no award of compensatory education for ESY programming in the summers of 2012 and 2013.

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## **CONCLUSION**

As set forth above, the District denied the student a FAPE in the 2011-2012 and 2012-2013 school years, and the 2013-2014 school year through December 2013. Consequently, parent is entitled to an award of compensatory education.

### **ORDER**

In accord with the findings of fact and conclusions of law as set forth above, the School District denied the student a free appropriate public education in the 2011-2012 and 2012-2013 school years, and the 2013-2014 school year through December 2013.

The student is entitled to a compensatory education as follows:

- 2.5 hours per day for every school day from October 9, 2011 through December 22, 2011;
- 2.25 hours per day for every school day from December 23, 2011 through the end of the 2011-2012 school year;
- 4.75 hours per day for every school day from the outset of the 2012-2013 school year through December 12, 2012;

- 4.75 hours per day for every school day from December 13, 2012 through the end of the 2012-2013 school year; and
- 4.25 hours per day for every school day from outset of the 2013-2014 school year through the last school day in December 2013.

As for the nature of the compensatory education award, the parent may decide in her sole discretion how the hours should be spent so long as they take the form of appropriate developmental, remedial or enriching instruction or services that further the goals of the student's current or future IEPs. These hours must be in addition to the then-current IEP and may not be used to supplant the IEP. These hours may occur after school, on weekends and/or during the summer months, when convenient for the student and the family.

There are financial limits on the parent's discretion in selecting the appropriate developmental, remedial or enriching instruction that furthers the goals of the student's IEPs. The costs to the District of providing the awarded hours of compensatory education must not exceed the full cost of the services that were denied. Full costs are the hourly salaries and fringe benefits that would have been paid to the District professionals who provided services to the student during the period of the denial of FAPE.

This decision does not reach the merits for any claim after December 2013.

Any claim not specifically addressed in this decision and order is denied.

*Jake McElligott, Esquire*

Jake McElligott, Esquire  
Special Education Hearing Officer

February 19, 2014