

*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: E. R.

Date of Birth: [redacted]

ODR No. 18166-16-17-KE

### CLOSED HEARING

Parties to the Hearing:

Representative:

Parent[s]

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Dates of Hearing:

January 31, 2017; March 6, 2017;  
March 9, 2017; April 20, 2017; April  
21, 2017

Date of Decision:

June 16, 2017

Hearing Officer:

William F. Culleton, Jr., Esq., CHO

## INTRODUCTION AND PROCEDURAL HISTORY

The child named in this matter (Student)<sup>1</sup> is enrolled currently in a middle school within the District named in this matter (District). The District has classified Student under the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA) as a child with the disabilities of Autism, Intellectual Disability and Speech or Language Impairment. (NT 6-7.)

Parents assert that the District failed to offer Student a free appropriate public education (FAPE) during a relevant period from August 6, 2013 to August 6, 2015 and from August 31, 2016 to the first hearing date in this matter, on January 31, 2017<sup>2</sup>. Parents assert Student's right to a FAPE pursuant to the IDEA, section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (section 504)<sup>3</sup>, and the respective implementing regulations. Parents request an order that the District provide Student with compensatory education for the relevant period, and an order that the District provide Student with appropriate educational services going forward. The District asserts that it has offered and provided a FAPE at all relevant times.

The hearing was completed in five sessions. I have determined the credibility of all witnesses and I have considered and weighed all of the evidence of record. I conclude that the District offered and provided a FAPE to Student during the relevant period.

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<sup>1</sup> Student, Parents and the respondent District are named in the title page of this decision and/or the order accompanying this decision; personal references to the parties are omitted here in order to guard Student's confidentiality. References to Parent in the singular refer to Student's Mother, who engaged in most of the interactions with the District discussed herein.

<sup>2</sup> The parties stipulated to this relevant period.

<sup>3</sup> The parties stipulate that Student is otherwise qualified within the meaning of section 504 and that the District receives federal funds. (NT 6.)

## **ISSUES<sup>4</sup>**

1. During the relevant period of time from August 6, 2013 to August 6, 2015 and from August 31, 2016 to the first hearing date in this matter, on January 31, 2017, did the District offer and provide a FAPE to Student in compliance with the IDEA and section 504?
2. During the relevant period, did the District provide Student with appropriate services as needed to teach Student the use of signs or sign language and to communicate appropriately with staff?
3. Should the hearing officer order the District to provide Student with compensatory education on account of all or any part of the relevant period?
4. Should the hearing officer order the District to provide Student with educational services for the remainder of Student's current school year or for Student's next school year, the 2017-2018 school year, including convening an IEP team meeting to implement recent recommendations of private evaluators, and providing a one-to-one educational aide who is trained in utilizing signs or sign language?

## **FINDINGS OF FACT**

1. Student is enrolled in a District middle school. Student has received educational services from the District since kindergarten. (NT 777; J 3 p. 2.)
2. The District has classified Student under the (IDEA) as a child with the disabilities of Autism, Intellectual Disability and Speech or Language Impairment. (NT 5-6.)
3. Student has a history of diagnoses with Pervasive Developmental Disorder Not Otherwise Specified (PDD-NOS); Autism Spectrum Disorder; Attention Deficit Hyperactivity Disorder (ADHD); Speech or Language Impairment; Epilepsy; Pica; and Static Encephalopathy secondary to prematurity. (J 5 p. 1.)
4. Student's past performance on standardized testing of both cognitive ability and adaptive behaviors satisfied the criteria for diagnosis of Intellectual Disability. (J 7 p. 11, J 8 p. 3.)
5. Student does not communicate through speech and has a limited vocabulary of gestures and "signs" derived from American Sign Language (hereinafter referred to as "signs"). Student can form short sentences using signs. (NT 150-158.)

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<sup>4</sup> In their written summation, Parents note that the appropriateness of District evaluations is at issue in this matter; however, at the hearing, this was limited to addressing the comprehensiveness of the evaluations as part of the FAPE determination, and I address that in this decision. As I made it clear that I would decide only issues defined at the outset, I decline to address the evaluations' appropriateness as a separate issue. Such a procedure would deprive the District of a fair notice and opportunity to defend its evaluations. (NT 10, 19-25.)

6. Student had been in a public preschool program and in a private preschool program by age three. Student had received speech and language support, occupational therapy and physical therapy and was placed in Early Intervention between the ages of three and five. (J 8 p. 2.)
7. As of February 2, 2012, the District was aware of Student's prior diagnoses of Pervasive Developmental Disorder Not Otherwise Specified (PDD-NOS); Attention Deficit Hyperactivity Disorder (ADHD); and Static Encephalopathy secondary to prematurity. (J 8 p. 1.)
8. As of February 2, 2012, the District was aware that, previously, Student had been classified under the IDEA with Autism, Intellectual Disability and Speech or Language Impairment. The District was aware that Student had received special education and related services, including full time autistic support in an autistic support program, speech and language services, occupational therapy and physical therapy from and before the age of three. (J 8.)
9. As of February 2, 2012, the District was aware that Student had demonstrated delays previously in social skills, self-help skills, motor skills, cognitive skills and communication skills. (J 8.)
10. As of February 2, 2012, the District was aware that Student had demonstrated needs previously in visual matching, expressive and receptive language, reading, fine motor skills, social skills, independent living skills and behavior. Student did not speak in sentences. Student utilized signs and gestures to communicate, including laughing and whining or crying. (J 8.)
11. As of February 2, 2012, the District was aware that Parents considered Student's greatest needs to be toileting, self-help skills and attention to task. Parents reported that Student was easily upset by loud noises. Student displayed minimal social skills with peers, although Student interacted more easily with adults. (J 8.)
12. As of February 2, 2012, Parent expressed approval of Student's then-current school program. (J 8.)
13. In February 2012, the District provided a re-evaluation report that identified Student as eligible for special education and classified Student with Autism, Intellectual Disability and Speech or Language Impairment. It listed educational needs as receptive language skills; fine motor/writing skills; social interaction skills; motor imitation skills; requesting skills; and visual performance skills. (J 8.)
14. District personnel reported Student's present levels of achievement as part of the February 2012 re-evaluation report. (J 8.)
15. In February 2012, Student was able to match all uppercase letters and the numbers 1-10 when given a field of three from which to choose the correct answer. Student was able to identify Student's written name receptively in 60% of probes given; to identify categories of objects by sorting pictures - 75% of probes for cars, 75% of probes for cats, 70% of probes for balls, 95% of probes for spoons, 70% of probes for shoes, 80% of probes for cookies, and 95% of probes for "E". Student could place blocks on AB block design cards

with 59% accuracy. Student could match written words to pictures only with a gestural prompt. Student could touch one body part independently with a gestural prompt, and could imitate a model touching 6 body parts. Student could request items from peers independently in 20% of opportunities. (J 8.)

16. In February 2012, Student was able to request 13 items or actions independently using approximated signs. Student demonstrated a repertoire of 20 approximated signs. (J 8.)

17. In February 2012, Student had demonstrated the following rates of acquisition (J 8 pp. 5, 7):

- Receptive identification of the numbers 1 and 2: one new item per 85 days. Student had not learned to identify any higher numbers without modeling prompts at that point;
- Matching sight words to pictures: one new item per 46 days.
- Receptively identifying items from a field of three (able to identify 8 items): one new item per 20 days;
- Selecting the function of an item from a picture (able to identify functions of 4 items): one new function per 40 days;
- Selecting a picture of an item when told its function (4 items): one new item per 41 days;

18. As of February 2012, Student required prompts to initiate and supervision to complete toileting tasks; occasionally took toys from peers without asking for them; was able to unzip Student's coat and place coat and backpack in a locker; Student needed assistance to zip the coat but put it on independently. Student could close some snaps on a dressing board. Student's functional independence was rated "very limited". (J 8.)

19. As of February 2012, Student was cooperative but required frequent and multiple prompting to maintain attention to task in small group and individual instruction, and to complete classroom routines. Student demonstrated escape-related behaviors. Student could request items from peers on average about twice per day. (J 8.)

20. As of February 2012, Student exhibited sound sensitivity and pica behaviors – putting objects in the mouth – which required close monitoring. (J 8.)

21. As of February 2012, the District was aware that, despite staff efforts to teach Student to use signs, Student was not always able to form correct signs, such as the sign for "yellow." Nevertheless, Student was reportedly making progress in using signs at school. (J 8 p. 6.)

22. As of February 2012, Student was unable to write or print, though Student was demonstrating some prewriting strokes. (J 8.)

23. The February 2012 re-evaluation report recommended a program with a curriculum including behavioral component; adapted instructional methods; emphasis on daily living skills, social skills, independence and functional goals; frequent breaks and a schedule

fostering independence; repeated drill and practice; small units of activity to support Student's attention; frequent physical, gestural and verbal prompting; and integrated occupational therapy and speech and language support. (J 8.)

24. On August 27, 2013, in the summer after Student's fifth grade year, the Student's IEP team met to discuss Student's then-present levels of achievement and to revise Student's IEP. (J 17.)
25. The IEP team agreed to retain Student in fifth grade for the 2013-2014 school year. (J 17.)
26. The IEP revised as of August 2013 continued Student's previous-year placement in full time special education support, consisting of both autistic and speech and language support, and staffed by Intermediate Unit staff trained in the principles of Applied Behavior Analysis (ABA). The placement classroom provided instruction through ABA techniques. (J 17, 18.)
27. District educators reported Student's present levels of achievement as part of the August 2013 revised IEP. (J 8.)
28. As of August 2013, Student's functional academic skills were the same as measured in February 2012. (J 8 pp1-8, J 17 p. 10.)
29. As of August 2013, Student was able to demonstrate the following basic language skills: receptively identifying 14 common items, with mastery of 6 items; identifying the function of 8 items, with mastery of 4; identifying items from their features for 6 items, with mastery of 2; and matching associated pictures for five sets of items, with mastery of 3. (J 17.)
30. As of August 2013, Student was able to make requests of others spontaneously for items or actions using sign approximations, a picture communication system and a speech-generating device. (J 17.)
31. As of August 2013, Student displayed a repertoire of 32 signs. (J 17.)
32. As of August 2013, Student continued to display difficulties with attention to task, escape behaviors, the need for frequent prompting and supervision, and hyper-sensitivity to loud noises. (J 17.)
33. As of August 2013, Student continued to need supervision for safety on stairs in school. (J 17.)
34. As of August 2013, Student was able to cut a straight line of about 2 inches, used a stamp to write Student's name, but could not direct the stamp to the correct place on a page. (J 17.)
35. As of August 2013, Student was able to get supplies for tooth brushing in 89% of opportunities; Student could perform all tasks required to put toothpaste on the brush and turn on the water in 68% of opportunities. Student could brush teeth for 10 seconds in 62% of opportunities. Student could zip and unzip a zipper, but needed help to engage the zipper, in 81% of opportunities. Student could snap all snaps on a vest on a dressing table with assistance. Student could put on and take off Student's jacket with verbal prompts. Student

could pull down pants for the bathroom, but was prompt- and schedule- dependent for continence. Student could feed self independently. (J 17.)

36. The August 2013 revised IEP noted that Student demonstrated ongoing delays across all developmental areas. It noted that Student was not able to master the skills that were a prerequisite of the general education curriculum. (J 17.)
37. The August 2013 revised IEP noted that Student would need modified curriculum, modified pace of instruction and modified methods of presenting materials. It noted needs for increased prompting; structured routine; frequent breaks; small units of classroom routine to support attention to task; repeated drill and practice; integrated speech and language support and occupational therapy support; and an emphasis on developing daily living skills, independence and functional goals. (J 17.)
38. The August 2013 revised IEP listed Student's needs as receptive skills; requesting skills; social skills; independent living skills; behavioral skills; leisure skills; and "match associations". It also listed parental identification of needs as putting on and taking off shoes; appropriate undressing and dressing; washing face and hands; and increasing communication through learning new signs. (J 17.)
39. The August 2013 revised IEP provided a measurable goal to address receptive language (identifying common items by name, function and feature). Student demonstrated moderate to significant progress on this goal in last two marking periods of 5<sup>th</sup> grade. (J 17.)
40. The August 2013 revised IEP provided a measurable goal to address requesting items from others. This goal presumed use of signs and picture communication systems. Student progress on this goal was not reported in last two marking periods of 5<sup>th</sup> grade. (J 17 pp. 24-25, 38-39.)
41. The August 2013 revised IEP provided a measurable goal to address social skills. Student demonstrated moderate to significant progress on this goal in last two marking periods of 5<sup>th</sup> grade. (J 17.)
42. The August 2013 revised IEP provided a measurable goal to address tooth brushing. Student demonstrated moderate progress on this goal in last marking period of 5<sup>th</sup> grade. (J 17.)
43. The August 2013 revised IEP provided a measurable goal to address escape behavior. Student made significant progress on this goal from August 2013 to December 2013. (J 17, 18.)
44. The August 2013 revised IEP provided a measurable goal to address visual attention and performance, including matching associated items. Student demonstrated moderate to significant progress on this goal in last two marking periods of 5<sup>th</sup> grade. (J 17.)
45. The August 2013 revised IEP provided a measurable goal to address fastening and unfastening clothing buttons, snaps and zippers. Student demonstrated significant progress on this goal in last two marking periods of 5<sup>th</sup> grade. (J 17.)

46. The August 2013 revised IEP provided a measurable goal to address Student's attention and time on task. Student demonstrated moderate progress on this goal in last two marking periods of 5<sup>th</sup> grade. (J 17.)
47. The August 2013 revised IEP provided a measurable goal to address using a name stamp at the proper place on a form. Student demonstrated moderate progress on this goal in last two marking periods of 5<sup>th</sup> grade. (J 17.)
48. The August 2013 revised IEP provided a measurable goal to address requesting actions of others. The goal provided for collection of baseline data within two weeks of the start of the school year. (J 17.)
49. The August 2013 revised IEP provided measurable goals to address taking off and putting on shoes and washing face and hands. The goals provided for collection of baseline data within two weeks of the start of the school year. (J 17.)
50. The August 2013 revised IEP provided a measurable goal to address forming signs with the most accurate physically possible approximation. The goal provided for collection of baseline data within two weeks of the start of the school year. (J 17.)
51. The August 2013 revised IEP provided specially designed instruction including differential reinforcement; errorless teaching; intensive teaching; interspersing easy and difficult targets; ongoing functional behavior assessment; prompting faded systematically; toileting schedule and support; daily communication sheet between Parent and teacher; support for noise sensitivity; monitoring for pica behavior; deep pressure and other sensory regulation opportunities; chaining; name stamp, grids and manipulatives, Springboard communication device and picture communication system; one-to-one personal care assistance; total communication with sign supported instruction; use of approximated "E" sign as Student's name sign; and use of naturally occurring opportunities to dress and undress. (J 17.)
52. The August 2013 revised IEP provided related services as follows: speech and language support, 2 individual sessions of 30 minutes each and one group session per week of 30 minutes (two to one ratio); occupational therapy, 1 individual session of 30 minutes and one group session per week of 30 minutes (two to one ratio); accommodated transportation; and personal care assistant. (J 17.)
53. Support for school personnel included consultation with speech therapist, autistic support and behavior specialists, psychologist and community liaison. It did not include consultation with specialist in sign language or teaching of the deaf. (J 17.)
54. The August 2013 revised IEP provided ESY services for the following summer break. (J 17.)
55. In December 2013, the District's behavior specialist provided an observation and functional behavioral assessment of Student's crying and yelling behavior, concluding that those behaviors were related to withholding of food during lunch or recess and were not interfering with instruction. The evaluator concluded that Student did not need a behavior support plan beyond the class-wide plan being implemented in the autistic support



classroom and program, because Student did not demonstrate behaviors interfering with learning. (J 7, 18.)

56. The District produced a re-evaluation report on December 10, 2014. The report relied upon previous comprehensive testing of Student in the areas of developmental delay, non-verbal intelligence, school readiness, social, adaptive, and gross motor and fine motor development. It also relied upon teacher input as to Student's current achievement in the autistic support program, including independent living skills, functional academics, basic language skills, social skills, and pre-vocational skills. The re-evaluation also relied upon classroom observation by the school psychologist; a speech/language report addressing sensory/motor information and attentiveness information; an occupational therapy report and an FBA. (J 7, 8.)
57. The District convened an IEP team meeting on January 13, 2014, and revised Student's IEP. (NT 36; J 15.)
58. The January 2014 revised IEP continued Student's placement in full time Autistic and Speech and Language Support in the Intermediate Unit's autistic support classroom. (J 15.)
59. The January 2014 revised IEP present levels showed that Student was able to match and sort ten sets of objects, including colors, utensils, and toothbrushes with 46% accuracy. This represented new repertoires of skills as contrasted with Student's matching and sorting repertoires of the year before. (NT 36-40; J 8, 17, 15, 27.)
60. The January 2014 revised IEP present levels showed that Student's time on task was about 17 seconds for some tasks, while Student could attend about 75% of the time to a story being read to Student by an adult. (J 15.)
61. The January 2014 revised IEP present levels showed that Student was able to request for missing items independently with 12.5% accuracy; this was a regression from reported requesting in February 2012. (J 8, 15.)
62. The January 2014 revised IEP present levels showed that Student had learned to select 10 new common item pictures from a field of three with 45% accuracy (with mastery for 3). (NT 36-40; J 15.)
63. The January 2014 revised IEP present levels showed that Student was able to select items by function with 45% accuracy; match associated pictures with 55% accuracy; and label items using approximated signs with 47% accuracy. (J 15.)
64. The January 2014 revised IEP present levels showed that Student was able to engage in a game after modeling with 17% accuracy. (J 15.)
65. The January 2014 revised IEP present levels showed that Student was able to label items with approximated signs with 45% accuracy. (J 15.)
66. The January 2014 revised IEP present levels showed that Student had regressed in some independent living skills and had increased or learned other independent living skills: Student was able to remove and put on shoes (20%); put on socks, shirt and pants with

prompting (28.75%) and put on and take off jacket with prompting; use a zipper independently (72-75%), after someone engaged the zipper; utilize snaps on a shirt (77%); fasten and unfasten buttons on a shirt Student was wearing (38.75%); wash face (58%) and hands (26%); get supplies for tooth-brushing (80%), prepare toothbrush (68%) and brush teeth (50% of the time for 50 seconds); feed self with supervision and use the bathroom with some assistance. (NT 36-48; J 15, 27.)

67. As of the January 2014 revised IEP, Student had learned two more approximated signs, displaying a repertoire of 34 signs in school, and had learned to master 7 signs. Student's ability to display signs was limited by physical difficulties with finger isolation. (J 15.)
68. As of the January 2014 revised IEP, Student had learned to identify 3 colors receptively, but was unable to label any colors expressively. (J 15.)
69. As of the January 2014 revised IEP, Student had learned to place a name stamp within a designated area (17%) and to stop stamping after a single stamping motion (27%). (J 15.)
70. As of the January 2014 revised IEP, Student continued to need supervision on stairs, and used an immature foot pattern, not alternating feet while descending. (J 15.)
71. As of the January 2014 revised IEP, Student remained hypersensitive to loud noises, displayed hypersensitivity to movement, becoming fearful on the playground, and remained easily distracted by visual and auditory input. (J 15.)
72. The January 2014 revised IEP listed Student's needs as receptive skills; requesting skills; social skills; independent living skills; behavioral skills; leisure skills; and "match associations". It also listed parental identification of needs as putting on and taking off shoes; appropriate undressing and dressing; washing face and hands; and increasing communication through learning new signs. (J 17.)
73. The January 2014 revised IEP omitted to list some needs and added others; it listed Student's needs as receptive skills; requesting skills; hygiene skills; dressing skills; motor imitation; time on task; and fine motor skills. It omitted from the previous IEP social skills; independent living skills; behavioral skills; leisure skills; and "match associations". It also listed parental identification of needs as preparing for Student to go into sixth grade; and learning ten new signs and using them in the classroom. It did not list previous parental concerns: putting on and taking off shoes; appropriate undressing and dressing; and washing face and hands. (J 17.)
74. The January 2014 revised IEP provided measurable goals to address requesting items; hygiene skills, including tooth brushing and washing hands and face; fine motor coordination to manipulate clothing fasteners, zippers, buttons and snaps; appropriate use of a name stamp; increasing time on task; labelling pictures or real objects using approximated signs; naming new common items; performing actions requested by another; imitating motor actions of another; putting on shirt, pants, socks and shoes; using signs or a communication device to ask for items; independent matching and sorting; and using core words and two or three word phrases to communicate. (J 15.)

75. The January 2014 revised IEP did not continue the previous goals of naming objects by function or feature; requesting actions by others; social skills; or proper formation of signs. (J 15.)
76. The January 2014 revised IEP did not provide an individualized behavior support plan, as it was deemed unnecessary because Student's problematic behaviors had extinguished. (J 15.)
77. The January 2014 revised IEP continued to provide for the specially designed instruction, modifications and accommodations of the previous IEP, except for removal of the FBA. It added the following modifications: chaining; activity schedule; fluency based instruction; mixing targets and tasks; modeling; first trial data collection; shaping; use of VB-MAPP; and aided language stimulation. (J 15.)
78. The January 2014 revised IEP continued related services and supports for school personnel from the previous IEP. (J 15.)
79. The January 2014 revised IEP provided for ESY for the following summer. (J 15.)
80. The January 2014 revised IEP was revised in March and August 2014 to provide all sessions on a one-to-one basis and to add ten minutes per week of speech and language support on a push-in basis. (J 15, 16.)
81. The District convened an IEP team meeting on November 13, 2014, and revised Student's IEP. (NT 85; J 14.)
82. The November 2014 revised IEP continued Student's placement in full time Autistic and Speech and Language Support in the Intermediate Unit's autistic support classroom. (J 14.)
83. The November 2014 revised IEP present levels showed that Student was able to match and sort ten sets of objects, including colors, utensils, and toothbrushes with 46% accuracy. This represented new repertoires of skills as contrasted with Student's matching and sorting repertoires of the year before. (NT 36-40; J 8, 17, 15.)
84. The November 2014 revised IEP present levels showed that Student was able to request ten items without prompts and had generalized this skill across two individuals for six items; this represented very slow progress, in that Student was requesting items more independently. Student also demonstrated the ability to request four new items with 53-59% accuracy, representing progress from the previous IEP present levels. (NT 215-221; J 14, 15, 20, 27.)
85. The November 2014 revised IEP present levels showed that Student was able to create 15 to 26 independent messages with physical prompting, including five independent responses. As this represented a new skill, it constituted some educational progress. (J 14.)
86. The November 2014 revised IEP present levels showed that Student was able to demonstrate new skills including making eye contact with a speaker; responding to own name; identifying family members or other reinforcers from an array of two pictures. (J 14.)

87. The November 2014 revised IEP present levels showed that Student was able to select 20 common item pictures from a field of four, and 31 objects from a field of six. The November 2014 revised IEP present levels did not provide data for selecting items by function or characteristics. (J 14.)
88. The November 2014 revised IEP present levels showed that Student was able to label four items; this represented measured regression from the previous IEP. (J 14, 15.)
89. The November 2014 revised IEP present levels showed that Student had learned to imitate gross motor movements and perform requested motions and functional skills. Student also was able to make eye contact with peers and “parallel play” with them. This represented some progress. (NT 89; J 14, 15.)
90. The November 2014 revised IEP present levels showed that Student was able to label 6 items expressively with approximated signs with 44% accuracy. This represented a slight regression in measured progress, but did not indicate actual regression, due to the variability of Student’s performance and its effect on the validity of the measurements. (NT 162-165; J 14, 15.)
91. The November 2014 revised IEP present levels showed that Student was able to label 11 items receptively with approximated signs with measured mastery; this represented progress in receptive language utilizing approximated signs. (NT 14, 15.)
92. The November 2014 revised IEP present levels showed that Student continued to work on visual tracking, grasping, and visually attending. Student demonstrated progress in matching objects by showing ability to do so from a messy array. (NT 87; J 14, 15.)
93. The November 2014 revised IEP present levels showed that Student had regressed or remained at the same level of skill in some independent living skills (including tooth brushing, hand washing and face washing). (NT 86-88; J 14, 15.)
94. The November 2014 revised IEP present levels showed that Student had made some progress in independent living skills by demonstrating ability to play with a wider variety of objects and to explore new options for play. (J 14.)
95. The November 2014 revised IEP present levels showed no progress in the gross motor function of placing a name stamp within a designated area and stamping only once. (J 14, 15.)
96. The November 2014 revised IEP omitted to list some needs and added others; it listed Student’s needs as receptive skills; requesting skills; hygiene skills; motor imitation; time on task; and fine motor skills, including buttons and zippers. It omitted from the previous IEP dressing skills. It also listed parental identification of needs as use of communication device and sign language. (J 14.)
97. The November 2014 revised IEP provided measurable goals to address requesting items; hygiene skills, including tooth brushing and washing hands and face; fine motor coordination to manipulate clothing fasteners, such as zippers and buttons; appropriate use of a name stamp; increasing time on task; labelling pictures or real objects using

approximated signs; naming new common items; performing actions requested by another; imitating motor actions of another; using signs or a communication device to ask for items; using two words to request an item; and using core vocabulary (goal modified to reduce demand). (J 14.)

98. The November 2014 revised IEP did not continue the previous goals of putting on shirt, pants, socks and shoes, naming objects by function or feature; requesting actions by others; social skills; or proper formation of signs. (J 14.)
99. The November 2014 revised IEP did not provide an individualized behavior support plan, as it was deemed unnecessary because Student's problematic behaviors had extinguished. (J 14.)
100. The November 2014 revised IEP continued to provide for the specially designed instruction, modifications and accommodations of the previous IEP. It added reference to the classroom-wide behavior support plan as a modification. (J 14.)
101. The November 2014 revised IEP continued related services and supports for school personnel from the previous IEP, and added adapted physical education. (J 14.)
102. The November 2014 revised IEP provided for ESY for the following summer. (J 14.)
103. In the following IEP year, Student showed progress in requesting missing items; minimal progress in utilizing the name stamp and using two words to request something; moderate progress in naming new items from an expanded field of 6; moderate progress in imitating motor movements; progress in modified goal for using core vocabulary; and following directions to perform five new actions. Student made progress in using the communication device to learn communication skills. (J 14, 15.)
104. In the following IEP year, Student showed regression in opening and closing buttons and zippers; time on task; using signs to label items; tooth brushing; washing face and hands; (J 14, 15.)
105. Parents declined to sign the November 2014 revised IEP because it provided for teaching Student to use a communication device and insisted that the District should teach Student only sign language; Parents also insisted that the District provide speech and language support only through a therapist fluent in sign language. (J 15 pp. 59-65.)
106. The November 2014 revised IEP was revised in February and April 2015 to provide among other things, a hearing support teacher to consult with Student's educators on the teaching of properly formed signs, and a hand strengthening program to facilitate Student's finger separation for making signs. (J 13, 14.)
107. The District convened an IEP team meeting on November 11, 2015, and revised Student's IEP. (NT 85; J 12.)
108. The November 2015 revised IEP continued Student's placement in full time Autistic and Speech and Language Support in the autistic support classroom. (J 12.)

109. The November 2015 revised IEP present levels showed that Student was able to request ten items without prompts and had generalized this skill across two individuals for six items; this represented no progress. Student also demonstrated the ability to request others to do something that Student wanted, such as “go”, “stop” and “help”, representing development of a new skill. (NT 215-221; J 12, 14, 20.)
110. The November 2015 revised IEP present levels showed no progress in making eye contact with a speaker; responding to own name; or identifying family members or other reinforcers from an array of two pictures. (J 12.)
111. The November 2015 revised IEP present levels showed that Student was able to select 40 common item pictures from a field of six, representing significant progress in this skill. (J 12.)
112. The November 2015 revised IEP present levels showed that Student made significant progress in imitating gross motor movements and no progress in performing requested motions and functional skills. Student made no measured progress in being able to make eye contact with peers and “parallel play” with them, but some subjectively observed progress in social skills. (NT 117; J 12, 14.)
113. Student demonstrated somewhat greater ability to remain on task and follow directions in the classroom. (J 12, 14.)
114. The November 2015 revised IEP present levels showed that Student was able to label 34 items expressively with approximated signs with mastery. This represented significant progress. Student demonstrated no progress on utilizing Student’s communication device. (J 12, 14.)
115. The November 2015 revised IEP present levels showed that Student continued to work on visual tracking, grasping, matching and visually and aurally attending. Student demonstrated no progress in these skills. Student made minimal progress with the name stamp by reducing the number of times Student would strike the paper with it. (NT 114; J 12, 14.)
116. The November 2015 revised IEP present levels showed that Student had made moderate progress over the previous year in some independent living skills (including fastening buttons and zippers, tooth brushing, hand washing, face washing and toileting) but was not yet independent in those skills. (NT 117-118; J 12, 14.)
117. The November 2015 revised IEP present levels showed that Student had made some progress in independent living skills by demonstrating increased ability to play with a wider variety of objects and to explore new options for play. (J 12.)
118. The November 2015 revised IEP omitted to list some needs and added others; it listed Student’s needs as receptive skills; requesting skills; functional communication skills; fine motor skills; increased tacting skills and increased listener responding. (J 12.)
119. The November 2015 revised IEP listed parental identification of needs as ceasing the use of a communication device, teaching Student sign language and providing Student

with access to a certified sign language interpreter. Parent attributed Student's delays across developmental areas to the District's refusal to focus on teaching Student to improve communication in sign language. (J 12.)

120. The November 2015 revised IEP provided measurable goals to address requesting items; feeding skills; fine motor coordination to manipulate clothing fasteners, such as zippers and buttons; appropriate use of a name stamp; labelling pictures or real objects using approximated signs; performing actions requested by another when prompted from a picture and object array; identifying the feature, function and class of objects through picture arrays; using signs or a communication device to ask for help or to ask to stop an activity. (J 12.)
121. The November 2015 revised IEP did not continue the previous goals of hygiene skills, including tooth brushing and washing hands and face; increasing time on task; naming new common items; imitating motor actions of another; using signs or a communication device to ask for items; using two words to request an item; and using core vocabulary (goal modified to reduce demand). (J 12.)
122. The November 2015 revised IEP did not provide an individualized behavior support plan, as it was deemed unnecessary because Student's problematic behaviors had extinguished. (J 12.)
123. The November 2015 revised IEP continued to provide for the specially designed instruction, modifications and accommodations of the previous IEP. It added crisis response and counseling, as well as scheduled sensory breaks. (J 12.)
124. The November 2015 revised IEP continued related services and supports for school personnel from the previous IEP, and added weekly speech/language and occupational therapy consultation services. (J 12.)
125. The November 2015 revised IEP provided for ESY for the following summer. (J 12.)
126. The November 2015 IEP initiated a planning process to determine the need for a communication device in addition to utilizing signs with Student. (J 12.)
127. In the following IEP year, Student showed some progress in requesting items; feeding skills; fine motor coordination to manipulate clothing fasteners, such as zippers and buttons; appropriate use of a name stamp; increasing time on task; labelling pictures or real objects using approximated signs; performing actions requested by another when prompted from a picture and object array; and identifying the feature, function and class of objects through picture arrays. Student began learning to request "help" and "stop", and communication devices were tailed for three goals; student did not make progress in these goals, in part because of the trialing process. (NT 428-429; J 12, 26.)
128. The District convened an IEP team meeting on January 20, 2016, and revised Student's IEP. (J 11.)

129. The January 20, 2016 revised IEP continued Student's placement in full time Autistic and Speech and Language Support in the autistic support classroom. (J 11.)
130. The January 20, 2016 revised IEP recognized that Student had demonstrated behaviors that interfered with learning. (J 11.)
131. The January 20, 2016 revised IEP listed the same educational needs as the previous IEP, adding the need to decrease inappropriate behaviors. (J 11.)
132. The January 20, 2016 revised IEP provided measurable goals to address requesting items; feeding skills; fine motor coordination to manipulate clothing fasteners, such as zippers and buttons; appropriate use of a name stamp; labelling pictures or real objects using approximated signs; performing actions requested by another when prompted from a picture and object array; identifying the feature, function and class of objects through picture arrays; using signs or a communication device to ask for help or to ask to stop an activity; and performing non-preferred activities. (J 11.)
133. The January 20, 2016 revised IEP provided an individualized behavior support plan. (J 22.)
134. The January 20, 2016 revised IEP continued to provide for the specially designed instruction, modifications and accommodations of the previous IEP. (J 11.)
135. The January 20, 2016 revised IEP continued related services and supports for school personnel from the previous IEP, and added a full-time personal care assistant. (J 11.)
136. The January 20, 2016 revised IEP provided for ESY for the following summer. (J 11.)
137. In the following IEP year, Student showed some progress in requesting items; feeding skills; fine motor coordination to manipulate clothing fasteners, such as zippers and buttons; appropriate use of a name stamp; increasing time on task; labelling pictures or real objects using approximated signs; performing actions requested by another when prompted from a picture and object array; and identifying the feature, function and class of objects through picture arrays. Student began learning to request "help" and "stop", and communication devices were tailored for three goals; student did not make progress in these goals, in part because of the trialing process. (NT 429-429; J 11, 26.)
138. In 2016, the District personnel continued to work through a structured planning process to trial different communication devices for Student. (J 10, 11, 26, 30, 31.)
139. The District convened an IEP team meeting on September 8, 2016, and revised Student's IEP. (NT 443; J 9.)
140. In September 2016, due to increasingly unmanageable behavior at home, Parents sought and the District agreed to a placement change to full time autistic and speech/language support in a partial hospital program. The District added group counseling services to Student's IEP, and provided for additional training of educational staff by the



itinerant hearing support teacher. Nursing was added as a related service for Student due to recent medical issues. (P 18.)

141. On December 22, 2016, the District issued a comprehensive re-evaluation Report. The report relied upon parent input; records review; cognitive assessment through a non-verbal battery; academic readiness assessment; adaptive behavior assessment; behavior rating scales addressing executive functions and childhood autism; and functional behavior assessment. The report addressed Student's basic language, functional academic skills, social behavior, pre-vocational skills, independent living skills and behavior. It also addressed the need for augmented communication device and Student's functional communication skills, and attentiveness. It included review of an independent speech and language evaluation and an independent educational evaluation. (P 19.)
142. Student began attending the autistic support partial hospital program on December 26, 2016. (P 20.)
143. The District convened an IEP team meeting on January 12, 2017, while Student was in the partial hospital placement, and revised Student's IEP, retaining the placement, present levels, skill areas addressed, modifications, related services and supports for school personnel from the previous IEP, with some changes. (P 20.)
144. A behavior support plan was put in place to assist Student when displaying inappropriate behaviors. The IEP team determined that Student's behaviors were no longer interfering with learning. (P 20.)
145. Student regressed in identifying and labelling actual objects; performing requested motor actions; selecting correct picture/object on request. (P 20; J 11.)
146. Student made progress in motor movement tasks including imitation and selecting a picture and performing the motor action in the picture; social behavior (social play and sitting in small group); fastening buttons; feeding (opening containers); and communicating "stop" "help" and "different" through a communication device with significant prompting, representing progress. (P 20; J 11.)
147. The January 2017 IEP listed new needs – pre-vocational and motor imitation skills. It did not list fine motor skills or inappropriate behaviors. (J 20.)
148. The January 2017 IEP provided reworded goals addressing requesting; labelling; labelling using signs or a communication device; motor imitating; identifying feature, function and class; prevocational skills; using a zipper; opening sealed packages. (P 20.)
149. The January 2017 IEP added a seizure action plan and behavior response plan to the previous IEP's modifications and specially designed instruction, as well as group therapy sessions. (P 20.)
150. The January 2017 IEP removed the weekly consultation time from related services. (P 20.)

151. On February 23, 2017, the District amended the IEP to reflect Student's return to Student's previous District school. Group counseling was removed from the modifications section. (P 21.)
152. The District has processes in place to enhance the fidelity of service delivery to Student. (NT 426-427, 514-516.)
153. Student needs to learn to utilize both signs and a communication device as much as possible for educational, developmental and functional purposes. (NT 233-234, 253, 526-528, 600-601; J 4, 5.)
154. Student's learning pace is unique due to Student's complex cognitive and educational needs. Student is context-dependent as a learner. Therefore, Student needs to be taught very defined and simple skills in a context that lends meaning to the skill being taught and motivation to the learner. (NT 349-384, 450-454, 662-663, 802.)
155. Overall, Student has made progress in being able to utilize signs and assigned communication devices to express needs and desires. (NT 151-152, 206-209, 511-514, 555-562, 675; J 11 to 17; P 20, 21.)
156. Student's data shows inconsistencies because Student's performance varies greatly from day to day, depending upon variables that are not completely known. Therefore, Student will demonstrate striking progress and striking regression on the same skill throughout multiple years; this does not indicate a lack of progress in and of itself. Progress sometimes has been demonstrated by the reduction of prompts and corresponding increase in Student's independent use of a skill. (NT 162-165, 428-429, 483-488, 512-514.)
157. District educators chose not to proceed sequentially or in a linear fashion with teaching skills to Student, because, given Student's inconsistent performance and frequent regressions, a linear approach, teaching to mastery in the standard sense, would have narrowed the range of Student's learned skills. Instead, Student's educators chose to teach to an incomplete level of mastery with some skills, in order enable Student to move on to learning additional, necessary basic skills. Skill targets, such as buttons and zippers, varied also according to functional priority of need. (NT 180-181, 414-415, 483-488, 478-479, 572-579.)

## **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.<sup>5</sup> In Schaffer v. Weast, 546 U.S. 49, 126 S. Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence<sup>6</sup> that the moving party is entitled to the relief requested in the Complaint Notice. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006).

This rule can decide the issue when neither side produces a preponderance of evidence – when the evidence on each side has equal weight, which the Supreme Court in Schaffer called “equipoise”. On the other hand, whenever the evidence is preponderant (i.e., there is weightier evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. See Schaffer, above.

In the present matter, based upon the above rules, the burden of persuasion rests upon the Parents, who initiated the due process proceeding. If the Parents fail to produce a preponderance of the evidence in support of Parents’ claim, or if the evidence is in “equipoise”, the Parents cannot prevail under the IDEA.

#### CREDIBILITY/RELIABILITY

It is the responsibility of the hearing officer to determine the credibility and reliability of witnesses’ testimony. 22 PA. Code §14.162 (requiring findings of fact); A.S. v. Office for Dispute Resolution, 88 A.3d 256, 266 (Pa. Commw. 2014)(it is within the province of the hearing officer to make credibility determinations and weigh the evidence in order to make the required findings

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<sup>5</sup> 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).

<sup>6</sup>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.

of fact). I carefully listened to all of the testimony, keeping this responsibility in mind, and I reach the following determinations.

Considering the testimony in light of the documentary evidence, I find that Parent's testimony was credible and reliable. I base this finding upon the lack of substantive conflicts with the record, as well as Parent's way of answering questions, which was consistently forthright and helpful.

Based upon the same criteria, I find no reason to doubt the credibility of any of the other witnesses, and found them all to be reliable. As to conflicts in the testimony of expert witnesses, I accorded differing weight based upon their degree of experience, the extensiveness of their data, and their care in rendering only those opinions that were supported by their data. Nevertheless, all opinions were accorded some weight in that they were deemed credible and reliable.

#### 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). FAPE is "special education and related services", at public expense, that meet state standards, provide an appropriate education, and are delivered in accordance with an individualized education program (IEP). 20 U.S.C. §1401(9). Thus, school districts must provide a FAPE by designing and administering a program of individualized instruction that is set forth in an IEP. 20 U.S.C. §1414(d). The IEP must be "reasonably calculated" to enable the child to receive appropriate services in light of the child's individual circumstances. Endrew F. v. Douglas County Sch. Dist., RE-1, \_\_\_ U.S. \_\_\_, 197 L.Ed.2d 335, 137 S. Ct. 988, 999 (2017). The Court of Appeals for the Third Circuit has ruled that special education and related services are appropriate when

they are reasonably calculated to provide a child with “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 (3d Cir. 2009), see Souderton Area School Dist. v. J.H., Slip. Op. No. 09-1759, 2009 WL 3683786 (3d Cir. 2009). In appropriate circumstances, a District that meets this Third Circuit standard also can satisfy the Andrew F. “appropriate in light of the child’s individual circumstances” standard. E.D. v. Colonial Sch. Dist., No. 09-4837, 2017 U.S. Dist. LEXIS 50173 (E.D. Pa. Mar. 31, 2017).

In order to provide a 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).

A school district is not necessarily required to provide the best possible program to a student, or to maximize the student’s potential. Andrew F., 137 S. Ct. above at 999 (requiring what is reasonable, not what is ideal); 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.

The law requires only that the program and its execution were reasonably calculated to provide appropriate benefit. Andrew F., 137 S. Ct. above at 999; 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.) The program’s appropriateness must be determined as of the time at which it was made, and the reasonableness of the 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).

Applying these standards to the above findings and the record as a whole, I conclude that the District has provided Student with an educational program that was appropriate in view of Student's circumstances during the relevant period, and that could be expected to and did confer meaningful educational benefit upon Student, in view of Student's unique learning style and needs.

During the relevant period, Student presented as a child with complex learning needs, low cognitive ability according to standardized tests, and significant delays in development, including in pre-academic, functional, adaptive, social, communication, fine motor, gross motor and behavioral regulation skills. Student's historic pace of acquisition was idiosyncratic and was characterized by spurts of progress followed by lack of growth and often regression in measured skills. For this child, passing grades and advancement grade-to-grade were not a reasonable measure of progress; nor could standardized testing be counted upon to detect growth, as Student's similar, very low scores on successive instruments over time demonstrated. Rather, Student's circumstances dictate that Student's progress – both reasonably anticipated and actual - must be measured by “dramatically” different measures. Andrew F. v. Douglas County Sch. Dist., RE-1, \_\_ U.S. \_\_, 197 L.Ed.2d 335, 137 S. Ct. 988, 999 (2017).

Here, the District provided Student with an ABA-based, full time autistic support program, with speech and language and occupational therapy services. The program provided Student with both intensive one-on-one instruction and teaching in the context of the classroom activities. Student's IEP posited goals that, during the relevant period, addressed all of Student's suspected and identified educational needs. The program was substantially modified, and the list of

modifications and specially designed instruction was extensive in each IEP. These modifications called for state of the art teaching methodologies. Related services included intensive work with the speech and language pathologist and the occupational therapist.

The District, on this record, did not hesitate to change its interventions as Student demonstrated changes in Student's learning and progress. Witnesses testified that they expected Student to be inconsistent, and, anticipating that, they adopted a non-linear approach, in which they would teach to Student's closest level to mastery, then add or substitute goals and objectives to approach the same core skills through different ways of presenting demands, different contexts, and different motivators as Student's motivation changed over time. They altered their classroom approaches daily to meet Student's varying moods and needs. When it became clear that Student could not form appropriate signs due to physical limitations, District educators both addressed the physical issues through more intensive work in occupational therapy, and engaged in a lengthy and detailed process of assessing and trialing communication devices. When Student uncharacteristically developed negative behaviors that interfered with learning, they evaluated and put a plan in place; when the behaviors receded and then burgeoned again to serious levels of disturbance, they placed Student in a partial hospitalization program for several months, to provide Student with additional emotional support. In these and many ways, the District was alert to detect and remediate deficiencies in programming that arose over time due to changes in Student's needs.

The program took extensive data, and I find by a preponderance of the evidence that the Student did make progress in many of the fine-grain-analyzed skills of communication, functional academic, adaptive, social and physical skills that Student needed to learn. The data were at times confusing and confused, and parent rightly complained that changes in how data were measured

and reported sometimes made it difficult to detect progress or lack of progress year-to-year<sup>7</sup>. Yet, the full record shows preponderantly that progress was there, whether in increasing numbers of items identified, or changes in the numbers of pictures in an array from which Student had to choose, or the incremental retraction of the hierarchy of prompts from hand-over-hand to minimal touch, to modeling, to decreasing verbal prompts, to independent and spontaneous demonstration of a skill. Sometimes progress lay in generalization of a skill from performance only for one person to performance for multiple others. At the same time, the record is clear that Student failed to make progress in a substantial number of the skills being measured, and even regressed in some skills, most notably Student's ability to utilize buttons and zippers, and tooth-brushing – yet Student made gains in hygiene skills such as toileting and washing hands and face more independently.

On balance, I conclude that the Student did make progress that was appropriate in view of Student's circumstances, as described above. Witnesses credibly and expertly testified that Student's complex and unique learning needs led to a learning style that was characteristically inconsistent, and that Student could demonstrate skills one day and appear to have lost them the next day, month or year. They testified credibly and preponderantly that this did not indicate a lack of appropriate progress. Often the same very basic skill would manifest through a differently defined task; sometimes a loss in one area was overshadowed by development of new, more useful skills in a given area of need. I noted this in reviewing the data, and also noted palpable gains in communication skills, using both signs and the augmentative communication device, progress in fine-motor and gross-motor skills, and a mix of regression and progress in functional skills, along with some albeit minimal advances in social interaction skills and classroom-readiness skills..

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<sup>7</sup> Such inconsistencies can be a sign of disorganization in the program itself; however, the evidence weighs against this interpretation preponderantly, as discussed below.



Parents argue, somewhat globally, that the District failed to deliver a FAPE because it failed to identify all of Student's needs. They point to two early re-evaluation reports that they asserted were skimpy in the numbers and types of tests and other strategies used. This argument is not persuasive in the context of the entire record. On the contrary, I find that the challenged re-evaluation reports were comprehensive in that they addressed all suspected disabilities, 34 C.F.R. §300.304(c)(4). Moreover, the Student's IEPs during the relevant period were extensive, detailed and focused, demonstrating that the District informed itself of the full range of Student's needs, and sought appropriately to address those needs. 34 C.F.R. §300.304(c)(6).

Parents' main argument is that the District failed to provide a FAPE because it failed to provide intensive-enough training to teach Student sign language. Parents argued that sign language was the better choice for Student - that the District was wrong to insist on pushing Student to use an augmentative communication device. They argued that the effort interfered with Student's acquisition of multi-word communication skills for several months. Parents asserted that Student would have made much more rapid progress from receiving additional services to teach Student sign language. Thus, they urge, the District denied Student a FAPE because its services were not "reasonably calculated", and because Student made much less rapid progress than Student had accomplished at home.

Parents argued, not that Student should be trained in American Sign Language, sometimes called the language of the deaf. Rather, they sought to educate their child in Signed Pidgeon English, using signs and sign approximations as vocabulary while emulating the syntax of the English language in use. Parents had embraced signs as a communication mode for Student early on and reported tremendous success with it at home. Parent asserted that Student had a vocabulary of over 100 signs and that Student could communicate with Parent in three to four word sentences.

Yet in school, Parents pointed out, Student could amass varying counts of less than 100 signs, and Student was just beginning to show the ability to put two words together. Still, the evidence showed that the Student demonstrated a preference for using signs over the new communication device, while still showing some success in using it as prompted.

Parents strenuously disagreed with the District's efforts during the relevant period to trial and train Student to use an augmented communication device. They argued that Student struggled to use this, preferred signs, and would be able to communicate much more easily and spontaneously using signs. They urge the conclusion that the District's efforts to provide an alternative means of communication to Student were misdirected.

Parents urge the conclusion that this misdirected movement toward a dual-mode communication system for Student directly caused Student to lose the greater educational benefit of more intensive training in utilizing signs to communicate. The data and District educators' entries in documents show that the effort to introduce the augmentative communication device did indeed detract from Student's acquisition of communication skills - namely, using two word combinations in requesting things and actions. Parents argued that Student could have shown increased acquisition of sign vocabulary if provided with added speech/language time; direct sign language instruction on a drill and repeat modality by a trained signer; training-to-fluency for all staff working with Student, including Student's educational paraprofessionals; and provision of sign language interpreters in the classroom.

The evidence does not prove this contention by a preponderance. The District contested Parents' dismissal of the value of the augmentative communication device. Its educators credibly and persuasively showed that more intensive training in sign vocabulary would not have been an appropriate approach and probably would not have led to increased rate of acquisition of signs.

Nor would such an approach have contributed to the acquisition of more generalized functional communication skills. I conclude that the District's educational approach was demonstrably appropriate.

The District pointed to weaknesses in Student's ability to utilize signs. Student had physical and neurological delays that interfered with making a significant number of signs. Student could not perform adequate finger separation for some signs. Student struggled with crossing the midline and coordinating both hands, something very necessary to execute appropriate signs. Many of Student's gestures were not proper signs, but were idiosyncratic and sometimes would be translated as inappropriate by persons familiar with the lexicon. Thus, the educators felt compelled professionally to introduce an augmented communication device in the hopes that it would fill in the gaps in Student's sign vocabulary, and ultimately, provide a vehicle for more mature communication capabilities. Two independent evaluators seconded this approach, at least as reasonable during the relevant time, although they allowed that the issue should be revisited as more data accrued.

The evidence is preponderant that more intensive direct instruction and staff training, and use of an interpreter, would not have been likely to improve Student's rate of acquisition of functional communication through signs. Witnesses testified credibly that it was more appropriate to teach vocabulary to Student in a natural setting, where it would be more meaningful and therefore motivating to Student – where it would transform from memorized gestures to means of communicating needs and wants. At the Student's level of utilization, educational staff did not need to be fluent in any form of sign language; rather, they needed to learn a sufficient vocabulary of signs in proper form, so as to teach them to Student and utilize them in class so Student could get review and repetition in the natural context. The evidence is preponderant that the educators

were being trained to this extent and were teaching signs to Student appropriately. Moreover, there was no reason to use a sign language interpreter.

In sum, this record shows persuasively that the District's effort to introduce an augmentative communication device for Student did not deprive Student of a FAPE. It was appropriate to attempt this. It would not have been appropriate to provide more intensive direct instruction services instead. Staff were properly trained and delivered appropriate instruction in sign vocabulary.

Parents also argue that the District's documents show that it did not adjust its approach to Student as it should have done. They argue that Student showed numerous instances in which Student was regressing or not progressing in skills to be taught according to the IEPs. Yet, the District continued with the same goals and methods, seemingly ignoring that these goals and methods did not work. I do not find this to be the case. On the contrary, there were variations in the types of skill that different IEPs addressed. Moreover, Student's learning style, which repeatedly showed regression in measured skills, led the educational staff to modify their approach to a non-linear paradigm, in which they repeatedly switched away from some skills before measured mastery, to approach basic communication, adaptive skills and functional skills through different tasks, and through introducing new skills and routines. Staff intervened quickly when new behaviors manifested, changing behavior plans and placement. They sought the augmentative communication device in response to their data on the limitations of Student's sign repertoire. On the whole, the record does not support Parents' argument.

While these and other inconsistencies in the program may raise a question of fidelity, I do not find evidence of a lack of fidelity in implementation. Witnesses credibly testified that processes were in place to assure fidelity. ABA-based instruction was backed by extensive record-keeping that is part of the record in this matter. On the whole, the record is persuasive that the

inconsistencies for the most part were due to the District's efforts to deal with Student's unique – and often inconsistent – learning style.

I conclude that the District offered and provided special education services that were reasonably calculated to provide Student with the opportunity for appropriate, meaningful progress and educational benefits, based upon what the District knew at the time. It provided interventions that addressed all of Student's identified needs with fidelity, on this record. At the start of the relevant period, these interventions were reasonably calculated to meet all of Student's needs appropriately. As time went on, the District made numerous, appropriate changes to adjust to Student's development and inconsistent learning style. In sum, the District's program was appropriate for this Student, in view of Student's unique circumstances.

#### SECTION 504 VIOLATION

I conclude that the District, by providing a FAPE as defined in the IDEA, also provided Student with appropriate services and accommodations to meet Student's individual needs as adequately as the needs of non-handicapped children in the District are met. 34 C.F.R. §104.33(b)(1). In this case, compliance with the IDEA is preponderant evidence that the District also complied with section 504. 34 C.F.R. §104.33(b)(2).

#### **CONCLUSION**

I conclude that the District provided Student with a FAPE during the relevant period. Accordingly I order no equitable or other relief.

**ORDER**

In accordance with the foregoing findings of fact and conclusions of law, the Parents' requests for relief are hereby **DENIED** and **DISMISSED**.

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

*William F. Culleton, Jr. Esq.*

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

DATED: June 16, 2017