

*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: J.N.

Date of Birth: [redacted]

Dates of Hearing:

June 10, 2013

July 8, 2013

July 15, 2013

July 18, 2013

August 7, 2013

### **CLOSED HEARING**

ODR Case #13719-1213KE

Parties to the Hearing:

Parents

Seneca Valley School District  
124 Seneca School Road  
Harmony, PA 16037

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Arthur Feldman, Esquire  
1010 LaClair Avenue  
Pittsburgh, PA 15218

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September 9, 2013

September 24, 2013

Jake McElligott, Esquire

## **INTRODUCTION AND PROCEDURAL HISTORY**

[Student] (“student”) is a [pre-teenaged] student residing in the Seneca Valley School District (“District”). The parties agree, at this time, 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 specific learning disabilities.<sup>2</sup>

Parents assert a number of claims that amount, in parents’ view, to the denial of a free appropriate public education (“FAPE”). Parents assert that:

the District did not timely identify the student as having specific learning disabilities;

the individualized education plans (“IEPs”) which guided the student’s educational programming in the 2010-2011, 2011-2012, and 2012-2013 school years were inappropriate;

specifically, the student was denied FAPE regarding the handling of music education;

in not offering extended school year (“ESY”) programming in summer 2011, the student was denied FAPE, and that ESY programming

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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.

<sup>2</sup> As of the date of this decision, the student has been identified as a student with autism and specific learning disabilities in reading and mathematics. One of the issues in the hearing, however, is parents’ child-find claim that the District did not timely identify the student with a specific learning disability.

for the summer of 2012, though offered, was unavailable to the student given the District's decision that transportation would not be provided;

an alleged failure to address the student's needs resulted in bullying which, in turn, led to the removal of the student to the more restrictive environment of homebound instruction (which was also, in parents' view, occasioned by a prejudicial delay in arranging for homebound instruction); and

the District engaged in retaliation against the parents as a result of their request for a later transportation pick-up time given needs arising out of the student's disability.

As a result of these claims, parents claim that compensatory education should be awarded for a 2-year period prior to the filing of their complaint in April 2013. The District counters that, at all times, it met its obligations under the IDEA and provided the student with FAPE.

For the reasons set forth below, I find in favor of the parents on certain issues and in favor of the District on other issues.

### **ISSUES**

Was the student provided with FAPE in the 2010-2011, 2011-2012, and 2012-2013 school years?

Did the District retaliate against the parents in its decisions regarding transportation?

If the answer to either or both of the foregoing question(s) is/are in the affirmative, what remedy is available to the student?

## **FINDINGS OF FACT**

1. In November 2005, the student was diagnosed medically with pervasive developmental delay, not otherwise specified. (School District Exhibit ["SD"]-F).
2. In October 2009, as part of a re-evaluation for dysphagia (difficulty with tongue control and swallowing) in the fall of the student's 1<sup>st</sup> grade year, the student continued to be identified as a student with autism and speech and language impairment. (SD-E).
3. The student was instructed in District schools for 1<sup>st</sup> grade and 2<sup>nd</sup> grade. (SD-CCC, SD-DDD).

### IEPs: February 2011 & February 2012

4. In April 2011, the student was in the spring of the 2<sup>nd</sup> grade year. The student was being instructed under the terms of a February 2011 IEP. The student was in a supplemental autism support placement, spending 77% of educational programming in regular education. The February 2011 IEP contained one reading goal (focused on decoding), one mathematics goal (focused on mixed computation), two goals for attentiveness and engagement, one occupational therapy goal, and three speech and language goals. (SD-DDD at pages 21-29).
5. The February 2011 IEP contained no specially designed instruction. In the portion of the IEP dedicated to specially designed instruction, only two items are listed: daily "music and movement group" and modifications to address the student's dysphagia, such as dietary restrictions and use of a straw. (SD-DDD at page 30).
6. At this time, the District's practice was to place the specially designed instruction for a student in the section of the IEP dedicated to present levels of academic achievement. The present levels of academic performance in the February 2011 IEP contain no specially designed instruction. (SD-CCC at pages 7-15; Notes of Testimony ["NT"] at 103-106.)
7. The February 2011 IEP indicates that the student's behavior does not impede the student's learning or the learning of others. In the present levels of academic achievement, however, the special

education teacher reported that the student “is frequently off-task and requires constant redirection”; becomes non-compliant and task-avoidant when frustrated; talks out loud/gets out of seat/approaches the teacher to express needs, including pulling that person’s name tag and touching her; and “will script videos such as Thomas the Tank Engine and make rocket explosion noises”; and has a hard time with transition from one activity to another. The student’s regular education teacher reported that the student “is very inattentive....needs a lot of redirection, occasionally refusing to do what (is asked)...is often overwhelmed.” The February 2011 IEP did not have a positive behavior support plan. (SD-DDD at pages 9, 14).

8. When “scripting”, the student is verbalizing to self the script of a television show or movie. (NT at 102).
9. Over March – June 2011, the student exhibited problematic in-class behavior. (SD-P).
10. The February 2011 IEP guided the student’s instruction at the outset of the 2011-2012 school year, the student’s 3<sup>rd</sup> grade year. (SD-DDD).
11. In February 2012, the student’s IEP was revised. (Parents Exhibit [“P”]-3).
12. The February 2012 contains no data or measurable benchmarks in the section dedicated to present levels of academic achievement. (P-3 at pages 6-7).
13. The February 2012 IEP contained two reading goals. The decoding goal was replaced with a goal focused on sight words, and a goal was added in reading comprehension. The mathematics goal was changed from mixed computation to straight addition or subtraction computation. The IEP also contained one occupational therapy goal, and four speech and language goals. (P-3 at pages 20-28).
14. The February 2012 IEP contained no specially designed instruction. In the portion of the IEP dedicated to specially designed instruction, only two items are listed: the student’s dietary restrictions and pass/fail grades for the regular education classes science and social studies. (P-3 at page 28).
15. The District’s practice continued to be placing the specially designed instruction for a student in the section of the IEP

- dedicated to present levels of academic achievement. The present levels of academic performance in the February 2012 IEP contained no specially designed instruction. P-3 at pages 6-7).
16. The February 2012 IEP indicated that the student did not qualify for ESY programming. (P-3 at pages 30-31).
  17. The February 2012 IEP cut in half the student's time in regular education. The student continued in an autism support placement, spending 38% of educational programming in regular education. (P-3 at page 34).
  18. The February 2012 IEP indicates that the student's behavior does not impede the student's learning or the learning of others. In the present levels of academic achievement, however, the special education teacher reported that the student required frequent prompting. The student was reported as "often off task and (needing) constant redirection to focus on teacher instructions". The student was "frequently...seen talking to (self), or repeating TV shows or videos." The student's inattentiveness and off-task behavior was noted to have intensified since returning from the holiday break in December/January 2011-2012. The student's regular education teacher reported that the student "has a difficult time focusing on lessons and constantly needs to be redirected." The student often would leave the student's seat "and (walk) around the room looking at other items." The student was reported to have difficulty preparing for tests in regular education and to have had difficulty with transitions, noting the exact time for the end of class and requesting to leave even if instruction continued. The February 2012 IEP did not have a positive behavior support plan. (P-3 at pages 5-7).
  19. The student's 3<sup>rd</sup> grade special education teacher testified that she saw no need for a functional behavior assessment or positive behavior support plan because problematic behaviors were a part of the student's disability profile and were not outbursts, or self-injurious, or disciplinary in nature. (NT at 97-102).

#### Progress Monitoring Through April 2012

20. In April 2011, the spring of the student's 2<sup>nd</sup> grade year, the student's decoding goal was 80% accuracy on digraphs, blends, and vowel pairs. The baselines in April 2011 as reported in quarterly progress monitoring were 71% in digraphs, 84% in blends, and 76% in vowel pairs. (SD-EE at page 36).

21. By June 2011, the student had made no progress on the reading goal, with accuracy at 67% in digraphs, 72% in blends, and 72% in vowel pairs. (SD-EE at page 36).
22. By November 2011, the fall of the student's 3<sup>rd</sup> grade year, the student had made minimal progress in digraphs (72%) and vowel pairs (76%). The student made progress in blends (82%). But the November 2011 scores were nearly identically mirror the student's scores reported in April 2011, six instructional months earlier. The November 2011 progress report notes that "digraphs and vowel pairs are still difficult". (SD-EE at page 36).
23. By February 2012, on the cusp of the February 2012 IEP revisions, the progress reports "no change—(the student's) ability to decode words is very inconsistent but remains at about the same levels as last marking period". Numerical accuracy scores are not reported. (SD-EE at page 36).
24. The February 2012 IEP replaced the decoding goal with a sight-word goal. (P-3 at page 25; SD-DDD at page 21).
25. In April 2011, the spring of the student's 2<sup>nd</sup> grade year, the student's mixed mathematical computation goal was 20 correct digits per minute across three assessments. The baselines in April 2011 as reported in quarterly progress monitoring was 17 digits. (SD-EE at page 37).
26. By June 2011, the student had scored 20 correct digits. The November 2011 progress monitoring report noted that the student had mastered this mathematics goal. (SD-EE at page 37).
27. The February 2012 IEP developed a new mathematics goal. (P-3 at page 24).
28. Three times per school year, the District monitors student progress in reading and mathematics utilizing an evaluation designed by the Northwest Evaluation Association ("NWEA"). The NWEA evaluation is administered in the fall, winter, and spring of every school year. (P-7; SD-F at page 1; NT at 108).
29. In the 2008-2009 school year, the student's kindergarten year, the student scored at the 30<sup>th</sup>, 54<sup>th</sup>, and 31<sup>st</sup> percentiles in reading. The student scored at the 44<sup>th</sup>, 48<sup>th</sup>, and 38<sup>th</sup> percentiles in mathematics. (P-7; SD-F at page 2).

30. In the 2009-2010 school year, the student's 1<sup>st</sup> grade year, the student's NWEA scores declined on the fall evaluation. The student scored at the 23<sup>rd</sup> percentile in reading and the 7<sup>th</sup> percentile in mathematics. (P-7; SD-F at page 2).
31. In the remainder of the 2009-2010 school year, the student's NWEA scores in reading continued to decline markedly, to the 9<sup>th</sup> percentile in the winter and the 6<sup>th</sup> percentile in the spring. The mathematics scores rebounded, but to a lower level, to the 17<sup>th</sup> percentile in the winter and the 15<sup>th</sup> percentile in the spring. (P-7; SD-F at page 2).
32. In the 2010-2011 school year, the student's 2<sup>nd</sup> grade year, the student's NWEA scores in reading continued to decline into the single-digit percentiles, at the 1<sup>st</sup>, 2<sup>nd</sup>, and 8<sup>th</sup> percentiles. (P-7; SD-F at page 2).
33. In the 2010-2011 school year, the scores in mathematics rebounded in the fall and winter evaluations, to the 26<sup>th</sup> and 42<sup>nd</sup> percentiles. The spring evaluation, however, collapsed to the 1<sup>st</sup> percentile. (P-7; SD-F at page 2).
34. In the 2011-2012 school year, the student's 3<sup>rd</sup> grade year, the student participated in the fall and winter evaluations prior to the issuance of a re-evaluation report in March 2012. The student's scores on the reading evaluation were at the 3<sup>rd</sup> and 1<sup>st</sup> percentiles. The student's scores on the mathematics evaluation were at the 21<sup>st</sup> and 4<sup>th</sup> percentiles. (P-7; SD-F at page 2).
35. In sum, over kindergarten, 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> grades, the average reported NWEA percentiles for reading were 38.33, 12.66, 3.66, and 2. The percentiles for mathematics were 43.33, 13, 23, and 8.33. (P-7; SD-F at page 2).

#### March 2012 Re-Evaluation

36. In March 2012, the District issued a re-evaluation report ("RR") for the student. (SD-F).
37. The March 2012 RR found that the student continued to be eligible as a student with autism and speech/language impairment. Additionally, though, the student was found to be eligible as a student with specific learning disabilities in reading and mathematics. (SD-F).



38. The March 2012 RR noted the student “has not completely mastered phonemic awareness and struggles with decoding unknown words. Consequently, fluency and comprehension are difficult.” Also, “because reading and language affect all subject areas, (the student) struggles with math problem-solving.” (SD-F at page 16).
39. The March 2012 RR recommended that academic goals addressing the student’s weaknesses in reading and math. “Specifically, reading decoding, fluency, and comprehension, and math application/problem-solving are areas to be targeted when designing instruction.” (SD-F at page 17).

### March 2012 IEP

40. In March 2012, following the issuance of the March 2012 RR, the student’s IEP team met to revise the student’s IEP. (P-5).
41. The results of the March 2012 RR were not included in the present levels of academic achievement in the March 2012 IEP. The present levels of academic achievement are identical to the present levels in the February 2012 IEP. (P-3 at pages 6-14; P-5 at pages 6-12).
42. The March 2012 IEP goals were identical to the goals in the February 2012 IEP. (P-3 at pages 20-28, P-5 at pages 20-27).
43. The recommendations of the March 2012 RR for specially designed instruction to address the student’s needs in reading (decoding, fluency, and comprehension) and mathematics (application/problem-solving) were ignored in crafting the March 2012 IEP. (P-5 at pages 20-27; SD-F at page 17).
44. The District made an explicit decision not to address basic reading skills in decoding, fluency, and reading comprehension and instead to change the decoding goal to a goal where the student would identify sight words. (P-27).
45. The March 2012 IEP contained no specially designed instruction. The same two items in the specially designed instruction from the February 2012 IEP (restrictions and pass/fail grades for the regular education classes science and social studies) remain. There is no specially designed instruction contained in the present levels of academic achievement. (P-5 at page 28).

46. The March 2012 IEP indicated that the student did not exhibit behaviors that impeded the student's learning or the learning of others. There was no functional behavior assessment or positive behavior support plan. (P-5 at page 5).
47. The student's mother attended the IEP meeting to discuss the March 2012 IEP. It was an emotional meeting, and the student's mother voiced her disagreement with the March 2012 IEP. (NT at 172, 577-579).
48. As of April 13, 2012, parents withdrew the student from the District and enrolled the student in a private placement. The student did not return to the District for the remainder of the 2011-2012 school year. (P-28; SD-V at pages 1-2).

#### 4<sup>th</sup> Grade: 2012-2013 School Year

49. The student returned to the District for the 2012-2013 school year, the student's 4<sup>th</sup> grade year. (SD-V at page 3).
50. At the outset of the 2012-2013 school year, the student's instruction was guided by the February/March 2012 IEPs (in effect, the same document). (P-3, P-5).
51. In September 2012, parent testified credibly that when she asked for the student to receive services from a reading specialist, she was told by a District administrator that the student could not receive such services because of financial considerations. (NT at 604-606).
52. In September 2012, the parents communicated with the student's special education teacher (the same teacher who worked with the student in 3<sup>rd</sup> grade) regarding new goals in the student's IEP. (P-32, P-34, P-35).
53. Parents explicitly requested goals for reading fluency. The special education teacher, with whom the correspondence was carried out, explicitly advised against a fluency goal. (P-32 at page 2; P-34).
54. Although the parents had not approved the March 2012 IEP, on this record, the District apparently did not utilize a notice of recommended educational placement to formalize the student's program and placement. The District relied on the September 2012

- email exchanges to revise the March 2012 IEP. (P-32, P-34, P-35, P-52).
55. As a result of the September 2012 email exchanges, the mathematics goal from the March 2012 IEP remained the same. (P-5 at page 24; SD-EE at pages 17-18).
  56. As a result of the September 2012 email exchanges, the reading comprehension goal from the March 2012 IEP remained the same. (P-5 at page 25; SD-EE at pages 19-20).
  57. As a result of the September 2012 email exchanges, the sight-word goal from the March 2012 IEP remained the same. (P-5 at page 27; SD-EE at pages 22-23).
  58. As a result of the September 2012 email exchanges, two goals were added in written expression, one in spelling and one in capitalization/punctuation. (P-52; SD-EE at pages 24-25).
  59. By early October 2012, a reading specialist had done three informal screenings. The special education teacher noted in an email to the parents that the student “needs more work on decoding skills.” (P-37).
  60. At some point in September/October 2012, the District began to instruct the student based on the goals outlined in the September 2012 email exchanges. (P-38; SD-EE at pages 17-25).
  61. In October 2012, the parents again re-visited her request for a reading specialist to work with the student. The parents were informed that the prior information she had received regarding ineligibility due to financial considerations was incorrect. (P-38, P-39).
  62. In November 2012, the parents were informed that the District did not feel that its reading specialist was in a position to help the student. (P-41, P-43; see generally SD-PP).
  63. In the fall of 2012, the student was enrolled in music education for trumpet. The student was unsuccessful. (NT at 189-203).
  64. In December 2012, instead of offering reading specialist services, the District changed the student’s educational placement. The student began receiving reading instruction in a learning support setting rather than autism support. Parent was deeply

- dissatisfied with this course of action but felt “a few crumbs are better than starving to death”. (P-46; NT at 608).
65. The student had received reading instruction in the autism support classroom with the same teacher in 3<sup>rd</sup> grade (August 2011 – April 2012) and 4<sup>th</sup> grade to December 2012. No transition plan was put in place to prepare the student for reading instruction in a new classroom with a new teacher nor were parents informed of the exact nature and timing of the transition. The student was upset with the change and reacted emotionally. (SD-NN at pages 110-111; NT at 608-610).
66. In December 2012 and January 2013, the student was involved, for the first time evident on this record, in teasing and negative peer interactions. (SD-HH, SD-NN at pages 115, 128, 140, 144-145).
67. In January 2013, the student was involved in two physical confrontations with the same peer, a friend of the student’s, confrontations initiated by the peer. [Redacted.] (SD-FF, SD-GG).
68. In the days thereafter, parents removed the student and requested, through counsel, instruction in the home. A letter supporting the request was sent to the District by the student’s private psychologist. The District asked for clarification on the request of parents given the different meanings of “instruction in the home” and “homebound instruction”. (P-48; SD-RR; see generally NT at 623-760, 886-887).
69. The student’s IEP team met in late January and mid-February to discuss a home-based program for the student. After the February 2013 IEP meeting, the student began to receive homebound instruction for 19 hours per week, provided by a District teacher in the student’s home. (SD-I, SD-J, SD-SS, SD-TT; NT at 883-893).
70. In March 2013, the student’s IEP team met to discuss the student’s IEP. An IEP was proposed that contained the same goals that had guided the student’s instruction since the September 2012 email exchanges. In reading, this included only sight-word identification. (P-6, P-52; SD-K; NT at 882-883).
71. The March 2013 IEP added the following specially designed instruction: a home/school communication log, paraprofessional support, and “adapted curricula and materials...as required”. Specially designed instruction (including preferential seating,

repetition of directions, prompting, extended wait-time, reading aloud of tests/quizzes, and individualized spelling lists) was listed in the present levels of academic achievement section. (P-6 at pages 8, 31; SD-K at pages 10, 33).

72. The learning support teacher who had worked with the student from December 2012 through January 2013 testified credibly that the student exhibited significant struggles with decoding and fluency. The learning support teacher attended an IEP meeting on January 31, 2013, where the student's homebound program was discussed. Thereafter, the learning support teacher was instructed by District administration not to attend any further IEP meetings. (S-I; NT at 815-850, 891-892).

### Transportation

73. During the 2011-2012 school year, the student was picked up by a District bus between 7:15 to 7:20 AM. The student arrived at school at approximately 8:30 AM. The student's house is approximately 15 minutes away from the school building where the student attended. (P-14; SD-PP at page 19; NT at 161, 555-556).
74. During the 2011-2012 school year, the student's parents three times contacted the District regarding the student's pick-up time given the student's slow and intricate morning routine arising out of the student's difficulties with chewing and swallowing. Each time, the District moved the pick-up time back to an earlier time. (NT at 560-568).
75. By February 2012, the student's pick-up time had been adjusted by the District's reorganization of the student's bus route. (P-20; NT at 858-863, 870-874).
76. The student's mother testified credibly on transportation matters, although it was somewhat muddled. The issue of changing transportation pick-up times was not covered by either party in the examination of the District's transportation manager. The testimony of both witnesses leaves no clear picture of the transportation issue in the 2011-2012 school year up to February 2012. (NT at 555-568, 853-874).
77. During the 2012-2013 school year, the student was picked up at 7:50 AM. The student didn't actually arrive at the school until 8:40 or 8:50. The student's March 2012 IEP required that

“daily transportation should not be longer than 60 minutes.” (P-5 at 29; SD-PP at page 65; NT at 598-600).

## **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)). Parents have made a number of claims related to deficiencies in the student’s educational programming. These claims will be segmented and taken up in turn.

### Child-Find

Here, the District knew about the student’s needs in basic reading, including decoding, since at least 2009-2010 school year, the student’s 1<sup>st</sup> grade year. Indeed, the IEP which the student carried into 2<sup>nd</sup> grade, and was operative in April 2011, contained an explicit decoding goal that addressed digraphs, blends, and vowel pairs. This goal continued to guide the student’s instruction until February 2012, when the District

inexplicably changed the decoding goal to a sight-word goal. The student has also continually had a mathematics goal, a goal which the student has consistently made progress on throughout the period in question. So, while the student had not been formally identified as having a specific learning disability in reading, the District was programming for the student's needs in reading and mathematics.

Formally, then, the record does not support a finding that the District failed in its child-find duty. This does not mean, however, that the District provided the student with FAPE. (See the IEPs sub-section immediately below.)

### IEPs

Here, the District's IEPs for the entire recovery period under consideration, April 2011 – April 2012 and August 2012 – June 2013, are inappropriate. Under the terms of the February 2011 IEP, the student's progress in reading had stalled by the end of the 2010-2011 school year, the student's 2<sup>nd</sup> grade year. The student's progress had deteriorated precipitously by the time the February 2012 IEP was drafted in the midst of the student's 3<sup>rd</sup> grade year. At that point, the District chose not to address the difficulties the student was having in decoding; instead, decoding was removed from the student's IEP. Even after the re-evaluation of March 2012, with its appropriate and explicit

recommendations regarding decoding, fluency, and comprehension (and a formal recognition that the student should be identified with a specific learning disability in reading), the March 2012 IEP wholly ignored those recommendations.

The 2012-2013 school year, the student's 4<sup>th</sup> grade year, began with the same flawed IEP. The September/October 2012 IEP revisions continued to focus solely on sight-words, even in the face of explicit recognition that the student had deeply problematic issues with decoding. The reasonable, and seemingly appropriate, request for support by a reading specialist was denied, and instead the student's placement was changed from autism support to learning support. Not surprisingly, the student continued to struggle with all elements of reading.

The March 2013 IEP did not address the student's long-recognized needs in decoding and fluency. Indeed, since February 2012 and as of the closing of the record, the student's needs for fundamental, explicit, and goal-driven instruction in decoding and fluency is absent from the student's IEPs.

It is also an explicit finding of this decision that the District's practice of not including specially designed instruction in the section of the IEPs explicitly marked out for that information (or, as indicated on the form of the IEP utilized by the District, listed in a goal-specific way for each goal in the IEP) is a prejudicial procedural flaw. There are two



elements to this. First, the custom and practice of most educators will be to look for specially designed instruction in the section that explicitly calls for specially designed instruction. To ask most, if not all, educators to find specially designed instruction in the section of the IEP dedicated to present levels of academic achievement is not only counter-intuitive, it is misleading; looking at the student's IEPs would lead most educators to ask, quite rightly, "where's the specially designed instruction"? Second, the design of the IEP document itself dictates the commonsensical approach that present levels of academic achievement are retrospective and are gauged at the time the IEP is drafted; that section comes near the beginning of the IEP document. Specially designed instruction is forward-looking. Specially designed instruction, whether contained in the section marked out for it or addressed in a goal-specific way in the goals section, will guide the educator for the prospective implementation of the IEP (normally, for the coming chronological year of the student's instruction); the specially designed instruction section (and goals section) are toward the end (or middle) of the IEP document. As a practice, then, the District courts a FAPE disaster.

Here, however, the exact placing of specially designed instruction is an academic exercise because the February 2011, February 2012, March 2012, and September/October 2012 IEPs lack any specially designed instruction at all. This is clearly a prejudicial procedural denial of FAPE.

Finally, at no time did any IEP address the student's problematic in-school behaviors. The record in its entirety fully supports the conclusion that the student exhibited behaviors that impeded the student's learning and that of others, yet those behaviors were not addressed through a functional behavior assessment or positive behavior support plan.

Accordingly, the student was denied FAPE for all periods from April 2011 through the end of the 2012-2013 school year where the student was instructed under IEPs. An award of compensatory education will follow.

### ESY

Where a student with a disability exhibits difficulty with recoupment and/or regression given an break in educational programming, such as summer when school is not in session, the student may require ESY programming. (34 C.F.R. §300.106; 22 PA Code §14.132). Here, the record does not support an award of compensatory education for ESY programming. The District found the student ineligible for ESY programming for the summer of 2011. But parents did not carry their burden of proof in showing that the student, at that time, suffered from recoupment or regression issues due to a break in educational programming. This is not to say that the student is not eligible for ESY now or into the future; but, on this record, the record does not support a

finding that the District denied the student FAPE by not providing ESY programming in the summer of 2011.

As for the summer of 2012, the student had been dis-enrolled from the District in April 2012. The student was not re-enrolled at the District until August 2012, in anticipation of the 2012-2013 school year.

Therefore, the District was under no obligation to provide educational programming for the summer of 2012, and there will be no finding that the District denied the student FAPE related to ESY programming that summer.

#### Bullying & Homebound Instruction

The record supports a finding that the District did not deny the student FAPE for its handling of the teasing and bullying that emerged in December 2012 and January 2013, culminating in the two assaultive altercations in mid-January 2013. There is no indication that prior to this period, the student had any problematic interactions with peers. The emergence of the incidents was not so consistent or pronounced that the District should have taken action prior to mid-January 2013. And even if the District had in place a positive behavior support plan, nothing in the record indicates that it would have, or should have, addressed interactions with peers. Finally, when the assaults took place in mid-January 2013, the District responded immediately and appropriately. There was no denial of FAPE related to bullying.

Similarly, there was no denial of FAPE related to the handling of homebound instruction after the student was removed from the District in mid-January 2013. The delay in providing these services until mid-February 2013 related to mis-communications between the parties. This was not a matter of mere semantics; the District responded appropriately by convening the student's IEP team for consideration of a highly restrictive change of placement to instruction-in-the-home. Once the confusion was cleared up, the IEP team moved to provide homebound instruction, an entirely different home-based effort, in a timely way. There was no denial of FAPE related to the District's handling of homebound instruction January/February 2013.

### Retaliation

This hearing officer takes very seriously the allegation that the District retaliated against the student and parents by extending, multiple times, the daily morning bus ride in the 2011-2012 school year. Given the student's well-documented and severe issues with chewing and swallowing, the student's morning routine would necessarily be intricate and prolonged. Aside from the obvious concerns over a student with autism being exposed to one-way transportation in excess of an hour when the student lives 15 minutes away from the school, such a course of action would be vindictive in light of the student's needs. On this record, though, it cannot be ascertained with clarity or certainty that the

District engaged in such behavior. As such, there will be no finding that the District retaliated against the student and family in the morning transportation of the student from August 2011 – February 2012.

Under the terms of the March 2012 IEP, however, the student's daily transportation time should be no more than 60 minutes. If this was meant to reflect one-way transportation, by the plain terms of the statement clearly it does not. And the testimony of student's mother, unrebutted by the District transportation director, is credible that the morning bus ride alone took nearly 60 minutes. The record supports the conclusion that this portion of the IEP was not honored. Still, there will be no separate award of compensatory education; the award of compensatory education below addresses any denial of FAPE or procedural/substantive flaws in the student's programming.

#### 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 IDEA. (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)). In this case, the District has denied the student a FAPE from April 2011 onward.

In Pennsylvania, an elementary school student must be provided with a minimum of six hours of education per school day. (22 PA Code Section 11.3). Here, the District's procedural and substantive denial of FAPE since April 2011, especially where the student stalled in reading progress and then had significant and broad-ranging needs in reading go unaddressed in the student's IEPs, amount to an entire denial of FAPE. Aside from the documentary evidence in this regard, as an additional equitable consideration the District showed little interest in revising its programming even when it was explicitly called for, or when it was explicitly requested by the parents, or (as with the request for reading specialist services in the fall of 2012) when the course of action the District rejected was clearly appropriate.

Still, the District consistently programmed appropriately (albeit, after the March 2012 RR, incompletely) for the student's needs in mathematics. The record supports, and multiple witnesses testified, that mathematics is a relative area of strength for the student. And at the end of the day, the student made progress in mathematics as a result of the District's instruction. Therefore, to reflect this progress, the student will be awarded five hours of compensatory education for every school day from April 6, 2011 through the end of the 2010-2011 school year (2<sup>nd</sup> grade), every school day for the 2011-2012 school year (3<sup>rd</sup> grade)

through April 13, 2012 when the student was dis-enrolled from the District, and every school day for the 2012-2013 school year (4<sup>th</sup> grade).<sup>3</sup>

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.

In sum, then, an award of compensatory education will be made for a denial of FAPE for (1) the period from April 6, 2011 through the end

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<sup>3</sup> In their closing statement, parents request tuition reimbursement for the private placement where the student was enrolled from April – June 2012. This issue was not presented in parents' complaint nor was it placed at issue at any time during the proceedings. Therefore, the requested remedy is not addressed in this decision, and the period when the student was dis-enrolled from the District is not made part of the calculation of the compensatory education award.

of the 2010-2011 school year, (2) the 2011-2012 school year through April 13, 2012, and (3) the entire 2012-2013 school year.

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**ORDER**

In accord with the findings of fact and conclusions of law as set forth above, the student is awarded five (5) hours of compensatory education for every school day from April 6, 2011 through the end of the 2010-2011 school year, every school day from the beginning of the 2011-2012 school year through April 13, 2012, and every school day for the 2012-2013 school year.

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

*Jake McElligott, Esquire*

Jake McElligott, Esquire  
Special Education Hearing Officer

September 24, 2013