

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

PENNSYLVANIA

SPECIAL EDUCATION HEARING OFFICER

DECISION

Student: J.S.

Date of Birth: [redacted]

Hearing Dates: November 12, 2009, March 29, 2010, March 30, 2010, April 21, 2010, May 13, 2010

ODR File No.: 00219/09-10AS

School District: North Penn School District

CLOSED HEARING

<u>Parties:</u>	<u>Representatives:</u>
Parent[s]	<u>Parent Attorney:</u> Frederick M. Stanczak, Esq. Law Offices of Frederick M. Stanczak 179 North Broad Street Doylestown, PA 18901
North Penn School District	<u>School District Attorney:</u> Brian Jason Ford, Esquire Dischell Bartle Yanoff & Dooley, P.C. 1800 Pennbrook Parkway Lansdale, PA 19446-3860
<u>Date Record Closed:</u>	June 5, 2010
<u>Decision Date:</u>	June 19, 2010
<u>Hearing Officer:</u>	Gloria M. Satriale, Esquire

INTRODUCTION AND PROCEDURAL HISTORY

This case concerns the provision of a Free Appropriate Public Education (hereinafter referred to as “FAPE”) for Student (hereinafter referred to as “Student”), an eligible elementary school age student, who resides with the Parents within the North Penn School District (hereinafter referred to as “District”) and who has been diagnosed with Autism Spectrum Disorder (hereinafter referred to as “ASD”). The District denies all claims the Parents assert regarding the District’s failure to provide an IEP which was reasonably calculated to confer meaningful educational benefit in that the District failed to employ critical analytical procedures to establish and address needs in behavior, life skills and communication domain areas.

The matter was initially filed in June of 2009, but was subsequently withdrawn with an agreement to toll time lines pending approval of an agreement reached on the issues between the parties. The instant complaint was filed once the agreement was not approved by the Board. The matter was originally convened by Hearing Officer DeLauro who deemed the two proceedings treated as one honoring the original timelines and extended period for which relief is sought. {NT 12} The matter was reassigned to the undersigned Hearing Officer.¹

Due process concerning the current matter was filed with the Office for Dispute Resolution on August 23, 2009. The resolution meeting was waived. A Due Process hearing was conducted in this matter on November 12, 2009; March 29, 2010; March 30, 2010; April 21, 2010; and May 13, 2010.

¹ The hearing was further delayed by a number of requests by the District and was complicated by the occurrence of a Teachers’ strike in April 2010.

- a. Exhibits were submitted and accepted on behalf of the Hearing Officer as follows:
HO-2, HO-3
- b. Exhibits were submitted and accepted on behalf of the Parent as follows:
P-1, P-2, P-3, P-4, P-5, P-6, P-7, P-8, P-9, P-10, P-11, P-12, P-13, P-14, P-16, P-17, P-18, P-19, P-20, P-21, P-22, P-23, P-24, P-25, P-26, P-27, P-28, P-29, P-30, P-31, P-32, P-33, P-34
- c. Exhibits were submitted and accepted on behalf of the District as follows:
SD-1, SD-2, SD-3, SD-4, SD-5, SD-6, SD-7, SD-8, SD-9, SD-10, SD-11, SD-12, SD-13, SD-14, SD-15, SD-16, SD-17, SD-18, SD-19, SD-20, SD-21, SD-22, SD-23, SD-24, SD-25, SD-26, SD-27, SD-28
- d. Exhibits were submitted and accepted on jointly as follows:
J-1, J-2

For the reasons that follow, and in accordance with the following ORDER, I find IN PART for the PARENT and IN PART for the SCHOOL DISTRICT in that I find that the Student was DENIED FAPE for the 2007/2008/2008-2009/2009-2010 school years and award compensatory education in the amount of 1440 hours and find the current IEP INAPPROPRIATE and direct the DISTRICT to convene an IEP within 10 days of this ORDER to address behavioral needs under the guidance of a Board Certified Behavior Analyst with previous experience with young children with the diagnosis of autism to oversee the development and implementation of a positive behavior support/Crises prevention/intervention plan. Additionally, the District shall maintain a home program at the level of intensity determined by the IEP team, but in no event less than 10 hours per week.

ISSUES

The issues presented at this hearing included the following:

1. Did the District fail to provide the Student with a Free and Appropriate Public Education (hereinafter referred to as a “FAPE”) for the 2007-2008 and the 2008-2009 and the 2009-2010 school years?
2. Is the Individualized Education Plan (hereinafter referred to as “IEP”) that has been proposed for the current school (2009-2010) year appropriate?
3. Is the Student entitled to Compensatory Education for the 2007-2008, 2008-2009 and 2009-2010?
4. Is the Parent entitled to reimbursement for the Independent Educational Evaluation (hereinafter referred to as “IEE”) procured and paid for by Parent.²

FINDINGS OF FACT

1. The Student is an elementary school-aged student with a disability within the meaning of the Individuals with Disabilities Education Act, IDEA, 20 U.S.C. § 1401 due to identification as a child with autism.
2. The Student resides with the Parents in the District, and the District is the Local Educational Agency (hereinafter referred to as “LEA”) that is responsible for the provision of special education services to the Student.
3. The Student was enrolled in the District during kindergarten year (2006/2007). Student has a profound level of deficit in behavior, ability to attend, self care skills, social interaction, and communication. (NT 39-33, P-6, P-9.)
4. The Student attends in a full time Autistic Support (hereinafter referred to as “AS”) class throughout enrollment in the District. In addition to the programming that the Student received during the regular school day, Student also receives ABA based

² In their closing argument, Parents also assert a claim under Section 504 of the Rehabilitation Act, however, in the recitation of the issues to be covered by the Hearing, the Section 504 claim was not asserted and will not be addressed here.

intervention for the purpose of generalization of skills across environments at home (hereinafter referred to as the “home-based program”) (P-17-25)

5. With the exception of Toileting, the student’s program addressed life skills.
6. A Functional Behavioral Analysis has never been conducted. (NT 349)
7. The Student did not make meaningful progress during the 2006-2007 Kindergarten year, 2007-2008 first grade year, or 2008-2009 second grade year. (NT 67-68)
8. The Student’s IEP noted that Student required continuous facilitation from an adult in order to remain involved with interacting with peers and adults. (P-5, p. 14, 143, P-30, p. 428, NT 419-420).
9. The Student’s educational needs, as of the first grade year, and continuing into the present, included the development of basic life skills, including toileting skills, behavior concerns, including self-stimulatory and self-injurious behaviors, and verbal communication skills. (P-9, P-6, NT 414-413)
10. The only Functional Behavioral Assessment (hereinafter referred to as “FBA”) that was performed for the Student was in 2003, which was conducted by the Intermediate Unit. (NT 425-426, P-9, p. 214).
11. The Student’s first grade AS teacher collected behavioral data over a two to three week period, but did not conduct a full FBA. (NT 427)
12. The data that the teacher collected is no longer available. (NT 428-429)
13. The Student’s behavior plan during first grade was not individualized. (P-5, p. 430, S-18, NT 430-431)
14. The Student’s elopement behavior was noted to emerge between kindergarten and first grade and continued to escalate into a serious safety concern. (NT 205-206, 434, 763-768, 770-771)
15. No FBA has been conducted to assess the Student’s elopement behavior. (NT 764)
16. The first grade teacher kept data pertinent to IEP goals on a first time probe basis only. (NT 436)

17. The Assessment of Basic Language and Learning Skills (hereinafter referred to as “ABLLS”) assessment was utilized once per year but the data from that assessment was not used to assess progress toward IEP goals. (NT 437)
18. The Student’s goal for developing bathroom skills was that staff would check on an hourly basis and encourage Student to communicate a need to use the bathroom using a picture system. (NT 451-452)
19. The Student did not void in the toilet, there was no program in place, such as increasing fluid intake, to encourage Student to do so. (NT 348-349, 452)
20. The baseline for the goal and objectives addressing bathroom skills in the May, 2007 (1st grade) IEP was zero – indicating no skills in this area. (P-5, p. 152, NT 457)
21. The Student would engage in self-stimulatory behavior, such as “talking to Student’s hands” and wandering, on a continual basis during the first grade year. (NT 460)
22. The frequency and duration data of these behaviors was not taken. (NT 461-462)
23. The behaviors that were targeted in the behavior plan were not extinguished. (P-30, NT 751, 765)
24. The second grade teacher claimed that the targeted behaviors were reduced, but could not quantify the reduction. She did not track the frequency of the targeted behaviors in the data that she kept pertaining to other IEP goals. (NT 468-469)
25. The Evaluation Report (hereinafter referred to as “ER”) that was completed on April 6, 2009, included two observations of the Student. Student was observed to continually engage in self-stimulatory and avoidant behaviors including banging the chair with a hand, staring into space, eloping to avoid work, spinning, making inappropriate noises, tapping the floor and hand flapping. (P-30, pp. 427-428)
26. The Student was observed to require hand-over-hand assistance to accomplish routine classroom tasks and to work on a painting task. (*Id.*)
27. The teacher’s recommendation, as reported in the ER, was that the Student required small group 1:1 instruction to learn new skills and to maintain previously learned skills. (P-30, p. 428)
28. The Parents have continually expressed their concerns as to the Student’s persistent behavioral needs. (NT 245-247)

29. The Parents secured an expert opinion. The Parent's expert observed the Student for a full day in both the 2008/2009 and the 2009/2010 school years. Her reports, based on these observations and other information, are included in the record. (P-29, P-32)
30. The first observation took place on December 15, 2008, during the Student's 2nd grade year. The expert, in her report and in her testimony, conveyed her observation of a relatively chaotic atmosphere in which the Student was provided with, at best, minimal 1:1 attention from classroom staff, and was given frequent "breaks" that were unsupervised. During the unstructured time, the Student would engage in self-stimulatory behaviors, and would wander to and stare out of a window. (P-29). The expert described the atmosphere in the class as a "very out of control situation." (NT 821). The Student was noted to run away from classroom staff, and engage in almost constant self stimulatory behaviors. (NT 825, 831, 140)
31. The expert also observed the Student's class during the current school year. Although there was considerably more structure and less "free" time as compared with the prior year, the AS class still fails to address the Student's needs in critical respects. For instance, Dr. [redacted] noted that the teacher and aides were still not implementing any consistent behavior plan to address the Student's behaviors. (NT 891-892)
32. Although certain concerns continue, the expert noted several positive changes to programming appropriate for the Student. The behavior plans that were in effect during the 2nd and 3rd grade years were not individualized for the Student but were designed to be implemented for the entire class. No data was taken to individually track the Student's behavior. (NT 615-616)
33. The expert opined that the lack of a consistent Behavior Intervention Plan (hereinafter referred to as "BIP") is harmful in that classroom staff may inadvertently reinforce unwanted behaviors by providing inconsistent responses. (NT 836-838) The expert observed that the Student continued to engage in self stimulatory behaviors at a high rate of frequency. (NT 891-892)
34. Plans for intervention were not written (NT 599-600; 668-670)
35. The Student engaged in self stimulatory and maladaptive behaviors throughout the day. (NT 893-894)

36. The expert noted that the Student's behaviors are a critical concern in that they interfere with all aspects of functioning and raise concerns as to safety. (NT 801)
37. In both of her reports, the expert noted that there was no evidence of a BIP being implemented as a part of the Student's program. (P-29, P. 414, p-32, PP. 14-15). The expert further noted, in her testimony, that there was no evidence of data collection with regard to the Student's behaviors. (NT 835).
38. The Student's behavior plan for the 3rd grade year does not address self-stimulatory behaviors, bathroom skills or elopement. (NT 750-751)
39. The Student achieved a list of skills. (S-19) (NT 549-555)
40. The data submitted by the district does not address the Student's behavior or toileting goals. (NT 573)
41. The expert, the graphs do not reflect the frequency of the data collection, and it is not clear what performance the graphs are showing. (NT 865). The amount of fluctuation in performance reflected in the graphs and supporting documentation is not explained. Moreover, the data sheets do not indicate the points at which progress was measured, or whether there was any particular factor that contributed to the inconsistent performance. (NT 870-871)
42. The District was not making data based decisions.
43. The teacher could not explain what accounted for the notable fluctuation in the graph reflecting the Student's progress toward following instructions presented to a group, nor does the data provide an explanation for the inconsistent performance. (NT 565-566, S-20, p. 20).
44. The teacher could not interpret graphed data.
45. Goals that were reportedly "mastered" during the school year were not changed to increase the expected level of performance, but remained unchanged in order to maintain the skill. (NT 602-603). The Student's progress was inconsistent and was marked by gains, followed by regression. (NT 604)

DISCUSSION AND CONCLUSION OF LAW

The Right to a Free and Appropriate Public Education and Burden of Proof

The Individuals with Disabilities Education Act (hereinafter referred to as “IDEA”) requires that a state receiving federal education funding provide a “Free Appropriate Public Education” (Hereinafter referred to as a “FAPE”) to disabled children. 20 U.S.C. § 1412(a)(1). In Pennsylvania, the Commonwealth has delegated the responsibility for the provision of a FAPE to its local school districts. School districts provide a FAPE by designing and administering a program of individualized instruction that is set forth in an Individualized Education Plan (hereinafter referred to as “IEP”). 20 U.S.C. § 1414(d). The IEP “must be ‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’ ” *Shore Reg’l High Sch. Bd. of Ed. v. P.S.*, 381 F.3d 194, 198 (3d Cir.2004) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182-85 (3d Cir.1988)). In assessing whether an individualized program of instruction is “reasonably calculated” to enable the student to receive meaningful benefit, the progress noted must be more than a trivial or *de minimis*. *Board of Education v. Rowley*, 458 U. S. 176, 73 L.ed.2d.690, 102 S.Ct.3034 (1982); *Ridgewood Board of Education v. M.E. ex.rel. M.E.*, 172 F.3d 238 (3d Cir.1999).

A parent who believes that a school has failed to provide a FAPE may request a hearing, commonly known as a Due Process Hearing, to seek relief from the school district for its failure to provide a FAPE. 34 C.F.R. § 300.507. In Pennsylvania, the hearing is conducted by a Hearing Officer. *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 527 (3d Cir.1995).

As the moving party, the student bears the burden of proof in this proceeding. The

United States Supreme Court has held that the burden of proof in an administrative hearing challenging a special education provision of a FAPE is upon the party seeking relief, whether that party is the disabled child or the school district. *Schaffer v. Weast* U.S., 126 S. Ct.528, 163L. Ed.2d 387 (2005); *In Re J.L and the Ambridge Area School District, Special Education Opinion No. 1763* (2006). Because a student's parents seek relief in this administrative hearing, they bear the burden of proof in this matter, i.e., they must ensure that the evidence in the record proves each of the elements of their case. The United States Supreme Court has also indicated that, if the evidence produced by the parties is completely balanced, or in equipoise, then the party seeking relief (i.e., student's parents) cannot prevail because the party seeking relief bears the burden of persuasion. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005); *L.E. v Ramsey Board of Education*, 435 F. 2d 384 (3d Cir.2006). Of course, where the evidence is not in equipoise, one party has produced more persuasive evidence than the other party.

Having been found eligible for special education, the student is entitled by federal law IDEA as reauthorized by Congress December 2004, 20 U.S.C. *Section 600 et seq.* and Pennsylvania Special Education Regulations at 22 PA Code § 14 *et seq.* to receive a FAPE. A FAPE is defined in part as: individualized to meet the educational needs of the student; reasonably calculated to yield meaningful educational benefit and student or child progress; provided in conformity with an IEP.

As previously noted, a student's special education program must be reasonably calculated to enable the child to receive meaningful educational benefit at the time that it was developed. *Board of Education v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982); *Rose by Rose v. Chester County Intermediate Unit*, 24 IDELR 61 (E.D. PA. 1996). The IEP must be likely to produce progress, not regression or trivial educational advancement *Board of Educ.*

v. Diamond, 808 F.2d 987 (3d Cir. 1986]. *Polk v. Central Susquehanna IU #16*, 853 F.2d 171, 183 (3rd Cir. 1988), cert. denied, 488 U.S. 1030 (1989), citing *Board of Education v. Diamond*, 808 F.2d 987 (3rd Cir. 1986) held that “Rowley makes it perfectly clear that the Act requires a plan of instruction under which educational *progress* is likely.” (Emphasis in the original). The IEP must afford the child with special needs an education that would confer meaningful benefit. The court in *Polk* held that educational benefit “must be gauged in relation to the child’s potential.” This was reiterated in later decisions that held that meaningful educational benefit must relate to the child’s potential. See *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572 (3rd Cir. 2000); *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999); *S.H. v. Newark*, 336 F.3d 260 (3rd Cir. 2003.) (District must show that its proposed IEP will provide a child with meaningful educational benefit). The appropriateness of an IEP must be based upon information available at the time a district offers it; subsequently obtained information cannot be considered in judging whether an IEP is appropriate. *Delaware County Intermediate Unit v. Martin K.*, 831 F. Supp. 1206 (E.D. Pa. 1993); *Adams v. State of Oregon*, 195 F.3d 1141 (9th Cir. 1999); *Rose supra*.

Districts need not provide the optimal level of service, maximize a child’s opportunity, or even a level that would confer additional benefits, since the IEP as required by the IDEA represents only a basic floor of opportunity. *Carlisle Area School District v. Scott P.*, 62 F. 3d at 533-534.; *Hartmann v. Loudoun County Bd. of Educ.*, 118 F.3d 996, 1001 (4th Cir. 1998); *Lachman, supra*. In creating a legally appropriate IEP, a school district is not required to provide an optimal program, nor is it required to “close the gap,” either between the child’s performance and his/her untapped potential, or between his/her performance and that of non-disabled peers. *In Re A.L., Spec. Educ. Opinion No. 1451 (2004)*; See *In Re J.B., Spec. Educ. Opinion No. 1281 (2002)*

What the statute guarantees is an “appropriate” education, “not one that provides everything that might be thought desirable by ‘loving Parents.’” *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989). Under the IDEA parents do not have a right to compel a school district to provide a specific program or employ a specific methodology in educating a student. *M.M. v. School Board of Miami - Dade County, Florida*, 437 F.3d 1085 (11th Cir. 2006); *Lachman v. Illinois Bd. of Educ.*, 852 F.2d 290, 297 (7th Cir. 1988) If personalized instruction is being provided with sufficient supportive services to permit the student to benefit from the instruction the child is receiving a “Free Appropriate Public Education as defined by the Act.” *Polk; Rowley*. The purpose of the IEP is not to provide the “best” education. The IEP simply must propose an appropriate education for the child. *Fuhrman v. East Hanover Bd. of Educ.*, 993 F. 2d 1031 (3d Cir. 1993). (See also *Board of Education v. Murphysboro v. Illinois Bd. of Educ.*, 41 F.3d 1162 (7th Cir. 1994) (Under the IDEA a District must follow the procedures set forth in the act, and develop an IEP through procedures reasonably calculated to enable the child to receive educational benefits. Once the district has done this the court cannot require more; the purpose of the IDEA is to open the door of public education to handicapped children, not to educate a child to his/her highest potential), citing *Rowley*, 458 U.S. at 206-07.) The balance imposed by the Federal Standard is particularly applicable to the facts of this case in that, in some matters, the presentation of evidence clearly establishes a weight of evidence in the provision/lack of provision of FAPE. In the instant case, a common thread exists throughout all relevant time frames and becomes the reason the infrastructure of the District’s program fails.

Did the District fail to provide the Student with a Free and Appropriate Public Education for the 2007-2008/2008-2009/2009-2010 school years?

For each of the time periods the Parents seek relief their assertions supporting their position of a denial of FAPE fall into 3 basic categories

1. The District failed to implement an appropriate behavior plan.
2. The District failed to adequately address communication needs.
3. The District failed to develop and implement programming in the area of general life skills, including a toileting program.

In support of their position the District relies heavily on the report and recommendations of their expert, for which they seek reimbursement. In defense of their denial of all of the Parents' allegations the District relies heavily on its presentation of data.

Behavior

The testimony establishes that the Student exhibits a number of behaviors that impact ability to learn and which pervade in every aspect of Student's life. These include self stimulatory behaviors, lack of attentiveness, non contextual vocalizations, inappropriate and maladaptive behaviors including aggression and elopement. The District identified these behaviors and indicated such on the IEP by checking the "special consideration" box. All of these facts should have resulted in the District initiating the process of conducting Functional Behavior Assessment (hereinafter referred to "FBA") followed by a Behavior Intervention Plan (hereinafter referred to "BIP"), designed to identify and address these behaviors. See, 2006 ER, Kindergarten IEP, P-5, P-6, P-30. The District asserted that its development of a Behavior Intervention Plan (hereinafter referred to as "BIP") was sufficient to address the behavior concerns. The only problem is that, it is well settled and a basic tenant of behavioral programming that you cannot attempt to modify behavior without the knowledge of the function the particular behavior serves for the individual. Without the

benefit of a properly conducted and interpreted FBA, you cannot develop an appropriate BIP. Deficiencies in the BIP include the fact that the target behaviors were not specifically identified, and that the form used for the plan did not conform to the terminology used for BIP plans. NT 206-215. Additionally, the BIP simply did not address certain behaviors (e.g. self-stimulatory behaviors). NT 206-215.

The evidence demonstrates that the Student's maladaptive behaviors have increased over the three year period leading up to the 08-09 school year. P-28, pp. 414-415. Student's behavior was noted to have remained essentially the same during the current school year. P-32, p. 18.

The Parents have continually expressed their concerns that the Student has continued to engage on these behaviors throughout the elementary school years. (P-30 which describes the Student's behaviors during kindergarten and 3rd grade years) Further the Parent's expert noted that the Student's behaviors are critical concern in that they interfere with all aspects of functioning and raise concerns as to safety. (NT 801)

It is not unusual to find behavior as one of the most pressing educational needs for an individual with autism. What *is* unusual is for a District to have so many reasons to conduct an FBA and, even to this day, fail to do so. It is clear that the required intervention under these circumstances is the frequent implementation and analysis of an FBA. The District simply failed to do so³ and on this ground alone the Student was denied a FAPE. The District will be ordered to secure the services of a Board Certified Behavior Analyst with prior experience in developing and monitoring positive behavior and Behavior

³ It is also noted that the District testified to collecting data, but not utilizing it and that the data was no longer available. (NT 427-430) It is also clear from the testimony that the District is not fully schooled in the proper use of data

Intervention Support Plan for the purpose of conducting a FBA and developing and monitoring the consequent necessary intervention plans.

Additionally, however, the District clearly failed to provide a FAPE for the periods 2006-2007/2007-2008. During each of these years, the IEP's, excepting minor differences, mirror each other. (NT 64-65; p-4; 5; 6). Even intermittent progress on short term goals is not in evidence indicating that the District failed to modify the goals , objectives and specially designed instruction in order that progress could be achieved. In that the IEP's were not, then reasonably calculated to confer meaningful benefit, the District has failed the minimum standard under the law. Consequently, an award of compensatory education will be made.

Life Skills

The Parents contention regarding a lack of FAPE in the domain area of Life Skills really centers on a disagreement between the parties regarding toileting goals⁴, however, based upon the District's testimony that they are willing to implement a specific toileting program and the Parent's indication that they are now willing to participate in the implementation of a toileting goal across the school setting into the home, *and* in light of the fact that Home Program hours are here awarded which can be utilized to assist parents in the continued instruction in toileting in the home setting I find that this issue is moot and directed to the IEP team to formulate and implement the appropriate program. NT 192-194

Communication

As with problem behaviors, the Student's IEPs consistently indicate that communication is an area of special consideration. P-1, p. 5, P-2, p. 46, P-3, p. 76, P-5, p. 140, JE-1.

⁴ Parents also assert deficiencies in other life skills, however I find that those skills are adequately addressed particularly through the home program.

Adaptations regarding programming and assessment, including an evaluation for assistive technology is supported by the evidence and the expert report.

Is the Individualized Education Plan that has been proposed for the current 2009/2010 school year appropriate?

The IEP for each child with a disability must include a statement of the child's present levels of educational performance; a statement of measurable annual goals, including benchmarks or short-term objectives, related to meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum and meeting the As with problem behaviors, The Student's IEPs consistently indicates that communication is an area of special consideration. P-1, p. 5, P-2, p. 46, P-3, p. 76, P-5, p. 140, JE-1. child's other educational needs that result from the child's disability; a statement of the special education and related services and supplementary aids and services to be provided to the child...and a statement of the program modifications or supports for school personnel that will be provided for the child to advance appropriately toward attaining the annual goals (and) to be involved and progress in the general curriculum...and to be educated and participate with other children with disabilities and nondisabled children; an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class... CFR §300.347(a)(1) through (4)

An IEP must be crafted in such a manner that provided it is implemented; there is a reasonable degree of likelihood that the student will make educational progress. Implementation of an appropriate IEP does not guarantee that the student will make progress.

Is the Student entitled to Compensatory Education for the 2007/2008, 2008/2009 and the 2009/2010 school years?

Compensatory education is an appropriate remedy where a school district knows or should know that a child's educational program is not appropriate or that the student is receiving only trivial educational benefit, and the district fails to remedy the problem. The period of compensatory education granted should be equal to the period of deprivation, excluding the period of time reasonably required for the district to act accordingly. *Ridgewood Board of Education v. M.E. ex.rel. M.E.*, 172 F.3d 238 (3d Cir.1999); *M.C. v. Central Regional School District*, 81 F. 3d 389 (3rd Cir. 1996).

However a technical violation alone does not entitle a student to compensatory education. A mere procedural glitch or technical violation of the IEP is insufficient. A violation must amount to a substantive effect on the child's ability to receive FAPE in order to hold the district responsible for any procedural glitches. In the instant case, all of the violations rise to the level of substantive denial of FAPE. Further, the grant of compensatory education should be such to return the child to the same status had the denial not taken place. Particularly in the current school year, the District employed structure and supports which served to mitigate the previous deprivations, yet did not completely rise to the level of a complete provision of a FAPE or resulted in a fully appropriate IEP. Although the District could not demonstrate the proper use of data, an understanding of data interpretation in order to make data based decision making or substantiate its claims of meaningful progress attained through the extensive presentation of data, The District's witnesses testified credibly and clearly presented as dedicated interested educational professionals whose goal is to advance this student. Notwithstanding the District's failure to utilize all of the appropriate tools at their disposal (certified professionals, FBA etc), and maintain a less

chaotic environment, some minimal progress for this student is gleaned from the records and testimony. Therefore, under the applicable legal standards in assessing the appropriate award of compensatory education, an award is made for the total claim asserted less the period calculated wherein the District could have reasonably rectified the deprivation and less the period of time the District was able to appropriately implement instruction which resulted in meaningful progress under the law.

Is the Parent entitled to reimbursement for the Independent Educational Evaluation procured and paid for by Parent?

The starting point for the determination of the appropriateness of an offer of a FAPE is the initial evaluation from which the needs of a student are identified. In order for an evaluation to be determined to be appropriate, it must meet the requirements of 34 CFR § 300.532. More specifically, the Evaluation Report (ER) should: 1) utilize a variety of assessment tools and strategies to gather relevant functional and developmental information about the student, including information provided by the parents; 2) assess the student in all areas related to the suspected disability; 3) be sufficiently comprehensive to identify all of the student's special education and related services needs; and 4) utilize technically sound instruments to assess the relative contribution of cognitive, behavioral, physical and developmental factors. See *In Re the Educational Assignment of L.-M. B.*, Special Educ. Op. No. 1795 (2007).

Pursuant to 34 CFR §300.502(b)(i), a parent is entitled to reimbursement of an IEE at public expense if they disagree with the District evaluation report and the District evaluation report is in some way inappropriate. *Holmes v. Millcreek Tp. School Dist.*, 205 F.3d 583

(3rd Circ. 2000). See also P.P. ex rel. *Michael P. v. West Chester Area School Dist.*, 585 F.3d.

In addition, “the IEE must answer questions not previously raised, provide *essential* new information, or add something to the prevailing understanding of the student’s disability. A mere showing of differences between the district and independent evaluations is not, though, sufficient.” *In re: J.P.*, Pa. SEA No. 1573 at 13 (2005) (emphasis added). The Parents Expert report is replete with specific suggestions which may prove beneficial to the Team and raises a number of issues for consideration by the Team, all of which have not been contained in previous evaluations by the District. For the reasons previously detailed, the Parents in the present matter have met these requirements and, accordingly, are entitled to the reimbursement for the evaluation.

CONCLUSION

Although the District had demonstrated improvement in the design and implementation of programming for this student in the current school year, the District continues to fail to appreciate the critical nature of following the basic protocol for the assessment and intervention of behavioral concerns. Basic procedure as indicated by the IEP itself demands an FBA the instant the team identifies behaviors which impact the student’s ability to access education. To this day, the district has failed to enlist the services of a qualified professional to successfully extinguish or redirect or replace the numerous behaviors preventing this student from using Student’s potential and thereby has deprived Student of the floor of opportunity and access to education. Likewise, the District’s evaluation fell short of providing sufficient information and was clearly benefited by the information provided by the privately secured IEE. Thus, for all of the reasons heretofore discussed, the following ORDER is issued.

ORDER

- The Student has been denied a FAPE for the 2006-2007/2007-2008/2008-2009 school years
- Reimbursement is awarded in the amount paid for the IEE conducted by Parents Expert
- The IEP for the 2009/2010 school year is not appropriate.
- The IEP team will convene within 10 days of this ORDER in order to modify the IEP in accordance with this ORDER and to determine how the grant of compensatory education shall be applied.
- Written instructions shall be developed indicating prompting hierarchies, levels, and systems of reinforcement, and incorporating positive support and behavior intervention plans, data collection procedures, FBA and any all other procedures and protocols affecting instruction to ensure consistency of application among staff.
- The student shall be placed in a classroom setting which utilizes the principals of ABA and shall maintain minimal distractions, low ratios, and individualized supports including 1:1 for direct instruction and behavior intervention by staff specifically trained in positive behavior supports, crises prevention/intervention, and ABA principals.
- A Board Certified Behavior Analyst with previous experience with positive support and behavior intervention plans as applied in a school setting with young children with autism shall be a regular member of this student's team and shall conduct an FBA for all target behaviors as determined by the team and shall develop, implement and monitor necessary intervention plans.
- The student shall be entitled to an evaluation to assess the appropriateness of augmentative communication/assistive technology in advancing communication goals.

- Compensatory education is awarded in the amount of 1470 hours for the total claim period of the 2007-2008/2008-2009/2009-2010 school years.

Dated: June 19, 2010

Gloria M. Satriale

Gloria M. Satriale, Esq.,

Special Education Hearing Officer