

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

ODR No. 3127-1112 KE

Child's Name: M.J.

Date of Birth: [redacted]

Dates of Hearing: 8/10/12, 9/4/12, 9/7/12, 9/13/12,
9/24/12, 9/26/12, 10/3/12, 10/23/12, 11/2/12, 11/8/12,
11/14/12, 11/19/ 12, 11/20/12, 12/10/12

CLOSED HEARING

Parties to the Hearing:

Representative:

Parents

Parent Attorney

Ilene Young, Esquire
Law Offices of Ilene Young, Esquire
172 Middletown Boulevard, Suite 204
Langhorne, PA 19047

School District

Tredyffrin-Easttown
940 W. Valley Road, Suite 1700
Wayne, PA 19807

School District Attorney

Lawrence Dodds, Esquire
Wisler, Pearlstine, Talone, Craig,
Garrity & Potash
Office Court at Walton Point
484 Norristown Road – Suite 100
Blue Bell, PA 19422-2326

Date Record Closed:

January 7, 2013

Date of Decision:

January 21, 2013

Hearing Officer:

Anne L. Carroll, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

Student is currently enrolled in a District elementary school and receiving instruction in an autistic support classroom. Student enrolled in the District for second grade prior to the beginning of the 2010/2011 school year. The family explicitly chose to relocate from northeastern Pennsylvania and move into the District to seek better special education services than they believed Student received in kindergarten and first grade, but hoped the District would agree to place Student in a private school Parents believed would provide the greatest benefit.

Although the District believed it could provide appropriate services to meet Student's needs, Parents disagreed and rejected the 9 IEPs offered by the District between July 2010 and January 2012. The District has, however, implemented the proposed IEPs, so special education services have been provided to Student without interruption through the present.

Parents filed a due process complaint in May 2012 seeking compensatory education and a change in program/placement for the current school year. A difficult procedural history followed, including a reassignment from the originally assigned hearing officer, interim motions/rulings and scheduling difficulties arising from personal and professional circumstances that affected both parties. The confluence of such issues resulted in an unusually long hearing in terms of both time and number of sessions.

Although it is unfortunate that the due process hearing required expenditures of significant time and resources on the part of everyone involved, the extensive record established that Student has received an appropriate program and placement from the time of enrollment in the District through the present. Student's needs, therefore have been met, and Student's educational progress has not been adversely affected by the length of the hearing.

ISSUES¹

1. Did the School District provide Student with a Free Appropriate Public Education (FAPE) during the 2010-2011 and the 2011/2012 school years, including ESY during the summers of 2011 and 2012?
2. If not, what remedy is appropriate?
3. Is the District offering Student an appropriate program for the 2012-2013 school year?
4. If not, is the appropriate remedy placement in the specific private school requested by Parents, or, in the alternative, should the District be ordered to identify a different program and placement for Student within or outside of the District, or to develop a different program and placement for Student?

FINDINGS OF FACT

Background/Prior Services

1. Student is a [preteen-aged] child, born [redacted]. Student is a resident of the Tredyffrin-Easttown School District and is eligible for special education services. (N.T. pp. 38, 139; S-17 p. 14)
2. Student has a current diagnosis of autism and speech/language impairment in accordance with Federal and State Standards. 34 C.F.R. §300.8(a)(1), (c)(1), (11); 22 Pa. Code §14.102 (2)(ii); (N.T. p. 139; S-17 p. 14)
3. Parents first sought services for Student in early childhood when they noticed developmental delays, particularly in speech. After receiving the autism diagnosis while residing in another state, they relocated to northeast Pennsylvania, where Student began receiving early intervention services. (N.T. pp. 140, 141; P-1 p. 1)
4. Shortly afterward, Student was enrolled in a new verbal behavior early intervention program, based upon the principles of Applied Behavior Analysis (ABA). Parents saw, and continue to see, communication as Student's greatest area of need. Since developing communication skills was the focus of the verbal behavior early intervention program, Parents believed it was a good fit for Student, were pleased that Student responded well to it and made considerable progress. (N.T. pp. 141, 143, 144, 154, 215)

¹ The issues were initially identified on the record by the previously assigned hearing officer during the first hearing session on August 10, 2012 after the opening statements of the parties. (N.T. pp. 39, 40) ESY has been added to the first issue, and options other than a specific private school placement as the type of current and future program/placement Parents seek was added to the fourth issue. Those adjustments to the statement of the issues reflect Parents' position as it developed during the remaining hearing sessions and in Parents' closing argument. See Parents' Closing Argument at pp. 5, 32.

5. Despite the distance between Parents' residence and the location of the verbal behavior program, Parents elected to keep Student in the early intervention program for an additional year before transitioning to the school-age kindergarten program in the school district in which they were then residing. (N.T. pp. 143, 144)
6. For four years, Student was assigned a particularly skilled and effective TSS (Therapeutic Support Services) worker through the county behavioral health agency. The TSS worker accompanied Student in the classroom and provided additional in-home services. Signs taught by the TSS worker gave Student the means to effectively communicate wants and needs to Parents. (N.T. pp. 144, 145, 150, 201, 586—588)
7. Intensive work with the TSS worker also resulted in Student's progress in developing pre-academic skills, such as matching identical pictures and identical objects, as well as an early transition to verbal communication with vocal imitation. Student used a small number of signs and made requests by pointing, pulling someone to, or standing next to, a desired item in response to the question "What do you want?" asked in sign. Three instances of a non verbal request by Student for an item not present and visible to Student were noted by the end of the summer program in 2008. (N.T. pp. 146—149, 587, 588; P-1 pp. 1—3, P-16 p. 5)
8. After transitioning to the kindergarten program in the family's school district of residence at the beginning of the 2008/2009 school year, Parents noted that Student's progress slowed. The TSS worker also left his position toward the end of the 2009/2010 school year. These circumstances prompted Parents to consider moving to a more urban area in order to obtain better special education services for Student. (N.T. pp. 151—153, 589, 590)

Progress Reports from Student's Prior School District

9. All of the progress reports on Student's IEP goals from the prior school district indicate progress toward each annual goal and toward each of the objectives included within the goal with a numerical value assigned to descriptive terms in accordance with a key indicating that 1= Goal attained; 2= Significant Progress; 3= Moderate Progress; 4= minimal Progress; 5= Introduced; 6= Not Introduced. Additional descriptive narrative, such as whether Student performed the skill consistently or with prompting, is included in some but not all of the progress reports. Parents could not define the terms of the progress monitoring key to describe Student's level of skill development (N.T. p. 235, 250; P-18, P-19, P-24, S-5)
10. Although the IEP goals repeated on the progress reports all include a measurement interval and the percentage that indicates the level to be achieved for mastery, none of the objectives are similarly quantified, and few percentages or data summaries indicating the number of times Student successfully performed the task or demonstrated the skill, are included to quantify the levels denoted by the terms "minimal" "moderate" and "significant" progress. (P-18, P-19, P-24, S-5)

11. Student's progress reports from the beginning of the 2008/2009 school year (kindergarten) through the end of the 2009/2010 school year (1st grade) reported mastery of all but one OT goal: Stringing 5 beads on a pipe cleaner (11/8, 1/9); imitating circular, horizontal and vertical strokes after a demonstration (1/10); completing a three part obstacle course with verbal cues (1/10); finding 10 specific items in noodles, putty or rice with verbal cues (11/09, 1/10); engaging a zipper latch with minimal verbal cues for four consecutive days (6/10); cutting on a 1 inch line across an index card within ¼ inch of the line. (6/10). Student did not master putting on shoes independently, but did master the objective of putting shoes on with minimal assistance. (P-18 p. 4, P-19, pp. 4, 5, P-24, p. 3, S-5 p. 3)
12. In the area of receptive language, Student met two of the ten objectives included in the kindergarten and first grade IEPs that were in effect from the beginning of 2008/2009 school year through the middle of the 2009/2010 school year: Following three enjoyable tasks and sorting pictures of dogs and cats into two separate piles. (11/09, 1/10). By June 2010, several new objectives in the IEP in effect during the second half of the 2009/2010 school year had not been introduced. Student's progress was reported as "moderate" or "significant" on the receptive language objectives similar to those in the two prior IEPs. (P-18, pp. 1—3, P-19 pp. 1—3, P-24 pp. 1, 2)
13. In the area of expressive language skills, by January 2010 Student met the objectives of being able to ask for a desired object with a reinforcer present and of labeling 10 common objects. Progress toward objectives for spontaneous requests and labeling with visual and verbal cues was described as significant in April 2010 and not introduced in June 2010. In the instructional area of Requesting, "significant" progress was reported on the objectives of making a request with no reinforcer present, requesting 20 items using signs or words, and asking others to perform specified actions. (P-19 p. 2, P-24 pp. 1, 2)
14. In the area of self-help skills, Student was reported to have met the objectives of completing the morning routine of hanging up coat, putting lunch box in the cubby and putting backpack away with no more than two verbal prompts (1/10); pulling down pants, flushing the toilet, washing and drying hands without prompts.(1/10, 6/10). "Significant" progress was reported with respect to the objectives of engaging in appropriate physical interactions with peers and communicating the need for toileting with 90% accuracy. (P-19 pp. 3, 4, P-24 p. 2)

Enrollment in the District/District Evaluation

15. Parents moved into the District after researching schools in the area, including a particular private school that they were advised to consider and that Mother visited in the early spring of 2010. Hoping to find a program comparable to the intensive verbal behavior program so that Student would again make the kind of progress they saw during the pre-school years, Parents came to believe that the private school would be the best placement for Student. (N.T. pp. 153, 155, 181, 182, 221, 595—598, 600, 857, 858)

16. Parents enrolled Student in the District in June 2010 and immediately sought an evaluation in order to assure that Student's IDEA eligibility was established and services were in place for the beginning of the 2010/2011 school year. (N.T. pp. 224, 225; P-13 pp. 4—13)
17. In the course of making arrangements for the evaluation, Parents requested that the school psychologist expedite the process in order for Parents to begin the intake process at the private school. Although the District had not yet received Student's records from the transferring school district, and although the family had not yet actually moved, the District accommodated Parents' request to proceed with the evaluation in two sessions, on June 23 and July 2. (N.T. p. 856; S-13 pp. 4—6)
18. After conversations with District staff and reviewing the evaluation report, Parents were convinced that the District would likely agree to place Student in the private school. Based upon an observation of a District autistic support classroom by Mother on the last day of the school year, Parents believed that the District placement was meant for higher functioning students with autism, and that such a program would not be effective for Student, whose communication and other skills were at a much lower level than Parent observed in the autistic support classroom. (N.T. pp.152—154, 183, 184, 225—228, 613—620, 640, 641)
19. Parent reported significantly delayed communication skills and that Student communicated with them using signs, primarily, but was beginning to speak words for which Student knew a sign. (S-17 pp. 1—3)
20. At [Student's age at the time], Student's self-help/daily living skills were at the level of a child two to three years old. Student was not potty trained and wore "pull-up" disposable diapers. (N.T. pp. 155, 600; S-17)
21. Parents considered Student's needs to center on developing effective communication skills, developing the ability to pay attention, reducing self stimulation ("stimming") and increasing all skill levels. Parents also wanted Student to be potty trained and to be able to write his/her name. (N.T. pp. 155, 159, 161; P-3 p. 2, S-17 pp. 1, 2)
22. The evaluation report (ER) was issued on July 15, 2010. The evaluation included a review of records provided by Parent; Parent input; interviews of Parent by the school psychologist, a speech/language pathologist and an occupational therapist; an observation of Student in the school psychologist's office with Parent present; administration and interpretation of the Gilliam Autism Rating Scale and Vineland Adaptive Behavior Scales; a speech/language evaluation and an occupational therapy evaluation. (S-17)
23. During the observation of Student, the school psychologist noted that Student communicated via non-verbal gestures and gave the example of Student taking [the school psychologist's] hand and making a rubbing motion. Parent explained and demonstrated that Student wanted the school psychologist to rub Student's arm with a soft stroke. (S-17 pp. 1—3)

24. During the speech/language evaluation, Parent reported that at home Student communicated by means of gesturing, signs, facial expressions and some words, consistently using six signs (more, drink, eat, apple, cookie and candy) and four words (ya, nope, cookie, candy). Student demonstrated the ability to follow a number of gross motor commands and one step directions, imitate simple speech sounds and words. Student could not follow all gross motor commands, imitate phrases or identify a picture in a field of two. Student's signs included actual signs, approximations of American Sign Language, as well as other signs, understandable only to the family and others who worked closely with Student. (N.T. pp. 831—835; S-17 pp. 6, 7)
25. In the OT evaluation, Student voiced the word “tickle” and used sign intermittently to indicate “finished,” “more” and “again.” Parent reported that student could eat with utensils without difficulty, could put on and take off shoes and socks and assist with dressing. By direct observation, Student could unsnap and unzip, but not put a snap together or pull up a zipper. Student was able to follow directions and perform the tasks requested for periods of 30 minutes with frequent breaks and variation of activities. (S-17 pp. 7—9)
26. It was not possible to administer standardized assessments of intelligence, achievement, sensory processing and language to Student due to the severity of Student's disability, limited attention and lack of skills. The prior school district's ER also noted that diagnostic assessments of Student's cognitive and school readiness skills were not possible. (N.T. p. 604; P-1 pp. 3, 5, S-17 pp. 4, 5,)
27. The District confirmed Student's continuing IDEA eligibility in the areas of autism and speech/ language impairment. Significant needs were identified for increasing/developing skills in the areas of academic readiness, functional receptive and expressive communication, adaptive behavior/self-help, social and fine motor ability. (S-17 pp. 12, 14)
28. Parents considered the ER a very accurate portrait of Student at that time. (N.T. p. 622)

Overview of District Autistic Support Services

29. There are two autistic support classrooms in the elementary school that Student attends, divided into kindergarten/1st grade and 2nd–4th grades, serving students with a broad range of abilities. (N.T. p. 1460)
30. A team approach is used in both classrooms, generally including the teacher, speech pathologist and occupational therapist, to assure that all necessary services are integrated and delivered consistently. Social skills training, attention and sensory needs are addressed throughout the day. An Intermediate Unit autism consultant is available to help develop strategies, deal with behavioral issues and improve educational programming. (N.T. pp. 1461—1463, 2640)

31. Individualized instruction incorporates ABA, TEACCH, intensive teaching, “errorless learning” and “mixing and varying” methods. Although ABA and TEAACH are based upon different philosophies, they can be combined for effective instruction. (N.T. p. 1463)
32. The TEAACH approach focuses on structuring the classroom environment by providing visual aids and work systems designed to foster independence, improve transition between activities and structure teaching of skills. (N.T. pp. 1356—1361, 1463—1464; S-101, S-102)
33. ABA provides a method for developing skills through changing behaviors by discrete trial training and intensive teaching. Those methods emphasize isolating the targeted skill, breaking it into small steps, eliminating distractions and implementing a variable reinforcement schedule for correct responses. (N.T. pp. 1367—1369, 1465)
34. Errorless teaching implements a schedule of most to least prompts when teaching a new skill to assure success early in the process. Mixing and varying combines requesting (manding), labeling (tacting), identification skills and sorting by feature, function and class in a single session to assure that a skill is truly mastered rather than a rote repetition and to build greater response fluency. (N.T. pp. 2647—2650)
35. During Student’s first year in the District, the teacher in the class to which Student was assigned has extensive experience in teaching students with autism and implementing the methods used in the District elementary autistic support classes, including several years of teaching at the private school where Parents want the district to place Student. (N.T. pp.1331—1355)
36. That teacher is currently on special assignment, with duties that include supporting all of the District’s K-12 autistic support classes; transition from early intervention; staff development—new teacher and paraprofessional training; curriculum and programming—modifications, new techniques; District-wide on-site implementation assistance for the autistic support programs to promote continuity across buildings. She also serves as the assistive technology contact for all special education students, working with the Intermediate Unit assistive technology coordinator from initial referral through, evaluation, data collection and trialing assistive technology devices. (N.T. pp.1329—1331)
37. With respect to developing communication skills, the District uses the “total communication” approach, encouraging all methods of communication, including signs, augmentative communication devices and speech. (N.T. pp. 1588, 1589, 1606, 1607, 2003)
38. Speech is always paired with signs or other means of communication, such as an augmentative device. Learning to talk is always the primary goal, since it is the means of communication most commonly used and understood. Although signing is not taught, it is accepted and re-enforced. (N.T. pp. 1830—1833, 1838, 1839, 2002, 2003, 2006, 2014)

2010/2011 School Year

39. The first District IEP was presented to Parents at a meeting a few days after the ER was completed. The District proposed goals and instruction in the areas of fine motor skills/OT, self-care, speech/language, functional reading (letter identification), functional math (counting, 1:1 correspondence and numeral identification), classroom behavior and self-care. The IEP provided for direct instruction in a full-time autistic support classroom and inclusion in the regular education setting, with support, for art, music, gym, lunch and in adapted activities for applied tech, science and social studies. The IEP included OT and speech/language as related services. (N.T. p.1545; S-19 pp. 8, 12—25, 27, 28)
40. After Parents rejected the NOREP for a full-time autistic support class within the District, the District scheduled another IEP meeting in August to address Parent concerns (N.T. pp. 901, 902; S-21)
41. As a result of the IEP meeting on August 24, some changes were made to the specially designed instruction (SDI) section of the IEP, including changing Student's homeroom to the autistic support classroom, adding an aide to prevent eloping, adding toilet training, and increasing OT and speech services. (N.T. pp. 902, 903; S-26 pp. 7, 21, 26)
42. Student began attending the autistic support classroom as one of four students, with a fifth joining later in the school year. In addition to the teacher there were always at least four aides in the classroom. (N.T. p. 1695)
43. Soon after the school year began, Student was referred for an assistive technology assessment. An IEP meeting was held on October 22 to discuss assistive technology and the team decided to begin trials of different devices. (S-41 p. 6)
44. After a physical therapy evaluation was completed, a limited IEP meeting was held on November 12, 2010. Present education levels were updated to reflect the information from the PT evaluation. Two physical therapy goals were added and physical therapy was added as a related service. (N.T. pp. 958—960; S-42, S-45 pp 1, 23, 24, 26, 29)
45. At the beginning of an IEP team meeting on November 23, 2010 Parent presented a classroom observation report from an independent psychologist, which led to the team's decision to adjourn the meeting to provide time for the District to review the report. An IEP proposal included updates to Student's present levels of academic achievement and functional performance. The information was also included in a November 2010 progress report. (N.T. pp. 2242; S-47, S-49 pp. 6—9)
46. In January 2011, Student's IEP team met again to update and revise Student's IEP, including present levels of academic and functional performance. (S-56 pp. 7—11)
47. With respect to the functional reading goal, Student was able to repeat the names of eight letters and a keyword and sound associated with each letter but could not independently

identify any letters in November 2010. By January 2011, although Student could still not identify the letters, Student was able to select the correct button from a field of four using the communication device when asked “What letter?” (S-49 p. 6, S-56 p. 7)

48. In November 2010, with respect to functional math, Student was demonstrating knowledge of 1:1 correspondence inconsistently depending upon focus and attention. By January 2011, Student demonstrated 1:1 correspondence in counting in 2 out of 3 attempts, still depending upon the level of focus and attention. (S-49 p. 6; S-56 p. 7)
49. In the January 2011 IEP proposal, the functional math goal and objectives were revised from counting to 10 to indicate correct quantity to counting to 5. (S-49 p. 19, S-56 p. 21)
50. Other revisions included adding functional handwriting skills and writing Student’s name; reducing the self-care goal to toileting only; altering receptive and expressive speech goals, including producing speech sounds, verbal labeling and verbalizing Student’s name in response to the question “What is your name?.” (S-49 pp. 21—23, S-56 pp. 23—25)
51. Based on Student’s potential for verbal communication, Student’s direct speech and language therapy was again increased. (N.T. pp. 1929--1932; S-49 p. 30, S-56 p.32)
52. By January 2011, Student had made progress in improving and developing fine motor skills and met the dressing goal and objectives. Student also met the objective of following an individualized picture schedule to navigate the classroom environment. (S-56 pp. 9—11)
53. The IEP team selected the Go-Talk 20 as Student’s assistive technology device, which was purchased through medical assistance and added to Student’s IEP. (N.T. pp.1220, 2085—2089, S-56 pp. 19, 29, S-104)
54. In February 2011, the District initiated a behavior management plan for toilet training. By the end of the school year, Student was remaining dry all day in school with re-enforcers removed . (N.T. pp. 807—810, 1500—1505; S-58,)
55. In February 2011, in a telephone conference, Student’s teacher and Mother discussed ESY services for the summer of 2011. The ESY IEP provided for Student to attend the District’s autistic support ESY program from July 5—28, 2011 for 3.5 hours, 5 days/week to work on all IEP goals, with one 1 hour session/week explicitly devoted specifically to social skills development. The IEP also provided for an additional week-long program during the first week of August to again focus specifically on social skills development. (N.T. pp. 1236—1238; S-63 pp. 32, 33)
56. In April 2011, Student’s IEP team met again. Updated present levels of academic and functional performance in the proposed IEP documented progress in letter identification, with Student beginning to demonstrate independent letter discrimination. When asked

- “What letter?” Student was able to select the correct letter from a field of four with 90% accuracy with a visual cue and 50% accuracy without a visual cue. (S-67 p. 6)
57. In math, Student demonstrated 1:1 correspondence up to 5, was able to verbalize while counting and able to elect the correct numeral to match quantities up to 3 in 60% of opportunities. (S-67 p. 6)
 58. Student demonstrated the ability to follow the individualized picture schedule and navigate the school environment independently in 5/5 surveyed attempts. (S-67 p. 8)
 59. Student also demonstrated progress in selecting pictures from a field of three and identifying people in photographs from a field of two. (S-67 p. 8)
 60. Based on Student’s progress, revisions were made to OT and speech objectives, the classroom behavior management goal, the functional reading goal and the functional math goal. (S-63 pp. 16, 17, 20, 21, S-67 pp. 14, 15, 17, 18, 20)
 61. By June 2011 Student met the OT objective for cutting simple geometric shapes within 1/8 inch of the line with four turns; could copy 6 lower case letters, could write his/her name with hand over hand assistance and met the objective for following a minimum of ten 1 step directions. Student continued to make progress with letter identification; with pointing to requested pictures on the communication device; demonstrated communicative intent by indicating 14 wants and needs on 4 of 5 attempts (objective was 20 daily wants/needs); identifying body parts; saying his/her name intelligibly, imitating consonant/vowel/consonant/vowel sounds (with distortion of some vowel sounds); walking down steps with alternating feet and without holding the railing with physical assistance and up steps with cueing only; maintaining attention to teacher-directed tasks. Progress reported on all goals and objectives was quantified by providing the number of trials and percentages. (S-69)

2011/2012 School Year

62. Student began the 2011/2012 school year in the kindergarten-1st grade classroom where Student was one of seven assigned to the class, with five adults in the room. Student began to transition to the 2nd—4th grade classroom in January 2012 and completed the transition to the higher grade level autistic support classroom by May 1, 2102. (N.T. pp. 2537, 2538, 2539, 2550—2552, 2725—2733; S-100)
63. In January 2012, Student’s IEP team met to revise and update the April 2011 IEP that was still being implemented. At that point, with respect to academic skills, Student was able to identify the correct letter from a field of four by physically handing the letter to the teacher with 100% accuracy with a visual cue, and with 67% accuracy without the cue. (N.T. pp. 2537, 2538; S-67, S-79 p. 6)
64. Student demonstrated 1:1 correspondence in counting up to 10 objects. Student could not verbally identify a numeral but could independently put numerals from 1—5 in order

- when presented with numeral written on separate pieces of paper in random order. (N.T. pp. ; S-79 p. 6)
65. Student was able to independently and consistently copy the letters t, l, i, c, o, a, e when provided with a model. Student could write the letters n, h, p, M with less than 25% hands on assistance. Student could independently copy all but two of the letters of his/her first name. Student's pencil/crayon grasp was improving but still required occasional physical prompts. (S-79 pp. 10, 11)
 66. With respect to functional performance Student's progress in the areas of independent work skills, communication, physical therapy, occupational therapy/fine motor skills and speech/language was detailed. (S-79 pp. 10, 11)
 67. In the area of speech/language, *e.g.*, by January 2012, Student was beginning to follow two step directions; choose more than 40 items from a field of 4—5 with 80% accuracy; identify objects when use or function was described; choose pictures that represented actions; could verbally produce the phrase "I want grapes.;" could clearly verbally label, or closely approximate, the words for more than 15 objects; spontaneously said "hi" in response to a greeting and "good" in response to the question "How are you?" Student also demonstrated an increased desire to verbalize by spontaneously displaying more vocalizations/vocal play. (S-79 pp. 9, 10)
 68. An ongoing concern with socially inappropriate sensory seeking behaviors prompted identification of a need to increase socially appropriate activities for meeting sensory needs, modification of the classroom environment to remove objects Student could use for inappropriate sensory input and re-direction before the negative behaviors occurred. At the time of the January 2012 IEP meeting, however, the behaviors had been eliminated during the school day. (S-79 pp. 11, 12)
 69. In general, needs, goals and specially designed instructions were added, eliminated and/or revised in the January 2012 IEP proposal to reflect Student's progress and changing needs, including removing Student's Go-Talk device. (S-67 pp. 10, 16, 18, 21, 25, 28, S-79 pp. 11, 12, 19, 21, 24)
 70. The January 2012 IEP also proposed an ESY program for 2012 similar to the program provided in 2011, including an additional week of a camp focused specifically on social skills development. In early February 2012, Parents were notified by letter of a change in the schedule for the additional week of camp providing for four days instead of five and giving Parents a choice of weeks for the camp. (S-79, p. 32, S-83)
 71. By the end of the 2011/2012 school year, Student's cutting and coloring skills had continued to improve and Student had become independent in using a mature pencil grip. Student could write his/her first name independently with recognizable to good accuracy when told to do so and was beginning to copy the letters of his/her last name when presented with a model. Student could independently copy 9 lower case letters, i t, l, c, o,

- a, e, r, h and upper case M and was increasing the ability to independently copy an additional 7 lower case letters, f, b, d, p, g, u, y. (S-98 pp. 1—3)
72. Student’s baseline for letter recognition had increased from selecting a letter from a field of four to selecting from a field of 6 during the third marking period. By the end of the school year, Student was averaging 87% accuracy for letter recognition from a field of 6, exceeding the objective for 70% accuracy. (N.T. pp. 2719, 2720; S-98 p. 5)
73. By May 2012, Student met the objective of identifying verbalizing numerals 1—5 and was beginning to work on numerals 6—10. (S-98 p. 5)
74. Progress was also noted in completing independent work tasks in a group of three students with an average of 5 prompts; identifying pictures by responding to the question “Is this a ___?”; identifying objects from a field of 8; identifying 14 people from photographs and naming them with and without initial sound prompts; verbalizing responses to the question “What is the boy/girl doing?; spontaneously providing 52 labels, including people, numbers, objects and actions. (S-98 pp. 8, 9)
75. At times, Student could complete the sentence “I want_” with the words apple, cookie, pop-tart, bathroom, swing and water in addition to the word grapes. (S-98 p. 9)
76. By the end of the school year, Student was averaging between 5 and 13 requests per day for wants or needs. (S-98 p. 4)
77. Student consistently responds to greetings initiated by others and added the name of the 2010/2011 teacher when encountering and greeting her. (N.T. pp. 1684—1686)

Outside Observations

Psychologist

78. Due to their initial dissatisfaction with the District’s decision not to place Student in the private school they preferred, and their continuing disagreement with the type of program the District was providing in general, Parents arranged for two observations of Student by a licensed psychologist in the autistic support classroom during the 2010/2011 school year, Student’s first year in the District. (N.T. pp. 170, 173—175, ; P-3, P-4²)
79. The psychologist’s evaluation reports were based upon two classroom observations of Student in late September 2010 and early February 2011, along with an Autism Treatment Evaluation Form (AETC), completed by Mother in September 2010 and at the end of March 2011, based on her observations of Student at those points. (P-3 p. 2, P-4 p. 3)

² Although the second observation and completion of the AETC form occurred in March 2011, the parties stipulated that the report was not produced by the observer and provided to Parents for more than a year afterward, until after the due process complaint was filed. (N.T. pp. 1258—1260; P-4)

80. Based on the classroom observations in September 2010 and March 2011, approximately 4.5 months later, the psychologist concluded that Student made minimal progress in academic skill areas. (P-4 pp. 9, 11)
81. Student's functioning improved with respect to independence with classroom behaviors and self-help/self-care skills such as buttoning and toileting. In September 2010, the psychologist reported that Student seemed unaware of the classroom surroundings and where things were located. Student required constant physical assistance, re-direction and prompts to follow the classroom schedule. Although not independent a few months later, Student could follow the classroom schedule with an escort, some supervision, coaching and re-direction. In the February 2011 observation, Student also exhibited less need for vestibular stimulation (swinging) than when Student first entered the District in September 2010. (P-3 pp. 5, 7, 8, P-4 pp. 10, 11)
82. In September 2010, the psychologist noted Student's time on task, 1—2 minutes for most activities. Time on task was not noted in the February observation report. (P-3 pp. 4—6, P-4)
83. In September 2010, Student did not respond to many directions without direct supervision to follow the teacher's prompts and directions, but in February 2011 Student was observed to follow many one step directions with supervision, coaching and verbal prompts, including verbal prompts for toileting. (P-4 p. 10)
84. In the Parent interview reported by the psychologist, Mother noted minimal progress in communication and academic skills such as understanding of letters and numbers. (P-4 p. 3)
85. Scoring of Parents' observations recorded on the AETC is in terms of percentile ranges, with higher percentiles indicating a greater degree of impairment. As set forth below in the table, scoring of Parent's ratings of Student in the various skill areas in March 2011, after Student had been in the District autism support class for approximately three quarters of the first school year, indicated some improvement in all skill areas except communication, which remained the same. One area, health/physical/behavior showed a significant improvement. Overall, the scoring of Parent's AETC observations were two percentile ranges below the observation scores obtained after only a few weeks in the District's program.

<u>Skill Area</u>	<u>September 2010</u>	<u>March 2011</u>
Speech/language/communication	70-79 th percentile	70-79 th percentile
Sociability	80-89 th percentile	70-79 th percentile
Sensory/cognitive awareness	90-99 th percentile	50-59 th percentile

<u>Skill Area</u>	<u>September 2010</u>	<u>March 2011</u>
Health/physical/behavior (Self-help skills, compliance, emotionality, flexibility with surroundings)	70-79th percentile	30-39th percentile
Total Impairment (P-4 pp. 4, 11)	Above 99th percentile (Severe)	70-79th percentile (High)

Educational Consultant Observation/Testimony

86. In the fall of 2011, Parents engaged an educational consultant to observe Student in the classroom and review Student’s IEPs and progress/skill development from the pre-school program through the District’s latest proposed IEP. (N.T. pp. 205, 206, 321—326, 371—378, 413; P-5)
87. The educational consultant is a certified special education teacher with many years of experience in teaching, as well as in developing programs and curricula for children with autism spectrum disorders. (N.T. pp. 70—81, 321; P-29)
88. In her review of Student’s IEPs and progress reports from the District, the consultant focused on the extent to which Student’s program was directed toward developing skills in the core curricular areas recommended by the National Research Counsel as best practices for children with autism: Functional communication; play and leisure; socialization; cognitive; behavioral and generalization, as well as how well those areas are integrated into the program and the level/type of related services. (N.T. pp. 371—378, 400—404, 2469; P-5)
89. The consultant based her opinions concerning the skills Student had acquired prior to entering the District and in the District program upon review of the documents (IEPs and progress reports) and a 2—2.5 hour observation of Student. She did not meet with Student or elicit information directly from Parents concerning their views of Student’s skills and progress. The consultant was not personally present for the entire observation and relied on notes taken by the assistant who accompanied her for any aspects of the program that she could not personally observe. (N.T. pp. 323, 324, 331, 348, 371—378; 2431—2441)
90. The educational consultant accepted the primarily un-quantified descriptions of Student’s progress in the reports provided by Student’s prior school district to determine the skills Student had acquired or nearly acquired at the time of enrollment in the District, including some self-help and fine motor, matching skills, but not matching similar objects and similar pictures. (N.T. pp. 406, 407, 410)
91. The consultant described Student’s communication skills at the time of enrollment in the District as “emergent” with limited signing as Student’s primary mode of

communication, based upon Student's reported ability to respond to 26 signs. (N.T. pp. 405, 421, 422, 435, 437)

92. Although the consultant considered it necessary for Student to continue to use the familiar communication system, she also noted that instruction in other means of communication must be undertaken at the same time because signs are very self-limiting. Signing would naturally be dropped as Student transitions to and gains fluency in other, more functional means of communication. (N.T. pp. 436, 1144—1146)
93. The consultant noted that since Student had not previously been exposed to academic skills it was understandable that the District would attempt to teach reading skills even during the first year of enrollment, despite Student's limited ability to match objects and to identify objects. (N.T. p. 451—453)
94. The consultant explained that academic skill acquisition would proceed with further development of more complex matching skills, increasing the ability to label objects and pictures, color identification, visual discrimination and attention. (N.T. pp. 465, 466)
95. The consultant's classroom observation report noted a color matching activity, an activity requiring Student to identify an object from a field of three picture cards and teacher prompts to attend to the task. The consultant noted that Student was cooperative with re-direction. (N.T. p. 1077; P-5 pp. 3—5; S-53)

DISCUSSION AND CONCLUSIONS OF LAW

GENERAL LEGAL STANDARDS

Fape/Meaningful Benefit

The IDEA statute provides that a school-age child with a disability is entitled to receive a free appropriate public education (FAPE) from his/her school district of residence. 20 U.S.C. §1400, *et seq.*; 34 C.F.R. §300.300; 22 Pa. Code §14. The required services must be provided in accordance with an appropriate IEP, *i.e.*, one that is “reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress.” *Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982); *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d at 249. “Meaningful benefit” means that an eligible child’s program affords him or her the opportunity for “significant learning.” *Ridgewood Board of Education v. N.E.*, 172 F.3d 238 (3RD Cir. 1999). Consequently, in order to properly provide 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. *Rowley; Oberti v. Board of Education*, 995 F.2d 1204 (3rd Cir. 1993). An eligible student is denied FAPE if his program is not likely to produce progress, or if the program affords the child only a "trivial" or "*de minimis*" educational benefit. *M.C. v. Central Regional School District*, 81 F.3d 389, 396 (3rd Cir. 1996); *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F. 2d 171 (3rd Cir. 1988).

Under the interpretation of the IDEA statute established by *Rowley* case and other relevant cases, an LEA is not required to provide an eligible with services designed to provide the "absolute best" education or to maximize the child's potential. *Carlisle Area School District v. Scott P.*, 62 F.3d 520 (3rd Cir. 1995).

Due Process Hearings/Burden of Proof

The IDEA statute and regulations provide procedural safeguards to parents and school districts, including the opportunity to present a complaint and request a due process hearing in the event special education disputes between parents and school districts cannot be resolved by other means. 20 U.S.C. §1415 (b)(6), (f); 34 C.F.R. §§300.507, 300.511; *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d at 240.

In *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005), the Supreme Court established the principle that in IDEA due process hearings, as in other civil cases, the party seeking relief bears the burden of persuasion. Consequently, because Parents have challenged the District's actions during the period in dispute, Parents must establish the violations they alleged and that were identified at the beginning of the due process hearing in this case.

The Supreme Court limited its holding in *Schaffer* to allocating the burden of persuasion, explicitly not specifying which party should bear the burden of production or going forward with the evidence at various points in the proceeding. Allocating the burden of persuasion affects the outcome of a due process hearing only in that rare situation where the evidence is in “equipoise,” *i.e.*, completely in balance, with neither party having produced sufficient evidence to establish its position.

Parents’ Contentions/Evidence

Parents in this case literally fault every action the District took with respect to Student and despite very substantial, if not overwhelming, evidence that Student’s progress in all areas relevant to school functioning amply met IDEA standards for providing a FAPE to an eligible student, seek a completely different program going forward, as well as significant compensatory education. Not surprisingly, however, Parents presented no explicit suggestions with respect to how the details of Student’s program should—or could—be altered to satisfy them. It is very clear that the dispute originated with Parents’ disappointment with the District’s refusal to fund the private placement they believed Student needed in the fall of 2010. (FF 15, 17, 18) Parents, however, also presented no evidence even suggesting how that placement could have provided a better program for Student.

It appears from Parents’ testimony that their continuing dissatisfaction with the District’s program and placement may be based upon their disappointment that they do not see the level of progress in the home that the District reports in school, in terms of Student’s communication, adaptive and self-help skills. In that regard, the record strongly suggests that Parents attribute the level of progress they observed during Student’s pre-school program to the school-based program. Progress in the home setting during that period, however, could very likely be

attributed primarily to the TSS working with Student at that time in both the home and the school setting, who was, therefore, in a good position to facilitate the transfer and generalization of communication and other skills. (FF 6, 7)

The extensive testimony and large number of documents in this case yielded an unusually detailed record as a basis for the numerous findings of fact above, largely because the District's IEPs and progress reports provided a wealth of information about Student's high degree of need in many areas and how the District met those needs by frequent adjustments to Student's program and services, particularly during the first year in the District. *See* FF 39—61 (2010/2011); FF 62—77 (2011/2012) The Findings of Fact, therefore, establish the appropriateness of the District's program with little need for elaboration. Some of Parents' specific contentions, however, and the basis for them, require at least brief comment.

Evaluation

Parents argued that the District's July 2010 evaluation report was an inappropriate basis for developing an appropriate program and placement for Student. Parents contend that the District violated statutory and regulatory requirements for an appropriate evaluation by failing to review all records from Student's former school district and by failing to conduct an observation in a school setting.

The record, however, establishes without conflict that Parents were pushing hard to have the evaluation completed during the summer, and the District accommodated Parents' request by conducting assessments and completing the evaluation report before the family even completed its move into the District. (FF 16, 17, 18) Moreover, since Parents enrolled Student in the District after the 2009/2010 school year ended, it would have been impossible for the District to conduct an observation other than in the ESY program in a distant school district.

Even if the absence of an observation of Student in a classroom setting and/or the lack of prior school district records to review could be considered a procedural violation despite Parents' belief that circumstances dictated that the evaluation be completed on an expedited basis, Parents presented no evidence of any adverse substantive effect. The evaluation report, like all of the District's documents, was thorough and detailed, including input from Parents, and they admitted that it accurately portrayed Student's functioning in the summer of 2010. (FF 19—28)

Independent Observations/Testimony

Parents' central argument that the District's IEPs, from July 2010 through the most recent proposal in January 2012, failed to offer Student a FAPE was based primarily on the observations of a psychologist they engaged to observe Student in the District's program during the 2010/2011 school year, as well as their educational consultant's opinion that Student has not made meaningful progress in the District, and that the goals in the District's IEPs are not appropriate to Student's disability-based needs. The educational consultant's opinion is based to a large extent upon the conclusion that Student had already acquired many of the skills included in the District's IEP goals.

The centerpiece of Parents claims, however, is their, and their educational consultant's, opinion that the District has not sufficiently emphasized functional communication and discouraged Student from continuing to use an effective means of communication, signing, that was already in place when Student enrolled in the District. Parents' contentions regarding Student's ability to communicate in sign at the time Student entered the District, the purported lack of progress and their criticism of the District's approach to fostering further development of Student's communication skills during the 2010/2011 and 2011/2012 school years are particularly striking and serve as a paradigm for Parents' misplaced expectations and/or

misunderstanding of the District's obligation to provide an appropriate placement and instruction.

Student's ability to communicate at the end of the 2009/2010 and beginning of the 2010/2011 school year was extremely limited. (FF 19, 20, 21, 24) Although references to Student's signing as the primary means of communication throughout the testimony, in comments/arguments by Parents' counsel at various points in the record and in Parents' written closing argument suggest that the District caused a set back in Student's development of the ability to communicate, a thorough and objective review of the evidence, including the testimony and opinions expressed by Parents' educational consultant, do not support that view.

Tellingly, although the educational consultant generally made little or no distinction between receptive and expressive use of signs when discussing Student's ability to communicate via signing, she did note early in her testimony that Student recognized 26 signs at the time of enrollment in the District. (FF 91) There is no basis in the testimony or documents, however, to doubt Mother's input to the District's ER, in which she reported to the District school psychologist that in July 2010 Student could actually make the signs for 10 words. (FF 24) Moreover, all of the evidence, including Parents' own testimony, established that Student's "signing" included gestures and other physical indications of Student's needs and wants. (FF 24, 25) There was no adequate explanation why signing was singled out as the Student's preferred mode of communication by the consultant when the evidence indicates that it was just one aspect of Student's non-verbal communication. Nothing in the actual evidence supports the opinions of Parents and their educational consultant that Student entered the District with an effective and established means of communication which the District should have expanded and used to instruct Student. To the contrary, the District espouses the "total language approach" and

accepted/ permitted all means of communication, including Student's approximations of spoken words and signs, as well as other non-verbal forms of communication. (FF 37, 38) The educational consultant agreed with the principle of encouraging total communication, noting that even when a child with autism appears to have little capacity for verbal speech, the effort is not abandoned. (N.T. pp. 1144, 1145). In this case, however, the District concluded that Student has a high potential for verbal speech, and the reports of Student's progress in verbal speech confirms the accuracy of that conclusion. (FF 51, 67, 73, 74, 75, 77)

Given Student's rudimentary communication skills at the beginning of the 2010/2011 school year, it was certainly not unreasonable or in any way inappropriate for the District to emphasize development of verbal communication over increasing Student's proficiency with signing. Even without the supportive testimony of the District speech therapist, with which Parents' educational consultant essentially agreed, it intuitively makes sense to focus on verbal communication, since spoken language is obviously the most common and most expected form of communication, and would naturally be understood by far more people that Student contacts in all settings than signing. (FF 38, 92) There was also nothing inappropriate in trialing and providing Student with augmentative communication devices along with speech/language therapy designed to develop greater facility with verbal communication, since use of a communication device has the same advantage of being generally understandable by everyone Student encounters in all settings.

In addition, the psychologist Parents engaged to observe the District program in September 2010 and March 2011 was very much in favor of intensive training and encouraging Student to use an augmentative communication device in all instructional areas. (P-4 pp. 8, 9)

Finally, no factual evidence in documents or testimony was produced to support the contention that Student was in any way confused by the use of a communication device, or that Student's language development slowed or regressed in the two and a half school years the District has been providing services in the autistic support classrooms. To the contrary, other than Parents' subjective belief that Student has made little progress in communication skills, the hearing record overwhelmingly supports the conclusion that Student has made meaningful progress in the core area of improving communication skills while enrolled in the District.

The evidence likewise fails to support Parents' contention that the District placement has not provided Student with the opportunity to make meaningful progress toward overcoming the core deficits of autism, or that Student has not made meaningful progress. As noted in the findings of fact, the testimony and opinions offered by Parents' educational consultant are based upon essentially anecdotal progress reports from the prior school district that Student had already made "significant" progress toward many of the goals and acquired, or nearly acquired, many the skills included in the District IEPs. (FF 9—14, 89. 90)

Parents argued that the far more detailed and quantified progress reports produced by the District are unreliable because the underlying data was not made available, yet urge rejection of the District's program/placement for Student based upon the conclusions and recommendations of their educational consultant who unquestioningly accepted the accuracy of descriptions of the abilities Student brought to the District such as "significant" progress with no indication that the assessment of the progress on the various objectives and acquisition of skills was even purported to be based on data.

For all of the foregoing reasons, Parents' educational consultant's opinion that the District's past and current program/placement were and are inappropriate cannot be given

dispositive effect, or indeed much weight, because the underlying factual basis for such opinions is far too speculative and insubstantial.

As Parents noted at the first hearing session (N.T. p. 118), their claims in this matter rested almost entirely on the comments, opinions and recommendations of the educational consultant that the District's selection of goals, objectives and instructional methods for Student has been so flawed that the District must be required to provide compensatory education for the entire time Student has been enrolled and must either place Student in the private school preferred by Parents or substantially revise the program/placement in accordance with the consultant's recommendations. There is no doubt that the consultant has significant experience in both developing and delivering educational programs for children with autism spectrum disorders, and the rejection of her opinion concerning the appropriateness of the District's program/placement is not intended to suggest otherwise, or to suggest that her opinions and recommendations could not provide valuable input to the District as it continues to provide special education to Student.³

Nevertheless, her opinions and recommendations in this case concerning the type of program and placement Student should have does not provide a basis for a remedy to Parents in this case, either prospectively or retrospectively. The District has broad discretion to select the setting, level and type of services, specific goals, objectives and instructional methods included in Student's program and placement. Moreover, as noted in the statement of applicable legal standards, the District is required to provide an appropriate program, not an ideal program. The District is also not required to select services or settings preferred by the parents of an eligible child, even if the evidence establishes that the services parents request are likely to be an

³ Parents' educational consultant has, in fact, served as a consultant to the District and other school districts. (N.T. p. 79)

improvement over what the school district proposes or is providing, as long as the district's program meets the legal standard for the provision of a FAPE to the child. Parents' educational consultant based her recommendations for the components of an effective program for a child with autism on the recommendations of the National Research Council and there is nothing wrong or invalid in relying on such recommendations. There is, however, no requirement that the District conform its autistic support services program to such recommendations in general—or to Parents' consultant's view of how such recommendations should be incorporated into a special education program/placement for Student.

The second observation report produced by the psychologist who observed the classroom early in Student's enrollment in the District provides even less support for Parents' claims. Her observation report, in fact, demonstrates that Student began making progress in the District's placement in just a few months, despite the psychologist's stated conclusion that Student's progress was minimal. (FF 80, 81, 83)

Most tellingly, despite Parents' subjective belief that Student was making no progress, the observation form Mother completed at the request of the private psychologist established that Student was making substantial progress by March of the first school year in the District, and corroborates the District's reports of continued substantial progress. (FF 84, 85)

In short, as established by the findings of fact and the discussion above, the District's program clearly and amply meets the IDEA legal standard and has provided Student with a FAPE from the 2010/2011 school year through the present.

General Observations/Recommendations

Although the record in this case provides no basis for an award of compensatory education for the past, or for an order to alter the Student's present or future program/placement,

that is not to say that the parties cannot discuss and consider changes to any aspect of Student's current services. It may be, *e.g.*, that the District would consider goals, objectives and services specifically directed toward developing better play and leisure skills, social skills, and generalizing skills, as well as use of an augmentative communication device, to the home environment and other settings, including providing parent training to facilitate that process. In addition, the parties can certainly discuss whether the focus of the functional academic skills the District is seeking to develop in Student should be adjusted. Certainly, the record indicates that the District has been responsive to Student's changing needs, and has been willing to revise Student's IEPs based on those needs and Student's response to instruction.

It is essential, however, that the parties truly collaborate on the development of Student's IEPs going forward. The record in this case leaves the distinct impression that Parents' early conviction that the District must ultimately be forced to agree to Parents' desire for a private school placement interfered with the development of the kind of cooperative relationship between Parents and District that the IDEA statute and regulations contemplate. It would be greatly beneficial to all, and especially to Student, if that course can be reversed now that this matter is concluded.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, is hereby **ORDERED** that Parents' claims are **DENIED** and the School District need take no action with respect to Student based upon the complaint and due process hearing in this matter.

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

Anne L. Carroll

Anne L. Carroll, Esq.
HEARING OFFICER

January 21, 2013