

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. 1442-1011KE

Child's Name: N.H.

Date of Birth: [redacted]

Dates of Hearing: 4/28/11, 5/17/11, 5/23/11,
6/6/11, 6/22/11, 7/21/11

CLOSED HEARING

Parties to the Hearing:

Parents
Parent[s]

School District
Central Bucks
16 Weldon Drive
Doylestown, PA 18901-2359

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

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August 9, 2011

August 16, 2011

Anne L. Carroll, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

Student in this case has physical disabilities and impairments that adversely affect all aspects of life and are associated with significant limitations on Student's ability to learn and otherwise function successfully in school. Student moved into the District at the beginning of the 2008/2009 school year and began attending a life skills program in a District elementary school, where Student had regular education inclusion experiences primarily with a 4th grade class. Although Student was classified as a 6th grader, and, therefore, would ordinarily have moved to middle school for the 2009/2010 school year, the IEP team determined that Student should remain at the elementary school for the following school year. Again, Student's regular education setting was 4th grade, and at Parents' insistence, Student's inclusion in regular education classes was significantly increased.

For the 2010/2011 school year, Parents reluctantly agreed to move Student to a middle school life skills support class as the District proposed, although they had serious reservations with respect to whether Student would receive sufficient academic instruction and sufficient appropriate inclusion with non-disabled peers. Due to Student's growing and ultimately extreme resistance to going to school, Parents did not return Student to school after the winter holiday and filed a due process complaint alleging both an IDEA violation for a denial of FAPE and discrimination on the basis of disability in violation of §504 of the Rehabilitation Act of 1973.

The hearing was held over five sessions from May to July 2011. Based upon the findings of fact and applicable legal standards as discussed below, Student will be awarded full days of compensatory education for 2010/2011 school year for the District's violation of both IDEA and §504 of the Rehabilitation Act.

ISSUES

1. Did the School District (District) fail to provide a free, appropriate public education (FAPE) to (Student) during the 2010/2011 school year?
2. Did the District intentionally discriminate against Student on the basis of disability in violation of §504 of the Rehabilitation Act of 1973?
3. Is Student entitled to an award of compensatory education for denial of a FAPE and/or disability-based discrimination, and if so, for what period, in what amount and in what form?
4. Should the District be permitted to conduct a Functional Behavioral Assessment (FBA) of Student?

FINDINGS OF FACT

1. Student is an early teen-aged child, born [redacted]. Student is a resident of the School District and is eligible for special education services. (Stipulation, N.T. pp.16, 17)
2. Student has a current diagnosis of multiple disabilities of in accordance with Federal and State Standards. 34 C.F.R. §300.8(a)(1), (c)(7); 22 Pa. Code §14.102 (2)(ii); (Stipulation, N.T. pp. 17, 18)

Background/Prior Educational History

3. Student's physical health, as well as academic, social, language/communication, motor, visual and functional skills have been severely affected by a birth injury, resulting in significant developmental delay, permanent physical disabilities and intellectual limitations. (N.T. pp. 353—356, 360, 361, 366, 367; P-14, P-16)
4. Student's impairments also [redacted physical manifestation of Student's impairment]. (P-14, p. 4)
5. In addition to the readily discernible physical, academic and social/communication impairments that adversely affect Student's educational performance, Student is prone to seizures and exhibits challenging avoidant and aggressive behaviors such as tantrums, hitting, biting, dropping to the floor and self-injury (biting hands, arms) when stressed and/or frustrated by adult demands, inability to understand directions and communicate effectively and transitions, including from home to school, school to home and between activities during the school day. (N.T. pp. 358, 359, 378—381; P-14, P-16, S-3, pp. 13—19)
6. An evaluation report from the beginning of the 2007/2008 school year also noted attention issues and visual/spatial weaknesses. Parents have noted that Student has a difficult time responding to written materials with many items on a page. In the report of

a recent private educational evaluation, the examiner noted that some test scores were adversely affected by weakness in visual discrimination, based upon observations during the test. Visual concept formation and visual reasoning, however, appear to be areas of relative cognitive strength. (N.T. pp. 135, 136, 139, 140, 367, 368; P-9, pp. 20, 21; P-14, pp. 6, 8, 9, 12, 13)

7. In terms of adaptive functioning, Student exhibits relative strengths in receptive language skills and socialization. Student has demonstrated the desire and ability to form interpersonal connections, and engages in friendship seeking behaviors and social activities such as playing games, taking turns, sharing toys and possessions. (P-14, pp. 9, 10, 12)
8. Student is friendly, outgoing, eagerly relates to others and engages in reciprocal interactions to the level permitted by significant cognitive and communication impairments. Student's level of engagement and communication appear to increase with repeated exposure to interpersonal interactions. Student is proud of accomplishments and highly motivated by attention, opportunities for success and verbal praise. (N.T. pp. 130—135, 407, 408; P-14, pp. 11—13, S-3, p. 13, S-13, p. 2)
9. Before enrolling in the District at the beginning of the 2008/2009 school year, Student had attended several schools in [another state] during the preceding five years. (N.T. pp. 376, 377, 382; S-3)
10. For part of 2006/2007 school year, when the family lived in [another state, different from that in FF 9], Student was enrolled in a school that provided significant opportunities for inclusion with typically developing peers by assignment to a regular education 5th grade class. In that setting, Parents discovered that Student responded very positively to interactions with nondisabled peers, including re-direction and reminders from peers to focus on school work, and that peer interactions were highly motivating to Student, resulting in decreased negative behaviors. (N.T. pp. 382—384, 405, 406)
11. When Parents returned and moved into a [redacted, same as in FF 9] school district, they [enrolled Student in two school districts for the next 2 school years, but] were dissatisfied with the educational services provided to Student, prompting them to look for a school district that Parents believed could better meet Student's significant educational needs. Parents were particularly concerned with advancing Student's academic learning and communication skills in as integrated a setting as possible. (N.T. pp. 384—387)

2008/2009, 2009/2010 School Years

12. When Student enrolled in the District at the beginning of the 2008/2009 school year, Student was considered a 6th grader, and with Parents' consent was assigned to an elementary school with an intermediate life skills classroom, not the elementary school Student would have attended if not disabled. (N.T. pp. 447, 740; S-3, pp. 4, 7)

13. At the beginning of the school year, the District implemented the IEP that had been developed by the [most recent] school district in which Student was previously enrolled. (N.T. pp. 388; S-3, pp. 9—42)
14. The District IEP team met and developed a new IEP in October 2008 that was implemented for the rest of the school year. (N.T. p. 390; S-4)
15. During Student’s first school year in the District, Student received functional academic instruction in the special education setting and was to participate in general education for music, physical education, lunch, recess, 2 computer classes/week and special events. Student’s special education placement was designated “supplemental life skills support.” (N.T. pp. P-, S-3, p. 7, S-4, p. 32)
16. Parents had frequent communication and worked closely with Student’s special education teacher throughout the 2008/2009 school year. Parents and the teacher developed a closer than usual relationship that extended beyond the school day. The teacher sometimes provided evening or weekend care for Student as a paid baby sitter. (N.T. pp. 399, 402; P-, S-)
17. At the beginning of the school year, Student was included in a weekly “buddy class” with a 4th grade class. Additional inclusion in the 4th grade class began in the spring. (P-25, pp. 16, 17)
18. There were also several periods of “reverse inclusion” each week, when 6th grade students would join the life skills class for activities. (N.T. pp. P-, S-)
19. Student enjoyed interactions with peers and adults, particularly inclusion in conversations with peers and teachers. Student enjoyed gross motor activities and group activities such as reading books and listening to stories on tape. (N.T. pp. 400; S-4, p. 8)
20. Parents considered the first year in the District a good year in which Student advanced in academic, language and physical skills. (N.T. pp. 399)
21. At the end of the school year, the parties agreed that Student would remain at the elementary school for the following year, although 7th grade is the beginning of middle school in the District, ordinarily requiring a change of schools. (N.T. p. 1331, 1332)
22. Student was again assigned to the intermediate life skills class, but with a different special education teacher, since the teacher from the previous school year was not retained by the District. Student’s related service providers also changed, as well as the 4th grade teacher for the first part of the year due to the permanent teacher’s maternity leave. Parents believed that Student’s adjustment to school at the beginning of the school year was adversely affected by the many changes. (N.T. pp. 410, 426, 427, 444, 445, 934)

23. At the beginning of the 2009/2010 school year, Student often resisted getting on the school bus to go to school, but that behavior lessened as the year progressed. (N.T. pp. 859, 861, 888, 889)
24. A marked increase in behavior issues during the first part of the school year required revised behavior support plans in October and December. (N.T. pp. 416, 423; S-6, S-7)
25. Triggers for difficult behaviors included arrival at school, because Student often fell asleep during the bus ride between home and school and was difficult to rouse upon arrival, leading to yelling or self-abuse (biting). Another difficult part of the day was preparing for transitioning from school to home. Negative behaviors associated with those problematic times persisted throughout the school year, but lessened in frequency, duration and intensity by the end of the school year. (N.T. pp. 822, 861, 862)
26. The 2009/2010 IEP originally provided for 40 min. daily of reverse inclusion with the 6th grade class at recess, as well as a weekly half hour period of reverse inclusion with the 4th grade, one 30 min./week math session in the 4th grade classroom and participation with the 4th grade for homeroom,, gym, music and art. (N.T. pp. 742, 837; S-5, p. 36)
27. Based upon scheduling considerations, Student was included in regular education classes with the new 4th grade class rather than with the same students as the prior year—now in 5th grade. Student’s schedule matched well with the 4th grade class taught by the same teacher in whose 4th grade class Student had participated during the previous school year. (N.T. pp. 414, 811, 812; S-5, p. 36)
28. At Parents’ request, Student’s inclusion in regular education increased during the school year. (N.T. pp. 443, 444; P-18, pp. 8, 10)
29. After returning from maternity leave during the 2nd half of the 2009/2010 school year, the 4th grade teacher implemented a behavior plan developed in December 2009 and an IEP dated January 26, 2010. (N.T. pp. 820, 839; S-7, S-8)
30. After Student’s schedule was revised, Student reported to the 4th grade class for homeroom in the morning, went to the special education classroom for academic instruction and then joined the 4th grade class for art, music, gym, lunch, recess, computers and library. Student also participated in reading activities with the 4th grade class each day with limited expectations. Student returned to the 4th grade classroom for dismissal at the end of the day. (N.T. pp. 810—814; P-18, p. 10, S-8, p. 37)
31. Student also joined the 4th grade class for math once a week, on “game day.” The teacher assigned Student a partner to work on a game Student could play, which was not on the same level as the rest of the class but involved similar kinds of activities. (N.T. pp. 818, 849)
32. Student’s special education teacher provided modified material for Student to use in the regular education classroom based upon general information from the 4th grade teacher

concerning the subjects she was covering, *e.g.*, reading or math. The teacher engaged Student in discussions by prompting questions. (N.T. pp. 819, 830, 839)

33. Student was always accompanied to the 4th grade classroom by an educational assistant, who took the data required by the behavior plan. Student sometimes engaged in avoidant and attention-seeking behaviors in the 4th grade classroom and had difficulties with transitions, particularly leaving the classroom to go to the bus at the end of the day, (N.T. pp. 425, 819—822)
34. Student sat with the 4th grade class for lunch and played with them at recess, [providing opportunities for informal socializing and additional modeling opportunities.] Student formed relationships with some of the students that continued outside of school hours. The out of school social opportunities included play dates, meeting at the park and for pizza. (N.T. pp. 429—431, 811, 838)
35. By the end of the school year, Parents saw significant progress in Student's language sociability and confidence, including initiating conversations, increased vocalizing and sentence length. Parents attributed Student's communication gains to the contact with the typical 4th grade classmates and to Student's speech therapy. (N.T. pp. 427, 428, 432)
36. In terms of positive adaptive behaviors related to IEP goals, progress reports from the end of the 3rd marking period and the present levels of performance included in the District's reevaluation report (RR) produced in June 2010 included data establishing that by the end of the school year, Student's adaptive behaviors had improved from the end of the 2008/2009 school year, and in some areas, between the end of the 3rd marking period and the end of the school year.¹ (P-25, pp. 14—20, 34, 35, S-5, p. 6, S-13, p. 2)

2010/2011 School Year

37. Parents and the District began discussing Student's placement options, including transfer to the middle school early the 2009/2010 school year. (N.T. pp. 433, 434, 437; P-18, pp. 11, 12)
38. Parents requested that Student remain at the elementary school for the next school year in order to continue regular education inclusion opportunities with the same class, who would be in 5th grade, since Student had been included with that group of 4th grade students for so many classes and activities. Parents considered their insistence upon greater inclusion activities during the 2009/2010 school year a great success and believed it should continue in order to build upon the gains Student had made. (N.T. pp. 452, 453)

¹ Student 1) asked for something from peers rather than yelling or demanding: 6/10—71%, 4/10—83% of the time; 2) maintained appropriate behavior and positive interactions with peers: 6/10—80% , 4/10—93% of the time; 3) asked for breaks/presented a break card when frustrated: 6/10—87%, 4/10—66% of the time; 4) asked for help when needed: 6/10—100%, 4/10—84% of the time; 5) requested or agreed to staff suggestions to use the bathroom: 6/10—93% , 4/10—75% of the time. (P-25, pp. 34, 35, S-13, p. 2).

39. Parent visited the middle school life skills class in January 2010, which raised significant concerns with respect to whether it would be an appropriate placement for Student based on how the room was arranged and the instruction organized. Parent believed that the level of activity and noise would be detrimental because Student is easily distracted. (N.T. pp. 438—442, 936, 937; P-18, p. 11)
40. Parent also visited the learning support class at the middle school and felt that would be a better option for Student. (N.T. pp. 441, 442)
41. As of February 2010, the options for the 2010/2011 school year that had been discussed at an IEP were Life Skills or full-time Learning Support at the middle school, or a combination of those programs; remaining in the elementary life skills support program; inclusion opportunities. Parent were informed by the District at that time, however, that remaining in the elementary program was not an option, but Parents still considered it a possibility until April. (N.T. pp. 449—451; P-18, p. 1)
42. Parents' consideration of school-related issues was interrupted in March, when the family experienced a personal tragedy, [redacted]. (N.T. pp. 455, 457)
43. Parents requested a reevaluation of Student in April 2010 that was completed in June. Parents believed that the District underreported Student's academic skills and achievements but did not push that issue with the District at that time. (N.T. pp. 453, 454, 524, 525; P-18, p. 3, S-12, S-13)
44. After the reevaluation report (RR) was issued, the parties participated in a July IEP meeting that resulted in a NOREP providing for Student's transition to the supplemental Life Skills program at the middle school. Parents approved the NOREP on August 27, but expressed significant reservations with respect to the appropriateness of the placement based upon the level of integration with non-disabled peers provided in the accompanying IEP and the leap from inclusion in a 4th grade class to inclusion with 7th graders. Parents stated their strong preference that Student be included in a 5th grade class, and their concern that the change in 2 grade levels would hinder Student's progress. (N.T. pp. 460, 461, 485, 486, 498; S-14, pp. 37, 38, 40—42)
45. There had been no discussion of how/why the middle school program was appropriate for Student during the IEP meetings to discuss Student's 2010/2011 program. Parents believed that because of the termination of the intermediate life skills classroom at the elementary school, middle school was the only available choice. (N.T. pp. 458, 460, 464, 465, 497; P-18, p. 2)
46. The District considered the middle school the only appropriate choice because Student needed to be with age appropriate peers. (N.T. pp. 466, 497, 1359, 1360)
47. At a meeting in June 2010 to discuss the District's proposed IEP, Parents noted a number of questions and concerns, including the specificity of the goals with respect to academic instruction, inclusion and assistive technology. Parents also objected to Student's

proposed participation in community trips and instruction in self-care/grooming. (N.T. pp. 490—492; P-20)

48. During the 2009/2010 school year, Parents had proposed and the District agreed to provide an assistive technology device, “Intellikeys,” an adapted keyboard, to facilitate Student’s communication and participation in academic activities during the 2009/2010 school year. Parents wanted to be certain that the device would be available and working properly at the middle school. Due to a mistake and subsequent technical difficulties related to a software updates at the middle school, the Intellikeys system did not work correctly and consistently until the end of the first marking period. Although the technical problems with the system were resolved earlier, Student’s special education teacher had difficulty adapting the device to the school program. (N.T. pp. 435, 436, 492, 494, 504—512; P-18, pp. 1, 4—6, S-39, pp. 5, 12, 20, 21, 24, 25, 32, 36—38, 46, 49, 50, 52)
49. Student visited the middle school just before the first day of classes. Due to Parents’ earlier opposition to placing Student at the middle school, Student did not attend the one day visit that had occurred for the elementary school students transitioning to middle school. (N.T. pp. 501, 502, 939, 940; S-39, p. 5)
50. The July 2010 IEP provided that special education instruction to meet goals relating to functional academics, personal management, community-based instruction, and recreation/leisure skills would be delivered in the life skills classroom as part of the life skills curriculum. Including Student, there were 7 children in the middle school life skills class, with 5 adults assigned to the class. (N.T. pp. 937, 938; S-14, p. 31)
51. The IEP provided for inclusion with non-disabled peers for homeroom, assemblies, specials, lunch and science, as well as for 10 min./week of reverse inclusion. (N.T. pp. 941, 942; S-14, p. 31)
52. Academic instruction in the life skills classroom was based upon stations for vocational, reading and math skills to which the students rotated. Community-based instruction, community and classroom jobs were also part of the activities in the life skills class. Direct instruction was provided from Monday to Thursday, with “Fun Friday” devoted to social skills development and group work. (N.T. p. 942, 953, 954, 961—966)
53. Student received 30 minutes of one to one math instruction directed toward goals that were identical to the 2009/2010 math goals. Student’s achievement levels remained approximately the same between the end of the 2009/2010 school year and the end of the 1st marking period in November 2010, exceeding the benchmarks, which also remained the same for both periods. (N.T. pp. 953, 954; P-25, pp. 37, 50, S-13, p. 2)
54. Student also received 30 minutes reading instruction from Monday to Thursday, using the reading A to Z series (Level A), supplemented with the Edmark program used primarily in connection with community-based instruction themes. (N.T. pp 961—963)

55. Student was assigned to a 7th grade science class co-taught by a regular and a special education teacher. The regular science teacher discussed ways of including Student with both the special education coordinator for the building and Student's special education teacher and received materials for Student from the special education teacher. Student was included in group work by being assigned to a team with a partner and assigned to tasks Student could complete with prompting from peers. (N.T. pp. 894, 900—902; S-39, p. 48)
56. At times, Student was given worksheets from the special education teacher that included materials with the same themes covered in the 7th grade curriculum to practice skills at his/her level. If work was not provided, Student would try to sleep. Student also had a science notebook with work sheets at the grade level curriculum. A communication book with entries written by either the science teacher or Student's educational assistant reported on Student's activities in science class. (N.T. pp. 896—898, 911, 920—922, 930, 931; P-31, P-32, P-33, p. 21, S-27, S-28)
57. Due to Student's difficulty transitioning from the special education setting to the science class, 2 7th grade "buddies" began escorting Student from the life skills classroom to science class. That system worked well for awhile, since Student responded well to peer interactions. As the school year progressed, Student's participation in the science class decreased from 45 min./day, 4 days/week to 2—3 days/week or less, because Student was falling asleep in the life skills classroom and not awakened to go to science class. (N.T. pp. 899, 923, 929, 952)
58. Early in the year, Student's adjustment to the new school appeared to be going well, but difficulties began to arise by mid-September. Parents noted an increase in Student's behaviors that had been eliminated during the previous school year, and the special education teacher noted problem behaviors more frequently, with occasional reports of consecutive good days. Reports from the nurse assigned to the life skills classroom, who also accompanied Student on the school bus noted 12 instances of self-injury between October and December. (N.T. p. 513; S-36, S-39, pp. 11—15, 17, 37, 41, 45, 48, 60)
59. Progress reports at the end of the 1st marking period disclosed a significant decrease in functional performance compared to the end of the previous school year with respect to packing/unpacking Student's back pack (6/10—100% unpacking/83% packing; 11/10--0); transition to the bus (6/10—91% of the time; 11/10—0); completing a classroom job with a visual aid and no more than 2 gestural prompts (6/10—100% of the time; 11/10—33% of the time); asking for something from peers rather than yelling or demanding: (6/10—71% of the time/11/10—53%); maintaining appropriate behavior and positive interactions with peers in the inclusion setting (6/10—80% of the time, 11/10—63%); asking for breaks/presenting a break card when frustrated (6/10—87% of the time, 11/10—0); asking for help when needed (6/10—100% of the time, 11/10—33%). (P-25, pp. 45, 46, 48, 49, S-13, p. 2)
60. Parent expressed concerns about the nurse delivering Student's academic instruction and , that the materials Student was working on were not individualized and were at a lower

- level than in the past because they were based upon the curriculum used generally in the life skills classroom rather than Student's needs. (N.T. pp. 513—516)
61. Parent also objected to Student not receiving individual session of speech therapy. (N.T. pp. 548—551; S-14, p. 26)
 62. The parties met for an IEP meeting in October to discuss Parents' sense that the school year was not going well, specifically, concerns with the level of academic instruction Student was receiving, the problems with the Intellikeys system and speech therapy. Parents' concern with the middle school life skills curriculum from the outset was the potential for de-emphasizing academics (N.T. pp. 562, 563, 571; S-15)
 63. Student's intermittent resistance to boarding the school bus in the morning had been noted in the preceding school years, but occurred during the 2010/2011 school year with increased frequency and intensity that worsened rather than subsided as the school year progressed, culminating in major incidents on December 20 and 21. (N.T. pp. 517, 518, 526, 860, 881, 888, 889; S-39, p. 73)
 64. The December 21 meltdown over boarding the bus was the most extreme resistance to going to school that Parents had ever seen, and followed an extremely bad day in school on December 20, after which Student had a swollen lip and hand from accidental and self-inflicted injuries. (N.T. pp. 518—521, 526—528, 880—882; S-36, p. 3, S-39, p. 73)
 65. Student remained at home that day and did not return to school for the remainder of the school year. (N.T. pp. 520, 533, 545; S-39, p. 73)
 66. Upon the advice of a psychologist whom Parents had engaged to conduct an independent evaluation, Parents requested homebound instruction and submitted a letter from the psychologist in support of the request. (N.T. pp. 530, 531; P-3, P-4, p. 1)
 67. The District considered that letter from the psychologist and a letter from Student's pediatrician insufficient and subsequently instituted truancy proceedings against Parents. (N.T. pp. 538; P-4, pp.4, 5, P-6, S-21)
 68. Although the parties met for another IEP meeting in February 2011 and discussed changes to Student's IEP and behavior plan, they did not reach an agreement for Student to return to school. (S-16, S-17)
 69. Parents' application for homebound instruction was approved after they submitted a letter from a psychiatrist with an anxiety disorder diagnosis in March 2011. (N.T. pp. 539, 540; P-4, pp. 6, 7)
 70. Homebound instruction began on April 14, 2011. (N.T. pp. 544, 545)

DISCUSSION AND CONCLUSIONS OF LAW

Applicable Legal Standards

The legal obligation of to provide for the educational needs of children with disabilities has been summarized by the Court of Appeals for the 3rd Circuit as follows:

The Individuals with Disabilities Education Act (“IDEA”) requires that a state receiving federal education funding provide a “free appropriate public education” (“FAPE”) to disabled children. 20 U.S.C. § 1412(a)(1). School districts provide a FAPE by designing and administering a program of individualized instruction that is set forth in an Individualized Education Plan (“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)).

Mary Courtney T. v. School District of Philadelphia, 575 F.3d 235, 240 (3rd Cir. 2009)

The central issue in this case is whether the program and placement the District provided for Student during the 2010/2011 school year met the “meaningful benefit” standard, *i.e.*, afforded Student the opportunity for “significant learning.” *Ridgewood Board of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999). That inquiry was complicated in this case by the significant needs arising from Student’s disabilities, but also by the circumstances relating to Student’s life skills support placement during the previous two school years, requiring a more detailed than usual consideration of the educational services Student received and Student’s progress during periods not in dispute in this case.

In addition to the IDEA claims for denial of FAPE, Parents have also asserted that the District’s decision concerning the nature and location of Student’s 2010/2011 program and placement constituted discrimination on the basis of disability.

The statute prohibiting disability-based discrimination commonly referred to as “§504 of the Rehabilitation Act of 1973” or simply “§504” is found at 29 U.S.C. §794(a), and provides as follows:

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

In addition to prohibiting discriminatory conduct by recipients of federal funds, the protections of §504 are considered co-extensive with those provided by the IDEA statute with respect to the obligation to provide a disabled student with a free, appropriate public education (FAPE). *D.G. v. Somerset Hills School District*, 559 F.Supp.2d 484 (D.N.J. 2008); *School District of Philadelphia v. Deborah A. and Candiss C.*, 2009 WL 778321 (E.D. Pa. 2009).

In this case, unlike many in which parents invoke §504 claim as an alternative basis for a an alleged denial of FAPE, Parents’ §504 claim is based upon allegations that the District treated Student less favorably than other pupils due to the nature and severity of Student’s disabilities. In such circumstances there is a distinction between a §504 and an IDEA claim:

In contrast to the IDEA, Section 504 emphasizes equal treatment, not just access to a FAPE. In other words, the drafters of Section 504 were not only concerned with [a student] receiving a FAPE somewhere (as was the case with the IDEA), but also that a federally funded program does not treat [the student] differently because [s/he is disabled].

Chavez v. Tularosa Municipal Schools, 2008 WL 4816992 at *14 (D.N.M. 2008), quoting

Ellenberg v. N.M. Military Inst., 478 F.3d 1262, 1281-82 n. 22 (10th Cir.2007)(quoting C.

Walker, Note, *Adequate Access or Equal Treatment: Looking Beyond the IDEA to Section 504 in a Post-Schaffer Public School*, 58 Stan. L.Rev. 1563, 1589 (2006)

To assert a successful §504 claim a parent must prove four elements: 1) that the student

has a disability; 2) that he or she is otherwise qualified to participate in school activities; 3) that the LEA receives federal financial assistance; 4) that the student was excluded from participation in or was denied the benefits of educational services available to other students or was subjected to discrimination at school. *Andrew M. v. Delaware Valley Office of Mental Health and Mental Retardation*, 490 F.3d 337, 350 (3rd Cir. 2005); *School District of Philadelphia v. Deborah A.*

As in most cases where a §504 claim is asserted against a public school district, there is no dispute over the first three elements, leaving only the question whether Parents have produced sufficient evidence of unlawful discrimination.

Parents have the burden of proving their IDEA claims. 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, one of the two elements encompassed by the term “burden of proof.” In *Schaffer*, the Supreme Court addressed only the burden of persuasion, which generally requires proof by a preponderance of the evidence. See *Jaffess v. Council Rock School District*, 2006 WL 3097939 (E.D. Pa. October 26, 2006).

Claims and Defenses

§504

Student’s pervasive disabilities have resulted in numerous physical ailments and significant global delays, along with challenging behaviors, including aggression toward self and others. (FF 3, 4, 5, 6) Although Student’s academic and functional skills are well below the level of even considerably younger children, Student has areas of relative cognitive strength and there is no dispute that Student has a great desire to interact with typically developing peers or that such contacts are highly motivating. (FF 7, 8) Parents became aware of the positive effects

of Student's inclusion in regular education classes with typical peers during a brief period of residence in [another state]. (FF 10)

During Student's second year in a District elementary school, Parents requested that Student spend more time in regular education classes, which was accomplished by the end of that school year. (FF 26, 28, 30, 31) Despite a difficult start to the school year, and a significant increase in negative behaviors during the fall, Student ultimately made considerable progress during the 2009/2010 school year and difficult behaviors were significantly reduced by the end of the year. (N.T. pp. 1362, 1393) Student's progress in functional and adaptive skills, including communication, is supported by the District's data as well as Parents' judgment. (FF 35, 36)

In Parents' view, all of the components of a successful program had come together by the end of the 2009/2010 school year, including a permanent and now familiar staff, a behavior plan that was consistently implemented and considerable inclusion in regular education classes. Understandably, Parents wanted to assure that Student could build on that successful school year by keeping those elements intact. Parents, therefore, wanted to retain Student in the elementary school to advance to 5th grade, and presumably then to 6th grade, with the 4th grade class in which Student had been successfully included during the 2009/2010 school year. (FF 38)

The District, however, insisted that Student had to join an age appropriate class, which the District defined as 7th grade, although Student had entered the District classified as a 6th grader and had then spent what would have been 7th grade still in the elementary school. (FF 46) Parents contend that the District's insistence on an age appropriate class was discriminatory because it required Student to jump 2 grade levels and become a 7th grade student immediately after 4th grade. The District argued that Student had not really been "in" 4th grade because

Student was unable to access the 4th grade curriculum to any greater extent than the 7th grade curriculum—both are much beyond Student’s intellectual capacity. The District also noted that Student’s life skills class had “reverse inclusion” with 6th grade students. That inclusion was during a daily 40 minute recess, considerably less contact than Student had with the 4th grade. (FF 26, 30, 31, 34) Finally, with most of the students who had been assigned to the intermediate level of the life skills support class transitioning to the middle school, the District had no need to maintain two life skills support classes at the elementary school and argued that there would be no appropriate class for Student in the elementary school. (N.T. pp. 1413, 1414)

The District’s arguments, however, cannot dispel the inference that the District’s decision to assign Student to a 7th grade life skills support class was driven by the District’s view of Student’s needs derived from the nature and severity of Student’s disabilities rather than actual consideration of Student’s unique individual needs. The supervisor of special education testified, *e.g.*, that it was time for Student to join a class that focused more on community-based instruction and pre-vocational skills. (N.T. pp. 1370—1372) Although transition planning may begin at age 14, there was no consideration given to whether Student would actually benefit from the change in focus from academic learning, leading to the inference that Student’s developmental and functional level, interests and needs were of little or no consequence in determining the educational services Student should receive. There was no testimony from the District relating Student’s transfer to the middle school life skills program to any of Student’s identified needs or strengths. The notion that Student’s age should be the primary factor used to determine whether it was past time for Student to join that level of a life skills program implies that academic instruction for all children with disabilities as severe as Student’s should be de-

emphasized beginning in 7th grade regardless of the individual student's developmental level and interests.

In addition, in deciding that Student should be assigned to the middle school life skills support classroom and curriculum based on age alone, the District obviously gave no thought to whether it might be detrimental to Student not to have the opportunity to experience the gradual developmental changes of peers who progress from the end of 4th grade to the beginning of 7th grade over a period of two years. There was also no suggestion in the record that the District considered whether Student might be less engaged in a 7th grade science class than a 4th grade reading class due to perceiving a bigger gap in functional, academic and social skills. Instead, the District took the position throughout the hearing that peers are age mates and appeared to recognize no maturational difference between children in early 5th grade and children in early 7th grade, or at least concluded that Student could not perceive a difference. There is no suggestion in the testimony or documents that the District considered whether Student might need to be better prepared for the transition to a 7th grade peer group beyond what is generally offered. It is true that Student did not participate in the one day visit to the middle school. (FF 49) It is not reasonable to conclude, however, that a single visit to the life skill classroom would have been sufficient given Student's needs, and such visit would not have prepared Student for inclusion with much older children. The District could, however, have increased Student's contact with the 6th grade student in the elementary school, but there is no evidence that such preparation was considered or suggested to Parents

The inference is inescapable that the District believed that it was of no consequence to Student to be with a group of children at the developmental level of a 5th grader or a 7th grader,

and the same considerations that would preclude advancing a typical student two grade levels with no real preparation does not apply to a child with severe and pervasive disabilities.

The District's argument that Student is outgoing and makes friends easily misses the fundamental question whether, for Student, the benefits of inclusion in a regular education class might be considerably less in an older group of Students without the opportunity to experience gradual maturation and change. The District provided no rationale based upon Student's unique needs for assigning Student to either the middle school life skills support class or a 7th grade science class, and expressed no concern that the level of change in the peer group might affect Student.

The District cited *Centennial School District v. Pa. Dept .of Education*, 94 Pa. Cmwlth 530, 503 A.2d 1090 (Pa. Cmmwlth. 1986) for the proposition that a child's assignment to a class should be based upon his/her unique needs, not age alone. (Closing Argument of Central Bucks School District, p. 18) That case, involving a gifted student whose intellectual capacity exceeded his emotional development, is similar to the situation presented by this case, except, of course, that in this case, the Student's intellectual and social/emotional development are both much below age level. In *Centennial*, the court agreed with the ultimate determination of the administrative hearing process that the student should be provided individualized academic instruction at his intellectual level within an age appropriate setting, which was also the developmentally appropriate placement for the child. Here, Student also needs individualized instruction based upon intellectual capacity, and based on the principle underlying the *Centennial* decision, the District should have considered whether that instruction could best delivered in a developmentally appropriate setting. There is nothing in the record that suggests that an age level classroom is developmentally appropriate for Student. If the District considers

the *Centennial* decision controlling, therefore, it should have determined a developmentally appropriate setting in which to deliver appropriately individualized academic instruction.

IDEA FAPE Claim

Regardless of the basis for the District's decision to move Student to the middle school life skills support classroom and curriculum for the 2010/2011 school year, the core issue with respect to Parents' IDEA claims is whether the IEP, as proposed and as implemented, provided an appropriate program/placement in the least restrictive environment. The outcome does not, as the District argued, depend upon whether Student's move from an elementary life skills program to a middle school life skills program was a change of placement. However reluctantly, Parents approved the NOREP that assigned Student to the middle schools life skills program, and they do not contend that the intermediate life skills program in the elementary school was Student's pendent placement.

Parents argued, and the record supports the conclusion, that Student did not make meaningful progress in most, if not all academic and adaptive/functional goals under the IEP implemented from the beginning of the 2010/2011 school year. In this case, given the nature and severity of Student's disabilities, the academic progress on which the District focused so closely is not the most important measure of progress, as the District's argument suggests. Of equal or greater importance is whether Student made progress in functional and adaptive skills, social skills and the frequency and intensity of problem behaviors.

Adaptive Skills

Because the IEPs implemented during the 2009/2010 and 2010/2011 school years have identical goals in many areas, it is possible to directly compare the District's data reported at the end of the 2009/2010 school year and the end of the 1st marking period of the 2010/2011 school

year. (See S-5, 2009/2010 IEP and S-14, 2010/2011 IEP) Such comparison reveals that Student regressed in all areas. (FF) As just one example, Student went from unpacking Student's backpack in the morning with no more than two visual prompts 100% of the time in June 2010 to needing regular verbal prompts and physical guidance to complete that task in November 2010. (FF 59; P-25, p. 45)

Academics

The District argued that Student made meaningful progress during the 2010/2011 school year based on improvements in academic skills. That narrow view, however, ignores Student's regression in functional and adaptive skills and the deterioration in Student's behavior, culminating in extreme incidents and self-inflicted injury in December 2010. (FF 63, 64) Direct academic instruction was a relatively small part of the life skills curriculum. (FF 52, 53, 54)

Moreover, Student's achievement was not as significant as the District suggests. With respect to math, Student's performance was virtually identical at the end of the 2009/2010 school year and in November 2010. (FF 53) Although there was no regression, the skill levels were maintained on the identical math goals that the District's data from the end of the 2009/2010 school year indicated had been mastered. (FF 53) Nothing in the record suggests that the District ever considered updating or revising Student's math goals, supporting Parents' argument that the academic instruction Student received was not based upon individual needs and progress but upon the curriculum delivered to all students in the life skills support class.

7th Grade Science Inclusion

Although Student was to be included in a 7th grade science class daily, and the science teacher testified about Student's participation in group work and that materials were modified, only 2 actual worksheets adapted to both the regular education curriculum and Student's skill

level were included in the record. (P-27, pp 1, 3) The other science materials in the record consisted of either blank pages with scribbles or regular, unadapted 7th grade science worksheets. (P- 31, S-27, pp. 2,4) The science teacher also testified that Student slept through classes for which no work was provided and that Student's participation in the class diminished over the course of the school year. (FF 56) The testimony left the impression that the several examples of Student's active participation in group work and other aspects of the 7th grade science class though adapted materials constituted the entirety of Student's active participation in the inclusion setting.

Even if that was not the case, however, Student's opportunities for inclusion in the regular education curriculum were far less than during the previous school year and appeared to be based upon scheduling considerations and a token effort to meet Parents' consistent requests to increase Student's opportunities to interact with non-disabled peers. (FF 51) The federal IDEA regulations provide that an eligible student's program is to be delivered in the least restrictive environment ("LRE") appropriate for the student, *i.e.*, one in which the student is educated with children who are not disabled to the maximum extent appropriate. 34 C.F.R. §300.114(a)(2)(i). The requirement for inclusion in regular education classes to the greatest extent appropriate, is a fundamental IDEA principle and should not be an afterthought or matter of scheduling convenience.²

Behavior/ District Request to Conduct an FBA

The District contended that Student's behaviors were no worse than in other school years at the time Student stopped attending school in December 2010, and that the behaviors reported by the Parents were not present in school, implying that Parents did not want the middle school

² It is true that the 4th grade inclusion that worked so well for Student during the 2009/2010 school year also appeared to be born of convenience. (FF) That fortuitous circumstance, however, does not mean that it is an approved practice.

placement to succeed. The record does not support such implication. Parents worked cooperatively with the District throughout Student's enrollment and accepted all of the District's recommendations. The record, including the testimony of the nurse who accompanied Student to school, supports Parents' contention that Student's resistance to going to school increased rather than decreased as the school year progressed and Parents did not take the drastic step of removing Student from school until Student came home with self-inflicted injuries from extreme behavior incidents in school that were connected in time to the most extreme instances of school refusal. (FF 63, 64) It is difficult to fault Parents for their judgment that the behaviors were more likely to worsen than subside, which could have resulted in more serious injuries, if they continued to send Student to school.

The District also contends that it has been prevented from effectively responding to the extreme behavior that directly led to Student not returning to school for the remainder of the 2010/2011 school year by the Parents' refusal to permit the District to conduct a functional behavior assessment. The District now seeks an order to conduct the FBA.

The District's single-minded focus on addressing the behavior issues that arose and worsened during the fall of 2010 is a classic case of being unable to see the forest for the trees. In essence, all that the District expressed a willingness to do was count and analyze Student's behaviors rather than take a hard look at the entire circumstances, including reevaluating whether assigning Student to the middle school life skills program/placement was a fundamental mistake. There is nothing in the record suggesting that the District was ever willing to undertake such a comprehensive review. The District's request to conduct an FBA in response to the significant problems that arose during the 2009/2010 school year is too late at this point, and was too little from the outset.

Compensatory Education

An eligible student who has received no more than a *de minimis* educational benefit is entitled to correction of that situation through an award of compensatory education, an equitable “remedy ... designed to require school districts to belatedly pay expenses that [they] should have paid all along.” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d at 249 (internal quotation marks and citation omitted). Compensatory education is intended to assure that an eligible child is restored to the position s/he would have occupied had a violation not occurred. *Ferren C. v. School District of Philadelphia*, 612 F.3d 712, 718 (3rd Cir. 2010), *citing Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005).

Compensatory education is awarded for a period equal to the deprivation and measured from the time that the school district knew or should have known of its failure to provide FAPE. *Mary Courtney T. v. School District of Philadelphia* at 249; *M.C. v. Central Regional School District*, 81 F.3d at 395; *Carlisle Area School District v. Scott P.*, 62 F.3d 520, 536 (3^d Cir.1995). The school district, however, is permitted a reasonable amount of time to rectify the problem once it is known. *M.C. v. Central Regional School District* at 396.

Based upon the conclusions that the District’s conduct in this matter constituted a violation of §504 of the Rehabilitation Act and denied Student a FAPE in violation of the IDEA, Student will be awarded compensatory education for the entire 2010/2011 school year.

The District argued that any compensatory education remedy should be limited to the time Student was in school. The District contends that Parents’ actions in keeping Student out of school from December 2010 until the school year ended school gave the District no opportunity to effectively address the issues that caused Parents to keep Student out of school. As noted above, however, there is no evidence in the record that the District was willing to fundamentally

reexamine Student's program and placement. Parents and the District met in February 2011, and the District proposed a revised IEP which was rejected by the Parents. (S-16) Comparison of the original IEP for the 2010/2011 school year and the October 2010 revision to the February 2011 IEP establishes that the District proposed no significant changes to the flawed program and placement. (S-14, S-15, S-16) The compensatory education award, therefore, will encompass the entire school year.

Moreover, although a compensatory education award based upon an IDEA violation would ordinarily be reduced by the hours of homebound instruction provided by the District, such reduction will not be made in this case, since the compensatory education award is also provided as a remedy for the District's §504 violation.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, the School District is hereby **ORDERED** to provide Student with full days of compensatory education for every day school was in session during the 2010/2011 school year

- a. The monetary value of the compensatory education hours awarded to Student shall be measured by the proportional cost to the District to provide educational services to Student based upon the salary, including the value of benefits for the special education and regular education teachers who worked with Student during the 2010/2011 school year
- b. Student's Parents shall determine the specific type of compensatory education services provided via this order, which will be limited to academic and/or psychological/counseling/behavioral services designed to meet Student's identified need, and may include paying private school tuition in the event the parties cannot agree upon an educational program/placement for Student for the 2011/2012 school year;
- c. Compensatory education services may occur after school hours, on weekends and/or during the summer months when convenient for Student and Parents;

- d. The hours of compensatory education may be used at any time from the present to Student's 21st birthday;
- e. Parents may use part of the compensatory education award to reimburse costs they incurred in providing Student with educational or related services from December 22, 2010 to the end of the 2010/2011 school year.

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

August 16, 2011

Anne L. Carroll

Anne L. Carroll, Esq.
HEARING OFFICER