

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. 2527-1112 AS

Child's Name: R.B.

Date of Birth: [redacted]

Dates of Hearing: 2/9/12

CLOSED HEARING

Parties to the Hearing:

Representative:

Parents

Parent Attorney

Drew Christian, Esquire
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Scranton, PA 18510

School District

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Date Record Closed:

February 28, 2012

Date of Decision:

March 13, 2012

Hearing Officer:

Anne L. Carroll, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

Student has resided in the School District for several years but attended school only briefly. Due to a number of significant medical conditions and impairments, a psychologist who provided private evaluations in 2007 and 2010 recommend that Student not return to a public school setting. Since that time, instruction in the home has been Student's special education placement.

Parent filed a due process complaint when the District provided no educational services at all to Student for approximately the first 10 weeks of the current school year due to its inability to assign a teacher until the scholastic football season ended. Parent alleged a denial of FAPE arising from the District's failure to provide sufficient evaluations, academic instruction and related services for two years prior to the date of Parent's November 11, 2011 complaint and continuing through the present.

For the reasons explained below, Parent's request for compensatory education will be granted from the beginning of the two year period, and the hours of compensatory education will continue to accrue until the District offers an appropriate special education program, including related services. The District will also be ordered to convene Student's IEP team to begin developing an appropriate IEP that includes a realistic plan for providing a less restrictive special education placement for Student as soon as reasonably possible. The District will also be ordered to fund independent evaluations to assure that all of Student's physical, emotional, social, academic and transition needs are properly investigated and identified.

ISSUES

1. Did the School District deny Student a free, appropriate public education at any time from November 11, 2009 to the present by failing to provide:
 - a. Appropriate IEPs, including sufficient hours of instruction
 - b. Related services necessary for Student to benefit from special education services?
2. Should the School District be required to fund one or more independent educational evaluations to determine Student's current needs for special education, related services and transition to adult life services?
3. Is Student entitled to an award of compensatory education, and if so, for what period and in what amount?

FINDINGS OF FACT

1. Student is a [teenaged] child, born [redacted]. Student is a resident of the Abington Heights School District and is eligible for special education services. (P-3, P-4, P-11, S-6)¹
2. With respect to eligibility for IDEA services, Student has a current diagnosis of Other Health Impairment (OHI) and Speech/Language Impairment in accordance with Federal and State Standards. 34 C.F.R. §300.8(a)(1), (c)(9), (11); 22 Pa. Code §14.102 (2)(ii); (N.T. p. 199; P-3, p. 1)
3. Student has been diagnosed with a number of medical and neurological conditions affecting the ability to develop academic, language, and social skills and otherwise function successfully in a school setting without significant supports. (N.T. pp. 76—78; P-3, pp. 2, 8, P-7 p. 2—4, 22, 23)
4. The most recent reevaluation conducted by the District occurred in September 2009. At that time Student had been receiving academic instruction at home for two school years, and that continues to the present. (P-3 pp. 1, 2, P-5, p. 1, P-12, p. 1, P-14, p. 20)
5. The District administered standardized assessments of academic achievement (WJ-III-ACH), which revealed limited academic skills. The District school psychologist placed Student at a mid 3rd grade level overall in basic academic skills—reading, writing and math. The District considered Student to be in 6th grade at that time (P-3 pp. 1, 8)

¹ By agreement of the parties, all exhibits referenced at the due process hearing in this matter are admitted into the record. (N.T. pp. 204, 205) Accordingly, the following exhibits are **ADMITTED**:

P-3, P-4, P-5, P-6, P-7, P-9, P-10, P-11, P-12, P-13, P-14;

S-1, S-2, S-4, S-6, S-9, S-14, S-15, S-17.

6. The District accepted the results of standardized assessments (WJ-III-COG, C-Toni) administered in the summer of 2007 by an independent neuro-psychologist, who concluded that Student's cognitive ability was in the low average range. (P-3, pp. 2, 3)
7. The District's evaluation report (ER) identified the need for direct, systematic, intensive instruction in reading, writing and math. The school psychologist recommended that the interventions in reading focus on increasing Student's sight word vocabulary and developing automaticity, as well as developing reading fluency and comprehension strategies. She noted Student's needs in writing, including increased experiences with spelling; and noted intense math needs, including explicit, intentional teaching of math concepts and vocabulary to improve math calculation, reasoning and fluency. (P-3, pp. 9, 10)
8. Although the District's school psychologist mentioned speech/language impairment as Student's secondary disability category, reported weaknesses in oral expression as measured by the WJ-III, and observed that Student's speech was below chronological age expectations in both articulation and fluency, the ER includes no recommendations for speech/language services. (P-3, pp. 1, 4, 6, 9, 10)
9. The ER also notes that Student's fine motor skills were below age expectations with respect to ease and speed of movements that impacted mechanical writing skills, but includes no recommendations for occupational therapy. (P-3, pp. 4, 6, 9, 10)
10. In March 2010, Student was evaluated by the same independent psychologist who provided the 2007 evaluation. Although it is possible that ability assessments underestimate cognitive potential due to anxiety and other conditions, Student's overall cognitive ability remained in the low average range as measured by the WISC-IV and in the borderline to low average range on the WJ-III-COG. (P-7 pp. 5—10)
11. Achievement testing (WJ-III-ACH) placed Student's basic reading skills in the average range, an improvement over the 2007 results. Student's sight word vocabulary increased, but reading fluency and comprehension were areas of significant weakness. (P-7 p. 11)
12. Math calculation skills were in the borderline range, with math reasoning and broad math measured in the average range. (P-7 p. 12)
13. Student's writing skills were an area of significant weakness, in the borderline range, as was written expression. (P-7 p. 13)
14. Rating scales completed by Parent and Student supported a diagnosis of attention deficit disorder. Student revealed significant concerns with peer rejection. (P-7 pp. 16—22)
15. The evaluator recommended continuing with instruction at home. (P-7 p. 23)
16. Beginning in October of the 2008/2009 school year, and continuing through the 2009/2010 and 2010/2011 school years, the District scheduled 10 hours/week of

academic instruction in reading, writing and math provided by a regular education middle school teacher who met with Student after regular school hours. For reasons arising from Student's physical conditions, many times the teacher could not provide a full 10 hours of instruction. (N.T. pp. 17, 29, 30)

17. The teacher unsuccessfully attempted to speak with the District's director of special education before beginning instruction with Student in the 2008/2009 school year. He also requested but was not provided with a copy of Student's IEP during that school year, and also did not receive a copy of Student's 2010/2011 IEP . The school psychologist gave the teacher a copy of the independent psychological evaluation report. (N.T. pp. 19, 20, 22—24, 28, 29, 37)
18. Prior to beginning instruction, the teacher met with Student's 3rd grade learning support teacher, who provided reading, math and possibly writing instructional materials that she had used with Student. The reading and math materials provided to the teacher for Student's instruction were the same books the District used for 3rd grade regular education classes. (N.T. pp. 27—29)
19. As observed by the teacher, Student had difficulty with fine motor skills that affected academic tasks such as completion of worksheets. The teacher adapted instructional materials, attempted to improve Student's use of a pencil/pen, and to teach Student cursive writing. (N.T. pp. 24—26)
20. Student also had problems with speech that worsened after surgeries during the 2010/2011 school year. (N.T. pp. 26)
21. At times, Student perseverates in speaking about topics of current interest. When that occurred during instruction, it was particularly difficult to refocus Student's attention to the lessons the teacher was attempting to provide. (N.T. pp. 26, 27, 82)
22. The teacher discovered that Student was unable to read cursive writing and had other significant gaps in academic knowledge and experience that the teacher tried to remedy. Upon learning that Student had never read a book, the teacher introduced classic literature that aligned with Student's interests during the 2009/2010 school year. (N.T. pp. 25, 41; P-11, p. 7)
23. The teacher concentrated on teaching reading and math during the school years. Because of Student's significant needs in those areas and limited time, written expression was covered primarily during the 2011 ESY program. (N.T. pp. 45, 68)
24. During the 2009/2010 school year, the teacher requested that the District purchase a computerized math program that he knew of and believed would be helpful to Student to replace the written materials provided by the District. The program was more successful because of an embedded reward system and eliminating the worksheets Student found difficult to complete due to fine motor skill deficits. (N.T. pp. 39, 40)

25. The teacher also requested that the District order a computerized reading program to accommodate to Student's difficulties with paper and pencil tasks. Both the reading and math programs the teacher requested were regular education programs. Student's current teacher has continued instruction with the math program and has requested a computerized reading comprehension program at a higher level. (N.T. pp. 41—43, 154—157)
26. The 10 hours/week scheduled for Student's academic instruction provided insufficient time to present the grade level science and social studies curricula. The teacher introduced elements of science and social studies in connection with reading instruction. Student was particularly interested in animals, and would have benefited from instruction in those content areas. (N.T. pp. 30, 33, 34, 52; P-11 p. 7)
27. Although the teacher was certain that Student could have handled additional instruction earlier in the day, he would not have been able to provide it due to his full-time position. Student could not have added instructional time at the end of the day because of fatigue and the amount of time needed for eating and bedtime self-care activities because of Student's physical disabilities. (N.T. pp. 31—34, 36, 88—90)
28. Because additional time at the end of the day was not feasible and the District could not easily provide additional instruction at any other time of the day, the District denied Parent's request to add 45 minutes/day to Student's instruction. (N.T. pp. 92, 179, 187, 188—190; P-6)
29. The teacher recalled attending one IEP meeting for Student, which also included a District learning support teacher. Student's teacher provided information concerning Student's reading and math levels, the instruction he was providing, and stated that Student had made progress during the 2009/2010 school year. The teacher did not engage in formal progress monitoring with respect to Student's IEP goals, but provided information when requested. A progress report on Student's IEP goals was provided to Parent for the first time in February 2012. (N.T. pp. 34, 36, 37, 55, 59, 60, 160; P-11 p. 7, S-6 pp. 6, 7)
30. The teacher did not continue instructing Student in the current school year due to his retirement. (N.T. pp. 59, 107)
31. The learning support teacher who now provides Student's instruction is also an assistant football coach and could not begin instruction until the season ended in mid-November. (N.T. pp. 106, 136)
32. Student's IEPs from the 2009/2010 school year through the current IEP developed in October 2011, included academic goals for reading fluency, reading comprehension, math calculation, math reasoning and written expression. The math reasoning goal was added in the 2010/2011 school year. The reading fluency goal was not included in the most recent IEP. The written expression goal was substantively identical in all three IEPs, but the current IEP provides that Student will use a computer to complete a more detailed

writing task. None of the IEP goals include baseline information. (P-4 pp. 22, 23, P-11, pp. 19—21, S-6, pp. 16, 17)

33. Student's IEPs from the 2009/2010, 2010/2011 and 2011/2012 school years include no goals to address speech/language, attention, social skills or emotional issues such as anxiety. The modifications comprising the list of specially designed instruction to be provided to Student that minimally address attention, language and fine motor skills issues are providing for frequent breaks and movement, shortening the length and number of directions, reducing the amount of writing, providing extended time for writing, and using assistive technology and a computer for writing tasks. (N.T. pp. 143, 183; P-4 p. 24, P-11, p. 23, S-6 p. 18)
34. Transition services were added to the 2010/2011 and 2011/2012 IEPs, listing Student's goals as attending a two or four year college, competitive employment, and in the 2011/2012 IEP, an independent living goal, accessing community resources with adult assistance. Accompanying activities were directed primarily toward improving academic skills and early exploration of career interests, including researching careers and completing a job interest survey and inventory. Student's current teacher administered a job inventory. (N.T. p. 145, 146; P-11, pp. 13, 14, S-6 pp. 11, 12, S-17)
35. Assessments and information provided by Student's teachers from the 2009/2010 school year to the most recent assessments of progress indicate that Student advanced from the third grade to the 5th grade independent reading level and is currently at a 6th grade/upper middle school instructional level for reading. More recent assessments indicate improvement in comprehension to the 7th grade level. Student is currently being instructed at a 6th grade level in math. (N.T. pp. 140, 155; P-11, p. 7, S-6 p. 6, S-14, S-15)
36. The District required Parent to provide the same medical justification for continuing the instruction in the home special education placement that is required of students receiving homebound instruction. The District makes no distinction between instruction in the home and homebound instruction based upon the belief that for students who are provided with academic instruction at home, the term "instruction in the home" is used for special education students while homebound instruction is the term used for regular education students. Instruction for 10 hours/week is the standard amount of time allotted for "in-home" educational services (N.T. pp. 93—96, 103—105, 176, 182, 183, 186, 193—195; P-9, P-10, P-12)
37. The District did not consider or explore the possibility of looking to another public agency or to any community resources for a program that could provide services to Student other than at home. The District's goal is to return Student to a public school setting, but District has taken no steps to develop a plan for transitioning Student into a school-based placement. (N.T. pp. 196, 197)

DISCUSSION AND CONCLUSIONS OF LAW

Before turning to a discussion of the specifics concerning the District's IDEA violations with respect to Student, it must be noted that the record in this case reveals a marked, surprising and disturbing lack of understanding by the District of the extent of its obligations to provide a free, appropriate public education (FAPE) to an IDEA eligible student. The District has an incorrect understanding of the law with respect to a number of very basic IDEA concepts, *i.e.*, (1) the obligation to conduct evaluations that are sufficiently comprehensive to thoroughly investigate all areas of suspected disability and identify all special education and related services needs; (2) the obligation to propose annual IEPs that include a description of all current needs and how the District proposes to meet those needs via appropriate goals and specially designed instruction; (3) the obligation to develop appropriate transition to adult life goals and a coordinated set of activities directed toward meeting transition goals; (4) the obligation to appropriately monitor Student's progress toward IEP goals; (5) the obligation to assure that IDEA eligible students have the opportunity, as appropriate, to participate and advance in all aspects of the regular education curriculum; (6) the important difference between instruction in the home, an IDEA placement option, and homebound instruction, a temporary excusal from school due, generally, to a temporary illness/injury and available to all student as a regular education accommodation; (7) the continuing obligation to evaluate a special education placement to assure that it remains appropriate for the eligible student in all aspects, including the requirement that the placement is the least restrictive environment appropriate for assuring that an eligible student has a reasonable opportunity to make meaningful progress; (8) the obligation to identify related services necessary for an eligible student to benefit from special education services, and offer such services, if necessary.

Contrary to the implicit contention underlying the District’s position in this matter, parents and the District do not bear equal or even equivalent responsibility for assuring that the requirements of the IDEA statute and regulations described above are met. Many court decisions have emphasized that Parents are entitled only to an appropriate program/placement, reasonably calculated to assure that an eligible student makes meaningful educational progress, not a particular type or location of service. *See, e.g., J. L. v. North Penn School District*, 2011 WL 601621 (E.D. Pa. 2011) at *6; *J.E. v. Boyertown ASD*, 2011 WL 476537 (E.D. Pa. 2011) at *11: “Parents do not have the right to compel the District to provide a specific program....”

The other side of that coin, however, is the absence of an obligation on the part of parents to precisely identify an eligible student’s needs, explicitly request services that are necessary to meet such needs, or to know the full extent of school district obligations and responsibilities under IDEA. School districts, with their educational expertise and resources, are obligated to appropriately evaluate eligible students, determine the full extent of their needs, particularly as related to school and develop a plan to address all such needs. The nature, severity and extent of an eligible student’s needs, and the difficulties inherent in appropriately meeting such needs do not relieve or lessen the responsibilities IDEA imposes on school districts.

The record in this case establishes that Student has extensive unaddressed needs in the areas of academic instruction, social skills training, transition to adult life services, speech/language therapy, occupational therapy and emotional support. A review of the applicable legal standards with respect to each aspect of the dispute in this case provides a useful framework for addressing the specific issues.

Procedural Safeguards/Burden of Proof

The substantive protections of the IDEA statute and regulations discussed below are enforced via procedural safeguards available 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 235, 240 (3rd Cir. 2009).

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 proof. In this case, since Parents filed the complaint, it was their obligation to prove each of their claims. As is also usual in civil cases, Pennsylvania federal courts have generally required that the filing party meet their burden of persuasion by a preponderance of the evidence. See *Jaffess v. Council Rock School District*, 2006 WL 3097939 (E.D. Pa. October 26, 2006).

FAPE Requirements

Under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400, *et seq.*, and in accordance with 22 Pa. Code §14 and 34 C.F.R. §300.300, a child with a disability is entitled to receive a free appropriate public education (FAPE) from the responsible local educational agency (LEA) 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).

Evaluation Standards

The IDEA statute and regulations require an initial evaluation, provided in conformity with statutory/regulatory guidelines, as the necessary first step in both determining whether a student is eligible for services and in providing special education services. *See* 20 U.S.C. §1414; 34 C.F.R. §300.8(a). The primary purpose of the initial evaluation is, of course, to determine whether the child meets any of the criteria for identification as a “child with a disability” as that term is defined in 20 U.S.C. §1401 and 34 C.F.R. §300.8, as well as to provide a basis for the contents of an eligible child’s IEP, including a determination of the extent to which the child can make appropriate progress “in the general education curriculum.” 34 C.F.R. §§300.8, 300.304(b)(1)(i), (ii).

After a child is determined to be eligible, the IDEA statute and regulations provide for periodic re-evaluations, which “may occur not more than once a year unless the parent and public agency agree otherwise; and must occur at least once every 3 years, unless the parent and the public agency agree that an evaluation is unnecessary.” 20 U.S.C. §1414(a)(2)(B)(i), (ii); 34

C.F.R. §300.303(b). School districts, however, also have the obligation to “ensure that a reevaluation of each child with a disability is conducted” at any time “the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or if the child’s parent or teacher requests a reevaluation.” 20 U.S.C. §1414(a)(2)(A)(i), (ii); 34 C.F.R. 300.303(a).

The general standards for an appropriate evaluation or re-evaluation are found at 34 C.F.R. §§300.304—300.306, which require a school district to: 1) “use a variety of assessment tools;” 2) “gather relevant functional, developmental and academic information about the child, including information from the parent;” 3) “Use technically sound instruments” to determine factors such as cognitive, behavioral, physical and developmental factors which contribute to the disability determination; 4) refrain from using “any single measure or assessment as the sole criterion” for a determination of disability or an appropriate program. C.F.R. §300.304(b)(1—3). In addition, the measures used for the evaluation must be valid, reliable and administered by trained personnel in accordance with the instructions provided for the assessments; must assess the child in all areas of suspected disability; must be “sufficiently comprehensive to identify all of the child’s special education and related service needs” and provide “relevant information that directly assists” in determining the child’s educational needs. 34 C.F.R. §§300.304(c)(1)(ii—iv), (2), (4), (6), (7).

Every reevaluation (and initial evaluations if appropriate) must also include: 1) a review of existing evaluation data, including a) local, state and current classroom-based assessments; b) classroom-based observations by teachers and related service providers; 2) a determination of additional data, if any, necessary to determine a) whether the child has an IDEA-defined

disability (in the case of an initial evaluation); b) the child's educational needs, present levels of academic achievement and related developmental needs; c) whether the child needs/continues to need specially-designed instruction and related services. 20 U.S.C. §1414(c); 34 C.F.R. 300.305(a)(1), (2). It is the district's responsibility to administer all assessments and other measures needed to compile the required evaluation data. 34 C.F.R. 300.305(c).

With respect to reevaluations, the district must also use the data/information it is required to gather to determine whether any modifications or additions to the special education program are needed to assure that the child can make appropriate progress and participate in the general curriculum. 34 C.F.R. §§300.305(a)(2)(iv).

Once the evaluation assessments are completed, a group of qualified school district professionals and the child's parents determine whether he/she is a "child with a disability" and his/her educational needs. 34 C.F.R. §300.306(a). In making such determinations, the district is required to: 1) "Draw upon information from a variety of sources," including those required to be part of the assessments, assure that all such information is "documented and carefully considered." 34 C.F.R. §300.306 (c)(1). The District must also provide a copy of the evaluation report and documentation of the eligibility determination to the Parents at no cost. 34 C.F.R. §300.306(a)(2). If it is determined that the child meets the criteria for IDEA eligibility *i.e.*, is a child with a disability and is in need of specially designed instruction, an IEP must be developed. 34 C.F.R. §§300.306(c)(2).

IEP

The centerpiece for the implementation of FAPE is the IEP. *S.H. v. State-Operated Sch. Dist. of the City of Newark*, 336 F.3d 260, 264 (3d Cir.2003). The IEP consists of a detailed written statement developed for each child summarizing the child's abilities, how the disability affects performance, and measurable annual goals. *Id.* The IEP specifies the special education services and supplementary aids the school

will provide the child, explaining how these will allow the child to progress. *Id.*

Damian J. v. School District of Philadelphia, 2008 WL 191176 (E.D.Pa. Jan. 22, 2008) at *1, FN.2.

Least Restrictive Environment

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). In order for a proposed placement to meet LRE requirements, school districts must, at a minimum, assure that placement decisions are "made by a group of persons, including the parents and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options" §300.116(a)(1); are "determined at least annually" §300.116(b)(1); are "based upon the child's IEP" §300.116(b)(2). In addition, unless an eligible child "requires some other arrangement, the child [must be] educated in the school he or she would attend if not disabled." §300.116(c).

Application of the Legal Standards to the Facts

There was virtually no conflicting evidence with respect to the facts in this case. The District's defense was it provided the services Parent requested in the setting recommended by an independent psychologist chosen by Parent who evaluated Student on two occasions. Although that is certainly accurate, the District's IDEA responsibilities are far greater and were clearly not fulfilled.

The District's 2009 evaluation was cursory, providing only updated achievement assessments in reading, writing and math. (FF 5) The ER noted Student's many disabling conditions and acknowledged Student's speech/language impairment and deficits in fine motor

skills, both of which are likely to have a significant impact on academic tasks and progress, and did in this case, but recommended no additional evaluations to determine the full extent of Student's needs in those areas or address them. (FF 8, 9, 19, 20, 21, 24, 33)

The District relied on Parent's apparent satisfaction with services she was receiving privately to conclude that there was no need to address those issues. There was no evidence, however, that the District ever sought or obtained information concerning the goals and focus of the private therapies Student was receiving to determine whether additional services, specifically directed toward improving educational performance, are necessary.

Student's IEPs included academic goals limited to reading, writing and math only, instruction targeted to the writing goal was not provided regularly, and there was little effort made to track Student's progress toward the IEP goals until very recently. (FF 23, 29, 32) The number of hours of instruction provided to Student was based on the District's formula for educating both regular education and special education settings in the home setting when necessary. (FF 16, 36) No consideration was given to determining whether 10 hours of weekly instruction, delivered in two hour blocks in the late afternoon, is reasonably calculated to assure meaningful progress for Student, given the significant physical conditions that adversely affect Student's strength and ability to attend to instruction. The District also gave no thought to assuring that Student had access to the content areas of the general education curriculum, such as science and social studies, despite the opinion of the teacher who provided Student's instruction for three years that Student would benefit from such instruction if provided earlier in the day. (FF 26, 27) The District apparently believes that the difficulty of providing instruction other than after regular school hours relieves it of the obligation to provide instruction in all areas of the curriculum. (FF 28)

The District also expended no effort, in the context of IEP team meetings, to determine instructional methods and materials that appropriately meet Student's academic needs. Student's teachers have had to find and/or adapt materials and instructional methods, including the benefits of technology, to assure that Student had access to beneficial reading and math instructional materials. (FF 18, 24, 25) It is a testament to the skill and dedication of the teachers that Student was able to make approximately a year's worth of progress in each year in reading and math, although Student still remains far behind peers of the same age. The now-retired teacher who instructed Student for three years provided enriching educational experiences to address academic deficits that were not considered or addressed through the IEP process. (FF 22) Those academic areas, however, were the only needs addressed by the District and, therefore, represent little progress.

Clearly, Student's physical/neurological conditions and anxiety, and the many years of instruction in the home, it is not feasible to meet the LRE goal of instruction in a regular classroom, or in any public school placement at present. That does not mean, however, that the District is justified in keeping Student in a very restrictive placement forever. Although the District expressed a vague aspiration to return Student to school, the District acknowledged that it never considered evaluations or services to address Student's needs in the areas of social skills and anxiety. (FF 33, 37) It is difficult to understand how the District could have any realistic or reasonable goal for developing a less restrictive placement without addressing any of the significant issues that currently require a very restrictive placement for Student in order to receive even the minimal educational services the District has been providing.

In short, all of the essential facts in this case establish that the District did not even attempt to fulfill its IDEA obligations to Student, and, indeed demonstrated very little understanding of those obligations.

To begin the process of rectifying the District's significant lapses for the future, the District will be required to provide evaluations to fully explore the extent of Student's needs in all areas and obtain recommendations for appropriate services. In light of the extent of the District's IDEA violations in this case, independent evaluations at the District's expense will be ordered pursuant to the broad equitable powers describe by the Court of Appeals in *Ferren C. v. School District of Philadelphia*, 612 F.3d 712.

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 at 718, 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 (3d

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.

As discussed above, the District in this case demonstrated a complete lack of understanding of its responsibilities to Student under IDEA. There is no basis in this case for excusing the District's significant lapses and reducing its responsibility for providing replacement services by providing a period for rectifying the problem. The origin of the problem in this case was the District's failure to become fully and accurately informed of the requirements of the IDEA statute, and thereby understand its IDEA obligations sufficiently to fulfill them. Parent will, therefore, be awarded a full two years of compensatory education, as requested, in addition to compensatory education hours for the IDEA violations that have continued into the current school year.

Parent parsed the hours of compensatory education requested in terms of the types and amounts of services denied. For the most part, the hours and the types of services for which Parent requests compensatory education are reasonable and will be awarded with some modifications.² Because of the District's failure to even consider providing Student with any exposure to the regular education curriculum, and its failure to appropriately evaluate Student to assist in determining how many additional hours of instruction that would have been sufficient but not overwhelming, given Student's health and tendency to fatigue easily, Parent's request for an additional 3.75 hours for forty weeks for the 2009/2010 and 2010/2011 school years and half

² Parent's claims for compensatory education hours are based on a 40 week school year and many categories of hours in Parent's Closing Statement are based upon 2 full school years, plus half of the current year. The two year period, however, began in November 2009, not the beginning of the 2009/2010 school year. The number of weeks included in the 2009/2010 school year should be 31. In addition, there were 22 weeks of school from the beginning of the current school year until the date of the due process hearing. Parent did not explicitly include compensatory education for ESY services in the calculation of hours. Deficiencies in the services provided in the summers encompassing the period in dispute are fairly covered by allowing a full 40 weeks for two full school years, along with the 20 weeks Parent requests for the current year, 40 weeks will be used for awarding compensatory education for the 2009/2010 school year.

of the current school year will be granted, and those hours will continue to accrue until the District adds that amount of time to Student's instruction. The additional hours represent the amount of time Student should have been exposed to the regular education curriculum from the beginning of the recovery period to the date of the due process hearing, and should now be provided until a final IEP is developed, based upon thorough and appropriate evaluations.

Since the District acknowledges that it owes Student 100 hours of compensatory education for failing to provide any instructional services at all for 14 weeks at the beginning of the current school year, those hours will be included in the award.

Parent's request for an hour of compensatory education for speech/language and OT services is reasonable. In general, students exhibiting significant needs in these areas, as Student in this case certainly has, are provided with that level of services.

On the other hand, Parent's request for compensatory education for all hours of instruction provided over the past period in dispute based upon the District's failure to provide a special education teacher is excessive. There is no absolute requirement that a special education teacher provide all academic instruction to an IDEA eligible student. In fact, the IDEA LRE requirement suggests otherwise. An eligible student educated with non-disabled peers to the maximum extent appropriate might spend the entire day in regular education classes and receive considerable instruction from a regular education teacher.

Moreover, the evidence in this case establishes that the teacher provided by the District developed a good rapport with the family, and Student made appropriate progress in the subjects in which he provided instruction. The teacher, however, should have been in regular contact and consultation with a special education teacher/case manager who assisted the regular education teachers in assuring that Student's goals were implemented and directed appropriate progress

monitoring on the goals and assured that the teacher was using instructional materials and strategies appropriate for Student's needs. The District should have provided for at least one hour of such consultation time weekly, and an additional 2 hours/week will be awarded for the District's failure to assure that the teachers who instructed Student were provided with appropriate, research-based programs appropriate for Student's learning needs.

Parent requested an hour of transition services weekly for the 2010/2011 school year and the 2011/2012 school year to date. Transition services include identifying interests and assessing needs in areas such as academic skills, social skills and independent living skills, none of which has been provided to Student. An hour/week to replace those services is reasonable and will be awarded.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, the Abington Heights School District is hereby **ORDERED** to take the following actions:

1. Convene an IEP team meeting no later than March 30, 2012 to discuss [Student's] special education program, placement and related services needs as currently known and develop an appropriate interim IEP that meets all statutory/regulatory requirements. In addition to the minimum IEP team members specified in the IDEA regulations (34 C.F.R. §300.321, 322), the meeting shall include a guidance counselor, speech/language therapist, occupational therapy provider, and the District's transition coordinator. The District shall also explore community and other public agency resources to determine whether additional participants should be invited to attend the IEP meeting, provided that the attendance of any such participants is subject to Parent's approval.
2. As part of the process of beginning to develop an appropriate interim IEP, the District shall be prepared to discuss a realistic and reasonable plan for a less restrictive special education placement for Student, including identifying potential placements and/or services/locations, and outlining the supports and services that presently appear necessary to assure that a proposed placement will afford Student the opportunity for meaningful educational progress, including services necessary to support Student's transition to a less restrictive placement.

3. Fund independent evaluations by providers of Parent's choice in the following areas: medical, psychological (specifically including social/emotional issues and needs), psychiatric, educational, speech/language, occupational therapy, assistive technology and transition to adult life. The purpose of the evaluations is to identify Student's needs as they relate education. To the extent necessary after receiving the evaluation reports, the District shall contact the evaluators to discuss how recommendations related to Student's education can be adapted in order to be appropriately implemented by the District.
4. After all evaluations are completed, the District shall convene Student's IEP team to begin developing a final program/placement for the 2012/2013 school year, shall thereafter convene as many additional meetings as necessary to complete an appropriate IEP, and shall thereafter comply with all substantive and procedural IDEA requirements found in federal and Pennsylvania statutes and regulations.
5. Provide [Student] compensatory education as follows, based upon the reasons and explanations set forth in the accompanying decision:
 - a. 923 hours, representing the amount of compensatory education due from November 11, 2009 to the date of the February 9, 2012 due process hearing.
 - b. 6.75 hours/week from February 13, 2012 until March 9, 2012.
 - c. Compensatory education hours shall continue to accrue until the first week in which the District provides Student with an additional 3.75 hours of instruction, 1 hour of speech/language therapy, 1 hour of occupational therapy, 1 hour of transition services. The compensatory education hours that accrue weekly shall decrease by the amount of time specified for each service as it is added to Student's program.
 - d. Compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product or device that furthers the goals of Student's current and future IEPs and/or will otherwise assist him/her in overcoming the effects of his/her disabilities.
 - e. The compensatory education shall be in addition to, and shall not be used to supplant, educational services and/or products/devices that should appropriately be provided by the School District through Student's IEP to assure meaningful educational progress.
 - f. Selection of compensatory education services, products or devices shall be at Parent's sole discretion.
 - g. Parent may use part of the compensatory education award to pay for the services of a knowledgeable, independent educational consultant to help her choose appropriate compensatory education services/products/devices,

provided, however, that any such consultant may derive no financial benefit from the services s/he recommends or from the providers of such services;

- h. Compensatory services may occur after school hours, on weekends and/or during the summer months when convenient for Student and Parent. The hours of compensatory education, or fund for compensatory education services/products/devices, should the District choose to create such fund, may be used at any time from the present to Student's 21st birthday

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

March 13, 2012

Anne L. Carroll

Anne L. Carroll, Esq.
HEARING OFFICER