

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

Pennsylvania

Special Education Hearing Officer

DECISION

Child's Name: R.F.

Date of Birth: [redacted]

Dates of Hearing: 3/6/2015, 6/3/2015, 6/4/2015, and 6/5/2015

CLOSED HEARING

ODR File No. 15844-14-15

Parties to the Hearing:

Representative:

Parents

Parent[s]

Parent Attorney

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Date Record Closed:

July 3, 2015

Date of Decision:

July 13, 2015

Hearing Officer:

Cathy A. Skidmore, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

The student (hereafter Student)¹ is an early-teenaged student in the Warren County School District (District) who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).² Student's Parent filed a due process complaint against the District asserting that it denied Student a free, appropriate public education (FAPE) under the IDEA and Section 504 of the Rehabilitation Act of 1973,³ as well as the federal and state regulations implementing those statutes.

The case proceeded to a due process hearing convening over four sessions,⁴ at which the parties presented evidence in support of their respective positions. The Parent sought to establish that the District failed to provide Student with FAPE from January 2012 through the end of the 2014-15 school year,⁵ and thereby also discriminated against Student on the basis of Student's disability; the Parent sought compensatory education. The District maintained that its special education program, as offered and implemented, was appropriate for Student and that it did not engage in discrimination. For the reasons set forth below, I find in favor of the Parent on her claims.

ISSUES

1. Whether the District provided an appropriate educational program to Student beginning in January 2012 and continuing through to the present;
2. If it did not, is Student entitled to compensatory education and in what form

¹ In the interest of confidentiality and privacy, Student's name and gender, and other potentially identifiable information, are not used in the body of this decision.

² 20 U.S.C. §§ 1400-1482.

³ 29 U.S.C. § 794.

⁴ The exhibits identified in Hearing Officer Exhibit (HO-) 2 at pp. 3-5 are hereby admitted, as are HO-1 and HO-2. Parent Exhibits will be referenced as "P-" followed by the number, and School District Exhibits will be referenced as "S-" followed by the number. Exhibits which are duplicative (*e.g.*, P-1 and S-17) are referenced to that of one party or the other, or occasionally both. Citations to specific page numbers in exhibits, particularly large documents (*e.g.*, S-26), are not necessarily exhaustive.

⁵ The parties had an agreement to toll the original filing date. (Notes of Testimony (N.T.) 19-20)

and amount?

3. Did the District discriminate against Student on the basis of Student's disability?

FINDINGS OF FACT

1. Student is an early-teenaged student who is a resident of the District and is eligible for special education on the basis of an Autism Spectrum Disorder and a Speech/Language Impairment. (N.T. 31-32; P-1 p. 9; S-17 p. 9)
2. Student exhibited developmental delays in Student's first year, and was diagnosed with Pervasive Developmental Disorder at the age of 14 months. Student was provided with speech, occupational, and physical therapy due to those delays. (N.T. 771; P-1 p. 3; S-2)
3. Student attended kindergarten in the 2008-09 school year at an approved private school operated by a behavioral service institution (hereafter BSI) in a nearby city. (N.T. 772-74; P-64)
4. Student entered the District the following year, repeating kindergarten. (N.T. 772, 775, 863-64)

Communication Needs

5. Student is essentially nonverbal and has apraxia. The Parent attempted to use the Picture Exchange Communication System (PECS) with Student at an early age, but Student did not show interest in PECS. (N.T. 774-77, 860, 1015, 1018; P-1 p. 3, P-62 p. 2)
6. Student has had parentally-arranged speech/language therapy on a weekly basis since kindergarten. (N.T. 1003-04, 1020)
7. During the District kindergarten year, the Parent made a recommendation to the District for an iPod for Student. The District contacted the local Intermediate Unit (IU) and learned about an app, Proloquo2Go, an augmentative communication application available for Apple products such as the iPod and iPad. Proloquo2Go uses PECS icons. The District obtained the app for Student and installed it on Student's iPod. (N.T. 205-08, 234, 777-78, 866-67, 875-76)
8. The Parent took an active role in setting up the Proloquo2Go app for Student on the iPod and an iPad. There were at times "glitches" with the app, sometimes as a result of synchronization across devices and with computers. Additionally, there were at times conflicts between the District and Parent with use and location of device apps, such as icons being moved from folders. (N.T. 209-13, 216-19, 228-29, 230-32, 237, 422, 426, 843-46, 911-12, 1000, 1029; S-26 pp. 11, 138)
9. Student showed an immediate interest in the Proloquo2Go icons, and the Parent arranged them into folders that were useful for Student. She also took photographs using a District

camera to add personal icons to Student's Proloquo2Go app. Student was successful in communicating with the Parent using Proloquo2Go by the middle of the kindergarten year, particularly for expressing wants and needs. (N.T. 216-17, 778-82, 867-70, 999)

10. The Parent worked to make Proloquo2Go functional for Student on an ongoing basis, continually adding content that expanded to include academic information and phrases that were specific to Student at school. It was necessary to synchronize or back up the content used in the Proloquo2Go app. The Parent encountered difficulties in backing up the content, sometimes losing information added for Student. (N.T. 781, 783-84, 786, 868, 870-71; P-9, P-60)
11. Student used the iPod at school primarily for communication such as greeting others and socializing with peers. Student usually needed prompting to use the iPod but was comfortable using it. (N.T. 59, 114-15, 185, 200-01, 409, 427-28, 651, 664, 697-98, 739, 765, 782-93, 851, 913, 915-16, 999, 1002, 1038, 1042, 1079-80, 1089, 1122-24; P-1 p. 2)
12. Student used the iPad at school that also went home, but the device was used infrequently in the classroom on a regular basis. Student at times needed prompting to use the iPad. Some days, Student did not bring the iPad to school. (N.T. 115-16, 409, 417-18, 427, 429, 431, 698-99, 843-45, 893-95, 912, 914, 1004-05, 1025-27, 1042-44, 1047-49, 1079; S-72)
13. There were occasions when Student's assistive technology (AT) devices were temporarily unavailable for Student, such as when a wireless printer did not work and when a device needed repair or replacement. Student's teachers at times needed the devices to add information to them. (N.T. 222-23, 226-27, 240-41, 428-29)

Behavioral Needs

14. From the age of 2½, Student was provided behavioral services through a behavioral service institution (hereafter BSI) providing therapeutic support staff (TSS) and behavior specialist consultants (BSC). The focus at the beginning of those services was on communication skills for Student. (N.T. 804, 806, 855, 966; P-1 p. 3; S-1, S-2, S-18)
15. Student had BSI services in the home from a BSC and TSS worker throughout the time period in question, except that TSS services ceased in the spring of 2013. (N.T. 831-33, 888-90, 964, 966-67)
16. BSI developed treatment plans for Student to be implemented in all environments, including at school. The treatment plans have included long term goals and objectives to decrease disruptive problematic behaviors (tantrums, aggression, vocal protests, self-injurious behaviors) across settings; increase functional communication; increase compliance with demands including adult directives; increase success at school including transitions to and between activities/settings; increase age-appropriate social skills; increase independence with activities of daily living; and increase safety in the community. It also provided various interventions to be used toward those goals and objectives and a crisis plan. (N.T. 275-76, 296-97, 312-14; P-62; S-18)

17. BSI conducted a Functional Behavior Assessment (FBA) in April 2012, which identified the behaviors of concern as self-stimulatory behavior (hand flapping, clapping, pounding chest, screeching and giggling). Skill deficits contributing to the behaviors were communication difficulties, physical abilities, fine motor tasks including writing, and sensory input. The hypothesis generated from the FBA was that Student engaged in the behaviors of concern in order to obtain sensory reinforcement and to escape nonpreferred tasks and demands across environments. The FBA was due for updating by the time of the due process hearing. (N.T. 274, 987-89, 992; P-62 pp. 3-5)
18. The District had an agreement with BSI to provide behavioral services for its schools including consultation with staff. That agreement is for ten hours per week with a BSC and ten hours per week with a mobile therapist. (N.T. 48-49, 132-34, 337-38, 354, 611-12)
19. Student had BSI behavioral support services at school that were provided to Student individually outside of the District's agreement with that entity. Student at times had a BSC and TSS worker at school who worked with Student and conducted observations. (N.T. 83-88, 133, 135, 272, 275, 288-89, 297-98, 339, 352-54, 435, 606, 966-70, 981, 1042, 1125-26; P-1 p. 3)
20. Student engaged in problematic and disruptive behaviors at school including aggression, vocalizations, self-stimulatory behavior, and stamping feet, and often had difficulty attending to tasks that were demanding. Student's safety at school and in the community has also been a concern; for example, Student at times eloped or put non-food items in Student's mouth. Student's behaviors interfered with Student's learning. (N.T. 61, 128-30, 289-90, 380-81, 408, 574-75, 630, 632, 643-45, 648-50, 726-27, 924, 941-43, 973-74, 1006-07, 1044-45, 1049, 1112; P-1 pp. 3-5, P-10 p. 9, P-62 pp. 5-6, P-68, P-69; S-18, S-26 pp. 101, 105, 109, 131; S-73 pp. 11-12)
21. Student required significant attention and redirection to stay on task, in addition to breaks throughout, when receiving instruction and therapy, at school. Student also had sensory needs. (N.T. 842-43, 941-44, 946-51, 1010-12)
22. District staff have had to restrain Student at times. (N.T. 633-36, 727-29, 745-47)
23. During the time period in question, the District followed the BSI treatment plan at school to address Student's behavior, following a request by the Parent for it to do so. (N.T. 45, 47-50, 568-69, 576, 590)
24. BSI staff met with District staff from time to time in order to discuss and model behavior interventions and to promote skill transfer, i.e., generalization of behavior skills consistently across people in other environments. (N.T. 280-81, 300-01, 313-14, 321, 327, 402-04, 415, 628, 672, 768-69, 982-83, 984-85; S-60)
25. The District did not include behavior goals or a Positive Behavior Support Plan (PBSP) in Student's Individualized Education Programs (IEPs) because it was implementing the behavior plan created by BSI. (N.T. 128-29, 149-50, 0345-46, 351, 569, 576, 579, 583)

26. The District did not consider developing a behavior plan for Student when Student was participating in the cyber program at home. (N.T. 81-82, 600-01)
27. The District consistently checked the question regarding behaviors that impede learning on the special considerations page of Student's various IEPs prior to November 2014 as "no," because its personnel believed Student's behaviors were typical for children with Student's disability and were being addressed appropriately in the autistic support program. (N.T. 42-47, 128-32, 342-43, 406, 408, 573, 575, 723-24; P-3 p. 5, P-7 p. 5, P-P-14 p. 5; S-45 p. 5, S-68 pp. 6-7, S-79 p. 6)
28. The District relied on the BSI staff to measure and report Student's behaviors, including progress on behavioral goals that BSI developed, and BSI staff did all data collection at school for Student's behaviors. Typically a TSS worker collected data to assess frequency of behaviors. BSI staff would use this data for treatment plan decisions, including reauthorization, but it was not typical information for discussion at IEP meetings. The Parent communicated to the District that she would contact BSI staff about collecting behavioral data as part of its service to Student. (N.T. 89-90, 94-96, 144-45, 299, 304-08, 309, 323-24, 326-27, 382-83, 413-14, 971, 977; P-10 pp. 3, 5; S-18, S-26 p. 6, S-27 p. 1)
29. The BSI staff attended IEP meetings at the request of the Parent, not the District. (N.T. 83-87, 298, 318, 322-23, 328, 361, 588, 807)
30. District staff attended interagency meetings with BSI staff regarding Student. The purposes of some of those meetings, conducted two or four times per year, were to discuss behavioral interventions and to make revisions to, determine progress with, and obtain reauthorization for continuation of, behavioral services across all settings. (N.T. 88, 94-96, 134-35, 137-38, 169-73, 278-79, 282, 297, 307, 319-20, 329-30, 340-41, 361-63, 610, 613, 971-73; S-18)
31. Student's most recent treatment plan with BSI was developed in February 2015. (P-62)

2010-11 School Year

32. The District conducted an evaluation of Student during first grade and issued a Reevaluation Report (RR) in February 2011. This RR reflected a summary of records, input from the Parent and teachers, and classroom observations (many with Student working with only the Parent, with TSS worker or BSC also present) in addition to standardized assessments and rating scales (Autism Rating Scales – Social Responsiveness, Vineland Adaptive Behavior Scales, Child Behavior Checklist). The Beery Developmental Test of Visual Motor Integration could not be interpreted. The District school psychologist also administered the Bracken School Readiness Assessment, a nonverbal assessment, and Student achieved scores ranging from 9% to 100%; no standard scores were reported apparently because of Student's age (see P-8 p. 2). (P-1; S-17)
33. The RR contained recommendations to Student's Individualized Education Program (IEP) team, including a highly structured program with small class size, consistency in

instructional and behavioral strategies and approaches, extra time for processing information, use of visual materials, and a means of functional communication. P-1 pp. 23-24; S-17 pp. 23-24)

34. An Assistive Technology (AT) Assessment was conducted by the District after the RR, and made recommendations for Student to use an iPod and iPad for communication. (P-2)
35. An IEP was developed in March 2011. The team determined that Student did not exhibit behaviors that impede his/her learning or that of others. The IEP summarized Student's present levels of academic achievement and functional performance with input from the teachers and speech/language therapist, as well as input from the Parent. Needs were identified for social language and other expressive and receptive language skills, communication skills and use of AT, and pre-academic skills in language arts and mathematics. (P-3)
36. The March 2011 IEP contained goals addressing expressive, receptive, and social language (to increase those skills with decreasing prompts); completion of language arts and mathematics work; peer interactions (initiating interactions during recess or playtime); use of the iPod to communicate needs; and completion of activities of daily living. Program modifications and items of specially designed instruction included a visual schedule; physical prompting and assistance; verbal reinforcement/praise; wait time; repeated directions; a personal care assistant; manipulatives; social skills instruction; use of an iPod and iPad; and small group and individual instruction and speech/language therapy. Adaptive physical education, occupational and speech/language therapy, AT consultation, and transportation were provided as related services. The IEP proposed supplemental autistic support with participation outside the regular education environment for language arts, mathematics, and science. (P-3)

2011-12 School Year

37. The District issued a new RR in October 2011 to include assessment of Student's gross motor development. The physical therapist utilized the School Function Assessment and concluded that Student qualified for physical therapy services. An updated classroom observation was also summarized, in addition to teacher recommendations that included addressing Student's self-stimulatory and aggressive behavior and vocalizations. (P-6)
38. A new IEP was developed in October 2011. This document contained updated information for the present levels of academic achievement and functional performance, and the team specifically noted that, "[t]here is a great concern on everyone's part with regards to aggressive behavior (biting, throwing things, etc [sic]). While stimming behaviors have always been a challenge to control with [Student], aggression has never been an issue. The intensity and frequency of aggression both [at] school and at home is very concerning." (P-7 p. 10)
39. Needs identified in the October 2011 IEP were behavior (self-stimulatory, aggressive, and inattentive); functional communication; academic skills; following directions;

occupational, physical, and speech/language therapy; personal care skills; and transportation. The expressive, receptive, and social goal remained the same, but the language arts and mathematics goals were revised based on new present levels (correctly answering reading comprehension questions, correctly spelling words, writing sentences about a picture, and correctly solving mathematics problems). The peer interaction goal was removed but made an item of specially designed instruction. Other program modifications and specially designed instruction related to the personal care assistant, physical prompting as needed, chunking of assignments, small group instruction, and a pass/fail grading system. Physical therapy was added as a new related service. This IEP continued to propose supplemental autistic support, with Student participating in regular education for morning and end of day routines, social studies, health, science, and specials. (P-7)

40. In early March 2012, Student's second grade class had treats for St. Patrick's Day. Student had a serving of chocolate chips that had previously been provided by the Parent to substitute for treats the other children occasionally had. After Student arrived home from school that day, the Parent noticed a brown substance under Student's shirt. She concluded it was frosting or something similar, but was concerned about how it had occurred. (N.T. 105-06, 792-93, 796-800, 881, 1052-56, 1058, 1066, 1068-69; P-18; S-33)
41. A meeting convened after the treat incident at which the Parent expressed concerns about Student's safety. No one in the District understood how the incident happened, as Student's teacher and TSS were present for the treats, but most believed the substance was the Parent-provided chocolate chips. The team also discussed Student's progress, peer interactions, and behaviors at the meeting. The Parent began to explore other options following the meeting, and Student did not return to the classroom. (N.T. 385-88, 801, 802-03, 812-13, 1056-58; P-10)
42. Student was placed on homebound instruction after the treat incident, but no instruction was provided in the home. For some period of time, the District provided related services (occupational, physical, and speech/language therapy) at home. For the remainder of the school year, Student returned to school only for related services and computer-based reading and mathematics activities provided in the autistic support classroom, SuccessMaker (SM), used by the District as a method of monitoring student skills in those areas. (N.T. 374-75, 389-94, 522, 524-25, 536-37, 538-39, 545-48, 599, 809-10, 820, 824)
43. Student began a cyber school program in the home after March 2012 following a brief period of home-schooling. The Parent assisted Student with the program as a learning coach. The District did not provide specific support to the Parent on how to adapt and modify the cyber program for Student, but the Parent did ask questions of District staff for assistance in its implementation and advised them of the "significant adaptations" she was required to make to the curriculum for Student (P-14 p. 8). (N.T. 110-12, 175-76, 181, 374, 457, 522-24, 526, 529-30, 593, 809-10, 812, 816-20; P-14)

44. Student's IEP was not revised after Student began receiving the majority of instruction at home, but the team did meet in June 2012. The team discussed Student's educational progress and then current program that included cyber school at home and autistic support and related services at school. (N.T. 395-97, 452-53, 522, 532, 534, 535; P-12⁶)

Independent Educational Evaluation

45. An IEE was conducted at District expense in December 2011. The IEE report summarized the District's RR, a 2011 evaluation by another institution, and another behavioral service organization evaluation. (N.T. 917-18; P-8)
46. Cognitive assessment for the IEE (Comprehensive Test of Nonverbal Intelligence – Second Edition and Pictorial Test of Intelligence – Second Edition) revealed scores in the deficient range, although the examiner noted the need for instructions to be clear so that Student was assessed on skills rather than the ability to understand directions or demands. Motor and perceptual skills (Beery-Buktenica Developmental Test of Visual-Motor Integration) results were in the deficient range. Academic Achievement was not completed as Student did not respond to this test administration. (P-8)
47. The IEE also reported on Student's social/emotional/behavioral functioning with rating scales completed by the Parent, teachers, and the TSS worker. Clinically significant concerns on the Behavior Assessment System for Children – Second Edition were noted by the Parent for Activities of Daily Living, and as at-risk for Atypicality, Attention Problems, Social Skills, Leadership, and Functional Communication. Clinically significant concerns by the teachers were for Hyperactivity, Somatization, Learning Problems, Attention Problems, Atypicality, Withdrawal, Social Skills, Study Skills, and Functional Communication and as at-risk for Adaptability and Leadership. The TSS worker reflected clinically significant concerns for Somatization, Learning Problems, Attention Problems, Atypicality, and Functional Communication, and as at-risk for Hyperactivity, Depression, Withdrawal, Social Skills, Study Skills, and Adaptability. On the Social Responsiveness Scale, the teachers and TSS worker provided ratings in the upper level of the mild to moderate range and in the severe range. Parent report of adaptive behavior (Adaptive Behavior Assessment System – Second Edition) revealed deficient skills in social, conceptual, and practical skills. (P-8)
48. The private psychologist who conducted the IEE provided Axis I and II diagnoses of Autistic Disorder and Mental Retardation. Significantly, he noted that Student's limited functional communication skills hampered the ability to evaluate the accuracy of responses in assessments; however, he also considered that Student often required multiple responses before choosing the correct answer. The psychologist concluded that Student "often did not significantly exceed the level of accuracy that could be achieved by chance alone." (P-8 p. 17) He also suggested that Student relied on rote memory in responding to prompt questions. However, he also noted that Student's lack of consistent functional communication hampered any estimate of what Student knew. (P-8)

⁶ There are notations on some exhibits, including P-12 at p. 3, that were part of the exhibit provided and not made by this hearing officer.

49. The private psychologist made a number of recommendations for Student's educational program, including behavioral programming that limited multiple responses; intensive mathematics instruction with repetition, manipulatives, and frequent review; preteaching; communication and social skills instruction; strategies for coping with anxiety and demands; sensory and other breaks; multi-sensory strategies; chunking of materials and information; a replacement curriculum in a self-contained classroom for most of the school day; and encouragement of consistent use of AT devices. (P-8)

2012-13 School Year

50. Student began a different online program in the fall of 2012 through the local IU. Student attended school for lunch recess, specials, and related services, and some time in the autistic support classroom for the SM computer based program. (N.T. 177-78, 829-30, 877-79; P-14 p. 4, P-47)
51. Student's IEP was revised in November 2012. This document provided present levels of academic achievement and functional performance, and identified needs identical to those in the prior IEP with the addition of Parent-Teacher communication for the cyber program. Three annual goals addressed accurate demonstration of actions related to community signs; "appropriately" communicating wants and needs at school (S-45 p. 16); use of various communication methods to ask/answer questions, express wants/needs, and demonstrate comprehension of content area concepts; and advancing one grade level on the SM program. New program modifications/items of specially designed instruction were a visual schedule; cuing for speech production; sensory break opportunities; and assignment accommodations for the online program, in addition to those from the previous IEP. Related services of AT, occupational therapy, and physical therapy remained. This IEP proposed itinerant autistic and speech/language support. (S-45)
52. The Parent sought an extension of homebound instruction in January 2013, but the District did not apply for that extension. Student's IEP team met in February 2013 and the District recommended Student's return to a half-day school program. The Parent did not approve the Notice of Recommended Educational Placement (NOREP). (N.T. 535; P-16; P-42 p. 30; S-48)
53. At an IEP meeting in March 2013, staff from BSI attended and informed the team that they were discontinuing behavioral services at home for safety reasons. (N.T. 76-78; P-19)
54. Student began a new online program in April 2013, Acellus, because of concerns with Student using the original online program. The Parent met with the District and agreed to this change, and found it overall to be a better cyber program for Student. She approved the NOREP for the in-home cyber program. (N.T. 446, 824-26, 829-30, 907-08; P-58)
55. The District provided Student with a laptop to access the Acellus program. (N.T. 236-37)

56. Student attended a summer program in 2013. Student had a full-time aide as well as a TSS worker for that program. Student also continued to use the Acellus program at home over the summer. (N.T. 624-27, 677-78, 680, 895-96)

2013-14 School Year

57. Student's IEP team met again in September 2013. The team discussed having Student participate in the Acellus program at school in the fall 2013 because of continued problems using it at home. (N.T. 461-62; P-21)
58. Student's IEP team met again in November 2013. The District at that time recommended that Student return to school, and developed a draft IEP that provided updated present levels of academic achievement and functional performance. This IEP contained goals for "improve[d]" expressive language skills (S-68 p. 18); accurate demonstration of actions depicted on community signs; "improve[d]" fine and gross motor skills for writing legibility (S-68 p. 20); gross motor skills (walking throughout the school building); accurately answering reading comprehension questions; accurately spelling words; writing sentences about a picture; and accurately counting coins. Program modifications and specially designed instruction were similar to previous IEPs with the addition of an adult escort into the building and non-violent crisis intervention. Related services were for AT, occupational and speech/language therapy, and a personal care assistant. Supplemental life skills support was recommended. (N.T. 467, 699-700; S-68)
59. The Parent did not approve the NOREP accompanying the November 2013 IEP. (S-70)
60. From the end of September 2013 to the end of the school year, Student attended school for approximately three hours a day for related services, specials, lunch and recess. In the spring semester, Student also attended a life skills class one day each week. In that life skills class, Student worked individually with the teacher and an aide on recognizing and understanding community signs. Student also continued working on the Acellus program at home throughout that school year. (N.T. 180-84, 637-40, 656, 693-95, 836-38)
61. Student was better able to identify community signs than to apply them by indicating what one should do when seeing a particular sign. The life skills teacher used a smart board as well as signs in the school building in working with Student. (N.T. 696-97, 699, 708, 763-64, 836-37)
62. The Parent worked with Student on the community signs using Student's iPad, and the District speech/language therapist believed that Student was capable of identifying the signs that the life skills teacher was working on with Student. (N.T. 836-37, 1016-1017)

2014-15 School Year

63. A new IEP was developed in September 2014. This IEP included current information on Student's present levels of academic achievement and functional performance, and identified needs for life skills and autistic support; speech/language, occupational, and physical therapy; AT; "substantial modifications" to the curriculum and intensive instruction (S-79 p. 14); prompting and the support of a PCA; and transportation. Goals

were proposed for “improve[d]” expressive language skills (S-79 p. 21); accurate demonstration of actions depicted on community signs; “improve[d]” fine and gross motor skills for writing legibility (S-79 p. 22) and filling in blanks; gross motor skills (walking throughout the school building); accurately answering reading comprehension questions; accurately spelling words; writing sentences about a picture; accurately solving mathematics problems; increasing compliance with adult directives; and independently communicating with peers using AT. (S-79)

64. Program modifications and specially designed instruction in that IEP were for direct reading instruction, hand over hand assistance, de-escalation of anxiety/agitation, and a PBSP. Related services were proposed for AT, speech/language, occupational, and physical therapy, a PCA, and transportation. Student would participate in the regular education environment for lunch, recess, art and music; and the District proposed itinerant life skills and autistic support. (S-79, S-86)
65. The PBSP identified four target behaviors: verbal protest, crying, plugging ears, and aggression. The goal for the plan was to increase compliance with adult directives and the daily schedule of activities, with specified behavioral interventions when Student did not comply. The PBSP included an FBA as well as a crisis management plan. The hypothesis of the function of Student’s concerning behaviors was to gain attention or to avoid/escape demands, activities, and noisy or unstructured situations. (N.T. 103-04; S-80)
66. Student had a different full time aide for the 2014-15 school year. (N.T. 724, 736)
67. Student returned to school following the November 2014 IEP meeting but continued to use the Acellus program at home. Student also used the Acellus program at school each day for approximately 15-20 minutes, but with the life skills support teacher on a one-on-one basis in addition to the support of an aide. The life skills support teacher tried to minimize distractions for Student during the Acellus program instruction and provided a picture schedule similar to what the Parent used at home. (N.T. 101-03, 112-13, 158, 713-14, 721-23, 724-25, 740-44, 749, 761-62, 840-41)
68. Student’s IEP was revised in November and December 2014. Unlike in prior IEPs, this document indicated that Student’s behavior did impede his/her learning or that of others. Also included was updated information on Student’s present levels of academic achievement and functional performance. The goals were nearly identical to those in the September 2014 IEP. Program modifications and specially designed instruction were for the option to provide electronic responses for written work; a liaison between home and school for the online program; adult support for social interactions and class participation; monitoring of online assessments by District staff; social skills instruction; hand over hand assistance; de-escalation of anxiety/agitation; and a PBSP. Related services were proposed for AT, speech/language, occupational, and physical therapy, adaptive physical education, a PCA, and transportation. Student would participate in the regular education environment for specials, lunch, and recess, with continuation of the online program at home for content area classes. This IEP proposed itinerant life skills and autistic support. (N.T. 101-02; S-87, S-88)

69. The Parent did not approve the December 2014 NOREP. (N.T. 101-02)
70. Student stopped attending school in late April 2015 for health reasons. At that time, Student was also exhibiting an increase in problematic behaviors. (N.T. 738-39, 901)

Cyber Programming

71. Student engaged in problematic behavior at home during participation in cyber programs. Those behaviors interfered with Student's learning. (N.T. 830-33)
72. The District did not provide support to the Parent in providing the online programs to Student or in adapting and modifying the curriculum based on Student's needs. Student exhibited behaviors during the instruction such as inattention, aggression, and frustration that impeded Student's learning. At times, the program did not allow sufficient time for Student to select an answer to the questions, resulting in frustration for Student. (N.T. 520-23, 825-28, 830-31, 833; P-42 p. 33; S-14 p. 15)
73. The Parent expressed concerns to the District about Student's frustration using the cyber programs that resulted in a loss of instructional time. (N.T. 188, 478)
74. The Parent asked the District if Student could take advantage of an optional tutoring option offered through the Acellus program but the District did not make it available, believing that would be a supplement that would be a parent's responsibility. (N.T. 463-64; S-32 p. 4)
75. There were occasions where Student and the Parent had difficulty with the connection to the cyber program. The District went to the home to try to resolve that problem but did not find the source of the difficulties. (N.T. 247-50, 475-76, 480-82, 488, 518-19, 827-28, 906-07; P-21; S-32 pp. 3, 6-9S-73 pp. 14-15)
76. The Parent observed Student use the Acellus program at school during the 2014-15 school year, and worked with Student on it at school as well while District personnel observed. District staff believed that the Parent provided more support for Student using the program than they did, such as by guiding or prompting Student toward selecting the correct answer. (N.T. 489-90, 493-94, 735-36, 751-52, 756-58, 841-43; S-73)
77. The Parent agrees that Student needs to be in school, which is the best means of providing opportunities for socialization with peers. She continued to have concerns with Student's safety at school at the time of the due process hearing. (N.T. 834-35, 846)

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

Generally speaking, the burden of proof consists of two elements: the burden of

production and the burden of persuasion. At the outset, it is important to recognize that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case rests with the Parent who requested this hearing.

Nevertheless, application of this principle determines which party prevails only in cases where the evidence is evenly balanced or in “equipoise.” The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position.

Hearing officers, as fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer found each of the witnesses to be generally credible, testifying from their individual perspectives to the best of their recollection. The one area on which there was conflicting testimony related to whether and how apps or folders on Student’s technology devices were moved or deleted; the contradictions, however, appeared to be based more on differences in understanding programs on Student’s devices and how they functioned than on any direct disagreement over whether that occurred. It should also be noted that the Parent is clearly a loving and devoted advocate for Student who knows Student very well and has taken a very active role in Student’s educational programming throughout Student’s time in the District. Additionally, the District personnel presented as dedicated professionals who worked to collaborate with the Parent and find compromise where opinions differed. Despite their conflicting positions at the hearing, the parties clearly shared a common goal in providing an appropriate program for Student under

challenging circumstances.

In reviewing the record, the testimony of every witness, and the content of each exhibit, were thoroughly reviewed in issuing this decision; and, this hearing officer also carefully considered the parties' Closing Arguments.

IDEA Principles

The IDEA and state and federal regulations obligate school districts to locate, identify, and evaluate children with disabilities who need special education and related services. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a); *see also* 22 Pa. Code §§ 14.121-14.125. In this case, there is no question that Student is IDEA-eligible and has been a resident of the District throughout the time period at issue. Thus, the District was required under the IDEA to provide Student with a “free appropriate public education” (FAPE). 20 U.S.C. §1412. In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that this requirement is met by providing personalized instruction and support services to permit the child to benefit educationally from the instruction, providing the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase “free appropriate public education” to require “significant learning” and “meaningful benefit” under the IDEA. *Ridgewood v. Board of Education*, 172 F.3d 238, 247 (3d Cir. 1995).

Local education agencies, including school districts, meet the obligation of providing FAPE to eligible students through development and implementation of an IEP that is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’ ” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). First and foremost, of course, the IEP must be responsive to the child’s identified educational needs. 20 U.S.C. § 1414(d); 34 C.F.R.

§300.324. An appropriate education encompasses all domains, including behavioral, social, and emotional functioning. *Breanne C. v. Southern York County School District*, 732 F.Supp.2d 474, 483 (M.D. Pa. 2010) (citing *M.C. v. Central Regional School District*, 81 F.3d 389, 394 (3d Cir. 1996)).

Further, a child’s educational placement must be determined by the IEP team based upon the child’s IEP, as well as other relevant factors. 34 C.F.R. § 300.116. All local education agencies are required to make available a “continuum of alternative placements” to meet the educational and related service needs of children with disabilities. 34 C.F.R. § 300.115(a); 22 Pa Code § 14.145(5).

Section 504 Principles

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of a handicap or disability. 29 U.S.C. § 794. A person has a handicap if he or she “has a physical or mental impairment which substantially limits one or more major life activities,” or has a record of such impairment or is regarded as having such impairment. 34 C.F.R. § 104.3(j)(1). “Major life activities” include learning. 34 C.F.R. § 104.3(j)(2)(ii). Relevant to this matter, the obligation to provide FAPE to a child with a disability is substantively the same under Section 504 and under the IDEA. *Ridgewood, supra*, at 253; *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa.Commw. 2005).

The Parent’s Claims

The first issue is whether the District’s special education program for Student was appropriate to address Student’s needs. Careful review of the record leads to the inescapable conclusion that the District’s program was significantly flawed, and thereby deprived Student of FAPE, throughout the time period in question. Analysis of the District’s program must begin

with two of Student's most significant educational deficits: communication and behavior.

The first major area in which the District failed Student is with respect to Student's communication needs. As a nonverbal child, it was imperative that Student be provided with a consistent means of communication across all environments, including school. The Parent's ongoing efforts to make Student's iPod and iPad functional for Student at school is impressive and laudable, and allowed the District to be in the enviable position of having had the bulk of the work to give educational purpose to the devices done for it. Student clearly demonstrated an ability to use those devices in a functional way when provided with the opportunity; yet, Student's use of them to communicate at school was largely limited to greeting others. District staff were unsure how to use the devices, particularly the iPad which was an ideal option for classroom work. In addition, Student's IEPs did not include goals or specially designed instruction for teaching Student functional communication. Other than prompting, the special education program lacked indication on how Student would "improve" expressive language (*e.g.*, P-3, S-45, S-68, S-79, S-88). The IEPs also did not provide support to District personnel to become familiar with how those devices worked and to recognize how to encourage effective augmentative communication on a regular basis to enable Student to participate meaningfully in classes and activities. The Parent's frustration with the District's failure to utilize Student's AT (N.T. 849-51) is well support in the record. In short, the District denied FAPE to Student in the area of communication.

The second significant flaw in the District's program is its failure to address Student's behaviors through the IEPs. At the outset, it is incomprehensible that none of the District personnel who worked with Student and testified at the hearing concluded that Student's behavior impeded Student's learning. The purpose of that question on the IEP, as a special

consideration, is to identify a need that can be addressed through educational programming, specifically including a PBSP. As early as October 2011, District staff expressed concern with Student's aggressive and self-stimulatory behaviors, and that concern did not abate over time. The record overwhelmingly demonstrates that Student exhibited behaviors that impeded Student's learning throughout the time period in question, and the District's failure to acknowledge this need and respond to it in the IEP was wholly inappropriate.

Moreover, the District's wholesale reliance on and deference to BSI to develop, implement, and monitor behavioral interventions at school is puzzling at best. Even accepting that the Parent asked the District to use the treatment plans that BSI developed, the IDEA imposed an ongoing obligation on the District to address Student's behavioral needs, not on BSI. There was no impediment to the District's development of a PBSP that would provide, in writing, a plan for addressing Student's behavior that was specific to the educational environment, to include behavioral support and interventions on which data could be taken to evaluate the success of that plan.⁷ The decision to rely on BSI staff, which provided variable hours of individualized services for Student at school, did nothing to ensure that Student's behavioral needs would be consistently addressed; and, by the spring of 2013 when Student no longer had TSS services, Student's individual BSI services were reduced to a minimal level. This entirely detached approach to Student's behavioral needs is also evident for the time periods when Student was provided with cyber-school programming at home, with no behavioral support from the District. In short, Student was deprived of FAPE on this basis as well.

Next, the District failed to provide any meaningful support to the Parent for the time periods when Student was provided cyber instruction at home. Her efforts in appropriately

⁷ It is noteworthy that a BSC from BSI found the District's adherence to its treatment plan to be unusual. (N.T. 980)

tailoring the cyber program curriculum for Student's unique needs is nothing short of remarkable, particularly in light of lack of education or experience in teaching. The District undoubtedly recognized that extensive modifications and adaptations would be needed for the cyber program so that Student could access it. Further, the Parent's description of the extensive time she spent working with Student on that program, five to six hours per day with manual review of previous material, actual instruction, and non-computer based activities related to that instruction, contrasts starkly with the records of the District for time spent logged on to the cyber program. (N.T. 817-20, 846-48, 899-900, 902-03; S-54)

Student's participation in the cyber program merits some discussion. All evidence of record supports the conclusion that Student should be in school, and not be educated through a cyber program in a separate environment (at home or in a classroom) where Student's specific needs, including those for socialization, communication, academics, and related services, cannot be adequately met. Student must learn to interact and communicate with others who, unlike the Parent, are not as attuned to Student, and in environments that are not as familiar as the home. Although it is clear that the District acceded to the Parent's desire to provide virtual programming outside of the school environment, its failure to revise Student's IEP when Student first transitioned to education provided in the home is quite concerning. The IEPs simply did not address cyber programming at home. Student has spent varying amounts of time at school since March 2012, yet Student's IEPs fail to address the cyber program in any meaningful way. While this circumstance undoubtedly presented challenges to the District to implement an appropriate program, "a child's entitlement to special education should not depend upon the vigilance of the parents[.]" *M.C. v. Central Regional School District*, 81 F.3d 389, 397 (3d Cir. 1996). The District's desire to collaborate with and acquiesce to the Parent's wishes, while understandable,

does not relieve it of the obligation to comply with the IDEA. The parties are reminded that the IEE provides impartial insight and a number of recommendations for Student that should be useful in programming going forward.

Moreover, the record reflects other concerns with the program that was implemented. The goals in the IEPs were in many cases not objectively measurable, and the lack of evidence regarding Student's progress toward IEP goals during the time period in question is distressing.⁸ When combined with the absence of appropriate communication and behavioral programming, the denial of FAPE in all of these respects is evident and warrants a remedy.

Finally, with respect to the Section 504 claim of discrimination, this hearing officer concludes that the District's denial of FAPE encompasses those claims, and that the District did not otherwise discriminate against Student on the basis of Student's disability.

Remedy

The above determinations lead to the next issue, the Parents' request for compensatory education. It is well settled that compensatory education is an appropriate remedy where a school district knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only trivial educational benefit, and the district fails to remedy the problem. *M.C, supra*. Such an award compensates the child for the period of time of deprivation of special education services, excluding the time reasonably required for a school district to correct the deficiency. *Id.* In addition to this "hour for hour" approach, some courts have endorsed a scheme that awards the "amount of compensatory education reasonably calculated to bring him to the position that he would have occupied but for the school district's

⁸ This hearing officer recognizes that the Parent has the burden of proof. Nonetheless, there were concerns about the District's provision of certain records (*e.g.*, N.T. 90-93), and the absence of evidence of progress reporting in the admitted exhibits is notable.

failure to provide a FAPE.” *B.C. v. Penn Manor School District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006) (awarding compensatory education in a case involving a gifted student); *see also Ferren C. v. School District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010) (quoting *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C.Cir.2005) (explaining that compensatory education “should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA.”)). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

Having concluded that that the District’s special education program was not appropriate and failed to address Student’s needs, the next question is how to calculate the remedy. The record contains no evidence from which a *B.C.* award, designed to place Student in the position Student would be in had FAPE been provided, may reasonably be derived. Thus, this hearing officer will apply the *M.C.* standard while giving consideration to the time that Student was in and out of the school environment for the time period at issue.

Student’s communication and behavioral needs clearly pervaded Student’s entire school day when Student was in attendance, and any educational benefit that Student may have received is impossible to quantify. *See Keystone Cent. School District v. E.E. ex rel. H.E.*, 438 F.Supp.2d 519, 526 (M.D. Pa. 2006) (explaining that the IDEA does not require a parsing out of the exact number of hours a student was denied FAPE in calculating compensatory education, affirming an award of full days). Student shall be awarded five hours per day⁹ of compensatory education for every day that school was in session from the January 2012 date set forth in the parties’ tolling agreement until the last day of the 2012-13 school year. The District may receive credit for documented hours that Student was provided related services; however, the hours may not be

⁹ See 22 Pa. Code § 11.3, providing for 900 hours of instruction for students in grades 1-6.

counted more than once for occasions when more than one related service provider was working with Student at the same time. There will be no deduction for the time that Student was provided cyber instruction at home that school year while the Parent took the initial steps to implement this program without a revised IEP or any support of the District.

For the remaining time period, when Student received some instruction through cyber programming and some instruction and related services at school, Student is equitably awarded 2.5 hours of compensatory education for each day school was in session for the entire 2013-14 and 2014-15 school years. This award is intended to remedy the denial of FAPE described above in both the home and school environments, while recognizing that Student did derive some educational benefit.

The hours of compensatory education are subject to the following conditions and limitations. Student's Parent may decide how the hours of compensatory education are spent. The compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product or device that furthers Student's behavioral and/or communication and/or academic needs. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the District through Student's IEP to assure meaningful educational progress. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parents. The hours of compensatory education may be used at any time from the present until Student turns age sixteen (16).

There are financial limits on the parents' discretion in selecting the compensatory education; the costs to the District of providing the awarded hours of compensatory education must not exceed the full cost of the services that were denied. Full costs are the average of the

hourly salaries and fringe benefits that would have been paid to the District professionals who did and would have provided educational services to Student during the period of the denial of FAPE.

Finally, as everyone understands, Student needs to return to school, as providing the cyber program at home is not meeting Student's needs. Student's IEP team will be directed to reconvene to develop a new special education program for Student at school for the 2015-16 school year, to include a PBSP based upon existing information with a new FBA to be conducted within 30 days of the start of classes and consideration of the IEE recommendations.

CONCLUSION

Based on the foregoing findings of fact and for all of the above reasons, this hearing officer concludes that the District denied Student FAPE under the IDEA and Section 504, and Student shall be awarded compensatory education. Student's IEP team shall also be directed to reconvene to develop a new IEP for the 2015-16 school year.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District denied FAPE to Student from January 2012 until last day of the 2014-15 school year.
2. The District shall provide Student with 5 hours of compensatory education for every day school was in session from the January 2012 date set forth in the parties' tolling agreement and continuing through the end of the 2012-13 school year; and 2.5 hours for every day that school was in session for the 2013-14 and 2014-15 school years. The compensatory education hours are subject to the conditions and limitations set forth above
3. Within 30 days of the date of this Order, the District shall convene a meeting of Student's IEP team to revise Student's IEP, develop a PBSP based on existing information and

input from BSI, and plan for an FBA at the start of the 2015-16 school year. The team shall also consider all of the recommendations in the 2011 IEE.

4. The parties may mutually agree to alter any of the terms of this Order.

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

Cathy A. Skidmore

Cathy A. Skidmore
HEARING OFFICER

Dated: July 13, 2015