

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

DUE PROCESS HEARING

Name of Child: R. H.

ODR #3108/11-12-AS

Date of Birth:
[redacted]

Dates of Hearing:
June 1, 2012, 9:08 am - 3:27 pm
June 18, 2012, 4:00 pm - 9:30 pm
June 22, 2012, 3:30 pm – 9:00 pm
July 2, 2012, 9:00 am – 4:33 pm

CLOSED HEARING

Parties to the Hearing:
Parents

Representative:
David Arnold, Esquire
920 Matsonford Road Suite 106
West Conshohocken, PA 19428

School District of Philadelphia
440 North Broad Street
Philadelphia, PA 19130

Brian Subers, Esquire
Fox Rothschild
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Date Record Closed:

July 21, 2012

Date of Decision:

August 3, 2012

Hearing Officer:

Linda M. Valentini, Psy.D., CHO
Certified Hearing Official

Background

Student¹ is an elementary-school-age resident of the School District of Philadelphia [District] who is eligible for special education pursuant to the Individuals with Disabilities Education Act [IDEA]² under the classification of Autism and consequently a protected handicapped individual under Section 504 of the Rehabilitation Act of 1973 [Section 504],³ as well as the federal and state regulations implementing those statutes. Student's current placement, an approved private school [Private School] for children with Autism, is funded by the District.

The current matter⁴ addresses the Parents' belief that Student has been denied a free appropriate public education [FAPE] at the District's current Private School placement [Private School].

Issues

1. Did the School District of Philadelphia, through the Private School placement, deny Student a free appropriate public education in the areas of speech/language therapy and occupational therapy; feeding; staff training; behavior management; and/or assistive technology? Did Student fail to make meaningful educational progress as a result of any failure of the Private School to implement the IEP?
2. If there was a failure to implement the IEP at the Private School, and if Student failed to make meaningful educational progress, what remedy is appropriate?
3. Is the Private School a dangerous environment for Student?
4. Should Student's educational placement be changed from the Private School?

Findings of Fact

Background

1. Student resides with the Parents in the District. [NT 26; HO-1 p. 18⁵]
2. Student is eligible for special education under the IDEA, having been diagnosed with Autism at 18 months of age and found eligible at age two. [NT 28; HO-1 p. 16]
3. Student is also diagnosed with verbal apraxia, a feeding disorder, a seizure disorder, and a sleep disorder. Student has expressive and receptive language delays.⁶ [NT 27]

¹ This decision is written without further reference to the Student's name or gender, and as far as is possible, other singular characteristics have been removed to provide privacy.

² 20 U.S.C. §§ 1400 *et seq.*

³ 29 U.S.C. § 794.

⁴ An expedited hearing was held in May regarding the issue of whether the Extended School Year [ESY] program offered at the Private School was appropriate for Student. The ODR case number for that hearing was 3094/11-12-AS.

⁵ Since some underlying facts are identical, the transcript from the ESY hearing of May 16, 2012 [Case number 3094/11-12-AS] will be incorporated as Exhibit HO-1.

4. Following Early Intervention Student was enrolled for kindergarten in a District school in September 2010 and placed in an Autistic Support Program. [NT 31-32; HO-1 p. 19]
5. From December 2010 to February 2011 Student was hospitalized⁷ at a local hospital for children to address a feeding disorder and therefore did not attend school. [NT 34-35; HO-1 pp. 20-21]
6. A feeding protocol was established at the hospital; the protocol used an Applied Behavior Analysis [ABA] approach with discrete trial training. [NT 36]
7. Student's behaviors regressed subsequent to leaving the hospital. [HO-1 p. 41]
8. In April 2011 Student was placed by agreement through District funding in a private school [first private school] other than the current Private School and remained there through the Summer 2011 ESY program.⁸ The private school was integrated with and indistinguishable from an afterschool ABA program in which Student still participates. [NT 40-41, 308-309, 38, 41, 582, 615-616, 618-619; HO-1 pp. 41-43, 54]
9. At the first private school, Student received primarily one-to-one therapy delivered by an ABA therapist in an individual therapy room, in the presence of Student's TSS. Thus Student was attended by two adults, with minimal interaction with other children. [NT 317- 318, 529-532, 619-628]
10. During the limited occasions when Student was involved in group activities at the first private school, there was no spontaneous independent interaction among the pupils. Each child had an individual ABA therapist present directing the child's participation in the structured activity and prompting peer and adult interaction. [NT 311, 317-318, 583-584, 619, 627]
11. At the time of Student's attendance at the first private school the highest enrollment in the school was six pupils, including Student, with the age range being from three to fourteen years old. [NT 625-626, 686-687]
12. The Parents were very pleased with the first private school placement, with the mother characterizing Student's behavior there as "amazing". [HO-1 p. 44]
13. When the mother initially met with the director of the current Private School she mentioned that she liked the first private school and wanted Student to continue there but that was not an option at that time, so she wanted Student at Private School until any changes could be made. [NT 976]

⁶ There is no reliable information in the record regarding Student's cognitive ability.

⁷ Student was in the hospital daily from breakfast time until bedtime and then was taken home to sleep. [NT 35]

⁸ However, Student still receives some ABA services at the private school once a week for two hours which the Parents fund privately. [NT 41-42]

Placement in the Private School / IEP

14. Pursuant to a previous confidential settlement agreement, the District planned to move Student to an Approved Private School [APS]. The Parents visited a at least four Approved Private Schools within a reasonable commute from home, and declined placement in each of these, before ultimately choosing the current Private School. Student has been placed in the Private School since September 2011. [NT 43-47, 55-56, 58, 181; HO-1 pp. 44-45; District Closing Brief]
15. Prior to the Parents' choice of the Private School, the Private School assured Student's mother that it could meet the requirements of Student's IEP. [NT 44, 55-56, 970]
16. The Private School director, the head teacher and the speech/language therapist are all familiar with the IDEA requirement that any changes to an IEP must be done with the consent of a child's parent[s]. None of these individuals convened an IEP meeting or communicated with the Parents to initiate revising the IEP for Student. [NT 412-414, 693-695, 969-970]
17. The IEP was developed in June 2011 by a team that included Student's mother, Parent's attorney, District's prior attorney, and staff from the public school Student had previously attended. [NT 50; P-1; District's Closing Brief]
18. A Behavior Support Plan was developed since Student displayed behaviors that adversely affected educational performance. The Behavior Support Plan was to be implemented along with the IEP. [NT 51-53; P-1]
19. The IEP carried goals/objectives to be addressed as well as the specially designed instruction [SDI] and related services which the Parents expected would be implemented. The Parents were not informed that any the SDIs or related services were not going to be implemented. [NT 54-55, 57]

Description of Private School, Classroom Routine and Staff

20. The Private School's total maximum enrollment for 2011-2012 was thirty-four pupils. There are five teachers and five classrooms. Student was placed in the pre-academic autistic support class. There were between five and seven students in that class during the 2011-2012 school year. Student's class was staffed by the head teacher, a full time classroom assistant and up to six personal care assistants; three pupils also had a TSS. [NT 855-856, 974]
21. There are two buildings on the campus of Private School. In December, following renovations, two classes of older pupils [upper, middle and high school students] were moved to the second building while the younger pupils remained in their original location. Student's classroom was a large room arranged in the typical configuration of an early elementary classroom. [NT 634-636, 975]

22. The classroom had a picture schedule posted that listed the daily activities. Student had a schedule on the iPad as well and when Student was doing an activity a timer reflected how much time had gone by so that Student could be prepared for transitioning to the next activity. [NT 398, 872, 877]
23. The communication skills of Student's class ranged from one child who was able to point to an identified object given the choice of two objects, up to a child who could verbally label most items and use sentences to make requests. [NT 378-379]
24. Students arrived at the pre-academic autistic support class in the morning between 8:15 and 8:45 and engaged in activities such as eating breakfast or playing with toys. Because it was difficult for the Parents to get Student ready to come to school, Student generally arrived late, between 9:00 and 9:15 and finished breakfast at the desk, so missed the early transition activities and some of circle time. [NT 611-612, 857-858, 901-902, 983]
25. Circle time, which usually started between 8:45 and 9:00 and lasted 15 minutes, was a group activity involving placing names on the sign-in chart, talking about calendar and weather, singing and doing imitation activities. During circle time the children were working on social skills, communication and following directions. [NT 857-858, 883]
26. Individual, one-to-one academic activities then took place for about 45 minutes each day. In March 2012, accompanied by the PCA and the TSS, and sometimes the head teacher, Student went to another room about 50-80% of the time for one-to-one activities as this diminished Student's distractibility. After individual work, the class engaged in a group motor activity outside the classroom. [NT 803-806, 858, 932-934]
27. Snack time followed the motor activity. Snack time was a very structured fifteen to twenty minute activity, which involved Students picking up their name cards, placing the cards beside the job they selected from the job chart, doing their jobs, returning to their seats, raising their hands and waiting to be selected to get their choice of snack from a table, getting and eating their snack, and raising hands for seconds if they wanted. [NT 392-393, 858-860]
28. The class then engaged in a 30-minute group reading activity, using Language for Learning, a program for non-readers. The program addressed following directions, labeling pictures, saying your name, and imitating various activities. The students as a group used the flannel board⁹ for matching letters to pictures, labeling, and categories. [NT 860-862]
29. A 10-15 minute story time followed during which the class worked as a group on vocabulary, identifying pictures and taking turns turning pages; reinforcement of social skills was a side benefit to this activity. As they sat together in a small group, this activity also reinforced the students' social skills. [NT 862-863]

⁹ This hearing officer notes for the reader that a "flannel board" is literally a piece of flannel, usually in a neutral color, stretched over a frame. Brightly colored cutout letters, numbers, and figures also made of flannel adhere to the board and can be arranged and rearranged for teaching and storytelling activities.

30. Preparatory activities before lunch included moving chairs to the lunch table and hand-washing and involved following directions and routines. The children ate lunch together, sitting at the big table in the classroom. Student's lunch routine required that Student initially sit at Student's desk with the TSS, who administered the feeding protocol¹⁰. [NT 667, 863]
31. Once the feeding protocol was finished Student could join the class at the large table for a packed lunch of preferred foods [e.g. peanut butter sandwich, noodles, macaroni and cheese, water]. Student ate and drank without adult assistance. Lunch took about 45 minutes followed by bathroom and cleaning up. [NT 247, 669-671, 863-867]
32. Recess outdoors or in the gym followed lunch, and the class was joined by other classes for recess. [NT 865-866]
33. Following recess, the Students returned to the classroom, used the bathroom, washed their hands, and had a drink of water during a five to ten minute transition [settling down] period. The class then participated in another group activity, for example an art project, science project, math instruction [counting, simple graphing and quantitative concepts] or home economics class. [NT 869-872]
34. Home economics was a communication program taught by the speech/language pathologist in concert with the head teacher. The children and the adults from the classroom would go to the home economics room for this class. [NT 377-378, 870-871]
35. The home economics class was centered around preparing a food item. Following a related story, the children would be given directions and then they prepared the item. The activity focused on language skills including labeling, requesting, and following directions. Student used the iPad and a "Go Talk" voice output device which was programmed with vocabulary for the lesson. [NT 377-381]
36. At times the speech/language therapist worked with the class in their classroom, focusing on vocabulary, labeling, matching, storytelling and cooperative play. The vocabulary, which was carried over throughout the school day, was themed to match the children's every-day world, and changed monthly based on events such as the start of the school year and holidays. Student's communication work addressed IEP matters such as labeling, choices, requests, rejecting and verbalization [NT 377, 384-387; P-1]
37. Following the group instruction, the students would participate in a structured joint play activity requiring cooperation and involving visual motor skills [e.g. building with Lego's]. [NT 872]

¹⁰ According to the protocol, Student must take 12 bites of non preferred foods, such as vegetables and fruit, usually presented in baby food [pureed] form. The protocol also includes explaining the rules about the meal and providing Student with a visual cue, indicating the bites Student has to take. However, the visual cue is not required at school because no new foods are introduced at school. [NT 145-152, 668-669]

38. The day ended with closing circle. The children were reminded of the day of the week, sang a goodbye song, and signed out by removing their names from the board. [NT 873]
39. Student's head teacher holds Pennsylvania certification as a special education teacher and received a bachelor's degree in elementary education and a master's degree in special education. [NT 689-690, 853]
40. Before beginning her now-four-year position as the pre-academic autistic support teacher at Private School, Student's head teacher taught regular education fourth grade at a parochial school, early intervention in a growth and development center, and for ten years taught at a residential and educational facility for persons with disabilities operated jointly by the state and a local university. [NT 690-693, 853]
41. At the residential center Student's head teacher was trained and gained experience in discrete trial training [ABA], the standard methodology employed at that facility. [NT 697, 854]
42. Student's PCA holds Pennsylvania certification as a regular education teacher, and has a bachelor's degree in health and physical education. Prior to taking the position as Student's PCA, [the PCA] was a long-term substitute health and physical education teacher, had interned as a one-to-one assistant at a special education school in New York State for three summers, and had done student teaching in an adaptive physical education class for special education students. [NT 925-928]
43. The PCA received training at the Private School in CPR, first aid, child development and behavior modification. [NT 981-982]
44. The PCA worked under the supervision of the classroom teacher and a senior support staff who provided oversight to the PCAs. The head teacher planned and directed all one-to-one activities conducted by the PCA with Student. [NT 974, 978, 980-982]
45. Student's speech/language therapist at Private School holds bachelors and masters degrees in speech pathology. She is licensed in the Commonwealth of Pennsylvania and has a certificate of clinical competency from the American Speech and Hearing Association. She has 39 years of experience as a speech and language pathologist with particular expertise in augmentative communication and working with autistic children. [NT 330-331, 366-368, 411]

Parents' Concerns

46. Shortly after the start of the new school year at the Private School the Parents observed some regression and/or behavioral changes in Student. Student wasn't using the speech device, wasn't speaking, and wasn't following directions. Student [redacted] after school. Student had temper tantrums. [NT 59-61]

47. Although the mother has never observed Student in the program at Private School other than morning drop-off and afternoon pick-up she received reports that Student [redacted], went to use the bathroom without asking, was playing in water in the bathroom at school, and eloped from instruction. [NT 61-63; HO-1 pp. 57-58]
48. The Parents had academic concerns as well, observing that Student's handwriting had regressed, that Student's iPad was coming home fully charged suggesting it had not been used, that Student was not receiving homework to reinforce skills and that Student was not doing math. [NT 64, 70, 72, 86, 88-89]
49. On October 28, 2011 the Parents brought all these concerns to the IEP team. At the meeting the mother learned that certain things in the IEP were not being implemented: a District one-to-one aide had not yet been assigned, occupational therapy had not started, speech/language therapy seemed to be delivered only once weekly, and the speech/language therapist was using a communication program other than the Proloquo2go program with which Student was familiar and which was on Student's iPad. The Touch Chat with Word program being used in therapy was not programmed onto Student's personal iPad. [NT 64-69, 75; HO-1 p. 46]
50. Another IEP meeting was held at the Parents' request in February 2012. Participants included attorneys for the parties, BHRS staff, Student's head teacher and the director of the private school. [NT 75]
51. At the February meeting the mother expressed the concern that the new communication program was not yet on Student's iPad, that Student was being placed in a quiet room when tantrums occurred, that Student was receiving some instruction in a private room without her knowledge, that she observed Student eloping on more than one occasion and that Student was still not receiving homework to reinforce skills. [NT 75-81, 86]
52. About two months after the meeting the Parents believed that Student's IEP was still not being fully implemented, and they also believed there were safety issues at the Private School. They Parents filed for a due process hearing on April 27, 2012. As noted earlier the matter was bifurcated in order for the ESY portion of the complaint to be heard in accord with expedited timelines. [P-2]

IEP Implementation Issues

Speech/Language

53. The IEP calls for Student to receive the related service of 300 minutes [5 hours] of individual speech/language therapy per week. However, the documentation from the speech/language therapist indicates that Student was receiving about one hour per week of individual therapy. [NT 103-105; P-1, P 15, P-16]
54. Student's IEP indicates that Student should receive 900 minutes per term of group speech/language therapy. Documentation from the speech/language therapist indicates that Student was not receiving the specified amount of group speech/language therapy. [NT 103; P-1, P-17]

55. The speech/language therapy notes kept by the speech/language therapist documented Student improved skills on 5 occasions, slightly improved skills on 32 occasions, made no progress on 17 occasions, and regressed on 7 occasions. [P-15, P-16, P-17, P-43]
56. A review of the progress reporting on the Annual IEP Goals related to speech/language indicates that Student did not master any Annual Goal related to speech/language, and met few of the Short Term Objectives/Benchmarks tied to the Goals. [P-4, P-5, P-6, P-7, P-31, P-32, P-33, P-34]
57. The speech language pathologist testified that she believes Student can make progress in communication if given appropriate services. [NT 579]

Occupational Therapy

58. As per the IEP, Student was to receive 5 hours of individual Occupational Therapy during the 2011-2012 school year as well as one-half-hour of a writing [printing] program once a week. [P-1]
59. For handwriting exercises Student was to be given raised line paper, a tactual cushion for support, and a ruler for guidance. [P-1]
60. Student's records indicate that from September 2011 through January 2012, Student was not provided with individual occupational therapy. Although records from February 2012 through May 2012 indicate that individual occupational therapy was provided, a careful analysis of the records and testimony from the head teacher indicate that the services given related to the implementation of the writing program, and not to the individual occupational therapy that was to be provided in addition to the writing program. [NT 796-798; P-1, P-19, P-44]
61. When the writing program started, Student was never given raised line paper, a tactual cushion, or a ruler according to testimony by the head teacher and the TSS. [598-600, 798]
62. Student did not meet the Annual Goal for handwriting, and never met even the first Short Term Objective/Benchmark for the Goal. [P-10, P-37]¹¹

Assistive Technology

63. The Touch Chat with Word communication program that was being used in Student's speech/language therapy was not provided to install onto Student's iPad¹² until March 2012. Hence, until that time Student could not use the communication program on which Student was being specifically instructed in speech/language therapy either in the

¹¹ One of the handwriting tasks given to Student was to write the mother's and the father's first names. I fail to see the value in this exercise on which Student struggled, as most children Student's age call their parents Mom and Dad, much more fitting words to practice writing.

¹² Student was supposed to use the iPad for communication throughout the school day and at home.

classroom during the day or at home during evenings and weekends. [NT 71, 84, 356-359, 401-402]

64. Although the original Proloquo2go communication program which with Student was familiar was on Student's iPad until Touch Chat with Word was installed, Student's PCA was not formally trained on Proloquo2go until January 2012. Further, once Touch Chat with Word was installed the PCA was not fully trained in this system until May 2012. [NT 567-570]
65. The TSS testified that Student was without the iPad about a third of the school day, and Student was not monitored to carry/have direct physical access to/regularly use the communication device at all times until after an interagency meeting in spring 2012. [NT 602-603]

Personal Care Assistant

66. The IEP called for Student to receive the related service of a one-to-one aide [Personal Care Assistant or PCA]. The PCA did not start until November 2011. [NT 71, 92; P-1]
67. Student's individual TSS was in attendance from the beginning of the school year. From November 2011 onwards Student was attended by two adults at Private School – the PCA provided by the District pursuant to the IEP and the Therapeutic Staff Support [TSS] worker funded through the state's "wraparound" or BHRS program. [HO-1 pp. 58-59]

Specially Designed Instruction

68. Student's IEP carried a Life Skills-Interpersonal Communication Goal, with a concomitant SDI that Student was to be given home practice. Student was never given any home practice to perform. [NT 108-109; P-1]
69. The IEP provides that Student would be taken on off-campus community outings to develop skills including making purchases. During the 2011-2012 school year Student was taken on just one community outing, a trip to the movies. [NT 600-601; P-1]
70. The head teacher would talk with the PCA in the morning before Student's arrival or after school, and go over materials and activities she planned for the PCA to use to review skills during a daily 45-minute individual instructional period. The PCA carried out the one-to-one work under the direction of the head teacher, and moved to the next objective in each goal as directed by the head teacher. Testimony suggested that from March 2012 to the end of the year at least some of the time the PCA was providing instruction to Student rather than reinforcing/practicing instruction provided by the head teacher. [NT 829, 932-936, 941, 980-981].
71. The PCA is not a certified special education teacher. [NT 925]
72. Although the IEP calls for the PCA to be taught discrete trial training [DTT] techniques, the PCA was not trained in discrete trial therapy. [NT 930-931; P-1]

Meaningful Educational Progress

73. A review of testimony from the head teacher and collected data¹³ reveals that as measured by the data collection system employed at Private School only one Annual Goal had been fully met. Ten Annual Goals had not been met; of these unmet Annual Goals, Student was still working on either the 1st Short Term Objective/Benchmark (4 Goals), the 2nd Short Term Objective/Benchmark (5 Goals) or the 3rd Short Term Objective/Benchmark (1 Goal). [NT 713, 736-737, 750, 752-753, 758-765, 767-768, 772-773, 793, 799-801, 809-811, 816-818P-30, P-31, P-32, P-33, P-34, P-35, P-36, P-37, P-38, P-39, P-40, P-41; Parents' Closing Argument]
74. Staff at the Private School did not convene an IEP Meeting to address Student's lack of progress [as assessed by the data collection system] under the IEP created prior to Student's entrance into the School, or to adjust Student's Annual Goals following their direct experience with Student. [NT 346, 695-696]
75. Nevertheless, Student made incremental progress in the area of speech/language over the 2011-2012 school year, primarily toward the end of the year. Student demonstrated the ability to request thirty-eight new preferred items, and although success was inconsistent, Student reached 100% on various trials in April and May. Student demonstrated an increased ability to request items needed to complete classroom activities and express preferences, reaching success levels ranging between 71% and 100% in April and May. [NT 391, 847-851; P-31, P-32]
76. Student progressed from complete resistance to labeling activities, to demonstrating receptive abilities, and producing verbal imitation at a level of 90%. On tasks of labeling new items Student was successful at levels ranging between 70% and 90% by April and May. Notably, Student increased verbalization from two to three syllable words in isolation to using common functional two and three word phrases. [NT 394-396, 573-575, 841-845, 996-997; P-33, P-34, P-43]

Behavior Plan

77. Although the Behavior Plan does not reference use of a quiet room, the Private School occasionally uses a quiet room adjacent to the classroom to help Student de-escalate. The TSS's testimony revealed that in the past year Student has been placed in the quiet room for about five to ten minutes a total of about five times. When Student is in the quiet room the PCA and/or the TSS are in there as well. [NT 592-593, 703-708, 994-995, 1015; HO-1 pp 52, 76-77, 79, 87]

¹³ In virtually all instances, raw data did not substantiate statements submitted via reports to the Parents that Student was "making adequate progress". The head teacher did not fully understand the data compilation system and could not explain it to me or to the attorneys present. One aspect of the problem was Student's being given portions of trials/probes rather than an entire probe, for example the raw data might show administration of 3 or 5 items rather than 10 items. When this then appeared as a graphed success rate of only 3 out of 10 or 5 out of 10 correct responses, the head teacher tried to explain by saying that if Student got all three or all 5 correct that would be 100%. The hearing officer did review a large sample of trials/probes to see if this would be a reasonable explanation but found that in most cases Student did not get all questions correct, with the scores being about 60% on average.

78. On occasion Student prefers to remain in the quiet room rather than rejoin the group and complete work. [HO-1 pp 79, 87]
79. The Behavior Specialist Consultant assigned through BHRS and the mother discussed behaviors that were purportedly inappropriate and new. Such behaviors, including [redacted], “playing in urine” and tossing food, when explored at length during credible testimony from the TSS and the PCA, turned out not to be as significant as the BSC’s and the Mother’s testimony first suggested.¹⁴ Further, the evaluation used to request authorization for BHRS prior to Student’s entering the Private School notes temper tantrums and other inappropriate behaviors that were of concern at that time. [NT 430-434, 464-468, 494-495, 499-501, 585-592, 649-650, 674, 677-679, 879, 886-893, 942-947; P-30, P-40]

Social/Emotional Progress

80. Even though Student was routinely late for the start of school, on the occasions Student arrived early enough over the course of the school year Student became capable of participating in circle time without step-by-step direction and following the routine automatically under the observation of the PCA even though the TSS had not yet arrived. [NT 611, 883, 1003]
81. By the end of the school year, during the highly structured snack time Student was able to participate in the routine, for example, deliver a placemat to a classmate following a verbal direction. During snack period Student called a classmate by name. [NT 921-922, 1015-1016]
82. Although Student strongly resisted going to recess in the gym, towards the end of the school year Student was able to tolerate the loud noise levels in the gym during recess and demonstrated joy in the activities. [NT 868-869]
83. Interaction among the Students at recess was encouraged. When Student first began in the Private School, Student self-isolated, showing little interest in peers and requiring high levels of prompting just to look at other students. Student did not engage at all. [NT 408, 491, 533, 534, 653-656, 867-868, 904, 997; P-23]
84. By the end of the school year, Student spontaneously initiated interaction with peers and engaged in play activities with them at recess, exhibiting obvious joy and excitement. [NT 408, 666, 904-905, 997-998]
85. Although Student initially reacted very adversely to the home economics activity because food was involved, Student discovered that Student would not be forced to eat anything. Student learned to say “no thank you” and participated actively, following directions with prompts, spontaneously verbalizing “no thank you,” and labeling items both verbally and with voice output devices. [NT 382-383]

¹⁴ For example, prior to entering the Private School the child had been allowed to [redacted and] the child seemed to be having some intestinal distress when pulling on lower clothing.

86. When Student first entered Private School, Student was prone to tantrums and excessive self-stimulation [stereotyped hand gestures]. Over the course of the year, Student appeared more relaxed in class and self-stimulation behaviors decreased, with some increase again toward the end of the school year. [NT 884, 985]
87. At the beginning of the school year Student had difficulty distinguishing directions given to others from those directed toward towards self, was easily frustrated with the noise in the classroom environment and routinely gravitated to the bathroom attached to the classroom. By the end of the year Student was more easily directed and responsive to staff requests, anticipated transitions and was compliant with the classroom schedule and activities. [NT 851, 878, 883, 911, 1003-1004, 1007]
88. Originally Student was very dependent on the TSS, routinely seeking her out for comfort. By the end of the year Student had developed a relationship with the PCA, identifying [the PCA] by name, [which Student reportedly had never done with anyone in the past], and making verbal requests to [the PCA. Student exhibited signs of physical affection toward other staff as well. [NT 665, 881-882, 966-967, 1015-1017]
89. Upon arrival at Private School Student required extensive prompting to interact with peers. By the end of the school year Student was aware of peers, reacted to and looked at them, took turns, recognized their names, and called another student by name. [NT 681-682, 878, 882, 1003-1004, 1015-1016]
90. By the end of the school year, Student was more vocal and communicative, and presented as a happy child at school, smiling and laughing, and more aware of the environment. [NT 664-665, 911, 996-999, 1007]

Safety

91. The Parents were concerned about safety because Student's TSS and the PCA did not have a key card to exit the building. The PCA received a key card in late May 2012. [NT 74]
92. The TSS testified that she and the Student waited for about three seconds before a staff person opened the door on the occasion that smoke was generated from something burning in the microwave [HO-1 pp. 86-87]
93. The Director of the Private School explained that once an alarm sounds all door locks are released such that the TSS could have exited with Student unassisted. [HO-1 pp 104-105]
94. The TSS's testimony established that when Student "elopes" Student is leaving the assigned seat, sometimes to use the bathroom located within the classroom. Student typically does not leave the classroom, has gone into the hall in a playful attention-seeking manner about two times, and has never left the building. [HO-1 pp 74-76, 88]

Discussion and Conclusions of Law

Burden of Proof:

In November 2005, the U.S. Supreme Court held the sister burden of proof element to the burden of production, the burden of persuasion, to be on the party seeking relief. However, this outcome determining rule applies only when the evidence is evenly balanced in “equipoise,” as otherwise one party’s evidence would be preponderant. *Schaffer v. Weast*, 126 S. Ct. 528, 537 (2005). The Third Circuit addressed this matter as well more recently. *L.E. v. Ramsey Board of Education*, 435 F.3d. 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006). Thus, the party bearing the burden of persuasion must prove its case by a preponderance of the evidence, a burden remaining with it throughout the case. *Jaffess v. Council Rock School District*, 2006 WL 3097939 (E.D. Pa. October 26, 2006). Here, the Parents requested this hearing and were therefore, assigned the burden of persuasion pursuant to *Schaffer*, and in this matter parents accepted the burden of production even though case law does not clearly assign same to either party. The evidence was not in equipoise on any issue, and therefore the *Schaffer* test on burden of proof did not apply.

Credibility:

During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make “express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses”. *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003); See also generally *David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009).

As was the case in the ESY hearing, I again found the mother to be a committed, caring and zealous advocate for her child. However, I could give her testimony limited weight with regard to her presentation of Student’s accomplishments at the first private school versus Student’s presentation at the Private School as she clearly seeks Student’s return to the first private school placement. Aside from what seemed to be her clear agenda of a return to the first private school, I found her recitation of Student’s accomplishments at that first private school not at all credible for two reasons. Given Student’s age and complex disabilities, and in light of every other written or verbal description of Student in the record, it is highly unlikely if not impossible that one year ago Student was speaking in sentences, able to communicate with typical peers, doing math and writing and age appropriate academics, and independently communicating with the program Proloquo2go on the iPad. Additionally given Student’s autism, it defies reason that “there were no behaviors by the time [Student] left [the first private school]”. [NT 38-40] Secondly, the mother’s testimony about Student’s behaviors was directly contradicted by information in the August 25, 2011 Comprehensive Bio-Psycho-Social Reevaluation [CBR] conducted by the behavioral health provider agency for purposes of requesting reauthorization of “wraparound” [BHRS] services. This evaluation, based upon input from the previous Behavioral Specialist Consultant, the TSS and the parents, in conjunction with the proposed behavioral health treatment plan of August 31, 2011 created by the former Behavioral Specialist Consultant, documents that Student’s inappropriate behaviors were significant prior to entry into Private School. In fact the insurance company agreed to continue funding wraparound services at the same level as the previous months based on the severity of Student’s needs. [NT 164-170, 172-

179, 533-540, 653-656; P. 22, P. 23] Finally I could give the mother's testimony little weight when she testified emphatically about events and conditions at the Private School that she had not witnessed. It appeared that she tended to greatly exaggerate or misinterpret events, a conclusion I drew based on the fact that her testimony at certain points was directly contradicted or greatly diluted by the very credible accounts of other witnesses, primarily that of Student's TSS worker who has a longstanding relationship with the family.

The TSS worker has been with Student for two years and was directly involved with Student in the first private school and in Private School on a daily all-day basis. She testified candidly and credibly despite her loyalty to the family, and as a fact witness was deemed to have provided very reliable evidence. Although she had to be at the Private School every day from the time of her testimony in mid-May, and she also had to interact with the mother and the Behavior Specialist Consultant on behalf of the child, during the hearing sessions the TSS worker handled the awkward situation in which she was placed with dignity and grace, and her clear testimony greatly assisted me in sorting out fact from perception and is greatly appreciated.

Student's Behavioral Specialist Consultant's testimony could be given relatively little weight as she made assertions about events that she had not witnessed, she had no direct knowledge of Student prior to November 2011, and her interpretation of events was not supported by the limited extent of her involvement with Student at school or by others who worked with the child on a daily basis. Further, as noted in the previous ESY case decision, it was clear that she had a personality conflict with staff at the Private School and seemed to have joined the mother's efforts to have Student return to the first private school. [NT 429, 907-910; P-29]

The staff members of Private School, and the speech/language therapist consultant who testified, were generally credible, and I relied on their daily observations of Student and descriptions of Student's program. I found the PCA's candid account of the behavioral changes [the PCA] observed in Student from November until the present convincing and reliable. Testimony between the head teacher and the PCA was somewhat contradictory on the question of whether or not the PCA was providing actual instruction to Student during the daily 45-minute individual academic period or simply reinforcing/practicing what the head teacher had already taught. Although the line is fine, especially at the elementary preliterate skill level at which Student is working, there is a difference between instruction from a very experienced special education teacher with an extensive background in discrete trial training and a relatively new regular education teacher without such experience. I conclude that at least some of the time instruction was being provided directly by the PCA. Finally, it was unfortunate that the head teacher, whose anecdotal descriptions of Student's progress were deemed very credible, was in the position of having to testify about and defend what seems to be a flawed system of data collection and reporting. In the sole regard of the statistical compilation of the data and the interpretation of same, I must find her testimony unreliable.

Legal Basis for Decision:

Having been found eligible for special education, Student is entitled by federal law, the Individuals with Disabilities Education Act as Reauthorized by Congress December 2004, 20 U.S.C. Section 600 *et seq.* and Pennsylvania Special Education Regulations at 22 PA Code § 14 *et seq.* to receive a free appropriate public education (FAPE). FAPE is defined in part as:

individualized to meet the educational or early intervention needs of the student; reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress; and provided in conformity with an Individualized Educational Program (IEP).

A student's special education program must be reasonably calculated to enable the child to receive meaningful educational benefit at the time that it was developed. (*Board of Education v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982); *Rose by Rose v. Chester County Intermediate Unit*, 24 IDELR 61 (E.D. PA. 1996)).

In determining whether the District has offered an appropriate IEP, the proper standard is whether the proposed program is reasonably calculated to confer meaningful educational benefit. *Rowley*. "Meaningful benefit" means that an eligible student's program affords him or her the opportunity for "significant learning." *Ridgewood Board of Education v. N.E.*, 172 F.3d 238 (3d Cir. 1999).

Under the Supreme Court's interpretation of the IDEA in *Rowley*, and in interpretations rendered in other relevant circuit court cases, a school district is not required to provide the best possible program to a student, or to maximize the student's potential. Rather, an IEP must provide a "basic floor of opportunity". There is no requirement to provide the "optimal level of services." *Mary Courtney T. v. School District of Philadelphia; Carlisle Area School District v. Scott P.*, 62 F.3d 520, 532 (3d Cir. 1995), cert. den. 517 U.S. 1135, 116 S.Ct. 1419, 134 L.Ed.2d 544 (1996). What the statute guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving parents.'" *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989). Citing *Carlisle*, Pennsylvania's federal court in the Eastern District noted, "Districts need not provide the optimal level of services, or even a level that would confer additional benefits, since the IEP required by the IDEA represents only a basic floor of opportunity." *S. v. Wissahickon Sch. Dist.*, 2008 WL 2876567, at *7 (E.D.Pa., July 24, 2008). The law requires only that the plan and its execution were reasonably calculated to provide meaningful benefit.

The IDEA authorizes hearing officers and courts to award "such relief as the Court determines is appropriate" 20 U.S.C. § 1415(h)(2)(B), and compensatory education is an appropriate remedy when a school district has failed to provide a student with FAPE *Lester H. v. Gilhool*, 916 F.2d 865, 871-73 (3d Cir. 1990) as the purpose of compensatory education is to replace those educational services lost because of the school district's failure. [*Id.*] Compensatory education is an equitable remedy. [*Id.*]

Discussion:

IEP Implementation: An IEP is a plan for a child's education that sets out reasonably calculated annual goals for the child to meet and describes specifically what types of instruction and related services will be given to assist the child to meet those goals. What an IEP says will be offered must be offered, and if a service is not offered then there is a violation of the "contract" into which the LEA and parents entered. In the real world at times an LEA cannot deliver a service for a limited period of time, as for example if a specialist becomes ill and has a brief medical leave; at these times the LEA informs the parents and arranges to make up the service hours in a mutually acceptable manner. That is not the case here.

There is no evidence to contradict the fact that Private School did not implement Student's IEP in certain significant ways. For example, about 80% of the speech/language therapy this child with verbal apraxia was supposed to have was not delivered. Individual occupational therapy was not provided to this child whose autistic spectrum disorder presented sensory and fine motor issues. The handwriting program to address fine motor skills did not begin until the second half of the year. The PCA did not appear until November, two months into the school year. The assistive technology equipment that Student needs for communication was not always within reach and its use was not actively promoted until the spring. Significantly, the program that the speech/language therapist used with Student in therapy was not the program loaded onto Student's device, thereby depriving Student of the daily practice in school and at home.

In the above regards the Parents met their burden of proof by a preponderance of the evidence and Student is entitled to compensatory education as described in the Order.

Meaningful Educational Progress

Although actual progress can demonstrate that an IEP provided FAPE, the inverse of this rule – that a lack of progress necessarily proves an IEP's inappropriateness – contradicts the fundamental concept that “[a]n IEP is a snapshot, not a retrospective.” *See Rowley; see also, Rowland M v. Concord Sch. Comm.*, 910 F 2d 983 (1st Cir. 1990).

I am persuaded that Student made a substantial amount of social and emotional progress at Private School, and am not disturbed by the fact that much of this progress did not begin to manifest itself until toward the end of the academic year. Prior to beginning at Private School, Student was briefly in a public school kindergarten setting, then spent the equivalent of half a school year in a day hospital for medical/nutritional reasons, and finally attended a program that was delivered almost exclusively one-to-one [except that in Student's case there were two adults with Student] in a private room or a private section of a room using Applied Behavioral Analysis teaching techniques. On the occasions when Student was in the presence of the program's five other pupils for a structured activity such as coloring eggs around a table, the peers ranged in age from three to fourteen, each pupil had an individual therapist participating [Student had the TSS as well], and the individual therapists prompted the group interaction. From the time Student left the public school to go to the hospital program Student had virtually no opportunity to interact in a semi-structured or unstructured manner with other children in a school setting. Going from an extremely restrictive program such as that offered at the first private school to a program set up physically and programmatically like a typical kindergarten required a great deal of adjustment, particularly given Student's disorder. I find credible evidence that by the end of the year Student had made significant social and emotional strides relative to Student's potential.

I find that Private School implemented an appropriate behavior plan for Student, and note that allowing a child with emotional regulation and sensory integration issues to recover in a “quiet room” is a ubiquitous, harmless, appropriate and effective practice in preschool and elementary school settings. The Private School is not obligated to follow the BHRS behavior plan and is not obligated to form a consensus with BHRS staff about how behavior should be handled. BHRS staff are guests in a school, and are there to assist but not to lead. The TSS seems to have been aware of appropriate boundaries, although the BSC may have wanted to have more control over

the Private School's behavior programming. Having two one-to-one staff serve one child whose behaviors have not been portrayed as dangerous to self or extremely aggressive toward others creates a difficult situation for all concerned. While it is still likely necessary for Student to have one adult present one-to-one, with lessening proximity and fading as appropriate, having two adults seems to be redundant at best and tension-creating at worst. There are two forums for resolving this problem, the Interagency Meeting required at the time of each application for reauthorization for BHRS, and the IEP team meeting, and the situation should be addressed in each.

Student's academic progress is much more difficult to gauge. First of all, although Parents' counsel made note of the belief that unlike many children with autism Student does not have an intellectual disability, I have no reliable evidence of exactly what Student's cognitive status/potential is at the present time. Taking Student's disabilities and disrupted educational history into account, it is still concerning that at the upper limit of what would be considered early elementary school age Student requires instruction that is roughly at the preschool level. Although this hearing was not about the appropriateness of the 2011-2012 IEP which was created with participation of counsel for both parties [another IEP was to be prepared in June for 2012-2013] and I am not enlarging the parties' issues, I believe strongly that Student requires a thorough cognitive evaluation using a standardized non-verbal instrument and an equally thorough evaluation of achievement. With data from these assessments, an appropriate IEP can be developed.

For 2011-2012, according to a data collection system that I found was casually applied at best, and a related computerized data reporting/analysis system that I found confusing and in fact misleading [without imputing intention to this characterization], Student made very modest academic progress until late in the school year. While I would not characterize the progress as minimal, it certainly was not robust and may not have been commensurate with what Student could have achieved with full IEP implementation. Again, while Student's need to adjust to a school environment that was more typical needs to be taken into account, I do have to consider whether Student received sufficient time receiving direct instruction with the very experienced head teacher as opposed to the time spent with the PCA. Although the head teacher testified convincingly to Student's social/emotional progress, I could not form a firm conclusion about academic progress from her testimony particularly as it related to the data collection and analysis exhibits.

Although a closer call, especially since I do not know Student's cognitive level and therefore do not know if the IEP goals and objectives were fitting, I conclude that Student made marginally adequate but inconsistent academic progress as put forth in the data sheets presented for the record. Further, however I conclude that the computerized progress reports given to the Parents did not provide an accurate picture of Student's functioning and therefore limited their meaningful participation in Student's education. Finally I conclude that Student's specially designed instruction was more often than not provided by the PCA rather than the experienced and well-credentialed head teacher.

Parents generally met their burden of proof on this issue and therefore some additional compensatory education will be awarded in the Order below.

Remedy: It is well settled that compensatory education is an appropriate remedy where a local education agency [LEA] knows, or should know, that a student's educational program is not appropriate or that the student is receiving only trivial educational benefit, and the agency fails to remedy the problem. *M.C. v. Central Regional School District*, 81 F.3d 389 (3d Cir. 1996). Such an award compensates the student for the period of time of deprivation of special education services, excluding the time reasonably required for an LEA to correct the deficiency. *Id.* In addition to this "hour for hour" approach, some courts have endorsed a method that awards the "amount of compensatory education reasonably calculated to bring a student to the position that the student would have occupied but for the school district's 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."))

I was provided no evidence to support a determination of what position Student would have been in had Student been provided with appropriate educational programming throughout the time period in question, and such evidence would only be speculative. Thus, I conclude that the *M.C.* standard is the appropriate method of determining the amount of compensatory education owed to Student in this case. An exact enumeration of compensatory education is contained in the Order that follows.

Dangerousness: Each and every claim made by the Parents regarding Private School's being a dangerous environment for Student has been considered and dismissed. The Parents failed to provide even one persuasive piece of evidence in this regard. The fact that Student and the TSS waited three seconds to be let out of the building when food in the microwave was burning did not constitute a dangerous situation. This is particularly true since when an alarm bell rings the door locks immediately disarm and in a few more seconds the TSS may have tried to open the door herself and succeeded. Student's "eloping" turned out to be leaving the assigned seat, or leaving the open space of the classroom to use a bathroom located in the classroom; on the two occasions when Student actually left the classroom and went into the hall Student was in view of the two adults providing "one-to-one" assistance. Although the Parents attempted to link an episode of an adolescent's running unclothed or partially clothed through the halls on one occasion with Student's pulling at Student's lower clothing and [redacted], there is no evidence that Student witnessed the adolescent's trip through the hall and witnesses testified that Student's behavior lasted a few days and seemed to be accompanied by some intestinal distress.

It is clear that Student's mother is very protective of Student and this is admirable. However, it did seem that the thrust of the mother's testimony was primarily designed to engineer Student's removal from Private School back to the first private school which she prefers. The brief testimony provided about the first private school by the Parent and the TSS demonstrated to me that this is not an appropriate placement in which to educate a young child with needs in the areas of communication and socialization. While it may have served its purpose as an interim

setting between the hospital and a genuine school it is in no respect an appropriate placement at this time.

The Parents failed to meet their burden of proof on this issue.

Placement: The Parents seek an Order to remove Student from the Private School. They cite the Private School's failure in several regards to implement Student's IEP, the Private School's failure to convene an IEP meeting when Student was not progressing, and concerns about dangerousness as noted above.

Private School's failure to implement the IEP, particularly in the areas of speech/language and assistive technology is lamentable, and will be rectified by the Order below. Whether Student actually failed to make academic progress or the data collection/data analysis system was flawed is debatable, and it is important for the Private School to revise data collection/analysis/reporting so that progress is accurately tracked. Accurate tracking with a simple tool will allow the Private School and the Parents to identify difficulties quickly and revise the IEP's goals, objectives, specially designed instruction and/or related services in a timely manner rather than only at the annual mandated IEP meeting.

Given the Student's specific disabilities and the lack of a consistent school experience when Student arrived at Private School, I find the social and emotional progress Student made this past year impressive. Student's socialization and emotional regulation are of paramount importance now to provide a foundation for Student's lifetime. In light of credible and persuasive evidence of Student's progress in socialization and emotional/behavioral regulation at Private School, I deem it to have been an appropriate educational setting. Indeed, transitioning Student at this point and removing the environment, routine, and relationships which are now familiar and trusted would almost certainly invite regression.

The Parents failed to meet their burden of proof on this issue.

Order

It is hereby ordered that:

1. The School District of Philadelphia through the Private School did deny Student a free appropriate public education in the areas of speech/language therapy and occupational therapy, staff training, and assistive technology.
2. The School District of Philadelphia, through the Private School placement, did not deny Student a free appropriate public education in the areas of feeding and behavior management.
3. As there were failures to implement the IEP which impeded Student's ability to make progress in certain areas, compensatory education is an appropriate remedy as follows:
 - a. Per the IEP Student was entitled to 300 minutes [5 hours] per week of individual speech/language therapy. Calculated upon the billing records kept by the speech/language therapist, Student is awarded one hour of compensatory education for every hour of individual speech/language therapy that was not provided from the first school day to the last school day of the 2011-2012 school year.
 - b. Per the IEP Student was entitled to 900 minutes [15 hours] per term of group speech/language therapy. Calculated upon the billing records kept by the speech/language therapist, Student is awarded one hour of compensatory education for every hour of group speech/language therapy that was not provided during the entire school term.
 - c. Per the IEP Student was entitled to 5 hours of individual occupational therapy per school term. Student was not provided with any individual occupational therapy. Student is awarded 5 hours of compensatory education for this denial.
 - d. Per the IEP Student was entitled to one-half hour weekly of handwriting instruction conducted by the occupational therapist. Student did not begin to receive this instruction until February 2012. Therefore Student is awarded one-half hour per week of compensatory education for each week the Private School was in session from the beginning of the 2011-2012 school year until the week in February when handwriting instruction began.
 - e. Although the Private School failed to institute the feeding protocol for Student as specified in the IEP, the TSS implemented the feeding protocol daily, and only on the few days the TSS was absent was the feeding protocol not implemented. Although no compensatory services are due in this regard, Student's teacher and PCA, and one additional person selected by the Private School, are to be trained by the hospital in the feeding protocol before the last day of September 2012.

- f. Although the PCA was not provided until November 2011, Student at all times had the one-to-one assistance of the TSS. No compensatory education will be awarded in this regard.
 - g. The PCA was not trained in delivering discrete trial training to Student as specified in the IEP. Further, beginning in March 2012 the PCA was at times providing instruction to Student as opposed to reinforcing/practicing skills. Student will be awarded partial compensatory education in the amount of 2 hours per week [based on 30 minutes per day for four out of five days a week] from the beginning of March 2012 until the last day of the school year.
 - h. As the behavior plan implemented by the Private School is deemed to have been appropriate, no remedy is due in this regard.
 - i. As the Private School, through the speech/language therapist, chose and used a specific communication software program during speech/language therapy, but did not provide that software for Student's iPad, Student was denied the opportunity to use and practice that program during the school day and at home in the evening and on weekends. Further, Student's PCA was not trained in a timely manner on either of the communication systems used for Student. Therefore, allowing a reasonable 30-day rectification period, Student is entitled to two hours per calendar day of compensatory education from October 1, 2011 to the day in March that the software was provided.
4. The Private School is not a dangerous environment for Student.
 5. Student's educational placement should not be changed from the Private School.

Any claims not specifically addressed by this decision and order are denied and dismissed.

August 3, 2012
Date

Linda M. Valentini, Psy.D., CHO
Linda M. Valentini, Psy.D., CHO
Special Education Hearing Officer
NAHO Certified Hearing Official