

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: S.O.
ODR #01639/10-11 JS

Date of Birth:
[redacted]

Dates of Hearing:
November 15, 2010
November 22, 2010

CLOSED HEARING

Parties to the Hearing:

Parent[s]

Representative:

Mimi Rose, Esquire
1601 Walnut Street Suite 1017
Philadelphia, Pennsylvania 19102

School District of Philadelphia
440 North Broad Street Suite 313
Philadelphia, Pennsylvania 19130

Heather Matejik, Esquire
440 North Broad Street Suite 313
Philadelphia, Pennsylvania 19130

Date Record Closed:

December 13, 2010

Date of Decision:

December 15, 2010

Hearing Officer:

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

Background

Student¹ is classified as having an autism spectrum disorder² and has been a kindergarten student in a public elementary school in the District since the beginning of the current (2010-2011) school year. In early October the Parents requested a due process hearing because they believed that the District was not offering Student a free appropriate public education (FAPE). They requested a change in placement and compensatory education. For the reasons put forth below I find in favor of the District.

Given events well known to the parties and counsel³, this hearing officer exercised her authority to control the record and admit or disallow evidence, and, determining that further testimony was not needed to address the issues in this matter, canceled the final scheduled hearing session. This action was taken so that a decision in the matter could be rendered in a timely manner consistent with statutory timelines without further exacerbation of the District's concerns regarding Parent counsel's examination of District staff.

Issues

1. Did the School District fail to offer Student an appropriate program and/or placement?
2. If the District failed to offer Student an appropriate program and/or placement is Student entitled to compensatory education and if so of what type and in what amount?

Findings of Fact

1. Student and the Parents live within the boundaries of the School District. [NT 45]
2. Although Student was found to be eligible for and received early intervention services from [redacted] in the form of speech and occupational therapy until approximately age three, the Parents chose not to enroll Student in any early intervention services or formal educational program between the ages of approximately three and five.⁴ [NT 49-50, 56, 94-95, 299-300, 312-313, 413-414; P-1, P-3]

¹ The decision is written without further reference to the Student's name or gender to provide privacy.

² Agreement by counsel on the record. [NT 43] [Redacted Name] found a Pervasive Developmental Disorder. [P-1]

³ Regarding the District's objection to Parents' counsel's participation in the hearing as [Parents' counsel] had left employment as an attorney for the District, representing an area of the District that included Elementary School, on or about October 1, 2010. [NT 27-29, 311]

⁴ Initially the father's testimony seemed to indicate that Student was out of programming from January 2010 to August 2010, but later in the record it became clear that the child had been kept out of programming for about two years. Compare NT 93-94 (father) with NT 298-299, 312-313 (mother) and finally Stipulation by Counsel NT 414-415.

3. The child's Pediatric Neurologist had written in a July 2008 reevaluation, "I emphasized to the parents the most important thing was the therapy through [redacted]". [P-6]
4. A Permission to Reevaluate (PTRE) had been generated in January 2010 in anticipation of Student's transitioning from preschool early intervention to school-age programming, but it was never signed. [NT 322; S-3]
5. In late August 2010 the Parents contacted the District expressing interest in enrolling Student in kindergarten, and on August 25, 2010 came to the District and signed a PTRE. [NT 53, 322]
6. The regional Director of Special Education immediately arranged for a School Psychologist to perform an evaluation. The evaluation was conducted on August 26, 2010, the very next day, although the 60-calendar-day period after the signing of the PTRE during which the evaluation had to be completed did not commence until the first day of school, nearly two weeks later.⁵ [NT 50-51, 54, 303, 422; S-3, P-10]
7. The School Psychologist who evaluated Student has 20 years of experience evaluating young children transitioning from preschool early intervention to school-age programming. [NT 274]
8. As part of the evaluation, the School Psychologist met with both the father and the child, and administered the Bracken Basic Concept Scales-Revised (BBCS-R), the Beery-Buktenica Developmental Test of Visual Motor Integration (DTVMI) and the Reynolds Intellectual Assessment Scales (RIAS). In addition, the Gilliam Autism Rating Scale-Second Edition (GARS-2) was utilized. The School Psychologist also conducted a review of educational and medical records and elicited parental input as part of the evaluation process. Prior to giving the [redacted] ER and IEP to the Director of Special Education on August 25th, and neurological evaluation[s] to the School Psychologist on August 26th, the Parents did not provide any documents to the District. [NT 92-93, 111-112, 260-262; S-4, P-5, P-6, P-7]
9. The father reported in writing on the Parent/Guardian Input Form: "cannot identify letters and or numbers" and "when change in routine may become angry: screams and or may throw objects or hit". Also the father wrote: "does not sit still for very long, needs assistance in feeding (eats very little), dressing, toileting, walking is good [sic]".⁶ [P-10]

⁵ Pennsylvania Special Education regulations exclude the summer break from the calculation of the time by which an evaluation report must be completed.

⁶ Based on other information in the record it seems that father meant to say that walking was good, while feeding and dressing were problems.

10. As father seemed anxious about the results, after completing the evaluation on August 26th the School Psychologist quickly scored some of the tests and discussed the results with the father before father and the Student left the building. [NT 262]
11. Student merely echoed the examiner's words so the verbal section of the RIAS was not able to be administered. Student has a nonverbal IQ of 80, which is below average and at the 9th percentile. The School Psychologist ruled out mental retardation on the basis of the assessment. [P-12]
12. Student's basic conceptual preparedness for formal schooling was assessed as being about two years behind chronological expectations and needs were substantial, requiring specialized instruction. [P-12]
13. Perceptual-motor delays appeared to be delayed by about two full years. [P-12]
14. Student is bladder trained but not yet fully bowel trained. Student defecates in a diaper at home but at school Student uses the toilet. [NT 295-296, 315-316]
15. Student cannot dress without assistance. [NT 296]
16. The Gilliam Autism Rating Scale yielded a standard score of 124, indicating a very high likelihood of autism. [NT 266]
17. The School Psychologist determined based on the evaluation that Student was a student with a disability and that Student required specially designed instruction, likely in an Autistic Support program, although the program/placement decision was properly deferred to the evaluation team. [NT 269-270; S-4, P-12]
18. The School Psychologist wrote a comprehensive report of findings in a Reevaluation Report dated September 2, 2010. Although the report carries a notation that it was given to the Parents on September 2, 2010, the Parents may not have received it until a meeting in early October. [P-12]
19. Based on the findings of the psychological evaluation, District administrators [Central Region Case Manager and another Case Manager] assigned Student to [redacted] Elementary School ("Elementary School") for the kindergarten year. It was determined that Elementary School was an appropriate placement because the autistic support teachers there are very experienced, the program there is research based, the classroom had an opening and the school was fairly close to Student's home. [NT 334]
20. In late August 2010 or early September 2010 the Parents were notified that Student would be going to Elementary School. [NT 99-100]
21. The Parents were invited to tour the school, and on the day they arrived various

- District staff met with and/or had contact with the Parents. The Special Education Liaison provided a very detailed description of the classroom visit in her testimony. [NT 568-571]
22. The father testified that he and the mother felt uncomfortable and/or uneasy while they were standing in the office of the school during their visit, but the mother admitted that her anxiety was due to their child attending a new school, being in a school setting and/or starting school and not specifically anything about Elementary School itself. The Parents were invited to visit at any time and were also provided information about a Back to School Night. Parents did not make any additional visits to their child's classroom since the initial visit, either individually or on Back to School Night. [NT 117, 126, 130, 305, 317]
 23. The mother poignantly testified to her feelings when she visited Elementary School with her husband and Student: "Well, it was just a bunch of feelings. It wasn't just like—just feeling uncomfortable, you know, detaching myself from [Student] and knowing that I've been with [Student] for so long. All those years of being with [Student] and dealing with [Student] and being nervous for [Student]. Of, you know, overwhelmed with feelings with the school being big and how [Student] was going to deal with strangers, you know, and---It's been a long time since [Student's] been around like other children and just strangers after daycare. And just nervous for Student and all the feelings like it was just an overwhelming feeling. Like just basically like scared at the same time and sad. But excited, you know, because I do want [Student] to go to school and being around all the children and learn, you know. I want [Student] to get a good education. I really do." [NT 306-307]
 24. The mother felt the same way when she had to say goodbye when her older child went to school. [NT 317]
 25. Elementary School staff recognized the mother's feelings of discomfort. Mother testified: "And they try to make me feel as comfortable as they could, you know, knowing that they know how it feels for mom to, you know, detach themselves from their kid and they were nice to me." [NT 307-308, 318]
 26. There was nothing specific about Elementary School itself or the staff there that made mother feel upset. Mother was upset at the idea of her child's being away from her and her missing [her child]. [NT 316-317]
 27. Student's Autistic Support classroom has a total of eight students, and is staffed by a special education teacher and a classroom assistant. Two children in the class have assigned TSS⁷ workers, bringing the classroom configuration to eight students and four adults. [NT 203-204]

⁷ Therapeutic Staff Support workers are funded through Community Behavioral Health and are assigned to work one-to-one with students for whom "medical necessity" for the service has been established. Although these two adults would not work with the other children in the class per se, their work with their

28. The Parents believed that because of Student's disability Student couldn't go to a "normal school" so in August 2010 they wanted to "start taking action to try to get [Student] into the proper placement for [Student's] disability." [NT 53]
29. The Parents wanted to get Student into a small school for special needs children. [NT 106, 118, 120]
30. In late August, through a family friend, the Parents, were put in touch with the social worker/legal advocate ["advocate"] from [advocacy agency redacted]. [NT 68, 373]
31. On September 21, 2010 the father met with the advocate. The father told the advocate he was under the impression that his child was being educated under the old [redacted] IEP and also thought that the other children in Student's placement at Elementary School were not high functioning enough. [NT 373, 399]
32. At the time of the September 21st meeting with the advocate the father did not tell the advocate that the child had just been evaluated by a School Psychologist at the District and that the results had been explained to the father right after the evaluation. [NT 387]
33. On September 21, 2010 with help from the advocate the father wrote a letter to the District asking for an "IEP meeting". On September 23rd the District offered to meet on September 27th but the Parents said that was too early; they said they could come on October 4th. [NT 67-68; P-13, P-14]
34. At the October 4th meeting the Parents were accompanied by the advocate. The Parents did very little talking, letting the advocate speak for them. This was not an IEP meeting as the evaluation was not yet completed, but the Special Education Liaison had directed the Upper Level Autistic Support Instructor to compose a draft of a beginning IEP given the Parents' letter. The District gave the Parents a copy of the ER, the preliminary draft IEP and a NOREP. The Parents did not want to sign anything at the meeting because they wanted some extra time before they signed. The advocate reviewed the documents with the Parents. [NT 69-71, 116, 375, 379, 573-574; P-15, P-16]
35. The Special Education Liaison testified that it was explained to Parents that the IEP was only a draft because the speech and OT evaluations were pending. [NT 574]

36. It was obvious that although the psychological portion of the evaluation had been completed even prior to the statutory time period for conducting an evaluation⁸, the speech/language and occupational therapy evaluations were still in process and therefore the evaluation, and thus the IEP, were not yet complete. [NT 376]
37. At the time of the October 4th meeting the Parents had not made the advocate aware that they had signed a separate PTE for speech/language and occupational therapy assessments. [NT 385-386; S-7]
38. Because the father kept saying that he did not think the Student's placement was appropriate the Special Education Liaison became concerned that the child would not be able to remain in the Autistic Support classroom while the evaluation was being completed so she asked the father to sign a NOREP allowing the child to remain in the placement. The advocate said "we're not signing anything". [NT 574, 593-595]
39. However, after discussion with the father and at the request of the Special Education Liaison the advocate drafted a written statement ("written statement") on behalf of the Parents, documenting that as of October 4th the Parents agreed that Student would remain in the Autistic Support class at Elementary School until the Speech/Language and Occupational Therapy evaluations were completed and the complete multidisciplinary evaluation was finished. This statement was needed because in the absence of a signed NOREP Student's continued participation in a special education class was questionable. [NT 134-136, 377, 382, 575, 577, 581; S-6, P-15]
40. Parents and School District staff indicated their agreement with the terms of the written statement by placing their signatures under the handwritten notes. Parents read and understood the agreement prior to signing. Parents were also counseled by their advocate prior to indicating their agreement. [NT 114; S-5]
41. The written statement acknowledged that speech/language and occupational therapy evaluations were pending.⁹ Although the Parents signed a separate PTE for speech/language and occupational therapy evaluations, the District asked that these be signed for additional assurance and did not consider the timelines for completing the evaluation reset. [NT 382-383, 578-579; P-15]
42. The advocate did understand that when the speech/language and occupational therapy evaluations were completed there would be a follow-up meeting, an MDT or an MDT/IEP meeting. [NT 396]
43. Before the meeting ended the Special Education Liaison specifically asked the father if he was satisfied with the outcome, and specifically asked the advocate

⁸ November 7th was the 60th calendar day from the first day of school which triggered the start of the evaluation period.

⁹ As noted the 60-calendar-day evaluation period was still ongoing.

- the same thing. Both said that they were in agreement that after the evaluation was completed they would meet again to discuss the entire evaluation and programming. [NT 577, 580-581]
44. The District's Speech/Language Pathologist conducted an evaluation of Student on October 4 and October 5, 2010 using age-appropriate standardized instruments. On the Comprehensive Assessment of Spoken Language (CASL) using the 3 to 6 year old examination form, Student's overall ability to comprehend and to express spoken language was a standard score of 59 (with the average being 100) placing Student over 1.75 standard deviations below the normative sample. Difficulties were noted in all areas assessed including pragmatic judgment (appropriate social language), basic concepts (following directions and locations), and syntax construction (putting sentences together). Student also had difficulty in sentence completion, antonyms and paragraph comprehension. Student demonstrated a severe language deficit. Student's articulation skills were assessed with the Goldman-Fristoe Test of Articulation (GFTA-2). Student was judged to be 90% intelligible, with 10% being attributed to speech sound errors. Student's articulation scores were within normal limits. Speech errors were attributed to a recognized dialect of Standard American English and to inability to produce two sounds - and this difficulty was not age-inappropriate. [S-9]
45. On October 6, 2010 the District's Occupational Therapist completed an evaluation of Student. She found that Student's upper extremity active range of motion and strength were within functional limits, but that Student may require adapted seating to facilitate focusing and prewriting skills. Fine motor manipulation skills were up to the 60 months level. However, she found fine motor writing and scissor skills to be at the 36 month-level with an immature pencil grasp, hand-switching, some loss of control during a difficult tracing activity, inability to draw a person, and emerging ability to use scissors with some loss of control resulting in jagged edges. The results of a sensory profile completed by the teacher were that Student has "definite differences" from a neurotypical child in sensory processing. Student demonstrated taste and smell sensitivity, movement sensitivity, under-responsiveness and sensation seeking, auditory filtering, low energy and weakness, and visual/auditory sensitivity as well as "probable difference" in tactile sensitivity. She recommended 15 sessions of OT per year to help with fine motor development and to develop and implement sensory strategies to be incorporated into the education day. [S-11]
46. As a necessary part of the occupational therapy evaluation, on October 6, 2010 the District's physician assessed Student and recommended transportation curb to curb with belt or harness, 15 sessions of occupational therapy, providing pre-writing curriculum to teacher for use in the classroom, establishing sensory strategies to be incorporated into the education day, and providing consultation to staff. [S-11]

47. On October 18, 2010 based on previous daycare and home behaviors reported by father at the time of the psychological evaluation the Upper Level Autistic Support Instructor completed a Behavior Planner addressing the reported behaviors of difficulty with transitions and difficulty focusing. [S-4, S-13]
48. On October 6th the father came into the advocate's office and went over all the documents from the October 4th meeting with the advocate.¹⁰ [NT 389-390]
49. Father told the advocate that one of the reasons he didn't like the draft IEP was that there were not enough speech services; the advocate testified that she explained to the father that he had to wait until the speech/language evaluation was finished [and the IEP was updated.] [NT 393-394]
50. Father told the advocate that he felt that his child was too high functioning for the placement. [NT 393-394]
51. The advocate went over "the different scenarios" with the father: leave Student in the placement; re-do the IEP; request another meeting; request mediation; request due process. [NT 391]
52. The advocate told the father that if he was concerned about "the delays in some of the evaluations"..." he could also file a complaint with the State through ODR".¹¹ [NT 392-393]
53. On October 6th, two days after signing the written statement drafted by their advocate, the Parents disapproved the NOREP in the presence of the advocate and checked the box asking for a due process hearing. On the NOREP father indicated, "IEP does not provide FAPE" and the "classroom is not appropriate". In testimony the father could not say why they asked for the hearing, testifying only, "I can't answer that, I just – I just wanted to have a due process hearing. I just changed my mind". [NT 138, 379-380, 397-398; S-10, S-12, P-16]
54. The father testified that he did not really know what a due process hearing was. [NT 138-139]
55. The Parents obtained counsel, and through counsel filed their Due Process Complaint on October 7, 2010, one day after the father met with the advocate and disapproved the NOREP. [NT 396-397; P-20]
56. Subsequent to the filing of the Due Process Complaint, the District revised the proffered IEP on October 18, 2010. The updated IEP added in the related services of speech/language therapy and occupational therapy. [S-14]

¹⁰ The written speech/language and occupational therapy evaluations were not yet available.

¹¹ It does not seem that the advocate explained that the evaluation period was still running, and it does seem that she was confused about the role of ODR and the role of BSE's Division of Compliance.

57. The IEP of October 18, 2010¹² includes a statement of the child's present levels of educational performance as assessed through current evaluations in each relevant area: Cognition/Academic Readiness, Speech/Language, Motor, and Life Skills-Functional Academics. [S-14]
58. The IEP of October 18, 2010 includes statements of measurable annual goals, including benchmarks or short-term objectives. Given Student's level of need in the area of Speech/Language, three annual language goals are included addressing labeling and communicating about feelings, producing a correct sequential procedural narrative about stories Student has heard read and about familiar activities and events, and acquisition of basic language concepts required for following directions and giving answers. [S-14]
59. Additional measurable annual goals, including benchmarks or short-term objectives, are present in the IEP. In the area of Motor skills there is a goal that addresses working with writing utensils and text to write/state personal or emergency information. In the area of Life Skills-Functional Academics there is a goal that Student will produce sounds, words and phrases in reading material with consistent effort and a goal addressing acquisition and understanding of vocabulary [concept] words. [S-14]
60. Short term objectives/benchmarks are provided for each of the IEP's annual goals. [S-14]
61. The IEP of October 18, 2010 contains a statement of the special education and related services and supplementary aids and services to be provided to the child including appropriate specially designed instruction, direct Speech/Language Therapy, and direct as well as consultative Occupational Therapy. [S-14]
62. The IEP of October 18, 2010 contains statements about program modifications in the form of appropriate specially designed instruction, as well as supports for school personnel that will be provided for the child to advance toward attaining the annual goals (and) to be involved and progress in the general curriculum. [S-14]
63. The IEP of October 18, 2010 contains an explanation of the extent to which Student will not participate with nondisabled children. [S-14]
64. The IEP of October 18, 2010 contains the finding that Student is eligible for Extended School Year [ESY] services focusing on Life Skills-Functional Academics. [S-14]
65. In accord with Student's needs and present levels, and related IEP goals and objectives, the District is monitoring discrete academic skills including

¹² Although this IEP was the IEP that was considered during this hearing, the District has since revised the IEP ; the revisions were not considered in this decision.

- identification of upper and lower case letters, tracing shapes and letters, writing letters independently, correctly spelling name, rote counting, identifying and reading numerals, reproducing numerals with assistance and independently, counting from 1 to 10 objects (with 1 to 1 correspondence), reciting and reading days of the week, reciting and reading months of the year and demonstrating understanding of vocabulary/concepts of time, colors, and shapes. [S-22]
66. The District is monitoring discrete social skills such as providing personal information, sharing toys during play, appropriate play behavior, interacting with peers and cleaning up. [S-22]
67. The District is monitoring discrete motor skills such as using mouse and keyboard, holding a pencil appropriately and opening food packages independently. [S-22]
68. The skills that the District is addressing are appropriate for a Student at the kindergarten level and appropriate for Student in light of Student's disability and current level of functioning as assessed by the multidisciplinary evaluation. [S-4, S-7, S-9, S-11, S-22]
69. The District administered placement tests to Student for the DISTAR Math Program and the Language for Learning Program. [S-22]
70. The School District also created a Behavior Planner for Student to address issues with attention and/or focus. Aside from the attention issues which may be age-related, in the classroom Student does not have any actual "behavior" issues such as those Student had previously displayed in daycare and/or at home. [S-13]
71. Student "missed quite a bit of time" of school according to the father because of being sick and having doctor's appointments. [NT 77]
72. The computerized attendance printout lists a total of 8 absences (6 unexcused absences and 2 excused absences) from October 11 through November 19th. [S-21]
73. In spite of the frequent absences, Student has demonstrated progress in academic skills including learning the alphabet, naming colors and shapes, counting, spelling and writing. [NT 210]
74. The assistant teacher testified that "when [Student] came to us, [Student] didn't recognize ... letters, ... numbers, the days of the week, the months of the year. [Student] is starting to pick out words, like from the morning story..." [NT 543]
75. The Principal has observed Student's classroom about once a week and found the children doing such typical kindergarten activities as singing songs, coloring, and going over the calendar. [NT 607]

76. The Special Education Liaison observed Student in the classroom and found Student to be sitting at the table doing work, displaying no behavioral issues. [NT 583-584]
77. The Parents have seen progress in Student since Student's entering Elementary School. [NT 127]
78. The Parents have not seen any regression since Student entered Elementary School. [NT 128]
79. Student talks to the Parents about school. Student sings what Student is learning, "little songs like the ABCs". Student colors. Student likes to do homework, letters and numbers. Student told the mother when Student received a time out, and when another student received a time out. It upset mother that Student received a time out. [NT 309-311; P-19]
80. Student attempts interaction more than some other children in the classroom, but Student has very basic skill needs that are addressed in the classroom. Student is in the middle of the class with regard to functioning in the opinion of the teacher and the assistant teacher, as well as that of the Upper Level Autistic Support Instructor. Only one of the Student's classmates is non-verbal. [NT 211-212, 495-497]
81. During several informal chats at the dismissal area mother never expressed any concerns about Elementary School to the school's Upper Level Autistic Support Instructor. [NT 478]
82. In preparation for the hearing the Elementary School Principal made inquiries of the bus attendant about the length of Student's trips to and from school. In the morning the trip is about a half-hour. In the afternoon Student is dropped off at home between 4:05 and 4:15, making the trip about an hour. [NT 605]
83. The Parents have never expressed any concerns about their child's transportation to the Elementary School Principal. [NT 604-606]
84. The first the Principal heard about the Parents' dissatisfaction with the bus schedule was in conjunction with the hearing complaint. [NT 606]
85. If a family had difficulty with the bus schedule and spoke to the Principal about it the Principal would definitely look into it. [NT 605]
86. After the IEP was updated, the District sent the Parents a packet on November 8th offering to schedule a meeting on November 10, 2010 to review and discuss the updated IEP. The father testified he did not read the packet until November 9th and then notified the District that November 10th was too short notice. On

November 10th the District delivered another letter asking to meet with the Parents on November 12th or November 15th. As the District wanted to meet without counsel the Parents declined. [NT 86-90; S-19, P-22, P-23]

87. On November 15th, prior to the start of the hearing, the hearing officer allowed the parties 75 minutes to hold a resolution meeting with counsel participating but the parties were unable to settle the matter.¹³ [NT 90-91]

Discussion and Conclusions of Law

Our United States Supreme Court has held that in an administrative hearing brought under the IDEIA the burden of persuasion, which is one element of the burden of proof, is properly placed upon the party seeking relief. *Schaffer v. Weast*, 126 S. Ct. 528, 537 (2005). The party bearing the burden of persuasion must prove its case by a preponderance of the evidence¹⁴. *Jaffess v. Council Rock School District*, 2006 WL 3097939 (E.D. Pa. October 26, 2006). The burden of persuasion under *Schaffer* only comes into play when neither party introduces a preponderance of the evidence. In that event, evidence is evenly balanced, or in "equipoise" as the Court put it, as the party having the burden of persuasion failed to tip the evidence scale in its favor and thus cannot prevail. Therefore in order for this hearing officer to award the relief sought, Student's parents must present a preponderance of convincing evidence to support their position on the issue of whether the District failed to offer Student FAPE in terms of program and/or placement. In this matter an analysis under *Schaffer* is not applicable as the Parents have not met their burden of proof, having failed to produce preponderant evidence that Student was denied FAPE.

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). Although both parents testified in this hearing and both participated in the decision to request a due process hearing, mother's testimony, though comparatively brief, was eminently credible and genuine and given considerable weight. However, this hearing officer found much of the father's testimony to be unreliable and therefore could not credit it with much weight at all. Examples abound, some being 1) his testimony that no one had ever gone over the evaluation with him [NT 56-57] whereas the School Psychologist explicitly testified that because father was anxious about the test results he did some quick scoring immediately

¹³ The District has continued to attempt to work with the Parents. The District offered to hold an IEP meeting with Parents on or about December 1, 2010 to discuss the IEP that had been updated on November 15, 2010. The Parents refused to attend the meeting unless their legal counsel was present. [School District Closing Argument and attachments Exhibits "A" and "B"]

¹⁴ A "preponderance" of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. Dispute Resolution Manual §810.

after the testing and went over results with him before he left the evaluation session [NT 281-282]; father's testimony that mother was uncomfortable with the whole feel of the school [NT 59] whereas mother explained that the feelings she had were about detaching from her child and not at all about the school or the staff [NT 306-308]; on the basis of 10 to 15 minutes of observation during which he and his wife were talking to classroom staff, father concluded that none of the other children in the classroom seemed verbal and that they were lower functioning than his child [NT 59, 61] and claimed that the assistant teacher told him that the children in the class were "pretty much non-verbal" [NT 124] but later admitted that he has had no conversations with District staff about the other children being lower functioning than Student [NT 132]; father has been so concerned about Student's placement that he filed for a due process hearing but has never gone back to observe the classroom or speak with the staff [NT 124, 126]; father testified that Student holds in bowel movements until Student gets home (giving rise to a concern about the length of the bus ride) [NT 78-79] but has never asked the District to adjust the bus route [NT 141] whereas the assistant teacher credibly testified that Student uses the toilet for bowel movements in school [NT 549-550]; according to the advocate, Father told her that mother had told him that the Upper Level Autistic Support Instructor told her that Elementary School was not appropriate for Student [NT 399-400] but the Upper Level Autistic Support Instructor denied unequivocally that she made any statement of this sort [NT 490-493] and mother was not questioned at all on this potentially important point during her testimony [294-319].

Even more troubling than the father's unreliable testimony however, was the clear impression that after keeping their autistic child out of formal educational programming for two years the Parents seemed focused from the beginning on having Student attend a small school setting for children with disabilities rather than a regular public school. They pursued their aim through premature actions that served to delay and harm rather than enhance their working partnership with the District. In late August the Parents connected with a special education advocacy agency; on August 25th they contacted the District to enroll their child; on August 26th the District evaluated the child and provided verbal feedback to the father; and on September 21st the father met with the advocate and drafted a letter asking for an IEP meeting. However, it must be noted that the District began its evaluation of Student almost two weeks before the period when it would have been obligated to begin, as Pennsylvania stops the clock on evaluation timelines during the summer when the regular education public schools are not in session. September 9th (the first day of school in the District) was Day 1 of the 60-calendar day time period for completing the evaluation, September 21st (the day father and the advocate wrote their letter requesting an IEP meeting) was Day 13, October 4 (the day of the meeting) was Day 26, and October 7th (the day the Parents filed for Due Process) was only Day 24 of the 60-calendar-day period, ending on November 7th, in which the District was required to conduct its evaluation. On the day of the first hearing session (November 15th) the time by which the District was required to hold an IEP meeting had not yet expired.

Although this hearing officer has no doubt that the advocate was testifying truthfully, and her testimony was credited for purposes of filling in some factual timelines and other events, her testimony regarding the appropriateness or lack thereof of the District's

placement was given no weight. Working from the father's concerns alone, she had no firsthand knowledge about the Elementary School's Autistic Support program, she has no firsthand knowledge about whether Student is in a class with lower-functioning children, and she has no firsthand knowledge of whether the classroom is appropriate for Student [NT 405-406]. Further she is not qualified by education or experience to render an expert opinion on special education matters as reflected on the record in the *voir dire* conducted by this hearing officer [NT 410-412]. Additionally, given her position as a staff member of an important resource agency for the community, it is troubling that she did not have sufficient grasp of the federal and state statutes and regulations to be able to help the Parents understand procedural requirements and timelines regarding evaluations and IEPs and guide them toward a more reasoned approach to addressing their concerns.

One red herring that this hearing officer wishes to address before turning to the substance of the case is the Parents' assertion that the District threatened to place the child into a regular education class if the Parents did not sign a NOREP. Although there in fact was no "threat", it is true that a school district, "must obtain informed consent from the parent of the child before the initial provision of special education and related services to the child." 34 C.F.R. § 300.300(b)(1). *See also* 20 U.S.C. § 1414(a)(1)(D)(i)(II). If a parent refuses to consent to the initial provision of special education and related services, the school district "shall not be considered to be in violation of the requirement to make available a free appropriate public education to the child for the failure to provide such child with the special education and related services for which the [district] requires such consent." 20 U.S.C. § 1414(a)(1)(D)(ii)(III)(aa). *See also* 34 C.F.R. § 300.300(b)(4)(i). Case law from other circuits is instructive for holdings that if the actions of the parents caused a denial of FAPE, a district should not be held responsible. *See Dorros v. District of Columbia*, 510 F.Supp. 2d 97, 100 (D.C. 2007); *Lessard v. Wilton-Lyndeborough Cooperative Sch. Dist.*, 518 F.3d 18, 26-27 (1st Cir. 2008) *citing* *M.M. v. Sch. Dist. of Greenville County*, 303 F.3d 523, 535 (4th Cir. 2002); *Doe v. Defendant I*, 898 F.2d 1186, 1189 (6th Cir. 1990); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 995 (1st Cir. 1990). In this case, based upon its psychological evaluation including parent interview and review of records, the District quickly chose a placement for Student in an Autistic Support class given the long interruption in programming and the fact that Student had received special education services in the form of early intervention in the past. However, once a conflict arose, in order to be able to keep the child in special education programming while the Parents took time to review the NOREP, the "written statement" was an acceptable solution with which the District was in agreement. In the absence of this written statement pendency would have been an issue in this case as there was no "last agreed upon placement" and absent an interim hearing officer order or agreement of the parties the child could, in fact, have to be placed into a regular education kindergarten classroom for the duration of the hearing.

Parents in their due process Complaint of October 7th challenged the appropriateness of the October 4, 2010 IEP which they and their advocate knew was a preliminary draft because the speech/language and occupational therapy evaluations [acknowledged in their "written statement"] were not yet completed. Subsequent to the IEP of October 4, 2010, the School District made revisions to the IEP on both October 18, 2010 and

November 15, 2010 and provided copies of the revised IEP(s) to Parents. Because the November 15th IEP was not provided as evidence at least five business days prior to the hearing, this hearing officer disallowed it; therefore the District's October 18th IEP is currently at issue. The School District's October 18th revised IEP includes the related services of speech/language and occupational therapy, among other services. The IEP, as well as the evaluations the IEP was based upon, was completed in a timely manner as the 60-calendar day period for an evaluation and the subsequent time for conducting an IEP meeting had not expired as of the date of the first hearing session. Further, the District has attempted to meet with Parents on at least three separate occasions to discuss the revised IEP[s], but the Parents have refused to meet with the District without their legal counsel even though they also have a very involved advocate. It is however duly noted that the District failed to convene a Resolution Meeting within 15 calendar days of receiving the Parents' Complaint, a procedural violation, albeit one that did not deprive Student of educational benefit nor deprive the Parents the opportunity for meaningful participation in planning the child's program. As related above, the parties did hold a Resolution Meeting the morning of the hearing prior to the convening of the session.

Having been found eligible for special education, Student is entitled by federal law under IDEIA, and by state law under the 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 "special education and related services" provided according to the IEP. 20 U.S.C. §1401(9); 34 C.F.R. §300.17. FAPE must be 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; provided in conformity with an Individualized Educational Program (IEP).

"The IDEA's requirements regarding a FAPE are 'modest.'" *Z.W. v. Smith*, C.A. No. 06-1201, 2006 WL 3797975, *3 (4th Cir.), quoting *A.B. v. Lawson*, 354 F.3d 315, 325 (4th Cir. 2000). 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)). The IEP must be likely to produce progress, not regression or trivial educational advancement [*Board of Educ. v. Diamond*, 808 F.2d 987 (3d Cir. 1986)]. *Polk v. Central Susquehanna IU #16*, 853 F.2d 171, 183 (3rd Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989), citing *Diamond*, held that "*Rowley* makes it perfectly clear that the Act requires a plan of instruction under which educational *progress* is likely." (Emphasis in the original). The IEP must afford the child with special needs an education that would confer meaningful benefit. The appropriateness of an IEP must be based upon information available at the time a district offers it; subsequently obtained information cannot be considered in judging whether an IEP is appropriate. *Delaware County Intermediate Unit v. Martin K.*, 831 F. Supp. 1206 (E.D. Pa. 1993); *Adams v. State of Oregon*, 195 F.3d 1141 (9th Cir. 1999); *Rose supra*.

Districts need not provide the optimal level of service, maximize a child's opportunity, or even offer a level that would confer additional benefits, since the IEP as required by the

IDEA represents only a basic floor of opportunity. *Carlisle Area School District v. Scott P.*, 62 F. 3d at 533-534.; *Hartmann v. Loudoun County Bd. of Educ.*, 118 F.3d 996, 1001 (4th Cir. 1998). 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). If personalized instruction is being provided with sufficient supportive services to permit the student to benefit from the instruction the child is receiving a “free appropriate public education as defined by the Act.” *Polk, Rowley*. The purpose of the IEP is not to provide the “best” education. The IEP simply must propose an appropriate education for the child. *Fuhrman v. East Hanover Bd. of Educ.*, 993 F. 2d 1031 (3d Cir. 1993). More recently, the Eastern District Court of Pennsylvania ruled, “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), citing *Carlisle*. See also, *Neena S. ex rel. Robert S. v. School Dist. of Philadelphia*, 2008 WL 5273546, 11 (E.D.Pa., 2008).

The October 18, 2010 IEP is appropriate in all respects addressed by the IDEA. The IEP for each child with a disability must include a statement of the child’s present levels of educational performance; a statement of measurable annual goals, including benchmarks or short-term objectives, related to meeting the child’s needs that result from the child’s disability to enable the child to be involved in and progress in the general curriculum and meeting the child’s other educational needs that result from the child’s disability; a statement of the special education and related services and supplementary aids and services to be provided to the child...and a statement of the program modifications or supports for school personnel that will be provided for the child to advance appropriately toward attaining the annual goals (and) to be involved and progress in the general curriculum...and to be educated and participate with other children with disabilities and nondisabled children; [and] an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class... CFR §300.347(a)(1) through (4)

An IEP must be crafted in such a manner that, provided it is implemented, there is a reasonable degree of likelihood that the student will make educational progress. Implementation of an appropriate IEP does not guarantee that the student will make progress. Implementation of the IEP takes place within the context of the special education placement. The Parents contest the appropriateness of Student’s placement in the Autistic Support class at Elementary School because they believe that Student is too high functioning for the class. However, the District’s evaluations all present the picture of a child with significant needs in overlapping areas, exacerbated by a two-year lapse in special education programming. It is noteworthy and pertinent as an equitable matter that after keeping the child out of specialized instruction for two years the Parents pressed for an IEP less than two calendar weeks after the child entered the Elementary School, and rushed to due process less than one calendar month after the child entered the Elementary School. The Parents filed their hearing complaint well before the expiration of the allotted time for an evaluation, well in advance of the appropriate timing for the crafting of an IEP that would address all their child’s needs, and without making a genuine effort

to observe the classroom, talk to the teachers and/or continue dialogue with the District. It is quite clear that at the time the Parents first contacted the District to enroll Student their agenda was to have the child placed in a small private school for disabled children rather than in public school. It is likely that the Parents misunderstood the conditions under which children are placed in segregated schools, but it would have been expected that the advocate would assist them in this regard.

22 Pa Code 4.21(b) related to “Elementary Education: primary and intermediate levels” – mandates that “curriculum and instruction in the primary program shall focus on introducing young children to formal education, developing an awareness of the self in relation to others and the environment, and developing skills of communication, thinking and learning”. Student is appropriately placed in Student’s current classroom and this classroom is fully capable of fulfilling the State mandate in the context of the child’s IEP. Student’s needs that the evaluations identified are being addressed in the context of a kindergarten curriculum. Despite missing eight days of instruction in the first five to six weeks of school, Student has shown progress in skill acquisition, and the Parents as well as classroom staff have seen Student’s progress. Moreover the child talks about school at home and spontaneously practices at home what was learned in school, for example by singing songs learned and by enjoying doing homework. Student has not exhibited behavior problems to any level of concern in the classroom and this is remarkable because of previous behavioral reports supplied by the father as well the facts that Student is out of the home and the mother’s care for the first time in two years, and immersed in a school setting. The mother’s protective concern about the use of a time out chair is noted, but this behavioral technique, used sparingly and briefly, is effective for children Student’s age and there is no indication that it is inappropriate for Student.

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), but compensatory education is an appropriate remedy only 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.*] As this hearing officer has determined that Student was not denied FAPE, no compensatory education is due. Even if this hearing officer had found that the District’s program and placement was inappropriate (which is not the case) the District would still be allowed a reasonable rectification period of 30 to 60 days from the date of this decision.

Order

It is hereby ordered that:

1. The School District did not fail to offer Student an appropriate program and/or placement.
2. As the District is and has been providing Student with an appropriate program and placement Student is not entitled to compensatory education.

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

December 15, 2010

Date

Linda M. Valentini, Psy.D., CHO

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