

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: Student
ODR #9629/08-09 AS

Date of Birth:

Dates of Hearing:

April 28, 2009

June 5, 2009

July 29, 2009

July 30, 2009

October 5, 2009

CLOSED HEARING

Parties to the Hearing:

Representative:

Parents

Pro Se

School District

Downingtown Area School District
126 Wallace Avenue
Downingtown, PA 19335-2643

School District Attorney

Andria B. Saia, Esq
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Date Record Closed: October 26, 2009

Date of Decision: November 10, 2009

Hearing Officer: Deborah G. DeLauro, Esq.

Background

Student (hereinafter “Student”) is a teen-aged seventh grade student who is a resident of the Downingtown Area School District (hereinafter “District”). The Student qualifies for special education services under the categories of autism and mental retardation. Student received Homebound Services¹ starting in February 2006 after Mr. and Mrs. (hereinafter “Parents”) removed Student from an approved private school placement² (hereinafter “APS”) where Student had been restrained and closeted by staff. On March 13, 2006, Parents³ filed a Complaint with the Pennsylvania Department of Education (hereinafter “PDE”) and then requested a due process hearing on May 15, 2006. The District and Parents executed a Compensatory Education Agreement in June 2006.⁴

Parents through their attorney⁵ requested a due process hearing on January 13, 2009. However, on February 19, 2009, Parents, by that time, *pro se*, amended their Complaint to add additional claims going back to February 2006. The District filed a partial Motion to Dismiss based on the statute of limitations⁶ which was partially granted. [HO-1] Consequently, the first hearing session on April 28, 2009 was designated to determine the “knew or should have known” (hereinafter “KOSHK”) date and whether either of the two statutory exceptions⁷ applied. This Hearing Officer found that the KOSHK date was May 15, 2006 and that neither of the exceptions applied. [HO-3] Parents’ claims were initially limited to the period between May 15, 2008 and January 13, 2009; however, upon re-consideration, the Parents were permitted to present claims between May 15, 2008 and February 19, 2009, the date Parents’ claim was amended. [HO-4]

Parents allege that the District failed to provide Student with a Free Appropriate Public Education (hereinafter “FAPE”) by conducting untimely and inappropriate evaluations, which then resulted in an inappropriate Individual Education Plan (hereinafter “IEP”) dated June 18, 2009. Parents further allege that the June 2008 IEP

¹ Homebound is provided when a student is deemed not able to attend school according to a physician’s instruction due to medical conditions. The instruction is often written on a prescription sheet with or without an accompanying District form. Homebound is for a given period of time (three-calendar-months) which may be renewed or extended with a subsequent physician’s instruction. Homebound, therefore, is not a placement determined by an educational team nor is it an option under the continuum of alternative placements. 34 C.F.R. §§300.39(a)(1)(i), 300.115(b)(1). It is reported separately to the Pennsylvania Department of Education for attendance and reimbursement purposes. 24 P.S. § 13-1329, *as amended*, Public School Code of 1949 The District is responsible to obtain a teacher to provide Homebound (five hours per week) for the period prescribed. The issue of Homebound in itself, and when not related to special education services, is not within the purview of this Hearing Officer.

² At the [school redacted].

³ Parents were represented by [redacted] Esquire.

⁴ Student was awarded 30 hours of Occupational Therapy; 10 hours of Physical Therapy; and 20 hours of Speech and Language Therapy.

⁵ [redacted], Esquire

⁶ On March 22, 2009, Parents filed a Response to the District’s Motion to Dismiss. [HO-2]

⁷ Whether the Parents were prevented from requesting a hearing due to: (i) specific misrepresentations by the District that it had resolved the problem forming the basis of the complaint; or (ii) the District’s withholding of information from the Parents that was required under this subchapter of the IDEIA to be provided to the Parents. 20 U.S.C. §1415(f)(3)(D).

was not implemented appropriately and that there were numerous procedural violations which in and of themselves resulted in a denial of FAPE. Finally, Parents also complain that the District retaliated against them because of their strong advocacy.

The District denies the allegations and further argues that there was no denial of FAPE because the IEP was reasonably calculated to provide and did in fact provide Student with meaningful progress in light of Student's potential, and did so in the least restrictive environment. The District further asserts that the Parents have failed to demonstrate by a preponderance of the evidence that the District retaliated against them by complying with the compulsory school attendance law or by allegedly having two IEP meetings without them.

The hearing officer convened five hearing sessions in this matter from April 2009 until October 2009. The record was held open for receipt of written summations, which were received on October 26, 2009, at which time the record was closed.

Issues

1. Whether the June 18, 2008 IEP was appropriate and was implemented appropriately?
2. Whether the March 31, 2008 Re-Evaluation Report was appropriate?
3. Whether the District committed procedural errors which resulted in a denial of FAPE?
4. Whether the Student was denied a free appropriate public education from May 15, 2008 to February 19, 2009?
5. If so, then what, if any compensatory education is owed to the Student?
6. Whether the District retaliated against the Parents because of their advocacy?

Findings of Fact⁸

1. Student (hereinafter "Student")⁹ is a teen-aged seventh grade student who resides in the Downingtown Area School District (hereinafter "District")

⁸ Although the scope of the hearing is from May 15, 2007 to February 23, 2009, background Findings of Fact are necessary as a context in this matter.

⁹ All future references to Student will be generic and gender neutral. These impersonal references to Student are not intended to be disrespectful but rather to respect Student's privacy.

2. Student is eligible for special education services as a student with mental retardation and autism pursuant to the Individuals with Disabilities Education Improvement Act (hereinafter "IDEIA"). [SD-51; SD-58; N.T. pp.]¹⁰
3. Student entered the District in September 2005, with an IEP placing Student in an approved private school (hereinafter "APS"). [SD-1] By a Notice of Recommended Placement (hereinafter "NOREP") dated August 9, 2005, the District agreed to implement the June 7, 2005 IEP in the Parents' chosen APS effective September 29, 2005. [SD-1; N.T.]
4. In February 2006, the Parents unilaterally removed Student from the APS and filed a Complaint with the Pennsylvania Department of Education (hereinafter "PDE"). [P-5; SD-2; NT-160, 165] An Investigation Report dated May 2, 2006 found that that the APS staff responsible for the implementation of Student's current IEP: used restraints; improperly changed the goals and objectives on the current IEP without an IEP meeting; failed to follow the goals and objectives for occupational therapy in the current IEP; failed to follow the goals and objectives for speech and language in the current IEP and failed to follow the goals and objectives for physical therapy in the current IEP. [P-14; SD-3]
5. On February 28, 2006, pursuant to a NOREP, the District offered the following placement: full-time multiple disabilities support in a separate public-school education center. Parents disagreed and rejected the February 8, 2006 IEP; and instead provided a medical note requesting that Student receive homebound services. [SD-2; SD-74; NT-21-24; 67-68, 146, 160, 165]
6. Student's homebound instruction¹¹ included 5 hours of tutoring a week, speech and language services (hereinafter "SpLg") (90 minutes per week), occupational therapy (hereinafter "OT") (60 minutes per week) Physical Therapy (hereinafter "PT")(30 minutes per week) and a Personal Care Assistant (hereinafter "PCA") to provide support for tutoring and speech (daily). [P-8,P-24; SD-58; NT 74]
7. Student received Student academic instruction (i.e. "homebound instruction") from a special education teacher/tutor¹² at the Child Development Center (hereinafter "CDC") which consisted of one hour and thirty minutes, three days a week. Related services including OT, PT, Sp.Lg, Music Therapy and Assistive

¹⁰ References to "SD" and "P" are to the School District, and Parent exhibits, respectively. References to "N.T." are to the transcripts of the April 28, June 5, July 29 and 30, and October 5, 2009 hearing sessions conducted in this matter.

¹¹ There was clearly a blurring of the terms and requirements "Homebound" and "Home Instruction" The facts presented leads this Hearing Officer to believe that Student was receiving 5 hours a week of academic instruction per "homebound" which was based on the medical prescriptions, as well as approximately 9 hours and 20 minutes a week of "home instruction" which was comprised of 90 minutes of SpLg, 60 minutes of OT; 30 minutes of PT and 6 hours and 20 minutes of PCA.

¹² [redacted] (hereinafter "Ms. H")

- Technology¹³ were provided both in Student's home and at the CDC. [SD-48; SD-2]
8. On May 15, 2006, Parents through their attorney¹⁴ requested a due process hearing alleging that the APS failed to offer Student a FAPE in the least restrictive environment. Parents alleged further that as a result of this, Student exhibited a significant increase in aggressive behaviors, severe school anxiety, and a decline in self-esteem and was therefore due, *inter alia*, compensatory education. [SD-4]
 9. The District and the Parents executed a Compensatory Education Agreement which provided Student with 30 hours of OT; 10 hours of PT and 20 hours of SpLg therapy. [SD-5]
 10. In June 2006, Parents obtained a neuro-developmental evaluation from Dr. C (hereinafter "Dr. C") wherein he concluded that not only that Student met the criteria for Autism Spectrum Disorder but also that Student's behavior may be in part the result of "environmental conditioning." Dr. C further recommended that a center based educational program versus a homebound program with psychopharmacology be used to augment behavioral strategies in an appropriate program. [SD-73]
 11. Parents requested an independent functional behavior assessment (hereinafter "FBA") and in July, 2006 [redacted] certified school psychologist (hereinafter "Dr. R.H.") completed a Functional Behavioral Report, wherein *inter alia*, he recommended placement in the Devereaux Cares program. [P-19; NT-77-79; 178-179]
 12. Parents declined to visit the Devereaux Care program as they deemed it inappropriate. [N.T.- 179, 78-79, 82] Parents also did not allow the District to make a referral to Devereaux and other proposed APS placements. [NT 78-79, 82]
 13. The District offered to send referrals to approximately ten APSs all of which the Parents either rejected or were rejected because the APS determined that it would not be able to implement Student's IEP and meet all of Student needs. [SD-50, SD-58, SD-59, SD-65; SD-66, SD-68; NT 174-178]
 14. The IEP team held IEP meetings on 11/20/06 and 1/26/07 and developed an IEP which was subsequently revised on 3/14/07; 6/12/07 and 7/25/07. [SD-59, 68; NT
 15. Having sought advice from [a staff person] at the PDE because of the difficulty finding an APS which the Parents would approve, the District issued a NOREP on 3/14/07 indicating that Student's educational placement was in an APS, to be determined. [SD-65; SD-66; NT 81-82]

¹³ A Dynavox was also used to enhance communication. [SD-48, 62]

¹⁴ [redacted], Esquire.

16. Between February 2006 and July 2007, the District offered several different programs and placements which were all rejected by the Parents. [SD-50, SD-58, SD-59, SD-65, SD-66, SD-68]
17. In January, 2008, the IEP team developed an interim IEP pending information from a Parent-requested and District-funded independent educational evaluation (hereinafter "IEE") conducted by (hereinafter "Dr. D.H."). [SD-21; SD-58; NT 833-835]
18. The Educational Evaluation conducted by Dr. D.H. and dated January 21, 2008 made the following recommendations:
- 1) Student's program needs to be planned out in detail by the team before it is implemented.
 - 2) The team working with student should be competency-based trained in the relationship/ D I R¹⁵ approach to supporting people of autism. Training needs to include an understanding of what it is like to have autism, what is helpful to people with autism, how to recognize situations that are likely to cause sensory problems, how to enhance the communication process, SCERTS¹⁶, sensory integration, proactive behavioral support, life skills instruction, how to structure a lesson using a task analysis approach, how to take data, have to teach Student to manage the environmental factors that bother Student, how to adapt curriculum to address students interest, how to adapt academic curriculum to facilitate inclusion in the regular classroom, how to facilitate social interactions with peers. Training needs to begin before the program is implemented, but then needs to continue on in a combined technical assistance/ongoing in-service training model.
 - 3) Student needs to have ongoing occupational therapy.
 - 4) Student needs intense work with a speech therapist across several areas.
 - 5) Students team needs to meet on a regular basis; one time per week for the first month.
 - 6) As student does not do well with strangers, a cadre of trained staff needs to be assigned to Student's team.
19. In February 2008, the District issued a NOREP for the current program at the Downtown Educational Center (hereinafter "DEC"). [SD-49, SD-58]

¹⁵ Dr. Stanley Greenspan's "Floor-Time" model which is based on "Developmental Stages," Individual Differences" and "Relationships."

¹⁶ The SCERTS model for working with students with Autism is based on "Social Communication," Emotional Regulation" and Transactional Support."

20. The staff and classroom were available to begin programming for Student as of the date of February NOREP. [NT 755-757]
21. Parents failed to attend IEP meetings in March, April and May, 2008, in order to finalize the IEP after the RR was completed, although all necessary IEP members were available. [SD-45, pp. 48, 55, 58, 61; P-167; NT 758-774]
22. School psychologist, (hereinafter Dr. L) completed a comprehensive evaluation, which resulted in a re-evaluation report (hereinafter "RR") dated March 31, 2008. [SD-48]
23. Student's mother testified that although she received The Scales of Independent Behavior-Revised (hereinafter "SIB-R"), she did not submit it to Dr. L to be in order for it to be considered as part of the evaluation. [SD-48; NT 866-867]
24. The RR included the findings and recommendations of Dr. R.H. and Dr. D.H.; findings and recommendations from Dr. C, a neuro-developmental pediatrician, curriculum based assessments from Student's education tutor, progress data from the SCERTS program, reports from the Chester County Respite Network (hereinafter "CCRN") Behavior Specialist¹⁷ and related services information from the speech therapist, the occupational therapist and the physical therapist. [SD-15, SD-21, SD-48, SD-51]
25. In May 2008, Student's program was moved from the CDC to the DEC. Student's program consisted on the same services and staff as Student was receiving as part of Student "homebound programming." The DEC program was being offered at the same time as in the homebound program and in a classroom which Parent had approved. [SD-45 p. 40, NT-775-776]
26. The change in the location of Student's program from the CDC to the DEC did not constitute a change of placement. The program remained the same in terms of staff and the time of day services were delivered, only the location changed. Furthermore, there was no agreed upon NOREP for programming at the CDC. [SD-2, SD-45 p. 40]
27. Dr. D.H. agreed with the transition plan to move Student's services to a new classroom in the DEC. [SD-21; NT 776-777; 931]
28. Dr. S agreed with the transition of Student's programs to the new classroom in the DEC. [NT 931]
29. The team developed social stories to support Student's transition to Student new school, DEC. [SD-37;SD-39]

¹⁷ [redacted] (hereinafter "Dr. S")

30. Parents did not bring Student to school for the remainder of the school year or for the Extended Summer Year (hereinafter “ESY”) [SD-58; SD-59; NT 931]
31. Parents were aware that ESY was being offered to Student and questioned whether it was the classroom that was supposed to be for Student only per Dr. DH’s report. [SD-45 p. 43; NT 876, 884-886]
32. Once the Student’s program was moved to DEC and Parent continued to refuse to bring Student to school, the District sent Parents notices of unexcused absences and notified them of its obligation to file for truancy when a child is absent without a valid excuse. [P-208, P-209, P-211, P-215; NT: 775-776, 857, 933]
33. On June 18, 2008, the IEP team was convened, including Parents and their attorney.¹⁸ Dr. D.H., the behavior specialists¹⁹, and most all other related service providers with the exception of the speech therapist and met for over 6 hours to develop an IEP for Student. [SD-52; P-213; NT 779]
34. The June 18, 2008 IEP included present levels of educational and functional performance (hereinafter “PLEP” and “PLFP”) which were based on current and updated assessments provided by Student’s teachers and tutors and all other related service providers working with Student, including but not limited to the occupational therapist, the physical therapist, and the speech and language therapist. [SD-52; NT 779-780]
35. The June 18, 2008 IEP identifies Student’s strengths and weaknesses, as well as Student present levels in the area of post-secondary transition where appropriate. [SD-52;]
36. The June 18, 2008 IEP identifies goals and objectives in the following areas of educational need: Reading; Functional Math; Social Skills, Telling Time; Gross Motor and Fine Motor Skills; Social Cognition Skills; Functional Writing and Keyboarding Skills; Sequencing, Motor Planning and Social Communication Skills; Cooperative Work, Sharing and Turn-Taking Skills; and Expressive and Receptive Language Skills. All goals were measurable and based on data collection. [SD-52]
37. The June 18, 2008 IEP identified the following modifications and specially designed instruction:
 - 1) scheduled and regulated brief sensory breaks visually mediated into daily schedule following 20 to 30 minutes of structured activities/instruction;
 - 2) use of suspension hammock swing for vestibular input, intense rotary movement is noted to calm and organized student;

¹⁸ [redacted], Esq.

¹⁹ Dr. S; Dr. B.

- 3) provision of proprioceptive input through ball toss or trampoline use may be incorporated into sensory break or academic instruction i.e., spelling words;
- 4) oral motor tools for self-regulation including use of gum and making crunchy salty foods and drinks readily available throughout the day;
- 5) close sample to refer to for multiple step activities;
- 6) use of modeling when presenting new activity to assist with understanding of expectations;
- 7) use of social stories and role playing i.e. asking for help, sharing materials, turn taking during instruction;
- 8) explore the use of video modeling to introduce an unfamiliar activity;
- 9) monitor sensory needs and adapt environment accordingly, i.e., reduce visual clutter, reduce lighting, remove environment factors contributing to excessive noise, reduce volume and talking, reduce auditory information when presenting new material and couple verbal directions with modeling;
- 10) encourage active participation in writing such as creating visual schedules, planning or creating lists were shopping, etc.
- 11) Guide instruction through purposeful and meaningful identities related to interest;
- 12) Allow for turn taking during instruction;
- 13) Hand over hand instruction is not recommended for student as per report, it leads to anxiety and dysregulation;
- 14) Explore continued opportunities for developing keyboarding to assist with developing writing communication skills relative to functional needs i.e., given the opportunity student will access computer, type a word or highly desired reinforcer and then is immediately given access to the reinforcer building on skill over time;
- 15) Continue to use an activity schedule during PT sessions with a mini- break./rewards of student's choice;
- 16) Give demonstration and review new activities with student prior to starting the activity list;
- 17) Make corrections during the activity being performed, if needed;
- 18) Encourage and praise student with completion of activities throughout the session;
- 19) Continue 1:1 services by the Behavioral Health (hereinafter "BH") -PCA, including a BSC;
- 20) Immediate verbal and sometimes tactile reinforcement when appropriate behaviors are displayed; and
- 21) Opportunities for structured social interaction with peers.

[SD-52]

38. The following programs were identified in the June 18, 2008 IEP: Touchmath; Just My Type, SCERTS. [SD-52]
39. The June 18, 2008 IEP referenced the FBA dated July 25, 2006 a Speech and Language Summary Analysis by Ms. L. M. MS, CCC-SLP and the use of a Dynavox assisted communication device. Also referenced are OT and PT updated summaries. [SD-52;]
40. At the end of the June 18, 2008 IEP meeting, it was the understanding of the school-based members of the team that there was an agreement regarding the contents of the IEP. [SD-52; NT 779-780, 930]
41. The evidence reveals that DIR, SCERTS and Community-Based Instruction are the guiding principles of Student's program. [SD-14; NT 752-753] Staff are trained in DIR principles and Student has a DIR Profile. [SD-14; SD-17; NT 753-754]
42. Sensory Integration principles and techniques are incorporated and used during Student's day. Staff has developed a "sensory diet" for Student.[SD-18; 19; 20]
43. Student receives reading instruction using the "Lexia Reading Program." [SD-35] The evidence shows that Student made progress in Reading during the 2008-2009 school year. [SD-75]
44. The June 18, 2008 IEP was implemented during the 2008-2009 school year and was developed with in-put from Parents, Parents' experts: Dr. D.H and Dr. B. as well as the Behavioral Expert: Dr. S., the related service providers (e.g. occupational therapist, speech language therapist, and physical therapist), educational tutors and all staff working with Student. [SD-45; SD-52; NT: 779-780]
45. Parents requested independent Speech and Language evaluations and the District funded independent Communications Evaluations by Ms. L. M. , M.S., CCC-SLP on November 30, 2006 and March 27, 2009. [SD-69; SD-70; SD-4; P-]
46. Dr. D.H. has remained a consultant to the staff developing and implementing Student's program at DEC. [Paraphrasing] Dr. D.H. stated that the program has come a long way since it's inception..The people working in the classroom function as a supportive team, are respectful to all, and demonstrate genuine caring, dedication and concern..The atmosphere is positive, pleasant, and the new staff members are quick to smile..These are wonderful attributes for the new program. [SD-21]
47. Although it has been slow going at times, Student has made progress in all areas of Student's educational program. [SD-15; SD-55; SD-21; SD-24; Sd-25; SD-26; SD-27; Sd-41; SD-42; SD-43]

48. There were ongoing efforts by all staff working with Student to meet and communication with the Parents. [SD-24; SD-25; SD-26; SD-27; SD-28; SD-45; SD-55; SD-56; NT 754-758, 763-764]
49. The evidence shows that many staff members quit from Student's program because of the Parent's actions which were viewed by many as harassment, as holding them back from being able to appropriately implement Student's educational program. [SD-32; NT: 480-497; 783-785]

Credibility of Witnesses

Hearing Officers are empowered to judge the credibility of witnesses, weigh evidence and, accordingly, render a decision incorporating findings of fact, discussion and conclusions of law. The decision shall be based solely upon the substantial evidence presented at the hearing.²⁰ Quite often, testimony – or documentary evidence – conflicts; this is to be expected as, had the parties been in full accord, there would have been no need for a hearing. Thus, part of the responsibility of the Hearing Officer is to assign weight to the testimony and documentary evidence concerning a child's special education experience. 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)*. This is a particularly important function, as in many cases the hearing officer level is the only forum in which the witnesses will be appearing in person.

The District's administrator, Ms. Y, Assistant Director of Support Services for the Elementary schools (hereinafter “Ms. Y”), was involved with Student from the time Student entered the District in the Summer of 2005 through the end of the 2006-2007 school year. Ms Y was the point of contact between the Parents and the District during that time and in that capacity attended IEP meetings, sent out NOREPs, prepared packets for consideration by APSs, arranged for Homebound Instruction, etc. Yet when asked about specific meetings, whether Student was declared “active” or “inactive” pursuant to Cordero²¹ or whether Student's homebound status was properly reported to the PDE, she could not recall many of these key details that most certainly she would have reviewed in preparation for her testimony. Consequently, this Hearing Officer found Ms. Y's testimony to lack credibility in so far as her faulty memory obstructed the pro se Parent from obtaining answers to many of her questions.

Similarly, this was also true of Mr. H's (hereinafter “Mr. M.H.”)²² testimony during the first phase of the due process hearing. Mr. H frequently answered Parent's

²⁰ Spec. Educ. Op. No. 1528 (11/1/04), quoting 22 PA Code, Sec. 14.162(f). See also, *Carlisle Area School District v. Scott P.*, 62 F.3d 520, 524 (3rd Cir. 1995), cert. denied, 517 U.S. 1135 (1996).

²¹ *Cordero v. Pa. Dept. of Education*, 795 F. Supp. 1352 (M.D. Pa. 1992)

²² Mr. M.H. is the Assistant Director of Support Services for the District's Middle Schools.

question with a question followed by an “I don’t recall” or “Once again I’ll state that I don’t get into that level of detail with every student’s IEP”. Although I noted that Mr. H may not have been the best person to ask the question of, this Hearing Office found Mr. H’s answers to be evasive and therefore, lacking in credibility. When Mr. H testified a second time during the case-in-chief, his memory improved and so did his credibility.

On the other hand, in spite of the fact that Dr. B (hereinafter “Dr. B”) a behavior specialist who has worked with Student since Student was in pre-school, did not agree to be sworn in but instead offered affirmed testimony, this hearing officer found his testimony as far as it went to be credible and informative.

Both homebound teachers, Mr. E (hereinafter “Mr. E”) and Ms. H (hereinafter “Ms. S. H”) provided insightful and credible testimony about Student’s program and some of the obstacles they faced when implementing it. Specifically, their testimony that Student’s program was implemented successfully at CDC and their opinion that Student’s program would be equally successful when transferred to DEC, was supported by both documentary and testimonial evidence. Finally, this hearing officer found their testimony that Student made progress in spite of Student’s difficulty in generalizing skills learned in one setting with one person to another setting with a different person particularly persuasive.

Ms. M (hereinafter “Ms. M”) the speech pathologist also testified briefly but credibly about the extensive consultation with Student’s teachers and therapists, and her ongoing communication with Parents. Ms. M provided credible testimony which supported by progress monitoring notes and speech language updates that Student was making progress on Student’s IEP goals.

Ms. H (hereinafter “Ms. A.H.”) who has an emergency special education teacher’s certification, and provided support to Student’s lead teacher, was highly credible when describing Student’s program, her role in implementing Student’s IEP, the progress Student was able to make and the parent created obstacles she and the other staff encountered when trying to implement Student’s program.²³

This Hearing Officer found Dr. A’s (hereinafter “Dr. A”) testimony to be equally persuasive. As the Chester County Intermediate Unit’s (hereinafter “CCIU”) Supervisor of Special Education, Dr. A was intimately involved with Student’s program, services, and placement. She provided highly credible testimony about the hiring and training of

²³ More specifically, Ms. A.H. testified that she eventually had to quit as had five previous staff members as a result of Parent’s interference which she described as follows: [paraphrased] there was no way that I could do my job..with the Parent waiting outside, coming into the classroom, saying stuff that was totally inappropriate and holding Student back from growing. It felt to Ms. A.H. like Parent was holding her and the other staff members working with Student hostage. [NT: 491-495]

staff to create a program for Student where Student's unique educational needs could be met. Dr. A. provided specific, detailed testimony about the efforts made and the obstacles that had to be overcome in order to implement Student's IEP. Dr. A's testimony on this issue was extremely credible because she brought her 17 years of experience teaching and working with special education students, particularly those on the autism spectrum.

First, Parents need to be commended for their extremely well documented and detailed presentation of both testimonial and documentary evidence. Student's mother testified passionately and at length; and although it is certainly understandable in light of Student's experience in Student's previous placement in an APS, Parents are extremely protective of their child and have a heightened need to control Student's educational environment and program, the testimony revealed that their actions were frequently counter-productive, intimidating, and obstructionist. One example of Parents' counter-productive behavior was when they determined that all ten plus proposed APS placements and later the program created for Student at the DEC, which was offered by the CCIU and the District were not appropriate, even though some of those programs and placements were endorsed by their own experts.²⁴ Another example of Parents' problematic behavior was when they would not allow Student to start attending the program specifically designed for Student at DEC in May of 2008. Along these same lines, also counter-productive was Parent's insistence that every minute of every day, every activity had to be tied to one of Student's goals, and consequently, if not, she would pull Student out of an activity or stop a lesson if it wasn't clearly related to Parent's perception of the IEP or if Student simply said "no" to activity. Parent's constant hovering outside and in the classroom intimidated many staff members, some to the point of actually quitting.²⁵ Even during the hearing, Parent's anger and sarcasm punctuated her direct examination of some District witnesses as well as some of her answers to questions asked of her. Lastly, Parent's insistence that there was only one way to implement Student's program and if staff deviated from that one way, then Student was not receiving a FAPE, caused this Hearing Officer to give Parent's testimony less weight than other witnesses.

Legal Basis, Discussion and Conclusions

Burden of Proof

In November 2005 the U.S. Supreme Court held that, in an administrative hearing, the burden of persuasion for cases brought under the IDEA is properly placed

²⁴ Dr. RH recommended placement in the Devereaux Cares program but Parents refused to look at it. Dr. S and Dr. H both approved the program created specifically for Student and encouraged Student to attend ESY there as a way to begin the transfer process.

²⁵ See SD-46 p. 12 indicating the reasons why the teacher and PCA resigned were: 1) feeling as though they were not being allowed to react or formulate a plan to address Student's aggressive behaviors; 2) the intensity of mom; 3) the lack of freedom to develop a relationship with Student; 4) the lack of time with Student without mom being present; and 5) the lack of support in being allowed to do some "trial and error things with Student."

upon the party seeking relief. 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). The party bearing the burden of persuasion must prove its case by a preponderance of the evidence. This burden remains on that party throughout the case. Jaffess v. Council Rock School District, 2006 WL 3097939 (E.D. Pa. October 26, 2006).

In this case, the Parents requested the hearing and therefore they bear the burden of proof. The burden of proof is in two parts: the burden of production (simply, which party presents its case first) and the burden of persuasion (which side has to convince the decision-maker(s) by a preponderance of the evidence that its position should be upheld).

However, application of the burden of proof does not enter into play unless the evidence is in equipoise, that is, unless the evidence is equally balanced so as to create a 50/50 ratio. In this matter the evidence was not in equipoise. As described in greater detail below, the Parents did not meet their burden of proof on either issue.

Whether the June 18, 2008, 2008 IEP was appropriate thereby providing Student with a free appropriate public education (hereinafter “FAPE”)?

Children with disabilities who require specially designed instruction are guaranteed a FAPE by federal and commonwealth statutes.

Special education issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 (“IDEIA”), which took effect on July 1, 2005, and amends the Individuals with Disabilities Education Act (“IDEA”). 20 U.S.C. § 1400 *et seq.* (as amended, 2004). Eligible students are entitled under the IDEIA and Pennsylvania Special Education Regulations at 22 PA Code § 14 *et seq.* to receive a FAPE.

A school district offers FAPE by providing personalized instruction and support services pursuant to an IEP that need not provide the maximum possible benefit, but that must be reasonably calculated to enable the child to achieve meaningful educational benefit. Meaningful educational benefit is more than a trivial or de minimis educational benefit. Whether an IEP is reasonably calculated to afford a child educational benefit can only be determined as of the time it is offered to the student and not at some later date. 20 U.S.C. §1412; *Board of Education v. Rowley*, 458 U.S. 176, 73 L.Ed.2d 690, 102 S.Ct. 3034 (1982); *Ridgewood Board of Education v. M.E. ex. rel. M.E.*, 172 F.3d 238 (3d Cir. 1999); *Stroudsburg Area School District v. Jared N.*, 712 A.2d 807 (Pa. Cmwlth. 1998); *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3rd Cir. 1988) *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031 (3d Cir. 1993); *Daniel G. v. Delaware Valley School District*, 813 A.2d 36 (Pa. Cmwlth. 2002)

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*, *supra*, citing *Board of Education v. Diamond*, 808 F.2d 987 (3rd Cir. 1986) 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. Additionally, the court in *Polk* held that educational benefit “must be gauged in relation to the child’s potential.”

In this case particularly, it is important to note that Districts need not provide the optimal level of service, or even 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. According to the Court in *Rowley*, *supra*, the “‘basic floor of opportunity’ provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.” *Id* at 201, 102 S.Ct. at 3048. 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 or maximize the potential of the child. The IEP simply must propose an appropriate education for the child. *Fuhrman*, *supra*.

Guidance for determining the factors comprising “meaningful benefit” is offered in *Cypres v. Fairbanks*, 118 F.3d 245, 253 (5th Cir. 1997) as follows:

1. The program must be individualized on the basis of the student’s assessment and performance;
2. The program must be administered in the least restrictive environment;
3. The services must be provided in a coordinated and collaborative manner by the key “stakeholders”; and
4. Positive academic and nonacademic benefits must be demonstrated.

In addition, courts have also established that the substantive standard of appropriateness is a reasonable, not optimal, calculation of benefit. See *In Re. M.K.*, Appeals Panel Decision 1329, citing *Runner v. Board. Of Educ.*, 185 F.3d (6th Cir, 1999); *Delaware Valley Sch. Dist. V. Daniel G.*, 800 A.2d 989 (Pa. Commw. Ct. 2002); *Shanberg v. Commonwealth*, 426 A.2d 232 (Pa. Commw. Ct. 1981) The Third Circuit’s successive refinements as to the “benefit” element do not change the overall reasonableness approach. See, e.g., *Bd. Of Educ. V. Diamond*, 808 F.2d 987, 991 (3rd Cir. 1996); *In Re. J.H.*, Appeals Panel Decision 1572.

In the case at bar, the documentary and testimonial evidence clearly shows that Student’s IEP was individualized and based on up-to-date and on-going assessments. To that end, the evidence confirms that data was regularly collected from which baselines

and progress monitoring were developed and reviewed. The IEP was administered in DEC, a center based program, which for Student, constitutes the least restrictive environment; it was coordinated between a host of teachers, PCAs, therapists and behavior specialists who worked together collaboratively in order to provide Student with a basic floor of opportunity so that Student could derive meaningful benefit and make academic and non-academic progress pursuant to Student potential.

More specifically, a review of the June 18, 2008 IEP reveals that it included a statement of Student's present levels of educational and functional performance; a statement of measurable annual goals, including benchmarks or short-term objectives, related to meeting Student's needs; a statement of the special education, related services and supplementary aids and services to be provided to Student...and a statement of the program modifications or supports for school personnel that were to be provided for Student in order for Student to advance appropriately toward attaining the annual goals (and) to the extent possible, to be involved in and progress in the general curriculum...and again to the extent possible, to be educated and participate with other children with disabilities and non-disabled children, and finally, an explanation of the extent to which Student will not participate with non-disabled children in the regular class. CFR §300.347(a)(1) through (4)

Whether Student's June 18, 2008 IEP and the following IEPs were appropriately implemented?

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. Although implementation of an appropriate IEP does not guarantee that the student will make progress, in this instance the record is replete with evidence that although slow going, Student was capable of and in fact made progress in all identified areas of need.

In the instant case, the record confirms that the June 18, 2008 IEP was developed with input from the Parents, the Parent's experts, Dr. D.H. and Dr. B., the behavior specialist, Dr. S., the speech and language therapist, the OT, the PT, Student's educational tutors/teachers and all staff working with Student at the time. A review of the record also shows that SCERTS, DIR, Community Based Instruction (hereinafter "CBI"), and sensory integration were and continue to be the guiding principles for Student's program. In order to implement Student's IEP and program, all staff were and continue to be required to undergo extensive and ongoing training. Dr. D.H. has continued as a consultant to the program, and the behavior specialists also remain involved.

Moreover, a review of the record reveals that data is regularly collected, progress monitoring is being taken with fidelity, and communication between all team members, including the Parents, is frequent and consistent. As a result of the coordinated efforts of

the many people on Student's team, Student has made slow but steady progress in all areas of Student educational program.²⁶

Therefore, since the record is replete with evidence that the District/CCIU team has been implementing Student's IEP appropriately and Student has been making meaningful educational progress, Parents have not met their burden.

Whether the March 31, 2008 re-evaluation report was appropriate?

The local educational agency must conduct a "full and individual initial evaluation" 20 U.S.C §1414(a)(1)(A). The child must be "assessed in all areas of suspected disability." 20 U.S.C. §1414(b)(3)(B). The regulations require that the evaluation procedures "assist in determining ... [t]he content of the child's IEP. 34 C.F.R. §300.304(b)(1)

Additionally the IDEIA provides that all testing instruments must be valid and reliable for the purpose for which they are used, be administered by trained and knowledgeable personnel and be administered in accordance with the applicable instructions of the publisher. 20 U.S.C. §1414(b)(3)(A); 34 C.F.R. §300.304(c)(1).

In evaluating a child, a district may not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child; and The child is assessed in all areas of suspected disability;

Assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided.

Use of technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

Further, IDEA 2004 at Section 614(b)(3) imposes additional requirements that local educational agencies ensure that

Assessments and other evaluation materials used to assess a child:

- Are selected and administered so as not to be discriminatory on a racial or cultural basis;
- Are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally and functionally unless it is not feasible to so provide or administer;

²⁶ After participating in a transition period in August 2008, Student has been attending the educational program designed for much more regularly since the start of the 2008-2009 school year.

Are used for purposes for which the assessments or measures are valid and reliable;
 Are administered by trained and knowledgeable personnel; and
 Are administered in accordance with any instructions provided by the producer of such assessments;

Although a re-evaluation under 34 CFR 300.303 is not defined in the IDEA or in the 2006 implementing regulations, it is understood to be a comprehensive evaluation analogous to an initial evaluation under 34 C.F.R. 300.301, conducted for students who already have undergone evaluations and been found eligible for services. While a reevaluation must meet the same IDEA requirements as an initial evaluation, a student's reevaluation need not be identical to his initial evaluation in every respect. For example, because a re-evaluation must be individualized, it must take into account the student's then current needs. As a result, different procedures may need to be used.

A reevaluation under 34 C.F.R. 300.305(a)(2) of the IDEA a regulations should address the following five issues:

- 1) Whether the child continues to have a disability. 34 CFR 300.305(a)(2)(i).
- 2) The child's educational needs. 34 CFR 300.305(a)(2)(i)
- 3) Ascertainment of the child's present levels of academic performance, and related developmental needs. 34 CFR 300.305(a)(2)(ii)
- 4) Whether the child continues to need special education and related services. 34 CFR 300.305(a)(2)(iii)
- 5) Whether any additions or modifications to the special education and related services called for in the child's IEP are needed to enable him or Student to meet the measurable annual goals set out therein and to participate, as appropriate, in the general education curriculum. 34 CFR 300.305(a)(2)(iv)

With regard to reevaluation, the local educational agency must ensure that a reevaluation of each child with a disability is conducted "if it is determined that the educational or related services needs, including improved academic achievement and functional performance, of a child warrant, a reevaluation or if the child's parent or teacher requests a reevaluation." A reevaluation "may occur not more than once a year, unless the parent and public agency agree otherwise; and must occur at least once every 3 years, unless the parent and the public agency agree that a reevaluation is unnecessary." 34 C.F.R. §300.303 However, with regard to students with disabilities who are identified as mentally retarded, those students must be reevaluated at least once every 2 years.²⁷ 22 Pa. CODE §14.124.

²⁷ Arguably, the March 31, 2008 RR was out of compliance with timeline requirements. However, a review of the evidence reveals that Student was evaluated in January 2006 while in the APS. Further evaluation was obtained in June 2006 in a Neuro-developmental evaluation conducted at the Neuro-developmental Pediatric Center by J C, M.D. In addition, R H, Ed.D. conducted an FBA in July 2006 and there was a Communication Evaluation by L M, MS, CCC-SLP in November 2006. On April 2, 2007, R L, M.A., CCC-SLP from the [redacted] Hospital, conducted an Assistive Communication Evaluation. All of these evaluations were shared with the District and Student's educational team.

Here, a review of the evidence in the record persuades this hearing officer that the District's Re-Evaluation Report (hereinafter "RR") was appropriate and met all of the delineated requirements in IDEA. Specifically, the RR was comprehensive and evaluated Student in all areas of need; it not only ascertained Student's present levels of educational and functional performance, but also identified Student's related academic and developmental needs. The RR considered and incorporated many aspects of the independent evaluations conducted by Dr. D.H., Dr. B. and Ms. M. The RR also used curriculum based assessments, progress data from the SCERTS program, and others, reports from the behavior specialist, and updated information from the SpLg therapist, the OT and the PT.

A further review of the evidence reveals that the RR formed the basis of the June 18, 2008 IEP which provided an appropriate program that met both substantive and procedural regulatory requirements and, as noted above, was designed to provide meaningful educational benefit. *Rowley, at U.S. 176, 206-07, 102 S.Ct. 3034 (1982)*

Therefore, Parents' complaint that the IEP was not being implemented appropriately is not supported by a preponderance of the evidence.²⁸

Whether the District committed procedural errors which resulted in a denial of FAPE?

In the 2004 revisions to the IDEA, Congress affirmed its position that de minimis procedural violations do not constitute a deprivation of FAPE. Referencing 20 U.S.C. 1415(f)(3)(E) and (F), 1415(h)(4), 1415(o), it provides:

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies (1) impeded the child's right to a FAPE; (2) significantly impeded the parents' opportunity to participate in the decision making process...; or (3) caused a deprivation of educational benefits.

In the instant matter, Parents complain that evaluations and IEP meetings were untimely.²⁹ Parents also complain that their participation in the decision making process was impeded because there were two IEP meetings held in the 2007-2008 school year which were not took place without the Parents in attendance.

²⁸ It is clear to this Hearing Officer that contrary to the requirements as delineated in 34 CFR §300.503(c)(1), Parents based their claim on the faulty premise that the District was obligated to incorporate and implement every recommendation made by Dr. D.H.

²⁹ Specifically, the IEP meeting which was supposed to be held in October 2008 didn't convene until November 2008, and the speech and language evaluation which was supposed to have been completed by the start of the 2008-2009 school, wasn't, and so the District agreed to fund an independent speech and language evaluation which was completed in March 2009.

Nevertheless, a review of the testimonial and documentary evidence does not support Parents' arguments. It is certainly true that evaluations were delayed and IEP meeting postponed, but much of the time, Parents were a contributing factor. This is not to say that the District isn't legally obligated to comply with procedural timelines and due process, however, but the Parents must carry the burden of proving that the procedural errors were more than *de minimus* or that Student suffered impedance or a denial of educational benefit.

With regard to Parents assertion that they were denied meaningful participation in the decision making process belies the testimonial and documentary evidence in this matter which shows that Parents played a central role in every evaluation, program and placement decision.

Therefore, since Student received a FAPE and made meaningful educational progress, any procedural errors which arguably may have occurred, were harmless.

Whether Student entitled to compensatory education for the time period between May 15, 2007 and February 19, 2009?

Compensatory education is a remedy designed to provide a student with the services Student should have received pursuant to a free appropriate public education (FAPE). When a student has been denied the due process rights or an appropriate educational program that Student should have received, compensatory education is an in-kind remedy. *Lester H. v. Gilhool*, 916 F. 2d 865 (3d Cir. 1990), cert. denied 499 U.S. 923, 111 S.Ct. 317 (1991) A child is entitled to compensatory education services if the child is exceptional and in need of services and/or accommodations and if through some action or inaction of the District the child was denied FAPE.

In determining whether an award of compensatory education is warranted, the first step in the analysis is to assess the appropriateness of the program offered by the School District at the time it was offered or provided. *In re: The Educational Assignment of Karyn S., Special Education Appeals Panel Opinion No. 1124 (June 4, 2001)*. An award of compensatory education for lack of an appropriate program may be based upon implementation as well as the contents of the IEP. *Ridgewood; In re: The Educational Assignment of Zachary S., Special Education Appeals Panel Opinion No.1000 (February 28, 2000)*.

In the case at bar, the evidence shows that the program designed around Student's educational needs as delineated in the IEPs was appropriate and was being appropriately implemented. Therefore, there is no persuasive evidence that Student

However, compensatory education is an equitable remedy to restore services to which a student was entitled and which were denied to him/her. Where parental interference or obstruction is evident, there should be a balancing of the equities in determining the extent of the compensatory award. *In re the Educational Assignment of T.W., A Student in the Kutztown Area School District*, Special Education Opinion No.

1224 (April 1, 2002). In considering the equities, this hearing officer will “accor[d] ample latitude for parental passivity and advocacy.” *M.C.*, *supra* at 18. Nevertheless, where the Parent’s conduct has “become more than simply misguided,” *In re the Educational Assignment of E.V., A Student in the Easton Area School District*, Special Education Opinion No. 1333 (February 28, 2003), the equities will balance against compensatory relief.

Here, however, the evidence supports the appropriateness of the March 31, 2008 evaluation as well as the June 18, 2008 IEP which was reasonably calculated to provide Student with meaningful educational benefit, Student was making measurable progress in light of Student potential, in the least restrictive environment, therefore, there was no denial of FAPE , and no entitlement to compensatory education.

Did the School District retaliate against Parents or Student in violation of their rights under Section 504 of the Rehabilitation Act of 1973?

The test for a successful retaliation claim under Section 504 in this circuit is contained in *Lauren W. ex rel. Jean W. v. Deflamini*, 480 F. 3d 259 (3d Cir. 2007). First, plaintiffs “must show (1) that they engaged in a protected activity, (2) that defendants’ retaliatory action was sufficient to deter a person of ordinary firmness from exercising his or Student rights, and (3) that there was a causal connection between the protected activity and the retaliatory action.” *Id.* at 267. The third element, the causal connection, is satisfied if plaintiff can show either an unusually suggestive temporal proximity between the protected and retaliatory activity *or* a pattern of antagonism coupled with timing to establish a causal link. *Id.*

Here, the protected activity is the Parents’ advocacy for Student’s rights. A person of ordinary firmness would likely be deterred from advocating for her child’s rights by refusing to transfer Student’s homebound instruction to a center based program if it meant that truancy charges would be filed against them.

On the issue of causation, usually the most difficult element, Parents have not provided evidence more than suggestive of the temporal proximity. There is undoubtedly a pattern of antagonism between the parties, which no doubt resulted at least in part from the Parent’s advocacy or from the District’s perspective, Parents refusal to transfer Student’s “homebound” services provided at the CDC to the DEC program which had been designed specifically for Student, using the same staff and same time of delivery as an appropriate and necessary step in Student’s transition process. However, although the timing of the decision to file the truancy citation after the May 21, 2008 NOREP was issued was immediate, it was the pursuant to the District’s legal obligation under the compulsory school laws. 24 PS §13-1327 not because of Parents’ advocacy.

Similarly, Parents’ allegation that the District retaliated against them by convening IEP meetings without the Parents on two occasions. Although Parent is not clear as to which two IEP meetings they are complaining about, a review of the testimonial and documentary record reveals that it was the Parent’s choice not to attend several IEP meeting in March, April, and May 2008 because they wanted specific people to attend the IEP meeting and those people were not

available. Again, Parents do not meet their burden of showing that but for Parents' advocacy the District would not have filed the truancy citation or held two IEP meetings without the Parents. Therefore, this Hearing Officer is not satisfied that Parents have made out a case of retaliation.

ORDER

It is hereby ordered that:

1. The March 31, 2008 RR was appropriate and met both substantive and procedural regulatory requirements.
2. The June 18, 2008 IEP is appropriate, as it was based on an accurate and comprehensive evaluation and was reasonably calculated to provide Student with meaningful educational benefit.
3. Since Student was receiving a FAPE and making meaningful educational progress, any procedural error which arguably may have occurred, was harmless.
4. The Student is not entitled to compensatory education for the period between May 15, 2008 and February 19, 2009 as Student was receiving a FAPE to the extent Student Parents allowed Student to participate and suffered no educational harm as a result of procedural errors the District committed.
5. Since Parents did not meet their burden of showing that but for Parents' advocacy the District would not have filed the truancy citation or held two IEP meetings without them, this Hearing Officer is not satisfied that Parents have made out a case of retaliation

November 10, 2009
Date

Deborah G. DeLauro
Deborah G. DeLauro, Hearing Officer