

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 #10193/08-09 LS

Date of Birth:
Xx/xx/xx

Dates of Hearing:
July 1, 2009
August 11, 2009
September 1, 2009

CLOSED HEARING

Parties to the Hearing:

Representative:

Parents

Pro Se

School District
Upper Darby School District
4611 Bond Avenue
Drexel Hill, PA 19026

School District Attorney
Scott Gottel, Esq
Holsten & Associates
One Olive Street
Media, PA 19063

Date Record Closed: September 14, 2009

Date of Decision: September 30, 2009

Hearing Officer: Deborah G. DeLauro, Esq.

Background

Student (hereinafter “Student”) is a pre-teen aged seventh grade student who is a resident of the Upper Darby School District (hereinafter “District”). Student qualifies for special education services under the category of Autism¹. Student moved into the District in February 2005 and was initially placed at Parent’s request in the regular education program at [redacted] Elementary School (hereinafter Elementary School One). After a relatively short period of time, Parent agreed with the recommendation to place Student in the Autistic Support Program in the [redacted] Elementary School (hereinafter Elementary School Two). Towards the end of the 2004-2005 school year, however, Parent requested a due process hearing complaining that the District failed to provide Student with a Free Appropriate Public Education (hereinafter “FAPE”).

After an administrative appeals panel overturned the hearing officer’s decision², and determined that Student should be educated in the specialized autistic support program at Elementary School Two, the Parent then filed an appeal with the United States District Court for the Eastern District (hereinafter “USDCED”) where the Parties entered into a Consent Decree.³ [SD-16; N.T. pp.] Pursuant to the Consent Decree, the USDCED appointed a *guardian ad litem*⁴ and maintained jurisdiction through the end of the 2007-2008 school year.

Marcie Romberger, Esquire, acting as the *guardian ad litem*, approved the Individual Education Plan (hereinafter “IEP”) of March 26, 2008 which was amended on of June 9, 2008. [SD-1; N.T. pp. 104, 294-296; SD-16] Thus, the March 26, 2008 IEP amended on June 9, 2008 was accepted as providing FAPE by Student’s *guardian ad litem*.

However, in August 2008, the Parent requested an IEP team meeting prior to the start of the school year in order to change the agreed upon IEP. Nonetheless, Parent was persuaded to allow the District the opportunity to implement the IEP which had just been approved by the *guardian ad litem*. [P-39; SD-2] Parent made no additional complaints during the 2008-2009 school year, until she requested a re-evaluation and then contested its validity in the present case.

On June 16, 2009, Parent filed the instant Due Process Complaint alleging that the proposed extended school year (hereinafter “ESY”) program was inappropriate and requesting that her child be placed in the Lindamood-Bell Remedial Reading program

¹ Student has recently been diagnosed as a student with Asperger’s Syndrome, an Autism Spectrum Disorder.

² At the administrative hearing, the hearing officer found that Student should be placed in regular education in Student’s neighborhood school with special support services in reading and mathematics.

³ *Student B. v. The Upper Darby School District, et al.* USDCED docket at 06-343. Subsequent appeals by Parent may be found under the Third Circuit Court of Appeals dockets at 07-1739 and 07-4111.

⁴ The Hon. Paul S. Diamond held: “Unfortunately, Judge Rice has confirmed my own observations: that [Parent] has shown herself to be irrational, inconsistent, and belligerent in her dealings with the 3 different law firms that have represented her [child], in her dealings with the school district, and in her dealings with this court. As a result, she is hurting her [child] by making it impossible to implement the Consent Decree or any other educational improvements.”[SD-17; SD-18]

(hereinafter “Lindamood-Bell”) instead. Included in Parent’s complaint were additional allegations regarding the appropriateness of the May 11, 2009 RR, the June 4, 2009 IEP and the corresponding NOREP. [HO-1]⁵

On June 22, 2009, the District filed an Answer to Parent’s complaint which included a sufficiency challenge with regard to the additional allegations. [HO-2] On June 29, 2009, the Parent then submitted additional background information amending her Complaint. [HO-3] In light of Parent’s pro se status, this hearing officer denied the District’s partial motion to dismiss the additional allegations and accepted Parent’s amended Complaint. [N.T. pp. 7-8]

On July 1, 2009, an expedited hearing was held in order to address the ESY issue. However, at the start of the hearing, the Parent requested that the hearing be “un-expedited” in light of her belief that the ESY issue could not be resolved independently without first determining which IEP was in place at the time the Complaint was filed, and second, without addressing the ancillary issues related to the appropriateness of the May 11, 2009 re-evaluation report (hereinafter “RR”), and the June 4, 2009 IEP and the corresponding Notice of Recommended Placement (hereinafter “NOREP”). [N.T. p. 6]

Therefore, the July 1, 2009 hearing was treated as the first hearing session focused on the appropriateness of the District’s proffered ESY program and the Parent’s preferred Lindamood-Bell program. [N.T. p. 6-7]

Issues

1. Whether the ESY program recommended by the District was appropriate?
2. Whether the May 11, 2009 re-evaluation was appropriate?
3. Whether the IEP dated June 4, 2009 was appropriate?
4. Whether the June 4, 2009 NOREP recommending placement in the supplemental learning support program was appropriate?

Findings of Fact

1. Student (hereinafter “Student”)⁶ is a pre-teen aged seventh grade student who resides in the Upper Darby School District (hereinafter “District”)

⁵ Parent included only an incomplete Notice of Complaint at [P-1]. In order to have complete record, this hearing officer added the full and complete complaint filed by the Parent on June 16, 2009 at [HO-1]

⁶ 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 qualifies for special education services as a student with autism pursuant to the Individuals with Disabilities Education Act (hereinafter “IDEA”). [SD-22; SD-5; N.T. pp. 47, 81, 102-103]
3. Parent, on behalf of the student, was previously involved a due process hearing request appealed to federal court. [SD-16; N.T. pp. 24, 289]
4. The United States Court for the Eastern District of Pennsylvania (hereinafter “USDCEDEPA”) maintained jurisdiction to the end of student’s 2007/2008 school year. [SD-16; N.T. pp. 289]
5. The parties entered into a consent decree and the USDCEDEPA appointed a *guardian ad litem*, Marcie Romberger, Esquire. [SD-16; SD-18; SD-24; N.T. pp. 24, 54-55, 104]
6. The *guardian ad litem* approved the IEP of March 26, 2008, as well as the amendment of June 9, 2008, which occurred before the end of the school year while the federal court still had jurisdiction. [SD-1; SD-16; N.T. pp. 104, 294-296]
7. The March 26, 2008 IEP amended June 9, 2008 was accepted as providing a FAPE by the *guardian ad litem*, and was in effect at the time parent requested a reevaluation. [SD-4; N.T. pp. 60-62]
8. In the meantime, having determined Student’s need for ESY, on May 7, 2009, the District sent Parent a letter recommending the Elementary School Two’s Proactive Academic and Social Skills program (hereinafter “PASS” program).⁷ [SD-4; N.T. pp. 82-83; 105-116]
9. There was credible testimony that the PASS program would have provided Student with instruction in reading and math pursuant to Student’s IEP goals, as well as focusing on social skills with opportunities to generalize skills in practical community settings. [SD-4; N.T. pp. 107-111]
10. Parent wanted Student to attend the Lindamood-Bell program and had Student tested by the Lindamood-Bell staff. [SD-6; HO-1; SD-12; N.T. p. 69]
11. The prescribed Lindamood-Bell program was not an ESY program but a full-time program which would run for 24 weeks. [SD-12; N.T. 48]
12. The Lindamood-Bell program was a language based one-on-one comprehension program with no social skills. [SD-12; N.T. 44-45]

⁷ The PASS program was designed to provide academic and social skills to students within the autism spectrum

13. Lindamood-Bell based its recommendation regarding Student on its' own very limited testing considering no other reports, evaluations or Student's other needs as identified in Student's IEP. [SD-12; N.T. 48-52] The testing summaries did not include and interpretation or discussion of the results. [SD-12; N.T. pp. 33-37, 218-221]
14. Lindamood-Bell testing was conducted on August 6, 2008 and updated on April 9, 2009 but was not provided to the District in time for review and consideration before the June 4, 2009 IEP team meeting. [SD-12; SD-10; N.T. p. 69]
15. On May 11, 2008, the RR was completed and a copy given to Parent in preparation for a RR review team meeting scheduled for May 14, 2008. [SD-5; SD-6; N.T. pp. 221-224]
16. On May 12, 2009, Parent refused to attend the RR review meeting since she indicated that she disagreed with the RR.⁸ [SD-6; N.T. pp. 67-68;]
17. Also, on March 12, 2009, Parent requested a re-evaluation and signed a Permission to Re-Evaluate even though the *guardian ad litem* had previously ordered an IEE to be conducted by Dr. H on March 26, 2008. [SD-13; N.T. pp. 162] While the re-evaluation was being completed, Parent consented to continue the March 26, 2008 with amendments on June 9, 2008. [SD-14; SD-23]
18. On May 20, 2009, Parent again disagreed with the RR and requested an independent educational evaluation (hereinafter "IEE") at public expense. [SD-6; SD-7; N.T. pp. 151, 166-167, 169]
19. On May 29, 2009, the District approved Parent's request for an IEE, but notified Parent that the District was going to "move forward with the RR review and IEP meeting in order to meet all guidelines." The District further explained that once the IEE was received, the District would then give consideration to the information included in the IEE and amend the RR as appropriate. [SD-8; N.T. pp. 193-194]
20. Despite her request, Parent did not obtain an IEE but instead testified that she believed that the Lindamood-Bell assessments were sufficient and that the Student did not need a psychological evaluation. [N.T. 166-168-196-197]
21. On May 29, 2009, the District sent Parent, an invitation to participate in another RR review and IEP meeting, which was scheduled for June 4, 2009. [SD-9; N.T. pp. 66-68]
22. By June 3, 2009, since Parent hadn't notified the District of her decision regarding ESY, the District also offered Student the opportunity to participate in

⁸ Parent initially requested a Mediation, but later cancelled and instead filed the present due process complaint. [N.T. p. 68]

- the Educational Assistance Program (hereinafter “EAP”) in both reading and math. [SD-15; N.T. pp. 113-114]
23. On June 4, 2009, an IEP team meeting was convened and the RR was reviewed first. Parent disagreed with RR so she refused to participate in the IEP portion of the IEP meeting. [SD-10; N.T. pp. 72-73, 83-87]
24. Student was re-evaluated by school psychologist, Mr. R (hereinafter “Mr. R”) in March and April of 2009 and the RR was completed on May 11, 2009. [SD-5; N.T. pp. 213]
25. The RR included results from the following assessments: Test of Math Ability (hereinafter “TOMA”), the Woodcock-Johnson Test of Achievement – III (hereinafter “W-J III”), the Dynamic Indicators of Basic Early Literacy Skills (hereinafter “DIBELS”), the Gates-MacGinitie Reading Test, summaries from the Behavior Consultant and Speech/Language Therapist.
26. The TOMA yielded the following results:

Subtest	Raw Score	Percentile	Standard Score	Age Equiv	Grade Equiv
Vocabulary	12	91	14	18	12.2
Computation	16	37	9	11-6	5.8
General Information	20	50	10	12-6	6.8
Story Problems	6	9	6	8-6	2.7

27. Mr. R explained each score and found that the results of the TOMA indicate that Student’s strengths are in understanding words used in mathematical thinking, computation, and using math in every day situations. Student’s needs are in the area of Mathematical Reasoning.
28. The W-J III yielded the following results in Reading:

READING

Scale	Standard Score (a)	Percentile Rank (b)	Qualitative Description
Word Identification	115	84	Average
Word Attack Skills	100	50	Average
Passage Comprehension	91	29	Average
Reading Fluency	80	4	Low Average

- (a) Scores of 90 to 110 constitute the Average range, as do percentile scores of 25 to 75

- (b) Percentile scores indicate the percentage of same-aged peers, who, if given this test, would be expected to score below Student.
29. Mr. R concluded that Student's reading skills are at or near grade norms. It was only in the area of reading fluency that Student displayed borderline deficits. Mr. R found Student to be a methodical reader who would not do well in closely timed tests.
30. The W-J III yielded the following results in Math:

MATH

Scale	Standard Score (a)	Percentile Rank (b)	Qualitative Description
Calculation	91	28	Average
Applied Problems	80	10	Low Average
Quantitative Concepts	88	20	Low Average
Math Fluency	78	7	Low

31. Student's composite or Broad Math performance was in the Low Average range with wide variance see across math domains.
32. Mr. R gathered additional math data using subtests from the KeyMath-3 Test. [SD-5; N.T. p. 241]
33. The W-J III yielded the following results in Writing:

WRITING

Scale	Standard Score (a)	Percentile Rank (b)	Qualitative Description
Spelling	114	82	High Average
Writing Samples	85	16	Low Average

34. Mr. R found that Student had high achievement in Spelling but was inconsistent when required to write descriptions, stories with details and Student sometimes missed the theme or did not follow directions. [SD-5; N.T. pp. 238-239]
35. Mr. R also gathered additional information using the Test of Written Language-4 and found that although Student could respond well to structured questions, Student floundered when asked to produce a spontaneous writing sample. [SD-5; N.T. pp. 241]
36. Mr. R also included Student's results on the DIBELS, which gauged Student's progress in Reading in the Established category which is an equivalent to 6th grade students reading a 5th grade passage fluently. [SD-5; N.T. pp. 241-242]

37. The RR incorporated a summary of Student's behavior and Social functioning. Student had a behavior intervention plan which had been recently revised on 3/26/09 and revealed that Student's behavior had improved to the point where some of the behavior targets from the previous year had been discontinued because they were no longer major impediments to Student's success in school.[SD-5; N.T. pp. 244-245]
38. The RR also included updated information from Student's speech/language teacher who works with Student once a week in small group sessions. [SD-5]
39. Finally, the RR included current classroom-based and local and/or state assessments, Student's report cards and observations from Student's teachers. [SD-5]
40. Parent provided input but then requested that it not be included in the RR. [SD-5; N.T. pp. 184-186; 222-223]
41. The June 4, 2009 IEP addressed the needs and skill deficits identified in the RR and included:
- a. present levels of academic and functional performance. [SD-10; SD-5]
 - b. a behavior intervention plan [SD-10; SD-5; N.T. pp.324]
 - c. annual goals designed to enable Student to make progress; [SD-10; SD-3; N.T. pp. 325-327, 328-329, 335, 368-369]⁹
 - d. a statement of expected levels of achievement and how and when progress shall be reported; [SD-10; N.T. pp.]
 - e. goal progress notes.[SD-3; SD-10]
 - f. related services needed for Student to access Student's special education program: Occupational Therapy (hereinafter "OT"); Personal Care Assistant (hereinafter "PCA"); Social Skills Group; and Speech/Language Therapy. [SD-10]
 - g. a statement of program modifications and specially designed instruction (hereinafter "SDI"). [SD-10]
 - 1) a specially designed instruction included the use of many research-based curriculums such as Edmark, PCI sight words, Touchmath and Touchmoney. [N.T. 691]
 - h. procedural safeguards. [N.T. 320]
 - i. supports for school personnel. [SD-10; N.T.336-337]
42. The June 4, 2009 IEP includes Present Level of Educational Performance based on information derived from the RR. The IEP includes baseline information regarding the following areas of need: Reading Fluency and Comprehension, Written Language, Math Reasoning, Math Calculation, Social Skills, Speech; Conversation Skills, Behavioral and Social Functioning, [SD-10; N.T.]

⁹ Annual goals are broken down into specific skills to measure Student's progress in the Progress Notes but need to be revised to reflect the specific skills being measured in each goal area.[SD-10; SD-3; N.T. pp. 365-368]

43. Also included in the June 4th IEP are goals which follow the areas of need identified in the RR.¹⁰ [SD-10]
44. Finally, the June 4th IEP includes the following Modifications and Specially Designed Instruction (hereinafter “SDI”):
- 1) PCA will:
 - assist, monitor and guide student to pay attention, participate in activities, and complete tasks;
 - assist in note taking
 - monitor homework book
 - assist on stairs during fire drills
 - observe and intervene to redirect inappropriate behavior
 - check school back for necessary supplies/books.
 - 2) Allow wait time for processing and oral responses.
 - 3) Allow extra time for test completion.
 - 4) Clarification and further explanation to ensure understanding of directions and expectations of teacher.
 - 5) Consistent, highly structured classroom routine.
 - 6) Extended time for writing assignments.
 - 7) Preferential seating to minimize distractions.
 - 8) Use graphic organizers for written assignments.
 - 9) Break assignments into small manageable chunks.
 - 10) Daily planner used for homework assignments and signed nightly by parent.
 - 11) Frequent checks for understanding during independent work.
 - 12) Directions read aloud and clarification in further explanation to ensure understanding of directions and expectations of teacher.
 - 13) Learning support teacher to assist with assignments.
 - 14) Materials to be presented using varied modes; visual, auditory, and tactile.
 - 15) Opportunity to retest.
 - 16) Manner for problems read aloud to insure understanding.
 - 17) Opportunity to take tests outside of the classroom.
 - 18) Positive reinforcement for on-task behavior.
 - 19) Probes and prompts to aid information retrieval.
 - 20) Provide repetition during initial construction.
 - 21) Test directions to be read aloud.
 - 22) Use of visual supports.
 - 23) Use of verbal prompts.
 - 24) Behavioral intervention plan.

¹⁰ The June 4, 2009 IEP includes goals in Reading Fluency and Comprehension; Math Fluency and Reasoning as well as Calculations; Writing: mechanics, organization; paragraphs, essays and spontaneous writing; Conversational Speech; Behavior and Social Skills.[SD-10; N.T. 325-327, 328-329, 332-333, 335, 368-369]

- 25) Provide content outlines, study guides or overhead copies.
Classroom teacher will provide a copy of board work to reduce Student's frustration with copying from the Board.
- 26) Access to computer for completion of written assignments.
- 27) Other: daily schedule will be provided to students when a change in daily schedule is to occur.
- 28) Other: use of direct instruction for introduction of new skills and concepts.
- 29) Other: 2nd set of books will be sent home as needed for Social Studies and Reading/LA Anthologies.
- 30) Other: provides summary or content outline after initial reading.
- 31) Other: encourage students to refer back to reading when answering comprehension questions.
- 32) Other: reduce number of problems or questions required.
- 33) Other: when appropriate, if student initiates a topic of conversation, an adult will facilitate the opportunity for student to elaborate on it with peers/adults.
- 34) Other: headphones or earplugs to block out external noise is needed.
- 35) Other: provide repetition with any skill in various school settings including for academic and social skills.
- 36) Other: access to study carrel and/or headphones to reduce auditory or visual stimuli.
- 37) Other: daily behavioral checklist. [SD-10]

45. The June 4th IEP included the following related services:

- 1) occupational therapy – consultative: 1/monthly in general ed;
- 2) personal care assistant-individual – 5 days/week in general ed;
- 3) social skills group – 1/weekly 30 minutes in general ed;
- 4) speech and language therapy – individual - 1/ weekly 30 minutes outside of class. [SD-10]

46. The June 4, 2009 IEP included the following Supports for School Personnel:

- 1) Behavior consultant to work with the Student's personal care assisted on implementation of behavior plan.
- 2) Behavior consultant will meet with the IEP team work to provide guidance regarding how to address Student's behavioral needs.
- 3) Special education teacher will consult with the regular education teachers for recommendations of adaptations to the general education curriculum.
- 4) Transition meeting to occur with the middle school team prior to the opening of school in August. [SD-10; N.T. pp.304, 336-337]

47. Student's academic and behavioral progress was monitored using data collection and at regular intervals. [SD-3; SD-10]
48. The IEP team's recommended placement continues to be in the supplemental learning support program in the [redacted] Middle School. [SD-11; N.T. pp. 336]
49. During the 2008-2009 school year, Student made academic and functional progress in all areas of need identified in Student's IEP which was implemented in the supplemental learning support program. [SD-3; SD-5; SD-10; N.T. pp. 296, 302-303, 307, 311, 324-327]

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.¹¹ 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 Lindamood-Bell Director, Ms. S (hereinafter "Ms S") provided credible testimony regarding the Lindamood-Bell program and assessments, however, her admission that she had not reviewed the District's proposed ESY program or its testing, made it clear to this hearing officer that there was a prescribed protocol for Lindamood-Bell assessments and program recommendations which was not geared to Student's complete educational needs as delineated in Student's IEP.

¹¹ 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).

The District psychologist, Mr. R, conducted the re-evaluation between March and May 2009 which formed the basis of the June 4, 2009 IEP. This Hearing Officer found Mr. R's testimony to be comprehensive and highly credible. It was clear that Mr. R's twenty-six years of experience were critical in assisting the Student to feel comfortable so that he could get a true picture of Student's strengths and areas of need. Consequently, this hearing officer gave substantial weight to Mr. R's testimony.

The Special Education Coordinator, Ms. D (hereinafter "Ms. D") and Ms. B-D (hereinafter "Ms. B-D"), Student's special education teacher, both provided credible testimony which was supported by the documentary and testimonial evidence. Ms. B-D had some difficulty explaining how the annual goals were being measured, but her attempt to be forthright bolstered her credibility with this hearing officer.

Student's mother testified at length and although clearly concerned about her child, her testimony not only contradicted the testimonial and documentary evidence presented, but also revealed her to be difficult, inconsistent in her demands and determined to have her own way at all costs. For example, in disregard of this hearing officer's repeated explanation of the issues at bar and the scope of the present hearing, Parent continued her attempts to expand the instant issues and scope by constantly referring back to and stating her disagreement with the March 2008 IEP. Thus, this hearing officer found Parent's testimony to carry 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 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 Parent requested the hearing and therefore she bore 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, and as described in greater detail below, the Parent did not meet her burden of persuasion on any issue.

Whether the District’s proffered ESY program was appropriate? If not, then whether the Lindamood-Bell Remedial Reading Program was appropriate?

First, entitlement to ESY services derives from both federal and state special education provisions. Under the federal IDEA regulations, ESY services are to be provided to an eligible student if necessary to assure that s/Student receives a free, appropriate public education (FAPE). 34 C.F.R. §300.106(a)(2). Pennsylvania special education regulations provide additional and more specific guidance for determining ESY eligibility, explicitly requiring that the factors listed in 22 Pa. Code §14.132 (a)(2) (i)—(vii)¹² be taken into account. Nevertheless, ESY eligibility does not rise and fall solely

¹² (i) whether the student reverts to a lower level of functioning as evidenced by a measurable decrease in skills or behaviors, which occurs as a result of an interruption in the educational programming (Regression)
(ii) whether the student has the capacity to recover the skills or behavior patterns in which regression occurred to a level demonstrated prior to the interruption of educational programming (Recoupment).
(iii) whether the student’s difficulties with regression and recoupment make it unlikely that the student will maintain the skills and behaviors relevant to IEP goals and objectives.
(iv) the extent to which the student has mastered and consolidated an important skill or behavior at the point when educational programming would be interrupted.
(v) the extent to which a skill or behavior is particularly crucial for the student to meet the IEP goals of self-sufficiency and independence from caretakers.

on those criteria. In §14.102(a)(2)(xi) and §14.132(a), the Pennsylvania special education regulations incorporate by reference the federal ESY regulation referenced above, and §14.132(a) states that the seven factors are to be considered “In addition” to the requirements of the federal regulation. Consequently, the Pennsylvania factors provide neither exhaustive nor exclusive criteria for determining a need for ESY services. Rather, an IEP team must also consider a more global question: Are ESY services necessary for a given student to receive FAPE? Expanding that term, a district must consider whether ESY services are needed to assure that the student’s program is reasonably calculated to confer meaningful educational benefit. *Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982). “Meaningful benefit” means that an eligible student’s program affords Student or her the opportunity for “significant learning.” *Ridgewood Board of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999).

In determining the need for ESY services, school districts can, and do, consider factors such as significant deficits, slow progress and functioning considerably below grade level in a given area to determine whether ESY services are needed for a student to receive FAPE. See, e.g., *In Re: A Student in the Freeport Area School District*, ODR #9015/07-08 (August 7, 2008) at 7, 8. ESY services are not to be based on the desire or need for day care or respite care services, a summer recreation program, or services that are not required to ensure FAPE. 22 Pa. Code §14.132

In the instant case, because Student’s Parent challenges the District’s proposed ESY program and seeks District funding for a private placement of longer duration than the District’s 20 day proposed ESY program, again, she bears the burden of persuasion.

(vi) the extent to which the successive interruptions in educational programming result in a student’s withdrawal from the learning process.

Here, both the District and the parent agree that Student requires ESY programming to avoid regression and poor recoupment. However, the District's ESY program was geared towards academic and social skills for children on the autism spectrum and would have permitted student to maintain current levels of education and social skills. A review of the testimonial and documentary evidence reveals that the District's proposed ESY program was reasonably calculated to confer meaningful educational benefit. To that end, the evidence also shows that the District's PASS program would address Student's math and reading needs pursuant to Student's IEP in addition to focusing on social skills with opportunity to generalize skills in practical community settings.

On the other hand, the Lindamood-Bell program was not designed to address Student's unique academic and social needs as identified in Student's IEP. In fact, the Lindamood-Bell Director testified that Student would receive a prescribed one-to-one language based reading program with no social skills and further recommended a twenty-four week program which would far exceed the twenty-day ESY period. Ms. S based her recommendation on Lindamood-Bell's own very limited testing, considering no other reports, evaluations or Student's other needs as identified in Student's IEP. Moreover, the testing summaries did not include an interpretation or discussion of the results.

Therefore, the ESY program proposed by the District was appropriate as it was designed to confer meaningful educational benefit and would provide Student with a FAPE. To the contrary, the Lindamood-Bell program requested by the Parent was inappropriate because it was not designed to address Student's educational needs as identified in Student's IEP and consequently, would not provide Student with a FAPE.

(vii) , where the student's disability is severe, such as autism/pervasive developmental disorder, serious emotional disturbance, severe mental retardation, degenerative impairments with that mental involvement

Whether the May 11, 2009 RR 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]Student content of the child’s IEP. 34 C.F.R. §300.304(b)(1)

Additionally the IDEA 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 must be 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:

and severe multiple disabilities.

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;

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 Student's 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 Student or her 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. 22 Pa. CODE §14.124.

Here, a review of the record persuades this hearing officer that the District's 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 performance, but also identified Student's related academic, behavioral and social needs. The RR did not use any single measure or assessment as the sole criterion for determining an appropriate educational program for the Student; in fact, it used technically sound instruments which were valid for the purpose for which they were used, and were administered by Mr. R, who is highly trained with 26 years of experience who administered the tests in accordance with the applicable instructions.

A further review of the evidence reveals that the RR provided a comprehensive view of Student through observations, testing and assessments and is consistent with the requirements of the reevaluation. On the other hand, it is also clear that Parent's disagreement with the RR is because she personally disagrees with it rather than for any objective reason. Parent believed that since the Lindamood-Bell testing was different, the RR was inappropriate. Parent presented no evidence other than her own opinion that the District's RR was inappropriate simply because she agreed with the results of the Lindamood-Bell assessments, which failed to even contain a written explanation or analysis of the results.

Therefore, for the reasons stated above, the District's RR was appropriate.

Whether the June 4, 2009 IEP was appropriate thereby providing Student with a 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.”

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. 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 the case at bar, the documentary and testimonial evidence clearly shows that the May 11, 2009 RR formed the basis of the June 4, 2009 IEP, Student’s IEP was based on accurate and up-to-date assessments, and, most importantly, Student made academic and non-academic progress pursuant to Student’s potential.

In fact, the evidence reveals that the June 4, 2009 IEP provided more than a basic floor of opportunity, it was calculated and conferred meaningful educational benefit.

Specifically, a review of Student's IEP reveals that it included a statement of Student's present levels of educational performance; measurable annual goals, including benchmarks or short-term objectives, related to meeting Student's needs; a statement of the special education and 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 will be provided for Student 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 non-disabled children, to the extent possible; and an explanation of the extent, if any, to which Student will not participate with non-disabled children in the regular class... CFR §300.347(a)(1) - (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. Although implementation of an appropriate IEP does not guarantee that the student will make progress, in this instance the record is replete with evidence of Student's progress in all identified areas of need.

Furthermore, Student's IEP is specific enough to address all of Student's identified needs, academic, functional and behavioral. 20 U.S.C. §1414(d)(1)(A)(i)(II), (IV); *Christen G. v. Lower Merion Sch. Dist.*, 919 F.Supp. 793 (E.D. Pa. 1996); 20 U.S.C. §1414(d)(3)(A)(iv).

It is true that the IDEIA requires a local educational agency to address every substantial educational need of the child with a disability, including behavior and social skills. If the IEP is inadequate in any material way, it is inappropriate as a matter of law. *Rose v. Chester Co. Intermed. Unit*, 196 WL 238699, 24 IDELR 61, aff'd 114 F.3d 1173 (3d Cir. 1997). This is reflected in the requirements for both evaluations and individual education plans.

It is also true that to be appropriate, the IEP "must be reasonably calculated to enable the child to receive meaningful educational benefits in light of the student's intellectual potential." *Shore Regional High Sch. Bd. of Educ. v. P.S. ex rel. P.S.*, 381 F.3d 194, 198 (3d Cir. 2004); *L.R. v. Manheim Twp. Sch. Dist.*, 2008 U.S. Dist. LEXIS 23966 (E.D. PA 2008). The relevant inquiries are: "First, has the State complied with the procedures set forth in the Act? And second, is the [IEP] . . . reasonably calculated to enable the child to receive educational benefits?" *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206-07, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982); *L.R. v. Manheim Twp. Sch. Dist.*, 2008 U.S. Dist. LEXIS 23966 (E.D. PA 2008).

Regarding the first inquiry in determining FAPE, mere non compliance with IDEA procedures is not enough to find a lack of FAPE. "A child is denied a FAPE only when [a] procedural violation [of the IDEA] results in the loss of educational opportunity or seriously infringes the parents' opportunity to participate in the IEP formation process." *R.B. ex rel. F.B. v. Napa Valley Unified Sch. Dist.*, 496 F.3d 932, 940 (9th Cir. 2007); *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 860 (6th Cir. 2004); *L.R. v. Manheim Twp. Sch. Dist.*, 2008 U.S. Dist. LEXIS 23966 (E.D. PA 2008). When no substantive harm occurs, an "IDEA procedural error may be held harmless." *R.B.*, 496 F.3d at 938; see e.g., *Robert B. ex rel Bruce B. v. W. Chester Area Sch. Dist.*, 04-2069, 2005 U.S. Dist. LEXIS 21558, 2005 WL 2396968, at 9 (E.D. Pa. Sept. 27, 2005) (denying relief because although "no regular education teacher was present at the IEP meeting," "the Court finds no evidence in the record that Robert has been denied any necessary service . . . as a result of the flaw"). *L.R. v. Manheim Twp. Sch. Dist.*, 2008 U.S. Dist. LEXIS 23966 (E.D. PA 2008).

Here, although the June 4, 2009 IEP was designed to provide Student with meaningful educational benefit, the annual goals need to be revised in order for Student to be able to demonstrate mastery and measurable progress. However, it is clear that this procedural violation constitutes only harmless error since a review of the documentary

and testimonial evidence, confirms that Student suffered no substantive harm and that the IEP provided Student with a FAPE.

Next, with regard to whether Parent's refusal to participate in the June 4th IEP meeting because she disagreed with the RR constitutes a denial of FAPE, the record reveals that Parent had substantial opportunity to participate in the IEP process and stubbornly chose not to do so. Therefore, Parent cannot now claim that her opportunity to participate was infringed upon and there was no denial of FAPE.

Therefore, since a preponderance of the evidence indicates that the IEP appropriately addressed Student's needs and further shows that it provided Student with an opportunity to receive a FAPE, this hearing officer finds the June 4, 2009 IEP to be appropriate.

Whether the June 4, 2009 NOREP recommending the supplemental learning support program at the [redacted] Middle School is appropriate?

A placement decision is a determination of where a student's IEP will be implemented. Placement decisions for children with disabilities must be made consistently with 34 CFR 300.116 of the 2006 IDEA regulations. IEP team, including parents, makes placement decisions. Like the formulation of an IEP or a placement decision is not a unilateral matter for school district determination. 34 CFR 300.116(a)(1) however, is also clear that parental preference cannot have been the sole nor predominant factor in a placement decision. The IDEA merely mandates parental participation in the placement decision 34 CFR 300.116(a)(1), but does not suggest that the degree of weight parental preference should be given. Nevertheless, the placement should be based on the child's IEP, and, of course, allow its implementation.

That said, 34 CFR 300.116 establishes that placement teams must identify the placement that will allow the child to be educated with non-disabled children to the maximum extent appropriate. That is, the least restrictive environment (hereinafter "LRE") mandate set forth in 34 CFR 300.114. To that end, the placement team must first

consider if provision of supplementary aids and services or permit placement of a child with a disability in the regular education environment, rather than a more restrictive environment in which the child would otherwise be placed. 34 CFR 300.114 (a)(2). Although a placement decision is not and does not need to be a determination a specific classroom within the designated school or other facility or specific teachers.; other factors may be considered including, the category of significant of the child's disability, the availability of special education and related services, configuration of the service delivery system, availability of space, or administrative convenience.

In the present case, a review of the evidence reveals that the supplemental learning support program will permit Student to be educated to the greatest extent possible with regular education peers. Student will be educated in the regular education setting with a modified program in all areas of learning except for reading and math, where Student will be pulled out of class to receive Student's programming with other special education students. The record further reveals that student will be provided specialized reading instruction in the Prentice-Hall reading program and the McDougal Litell math program, both scientifically, research-based programs. Last, but certainly not least, the testimonial and documentary evidence confirms that Student has made both academic, social and behavioral progress in a supplemental learning support program.

Accordingly, the supplemental learning support program will permit implementation of Student's IEP and will provide services and accommodations identified to help Student access Student's educational instruction. Therefore, this hearing officer finds that the June 4, 2009 NOREP is appropriate.

ORDER

It is hereby ordered that:

1. The ESY program recommended by the District was appropriate. The Lindamood-Bell program requested by Parent was inappropriate in that it did not address Student's needs as identified in Student's IEP. Therefore, Parent's rejection of the District's program does not entitle the Student to compensatory education.
2. The May 11, 2009 Re-Evaluation conducted by the District was appropriate in that it met all of the substantive and procedural requirements identified in IDEA and therefore, Parent is no longer entitled to an IEE for Student.
3. The IEP dated June 4, 2009 was appropriate, as it was based on an accurate and comprehensive evaluation and was reasonably calculated to provide Student with meaningful educational benefit. Student is not entitled to compensatory education as the IEP offered Student a FAPE and Student would not suffer educational harm as a result of any harmless procedural errors the District may have committed.
4. The June 4, 2009 NOREP recommending placement in the supplemental learning support program is appropriate as Student has demonstrated progress in that program and it allows Student to be educated to the greatest extent possible with regular education peers while receiving special education supports and services implemented through Student's IEP.

September 30, 2009

Date

Deborah G. DeLauro

Deborah G. DeLauro, Hearing Officer