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## Pennsylvania Special Education Hearing Officer

### DECISION

Child's Name: TG

Date of Birth: xx/xx/xx

Dates of Hearing:

March 7, 2008, March 11, 2008, April 22, 2008, April 23, 2008, April 25, 2008, May 15, 2008, June 17, 2008

CLOSED HEARING  
ODR #8418/ 07-08 AS

Parties to the Hearing:

Mr. and Mrs.

New Hope-Solebury School District  
180 West Bridge Street  
New Hope, PA 18938-1424

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

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July 28, 2008

August 12, 2008

William F. Culleton, Jr., Esquire

## **INTRODUCTION AND PROCEDURAL HISTORY**

Student is an elementary school age eligible resident of the New Hope-Solebury School District (District). (NT 9.) The Student is identified with Autism. (NT 9.) Student is about to enter the third grade at the Elementary School in September 2008. (HO-1.)<sup>1</sup>

Mr. and Mrs. (Parents) requested due process on or about January 8, 2008. They allege that the District has failed to provide a free appropriate public education to the Student during the Student's first grade year (2006-2007) and Student's second grade year (2007-2008). (S-86.) In particular, the Parents allege a failure to provide FAPE with regard to behavior in school and social skills during both years, and a failure to provide FAPE with regard to mathematics and writing during the first grade year. (S-86.) The Parents seek compensatory education for two years and a prospective order regarding the program for the enumerated areas of alleged educational need. (S-86.)

The District denies the allegations and further argues that the Parents' allegations are based upon a disagreement with the methodology chosen by the District, which should be accorded deference. (HO-2.) The District further asserts that the Student has made such educational progress as to demonstrate receipt of meaningful educational benefit.

The hearing officer convened seven hearing sessions in this matter from March 2008 until June 2008. The record was held open for receipt of written summations, which were received upon an extended deadline on July 28, 2008, at which time the record closed.

## **ISSUES**

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<sup>1</sup> The parties submitted written summations in this matter on July 28, 2008, subsequent to the date upon which they had been due originally, at request of counsel. These are marked for the record HO-1 ("Parents' Closing Argument") and HO-2 ("Closing Argument for the New Hope-Solebury School District").

1. From the first day of school in the 2006-2007 school year until January 8, 2008, or for any part of that period, did the District fail to provide a FAPE to the Student by failing to provide adequate educational services with regard to behavior, social skills, mathematics, or writing?<sup>2</sup>
2. Should the hearing officer award compensatory education to the Student for all or any part of the period from the first day of school in the 2006-2007 school year until January 8, 2008?
3. For the 2008-2009 school year, has the District failed to offer an appropriate program that addresses all of the Student's educational needs and is reasonably calculated to provide meaningful educational benefit, by failing to offer adequate educational services with regard to behavior, social skills, mathematics or writing?<sup>3</sup>
4. Should the hearing officer order the District to amend its offered program for the 2008-2009 school year?

### **FINDINGS OF FACT**

1. The Student was evaluated in May 2005 while in kindergarten. The Student's cognitive skills were not scored due to performance difficulties that rendered the scores invalid. Performance was measured through two subtests of the Woodcock Johnson Tests of Achievement III; in letter –word identification Student scored in the 99<sup>th</sup> percentile and in calculation Student scored in the high average range. Through the Behavior Assessment System for Children, the Student's functional academic skill was scored in the average range and

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<sup>2</sup> The Parents stipulated that they were challenging the actual provision of instruction in mathematics and writing only with regard to the Student's first grade year, (2006-2007). (NT 17.)

<sup>3</sup> The Parents stipulated that they seek a prospective order regarding the proper preteaching of mathematics, writing and social skills in a 1:1 setting for the third grade year (2008-2008).

overall adaptive behavior was scored in the borderline range. (S-89.)

2. Through the IEP dated February 21, 2006, the District offered an appropriate program and placement to the Student for Student's kindergarten year. The placement included both regular classroom inclusion and explicit 1:1 teaching using applied behavior analysis techniques. (S2, 5, 89; HO-2.)
3. The February 2006 IEP provided goals addressing social skills (Goal 2, 4, 7), writing (Goal 5, 6) and negative behaviors (Goal 13). (S-89.)
4. The February 2006 IEP provided for related services of speech and language pathology therapy and occupational therapy. (S-89.)
5. The February 2006 IEP was revised in August 2006; this revised IEP was implemented in the beginning of the Student's 2006-2007 first grade year. (NT 786-88; S-90.)
6. The IEP as revised in August 2006 provided goals addressing social skills (Goal 2, 4, 5), and writing (Goal 6).

## NEGATIVE BEHAVIORS

7. In May 2005, the Student was reported to exhibit behaviors that interfered with Student's learning, including spitting, licking and grabbing things, crying or laughing out loud, and making loud noises. (S-89.)
8. The February 2006 IEP negative behavior goal 13 addressed spitting, licking, grabbing, loud noises, loud laughter and crying, in transitional situations during the school day. The IEP provided a behavior plan that addressed fake sneezing and spitting. (S-2, 89.)

9. The August 2006 revisions included dropping the negative behavior goal; however, the behaviors continued in non-transitional situations. (NT 788, 847-850, 1117; S-89, 90.)
10. The IEP revised in August 2006 included a behavior plan that focused solely upon loud vocalizations and did not address other negative behaviors that the Student was exhibiting. The plan provided for reinforcing the absence of loud vocalizations during defined periods of time during the school day. When the Student achieved the stipulated period of absence of loud vocalizations, Student was rewarded with a two minute period of time in which Student had the option to engage in a reinforcing activity instead of participating in class work. (NT 851-862; S-30, 69, 70.)
11. The behavior consultant for the Intermediate Unit designed the behavior plan along with the IU's senior behavior analyst. (NT 1118-1135, 1145-1150.)
12. The plan was data driven and based upon scientific principles accepted in the field of education and psychology. (NT 572-582, 1128-1135, 1145-1160, 1341-1348, 1373-1374, 1405.)
13. The IU behavior analysts trained District staff to implement the program, and monitored the behavior program to ensure that the teachers were implementing it properly and uniformly, and were taking appropriate data. (NT 1163-1169, 1310-1313, 1349-1350.)
14. As part of the behavior plan, the District instituted a protocol for removal of the Student from the regular education setting when Student's behavior became disruptive to Student's own education or that of other students. (NT 1352-53, 1373-1374.)
15. The District/IU plan began on a variable interval reinforcement schedule of five minutes. This resulted in a reduction of loud vocalizations within about one month; however, the Student's behavior became constant, in that incidents of loud vocalization were recorded in between five and twenty five percent of the five minute intervals during the day. This lack of progress extended for about eighty school days. (S-70, P-4.)

16. The IU behavior analysts who managed the plan concluded that the lack of progress was due in part to the inexperience of staff and their inconsistency in implementation. About six months after the start of school, the plan was then altered to a fixed interval reinforcement schedule. (NT 1147-1149, 1357-1358; S-70.)
17. From the beginning of the 2006-2007 school year until November 2006, the Student's behaviors were so intense that Student was removed from the classroom from one to ten times per day. After November 2006, the Student was removed zero times per day on most days, and less than five times on the worst days. (S-69, P-1 p. 20-22, P-2.)
18. In January 2007, the Student continued to display negative behavior in the form of loud vocalizations, but the rate of such behavior had decreased to the point where it was not an impediment to learning, from 22.6 % of scored intervals per day in September 2006 to 9.4% in January 2007. (NT 1145-1150, 1173; S-30.)
19. In January 2007, the IEP was revised to add a behavior goal and objective to reduce loud vocalizations. (S-30.)
20. Other negative behaviors were not targeted or addressed in the behavior plan. It was expected that these behaviors would be addressed by teachers within the regular classroom setting and in 1:1 sessions, utilizing techniques that are based upon scientific principles accepted in the field of education and psychology. (NT 588-590, 1155-1159, 1391; S-30, P-1.)
21. There were reports, but there was no data, that unwanted behaviors were being reinforced inadvertently by the fixed schedule reinforcement program that the District implemented to address the Student's behavior of loud vocalizations. There was insufficient information to compel the District or the IU analysts to address the other negative behaviors. Some of them either disappeared or appeared in negligible frequency. (NT 336-337, 376-377, 564-566, 586-588, 1160-1163, 1392-1399.)

22. The District did take some data on undesirable behaviors other than loud vocalizations, but available data did not show that their frequency was high enough to interfere with the Student's ability to benefit from education or that of Student's peers. (NT 350, 1260-1262, 1387; P-1, P-11.)
23. District staff were trained to identify and address negative behaviors through accommodations within the general education curriculum, and to report such behaviors when they reached a level of frequency or intensity that interfered with the Student's learning or that of others. (NT 1104, 1260-1262, 1324-1325, 1354-1360, 1411.)
24. While the fixed reinforcement schedule in the behavior plan did interfere with activities going on at the time of reinforcement, the Student was given the choice to go on with current activities instead of reinforcement, and Student often chose to continue current activity. (NT 1170-1172.)
25. Interference with other activities at the beginning of the program was seen as a trade off to eliminate behavior that could make it impossible for the Student to remain in an inclusive setting. (NT 1172-1175, 1375-1380, 138.)
26. The Parent asked the District to use a token economy approach to dealing with unwanted behaviors, but the behavior analysts from the IU disagreed. When the Parents were asked for data on the efficacy of token economy in the home, they did not provide data to the satisfaction of the IU analysts. (NT 1176-1177, 1329, 1370-1372, 1414-1417.)
27. The Parents retained a behavior analyst with experience in dealing with autistic children, who visited the school monthly for four hour periods at each visit, and sometimes for the entire day. The private analyst produced ten reports in the 2006-2007 school year and six reports in the 2007-2008 school year. (NT 109-110, 561-563; P-4.)

28. The private analyst also coordinated the home program for the Student. (NT 563.)
29. The private behavior analyst documented a significant number of incidents of negative behavior of the Student. These were documented anecdotally; data were not kept, and the observations were for the benefit of the Parents, in part to coordinate the home program with the school program, and not to perform a functional behavior assessment in the school setting. (NT 561-568; P-4.)
30. The private analyst documented instances of loud vocalizations, other negative behaviors including nose picking, fake sneezing, spitting, hand flapping or waving, whining, crying, and removal from the classroom due to the above behaviors. The bulk of these incidents occurred in the 2006-2007 school year, and most occurred in the first four months. (P-4.)
31. The private analyst documented a significant number of instances of removal from ongoing educational activities in which the Student was engaged, in order to provide reinforcement at variable and fixed intervals. (P-4.)
32. The private analyst repeatedly recommended to the Parents and the District that they change the reinforcement technique to a token economy, and documented her criticisms of the fixed interval reinforcement system in her reports. (P-4.)
33. In February 2008, the District was still implementing the behavior plan for loud vocalizations. The intervals between reinforcers had increased from five to thirty minutes. The thirty minute interval remained the same for over fifty days in the 2007-2008 school year. Disruptive behaviors had become infrequent. (NT 384; S-69, S-70, S-81.)
34. In the 2007-2008 school year, removals from class had reached zero or nearly zero on most days. (S-70.)
35. The February 2008 IEP included goals for using appropriate volume and tone in school settings, and decreasing loud vocalizations. (S-81.)



## SOCIAL SKILLS

36. In December 2005, the Student's social skills were reported to be limited. Student was recognized as needing social communication awareness and social and play skills with peers. Student did not use words to get the attention of others and Student did not seek interaction with Student's peers. Student took turns with textual and visual cues. Student asked for information and assistance with textual prompts. Student did not independently greet the teacher or Student's peers. (S-89, P-1.)
37. The August 2006 revisions included amending a goal in social greetings. (S-90.)
38. The Student made progress in social skills during the first grade year. (NT 360, P-4.)
39. In January 2007, the Student continued to have needs in social communication and play skills with peers. Student was able to make Student's needs known by asking for what Student wanted in all educational settings, but Student did so spontaneously only in contrived circumstances with high motivation. Student showed social awareness. Student was able to take turns if prompted. Student did not initiate play with peers. (S-30.)
40. In January 2007, the IEP was revised to revise social skills goals in initiating and returning greetings, turn taking and asking peers for objects; and to add goals in joining peers at play when invited, independently joining peers in play, and labeling observed emotions in others. (S-30.)
41. The Student began to demonstrate gains in social skills in February 2007 and showed increased social skills from then until June 2008. Student was observed playing more with peers.

Student was able to ask peers for desired objects, and even to hug them. (P-4 p. 26-28.)

42. In October 2007, the IEP was revised to add social skills goals of making appropriate eye contact with others and using appropriate tone and volume of speech in different school settings. (S-68.)
43. In October 2007, the IEP was revised to add related services in the form of social work services in both therapy room and integrated settings. These sessions included a focus upon social pragmatic skills. (S-68, 81.)
44. During the Student's first grade year (2006-2007), the Student received classroom based therapy sessions with the speech and language pathologist. (S-30.)
45. During the Student's first grade year (2006-2007), the Student participated in a "conversation club", in which Student had the opportunity to practice social communication skills with typical children who volunteered to work with Student in a carefully designed educational program. (NT 1189-1190, 1312-1316, 1332-1333; P-14.)
46. In February 2008, the Student was reported to be able to work well with peers in social studies classes and to participate in group activities with minimum prompting. Student could independently join groups at play when invited, and Student could take multiple turns with peers. Student could communicate Student's needs and wants by asking appropriately. Student continued to need prompts to speak in appropriate volume and tone, and to use full sentences. (S-81.)
47. By February 2008, the Student was demonstrating the skill of greeting peers and adults, both with prompting and spontaneously, although Student had not yet mastered the skill of initiating greetings and closings with peers. (S-81, P-4.)
48. The February 2008 IEP provided goals for turn taking, requesting objects from peers and help from peers and adults, initiating and returning greetings, inviting peers to join Student in play,

engaging in play with peers independently, conversational skills and appropriate eye contact. (S-81.)

## MATHEMATICS

49. In May 2005, the Student knew Student's numbers. In the beginning of the 2006-2007 school year, the District had no data to notify them that the Student was having difficulty with mathematics. (NT 1301, 1329-1331; S-89.)
50. The Student was behind Student's peers in mathematics in the beginning of first grade. In October 2006, the District responded by beginning to pre-teach mathematics in resource room, in coordination with the first grade teacher. (NT 312-321.)
51. In January 2007, the Student was able to rote count, count groups of items, and write one and two digit numbers. Student's basic mathematics skills were displayed inconsistently. Student was recognized as having needs in basic mathematics skills. (S-30.)
52. In January 2007, the IEP was revised to add mathematics goals in understanding fractions, identifying coins and their values, identifying time, measuring with a ruler, and single digit addition and subtraction. (S-30.)
53. In October 2007, the IEP was revised to add a mathematics goal of counting a mixed array of coins, and to revise the measuring goal to increased accuracy of measurement. (S-68.)
54. During the Student's first grade year (2006-2007), the Student received pre-teaching of targeted mathematics skills in 1:1 direct teaching during Student's resource room placement time. ((NT 1303-1305; S-30.)
55. The Parents also provided a home program that reinforced teaching of reading and mathematics. (P-7.)

56. By December 2007, the District had introduced the teaching of abstract concepts like all, some none, same and different. (P-4 p. 45.)
57. In February 2008, the Student, with prompting, was able to perform double digit addition with regrouping and with touch point visuals. Student could perform single digit subtraction without borrowing and without touch point visuals. Student could identify fractions from a mixed array of stimuli. Student was able to tell time to the minute using both digital and analog clock, thus exceeding Student's IEP goal. Student was able to measure to the 1/2 inch. Student was able to identify coins and coin value across a mixed array of stimuli, and was able to count coins with touch point visuals. (S-80, 81, P-4 p. 36-54.)
58. In February 2008, the Student remained below grade level in the Everyday Math Curriculum, and below grade level in curriculum based assessments. (S-80, 81, P-7.)
59. The February 2008 IEP included a goal for counting coins from a mixed array, double digit addition and subtraction, multiplication, and conceptualizing the passage of time. It added a new SSDI item calling for direct, explicit, multi-sensory, sequential math instruction in the resource room. (S-81.)

## WRITING

60. In May 2005, the Student did not consistently hold pencils and crayons with thumb and two fingers. Student was able to copy some upper and lower case letters, but not clearly within lines on the paper. Student was recognized as needing improvement in fine motor skills. (S-89.)
61. In January 2007, the Student was able to copy all letters, upper case and lower case, within 1/4 inch of first grade lines, with prompting. (S-30.)

62. In January 2007, the IEP was revised to add goals in punctuation, capitalization and alphabetization, as well as a goal in word spacing. (S-30.)

63. In February 2008, the Student was able to correct capitalization and punctuation in probes with incorrect sentences. Student was able to alphabetize to the second letter. Student had mastered independently spacing words when writing. (S-80, 81.)

### **DISCUSSION AND CONCLUSIONS OF LAW**

#### **BURDEN OF PROOF**

The United States Supreme Court has decided who has the burden of proof in the case of an administrative hearing on a challenge to a special education IEP. Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005). In Schaffer, the Court decided that the burden of proof is on the party asking a hearing officer to enter an order. In this case, that party is the Parent. However, the Court noted that the burden of persuasion determines the outcome only where the evidence is closely balanced, which the Court termed “equipoise” – that is, where neither party has introduced more evidence than the other party. In such unusual circumstances, the burden of persuasion provides the rule for decision, and the party with the burden of persuasion will lose. On the other hand, whenever the evidence is clearly in favor of one party – a preponderance<sup>4</sup>, or “preponderant” - that party will prevail.

#### **FREE APPROPRIATE PUBLIC EDUCATION**

Not every child with a disability is entitled to special education and related services from a school district. The IDEA defines a child with a disability as “a child ... who, by reason [of Student’s or their disability], needs special education and related services.” 20 U.S.C. §1401(3)(A)(emphasis supplied); accord, 34 C.F.R. §300.8(a)(1). Only a

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<sup>4</sup> A “preponderance” of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. Dispute Resolution Manual §810 (please note that the Manual was promulgated before the Supreme Court ruled in Schaffer v. Weast, at a time when the Local Educational Agency had the burden of persuasion in Pennsylvania and elsewhere in the federal Third Judicial Circuit. Thus, the first sentence of section 810, indicating that the LEA has the burden in most cases, is outdated and was effectively overturned by Schaffer).

child who needs such services is considered eligible for them. 20 U.S.C. §1412(a)(1)(A). Thus, the need for services is the basis for identification of a child as a child with a disability. See generally, Mr. I v. Maine School Administrative District No. 55, 480 F.3d 1 (1<sup>st</sup> Cir. 2007).

When a child is identified with a disability, the District is obligated to provide a free and appropriate public education (“FAPE”), in accordance with an Individualized Education Plan (IEP) reasonably calculated to enable the child to receive meaningful educational benefit. Bd. of Educ. v. Rowley, 458 U.S. 176, 206 (1982). “The education provided must be sufficient to confer some educational benefit upon the handicapped child.” L. E. v. Ramsey Bd. of Educ., 435 F.3d 384, 390 (3d Cir. 2006). Under the IDEA, a district must address “each of the child’s ... educational needs that result from the child’s disability ... .” 34 C.F.R. § 200.320(a). See, M.C. v. Central Regional School District, 81 F. 3d 389, 393-394 (3<sup>rd</sup> Cir. 1996). These needs include behavioral, social and emotional skills. Ibid. Thus, a district’s obligation is to provide those services that address the child’s individual needs. Mr. I, supra.

## ISSUE PRECLUSION

At the outset, the District argued that this matter is governed by proceedings in response to a previous due process request that the Parents had brought regarding the Student’s kindergarten year (2005-2006). The hearing officer reserved on the question of issue preclusion. (NT 23.) As the present hearing commenced, the previous matter was being litigated in the District Court for the Eastern District of Pennsylvania. (NT 20-21; HO-2.) During the pendency of these proceedings, the District Court rendered its judgment, affirming administrative findings that the IEP dated February 21, 2006 was appropriate. (HO-2.)<sup>5</sup>

Under the principle of issue preclusion, one “fact-finder” cannot legally make a finding contrary to that made by a previous fact finder. This principle applies only when:

"(1) the issue decided in the prior case is identical to the one presented in the later action; (2) there was a final

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<sup>5</sup> The District Court decision in its entirety is appended to the District’s written summation.

adjudication on the merits; (3) the party against whom the plea is asserted was a party . . . in the prior case; (4) the party . . . against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding; and (5) the determination in the prior proceeding was essential to the judgment."

P.G. v. Southern York County School District, 2006 U.S. Dist. LEXIS 77187 at 14 (M. D. PA 2006).

Under the above principle, the hearing officer considers himself bound by the previous administrative findings of fact affirmed by the District Court during the pendency of this matter. Consequently, the hearing officer will not re-litigate the issue of the appropriateness of the IEP of February 21, 2006. However, the hearing officer considers any changes in fact subsequent to the date of that offer to be relevant to determining whether or not the District was placed on notice that the previously adequate offer had become inadequate based upon changes in the Student's educational needs.

## BEHAVIOR

The Parents base their request for due process on two interrelated arguments. First, they assert that the token economy approach used in the home setting would have been superior to the interval reinforcement system instituted by the District under the direction of the IU behavior analysts. Second, they argue that the Student made de minimis progress educationally as a result. The hearing officer cannot accept the first argument because it is both unproven here and unfounded in the law. The hearing officer also finds that the record does not preponderantly support the argument that inadequate implementation of the behavior plan in the first grade year, 2006-2007, led to a failure to provide FAPE.

The Parents' argument for the token economy is based upon the premise that the Parents' approach would be better than that of the District. The Parents' privately retained behavior analyst repeatedly reminded the District of this opinion in nearly every one of her reports of private observations of the Student. (FF 32.) From the Student's kindergarten year, Parent campaigned with the District to adopt this preferred method. The hearing officer is in no position to adjudicate this assertion as against the

District's argument that the fixed interval was a reasonable trade off to address behaviors that were threatening the Student's very placement in an inclusive setting. (FF 25.) As the District points out, it is not the place of an administrative hearing officer to declare the winner as between two competing professional techniques. (HO-2.) The IDEA does not anywhere authorize such an intrusion into the professional judgment of District officials. On the contrary, the weight of legal authority preserves from administrative due process review the local educational agency's right to choose from among the many available techniques – provided the agency chooses a technique that is supported by professional literature and practice.

The IU analysts capably demonstrated that the technique they chose – the fixed interval reinforcement system – is supported by professional and scientific literature and was reasonably calculated to shape the Student's behavior away from the loud vocalizations that at the beginning of the year were regularly and frequently leading to exclusion from the classroom. (FF 10-12.) Administratively, it was well conceived, providing for data- based planning and adequate training and supervision for implementing staff. (FF 13-14, 16.) Even the Parents' analyst admitted that the technique is supported in the literature and in professional practice. (FF 12.) Parent disagreed with utilizing the approach for the Student, but not with its scientific legitimacy. The behavior plan thus devised was data driven and individualized. (FF 10-12.) It was also an attempt to support maximal inclusion for this Student with autism. Ibid.

As noted above, the IDEA does not require local educational agencies to provide the best possible educational services to their students. On the contrary, it requires only meaningful educational benefit. Here, the behavior plan ultimately provided meaningful benefit. It addressed an important educational need – the Student's negative behaviors. It in fact resulted in significant educational gain, as the record more than preponderantly shows.

The Student's negative behaviors and episodes of exclusion from the classroom dropped significantly as the plan was implemented in the fall of 2006. (FF 15.) The record shows that this drop in such behaviors was enough to meet the minimal standard of FAPE. The January 2007 IEP, in the Present levels section, contains data showing that the drop in negative behaviors was substantial – from 22.6% of recorded five minute intervals to 9.4% of such intervals. The Present Levels section asserts the conclusion that the remaining level of negative behavior did not prevent the Student



from receiving meaningful educational benefit during the period from the beginning of first grade until January 2007. (FF 18.)

The evidence is mixed on this issue of fact. The private behavior analyst's reports graphically show the disruptive impact of the Student's behavior in the first months of the first grade year. (FF 8, 9, 29-31.) However, these reports, when tracked by date, also evidence the reduction in such disruptions as the year went on, substantially corroborating the frequency and intensity data that the District introduced in evidence. (FF 15, 17, 18, 21, 22, 30.)

The District's witnesses admitted that the plan did not operate as desired in the first months. For a lengthy period of eighty days after the initial drop in frequency of the loud vocalizations, and while the plan was based upon a variable reinforcement schedule, the Student's behaviors leveled out to a constant and still unacceptable plateau of recurrent negative behaviors. (FF 15.) The District's IU consultants came to recognize this and eventually changed the plan to a fixed interval. (FF 16.) As the plan began to rely upon fixed intervals, the Student's negative behaviors began to subside, and the interval between reinforcements became progressively longer, because the target behavior progressively diminished. (FF 17, 18, 33-35.)

The Parents argue that the District delayed too long to remedy the plan's deficiencies. However, the Parents did not present any data on frequency or intensity. They did not provide any data showing that the behaviors and resultant removals from class were essentially negating any meaningful educational benefit from the Student's inclusion in school. They showed anecdotally that the Student was not socializing in the beginning of the school year, but their experts' anecdotal reports also evidenced some social skill development and some social experiences. They showed that the Student's mathematics skills were behind other student's skills in first grade, but the evidence shows that the Student was able to make meaningful advances consistent with Student's cognitive abilities. They found that the Student's writing was deficient, but did not show that progress in this skill, addressed in the resource room, was prevented by the Student's negative behaviors, which disrupted the regular classroom portion of Student's

program, and did not prevent Student from attending to Student's one-to-one ABA program.<sup>6</sup>

The Parents criticize the District's plan because for several months the Student's behaviors did not improve. Indeed both the data and the anecdotal reports of observations in the classroom support that claim. The evidence shows that the Student was frequently removed from class for loud vocalizations. This was at a rate that substantially interfered with the Student's learning and that of others. Witnesses testified that the problem with the variable interval plan was implementation, and the problem appears to have been the inexperience of implementing staff.

This does not prove a violation of the IDEA, however. As noted above, the law requires only that the local educational agency provide a minimal quantity of service (the meaningful benefit standard) – not a maximal quantity. Thus, the law does not compel the District to change its chosen program on grounds that a different program would be better – even if the different program would be substantially better, and the new program is intuitively superior to the one provided by the District. As long as the District meets the lower threshold test – meaningful benefit – the hearing officer cannot intervene.

The hearing officer, balancing the weight of conflicting evidence in this regard, concludes that the Student received meaningful educational benefit in first grade, despite the deficiencies in the program that the Parents point out and the District witnesses admit. The targeted behavior was impacted immediately and reduced to a level at which it did not prevent the receipt of meaningful educational benefit. Non-targeted behaviors were never shown on this record to have so interfered with education that the Student was prevented from receiving meaningful benefit. (FF 20-26.)

The Parents argue that this intervention was legally inadequate because the behavior plan addressed only one of a cluster of negative behaviors that were stigmatizing, disruptive, and functioned to allow the Student to avoid learning. The argument has some force, because the IDEA

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<sup>6</sup> The private analyst did show anecdotally that the Student engaged in negative behaviors in the one-to-one sessions, but the reports describing these behaviors in the one-to-one setting did not evidence disruptions that prevented learning altogether. The reports showed that the assigned teachers redirected the Student and kept Student working, albeit with interruptions.

does require the local educational agency to address all of the student's educational needs. Here, it can be argued that reduction of these other behaviors was a serious educational need in itself. Thus, the District's conscious choice to not address, for example, the frequent vocalizations that were not loud, but were atypical, or the nose picking behavior, or unusual physical movements – arguably failed to address all of the Student's educational needs because it ignored many of Student's behavioral needs.

The hearing officer finds that the evidence does not support the argument. On the contrary, the preponderance of the evidence is that the loud vocalizations were the single behavior that would have made inclusion impossible, because they were deeply disruptive to the classroom in the general education setting. The preponderance of the evidence shows that the other behaviors were not as frequent, nor as intensely disruptive to education, as the loud vocalizations. There was no data to support the contrary. Even in the absence of a behavioral plan to address these “other” behaviors, there was an educational system in place to deal with them – mainly, the trained teachers who were expected to accommodate the Student's other behaviors using their own skills as educators. (FF 23.) Teachers were expected to differentially reinforce alternative behaviors, thus extinguishing the undesirable ones. Teachers were also required to report such behaviors for behavior analysis if the behaviors should become disruptive to the classroom.

Thus, on one hand, there was no data that these other behaviors were interfering with the Student's education or that of others, no data that they were threatening the Student's inclusion in regular education. On the other hand, the District's teachers were trained and expected to deal with problematic behaviors professionally and scientifically. Thus, on this record, it cannot be fairly said that this District failed to address all of the Student's educational needs with regard to behavior.

Moreover, the record shows a diminishment of these other behaviors as time went on. Thus, in short, the District's plan -- whether or not it was the best conceived -- worked. The Parents on this record are not entitled to a change in that plan.

The Parents argue that the plan, because of its fixed interval structure, interfered with educational opportunities by interrupting programming of value to the Student. The intervals of reinforcement repeatedly broke into

lessons and activities from which the Student appeared to be benefiting. However, there is no evidence that these interruptions diminished the Student's educational progress. On the contrary, the record shows that the Student's progress accelerated as Student's disruptive behaviors decreased.

The Parents argue that the deficiencies in the District's program in the beginning of first grade resulted in unnecessarily slow educational gain. The record bears out that the gains for the Student were slow between September 2006 and January 2007, in behavior, social skills, mathematics and writing. However, this does not suffice to prove a failure to provide FAPE. The District's legal obligation was not to maximize the rate of educational gain in all areas of educational need. It was to address all areas of educational need.<sup>7</sup> This it did. The District's obligation was not to maximize the Student's potential, as desirable as that goal might be. The legal obligation was to provide services that would enable the Student to experience meaningful educational benefit. On this record, the District fulfilled its legal obligation during the first grade year.

Given this conclusion, the record even more clearly shows meaningful gain in the second grade year. Both the District's data and the anecdotal reports of the private analyst show this. In February 2008, the District was still implementing the behavior plan for loud vocalizations. The intervals between reinforcers had increased from five to thirty minutes. (FF 33-34.) Frequency of loud vocalizations had been reduced further, and removals from class had reached zero or nearly zero on most days. (FF 34.)

Although the thirty minute interval remained the same for over fifty days in the 2007-2008 school year, disruptive behaviors had become infrequent. Thus, negative behaviors had not been eliminated, but their propensity to interfere with learning was substantially reduced. This was corroborated in the anecdotal reports of the private analyst, whose reports described periods in which meaningful educational activities were the norm

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<sup>7</sup> It must be noted that the District addressed numerous areas of educational need that were not part of the issues in this due process matter. These included reading comprehension, attention to task, adaptive behavior and language arts as represented in the Language for Learning curriculum. (S- .) The adequacy of the District's educational services must be assessed in light of the broad array of educational needs addressed. The argument that the Student's progress was slow in mathematics, social skills and writing loses force when these areas of need, which were addressed as required by the IDEA, are placed in perspective of the overall educational plan.

and gains were demonstrated in social skills, mathematics and writing. The District continued to adjust its IEP goals for loud vocalizations, and it was clear to this hearing officer that the District was committed to continuing the Student's progress in third grade.

## SOCIAL SKILLS

The record is preponderant that the Student made meaningful progress in social skills during Student's first and second grade years. Student's progress in the first half of first grade was slow, but Student made some progress. (FF 36-39.) It is clear from the record that the District was not satisfied with the progress made and increased its effort during the second half of first grade and in second grade. In January 2007, the IEP was revised to revise social skills goals in initiating and returning greetings, turn taking and asking peers for objects; and to add goals in joining peers at play when invited, independently joining peers in play, and labeling observed emotions in others. (FF 40.) Also in first grade, the Student was provided with interventions by the school social worker, and was given the opportunity to join a "conversation club." (FF 42-46.) This program matched the Student with typical students so that Student could practice social conversational skills. Over all, the District's programming was a substantial and well conceived effort to address the Student's social skills deficits.

The record shows that these efforts yielded meaningful, though not maximal, results. By January 2007, the Student was able to make Student's needs known by asking for what Student wanted in all educational settings, in contrived circumstances with high motivation. Student showed social awareness. Student was able to take turns if prompted. (FF 41, 46.)

By February 2008, the Student was reported to be able to work well with peers in social studies classes and to participate in group activities with minimum prompting. Student could independently join groups at play when invited, and Student could take multiple turns with peers. Student could communicate Student's needs and wants by asking appropriately. Student continued to need prompts to speak in appropriate volume and tone, and to use full sentences. Student had not yet mastered the skill of initiating greetings and closings with peers, but had demonstrated that skill both with prompting and spontaneously. (FF 46.)

The weight of the evidence shows meaningful gains in both years in social skills.

## MATHEMATICS

The record shows that the District provided the Student with meaningful educational services from the start of first grade to the end of second grade. (FF 49-59.) The District addressed mathematics through its IEP. It responded when it became apparent that the Student was having difficulties and provided special education services in the resource room. In December 2007, the IEP was revised to introduce the teaching of abstract concepts like all, some none, same and different. Thus, the District responded to the Student's difficulties in first grade within a reasonable time of receiving notice, by adding services and revising the IEP.

The record shows that the Student made some progress in the first half of first grade. By January 2007, the Student was able to rote count, count groups of items, and write one and two digit numbers.

In January 2007, the IEP was revised to add mathematics goals in understanding fractions, identifying coins and their values, identifying time, measuring with a ruler, and single digit addition and subtraction. By February 2008, the Student, with prompting, was able to perform double digit addition with regrouping and with touch point visuals. Student could perform single digit subtraction without borrowing and without touch point visuals. Student could identify fractions from a mixed array of stimuli. Student was able to tell time to the minute using both digital and analog clock, thus exceeding Student's IEP goal. Student was able to measure to the 1/2 inch. Student was able to identify coins and coin value across a mixed array of stimuli, and was able to count coins with touch point visuals.

The Parents argue that the Student's progress was inadequate because Student remained behind Student's peers by second grade. (P-7.) This is not the test of meaningful gain. The Parents argue that the Student should have kept up with Student's peers because Student was able to do so in kindergarten. However, this does not account for two factors. First, curricula become more demanding from grade to grade, and the math curriculum demands new skills that the Student's disability makes it difficult for Student to learn; this is particularly true of demands for understanding

more abstract concepts, and of the need to solve word based applied mathematics problems. Second, the Student's cognitive potential, unknown when Student was in kindergarten, was revealed by second grade to be below average. (S-91.) Student's progress is to be assessed for IDEA purposes in light of Student's cognitive potential. In re the Educational Assignment of D.K., Special Education Appeal No. 1900 at 11 n. 72 (July 2008). Thus, evidence of slow progress in mathematics does not constitute preponderant evidence of a lack of meaningful educational gain.

The District remains committed to challenging the Student with new goals. In February 2008 the IEP team included a goal for counting coins from a mixed array, double digit addition and subtraction, multiplication, and conceptualizing the passage of time. Moreover, it added a new SSDI item calling for direct, explicit, multi-sensory, sequential math instruction in the resource room. (S-81.) Thus, the hearing officer sees no basis for a finding of a failure to adequately address the Student's needs in mathematics, and thus there is no basis for prospective relief.

By January, the Student had demonstrated significant learning and this learning accelerated in the second grade year. Thus, the record shows preponderantly that the Student made meaningful progress in both the first grade and second grade years.

The Parents argued that the District is unwilling to offer adequate resource room time to allow for meaningful pre-teaching of mathematics. The record does not support this contention. As noted above, the levels of one-to-one teaching in mathematics were sufficient to allow for adequate educational gains in mathematics over the past two years. Thus the evidence is preponderant that the District is committed to sufficient pre-teaching to make a prospective order unnecessary. Moreover, the program offered for the upcoming year, based upon the IEP documents entered in the record, is adequate.

## WRITING<sup>8</sup>

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<sup>8</sup> The Parents made much of the District's use of the language arts program called Language for Learning and Language for Thinking, alleging that the District had used inappropriately a lower level of curriculum in that program. (NT .) The hearing officer finds no evidence that the District failed to use this program appropriately. The IU behavior analyst, demonstrating familiarity with these programs, (NT 1284-1296),

Similarly, there is no evidence of a failure to provide adequate services in writing. (FF 60-63.) The IEP contained appropriate goals for writing and the record shows meaningful gain. The programs in place are adequate. Thus, the hearing officer finds no basis for relief with regard to writing.

### **CONCLUSION**

The District's offered program and placement were appropriate. There is preponderant evidence that it implemented its program adequately in the promised placement. In particular it adequately addressed negative behaviors, social skills, mathematics and writing in implementing the IEPs over the first and second grade years. As a result, the Student showed meaningful gain in these areas.<sup>9</sup>

### **ORDER**

1. From the first day of school in the 2006-2007 school year until January 8, 2008, the District did not fail to provide a FAPE to the Student by failing to provide adequate educational services with regard to behavior, social skills, mathematics, or writing.
2. The hearing officer will not award compensatory education to the Student for all or any part of the period from the first day of school in the 2006-2007 school year until January 8, 2008.

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showed that the District appropriately assessed the Student's instructional level and placed Student according to the assessed level of performance. (NT 789-92.) Although their assessment data differed from that of the home program as to what level the Student was qualified to start in, the District and IU behavior analysts appropriately based their decisions on the data they were generating in the school setting. (NT 1184-1189; P-1 p. 8.) The IU analyst did admit that she eventually, as it were, promoted the Student from the beginning curriculum to the higher level curriculum of this program, contrary to the program instructions. (NT 1294-1300.) However, this only accelerated the Student's progress, and the analyst stated that any resulting gaps in learning would be addressed through the District curriculum and the IEP. (NT 1294-1300.)

<sup>9</sup> Conceptually, FAPE arguably may not require meaningful gain with regard to every educational need identified in an evaluation. However, it is unnecessary to reach this question of legal analysis, because the District's implemented services provided meaningful gain in the areas at issue in the present matter.



3. For the 2008-2009 school year, the District has offered an appropriate program that addresses all of the Student's educational needs and is reasonably calculated to provide meaningful educational benefit, and the hearing officer will not order prospective relief.

*William F. Culleton, Jr.*

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WILLIAM F. CULLETON, JR., ESQ.  
HEARING OFFICER

August 12, 2008