

*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**  
**Final Decision and Order**

**CLOSED HEARING**

**ODR File Number:** 20110 1718

**Child's Name:** E.S.

**Date of Birth:** [redacted]

**Dates of Hearing:**

2/6/2018, 2/27/2018, 3/19/2018, 4/24/2018, 5/1/2018 and 5/7/2018

**Parent:**

[redacted]

*Counsel for Parent*

Joseph E Sulpizio Esq.

Cuddy Law Firm

One Liberty Place

1650 Market Street, 36th Floor

Philadelphia, PA 19103

**Local Education Agency:**

Reading School District

800 Penn Street

Reading, PA 19601-3616

*Counsel for the LEA*

Brian Subers Esq.

Fox Rothschild LLP

10 Sentry Parkway, Suite 200

P.O. Box 3001

Blue Bell, PA 19422-3001

**Hearing Officer:** William Culleton Esq.

**Date of Decision:** 6/4/2018

## **INTRODUCTION AND PROCEDURAL HISTORY**

The child named in this matter (Student)<sup>1</sup> is enrolled currently in a District elementary school. The school district named in this matter (District) is the Student's local education agency as defined in the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA). Student is classified under the IDEA as a child with Autism.

Parent asserts that the District has failed and continues to fail to provide Student with a free appropriate public education (FAPE) pursuant to the IDEA and section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (section 504)<sup>2</sup> and their implementing regulations. Parent states that the District failed to evaluate Student comprehensively and in a timely fashion, failed to place Student appropriately, failed to provide for Parents' appropriate participation in the decision-making process for providing a FAPE and failed to provide and implement an appropriate Individualized Education Program (IEP). Parent seeks an order for prospective relief as well as compensatory education for Student. The District denies Parent's allegations and seeks dismissal of the complaint.

The hearing was completed in six sessions. I have determined the credibility of all witnesses and I have considered and weighed all of the evidence of record. I conclude that the District failed to offer and provide a FAPE to Student for parts of Student's kindergarten and first grade years with regard to behavior, speech therapy, occupational therapy and parental participation. I order the District to provide compensatory education.

---

<sup>1</sup> Student, Parent and the respondent District are named in the title page of this decision and/or the order accompanying this decision; personal references to the parties are omitted here in order to guard Student's confidentiality. References to Parent in the singular indicate Student's Mother, who participated in many of the transactions discussed in this decision.

<sup>2</sup> There is no question that Student is otherwise qualified within the meaning of section 504 and that the District receives federal funds.

## **ISSUES**

1. Did the District provide Student with an appropriate and timely evaluation in compliance with the IDEA and section 504?
2. Has the District provided Student with a FAPE in compliance with the IDEA and section 504 for Student's kindergarten and first grade school years, including an appropriate placement, appropriate IEP present levels of academic performance and goals, specially designed instruction, related services including transportation, full-time one-to-one paraprofessional assistance and assistive technology?
3. Did the District impede parental participation in the decision-making process regarding the provision of a FAPE to Student contrary to the IDEA and section 504, including timely IEP team meetings and the presence of appropriate team members?
4. Should the hearing officer order the District to provide Student with compensatory education services on account of all or any part of the relevant period from the first day of school in Student's kindergarten school year (2016-2017 school year) to the last day of school in Student's first grade year (2017-2018 school year)?
5. Should the hearing officer order the District to provide Student with either a re-evaluation or an Independent Educational Evaluation at the District's expense, including psychoeducational, speech and language, occupational therapy, functional behavioral and assistive technology assessments and evaluations?
6. Should the hearing officer order the District to convene an IEP team meeting to revise Student's IEP with regard to placement, specially designed instruction, related services and any other special education services?

## **FINDINGS OF FACT**

### DEVELOPMENTAL AND EDUCATIONAL HISTORY KNOWN TO THE DISTRICT

1. Student is diagnosed with Autism, and was classified with Autism for early intervention services. Student is also diagnosed medically with Attention Deficit Hyperactivity Disorder (ADHD) and Eosinophilic Esophagitis. (NT 1387, 1684; S 1.)
2. Student received Infant-Toddler Early Intervention services at two years of age and received Preschool Early Intervention through the local intermediate unit from age 3. (S 1.)
3. On July 7, 2014, the local intermediate unit preschool early intervention program provided an evaluation report to Parents. The report confirmed Student's educational classification with Autism. (S 1.)

4. The July 2014 evaluation reported that Student was exhibiting significant developmental delays in cognitive functioning, adaptive functioning, receptive and expressive communication, fine motor skills and emotional and social functioning. Student demonstrated sensory needs. Student's gross motor skills were reported to be age appropriate. (S 1.)
5. During the July 2014 evaluation, the evaluator was unable to obtain test scores regarding Student's cognitive skills, because the Student was unable to respond to any directions required for the testing. (S 1.)
6. In the home and in early intervention, Student displayed significant behaviors of concern, including a variety of aggressive behaviors toward adults and peers, such as hitting, spitting or biting; banging Student's head on the floor or on furniture; throwing objects; throwing self on the floor, jumping on others; taking things from others; and escaping or eloping from situations and places. Student was distractible and excessively active. (S 1.)
7. The July 2014 evaluation reported that Student was able to use about six gestures or signs to request items. Student did not use words or imitate motions. Student looked at books, and would roll a ball back and forth with an adult, but did not play or communicate with other children. On a standardized measure, Student scored at the first percentile for total preschool language. (S 1.)
8. In July 2014, Student's gross motor skills were reported to be age appropriate. (S 1.)
9. The July 2014 evaluation report recommended that Student needed to develop basic school readiness skills, including giving attention to adult directed activities; imitating actions; communicating wants and needs; participating in back and forth exchanges; following one and two step directions; and improving functional communication skills. It recommended that Student needed to improve strength and coordination necessary to utilize crayons and scissors, and to draw on paper. It recommended that Student needed to develop basic social skills needed to play with others. (S 1.)
10. The July 2014 evaluation recommended accommodations for the classroom, including an assistive technology assessment; verbal, gestural and visual prompting; use of visual schedules; language modeling; and a reinforcement system to help Student develop better attention and behavior. (S 1.)
11. The July 2014 evaluation report recommended that Student receive specially designed instruction. (S 1.)
12. In July 2015, the early intervention program reported evaluative observations by a speech therapist, occupational therapist and psychologist in the present levels section of Student's IEP. The present levels were based partially upon a VB-MAPP, a data-gathering system utilized in the verbal behavior method of instruction for children with autism and communication delays. (P 2.)

13. In July 2015, Student was beginning to attend to an adult's voice sometimes; followed directions to move to another area of a room with gesture prompts; followed 6 one-step directions without gesture cues; imitated 19 actions; matched 5 objects in a field of three; vocally requested 3 items with single words and with signs requested 11 items; and labeled three objects with signs. Student was able to match single objects. (P 2.)
14. In July 2015, Student was able to remain in the area for circle time and was starting to pay attention to songs, but exhibited difficulty sitting and paying attention. Student was able to follow classroom routine with limited prompting. (P 2.)
15. In July 2015, Student was able to drink out of an open cup. Student could snip with scissors with moderate assistance and string a bead with prompting. Student was not toilet trained, and needed assistance with functional skills in dressing. Student showed sensory needs. (P 2.)
16. In July 2015, Student would greet adults but not peers. Student played mostly alone but sometimes joined in a game being played by peers. Student showed no play skill progress. (P 2.)
17. The July 2015 IEP placed Student in early childhood special education, with 2 1/2 hours of intensive instruction, three days per week; two hours of speech therapy, one day per week; two hours of occupational therapy, one day per week; and home-school consultation. (P 2.)
18. Student's preschool early intervention IEP proposed goals to address the skills of requesting, labeling, playing with others, imitating, following directions, transitioning from activities, [and] learning new concepts. (S 2.)
19. In February 2016, the District participated in a transition meeting with Parents and the early intervention agency. Parent reported that Student could use short phrases; imitate gestures or echo speech; and draw short lines. (S 2.)
20. In May 2016, the District's speech pathologist, its department chair for speech and language, evaluated Student's speech and language. The speech therapist reviewed Student's 2014 early intervention evaluation report and other documents pertaining to Student's preschool programming, visited the classroom and met Student, and attempted to perform standardized and other testing. (NT 1715-1721; S 6, S 7 p. 9.)
21. In conjunction with Student's transition to the District, the District's director of occupational therapy reviewed Student's 2014 evaluation and other documentation and prepared a certified occupational therapy assistant to provide consultation services for Student in the District's autistic support classroom. This was the substantially the same service that the early intervention program had been providing. (NT 1473-1481.)

22. By May 2016, Student was not able to understand the expectation that Student should sit and wait for directions for the purpose of one-to-one speech and language standardized testing. (NT 1720; S 6.)
23. By May 2016, Student would respond to Student's name being called, would follow routine classroom directions with minimal prompting, and could identify some objects when cued to do so. Student exhibited good imitation skills for both words and signs. Student did not respond well to novel directions. (NT 1715-1720; S 6.)
24. By May 2016, Student was speaking in one word utterances, and utilized a combination of utterances, gestures and signs to request some items, to protest and to label. Student used at least three words spontaneously, and approximated seven modeled words. Student was requesting some desired objects, using a combination of sign and vocalizations. (NT 1715-1720; S 6.)
25. By May 2016, Student would play chase games with peers and hiding games with adults in the specialized preschool early education setting. (NT 1715-1720; S 6.)

#### KINDERGARTEN: EVALUATION AND SERVICES PROVIDED

26. On April 25, 2016, Parent signed a permission to evaluate form sent her by the District; Parent provided this to the District on April 25, 2016. (S 2.)
27. The District did not conduct the re-evaluation within sixty calendar days. The District did not re-evaluate Student during Student's kindergarten year. (S 7, 16.)
28. On July 25, 2016, the District invited Parents to attend an IEP team meeting scheduled for August 11, 2016. The stated purpose of the meeting was to "develop an IEP ... ." (S 3.)
29. On August 11, 2016, the IEP team did not develop an IEP for Student. The District proposed to place Student in full time autistic support upon transition to school age services. (S 4.)
30. On October 7, 2016, the District invited Parents to an IEP team meeting to be held on October 24, 2016. The stated purpose was to discuss changes to Student's current IEP and revise it; however, at this time, Student did not have a current IEP. (NT 1105-6; S 5, 7.)
31. The District convened an IEP team meeting on October 24, 2016. This was more than one year after the previous meeting, so the previous IEP from the early intervention program was not in effect from the beginning of school year to the date on which Parent signed a NOREP agreeing to the IEP developed in conjunction with the October 24, 2016 IEP team meeting. (NT 1105-6; S 5.)

32. Meanwhile, the District had implemented its verbal behavior program with Student in the full-time autistic support classroom, including pairing and developing a baseline on the VB-MAPP. (NT 1105-6; S 5.)
33. The October 2016 IEP team meeting did not include a regular education teacher or either an occupational therapist or certified occupational therapist assistant. There was no input from occupational therapy in the IEP itself. (NT 196-201, 1538-1540; S 7.)
34. The October 2016 IEP did not contain significant information from the previous evaluation report in 2014 regarding Student's sensory and other occupational therapy needs. (NT 1139-1144.)
35. The October 24, 2016 proposed IEP placed Student in the District's full time autistic support classroom, which utilizes verbal-behavior methodology, and serves children in kindergarten and first grade. (NT 1084-1085; S 7.)
36. The October 24, 2016 proposed IEP offered to provide speech therapy, 30 minutes per week. (S 7.)
37. The District deemed 30 minutes per week of speech therapy to be appropriate because Student was to be in a full-time verbal behavior program that would work on language skills primarily throughout the day. (NT 833-841, 1011-1012, 1017-1019.)
38. The October 24, 2016 proposed IEP stated that the frequency of promised related services is reduced by any instances when a session is cancelled due to teacher or student unavailability, including holidays, snow days, district mandated testing and teacher conferences. (S 7.)
39. The October 24, 2016 proposed IEP included a VB MAPP which was a graph depicting Student's verbal behavioral skills as of that date. The graph was based upon an assessment undertaken over time in the first weeks of the school year. Student's kindergarten teacher decided not to assess for echoic verbal behavior because Student was demonstrating echoic behavior during instruction and class time. (NT 1089-1091, 1108-1114, 1121-1135, 1217-1221, 1240-1250; S 7.)
40. The October 24, 2016 proposed IEP included a current teacher report. The Student's classroom teacher reported that Student exhibited inconsistent compliance with some aspects of classroom routine; improved compliance with the direction to sit in a chair; and behaviors including eloping, screaming, lying on the floor, and kicking. The teacher reported that Student's play behavior with peers involved touching, both playfully and aggressively, and indicated a need to learn to respect personal space. The teacher indicated that a positive behavior intervention/reinforcement plan was being implemented and that Student was responding to it. (NT 1202; S 7.)
41. The October 24, 2016 proposed IEP included parental input consisting of Parent's concern with Student's behavior and consideration of private services. (S 7.)

42. The October 24, 2016 proposed IEP included strengths including identifying all letters, both upper case and lower case; identifying numbers one to ten and twenty; labeling colors; and enjoying music and songs. Needs included school ready skills including remaining in a seat and designated area; social skills of sharing and waiting; accepting “no” without a tantrum; maintaining appropriate personal space; and requesting wants and needs. (S 7.)
43. The proposed program in the October 2016 IEP was based upon the preschool early intervention program, but goals and modifications were changed based upon the understanding of the teacher and speech therapist as to Student’s present levels. (NT 1023-1025.)
44. The October 24, 2016 proposed IEP provided goals for sitting at a table for 15 minutes of intensive one-to-one instruction; requesting; labeling; play behavior with peers; imitating; following directions to imitate without visual prompt; and behavior. (S 7.)
45. The October 24, 2016 proposed IEP did not propose goals or specially designed instruction to address Student’s fine motor or sensory needs. It did provide for consultation services with a certified occupational therapy assistant. (NT 451-454, 461-462, 801-805; S 7.)
46. The October 24, 2016 proposed IEP did not offer a goal to reduce unwanted behaviors, but it did include a positive behavior support plan that was based upon an ABC analysis of the function of Student’s behaviors and reiterated the goal for sitting for 15 minutes. The plan was not based upon a functional behavioral assessment. (NT 84-86; S 7.)
47. The October 24, 2016 proposed IEP included modifications including specified reinforcers; direct one-to-one instruction daily; pairing; supports in large groupings; visual prompting; modeling; repetition and role play. (S 7.)
48. The October 24, 2016 proposed IEP found Student eligible for extended school year (ESY) services and set forth three goals to be addressed in ESY: remaining at the table; labeling ten objects without echoic prompts; and the receptive language skill of performing motor actions on command. (S 7, 8.)
49. Verbal behavior methodology is research based and sequential. It includes intensive “discrete trial” methodology to teach fundamental language skills like requesting using words or gestures; labeling things in order to be able to request them; listening, imitating, echoing or repeating, social skills and higher level language skills like asking questions. (NT 767, 1070-1074, 1096-1099, 1106-1108, 1189-1191, 1202-1212; S 7.)
50. Verbal behavior methodology prioritizes foundational skills involving language and classroom readiness skills like being able to sit for fifteen minutes. Not all academic skills were addressed in kindergarten for Student under this approach. (NT 1089-1092, 1189-1190.)

51. The District's kindergarten and first grade teacher is trained in the verbal behavior methodology, and the Pennsylvania Department of Education provided oversight of the classroom in its initial years. (NT 1074-1076, 1185-1189.)
52. The Student's autistic support classroom served eight students during Student's kindergarten year. (NT 1077.)
53. Parent consented to delivery of the services proposed in the October 24, 2016 proposed IEP. (P 16.)
54. By November 2016, Student had not made adequate progress on goals for imitating and following directions; during this time period from October 24, 2016 to November 2, 2016, Student's teacher and speech therapist were working on expanding Student's ability to sit for fifteen minutes and attend to instruction and classroom routine. (NT 1026-1027, 1046-1047, 1090-1091, 1146-1147, 1206-1209; S 9.)
55. The District's staff provided progress monitoring reports to Parents in November 2016. Of 5 IEP goals and 8 IEP objectives, the teacher reported progress either qualitatively or through data on 3 goals and 3 objectives. (NT 1028, 1044; S 9.)
56. The District's staff provided progress monitoring reports to Parents in January 2017. Of 5 IEP goals and 8 IEP objectives, the teacher reported progress either qualitatively or through data on 4 goals and 1 objective. (NT 1028; S 10.)
57. By January 2017, Student had made slight progress in sitting for 15 minutes. (S 10.)
58. By January 2017, Student had mastered the goal of labeling using adaptive sign or vocalizations. (S 10.)
59. The District's staff provided progress monitoring reports to Parents in March 2017. Of 5 IEP goals and 8 IEP objectives, the teacher reported progress either qualitatively or through data on 4 goals and 3 objectives. (NT 1028; S 11.)
60. By January 2017, Student made inadequate progress in the speech therapy goal of imitating and following directions. Student's attention in speech therapy fluctuated from 3 to 5 minutes. (S 10.)
61. By March 2017, Student had made inadequate progress in sitting for 15 minutes. From a baseline of 10 minutes once per week, Student had demonstrated this skill for 15 minutes once per week, and in one week had demonstrated it three times. (S 11.)
62. By March 2017, Student had made progress in the objective of matching pictures. (S 11.)
63. By the end of May 2017, Student had made satisfactory progress in the goal of sitting for 15 minutes, which Student could now do three days out of five. (S 13.)

64. On May 12, 2017, the Parent and District added a one-to-one paraprofessional to the services provided to Student. (NT 1225, 1387, 1611-1612, 1779; S 12.)
65. By June 2017, Student had demonstrated the ability to request four actions, from a baseline in October 2016 of ability to request ten items and no actions. (S 13.)
66. By June 2017, Student could label over 100 items without echoic prompt, from a baseline of ten. (S 21.)
67. By June 2017, Student could listen and select the correct item for 40 different items from a baseline of zero. (S 21.)
68. By June 2017, Student could match 25 items from a baseline of 10. (S 21.)
69. By June 2017, Student had demonstrated progress in play skills from a baseline of milestone 5 on the VB-MAPP (representing solitary movement play) to half of milestone 6, all of 7 and all of 9 (playing independently with toys on the playground). (S 21.)
70. By June 2017, Student could listen and select the correct item for 40 different items from a baseline of zero. (S 21.)
71. By June 2017, Student had demonstrated milestone 6 and 7 skills by selecting the correct object and imitating fine motor movements, from a baseline of milestone 5. (S 21.)
72. By June 2017, Student had demonstrated milestone 6 and part of milestone 7 in the VB-MAPP, by sitting at the lunch table for 3 minutes without engaging in negative behaviors, putting things away with prompting and lining up with prompting, from a baseline of zero. (S 21.)
73. By June 2017, Student's attention in speech therapy continued to be 3 to 5 minutes. (S 13.)
74. By June 2017, Student had not made adequate progress in the speech goal of imitating and following directions. (S 13.)
75. Student's progress in kindergarten remained below benchmark in almost all areas of functioning. (S 33.)
76. Student received eleven or twelve sessions of speech therapy during Student's kindergarten year. (NT 803, 1039-1043; P 30.)
77. Student's occupational therapist provided eight occupational therapy consultations to Student's teacher in Student's kindergarten year. (P 32.)

## FIRST GRADE IEP AND SERVICES

78. The Student's autistic support classroom served up to fourteen students during Student's first grade year. (NT 1077.)
79. The District provided one-to-one paraprofessional services to Student from the beginning of the first grade school year. (S 17 p. 14.)
80. Student's classroom participation was improved in the first marking period of first grade. It remained problematic through January 2018, with some good days and many days with multiple refusals. Behaviors continued to include hitting adults and eloping. (S 36, 38.)
81. On September 7, 2017, the District invited Parent to an IEP team meeting scheduled for October 20, 2017 to discuss Student's annual IEP. (S 14.)
82. On October 2, 2017, Parent filed a complaint with the Pennsylvania Department of Education alleging that Student was not receiving IEP services including one-to-one paraprofessional services and daily notes from the teacher; that there were too many children in Student's classroom, denying Student a FAPE; and that Student's classroom was not safe because an outer door to the building was not locked. The District reached a settlement with Parent by which it assured that daily notes would be provided, the classroom population would be reduced to below 12, and the outer door would be alarmed. (S 15.)
83. On October 10, 2017, Student's newly assigned speech therapist conducted an informal screening. (S 21.)
84. On October 19, 2017, the District requested Parents' permission to evaluate Student, sending a prior written notice and permission to evaluate form for Parental signature. (S 16.)
85. By October 23, 2017, Student had mastered Student's objective of sitting for 15 minutes for intensive instruction four out of five days, but had not mastered the goal of doing so for five of five days. (S 19.)
86. By October 23, 2017, Student had mastered Student's goal of labeling objects without echoic prompts. Student could label over 100 items from a baseline of ten. Student had been able to request up to 20 items for the new speech therapist in an October 10, 2017, screening, with high motivation and prompts. (S 19, 21.)
87. By October 23, 2017, Student had mastered Student's objective of requesting twenty objects using adaptive signs or vocalization, from a baseline of ten, when working for Student's autistic support teacher. Student had been able to request ten to fifteen items for the new speech therapist in an October 10, 2017, screening. (S 19, 21.)

88. By October 23, 2017, Student could perform a variety of motor actions with visual prompts. (S 19.)
89. By October 23, 2017, Student had not mastered or demonstrated progress on Student's goals and objectives for imitating, following directions, and performing motor actions without a visual prompt, for Student's autistic support teacher. Student was able to imitate seven gestures with verbal and visual prompts for Student's new speech therapist; the objective for this was ten. Student was able to perform three novel one-step directions on request with prompting for Student's new speech therapist; the objective for this was five. (S 19, 21.)
90. By October 23, 2017, Student was able to match more than twenty items in a field of nine, thus exceeding Student's objective of twenty in a field of eight. (S 21.)
91. By October 23, 2017, Student was verbalizing one-to-three word utterances. Student was greeting adults. Student was starting to participate in circle time. (S 21.)
92. In October 2017, Student's occupational therapist determined that Student needed direct occupational therapy services, as Student continued to exhibit a significant delay in fine motor skills. (NT 206-207; S 21.)
93. In October 2017, Student continued to exhibit behaviors in the classroom, resisting transition to the room in the morning and from activity to activity during the day; resisting using the bathroom on a schedule; and continuing to elope from designated areas. (S 21.)
94. On October 20, 2017, October 27, 2017 and November 16, 2017, the District convened IEP team meetings to finalize Student's annual IEP. The meetings included special education teacher and related service providers, but not a regular education teacher. (S 18, 21.)
95. Parent signed the written consent form for evaluation on November 13, 2017. (S 16.)
96. By November 16, 2017, Student had mastered the goal for sitting for 15 minutes, five days per week. This goal was mastered solely with Student's autistic support teacher. (S 19.)
97. By November 16, 2017, Student had demonstrated milestone 8 in the VB-MAPP play domain, playing with two objects. (S 21.)
98. By November 16, 2017, Student had demonstrated part of milestone 4 in the VB-MAPP social domain, engaging in parallel play with others. (S 21.)
99. By November 16, 2017, Student had demonstrated part of milestone 4 in the VB-MAPP group activity domain, transitioning between classroom activities with more than two prompts. (S 21.)

100. By October and November 2017, Student's articulation had become clearer and Student's speech could be understood better. (S 21.)
101. The District offered an IEP finalized on November 16, 2017, that continued Student's placement in full time autistic support in the District's verbal behavior classroom. It offered speech therapy thirty minutes per week; occupational therapy thirty minutes per week; and a one-to-one personal care assistant assigned to Student full time. (S 21.)
102. The November 2017 IEP offered a measurable goal for labelling ten actions without echoic prompt from a baseline of two. (S 21.)
103. The November 2017 IEP offered a measurable goal for performing ten motor actions with verbal but not visual prompt from a baseline of zero. (S 21.)
104. The November 2017 IEP offered a measurable goal for tracing seven pre-writing strokes independently from a baseline of two. (S 21.)
105. The November 2017 IEP offered a measurable goal for requesting 15 motivating items using adaptive signs or vocalizations from a baseline of 7. (S 21.)
106. The November 2017 IEP offered a measurable goal for following 10 one-step directions from a baseline of 3. (S 21.)
107. The November 2017 IEP offered a measurable goal for performing 8 motivating items without visual prompt from a baseline of 0. (S 21.)
108. The November 2017 IEP offered modifications and specially designed instruction in addition to those listed in the October 2016 IEP, including daily sensory activities and social skills instruction; communication with Parent three times per week; and a behavior modification procedure for attaining compliance with a bathroom schedule. (S 21.)
109. The November 2017 IEP found Student eligible for ESY services and offered ESY goals addressing labelling and following directions. ESY services would include 30 minutes per week of speech therapy and 30 minutes per week of occupational therapy, as well as a full time personal care assistant. (S 21.)
110. The November 2017 proposed IEP did not provide a positive behavior support plan. (NT 1617-1621, 1670-1678; S 7, 21.)
111. In late November and early December, Student's diet was changed due to Student's esophagitis. This necessitated denying Student foods and it eliminated a primary edible reinforcer that was being used in Student's educational program. (S 38 pp. 11-17.)
112. In November and December 2017, Student's autistic support teacher trained Student's one-to-one aide to deliver 15 minute verbal behavior instruction sessions to Student because the teacher was going out on maternity leave and the aide was paired with

Student sufficiently to obtain Student's compliance with sitting for the 15 minute session. The aide received additional training in verbal behavior methods. (NT 1189-1190, 1197-1200, 1214-1217.)

113. On December 5, 2017, Parent returned an offered NOREP proposing to implement the November 2017 IEP. Parent disapproved the NOREP, asserting that the IEP proposed inappropriate goals, modifications and related services. (S 24.)
114. In December 2017, Parent returned a form requested by Student's speech pathologist with information on Student's communication at home. (S 25.)
115. By December 2017, Parent's report indicated that many of Student's classroom verbal skills had not generalized to student's home environment. (S 25.)
116. By NOREP dated January 5, 2018, the District proposed to add modifications to Student's IEP: 1) Parent would prepare all food for student; 2) Student's teacher would fill out a food consumption list every day and send it home to Parent in Student's backpack. (S 26.)
117. By January 2018, Student was still exhibiting behaviors that impeded learning by eloping from people making demands upon Student, and by refusing directions. (S 28.)
118. On January 26, 2018 when Student's teacher went on maternity leave, Student's one-to-one aide began providing Student's 15 minute intensive verbal behavior instruction sessions. Although the classroom was being supervised by a substitute special education certified teacher, the aide provided direct instruction to Student. (NT 1083-1084, 1197-1200, 1201-1202, 1655-1656.)
119. Parent was not aware that Student was receiving intensive instruction from the one-to-one aide instead of the autistic support teacher. (NT 1349-1350, 1656; S 46 p. 20.)
120. Student received 14 sessions of speech therapy in first grade from September through January. (S 40.)
121. Student received 13 sessions of occupational therapy in first grade from September through January. Up to 16 sessions were missed, either fully or partially. (S 42.)

#### JANUARY 2018 EVALUATION REPORT

122. On January 11 and 12, 2018, the District's school psychologist attempted to obtain Parent's input for the re-evaluation being conducted. Parent did not provide the requested information. (S 27.)
123. The District provided an evaluation report dated January 14, 2018. The report was six months more than three years after the previous evaluation on July 7, 2014. (S 28.)

124. The January 14, 2018 evaluation report identified Student as a child with Autism under the IDEA. It recommended specially designed instruction to address sitting still in class; generalization of learned skills in different environments; increasing the length of Student's utterances; following verbal directions; and increasing Student's vocabulary. (S 28.)
125. The January 14, 2018 evaluation report recommended modifications to teaching methods, including reinforcing positive behaviors; including new information with already learned information; presenting tasks one at a time with simple directions; and using a variety of media to present new tasks. (S 28.)
126. The January 14, 2018 evaluation report was based upon a review of records, the psychologist's observations in the classroom and testing environment, teacher reports including behavior inventories addressing communication, a speech therapy report and an occupational therapy report. (S 28.)
127. The evaluation did not include formal cognitive and achievement testing due to Student's refusal to respond to questions on three occasions. It did not include adaptive behavior inventories because the District believed that it had sufficient data on adaptive behavior from other sources. (NT 639-643.)
128. The January 14, 2018 evaluation report recommended that high tech assistive technology for communication would be inappropriate because student was working on verbal communication, the most efficient way for Student to communicate. It recommended that the District provide pictures and other visual stimuli to aid in instruction. (NT 346-347, 1194-1195, 1630-1631; S 28.)
129. The January 14, 2018 evaluation included a Functional Behavioral Assessment (FBA). The assessment looked at the functions of the behavior of non-compliance, which was defined to include eloping from an area when a demand was placed on Student. The FBA was based upon two observations by the school psychologist using the ABC methodology. (S 29.)
130. The FBA focused on Student's non-compliance because it was considered to be the likely beginning of a chain of behaviors that led to other behaviors such as tantrums and aggressive behavior, and that it was the primary behavior of concern. (NT 633-634.)
131. The January 14, 2018 FBA concluded that the function of Student's non-compliance was escape from unwanted demands and activities, including academic activities. (S 29.)

## OFFER OF SERVICES FOR SECOND GRADE

132. On February 13, 2018 and March 8, 2018, the District convened an IEP team meeting to discuss the January 2018 evaluation report and revise Student's IEP. A regular education teacher was not present. (S 46.)
133. The March 8, 2018 IEP offered placement in full time autistic support in the District's elementary school, and 30 minutes per week of speech therapy and 30 minutes per week of occupational therapy. (S 46.)
134. The March 2018 IEP stated that the frequency of promised related services is reduced by any instances when a session is cancelled due to teacher or student unavailability, including holidays, snow days, district mandated testing and teacher conferences. (S 46.)
135. The March 2018 IEP offered a measurable goal for following 10 one-step directions with faded verbal and repetition cues from a baseline of 5 with increased verbal and repetition cues. (S 46.)
136. The March 2018 IEP offered a measurable goal for requesting motivating items using five word utterances from a baseline of requesting using two word utterances or gestures. (S 46.)
137. The March 2018 IEP offered a measurable goal for labelling 10 actions without echoic prompt from a baseline of 2. (S 46.)
138. The March 2018 IEP offered a measurable goal for performing 10 motor actions with verbal but not visual prompt from a baseline of 3. (S 46.)
139. The March 2018 IEP offered a measurable goal for tracing seven pre-writing strokes independently from a baseline of two. This was the same goal offered in the November 2017 IEP. (S 21, 46.)
140. The March 2018 IEP offered a measurable goal for printing Student's name independently in 4 of 4 attempts from a baseline of 0. (S 46.)
141. The March 2018 IEP offered a measurable goal for requesting 20 missing items with a verbal prompt from a baseline of 0. (S 46.)
142. The March 2018 IEP offered a measurable goal for reducing Student's average refusal or escape behaviors per work demand to 3 from a baseline of 5.5. (S 46.)
143. The March 2018 IEP offered modifications and specially designed instruction in addition to those listed in the November 2017 IEP, including use of a sentence strip with pictures in speech therapy; combining preferred activities with non-preferred activities during instruction; wait time; a thirteen day trial of a speech device; removal of dairy

products from reinforcers and a classroom protocol for giving only parent-provided food; increasing communication with Parents from three times per week to daily; modelling errorless teaching and error correction; natural environment teaching; differential reinforcement and repeated practice in requesting and labelling; use of a prompt hierarchy; activities and implements to promote mature grasping, build mature hand muscles, and promote bilateral coordination, crossing midline and strengthening upper extremity gross motor abilities; and a token economy system. (S 46.)

144. The March 2018 IEP found Student eligible for ESY services and offered ESY goals addressing labelling and following directions. ESY services would include 30 minutes per week of speech therapy and occupational therapy, as well as a full time personal care assistant. (S 21.)
145. The March 2018 IEP offered supports for school personnel including monthly consultation with a board certified behavior analyst. (S 46.)
146. The March 2018 IEP offered a positive behavior support plan based upon an ABC analysis of Student's behavior. The plan offered goals for reducing refusing and escaping behavior with a detailed protocol for extinguishing the behavior in the classroom. (S 46.)
147. The District provided a NOREP to Parent proposing the March 2018 IEP and placement in full time autistic support. Parent did not return the NOREP. (NT 1635-1636; S 47.)

## **DISCUSSION AND CONCLUSIONS OF LAW**

### **BURDEN OF PROOF**

The burden of proof is composed of two considerations, the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact.<sup>3</sup> In Schaffer v. Weast, 546 U.S. 49, 126 S. Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence<sup>4</sup> that the

---

<sup>3</sup> The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact (which in this matter is the hearing officer).

<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. See, Comm. v. Williams, 532 Pa. 265, 284-286 (1992). Weight is based upon the persuasiveness of the evidence, not simply quantity. Comm. v. Walsh, 2013 Pa. Commw. Unpub. LEXIS 164.

moving party is entitled to the relief requested in the Complaint Notice. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006).

This rule can decide the issue when neither side produces a preponderance of evidence – when the evidence on each side has equal weight, which the Supreme Court in Schaffer called “equipoise”. On the other hand, whenever the evidence is preponderant (i.e., there is weightier evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. See Schaffer, above.

In the present matter, based upon the above rules, the burden of persuasion rests upon the Parents, who initiated the due process proceeding. To the extent that the Parents fail to produce a preponderance of the evidence in support of Parents’ claims, or the evidence is in “equipoise”, the Parents cannot prevail under the IDEA.

#### CREDIBILITY/RELIABILITY

It is the responsibility of the hearing officer to determine the credibility and reliability of witnesses’ testimony. 22 Pa. Code §14.162 (requiring findings of fact); A.S. v. Office for Dispute Resolution, 88 A.3d 256, 266 (Pa. Commw. 2014)(it is within the province of the hearing officer to make credibility determinations and weigh the evidence in order to make the required findings of fact). I carefully listened to all of the testimony in light of the documentary evidence, and I reach the following determinations.

While I found Parent to be a sincere and devoted advocate for Student, Parent is not a professional educator and has a limited understanding of special education. Parent based her assessment of Student’s progress largely upon what she saw at home. This is understandable for a non-educator, but on this record, difficulty with basic skills and behavior at home does not prove

by a preponderance that the Student failed to make progress in school, because Student demonstrated substantial difficulty with generalization of the most basic skills. Even a different person making demands upon Student or a different location of such demands was enough to cause regressed behavior on this record. Therefore, I accorded reduced weight to Parent's testimony about Student's behavior and abilities demonstrated at home as an indicator of Student's progress at school. This includes Parent's testimony that Student knew Student's sounds in addition to the alphabet; without more, I am unable to draw a reasonable conclusion as to whether or not Student had regressed in this regard while at the District's program.

I also accord less weight to Parent's testimony about the services provided at the school that were not explicitly set forth in the IEP and other documents, simply because Parent was not in a position to know enough about the implementation of the Student's IEP in school. The record discloses instances of District efforts to schedule meetings and obtain documentation from Parent, in order to provide proposed services, in which Parent had difficulty scheduling due to the substantial demands of her employment, or failed to respond timely or at all. I understand that Parent did visit the school to observe student in the District's program, but one observation does not necessarily prove that what is observed happens regularly or repeatedly.

There was conflict in the testimony about whether or not Parent received quarterly progress monitoring reports from the Student's teacher and related services professionals. I found all of the witnesses testifying to this to be sincere in the belief that their statements were true. However, memories of all witnesses on this point were demonstrably flawed. Both Parent and the teacher professed lack of memory of many events during the years in question. I conclude that the evidence is at most in equipoise; accordingly, Parent has not proven by a preponderance that she did not receive the quarterly progress reports.

Similarly, I find in equipoise the conflicting testimony about who demanded that the 2017 IEP be marked to indicate that Student was not demonstrating behavior that impeded learning, and that the behavior goal be eliminated and the positive behavioral support program be eliminated from the IEP. Again, credible witnesses pointed fingers in opposite directions on this point. I cannot resolve this conflict in the testimony, nor do I need to do so. Regardless of whose idea it was, it was a bad idea, and never should have been done. The record is preponderant that the Student needed behavioral intervention, as discussed below.

Parent produced expert opinion testimony from several well-credentialed expert witnesses - a school psychologist, a speech and language expert and an occupational therapist. I accorded all of these witnesses' opinions reduced weight. None had ever met the Student or observed the Student in any setting. None had visited the Student's school or program. None had spoken with Student's teacher or related services professionals. All testified to numerous questions about the District's choices, judgments, evaluations and services without providing answers to those questions. Consequently, I found these opinions to carry little weight.

I find that most of the witnesses were credible. I gave particular weight to the testimony of the Student's teacher, whose expertise and extensive work with Student enabled her to provide needed perspective and helpful opinion evidence.

#### TRANSITION TO KINDERGARTEN – LACK OF STANDARD RE-EVALUATION

Parents point out, and the District acknowledges, that the District did not evaluate Student upon Student's transition to its kindergarten classroom. It issued a permission for evaluation to Parent, and Parent consented. Yet the District did not perform the evaluation prior to or during Student's kindergarten year, clearly an administrative oversight at the time. While Parents do not

assert that this was non-compliant<sup>5</sup>, they do assert that it caused a deprivation of FAPE. They argue that the lack of a comprehensive evaluation caused the District to provide inappropriate programming that failed to address all of Student's educational needs and was not reasonably calculated to provide Student with a FAPE.

The IDEA requires every school district to provide a comprehensive evaluation to every child who is identified as eligible for special education under the IDEA. The IDEA sets forth two purposes of the required evaluation: to determine whether or not a child is a child with a disability as defined in the law, and to "determine the educational needs of such child ... ." 20 U.S.C. §1414(a)(1)(C)(i). An evaluation must address all "areas of suspected disability", 20 U.S.C. §1414(b)(3)(B).

Here, the District had available the 2014 evaluation by the early intervention program. In addition, the District did assess Student's functioning prior to and in the first weeks of Student's transition to its autistic support classroom. Thus, it had evaluation data upon which to plan Student's program, and District witnesses credibly asserted that this information was an appropriate basis for planning. I conclude that the failure to conduct a formal re-evaluation prior to transition did not constitute or contribute to a denial of a FAPE.

Parent argues that the speech and language assessment was inappropriate because the evaluator failed to obtain standardized cognitive and achievement test scores. The early intervention evaluation had attempted to obtain standardized scores on an instrument that scores developmental delay in young children, and Student had been unable to participate due to extremely limited ability to attend to demands. The speech therapist in May 2016 again tried to test for cognitive ability and

---

<sup>5</sup> 34 C.F.R. §300.303(b)(2)(parent must waive re-evaluation); accord, Basic Education Circular July 1, 2003, Early Intervention Transition: Preschool Programs to School-Aged Programs. I make no determination on this point. It is unnecessary to do so, since the relevant question is whether or not the lack of a re-evaluation upon Student's transition denied Student a FAPE. 34 C.F.R. §300.513.

again Student refused to participate by refusing to sit with the examiner and pay attention to questions and prompts. Moreover, she credibly testified that she was able to obtain useful information from her assessment that could inform the IEP team about the Student's speech and language needs. I see no preponderant evidence that the District's speech therapist failed to assess properly because she was unable to get standardized scores.

While the IDEA requires assessment of cognitive factors that may contribute to a child's struggles in school, 34 C.F.R. §300.304(c)(4), it does not explicitly mandate the use of standardized cognitive testing in all cases. 34 C.F.R. §300.304(b)(1). Here, where it was not possible to obtain valid cognitive and academic achievement scores, the District's assessments were consistent with the IDEA in relying upon the developmental assessment inherent in verbal behavior instruction and the speech/language evaluation. Even with a score for Student's ability or intelligence, the District would have had to rely upon such other sources of information to make an accurate determination of the level of special education that would have been appropriate Student in kindergarten. I find that the District accumulated such other sources of information.

It must be noted that the verbal behavior program methodology used in the District's autistic support classroom is based upon an ongoing assessment protocol, the "VB-MAPP". This methodology is appropriate for teaching a child with significant developmental delays like Student. It teaches the rudiments of communication, starting at the very earliest stages of development of that skill, and proceeding in a sequential way to higher stages of development of that skill. The VB-MAPP is kept as a running record of a child's manifestation of the numerous discrete skills being taught. Thus, the District convincingly showed that its program was itself a continuous process of assessment of Student's practical communicative skills and it was appropriate to focus on such skills in Student's kindergarten and first grade years.

Parents argue that the District failed to assess Student's occupational therapy needs appropriately. It must be kept in mind that school-based occupational therapy is not a clinical service – that is, it is not aimed primarily at curing or ameliorating gross motor, fine motor and sensory deficits. Rather, it is aimed at addressing such deficits insofar as they interfere with the student's ability to benefit from special education services. 34 C.F.R. §300.34(a). The early intervention evaluation had mentioned sensory needs, though it did not indicate that such needs were preventing benefit from special education. The District reviewed Student's needs and was prepared to address them in its verbal behavior classroom. The evidence is preponderant that Student, at the time of transition, showed no gross motor needs or sensory needs that interfered with Student's ability to benefit from special education. The evidence shows preponderantly that the program addressed Student's fine motor needs to the extent that Student could participate in kindergarten classroom activities.

To the extent that Student's fine motor, sensory and pre-academic skills like spelling and mathematics were not addressed, the Parents have not shown by a preponderance of the evidence that this was inappropriate. The District credibly and preponderantly showed that Student's delays were so fundamental that it was necessary to prioritize and focus upon the most fundamental skills that would be needed in order to access higher levels of curriculum. Therefore, the District's educators began with a verbal behavior program that was aimed at both providing Student with the fundamental skill of communicating through words, and the basic skill of communicating to get needs and wants fulfilled by behaviors other than escaping demands, tantrums and aggressive behaviors toward self and others. Parent experts assailed the verbal behavior methodology, arguing that there are other approaches to educating children with such significant delays that would deal with a greater range of needs at the same time. Yet, as discussed above, the law accords local

education agencies the discretion to choose their methodologies, verbal behavior is research-based and encouraged by state policy, and the experts themselves were not in a position to show preponderantly that the District's strategies were inappropriate. Therefore, I conclude that, at the time of transition, the District's services were reasonably designed to enable Student to receive appropriate, meaningful educational benefit.

Parents argue that the District delivered its first re-evaluation report to them about six months later than the three year deadline required by the IDEA, in January of Student's first grade year. They are correct, and this constituted a procedural violation. With two exceptions, however, I conclude, for the reasons set forth above, that the procedural violation did not constitute a denial of FAPE or contribute to a denial of FAPE. During that period of time, July 7, 2017 to January 14, 2018, the District was providing the verbal behavior program discussed above, with its own inherent ongoing assessment, and so it was well aware of the Student's skill levels in practical communication and classroom participation, as well as Student's progress with the strategies being employed for Student. Compliance with the IDEA's time lines for re-evaluation would not have added to this knowledge or changed the program being delivered.

Nevertheless, I conclude that the District's failure to evaluate contributed to a denial of a FAPE in two ways. As discussed below, I conclude that the District failed to intervene appropriately or in a timely fashion regarding Student's behaviors that interfered with Student's learning and that of others. Also as discussed below, I conclude that the District failed to provide Student's Parent with appropriate opportunity to participate in the Student's educational decision-making process. The delay in providing a re-evaluation as required by law rose to the level of a denial of a FAPE by contributing to these two failures to provide a FAPE.

## PROVISION OF FAPE – LEGAL STANDARD

The IDEA requires that a state receiving federal education funding provide a “free appropriate public education” (FAPE) to disabled children. 20 U.S.C. §1412(a)(1), 20 U.S.C. §1401(9). FAPE is “special education and related services”, at public expense, that meet state standards, provide an appropriate education, and are delivered in accordance with an IEP. 20 U.S.C. §1401(9). Thus, school districts must provide a FAPE by designing and administering a program of individualized instruction that is set forth in an IEP. 20 U.S.C. §1414(d). As discussed above, the IEP must be tailored to meet the “unique” needs of each eligible child.

In addition, the IEP must be “reasonably calculated” to enable the child to receive appropriate services in light of the child’s individual circumstances. Andrew F., 137 S. Ct. above at 999. The Court of Appeals for the Third Circuit has ruled that special education and related services are appropriate when they are reasonably calculated to provide a child with “meaningful educational benefits” in light of the student's “intellectual potential.” Shore Reg'l High Sch. Bd. of Ed. v. P.S. 381 F.3d 194, 198 (3d Cir. 2004) (quoting Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 182-85 (3d Cir. 1988)); Mary Courtney T. v. School District of Philadelphia, 575 F.3d 235, 240 (3d Cir. 2009), see Souderton Area School Dist. v. J.H., Slip. Op. No. 09-1759, 2009 WL 3683786 (3d Cir. 2009). In appropriate circumstances, a District that meets this Third Circuit standard also can satisfy the Andrew F. “appropriate in light of the child’s individual circumstances” standard. E.D. v. Colonial Sch. Dist., No. 09-4837, 2017 U.S. Dist. LEXIS 50173 (E.D. Pa. Mar. 31, 2017).

For a child not progressing smoothly from grade to grade – a child such as Student, who clearly is not advancing in grade level performance academically, functionally or socially – a district must offer and provide educational services that are “appropriately ambitious” in light of the child’s

circumstances. Andrew F., 137 S. Ct. above at 1000. The child must have a chance to meet “challenging objectives.” Ibid.

A school district is not necessarily required to provide the best possible program to a student, or to maximize the student’s potential. Andrew F., 137 S. Ct. above at 999 (requiring what is reasonable, not what is ideal); Ridley Sch. Dist. v. MR, 680 F.3d 260, 269 (3d Cir. 2012). An IEP is not required to incorporate every program that Parents desire for their child. Ibid.

The law requires only that the program and its execution were reasonably calculated to provide appropriate benefit. Andrew F., 137 S. Ct. above at 999; Carlisle Area School v. Scott P., 62 F.3d 520 (3d Cir. 1995), cert. den. 517 U.S. 1135, 116 S. Ct. 1419, 134 L.Ed.2d 544 (1996)(appropriateness is to be judged prospectively, so that lack of progress does not in and of itself render an IEP inappropriate.) The program’s appropriateness must be determined as of the time at which it was made, and the reasonableness of the program should be judged only on the basis of the evidence known to the school district at the time at which the offer was made. D.S. v. Bayonne Board of Education, 602 F.3d 553, 564-65 (3d Cir. 2010); D.C. v. Mount Olive Twp. Bd. Of Educ., 2014 U.S. Dist. LEXIS 45788 (D.N.J. 2014).

Applying these standards to the above findings and the record as a whole, I conclude that the District provided valuable and appropriate services to Student, in view of Student’s circumstances, but it nevertheless failed to provide Student with a FAPE in four ways. I conclude that the District provided an appropriate placement in its verbal behavior program, but failed to provide timely and appropriate intervention with regard to Student’s negative behaviors that impeded Student’s learning. I conclude that the goals and modifications in the IEPs were appropriate, but the District failed to provide the speech therapy and occupational therapy services that the Student and the IEP required. I find that the District failed to provide a timely evaluation report and progress monitoring

reports to Parent, denying Parent appropriate opportunity to participate in Student's educational decision-making.

#### PROVISION OF FAPE – PLACEMENT

There is no evidence of any weight to suggest that the placement of Student was inappropriate. On the contrary, the District placed Student in its most supported environment, the full time autistic support classroom. As a research-based verbal behavior program, this placement was tailored to address Student's needs given Student's substantial developmental delay. The record is more than preponderant that Student's first need was to learn to communicate – to request what Student wanted; to be able to name things and actions that Student wanted or – later on - wanted to communicate about; to listen to a speaker; to play at a developmentally appropriate level; to interact appropriately with other children; to learn from others by imitating them; to use words orally; and to have the fundamental skills needed to participate in school. The record is convincing that Student had not yet developed these fundamental skills in early intervention. I conclude that the District's judgment to address these needs before higher level skills was appropriate, and that the placement for this purpose was appropriate.

Parents' evidence, especially from their expert witnesses, essentially constituted a disagreement with the District's decision to place Student in a verbal behavior program. Yet, the IDEA does not require a district to acquiesce in any and all parental requests for services, and it does not preclude the District and its experienced educators from determining the methodology to be employed in educating a child enrolled in its schools. T.L. v. Lower Merion Sch. Dist., No. 15-0885, 2016 U.S. Dist. LEXIS 80315 (E.D. Pa. June 20, 2016); K.C. v. Nazareth Area Sch. Dist., 806 F.Supp.2d 806, 813-814 (E.D. Pa. 2011)(upholding agencies' discretion under the IDEA to

select their own educational methodology); See, Leighty v. Laurel School Dist., 457 F.Supp.2d 546 (W.D. Pa. 2006)(IDEA does not deprive educators of the right to apply their professional judgment). Parents' criticisms of the District's placement do not reveal a denial of FAPE.

#### PROVISION OF FAPE – IMPLEMENTATION OF VERBAL BEHAVIOR PROGRAM

Parents assert that the District failed to implement its verbal behavior program with fidelity in kindergarten. I do not find preponderant evidence for this assertion. Parents criticized Student's teacher for not conducting a "barriers assessment" and other assessments, but they offered little evidence that not doing so would have any effect on the delivery of a FAPE. Similarly, they argued that the teacher failed to provide assessments of Student's echoic skills on the VB-MAPP. The teacher actually agreed with them that she should have filled out the form, but explained that she knew that Student was able to echo modeled words and that she saw no need to mark the form accordingly. While the VB-MAPP can be used to convey information on how the child is progressing through the program, its primary purpose is formative, as the evidence showed: it helps the teacher to gauge progress for instruction purposes. Yet, the teacher already was aware of Student's progress in the echoic skill as it was demonstrated on a daily basis.

I conclude that Parents failed to show by a preponderance of the evidence that the failure to mark "echoic" on the form, or the failure to conduct other tests available in the verbal behavior program, was inappropriate. They failed to show that these omissions contributed to a denial of FAPE.

Parents' argument about denial of FAPE in kindergarten are based primarily upon the assertion that Student failed to make more than incremental progress during kindergarten in the verbal behavior skills being taught, and that Student never even began to learn pre-academics. Yet,

FAPE is prospective in nature, not retrospective, as discussed above. Slow progress in and of itself does not prove a denial of FAPE.

Parents' global argument about the implementation of Student's program in first grade is similarly unavailing. Although the classroom had too many children in it, there was no evidence to show that this caused Student to progress slowly.

Although the teacher delegated intensive daily verbal behavior instruction to the one-to-one aide during approximately four months of the teacher's maternity leave, the record shows preponderantly that this was the best option for continuing Student's progress in the program, because the Student had "paired" with the aide and would be more likely to work for the aide than for anyone else. In fact it was virtually certain that Student would not cooperate with anyone else, especially a new teacher; this was reinforced in January when the District's school psychologist was unable to obtain Student's attention for testing despite three attempts.

That the program did not teach Student mathematics or reading was not inappropriate in this matter, because Student preponderantly was unable to begin learning these subjects, and the record preponderantly supports the appropriateness of the District's strategy of teaching classroom and communication fundamentals before proceeding to higher skills.

#### PROVISION OF FAPE – IEPs

Parents pointed out a number of procedural errors in the IEPs that are concerning. The kindergarten and first grade IEPs were finalized more than a year after the previous IEPs. Meetings did not have the presence of a regular education teacher. IEPs noted Student's behavior impeding learning but there was no FBA prior to January 2018. Occupational therapy needs were not even

mentioned in the kindergarten IEP. I conclude that these apparent procedural violations<sup>6</sup> did not amount to a denial of a FAPE, except as set forth below with regard to behavior, speech therapy, occupational therapy and parental access to decision-making.

The IDEA requires the District to provide goals that address all of Student's educational needs as noted in the IEP. IEPs "must include" goals designed to "meet each of the child's ... educational needs that result from the child's disability ... ." 34 C.F.R. §300.320(a)(2)(i)(B). The Parents argue that the District has failed to do so, because it did not provide goals to address Student's occupational therapy and behavioral needs or academics. While I conclude that the IEPs provide an appropriate placement and many appropriate goals, as well as appropriate specially designed instruction, modifications and accommodations, Parents have shown by a preponderance that the Student's IEPs failed to address Student's behavioral, speech/language and occupational therapy needs appropriately.

The record is preponderant that the Student's behavior was a serious impediment to learning from the very beginning, and continued to be an impediment in first grade as well. The record shows that the verbal behavior classroom is a behavior-oriented program with classroom behavior modification systems based upon applied behavior analysis principles. Thus, the District initially determined to utilize the program and its behavior strategies to address Student's severe behavioral problems. The record supports this strategy preponderantly.

Yet Student's behaviors did not extinguish. They did seem to be reduced in frequency and intensity over the course of a year, but the evidence is preponderant that they remained so frequent and intense that they clearly impeded Student's learning, based on this record. At the end of

---

<sup>6</sup> I do not conclude that the District's failure to issue an IEP at the beginning of Student's kindergarten year was a denial of FAPE. The District as much as possible emulated the services provided in early interventions, provided its full time autistic support services on the first day of school, and convened an IEP team meeting within a reasonable time in October 2016.

kindergarten, Student had not learned to sit and attend intensive verbal behavior training for more than four days per five day week. Yet this was the top priority skill to be taught to Student. The record is preponderant that the Student's behavior impeding learning this skill was refusal and escape behavior, yet this was not mastered even for the 15 minute per day sessions that were the focus of the verbal behavior program. In addition to this behavioral impediment, the Student exhibited other behaviors that impeded Student's learning in the various learning "stations" in which the classroom was organized. Student was still exhibiting aggressive and sometimes violent behavior in school. Meanwhile, Student had made no progress in developing social skills at any level higher than communicating with adults and some awareness of other children.

Even though the Student's kindergarten IEP acknowledged that Student's behaviors impeded learning until it was revised in November 2017, the District did not perform an FBA<sup>7</sup> until January of Student's first grade year. An FBA was required by state regulation. 22 Pa. Code §14.133(b). I conclude that this procedural violation did deprive Student of FAPE, as discussed above. Student's behavior continued to be a serious need for all of kindergarten and half of first grade before a District professional sought to assess Student's behavior systematically. The District continued to utilize its classroom behavior interventions, during this period of about one and one-half school years. I conclude that it should have intervened earlier.

The Student's IEP in kindergarten did include a positive behavioral support plan, and the IEP did have one goal, sitting for instruction for 15 minutes. The support plan merely echoed the annual IEP's single goal of sitting for 15 minutes. Neither the plan nor the annual IEP addressed the larger phenomenon of refusal behavior that was exhibited throughout the school day. Neither

---

<sup>7</sup> The positive behavior support plans did include prefatory material in the form of "ABC" analysis, which is the typical form of an FBA; however, I conclude that this analysis, without the benefit of systematically collected data, does not amount to an FBA appropriate to address the behaviors demonstrated in this record.

addressed the Student's aggressive and other behaviors. The record is preponderant that Student was exhibiting behaviors that were not part of any "chain" of refusal. Yet there was nothing separately addressing such behaviors.

The District argues that the Student's unwanted behaviors were decreasing in frequency and intensity, but its teacher's subjective impressions are not supported by any systematic data. The documentary record, taken as a whole, supports Parents' assertions by a preponderance. I conclude that at some point during Student's kindergarten year, and during the first half of Student's first grade year, the District failed to address Student's behaviors appropriately. As a result, Student's IEPs in parts of kindergarten and first grade were not reasonably calculated to provide Student with progress appropriate to Student's circumstances. Andrew F., 137 S. Ct. above at 999.

The District on this record is entitled to a reasonable period for rectification from the point in time that the District knew or should have known that its program was not addressing Student's behavior appropriately. Brandywine Heights Area Sch. Dist. v. B.M., 248 F. Supp. 3d 618,628-629 (E.D. Pa. 2017). It is difficult on this record to determine when the District reasonably should have been on notice that it needed to intervene. Student's developmental delay was reasonably believed to be profound and Student's progress in early intervention had been very slow. The District was reasonably entitled to a substantial period of time in which to utilize the ABA research-based principles of its verbal behavior classroom before concluding that it needed to provide additional supports to Student.

By the time of the October 2016 kindergarten IEP meeting, Student's teacher was optimistic; she reported that Student was responding, albeit slowly, to the verbal behavior program. Student was sitting for longer periods of time for instruction and was complying inconsistently with some aspects of classroom routine. I conclude that the District was not on notice of the need for

interventions at this point. However, by January 2017, Student had made only slight progress on the key goal of sitting for 15 minutes. Student's other behaviors of refusal and aggressiveness had not abated by any report. By this time, I conclude, the District should have known that additional interventions and supports would be needed. After that, the District should be afforded a reasonable period for rectification, which in this case, and given Student's profound need to begin to make progress in education, is sixty days, the IDEA's time frame for evaluation. Therefore, I conclude that the District failed to provide a FAPE by failing to address Student's behaviors appropriately from March 1, 2017 to January 14, 2018, when the District presented its FBA along with its re-evaluation report.

In first grade, the District did provide one new intervention. In response to Parent's request, it provided a one-to-one aide for Student in the classroom. There still was no FBA, though, and the evidence is preponderant that the addition of this service, while it seems to have helped Student to finally attain the goal of sitting for 15 minutes, did not allay Student's refusal or other behaviors. Thus, I conclude that the denial of FAPE continued until January 14, 2018, when the FBA was provided.

The parties made much of a decision that the IEP team reached at one of three IEP team meetings in either October or November 2017, in Student's first grade year. The team decided to remove the recognition that Student's behavior was impeding Student's progress, remove the behavioral goal for sitting for 15 minutes, and remove the positive behavior support plan, all without an evaluation of Student's behavior such as an FBA. As noted above, I do not need to resolve the parties' dispute over who initiated the change. The evidence remains preponderant that the change was not warranted or appropriate. There is no evidence that Student's behavior had improved in the first half of first grade so as to justify such a change. There was evidence that Student was able to

sit for 15 minutes for five days per week, but the record is unclear as to whether or not this achievement warranted removing this key goal. As discussed above, the evidence is preponderant that Student's behaviors required intervention throughout Student's first half of first grade, regardless of this change to Student's IEP.

Parent argues that the FBA was flawed because it addressed only the overarching class of behaviors defined as "noncompliance". This included all instances of avoiding a demand, such as refusal, elopement or other unwanted behaviors. The District's school psychologist and teacher both endorsed this strategy of singling out "noncompliance" to work on initially. The psychologist pointed out that the noncompliance was the start of a "behavior chain" that often escalated into more inappropriate behavior such as tantrums and aggression. While Parents pointed out that there were behaviors that were not part of such a "behavior chain", I do not find that their criticisms and experts' opinions provide preponderant evidence that the District's approach was inappropriate. Therefore, I conclude that at this point the District was intervening appropriately and its subsequent IEP provisions addressing Student's behavior were not shown on this record to be inappropriate.

#### PROVISION OF FAPE – SPEECH THERAPY

The record is preponderant that the District failed to provide an appropriate quantity of speech therapy as a related service. The District provided thirty minutes per week of direct speech therapy in kindergarten, and this was reflected in the IEP. However, there was a proviso that services would be provided only on days that both the therapist and student were available. Thus the amount of provided and promised service was reduced by absences, snow days, school-wide activities and therapist meetings. This not only reduced the actual amount of services to Student substantially, but it also rendered the IEP promise completely unpredictable for Parent. I find this exception to be

inappropriate, and conclude that it was a deprivation of FAPE that must be remedied on an hour-for-hour basis.

#### PROVISION OF FAPE – OCCUPATIONAL THERAPY

The District did not provide appropriate services to Student regarding fine motor and sensory needs. The early intervention IEP had made it clear that both of these were needs, yet the kindergarten IEP made no mention of needs or services. The occupational therapist did not attend, nor did the occupational therapist assistant assigned to Student's classroom. The District argues that the District's occupational therapy program provided consultation services in kindergarten and half of first grade, which was essentially the level of services provided in the early intervention program, but this does not excuse the failure to discuss occupational therapy needs in the kindergarten IEP.

This omission was not cured until the November 2017 IEP, in which the District provided present levels regarding gross motor, fine motor and sensory needs, and added to the IEP both a goal for fine motor needs and modifications to address sensory needs. From this point forward the record is preponderant that the District addressed Student's occupational therapy needs appropriately.

#### PROVISION OF FAPE – PARENTAL PARTICIPATION

I conclude that the combination of procedural deficiencies and poor progress reporting from the verbal behavior classroom combined to significantly impede Parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to Student. I further conclude that this substantive violation contributed to the District's slow recognition of the need to intervene

with greater support to address Student's negative behaviors, since Parent advocated from the start that these behaviors needed to be addressed.

I conclude that the District's procedural errors that impeded parental participation included late IEP meetings; the failure to conduct FBAs when and as required by state regulation; the failure of the kindergarten IEP to address Student's occupational therapy needs or explain what the District was doing to address them; and the progress monitoring reports, which I reviewed carefully and found to be incomplete and confusing.<sup>8</sup> As to the latter, instead of providing available data on each and every goal or objective which were stated as measurable in the IEPs, the reports combined either subjective characterizations of progress or no information at all. I conclude that these reports, a vital component of parental participation as mandated by law, impeded busy Parents' ability to keep tabs on the District's interventions in relation to Student's needs, thus impeding parental participation.

#### APPROPRIATENESS OF EVALUATION IN JANUARY 2018

I have reviewed the record regarding the appropriateness of the District's January 2018 re-evaluation report and find it appropriate. Given the lower weight that I accorded the criticisms of the District's experts and my own perusal, I conclude that the re-evaluation addressed all suspected disabilities, utilized an array of appropriate instruments and behavior inventories, and made appropriate recommendations. The re-evaluation report relied upon Parent's input and teachers' day to day observations of Student. The psychologist made classroom observations. The report also relied upon a speech and language evaluation and an occupational therapy evaluation. I conclude that all of these sources of information informed the evaluator and the IEP team as to Student's level

---

<sup>8</sup> I do not include the District's omission to advise Parent that an aide was going to provide direct instruction during the teacher's maternity leave. The record does not show that the aide's provision of services was inappropriate, nor does it show that the aide provided inappropriate services during this approximately four month period of time. Nor is it clear that Parent was entitled to notice of this staffing change.

of functioning and educational needs at the time of the re-evaluation, and that the professional judgment to rely upon them without standardized cognitive and achievement testing was not inappropriate.

Parent input was limited, but this was in part due to Parent's limited response to the evaluator's requests, no doubt due to Parent's work demands and the delays that might be inherent in communication with a due process pending and counsel involved. While the evaluator did not provide a great deal of time for Parent's response to her inquiries, the record is not preponderant that the requests were inappropriately rushed.

Consequently, I conclude that the re-evaluation was appropriate and that there is no need to order an independent educational evaluation as requested by Parents.

#### ASSISTIVE TECHNOLOGY

Parent strenuously requested assistive technology, and the District resisted their request. The District provided "low-tech" assistive technology, but Parents wanted Student to receive electronic assistive technology that would voice Student's wishes and thoughts by using a screen. The suggestion was that this way Student could communicate more things sooner than the verbal-behavior model would permit. Parents also point out that the technology also would increase Student's vocabulary and sentence length. The District countered that this would defeat the very purpose of verbal behavior instruction, which is to teach the child to communicate through oral language. It is clear from the record that Student is capable of voicing words. Given the District's cogent explanation of its disagreement, and the weight accorded to the Parents' experts' opinions on this case, I conclude that, on this record, the evidence is not preponderant that Student needs or would be likely to benefit from the assistive technology that Parents request.

## FAILURE TO PROVIDE A FAPE IN VIOLATION OF SECTION 504

Under section 504, federal regulations define the District's obligation to provide a FAPE differently than under the IDEA. Districts must provide "regular or special education and related aids and services that (i) are designed to meet individual educational needs of [persons with disabilities] as adequately as the needs of [non-disabled] persons are met and (ii) are based upon adherence to procedures that satisfy" the procedural requirements of section 504. 34 C.F.R. §104.33(b)(1). The evidence is preponderant that the District failed to provide Student with appropriate services and accommodations to meet Student's individual needs, and that Student did not make appropriate progress in light of Student's circumstances, as other District students do and are expected to do. Therefore, I conclude that the District's services were not designed to meet Student's needs as adequately as the needs of non-handicapped children in the District are met. 34 C.F.R. §104.33(b)(1). On this record, failure to comply with the IDEA is preponderant evidence that the District also failed to comply with section 504. Cf. 34 C.F.R. §104.33(b)(2).

## COMPENSATORY EDUCATION

Compensatory education is an equitable remedy, designed to provide to the Student the educational services that should have been provided, but were not provided. Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990). In the Third Circuit, it is common to order the District to make up such services on an hour-by-hour basis; however, there is support also for a "make whole" approach. See generally, Ferren C. v. School Dist. of Phila., 612 F.3d 712, 718 (3d Cir. 2010).

The present record does not provide a basis to order a "make whole" remedy for the FAPE deprivation found here. Therefore, I will order the District to provide compensatory education to Student.

The record shows that Student's behavior affected Student's progress at various times during the school day; Student's behaviors did not interfere with Student's learning every minute of the day. The "My Day" reports sent to Parent indicate that there were periods almost every day in which Student did not exhibit behaviors, and there were a number of days in which Student's behaviors were not an impediment. Given these facts, I will order provision of compensatory education for two hours per day for each day on which the Student's school was open for students during the period of deprivation, March 1, 2017 to January 14, 2018.

As discussed above, I conclude that the District's policy of not making up missed related services dates for Student constituted a denial of FAPE. The record shows that Student did not receive weekly speech therapy sessions on 21 occasions in kindergarten out of 31 scheduled days, (P 30); this is a rate of 68%. Assuming a 180 day school year, Student needed to receive a speech therapy session every week for 26 weeks. At a rate of 68% missed sessions, I conclude that an appropriate order for missed kindergarten sessions is 18 sessions to be made up. Similarly Student missed speech therapy sessions in first grade at a rate of 61%, missing 14 of 23 sessions in the exhibit available, (P 26). At this rate, assuming a 26 week school year, Student should have received 16 make-up sessions. Therefore, I will order the District to provide compensatory education in the amount of 34 half-hour sessions.

I have concluded that the District provided inappropriate occupational therapy to Student. To remedy this I will order provision of compensatory education in the amount of 26 half-hour sessions for deprivations during kindergarten and 10 half hour sessions for deprivations during first grade, for a total of 36 half-hour sessions.

I have concluded that the District impeded Parents' participation in educational decision-making for kindergarten and first grade. The record does not provide a basis for estimating the

extent to which this substantive violation caused any of the FAPE deprivations discussed above. Yet, there needs to a remedy for the impeding of parental participation. I conclude that a fair remedy would be to order the District to provide Parents with 10 hours of counseling and coordination services to assist Parents in supporting and reinforcing what Student has learned in the District's verbal behavior program.

#### PROSPECTIVE RELIEF

Parents have requested prospective relief in various forms, including an order to place Student in a private school and orders to provide specific services in the future. I conclude that none of these requests is warranted on the record before me, and they will be dismissed.

#### **CONCLUSION**

I conclude that the District failed to offer and provide a FAPE to Student in the areas of behavior, speech therapy, occupational therapy and parental participation<sup>9</sup>. Consequently I will order the District to provide Student with an appropriate amount of compensatory education services.

---

<sup>9</sup> There was some evidence about ESY services and what they included. I have not addressed ESY services in this decision because the complaint contained no allegation regarding ESY, 34 C.F.R. §300.511(d); Parents' opening statement did not reference ESY; and the issues as formulated did not include ESY. To decide any issue regarding ESY, therefore, would deprive the District of its right under the IDEA to defend its judgments, recommendations and services regarding ESY.

## ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows:

1. The District shall provide compensatory education to Student in an amount equal to
  - a. two hours per day of educational services for every day on which Student's verbal behavior autistic support classroom was open for students from March 1, 2017 to January 14, 2018; plus
  - b. 34 half-hour sessions; plus
  - c. 36 half-hour sessions.
2. The District shall provide compensatory education in the form of counseling for Parents and coordination with them to assist them in reinforcing and supporting at home what Student learns in school in the amount of 10 hours.
3. The educational services ordered in paragraph 1 above may take the form of any appropriate developmental, remedial or instructional services, product or device that furthers or supports the Student's education, as determined by Parent, and may be provided at any time, including after school hours, on weekends, or during summer months when convenient for Student or Parent. Such services may be provided to Student until Student reaches twenty-one years of age.
4. The services ordered in paragraph 1 above shall be provided by appropriately qualified, and appropriately Pennsylvania certified or licensed, professionals, selected by Parent.
5. The cost of any compensatory educational service may be limited to the current average market rate for privately retained professionals qualified to provide such service within a radius of fifty miles from the District administration building.

It is **FURTHER ORDERED** that nothing in this order shall preclude the parties from reaching an agreement to alter the terms of this order.

It is **FURTHER ORDERED** that any claims that are encompassed in this captioned matter and not specifically addressed by this decision and order are denied and dismissed.

*William F. Culleton, Jr. Esq.*

---

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

DATED: June 4, 2018