

*This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.*

**Pennsylvania**  
**Special Education Hearing Officer**

DECISION

Child's Name: AR

Date of Birth: x/xx/xxxx

ODR No. 00398-0910 AS

CLOSED HEARING

Parties to the Hearing:

Great Valley School District  
47 Church Road  
Malvern, PA 19355-1539

Date of Ruling:

Hearing Officer:

Representative:

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May 12, 2010

William F. Culleton, Jr., Esquire

## **INTRODUCTION**

(Student) is a seven year old eligible resident of the Great Valley School District (District). (NT 11-10 to 14.) He is privately placed in the Vanguard School, an Approved Private School for special education. (NT 24-3.) The Student is identified with Autism and Mental Retardation. (NT 12-2 to 3.) The Student attended kindergarten at the District's K.D. Markley Elementary School during the 2008-2009 school year.

The parents seek full day compensatory education for the entire 2008-2009 school year, including ESY services, alleging that the District failed to provide a FAPE to the Student.<sup>1</sup> In particular, they allege that the District failed to evaluate the Student appropriately with regard to his behavioral, social and emotional needs. They also assert that the District failed to offer or implement an appropriate educational program to the Student.

The District asserts that it offered a program and placement that was reasonably calculated to provide meaningful educational benefit and that it implemented that program appropriately. It asserts that, as a result, the Student made meaningful progress in kindergarten.

## **PROCEDURAL HISTORY**

The Parents filed their Complaint Notice by letter dated October 26, 2009. The hearing was held in three sessions: December 23, 2009, February 3, 2009 and March 18, 2009. Written summations were received on April 27, 2010 and the record closed on that day.

## **ISSUES**

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<sup>1</sup> The Parents' complaint was based upon the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1401 et seq.; and the Rehabilitation Act of 1973, section 504 (section 504), 29 U.S.C. §794.

1. During the period from September 2, 2008 through July 31, 2009, did the District appropriately evaluate the Student with regard to his behavioral, social and emotional needs?
2. During the period from September 2, 2008 through July 31, 2009, did the District offer an educational program and placement that for the 2008-2009 school year that was reasonably calculated to provide the Student with meaningful educational benefit by appropriately addressing all of the Student's educational needs?
3. During the period from September 2, 2008 through July 31, 2009, did the District provide the Student with a meaningful educational benefit through an appropriate educational program and placement?
4. Should the hearing officer award compensatory education to the Student?

### **FINDINGS OF FACT**

#### EVALUATION OF STUDENT'S NEEDS

1. In 2007 and during the 2007-2008 school year, the Student displayed inappropriate and disruptive behaviors in his home program. He was distractible and displayed atypical behaviors, tantrums and other forms of refusal, pinching, biting, scratching and hitting. (NT 116-5 to 117-21, 122-1 to 10; S-1, 7, 31, 32.)
2. Data made available to the District in the Spring of 2008 noted challenging behaviors at home but did not indicate that the Student's behavior at his Early Intervention program was problematic. (S-1 to 4, 7.)
3. The District's April 2008 Evaluation Report addressed the full range of the student's individual educational needs, including functional, cognitive, academic, physical, social, emotional and behavioral functioning. (S-7.)

4. The District's April 2008 Evaluation Report was based upon multiple sources of information, including parents' observations of behavior at home, teacher reports from the EI program, observations at home and at the Student's EI classroom program by school personnel, private evaluation reports, testing, records review and developmental history. (S-7.)
5. The April 2008 Evaluation Report identified behavioral needs including atypical behaviors, inadequate social skills and inattention. It did not explicitly reference the full range of possible problematic behaviors. (NT 376-5 to 378-16; 379-23 to 388-24; S-7 p. 2, 13, S-31 pp. 12 to 14.)

#### OFFERED PROGRAM AND PLACEMENT

6. The District's May 2008 IEP offered placement in part time autistic support, with inclusion for circle time, snack, recess, library, gym, art and music. This was a full day program, 6.5 hours per day. (S-9 p. 23, S-19 p. 22, S-40.)
7. The District's May 2008 IEP offered appropriate goals, SDI (including modified curriculum) and related services addressing a range of functional and academic skills, selected by the IEP team based upon sequential ABLLS criteria and other present level information in available evaluations and other documentation. (NT 428-22 to 448-19, 465-8 to 467-5, 480-18 to 484-4; S-9, 15.)
8. The District's May 2008 IEP offered an appropriate ESY program with a 1:1 aide providing supportive services. (NT 448-7 to 20, 470-1 to 472-1, 496-25 to 497-17; S-15, S-19 p. 24, S-42.)
9. The basic structure of the autistic support program was appropriate and data based, with appropriate progress monitoring for functional and academic goals other than behavioral goals. (NT 449-7 to 462-3; S-33, S-37, S-42.)
10. The District's May 2008 IEP offered goals, SDI (including modified curriculum) and related services addressing behavior and attention during small group instruction, and social skills with typical peers. (S-9 p. 17, 19 to 23.)

11. The District's May 2008 IEP noted behaviors that impede learning and, in response to the Parents' insistence, offered to perform a Functional Behavioral Assessment and Behavioral Intervention Plan to be completed within the first two months of the 2008-2009 school year. (NT 377-19 to 378-24; S-9 p. 5.)
12. During those two months, the autistic support teacher kept data on various behaviors which she defined informally and conveyed to staff working with the Student. (P-1.)
13. The District revised the IEP on December 22, 2008, adding two social skills goals. (S-15 p. 19, 20.)
14. The District provided a Functional Behavioral Assessment on October 28, 2008. It identified three kinds of behavior of concern: impulsivity, nonsense language and accidents. (S-13.)
15. The District provided a Behavior Intervention Plan on October 28, 2008. (S-13.)
16. From the beginning of school in September 2008 to February 2009, the Student's inappropriate and disruptive behaviors were substantially elevated over their level in the previous year in Early Intervention classes. (NT 59-17 to 24; P-3, S-39 p. 1, 4 to 6, 8.)
17. These behaviors were so problematic that the District convened an IEP team meeting and revised the Behavior Support Plan on February 11, 2009. (NT 59-17 to 24, 66- 8 to 11.)
18. The revised Behavior Intervention Plan identified and addressed four target behaviors: eloping, disrobing, non-compliance and accidents; it discontinued addressing two of the three target behaviors listed in the October 28, 2008 Behavior Support Plan. (NT 105-3 to 106-19; S-13, S-15 p. 6, S-16.)
19. The District revised the IEP on February 11, 2009, adding two objectives addressing appropriate behavior when seeking attention. (S-15 p. 16.)

20. The District revised the Behavior Intervention Plan in March 2009, adding three target behaviors: biting, hitting and pinching. (S-20 p. 1.)
21. During the 2008-2009 school year, the Student's challenging behaviors were most problematic during inclusion in typical settings. (NT 343-4 to 14; S-28 pp. 15 to 16; NT 108-25 to 110-12; S-40.)
22. During the 2007-2008 school year, the Student did not possess sufficient skills to derive educational benefit in social skills from inclusion, and the District's program of inclusion did not provide adequate supports to enable the Student to derive meaningful educational benefit. (NT 274- 22 to 275-23, 277-19 to 23, 336-6 to 338-23, 496-25 to 498-22; S-28 pp. 12 to 13, 15; S-40.)
23. The District's program was implemented with an inappropriate degree of variability and inconsistency in settings, identity of staff and staff response to the Student's behaviors. There was also some inconsistency in data gathering, both in the specificity of definitions of target behavior, and in the actual recording of data. Such variability and inconsistency reduced the fidelity of the program implementation inappropriately, and undermines the weight to be given to the data. (NT 119-18 to 120-11, 126-4 to 16, 148-6 to 151-11, 191-10 to 195-8, 204-12 to 209-14, 216-22 to 217-3, 260-4 to 23, 285-19 to 290-5, 339-25 to 340-2; P-1, S-28 pp. 12 to 13, 15, S-39 pp. 1 to 8, S-40.)
24. District personnel in charge of the Student's program did not address variability as an indicator of possible flaws in the system for assuring fidelity. (NT 245-18 to 247-24, 248-21 to 249-6.)
25. The District's program permitted an inappropriately large amount of the Student's time to be inadequately structured. (NT 148-6 to 151-11, 285-15 to 18; S-28 p. 9, S-40.)
26. The District's program did not provide an adequate amount of support for the generalization of behavioral learning at home. (NT 122-14 to 25, 126-217 to 127-6, 319-8 to 25, 348-21 to 349-21; S-28 p. 10, 18.)

27. The Autistic Support classroom in which the Student was placed for kindergarten had seven students at the beginning of the year and four starting in January. Staffing was one teacher and four aides. (NT 38-15 to 21, 39-9 to 14.)

## STUDENT'S PROGRESS

28. Based upon ABLLS testing, the Student improved in 20 out of 25 domains from October 2007 until April 2009. (NT 463-18 to 464-19; S-24 p. 3, S-37.)

29. Based upon ABLLS testing, the Student did not progress meaningfully in group instruction and classroom routine skills from October 2007 until April 2009. (NT 163-8 to 18; 166-23 to 168-5, 169-12 to 170-23, 172-17 to 174-10, 188-9 to 190-1; P-1, S-37 p.2, 5.)

30. Based upon ABLLS testing, the Student made some progress in appropriate requesting from October 2007 until April 2009. (S-37 p.1, 4.)

31. Although the Student's inappropriate and disruptive behaviors decreased from February 11, 2009 to the end of the school year, they continued at a substantially high level until March 31. In the months of April through June, the behaviors were substantially lower, reflecting improvement in the Student's behavioral control. (NT 74-5 to 75-22, 106-20 to 108-24; S-21, S-24 p. 6, 10 to 11, S-35, S-38 p. 1 to 3, S-39 p. 1 to 8, S-40.)

## **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>2</sup> The United States Supreme Court has addressed this issue in the case of an administrative hearing challenging a special education IEP. Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005). There, the Court held that the IDEA does not alter the traditional rule that allocates the burden of persuasion to the party that requests relief from the tribunal.

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 a preponderance of evidence<sup>3</sup> to support its contentions. 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 preponderant in favor of one party, that party will prevail. Schaffer, above. Therefore, the burden of proof, and more specifically the burden of persuasion, in this case rests upon Student’s Parents, who initiated the due process proceeding. If the evidence is in “equipoise”, the Parent will not prevail.

## EVALUATION

The Parents challenge the District’s evaluation only with regard to the sufficiency of its identification of behaviors that impede learning. I find that, although the District’s evaluation did not explicitly reference all of the Student’s behaviors, its evaluation meets IDEA requirements.

The IDEA obligates a local educational agency to conduct a “full and individual initial evaluation ... .” 20 U.S.C §1414(a)(1)(A). The purpose of the IDEA evaluation is to obtain “accurate information on what the child knows and can do academically, developmentally and functionally ... .” 20

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<sup>2</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>3</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).



U.S.C. §1414(b)(3)(A)(ii). The child must be “assessed in all areas of suspected disability.” 20 U.S.C. §1414(b)(3)(B). The regulation implementing this statutory requirement adds that this includes “social and emotional status ... .” 34 C.F.R. §300.304(c)(4). Assessments and other evaluation materials must “include those tailored to assess specific areas of educational need ... .” 34 C.F.R. §300.304(c)(2).

The IDEA requires the use of “a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information ... .” 20 U.S.C. §1414(b)(2)(A); 34 C.F.R. §300.304(b).

Further, the regulations require that the evaluation procedures “assist in determining ... [t]he content of the child’s IEP. 34 C.F.R. §300.304(b)(1). The evaluation must be “sufficiently comprehensive to identify all of the child’s special education and related services needs ... .” 34 C.F.R. §300.304(c)(6). The evaluation must be “sufficient to develop an appropriate IEP ... .” *Brett S. v. West Chester Area School District*, No. 04-5598, at 25 (E.D. Pa., March 13, 2006).

The agency must utilize information provided by the parent that may assist in the evaluation. *Ibid.* This must include evaluations or other information provided by the parents. 20 U.S.C. §1414(c)(1)(A)(i); 34 C.F.R. §300.305(a)(1)(i). Part of any evaluation must be a review of relevant records provided by the parents. 34 C.F.R. §300.533(a)(1)(i). As part of any re-evaluation, the IEP team and appropriate professionals, with “input from the child’s parents,” must “identify what additional data, if any, are needed to determine ... [t]he present levels of academic achievement and related developmental needs of the child ... .” 20 U.S.C. §1414(c)(1)(B)(ii); 34 C.F.R. §300.305(a)(2).

The District’s April 2008 evaluation met these standards. It addressed the Student’s individual needs comprehensively. (FF 3.) It utilized a variety of strategies and instruments. (FF 4.) It included the Parents’ reports on the Student’s behaviors at home, and substantial data on the Student’s behavior in preschool, including behavior in a classroom setting with typical students. (FF 1, 4, 5.) It identified behavioral needs. (FF 5.) It found the Student eligible and identified educational needs that included social and behavioral issues. (FF 5.)

The District and its evaluators were in possession of substantial data indicating the potential for inappropriate and disruptive behavior. (FF 1.) However, the evaluation did not call for a Functional Behavioral Assessment or a Behavioral Intervention Plan. (FF 3, 5 11.) I do not find this to be fatal to the evaluation. The IDEA does not explicitly require an FBA to evaluate behavior; even more so, it does not set forth what should be in an FBA.

In this matter, there was contradictory data, because two observations by different observers at the Early Intervention program did not detect any seriously inappropriate or disruptive behavior. (FF 2.) Moreover, reports from teachers in the Early Intervention program also were ambiguous about the degree of the Student's behavioral issues. (FF 2.) Under these circumstances, I cannot find that the evaluation failed unreasonably to call for additional behavioral data in the form of a Functional Behavioral Assessment..

#### APPROPRIATENESS OF THE PROPOSED PLACEMENT

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). School districts provide a FAPE by designing and administering a program of individualized instruction that is set forth in an Individualized Education Plan (“IEP”). 20 U.S.C. § 1414(d). The IEP must be “reasonably calculated” to enable the child to receive “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); Mary Courtney T. v. School District of Philadelphia, 575 F.3d 235, 240 (3<sup>rd</sup> Cir. 2009), see Souderton Area School Dist. v. J.H., Slip. Op. No. 09-1759, 2009 WL 3683786 (3d Cir. 2009).

“Meaningful benefit” means that an eligible child's program affords him or her the opportunity for “significant learning.” Ridgewood Board of Education v. N.E., 172 F.3d 238, 247 (3d Cir. 1999). In order to properly provide FAPE, the child's IEP must specify educational instruction designed to meet his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. Board of Education v. Rowley, 458 U.S. 176, 181-82, 102 S.Ct. 3034, 1038, 73 L.Ed.2d 690 (1982); Oberti v. Board of Education, 995 F.2d 1204, 1213 (3d

Cir. 1993). An eligible student is denied FAPE if his program is not likely to produce progress, or if the program affords the child only a “trivial” or “de minimis” educational benefit. M.C. v. Central Regional School District, 81 F.3d 389, 396 (3<sup>rd</sup> Cir. 1996); Polk v. Central Susquehanna Intermediate Unit 16, 853 F. 2d 171 (3<sup>rd</sup> Cir. 1988).

Under the Supreme Court’s interpretation of the IDEA in Rowley and other relevant cases, however, a school district is not necessarily required to provide the best possible program to a student, or to maximize the student’s potential. Rather, an IEP must provide a “basic floor of opportunity” – it is not required to provide the “optimal level of services.” Mary Courtney T. v. School District of Philadelphia, 575 F.3d at 251; Carlisle Area School District v. Scott P., 62 F.3d 520, 532 (3d Cir. 1995).

I find that the District’s program, both as offered and as implemented, failed to address the Student’s unique needs in that it did not adequately address the Student’s need for services to teach him adequate behavioral control. Consequently, from the beginning of the Student’s kindergarten year, he displayed severe inappropriate and disruptive behaviors that compromised his safety, interfered with his access to educational services and slowed his social and academic development. (FF 16, 31.)

The Parent insisted that the District acknowledge and address her conviction that the Student exhibited behaviors that impeded his learning and development. (FF 1, 11.) The District did so, begrudgingly, by agreeing to check the box on the IEP indicating the existence of problematic behaviors. (FF 11.) When the Student started school in September, then, the District and its autistic support teacher knew that there was a serious concern for problematic behavior. For two months, the teacher applied a subjective behavior intervention system of her own devising, which addressed a variety of behaviors including idiosyncratic utterances labeled as “nonsense language”, touching others inappropriately, running away from a task or demand, sitting quietly, following instructions and eating habits. (FF 11, 12, 16.) Within days, it became apparent that the Student’s behaviors were escalating. (FF 16.)

The District did not respond immediately to this behavioral escalation. Rather, it took a full sixty days to perform a functional behavioral assessment and formulate a behavioral intervention plan. (FF 11, 14.) This plan contained unclear definitions of the target behaviors. (FF 17, 18, 20.)

It also omitted behaviors of concern that had manifest in the previous year, as well as during the two month period after the first day of school. (FF 17, 18, 20.) The plan was revised subsequently to add target behaviors, including aggressive behaviors. (FF 17, 20.) Meanwhile, the Student's behaviors impeded his education for seven months. (FF 16, 17, 21, 31.)

The District argues that its offered program addressed these needs adequately. However, the Parents' expert made it clear that the offered program was flawed in two respects. First, the program called for too much unstructured time. Second, it contained too many changes of personnel and location to permit a high degree of fidelity in the behavioral management of the Student.

The program included too much unstructured time because of both the placement and the program implementation. It offered only a part time autistic support program, and included an inclusion component in the afternoon, with a 1:1 aide for supportive services. (FF 6, 27.) The Parents' expert found that the Student's behavioral needs and developmental and social deficits made it impossible for him to benefit from such a setting. (FF 22.) Moreover, the Student clearly was unable to maintain behavioral control independently in the inclusion setting. (FF 22, 25.) The expert explained that the larger class environment, as well as dealing with different staff and routines, led to problematic behavior. (FF 22, 25.) As to implementation, the Parents' expert testified that there was a relatively large amount of unstructured time in the autistic support program itself. (FF 22, 25.)

I give substantial weight to the Parents' expert's findings. He is well qualified to assess a public school educational program. He has earned a doctorate in education. (NT 265-3.) He is a certified as a school psychologist, a supervisor of psychological services and a supervisor of pupil services. (NT 265-7 to 10.) His experience includes work in the public school system in Pennsylvania, teaching at the secondary level, supervision of psychological services and consulting for the Department of Education. (NT 266-1 to 22.)

I also found that the expert's testimony was credible. The District itself recognized his reliability by requesting his consultation jointly with the Parents. (NT 269-2 to 7.) His conclusions were balanced, both recognizing positive aspects of the program and criticizing flaws. (NT 284-14 to 287-

17.) He was very straightforward in acknowledging limitations or flaws in the data he was able to gather, and readily conceded reasonable points made on cross examination. (NT 299-16 to 300-13, 301-19 to 303-19, 320-13 to 323-25.) He declined to provide opinions at Parents' counsel's request where he did not have adequate information. (NT 348-14 to 20.) His demeanor was reserved and objective; there was no trace of effort to convince me. He simply reported his observations and conclusions, responding with apparent honesty to the questions posed.

I also find that the data in the record corroborate this expert's conclusions. I examined closely the behavior data collected from September 2008 to June 2009. (FF 16, 17, 20, 21, 22, 23, 25, 31.) I found that the data confirmed the expert's key conclusions about the incidence of inappropriate and disruptive behavior.

The behaviors occurred in high numbers for the first several weeks of the program, which corroborates the expert's conclusion that the program's inclusion and time out features, as well as its fidelity controls, failed to provide the support that the Student needed to control his behavior. (FF 16, 17, 21, 22, 23, 24, 25, 31.) Furthermore, the numbers of incidents varied extremely – from numbers of twenty, forty, even seventy or eighty incidents per day, to zero or less than five within days of the spikes in behavior; there was also some evidence that the definitions of behavior to be recorded were not clear for several weeks until the target behaviors were redefined in the October revision to the Behavior Intervention Plan, and that there was variability in the actual counting of behaviors day to day. (FF 11, 12, 14, 15, 17, 18, 20, 23, 24.) Thus, even accounting for the reality that there will be some error in any record keeping system, I find that the expert's concern for the program's fidelity based on these data was well supported in the record.

In addition, the data support the expert's criticism of the inclusion aspect of the program and the too—large amount of free time permitted during the day. I find that the greatest numbers of recorded incidents occurred during the mainstreamed portions of the Student's day. (FF 21, 25.) Thus, these flaws in the basic plan for the Student left him with inadequate behavioral supports that permitted him to act out repeatedly for months, interfering with his access to the rest of the educational services offered and resulting in at best de minimis progress in learning to control his behavior and in learning his social skills. (FF 16, 17, 21, 25, 31.)

I also credit the expert's conclusion that the Student was unable to benefit from inclusion during his kindergarten year. (FF 22.) I find that the expert's conclusions were based upon his careful and substantial observation and direct work with the Student, as well as an extensive review of the record. (NT 269-10 to 272-8, 291-16 to 292-6, 314-8 to 315-15, 321-7 to 323-1.) These varied data all supported the conclusion that the Student does well behaviorally in highly structured, 1:1 or small group settings, and cannot function in large settings or when he is unsupervised in a classroom setting. (FF 22, 25.) The expert's individual evaluation of the Student corroborated that the Student's social, attention, verbal and cognitive skills are not sufficient to enable him to benefit from the inclusive environment. (FF 22, 25.)

The District made much of the fact that the expert's on-site observations were on atypical days, but I do not find that one flaw in his data to undermine his entire report. He was fully cognizant that the observations were not in settings that would demonstrate the Student's typical daily experience. (NT 297-7 to 300-13.) He observed toward the end of the school year, and much of the observation time occurred during an unusual party that occurred outside the school building on the school grounds. (NT 297-7 to 300-13.) However, the expert's data sources confirm well the thrust of the expert's conclusions - that the Student does not control his behavior well in unstructured settings. This was supported by the history of the previous year, direct observations in testing, and the behavioral data that showed the predicted result statistically. (FF 1, 22, 25.) Thus, the flaw in his observations did not vitiate the validity of his conclusions because these were based upon a variety of data sources, all of which were consistent with his inference about the program's flaws and the Student's need for a smaller, more structured environment.

I also credit the District's witnesses. For the most part, these professionals provided direct and forthright testimony in defending their functional behavioral assessment, revised behavior intervention plans and revised IEPs. Though there were many understandable gaps in memory, especially for the discussions at the IEP meetings with the Parents, the special education director and the Student's teachers demonstrated an honest and open demeanor for the most part. I was especially confident that the special education teacher was truthful. She volunteered information about anomalies in data gathering that supported the Parents' expert's observation of possible problems with program integrity. She also described her

consistent adherence to a data-based approach to education – a stance that supported the expert’s conclusion that the program provides a sound framework for effective services to address the Student’s needs. Thus, on balance, I conclude that the District witnesses defended their program in a straightforward and credible fashion.

Much was made of the graphs of behavioral data made by District personnel who did not testify at the hearing. In this administrative hearing context, I do not find that the graphs need further authentication and validation testimony. From counsels’ and my own inquiries during the hearing, it appeared that most of the graphs were made in the regular course of business, and although this alone would not qualify these documents as business records, I am confident that they are reliable enough to give them weight. I also relied more heavily upon my own assessment of the data in the record than on the trend lines that were such a point of contention in the hearing.

I find that the graphs made from data taken prior to the revision of the Behavior Intervention Plan of October 28, 2008 support the Parents’ contentions. This was the time at which the original offered program was in effect, prior to the development of a behavior intervention plan, and the data show an alarmingly high incidence of behaviors, with some amelioration for a few weeks, followed by a large spike of recurring behaviors. (FF 6, 9, 12, 16; S-39 p. 1.) The graphs taken from this data show such a modest trend line of improvement that cessation of these unwanted behaviors could not be predicted within the year. Given the virtual absence of these behaviors in structured settings in Preschool, I find that these graphs show a lack of meaningful educational progress from the beginning of the school year to October 28, 2008. (FF 16.) Moreover, the data subsequent to that date show that the behaviors continued at their high rate overall, for another five months. (FF 31.) Thus, I find that the lack of meaningful benefit extended from the beginning of school in September until the end of March.

During this period of time, I find that the District’s program and placement were inappropriate with regard to the Student’s behavioral needs. (FF 23.) Its inclusion component did not address the Student’s unique need for more structured programming in order to keep him attentive and prevent inappropriate and disruptive behaviors – and did not recognize his inability to participate meaningfully in inclusion. (FF 22.) Its autistic support program provided too much unstructured time, and the behavior intervention

program's implementation lacked fidelity, in the areas of defining the behavior of interest, providing sufficiently consistent settings, and staff consistency in implementing interventions. (FF 23, 25.)

The District points to its data to show that the Student made educational progress during his kindergarten year. Indeed, the record shows that the Student made some progress in functional, academic and other areas of learning, based upon ABLLS assessments conducted in the Early Intervention program and at the Spring of 2009. (FF 28, 29, 30.)

Parents argue that these data are misleading because the initial ABLLS testing occurred in October 2008, and many of the gains that appear in the Spring 2009 ABLLS testing may have been attained during the second half of the preschool year. (Ff 28, 29, 30.) Thus, the data do not raise a reliable inference that the Student made meaningful progress across the board while in kindergarten.

I conclude that the unsuccessful program of behavioral control necessarily undermined the Student's learning across the board. Thus, it cannot be found that he made progress commensurate with his potential during that year. It is clear, moreover, that the Student failed to make educational progress – in fact regressed – in learning to control his behavior and in developing social skills from September 2008 to April 2009. (FF 1, 2, 16, 17, 20, 31.)

### ESY

The parties offered little evidence concerning the 2008 ESY program, and I find no support in the record for a compensatory education award regarding ESY. From the documents provided, it was an adequate ESY program, (FF 8), and any behavior difficulties noted in the documents would be subject to the equitable notice exclusion that I employ below with regard to the regular school year. M.C. v. Central Regional School District, 81 F.3d 389, 396 (3d Cir. 1996).

### SECTION 504 CLAIMS



My conclusions do not vary based upon an section 504 analysis. The legal standards do not differ in this case. Therefore, there will be no separate findings or relief awarded.

### COMPENSATORY EDUCATION

I will order the District to provide compensatory education to the Student. However, compensatory education is an equitable remedy, and I must balance the equities in determining the amount of relief. In addition, I must consider what relief would be appropriate to restore the Student to the level of attainment that he would have reached if the District had implemented an appropriate educational program from September 2008 to April 2009. See, B.C. v. Penn Manor School District, 906 A.2d 642 (Pa. Cmwlth. 2006) .

Compensatory education is an appropriate remedy where a school district knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only trivial educational benefit, and the district fails to remedy the problem. B.C., 906 A.2d at 648; M.C. v. Central Regional School District, 81 F.3d 389 (3d Cir. 1996). Such an award compensates the child for the period of time of deprivation of special education services, excluding the time reasonably required for a school district to correct the deficiency. *Id.* Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990). Thus, in fashioning an award, I have taken into consideration the contradictory information that the District had prior to the school year in question, and the complexity of the behavioral problem with which they were faced in the initial weeks of the Student's kindergarten year. B.C., 906 A.2d at 650.

I find that the District devised a program that it believed in good faith was appropriate. M.C., 81 F.3d at 395. While there was evidence that the Student was capable of behaviors that would impede his learning in a classroom setting, there also was evidence that he could tolerate such a setting successfully – even in the inclusive environment. (FF 1, 2, 3, 4, 5, 6, 7, 9, 10.) Therefore, it was not unreasonable for District personnel to attempt to include the Student by way of its part time autistic support program. This is all the more equitably compelling in light of the firm

policy of this Commonwealth to seek inclusion of all eligible children in order to provide them with the social and developmental benefits of inclusion. Therefore, I will not assess compensatory education for the period from the beginning of school to the date of the first Behavior Intervention Plan, October 28, 2008. (FF 14, 15.)

The Parents argued that the Student's behaviors were severe and had interfered with learning during the Student's previous year, when he was in preschool. (FF 1, 2, 5.) They suggest that the District chose to downplay the Student's behaviors, and that it only grudgingly offered to conduct a Functional Behavioral Analysis, taking two months to do so. (FF 11.) In this regard, I give somewhat less weight to the Mother's testimony. I find that her perception of the educational issues involved is less reliable than the perception of the educators, who were required by law and policy to engage in a careful weighing of conflicting data and a difficult balancing of educational goals. No doubt, the Mother turned out to be correct, as events unfolded, but I must judge the appropriateness of the District's decisions based upon what they knew at the time, not hindsight.

Notwithstanding the difficulty of this matter, the data compel the conclusion that the District knew or should have known by October 28, 2008, that its programming for the Student was not delivering a FAPE. M.C., 81 F.3d at 396. Therefore, I will award compensatory education from that point forward.

The District provided a full day of kindergarten to the Student, 6.5 hours per day. (FF 6.) Thus, it conceded that the Student needed this level of services and this level of need was not questioned during the entire hearing. I find that the Student's behaviors were so debilitating and frequent that they undermined all of the goals of his kindergarten year, except his PT, OT and Speech/Language goals, which the parties excluded from my consideration by stipulation. This amounted to approximately three hours per week, or .6 hours per day. (S-19 p. 22.) This will be deducted from the award.

I find that the record supports an award based upon an hour-for-hour deprivation of kindergarten services, M.C., 81 F.3d supra., and does not support a finding as to the position the Student would have been in if provided with a full year of FAPE, B.C., 906 A.2d supra. While the District provided evidence of some academic attainment, its data were not

conclusive due to the timing of the ABLLS assessments upon which it relied. (FF 28, 29, 30.) The record simply does not explore the hypothetical progress that the Student would have made with a full year of FAPE; the parties did not address this question. Therefore, I utilize the M.C. standard.

Accordingly, compensatory education is awarded at the rate of 5.9 hours per school day from October 28, 2008 to April 1, 2009. The parents may decide how the hours should be spent so long as they take the form of appropriate developmental, remedial or enriching instruction or services that further the goals of the student's current or future IEPs. These hours must be in addition to the then-current IEP and may not be used to supplant the IEP. These hours may occur after school, on weekends and/or during the summer months, when convenient for the student and the family.

There are financial limits on the parents' discretion in selecting the appropriate developmental, remedial or enriching instruction that furthers the goals of the student's IEPs. The costs to the District of providing the awarded hours of compensatory education must not exceed the full cost of the services that were denied. As I find that the Student should have been placed in full time autistic support from October 28, 2008, compensatory services will be at the rate that the District pays for one child in its full time autistic support kindergarten placement. This rate will include the salaries and fringe benefits that would have been paid to the District professionals and paraprofessionals who provided services to the student during the period of the denial of FAPE.

### **CONCLUSION**

For the reasons set forth above, I find that the program and placement provided by the District for the Student's 2008-2009 school year was inappropriate and denied the Student FAPE. Compensatory education is awarded as set forth above.

**ORDER**

1. During the period from September 2, 2008 through July 31, 2009, the District appropriately evaluated the Student with regard to his behavioral, social and emotional needs.
2. During the period from September 2, 2008 through July 31, 2009, the District failed to implement an appropriate educational program and placement.
3. During the period from September 2, 2008 through July 31, 2009, the District failed to provide the Student with a meaningful educational benefit through an appropriate educational program and placement.
4. The District is ordered to pay for compensatory education, in the amount of 5.9 hours per school day for autistic support services, from October 28, 2008 to April 1, 2009, subject to the nature and limits set forth above.

*William F. Culleton, Jr. Esq.*

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

May 12, 2010