

*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: J.D.

Date of Birth: [redacted]

ODR No. 00417-0910 KE

CLOSED HEARING

Parties to the Hearing:

Representative:

Parent[s]

Michael J. Connolly, Esquire  
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188 North Main Street  
Doylestown, PA 18901

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

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1301 Mason's Mill Business Park  
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Dates of Hearing:

April 9, 2010; June 4, 2010; October 20, 2010; November 12, 2010

Record Closed:

December 6, 2010

Date of Decision:

December 20, 2010

Hearing Officer:

William F. Culleton, Jr., Esquire

## INTRODUCTION AND PROCEDURAL HISTORY

Student is a [beyond teenaged] student, who at all relevant times resided within the Downingtown Area School District (District)<sup>1</sup>. (NT 11-1 to 13-10; HO 1.) The Student is identified with Autism and Mental Retardation under the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA). (NT Vol. I, 13-5 to 10.) Parents request due process, requesting compensatory education due to an alleged denial of a free appropriate public education (FAPE) from October 29, 2007 until the Student was placed in an approved private school on February 23, 2009. The District asserts that it provided appropriate services at all relevant times.

On the District's motion, I confined the scope of the hearing to claims arising on October 29, 2007 (two years before the date on which the original Complaint Notice was filed). (NT Vol. I<sup>2</sup>, 26-2 to 21; HO 2 to 5.)<sup>3</sup> The entire matter was heard in four sessions and the record closed on December 6, 2010, upon receipt of written summations.

## ISSUES

1. Did the District inappropriately fail to evaluate all of the Student's educational needs during the relevant period from October 29, 2007 to February 23, 2009?

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<sup>1</sup> The Student attended second through fifth grades within the District; in February 2009, Student was placed in an approved private school, where Student currently attends twelfth grade. (NT 199-18 to 24, 237-22 to 25; P-31 p. 30.)

<sup>2</sup> The page numbering between the first and second transcript volumes overlaps. Therefore, references to the first volume of transcript are designated as "NT Vol. I". All other references are to volumes II through IV.

<sup>3</sup> The Parents originally requested relief for the two year period limited by the IDEA. However, on February 21, 2010, Parents amended their complaint by agreement with the District, asserting claims beginning in 2007. The parties submitted written offers of proof and the first day of hearings was devoted to the IDEA limitations issue. The parties submitted written closings on the limitation issue, and I ruled on the issue on June 29, 2010. The parties stipulated that the testimony and documents elicited in the first day of hearings would be considered as part of the record for the present decision on the merits. (NT 162-4 to 16.)

2. Did the District fail to provide the Student with a free appropriate public education during the relevant period, in violation of either the IDEA or the Rehabilitation Act of 1973, section 504, 29 U.S.C. §794 (section 504), including extended day or extended school year (ESY) services?
3. Should the hearing officer award compensatory education to the Student for all or any part of the relevant period?

### FINDINGS OF FACT DURING RELEVANT PERIOD

#### LEARNING DIFFERENCES AND EDUCATIONAL NEEDS

1. Student is diagnosed with Mental Retardation, Pervasive Developmental Disorder and Rett syndrome, and has a history of seizures at home and school, but none between 1996 and February 2009, when one seizure was observed. During the relevant period, Student was ambulatory. (S-46, P-33 p. 1.)
2. Student was nonverbal, with significant deficits in academics as well as personal care, communication, socialization and prevocational skills. Student also demonstrated need for related services of occupational therapy (OT), speech therapy and physical therapy (PT), including needs for therapy in fine motor and gross motor skills. (S-46, P-21.)
3. The Student was almost completely dependent, for meeting all of Student's needs, upon the parents and the one to one educational aide that was assigned to the Student full time during school hours. (NT 584-4 to 12, 586-6 to 13, 587-13 to 588-23; P-10 p. 7, P-20, P-21, P-33 p. 4, 5.)
4. Student lacked a functional communication system. (P-1, P-21.)
5. The Student's use of hands for communication devices and gestures was significantly impaired due to Rett syndrome. Student engaged in stereotypic hand wringing. (P-24 p. 5.)
6. The Student often was unwilling to work during the school day and was allowed to escape work demands. Student also occasionally engaged in hitting behavior, for which Student was reprimanded. (NT 307-1 to 11, 552-18 to 554-23; P-10, P-20, P-21, P-24 p. 8.)
7. Student was nonverbal and communicated wants through an electrical switch that turned on a light, as well as through eye gaze. Student's expressive communication in school was inconsistent. (S-46.)

8. Instructions were provided visually and orally in one step form, such as a cue to take attendance sheets to the school office, a daily task which Student performed some days in the District's high school. (S-46.)
9. Student socialized by smiling, laughing, touching and gazing at others. (S-46.)
10. Student received one to one assistance for all personal care activities, including feeding, dressing, and toileting. (S-46.)
11. Student demonstrated difficulty with retention of learned basic skills; retention of learned personal care skills required extensive repetition and practice. (S-46, S-73 p. 13.)
12. Student was able to interact with a computer through a touch screen. This skill was displayed inconsistently. (S-46.)
13. In March 2008, the Parent requested consideration of a portable communication device, educational software and an assistive technology evaluation. (P-11.)
14. In May 2008, the Parent requested that a consultant from the Intermediate Unit select appropriate educational computer hardware and software for the Student, and the IEP team and special education teacher, working with the consultant, began trials with computer touch screen technology to determine whether or not the Student could benefit from available computer technologies. (S-81 p. 31 to 43.)
15. In a March 2008 report, the occupational therapist recommended specially designed instruction including the use of adaptive feeding equipment, computer programs and a wrist splint, using songs to help the Student increase endurance, and touch cues. (S-74 p. 6.)
16. In a June 2008 report of independent evaluation, a neuropsychologist recommended giving first priority to development of a functional communication system. The report also recommended consultation with an inclusion specialist for program planning, and that the Parents create a home program for the Student to work on functional communication and personal care skills. (P-21 p. 11.)
17. During the relevant period, it was not possible to utilize standardized testing to evaluate the Student's cognitive functioning and academic achievement level because the Student was unable to participate in testing due to physical limitations and limited communication abilities. (NT 742-3 to 13, 750-6 to 21; P-21 p. 1.)

INDIVIDUALIZED SPECIAL EDUCATION PROGRAMS AND SERVICES  
OFFERED – MARCH 2007

18. Pursuant to an individualized education program (IEP) dated March 28, 2007, the Student was placed in part time life skills support, located in Student's neighborhood school. Student was included with typical students for lunch and one period per week of practical Spanish. (S-46.)
19. Student's program included individual one to one services, and joining the life skills class for one social studies period per day plus one day per week for socialization. (NT 558-1 to 20; S-46, P-3 p. 3, P-20.)
20. The March 2007 IEP provided two goals for expressive communication skills with three measurable objectives and two objectives that were not clearly measurable. (NT 311-8 to 325-9; S-46.)
21. Four objectives utilized eye gaze as the modality of expressive communication and one objective utilized reaching for an object. (S-46.)
22. Progress monitoring was performed on the communication goals, which were not clearly measurable, and progress monitoring was not performed consistently on the measureable communication objectives, with the exception of the objective for using reach to communicate a desirable action. (S-84, S-84 p. 115 to 144.)
23. The Student attained the objective for using reach on five consecutive dates in November 2007, and on three consecutive dates in April and May 2007. (S-84.)
24. The March 2007 IEP provided a goal for computer use with two measurable objectives. The objectives were to attend the computer and to activate the touch screen. (S-46.)
25. Progress monitoring was performed on the computer use goal, which was not clearly measurable, and progress monitoring was not performed on the measureable computer use objectives. (S-84.)
26. The March 2007 IEP provided an activity for post secondary transition, which consisted of participation once per year in Special Olympics. (S-46.)
27. Specially designed instruction provided for repetition, without further definition. (S-46.)
28. The March 2007 IEP provided the following related services: thirty minutes per week of direct OT service and thirty minutes per week of consultation; one day per week of direct PT services and three hours per week of consultation; thirty minutes per week of speech/language therapy with fifteen minutes per month

- consultation; and thirty seven and one half hours per week of one to one assistant services. (NT 623-15 to 634-5, 661-7 to 671-12; P-1, S-46, P-21, P-47 p. 67 to 69.)
29. The one to one assistant was not trained as an educator; the assistant had no post secondary degree or certification. (NT 537-4 to 25, 557-21 to 558-20, 777-9 to 778-1; P-20.)
  30. The one to one aide spent most of the Student's school day providing one to one instruction to the Student. The special education teacher provided only occasional direct instruction. (NT Vol. I, 52-3 to 54-10, 114-7 to 115-23, 121-17 to 23, 143-12 to 145-2; NT 195-23 to 196-10, 338-12 to 550-21 to 552-1, 557-21 to 558-20, 587-13 to 592-7; P-10, P-20.)
  31. Speech/language therapy services were changed early in September 2007; direct therapy was reduced to fifteen minutes per week, and consultation with staff was increased to fifteen minutes per week to train and monitor staff reinforcement of Student's communication skills. During the school year, the speech/language therapist stopped providing direct one to one teaching, and began to teach the Student in the context of group interaction. (NT 361-4 to 365-3, 623-15 to 634-5, 661-7 to 671-12; P-1, S-46, P-21, P-47 p. 67 to 69.)
  32. The speech/language therapist relied almost entirely upon the one to one aide for providing direct, explicit instruction to the Student on the IEP goals; the therapist worked with the Student directly for a short time each week and relied upon the aide's reinforcement of IEP skills during the rest of the school week. (NT 676-7 to 680-7, 684-9 to 685-8, 693-7 to 695-21; P-43.)
  33. The speech/language therapist relied almost entirely upon the one to one aide for providing data recording for feedback on the Student's progress on IEP goals. Data were recorded usually during the therapist's fifteen minute one to one sessions, with the therapist engaging in repetitions of the targeted behaviors and the one to one aide recording data. Data were not recorded daily. (NT 675-1 to 4, 676-7 to 678-7, 685-5 to 7, 691-3 to 13; P-43.)
  34. The speech/language therapist's knowledge of Rett syndrome was limited to personal research and the personal research of the one to one aide. From this knowledge base, the therapist concluded that the Student's inconsistent performance and slow rate of acquisition of skills was attributable primarily to the Student's Rett syndrome, rather than to a lack of research based practices or fidelity in implementation of the educational plan. (NT 680-8 to 683-18, 690-9 to 691-2; S-43 p. 9, S-44 p. 5.)
  35. The PT and OT services were provided by a contracting agency based upon a plan and measurable goals with progress monitoring and reporting to the Parents. The

- PT plan and goals were not made a part of the IEP. (S-46, 73, 84 p. 115 to 144, P-21.)
36. PT services addressed fine and gross motor skills. The PT contractor delivered thirty minutes per week of services. (S-73 p. 10 to 24, S-74 p. 22 to 36.)
  37. The priority goal for speech therapy in the 2007-2008 school year was to improve the Student's eye contact when the Student's name was said. (P-24 p. 8.)
  38. The March 2007 IEP did not note behaviors that impede learning, and there was no functional behavioral assessment or positive behavior support plan. District personnel were not aware of the function of the Student's frequent agitation and distress, or Student's frequent refusals to continue activities. (NT 402-5 to 21, 600-1 to 606-16, 612-9 to 622-5; S-46, P-24 p. 8, P-46 p. 2, 83.)
  39. Most of the Student's time in the life skills support room was spent in one to one interaction with the educational aide. There was no substitute available for the one to one aid, and Student went home when the aide was not available. (NT 557-21 to 558-20; P-20, P-24 p. 6, P-46 p. 139, P-47 p. 50, 61.)
  40. The March 2007 IEP found the Student eligible for ESY services due to difficulty in retention of skills, and offered about four weeks of ESY services in July 2008 in an ESY life skills program. (P-2, P-4.)
  41. Two of the offered ESY goals were based upon two of the seven objectives set forth in the March 2007 IEP. One ESY goal was a greeting goal addressing social skills that was unrelated to the goals in the March 2007 IEP. The assigned speech language therapist did not make a recommendation as to the amount of speech/language therapy should be provided in ESY. (NT 645-2 to 15, 691-3 to 13, 791-7 to 792-25; S-46, P-2, P-4.)
  42. In February 2008, the Student's special education teacher proposed to terminate a diary reporting system between the Parent and the Student's one to one educational assistant. (NT 577-22 to 579-16; P-3, P-46.)
  43. In February 2008, the Student's special education teacher suggested that the Parents consider transferring the Student to a private residential or day program for students with lower cognitive and developmental levels of functioning. (P-3, 5.)
  44. During the 2007-2008 school year, the Student made virtually no progress in learning communication skills, social skills, and self care skills. Student made some minimal progress in fine and gross motor skills and computer skills. (NT 600-1 to 606-16, 612-9 to 622-5; P-24 p. 6 to 10, P-30 p. 3, P-43, P-46 p. 75.)

45. The Student's teacher, one to one educational aide and the Parents did not utilize a data-driven, research based system to train the student in needed skills or to implement the Student's IEP goals. (NT 329-11 to 17, 557-21 to 558-20, 580-1 to 16, 597-6 to 598-6, 600-1 to 606-16, 612-9 to 622-5, 777-9 to 778-1; P-20, 21, 30, 33 p. 4 to 6, P-43.)

#### INDIVIDUALIZED SPECIAL EDUCATION PROGRAMS AND SERVICES OFFERED – MARCH 2008

46. Pursuant to an individualized education program (IEP) dated March 28, 2008, the Student was placed in part time life skills support, located in Student's neighborhood school. Student was included with typical students for eight hours per week. (P-10, 12.)
47. Student's program included an adapted and remediated curriculum intended to parallel the life skills curriculum being delivered in the life skills class, delivered through individual one to one services. In addition, the District offered participation with the life skills class for mathematics for five hours per week and for science for four hours per week. (P-10 p. 7, P-12.)
48. The March 2008 IEP provided one goal for responding to a greeting, addressing expressive communication. This goal was essentially the same as the goal offered in the February 2008 IEP for ESY, except that it allowed prompting and reduced the goal mastery level. (P-10.)
49. The March 2008 IEP provided one goal for utilizing a computer. This goal was the same as one of the objectives in the March 2007 IEP, except that mastery levels were slightly increased. (P-10, S-46.)
50. The March 2008 IEP provided one new goal, using a napkin, addressing feeding and etiquette. (P-10.)
51. The March 2008 IEP provided one new goal addressing receptive and expressive communication. (P-10.)
52. The March 2008 IEP provided an activity for post secondary transition, participation once per year in Special Olympics, and services described simply as "pre-vocational", including personal care and etiquette, to be provided through the Student's special education teacher. (P-10.)
53. Goals previously offered, including goals to address pre-reading skills, were not provided in the March 2008 IEP because the assigned special education teacher believed that the Student had lost the skills that those previous goals had addressed. (NT 458-3 to 464-21.)



54. Specially designed instruction included altering the “weight” of “class/course components”, drill and repetition, use of eye gaze and touch screen, and breaks to go on walks. (P-10.)
55. The March 2008 IEP provided the following related services: forty minutes per week of adaptive physical education, sixty minutes per week of direct OT service and thirty minutes per week of consultation; thirty minutes per week of direct PT services; fifteen minutes per week of direct speech/language therapy with fifteen minutes per week of consultation; curb to curb transportation with one to one aide attending; assistive technology and thirty seven and one half hours per week of one to one assistant services. (P-10 p. 14.)
56. The IEP speech/language services represented a reduction in the amount of direct service time from the previous IEP. The Speech/language therapist did not attend the meeting and the change was not adequately discussed at the IEP meeting at which the change was instituted. (NT 204-18 to 206-14, 356-10 to 362-2.)
57. The March 2008 IEP found the Student eligible for ESY services due to difficulty in retention of skills, and offered ESY goals that were identical to those offered in the March 2008 IEP, except that the receptive language goal was not offered. The speech/language therapist was not aware of the reason for this omission. (NT 648-24 to 649-7, 807-23 to 814-20; P-10, S-44, 45.)
58. The March 2008 IEP for ESY provided for an average of thirty minutes of direct OT services and an average of fifteen minutes per week of direct PT services. It provided an average of seven minutes per week of direct speech therapy services and seven minutes per week of consultation speech therapy services. It also offered an average of forty minutes per week of adaptive physical therapy. No related services plans or goals were made a part of the IEP. Later, these services were doubled when the Parents complained at an IEP meeting. (NT 795-14 to 796-21; P-10, P-33, S-43.)
59. The PT and OT services were provided by a contracting agency based upon a plan and measurable goals with progress monitoring and reporting to the Parents. The PT plan and goals were not made a part of the IEP, but were provided to the Parents along with the IEP. (NT 266-2 to 267-24, 446-15 to 448-20; S-73, 74.)
60. PT services addressed fine and gross motor skills. (S-73 p. 10 to 24, S-74 p. 12 to 36.)
61. OT services addressed feeding with fingers, spoon and fork; toileting and hand washing; dressing; walking; carrying objects; expressive communication; and following directions. (S-74 p. 1 to 9.)
62. The September, October 13 and October 31, and December 2008 revisions of the March 2008 IEP did not offer changes in the goals, or to SDI, or to the IEP as

- related to speech/language services, as a result of the private evaluation reports received by the District. The January 19, 2009 revision of the March 2008 IEP made no changes in the goals, or to SDI, or to the IEP as related to speech/language services. The assigned speech therapist did not review a functional communication assessment that was conveyed to the District from the private consultant. Many of the recommendations were considered and rejected by the IEP team. (NT 369-2 to 384-6, 437-15 to 446-8, 649-8 to 654-22; P-10, 11, 19, 24, 30, 31, 32.)
63. The March 2008 IEP did not note behaviors that impede learning, and there was no functional behavioral assessment (FBA) or positive behavior support plan (PBSP). District personnel were not aware of the function of the Student's frequent agitation and distress. Teaching staff were unaware of the potential benefit of an FBA. (NT 425-5 to 20, 477-11 to 478-13, 600-1 to 606-16, 612-9 to 622-5; P-10, 24 p. 8.)
  64. Teaching staff took data on goals not present in the IEP. (NT 425-21 to 426-9, 486-3 to 486-9; S-84 p. 209.)
  65. The Parent disagreed with the March 2008 offered IEP in April 2008, but agreed to a NOREP for ESY when the District offered to double the related services to be provided as part of ESY. (P-12.)
  66. On May 1, 2008, the Parent made a written request for a re-evaluation of the Student, including cognitive, achievement, vocational, speech/language and an assessment of curriculum as related to inclusion. The District agreed in writing to the specific evaluations requested by the Parent on May 5, 2008. (P-16.)
  67. Before the end of the 2007-2008 school year, the Parents inquired about placement in a private day program, but the program did not accept the Student due to limited placements available. (P-22.)
  68. In July 2008, the Parents requested that the District accept an outreach service from a private program to be delivered at the school in the 2008-2009 school year. The services proposed to train District personnel in implementing a data driven system of services for students with low cognitive and adaptive functioning and inadequate achievement. On September 1, 2008, the District offered a NOREP reflecting District permission for the private outreach services to be provided as requested. On September 8, 2008, the IEP was revised accordingly. (P-22, 23, 24 p. 29 to 32.)
  69. In September 2008, the Student's one to one aide requested authorization for and the Student's physician recommended use of a Rifton toilet seat with straps for restraint. The aide had been using the seat for years. The Student was not toilet trained and sometimes stood up while urinating or defecating; Student also became combative at times when brought to the toilet in a private bathroom. The

- seat was obtained and used until, in October 2008, it was discontinued at the Parent's request. No behavior plan or IEP goal addressed toileting. (NT 238-7 to 245-14, 562-6 to 567-21, 607-21 to 608-8; P-25, 26, 29 p. 12, P-47 p. 37.)
70. The Student's one to one aide used restraints to keep the Student on the toilet when the Student desired to get up and to keep the Student in a wheelchair for time out purposes when the Student behaved inappropriately. (NT 612-9 to 614-22; P-25.)
  71. From September to December, 2008, the IEP team tested and acquired use of computer based educational technologies for the Student. (NT 203-16 to 204-5, 207-3 to 25, 413-13 to 416-18; S-81.)
  72. In November 2008, the District proposed a NOREP to perform a functional behavioral Assessment. Data collection continued into December. (P-29 p. 32 to 34, P-31 p. 9.)
  73. The Student's teacher, the one to one educational aide and the Parents did not utilize a data-driven, research based system to train the student in needed skills or to implement the Student's IEP goals. (NT 224-4 to 226-13, 348-12 to 357-16, 408-8 to 409-24, 425-21 to 426-9, 467-9 to 468-4, 484-6 to 486-2, 557-21 to 558-20, 597-6 to 598-6, 600-1 to 606-16, 612-9 to 622-5, 777-9 to 778-1; P-15, 20, 21, 30, 33 p. 4 to 6, S-84.)
  74. Much of the data collected was aimed at determining the communication modes that the Student preferred, or whether or not a particular assistive technology device would be suitable for the Student. (NT 208-1 to 19, 411-11 to 425-1; S-84.)
  75. The District issued its re-evaluation report on February 17, 2009. (P-33.)
  76. The Parent insisted on a mainstreamed educational setting and resisted placements outside of the School District facilities that were recommended to support transitional planning for the Student. (NT 270-14 to 272-25, 341-23 to 346-10, 606-17 to 20; P-10, 21 p. 12, 31 p. 9, P-33 p. 5.)
  77. Student did not participate meaningfully in regular education classes, or in the life skills class when grouped with other students. (NT Vol. I, 122-2 to 123-1, 143-12 to 145-2; NT 286-9 to 288-15, 325-10 to 328-9, 451-11 to 454-9; P-46 p. 7, 21, 27, 60, 62, 75, 90, 92, 115.)

#### DISCUSSION AND CONCLUSIONS OF LAW

In this matter, the Parents assert that the District failed to evaluate and plan to address all of the Student's needs. Parents also assert that the District failed to address

these needs appropriately in the written Individualized Education Programs (IEPs) in effect during the relevant period; Parents allege defects in present levels, goals, specially designed instruction, related services, supports for school personnel and assistive technology. Parents assert that the interventions described in the IEPs are not research based. In addition to these alleged deficiencies in the offered program, the Parents assert that the District failed to implement the Student's IEP appropriately, because a special education teacher did not implement the programs; rather, implementation was left to an inadequately trained educational aide who provided one-to-one services to the Student throughout the school day during the entire relevant period. Finally, the Parents also claim that the District failed to provide adequate supplementary aids and services, extended school day services and extended school year services.

#### 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>4</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. Thus, the moving

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<sup>4</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).

party must produce a preponderance of evidence<sup>5</sup> that the District failed to fulfill its legal obligations as alleged in the due process Complaint Notice. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006).

In Weast, the Court noted that the burden of persuasion determines the outcome only where the evidence is closely balanced, which the Court termed “equipose” – that is, where neither party has introduced a preponderance of evidence 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 preponderant (i.e., there is greater evidence) in favor of one party, that party will prevail. Schaffer, above.

Based upon the above rules, the burden of proof, and more specifically the burden of persuasion in this case, rests upon the Parent, who initiated the due process proceeding. If the Parent fails to produce a preponderance of the evidence in support of Parent’s claims, or if the evidence is in “equipose”, the Parent will not prevail.

#### APPROPRIATENESS OF EVALUATION

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 assessment tools and materials is to obtain “accurate information on what the child knows and can do academically, developmentally and functionally ... .” 20 U.S.C. §1414(b)(3)(A)(ii).

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<sup>5</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. In this decision, I refer to “preponderant” evidence, which is a quantity or weight of evidence that is at least great enough to constitute a “preponderance” of evidence.

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). 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).

In this matter, the Parents assert that the District failed to provide a FAPE in part because it failed to appropriately evaluate the Student. However, the Parents do not directly challenge the District’s methodology, and there is a paucity of evidence in the record as to the District’s evaluations. Rather, the Parents complain that the District took an overly pessimistic view of the Student’s intellectual potential, without adequate evaluative data, and consequently failed to address the Student’s intellectual needs. In part this was due allegedly to the District’s failure to evaluate the Student within two years as required for students classified with mental retardation.

There was a re-evaluation report in February 2006, and another in February 2009. The first is not amenable to due process challenge because the Parents failed to file a due process complaint challenging it within two years of its issuance. As noted above, I have ruled that the IDEA’s limitation period precluded Parents from filing with regard to IDEA violations occurring prior to two years before the date on which they filed their complaint in this matter.

Thus, the re-evaluation report as to which the Parents have filed a timely claim is that of February 2009. (FF 75.) There was little evidence in this record going to the District’s methodology in this re-evaluation.<sup>6</sup> However, there was preponderant

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<sup>6</sup> I conclude that the re-evaluation was legally required to be filed within three years of the previous re-evaluation, which was dated February 4, 2006, because at the time the Student was identified, not with

evidence that the District failed in its duty to appropriately evaluate the Student for educational purposes, in two ways. First, its educational staff viewed the Student's cognitive abilities to be so low as to preclude all but the most trivial educational progress; yet, the District had so little information on the Student's cognitive abilities that it was not justified in this view. (FF 17.) Second, the District failed to employ appropriate methods to address the Student's behaviors, which a preponderance of the evidence proves were a serious interference with Student's education and with attaining Student's IEP goals. (FF 6, 38.)

As to cognitive functioning, the District's re-evaluation report recited a lengthy history of atypical development and of previous evaluations. (FF 1 to 5, 9 to 11, 14 to 16.) This history shows that it was difficult to assess the Student's cognitive abilities, and that no benchmark of cognitive capacity ever had been established. (FF 17.) Moreover, at the time of the re-evaluation, and for years before that time, it was impossible to utilize standardized testing in order to establish an IQ score. (FF 17.) Thus, there was so little reliable information available that in effect the Student's cognitive capacity was unknown.

In this regard, I credit reduced weight to the testimony of the District's expert witness, a school psychologist, who presented the District's view that the Student was

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mental retardation, 22 Pa. Code §14.124(c)(if identified as mentally retarded, students must be re-evaluated within two years), but with autism. (P-13.) Thus, on its face the February 27, 2009 re-evaluation appears to have been provided over twenty days beyond the three year federal timeframe. 34 C.F.R. §300.303(b)(2). However, the parties did not introduce evidence on the precise dates of delivery of the re-evaluation, nor did they raise the timeliness of the 2009 re-evaluation as an explicit issue in their opening statements or their written summations. Thus, I deem the record inadequate to support a finding that the District committed a procedural violation in this regard. Similarly, the February 2009 re-evaluation appears to have been proffered to Parents far beyond the permissible sixty calendar days of their request, which was dated May 1, 2008. 22 Pa. Code §14.124(b). However, the parties clearly did not raise this issue nor seek to introduce evidence concerning it. Thus, I conclude that it would be imprudent and unfair to the District to reach a conclusion of law with regard to this procedural issue.

unable to make meaningful progress due to Rett syndrome. This individual demonstrated a high level of academic training and experience, but did not have any particular expertise in Rett syndrome. (NT 723-15 to 724-19, 758-1 to 759-16, 771-21 to 772-1.) The witness, moreover, had no familiarity with the Student or the Student's needs. (NT 724-22 to 729-1, 759-17 to 761-5, 763-22 to 24.) Thus, the witness was called upon to make sweeping generalizations about the effect of Rett syndrome on the Student based upon very limited information, all without sufficient knowledge, training or experience to reliably interpret the paucity of data available to the witness.

As to the Student's behaviors, I conclude that the District's re-evaluation was inappropriate because there was no consideration of the effect of the Student's negative behavior upon the Student's educational progress. I find that the Student exhibited prominent negative behaviors that substantially interfered with educational progress. (FF 6.) The Student repeatedly resisted instruction, physically attempted to get up and walk when such behavior was disruptive, sought to escape tasks and engaged in hitting the one to one aide. Ibid. These behaviors were repeated over a long time and led to disruption of one to one training sessions, long walks in the corridor when other activities were more appropriate, and time out sessions, including removal from classes. (FF 3, 6, 10, 38, 45, 63, 69, 70, 77.)

The District never acknowledged or considered these disruptions of educational services available to the Student as part of its evaluations or educational planning. (FF 38, 63.) The District did not consider obtaining a Functional Behavioral Assessment (FBA) or preparing a Positive Behavioral Support Plan (PBSP) during most of the relevant period, and none was available at the time of the re-evaluation report. (FF 38,



63, 72.) District staff were unaware of the functions or causes of the Student's negative behaviors. (FF 6, 38, 63, 69, 70, 72.) Its IEP teams never marked the IEPs to recognize behavior that impedes learning. (FF 38, 63.) In sum, the District failed to consider all suspected areas of disability, and failed to utilize appropriate evaluative strategies to identify all educational needs in support of the IEP process.

#### FAILURE TO PROVIDE A FREE APPROPRIATE PUBLIC EDUCATION

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, 853 F.2d 171, 182-85 (3d Cir.1988)); 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), cert. den. 117 S. Ct. 176 (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).

The law requires only that the plan and its execution were reasonably calculated to provide meaningful benefit. 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.) Its appropriateness must be determined as of the time it was made, and the reasonableness of the school district’s offered 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).

In the present matter, there was extensive testimony and dispute about the Student’s lack of progress and capacity to make progress during the relevant period.

However, the above authorities demonstrate that progress is not the central issue in determining whether or not the District provided a FAPE to the Student. The central issue in this matter is whether or not the District provided an educational plan and program that addressed all of the Student's educational needs, M.C., above, and was reasonably calculated to provide meaningful educational benefit, Carlisle Area S.D., above. I conclude by a preponderance of the evidence that the District failed to provide such a plan and program.

The District's actions during the relevant period are to be evaluated in light of what it knew of the Student's educational needs during that period, D.S., above . Evidence of progress may raise an inference that an educational program was appropriate; conversely, lack of progress may imply that a program was inappropriate. Yet, in this matter, the Student enjoyed very minimal educational gains during the relevant period. This fact by itself does not raise an inference either way.

#### FAILURE TO ADDRESS ALL EDUCATIONAL NEEDS ADEQUATELY

The District's IEPs failed adequately to address all of the Student's educational needs as set forth in the available evaluations and as summarized in those IEPs. Certain needs were addressed only minimally. Others were not addressed at all.

Numerous evaluations and the March 2007 IEP present levels had identified educational needs with regard to communication, including speech and language, personal care, including safety skills, feeding, toileting, bathing and dressing, social skills and fine and gross motor skills, including walking, climbing stairs safely, utilizing implements and utilizing computer screens and electrical switches. (FF 1 to 16.)

The March 2007 IEP offered only three goals (with seven objectives) that addressed only communication skills (including symbolic language) and the utilization of a computer. (FF 18 to 22, 24 to 26.) Occupational therapy and Physical therapy goals were not part of the IEP, but were established to address gross and fine motor needs, as well as utilizing utensils for feeding, walking and stair climbing, and dressing skills. Speech/language related services worked on the communication goals. (FF 28.) The offered IEP goals failed to address toileting and sanitary practices while at school, and safety and social skills. (FF 18 to 22, 24 to 26.) As noted above, behavioral issues, though manifest, were not addressed in the IEP. There was no meaningful post secondary transition plan. (FF 26.) The performance standards established in the goals were minimal. (FF 18 to 22, 24 to 26.)

The March 2008 IEP offered only four goals, with no objectives, including a new greeting goal, the same goal for activation of a computer as was offered in 2007, a new goal for using a napkin, and a language goal that was essentially the same as the third objective of the 2007 communication goal, with lower performance standards. (FF 46 to 51.) Thus, the 2008 IEP reduced the specific behaviors for which the District offered to provide explicit teaching and data reporting from seven to four. (FF 46 to 51, 53.) Three of the objectives for communication from the previous year were abandoned. Ibid. Again there was no meaningful post secondary transition plan. (FF 52.) The performance standards described in the goals were minimal. (FF 46 to 51.)

Occupational therapy and Physical therapy goals in the 2008 program were again separate from the IEP. (FF 55, 56.) However, these goals did address gross and fine motor needs, including walking, using stairs, and feeding with utensils. Ibid.

The 2008 computer goal performance standards appear to be identical to the standards of the year before, (FF 49), suggesting a failure to address this need: if there was no progress, it was incumbent upon the District to change the strategy for teaching computer skills, but if there was progress, the performance standards of the goal should have been increased.

Neither of these IEPs addressed the Student's behavior. (FF 38, 63, 72.) Yet, as discussed above, the Student exhibited significant behaviors that impeded learning – thus demonstrating an educational need that should have been addressed appropriately. (FF 3, 6, 10, 38, 45, 63, 69, 70, 77.)

The assigned one to one aide was left to manage the Student's behaviors without guidance on behavior modification techniques or appropriate practices. (FF 29, 30.) As a result, the Student was allowed to refuse work, escape from the classroom to take walks repeatedly, and engage in sleeping and hitting. (FF 6, 10, 16, 38, 63, 69, 70.) The one to one aide's responses were not research based or data driven, and the aide developed an inappropriate response pattern of using physical restraints when assisting the Student with toileting and in response to inappropriate behavior. (FF 69, 70, 73.) In fact the aide explained that she restrained the Student in an adult stroller when the student would stand inappropriately in class, partially to show the other students that the Student could not be disobedient without consequences – Student was special, but not that special. (FF 70.)

I conclude that the District's management of the Student's behavior was inappropriate. In so concluding, I am cognizant that the Student's Rett syndrome and overall physical condition may have contributed in part or in whole to the behavior, and

that an understanding and compassionate indulgence might have been appropriate with regard to some or all of the Student's behavior. However, the District's educational plan and services were not reasonably calculated to address the behavior appropriately, because it never assessed the behavior utilizing research based, state of the art techniques, and thus its staff did not know the cause or function of the behavior. I conclude that the behavior, thus inappropriately addressed, disrupted the Student's educational program and impeded the Student's learning.

I conclude by a preponderance of the evidence that the speech and language related services were inappropriate to the need. Various evaluations identified this need as the first priority to be addressed. (FF 13, 16.) Yet the March 2008 IEP reduced direct, explicit speech language therapy to 15 minutes per week from the thirty minutes allotted in the March 2007 IEP, and the evidence is preponderant that the speech/language therapist was providing only 15 minutes of direct, explicit teaching even during the previous year, despite the larger allocation in the IEP. (FF 28, 31, 51, 55, 56, 62.) The March 2008 IEP dispensed with three speech/language objectives, even though there was no reliable evidence that the Student had mastered them. Ibid. Most of the time provided for direct, explicit teaching of communication skills was provided by the one to one aide. (FF 33.)

#### FAILURE TO PROVIDE A GOAL DIRECTED, DATA DRIVEN EDUCATIONAL PLAN

I conclude that the District failed to offer and provide an educational plan that was directed to reasonable goals and data driven. It is clear that the overall program was not

set forth in or directed by the IEP; thus, the program was driven by the IEP process. (FF 35, 36, 59 to 61.) As noted above, there were a paucity of goals in the IEP, and they did not address all of the Student's educational needs. Moreover, the goals as written were not clear and were not all measurable. (FF 20 to 27, 48 to 54.) The record discloses that there were areas of learning that were being addressed without any goals or any mention in the IEP. (FF 64.) While there was some data taken on some of the goals, the record of data collection is spotty, with much of the data taking left to the one to one aide, but other staff taking data episodically, and the evidence is preponderant that data was not taken or reported systematically on each IEP goal and objective. (FF 22, 23, 29, 30, 33, 34, 39, 45, 68, 73, 74.)

The District's special education life skills teacher demonstrated a lack of grasp on the overall purpose, structure and implementation of the program. (FF 30, 39, 42, 45, 53, 54, 62, 64, 68, 73, 74, 77.) For example, the teacher repeatedly explained the purposes of various IEP goals and progress monitoring in terms of finding out how the Student behaves, as though the IEP were an analytical, diagnostic program, instead of a program that aimed to teach a child necessary skills. (FF 74.) Repeatedly, in addition, the teacher demonstrated a lack of knowledge of what other actors in the program were doing, and why. (FF 23, 30, 42, 53, 56, 59, 62, 63, 64, 69, 70, 72, 77.) Thus, the program seemed to lack firm management from any single responsible participant.

#### **FAILURE TO DELIVER SERVICES THROUGH APPROPRIATELY TRAINED STAFF**

The record proves preponderantly that virtually all of the educational services delivered to the Student on a day to day basis were delivered by the one to one aide. (FF

19, 30, 32, 33, 55.) This aide was not adequately trained or supervised. (FF 29.) The aide was not certified or degreed in education. Ibid. The aide had not been trained systematically in the delivery of special education services. Ibid. Yet the Student spent almost all school hours with the aide alone. (FF 19, 30, 32, 33, 55.) While therapists worked with the Student, the total hours for these related services were no more than two and one half hours per week. (FF 28, 55.) The record shows preponderantly that the Student's life skills teacher spent a negligible amount of time with the Student. (FF 30, 69, 70.) Thus, in addition to relying upon the aide to deliver nearly all services, the District plan did not provide this inexperienced, poorly trained aide with adequate supervision, as demonstrated by the aide's inappropriate use of physical restraints to address what the aide admitted were behavioral problems, not safety problems. (FF 69, 70.)

In this regard, I give great weight to the testimony of the aide. This individual was demonstrably honest and forthright in testimony, as shown by facial expression and a very relaxed, open style in answering questions. The witness was quick to offer additional information to help listeners understand, and to correct her own misstatements during two lengthy examinations. The witness' statements are corroborated by the documentary evidence and the testimony of the Student's Mother, whom I also found to be credible based upon her demeanor and answers to questions.

In sum, I conclude that the educational services provided by the District lacked priorities. Services were not sequenced. The planning process was reactive to complaints, but not proactive or reasonably calculated to provide the Student with an



opportunity for meaningful educational benefit. (FF 13 to 16, 42, 65 to 68, 71, 72, 74 to 77.)

The District argues that all of the above apparent inconsistencies and failures to provide a comprehensive, well implemented educational plan are due to the difficulty created by the Student's Rett syndrome. The District suggests that it was impossible to provide the Student with meaningful educational progress because the combination of the Student's low cognitive functioning and physical limitations were enough to preclude any meaningful progress. I do not find this argument to be convincing.

As noted above, it was not possible for anyone to know the Student's cognitive potential because it was not possible to test the Student with valid and reliable psychological tests. (FF 17.) Under these circumstances, without scientific, objective testing, the Student's response to District interventions was the only viable way to assess the Student's ability to learn. However, the interventions were not calculated to yield reliable information because they were not reliable themselves, as described above. The interventions, were not research based or data driven, and were not delivered with fidelity and consistency by well trained staff. (FF 45, 73.) Thus, the Student's lack of progress, (FF 11, 34, 44, 48, 53, 57), does not prove that the Student was incapable of learning; Student's lack of progress is at least as likely to have been due to the inadequacies of the District program. Thus, the District cannot be absolved on the theory that progress was impossible.

In this regard, I accorded less weight to the testimony of the special education teacher assigned to the Student during the relevant period. This witness repeatedly avoided answering questions and by demeanor indicated a palpable defensiveness that

caused me to doubt the reliability of the witness' answers. (NT 329-2 to 334-15, 358-8 to 362-2, 468-22 to 477-8.) I also noted some contradictions within the testimony itself.

The District argues that it gave the Parents what they wanted, inclusive education in the neighborhood school. (FF 76.) It implies that the Parents have no cause to complain after receiving what they demanded. The District thus implies that the Student was not appropriately placed in its life skills class, because the Student's functioning was too far below that of the Student's peers in that class. If the Student made no progress, this theory asserts, it was because the Parents insisted on placement in an inappropriately high functioning class. (FF 77.)

This argument ignores the obligation that the District bears to provide all necessary supplemental aids and services to ensure that the Student could learn in the inclusive environment. Even if the inclusive environment was in this case a life skills class, it was the District's duty to provide all necessary modalities to make it work, including behavior modification and staff training, which were not provided here appropriately. Oberti v. Board of Ed. of the Borough of Clementon Sch. Dist., 995 F.2d 1204, 1216 (3d Cir. 1993). The District instead failed to provide an appropriate program as discussed above. Thus, it cannot now be heard to fix responsibility for its failures upon the Parents. Moreover, it is settled that a child's right to special education does not depend upon the vigilance of the parents. Ridgewood Board of Education v. N.E., 172 F.3d at 247.

#### EXTENDED SCHOOL DAY AND EXTENDED SCHOOL YEAR SERVICES

I conclude that the Parents failed to prove by a preponderance of evidence that the District failed to provide appropriate extended school day and extended school year

(ESY) services. There was no evidence concerning extended school day services. As to extended school year, there was little evidence implying that the District had failed to provide services adequate for the purposes of ESY, which are different from the purposes of special education during the school year.

The purpose of ESY services is limited to preventing regression or loss of skills gained during the regular school year. It is not legally required for purposes of providing an opportunity for educational progress. Due to this difference in purpose, I conclude that the ESY program is to be held to a lesser standard in this matter. Thus, the deficiencies of the District's regular school year program, though inherent in the ESY program that it offered, do not necessarily diminish the appropriateness of the ESY program.

Here, during the relevant period, which encompasses only the summer of 2008, the District offered a program encompassing all of the Student's goals and including the Student's related services as set forth in the IEP. (FF 57, 58.) Given the lower applicable standard, this was sufficient, because it was sufficient to maintain the Student's skills. The record discloses no expert opinion to the contrary.

#### SECTION 504

Generally, section 504 protects students with disabilities from discrimination in access to and equal opportunity to benefit from educational services from kindergarten through twelfth grade. 29 U.S.C. §794 ; 34 C.F.R. §104.4. To establish discrimination under Section 504, a student or parent must prove that (1) he or she is disabled or has a handicap as defined by Section 504; (2) he or she is "otherwise qualified" to participate in school activities; (3) the school or the board of education

received federal financial assistance; (4) he or she was excluded from participation in, denied the benefits of, or subject to discrimination at the school; and (5) the school or the board of education knew or should be reasonably expected to know of his or her disability. 29 U.S.C. §794; 34 C.F.R. §104.4; Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 253 (3d Cir. 1999); W.B. v. Matula, 67 F.3d 484, 492 (3d Cir. 1995).

Section 504 defines an “individual with a disability” to include a student who has: 1) a physical or mental impairment that substantially limits one or more major life activities of such individual; 2) has a record of such impairment; or 3) is being regarded as having such an impairment. 29 U.S.C. §705(20), 42 U.S.C. §12102; 34 C.F.R. §104.3(j). The applicable regulations define “being regarded as having such an impairment” to require agency action on the basis of a perception that the individual has a disability. 34 C.F.R. §104.3(j)(2)(iv).

The Commonwealth of Pennsylvania protects the student’s right to be free from discrimination on the basis of handicap or disability, through Chapter 15 of the Pennsylvania Code, part of the regulations implementing the educational statutes of the Commonwealth. 22 Pa. Code Chapter 15. A “protected handicapped student” under these regulations is entitled to those related aids, services or accommodations which are needed to afford that student equal opportunity to participate in and obtain the benefits of the school program and extracurricular activities without discrimination and to the maximum extent appropriate to the student’s abilities, without cost to the student or his or her family. Chapter 15 by its terms is intended to implement students’ rights under section 504, and it does not expand or limit those rights. 22 Pa. Code §15.11(c).

In the instant case, the only evidence addressing the claim of discrimination - exclusion from participation in, denial of the benefits of, or discrimination at the school on the basis of handicap – was the evidence discussed above that the District failed to provide a FAPE to the Student. The facts of record do not make out any claim above and beyond the IDEA claim – or different in nature from the IDEA claim. Thus, I do not engage in a separate section 504 analysis. Nevertheless, the District’s failure to comply with the requirements of the IDEA with regard to evaluation and provision of a FAPE also constitute a violation of section 504. Ridgewood Board of Educ. v. N.E., 172 F.3d at 253 (3d Cir. 1999); W.B. v. Matula, 67 F.3d 484, 500-501 (3d Cir. 1995); see, H.G. v. Audubon Bd. Of Educ., 2006 WL 1675072 at \*4 (3d Cir. 2006).

#### 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. Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990). 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. 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.

In the present matter, the District was sufficiently on notice that its program was inappropriate, long before the first day of the relevant period. The Student had been in its

classrooms from second grade, and the present levels in the two IEPs in evidence, as well as the evaluation reports in evidence demonstrate that the Student had made minimal progress for years. The District knew that its IEPs did not address all of the Student's identified educational needs, and that it was failing to address the Student's behaviors. It knew that its one to one aide was inadequately trained. It knew that the Student's functioning was below that of its other life skills students, yet it did not remediate its programming. Under the circumstances, I conclude that an equitable award will encompass the entire relevant period. Given the pervasive nature of the Student's school failures during that period of time, full school days will be awarded, to be measured by the number of hours in the official school day as defined by the District.

### CONCLUSION

For the reasons set forth above, I find that the District failed to evaluate the Student appropriately and to provide a FAPE during the relevant period. Therefore I will direct the District to provide compensatory education for that period of time.<sup>7</sup>

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<sup>7</sup> The District has objected to admission into evidence of Parents' Exhibit 47, which contains email messages, except for some emails that were identified on the record. Parents have raised the same objection to admission of District Exhibits 86 and 87. I have admitted all three exhibits in their entirety. At the outset of the hearing I set forth the procedure for admission of documents, (NT Vol. I, 18-12 to 20-6), which deviates from the judicial procedures meant to enforce the rules of evidence; the judicial rules of evidence do not apply in these administrative proceedings. Hearsay is admissible here with certain limitations; authentication is dispensed with in certain circumstances. It has been customary in these proceedings to admit documents that are referred to in the record, regardless of authentication. These deviations from judicial procedure are not so fundamental as to deprive the District of constitutional due process, which traditionally allows flexible procedures as long as they accord notice and a reasonable opportunity to be heard.

ORDER

1. The District inappropriately failed to evaluate all of the Student's educational needs during the relevant period from October 29, 2007 to February 23, 2009.
2. The District failed to provide the Student with a free appropriate public education during the relevant period, in violation of the IDEA and the Rehabilitation Act of 1973, section 504, 29 U.S.C. §794 (section 504).
3. The District did not provide inappropriate extended day or extended school year (ESY) services.
4. The District is hereby ordered to pay for compensatory education to the Student in the amount of one full school day for every day on which school was in session during the period from October 29, 2007 to February 23, 2009.
5. The compensatory education ordered herein shall take the form of appropriate developmental, remedial or enriching instruction or other educational services. Compensatory education may occur after school, on weekends and/or during the summer months, when convenient for the student and the family, and may be utilized after the Student attains 21 years of age. Compensatory education must be in addition to the then-current IEP and may not be used to supplant the IEP. The hourly cost for compensatory education shall not exceed the hourly cost of salaries and fringe benefits for qualified professionals providing similar services at the rates commonly paid by the District.

*William F. Culleton, Jr. Esq.*

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

December 19, 2010