

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

Student: K.S.

Date of Birth: [redacted]

Hearing Dates: April 16, 2010, April 28, 2010, June 7, 2010, June 8, 2010, July 22, 2010 and July 23, 2010

ODR File No.: 00579/0910AS

School District: Wallingford- Swarthmore School District

OPEN HEARING

<u>Parties:</u>	<u>Representatives:</u>
Wallingford Swarthmore School District	Mark Fitzgerald Fox Rothschild LLP 10 Sentry Parkway, Suite 200 P.O. Box 3001 Blue Bell, PA 19422-3001
Parent[s]	Catherine Reisman Reisman Carolla Gran LLP 19 Chestnut Street Haddonfield NJ, 08033
<u>Date Record Closed:</u>	August 15, 2010
<u>Decision Date:</u>	August 30, 2010
Hearing Officer:	Gloria M. Satriale, Esq

INTRODUCTION AND PROCEDURAL HISTORY

This case concerns the provision of a free and appropriate public education (hereinafter referred to as a “FAPE”) to Student an eligible student who resides with Student’s Parent in [Redacted], Pennsylvania. Student’s eligibility rests with a complex pattern of generalized diffuse organic brain dysfunctions including multi-sensory neuropsychological impairments in addition to global developmental delays involving every area of speech, language, motor, sensory and all academic domains. This action challenges the actions of the Wallingford-Swarthmore School District in failing to provide a FAPE to the Student from September 2007 through the end of fall 2009-2010 school year, including applicable Extended School Year Services (ESY) services; and seeks compensatory education for that time frame as well as reimbursement for a subsequent unilateral private placement.

Due process concerning the current matter was filed with the Office for Dispute Resolution on December 18, 2009. The resolution meeting was waived. A due process hearing was conducted in this matter on April 16, 2010, April 28, 2010, June 7, 2010, June 8, 2010, July 22, 2010 and July 23, 2010.

- a. Exhibits were submitted and accepted on behalf of the Hearing Officer as follows:
HO-1
- b. Exhibits were submitted and accepted on behalf of the Parent as follows:
P-1, P-1A, P-2, P-3, P-4, P-6, P-8, P-10, P-11, P-12, P-13, P-14, P-15,
P-16, P-17, P-18, P-19, P-23, P-24, P-26, P-27, P-29, P-30, P-31, P-36,
P-38, P-40, P-41, P-42, P-43, P-44, P-45, P-50, P-51, P-52, P-54, P-55
- c. Exhibits were submitted and accepted on behalf of the District as follows:
SD-1, SD-2, SD-3, SD-4, SD-5, SD-6, SD-7, SD-8, SD-9, SD-10, SD-11,
SD-12, SD-12A, SD-13, SD-14, SD-14A, SD-15, SD-17, SD-17A, SD-18,

SD-18A, SD-19, SD-20, SD-21, SD-22, SD-23, SD-24, SD-26, SD-27,
SD-27A, SD-29, SD-29A, SD-30, SD-31, SD-33, SD-34, SD-35, SD-36,
SD-37, SD-38, SD-39, SD-42, SD-44, SD-48, SD-49, SD-50, SD-51,
SD-52, SD-53, SD-54, SD-55, SD-56, SD-57, SD-59, SD-61

- d. Exhibits were removed by stipulation as follows:
P-32, P-33, p2 of P-4

ISSUES

The issues presented at this hearing included the following:

1. Did the District provide sufficient and appropriate special education services (including ESY services) to the Student from December 18, 2007 through December 21, 2009, and if not, in what areas, in what amount and in what form should compensatory education be awarded to the Student?

2. Is the Parent entitled to reimbursement for tuition and transportation of the Student to the unilateral private placement for the spring 2010 semester? A decision on this issue must be framed in a three (3) part analysis:
 - i. Was the program and placement the District offered to the Student for the 2007/2008, 2008/2009 and Fall 2010 school year appropriate?
 - ii. If the program and placement the District offered to the Student for the 2007-2008, 2008/2009 and fall 2010 school year was not appropriate, was the placement unilaterally chosen by the Parents appropriate?
 - iii. If the District did not offer the Student an appropriate program and placement for the 2007/2008, 2008/2009 and fall 2010 school year, and the placement unilaterally chosen by Parents was appropriate, are there equitable considerations

that would serve to remove or reduce the District's responsibility to reimburse the Parents for the Student's tuition for that school year?

STIPULATIONS OF FACT

1. The student is a student with a date of birth of [redacted] and is eligible for special education. Student resides within the District, which is a recipient of federal funds. (NT18)

2. Dr. K, if called to testify, would testify consistent with P-33 regarding the Student. He would also testify that he did not observe the student in the school, nor did he speak with individuals from the District. (NT1115)

3. In an order dated August 25, 2009 Hearing Officer Anne Carroll ordered the District to place another student at [Private School] for 2009- 2010 District. As of the date of the order Dr. V had not observed at the Private School prior to the date of the order. (NT1212)

4. In response to the testimony presented by M D, Ms. R, if called to testify, would state that the information contained in Ms. D's report dated around September 22, 2009 was inconsistent with Ms. R's recollection of the information shared and discussed at their meeting of September 25, 2009. (NT1256)

FINDINGS OF FACT

1. The Student is eligible for special education as a student with Multiple Disabilities including, Severe Hearing Impairments, and Other Health Impairment; Severe Mixed Receptive and Expressive Language Disorders, Severe Reading Disorder, Severe Math Disorder, Severe Writing Disorder, and Moderate Attention Deficit Hyperactivity Disorder. (P-31; NT394)

2. The Student has surgically inserted cochlear implementations in the right ear which requires maintenance from time to time. Dysfunction of the cochlear implant negatively affects the Student's behavior.
3. The Student requires and uses an FM System which assists the Student's processing of speech sounds. (S-17)
4. The Student has been evaluated several times by multiple experts.
5. Experts have evaluated the student and issued reports were presented on behalf of both parties (P-31; S-2; S-62; NT 393-394; 953; 401-402; 451-453; 460-474; 953; 961-962)
6. Dr. P, an expert in school psychology and neuropsychology [NT 393] testified regarding the Student's needs. Dr. P's opinions and recommendations are summarized in the report at P-31. [NT 394].
7. Dr. P observed the Student at Private School on March 11, 2010. [NT 394-395] and at [a public elementary school] on March 24, 2010. (NT435)
8. At the beginning of the 2007/2008 school year, the student was exceptionally limited verbally, with only the ability to say a few short words. (NT 100; 270)
9. A comprehensive psycho-educational evaluation completed by Dr. F had just been completed in March, before the 2007/2008 school year. That evaluation determined the student has global cognitive deficits. (S-2)
10. Since the completion of Dr. F's evaluation the Student has been evaluated a number of times. Dr. P's evaluation updated standardized testing which, like Dr. F noted a full scale IQ score in the upper 50s. S-2,62; P-31. All evaluators, including Dr. S, do not categorize the Student as Mentally Retarded. However, both Dr. P and Dr. S conclude the Verbal Comprehension Index

("VCI") is the greatest indicator of school/academic success. N.T. 961-962.
The Student's VCI was 55 on the P evaluation. S-61.

11. Dr. P's evaluation also completed Adaptive Rating Scales on the Student. (P-31) Student's scores on the school based form, completed by Ms. T, was in the less than 1st percentile in all composite areas, and the Student scored a 1 in the area of communication, functional academics, school living, social. (P-31) One (1) is the lowest possible score on the Adaptive Scales. (NT 963)
12. Dr. P and Dr. S have a different philosophical approach to the student's profile. Dr. P asserts that it would not be scientifically valid to base assessment of the Student's ability on testing with heavy verbal demands. Verbally loaded testing does not give an accurate assessment of the Student's intelligence. [NT 401-402, 470, 574] He also asserts, that it is neither fair nor valid to use verbally-loaded intelligence tests to determine whether the Student is achieving commensurate with ability. [NT 451, 453]. and; that for children with severe expressive or receptive language problems, the verbal score on the WISC is not an accurate predictor of achievement in school. [NT 448]. Dr. S takes the position: that it is appropriate to use verbally loaded measures to assess the Student's cognitive potential, notwithstanding the Student's language-based disabilities. and; that "those low scores really are the scores that you would expect Student to function at achievement-wise." [NT 992; 962; 997].
13. School psychologist Dr. S agreed with Dr. P that the Student's achievement scores are not commensurate with nonverbal abilities. [NT 1004]
14. The verbal behavior consultant testified that the Student "picked things up very quickly" in a 1:1 setting. [NT 1340]
15. However, Dr. S acknowledged that a child's intellectual abilities do not correlate to behavioral issues: "You could have a very low functioning child who isn't exhibiting

behavior challenges if they're in the right program and their needs are being met. You could have a child who is very low and not exhibiting behavior difficulties.” [NT 997-998].

16. Notwithstanding documented non-verbal abilities, the District based IEP performance goals on lower and inappropriate “verbally” based measures. (NT 451; 453; 962; 1004)
17. Between September 2007 and December 2009, the IEP team for the Student met 6 times. (S-3; S-5; S-7; S-18; S-37; S-44) At these meetings the team reviewed behavioral data, updated present educational levels, modified services, reviewed annual IEP documents and reviewed evaluation reports. The parent fully participated in all of these meetings and signed procedural safeguards for these meetings consented to annual Notice of Recommended Educational Placements (“NOREPs”)¹.
18. Annual IEPs were written for the Student on February 29, 2008 and February 25, 2009.
19. The Student requires a very structured and supportive educational and behavioral program , with minimal transitions, which includes intensive 1:1 instruction and support even in group settings; occupational therapy, visual/motor integrations and sensory support (NT 404-407; P-31 pp.16; 414; 476-477)
20. The Student transitioned to [redacted public] Elementary School for first grade in September, 2007. [S-7, p.4]
21. In September 2007, The Student exhibited myriad problem behaviors, such as:

¹ The Student began Kindergarten at [redacted] in the District in 2005. When the Student began regressing behaviorally, Parent contacted a neuropsychologist known for working with internationally adopted children, Dr. F. [NT 828-829]. He recommended removing the Student from school and implementing a behavior modification program that included physical restraints. [NT 774-775]. After the intervention, the Student’s behavior improved. The second year of Kindergarten, 2006-2007, resulted in appropriate progress. [NT 775].

- a. screaming in the halls, biting, scratching, and punching. [NT 37-38, 99-100, 175, 270-271];
 - b. socially inappropriate behaviors and elopement in the classroom. [NT 1265];
 - c. crying, making animal sounds, and yelling. [NT 43-44; P-2 (communication book) at p.4].
 - d. "acting out and noncompliance in the form of escape, crawling on floor, noises, and aggression." [S-7, at p.4; NT 777].
22. This represented a regression from Student's behavior in March, 2007. At that time, The Student had decreased inappropriate behaviors to near zero levels. [S-5; NT 175].
23. An instructional support assistant was assigned to the Student from Fall 2007 to Spring 2009 (NT 36-37)
24. Instructional support assistant did not receive adequate training from the District in the Student's needs of appropriate instructions or supports for the student including restrictive practices (NT99; 136-138; 148-150; 156; 164-165; 272-273)
25. The Student was restrained several times (NT ; P-1)
26. Following the imposition of the restraints IEP meetings were not called or held (NT 1342; P-2 at 8)
27. The District did not have a policy regarding restraints (NT 373)
28. The Parent had no involvement in the development of the behavior plan implemented in the Fall of 2007. [NT 779]
29. The behavior consultant developed the behavior plan without doing a functional behavior assessment (FBA). [NT 1268, 1296]
30. The behavior consultant never did a standardized preference assessment to determine reinforcer effectiveness for The Student. [NT 1353-1354]

31. The Student was removed from the classroom and instruction as a result of behavioral difficulties (P-1; P-2; NT48-49; 67)
32. The District often made changes to behavioral plans without conducting an FBA or involving or notifying the Parent (P-41; NT 134; 239; 251-252; 980)
33. The Students maladaptive behavior continued to escalate well into 2008/2009. (S-27; NT87).
34. Notwithstanding unilateral actions by the District, communication between the parties was frequent (P-41).
35. In the Spring of 2009, the Student began to exhibit school avoidance/anxiety behaviors (P-41)
36. The District presented a plethora of evidence involving behavior charts, data collection, graphs, behavior plans. No evidence was presented that this information was used to effect program modifications or adjustments or resulted in behavior change (S-12A; S-14; S-14A; S-27; S-50; S-52; P-4; P-8; NT 487)
37. The Student did not achieve meaningful educational progress during the 2007/2008, 2008/2009 school years, ESY programs or Fall of 2010. (NT 260;295; 491; 253-254; 642; 260; 645-647; S-14)
38. Three experts and the IEP team recommended that a private placement be sought. (NT 910-911; P-33; NT 1193; S-24; S-25; S-31; S-32; S-36; NT 415)
39. Pursuant to the District's request the Student was evaluated by a private school but subsequently was not accepted. (NT210)
40. The District rejected the current unilateral placement from consideration citing initially issues of distance and later appropriateness. (NT 813)
41. The District did not assess the appropriateness of the Parent requested private

placement, observe or further investigate the program prior to its denial to so place the Student. (NT1212)

42. The primary focus of [redacted], the unilateral placement, is the child with language and sensory based learning differences. [P-33 at p.4].

43. Private School is accredited by the Middle States Association for Elementary Schools. [NT 547].

44. Student did a two-day visit at Private School in August, 2009. At that time, several teachers came in specifically to do some informal testing to assess program appropriateness. [NT 550].

45. Based upon the review of records and the visit to the school, Private School admitted the Student. At that time, Private School staff knew that Student would need significant 1:1 instruction to make progress. [NT 550-551].

46. At Private School, The Student participates with peers. [NT 552]. From 8:30 to 11:45 a.m., the Student receives 1:1 instruction in a 1:1 setting in reading, writing, and math. [NT 553; P-13].

47. Private School began instructing the Student in January 2009 using the existing IEP. [NT 553].

48. Private School's contracted behavior specialist developed a behavior plan for Student. [NT 554 584-585; P-45]. The teacher provided observations to the behavior specialist for completion of the plan. [NT 689-690].

49. The behavior plan was effective for the Student. [NT 675, 750-751].

50. The speech pathologist testified that the behavior plan helped address non-compliance during speech therapy. [NT 639].
51. Private School staff have never had to use a physical restraint with Student. [NT 556]. Student did not exhibit the same behaviors of concern at Private School as Student had at Elementary School. [NT 624-625].
52. The student achieved progress behaviorally and academically at [redacted].

DISCUSSION AND CONCLUSION OF LAW

Applicable Legal Standards

The Right to a Free and Appropriate Public Education and Burden of Proof

The Individuals with Disabilities Education Act (hereinafter referred to as “IDEA”) requires that a state receiving federal education funding provide a “free appropriate public education” (hereinafter referred to as a “FAPE”) to disabled children. 20 U.S.C. § 1412(a)(1). In Pennsylvania, the Commonwealth has delegated the responsibility for the provision of FAPE to its local school Districts. School Districts provide a FAPE by designing and administering a program of individualized instruction that is set forth in an Individualized Education Plan (hereinafter referred to as an “IEP”), which “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 260, 264 (3d Cir 2003); 20 U.S.C. § 1414(d). In assessing whether an individualized

program of instruction is “reasonably calculated” to enable the Student to receive meaningful benefit, the progress noted must be more than a trivial or *de minimis*. Board of Education v. Rowley, 458 U. S. 176, 73 L.ed.2d.690, 102 S.Ct.3034 (182); Ridgewood Board of Education v. M.E. ex.rel. M.E., 172 F.3d 238 (3d Cir.1999). The record in this case reveals disconnect between the parties assessment and pursuit of the Student’s abilities. Although the record reflects the District’s ability to craft a program “reasonably calculated” to achieve benefit (more significantly so in the Student’s second year of dispute than the first), the program falls short of the legal standards in the trivial results achieved and the inapplicable standards against which the Student’s progress was assessed

Sufficiency of IEP

The IEP must consist of a detailed written statement developed specifically for each child summarizing the child’s abilities, how the disability affects performance, and measurable annual goals. The special education services and supplementary aids enumerated in the IEP must be linked to an explanation of how each will enable the child to progress. Damian J. v. School District of Philadelphia, 2008 WL 191176(E.D. Pa. Jan 22, 2008) at *1, FN.2. The IEP must consider the concerns of the parent and, where applicable, include behavioral interventions and supports that address the behaviors 34 CFR 300.324 (a)(2)(1).

However a technical violation alone does not entitle a student to compensatory education. A mere procedural glitch or technical violation of the IEP is insufficient. A violation must amount to a substantive effect on the child's ability to receive a FAPE in order to hold the district responsible for any procedural glitches.

20 U.S.C. 1415(f)(3)(E)(ii), 34 C.F.R. 300.513(2) provides:

(2) In matters alleging a procedural violation, a Hearing Officer may find that a child did not receive a FAPE only if the procedural inadequacies —

- (i) Impeded the child’s right to a FAPE;
- (ii) Significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent’s child; or
- (iii) Caused a deprivation of educational benefit.

The deficiencies noted in the IEP are significant and pervasive enough to rise to the level of impeding the Student’s ability to receive a FAPE.

Administrative Due Process/Burden of Proof

A Parent who believes that a school has failed to provide a FAPE may request an administrative hearing, commonly known as a due process hearing, to seek relief from the School District for its failure to provide a FAPE. 34 C.F.R. § 300.507. In Pennsylvania, the hearing is conducted by a Hearing Officer. Carlisle Area Sch. v. Scott P., 62 F.3d 520, 527 (3d Cir.1995).

As the moving party, the student bears the burden of proof in this proceeding. The United States Supreme Court has held that the burden of proof in an administrative hearing challenging a special education provision of a FAPE is upon the party seeking relief, whether that party is the disabled child or the district. In Re J.L and the Ambridge Area School District, Special Education Opinion No. 1763 (2006). Because student’s Parents seek relief in this administrative hearing, they bear the burden of proof in this matter, i.e., they must ensure that the evidence in the record proves each of the elements of their case. The U.S. Supreme Court has also indicated that, if the evidence produced by the parties is completely balanced, or in equipoise, then the party seeking relief (i.e., Student’s Parents)

must lose because the party seeking relief bears the burden of persuasion. Schaffer v. Weast U.S. , 126 S. Ct.528, 163L. Ed.2d 387 (2005); L.E. v Ramsey Board of Education, 435 F. 2d 384 (3d Cir.2006) Of course, where the evidence is not in equipoise, one party has produced more persuasive evidence than the other party. The evidence in this matter was not in “equipoise”.

Private School Placement and Tuition Reimbursement

Tuition reimbursement claims by parents of children with disabilities are subject to the well-settled test as set forth in the United States Supreme Court’s decisions in Florence County School District Four v. Carter, 510 U.S. 10 (1993) and School Committee of Burlington v. Department of Education, 471 U.S. 359 (1985). In Burlington, the Court established that Parents do not have an automatic, unfettered right to tuition reimbursement for Parents’ unilateral placement of their child in a private school. Rather, it is only when the Parents prove that (1) the District has failed to offer a FAPE, and (2) the private school selected by the Parents is appropriate, and (3) relevant equitable considerations favor reimbursement. See Carter, supra; Sinan L., et al. v. School District of Philadelphia, 2007 WL 1933021 (E.D. Pa. 2007); Ridgewood Bd. of Educ. v. N.E. for M.E., 172 F.3d 238, 248 (3d Cir. 1999).

Only if there is a finding that the District failed to offer the Student an appropriate program should the aforementioned second and third prongs of the analysis then be considered. See Carter, 510 U.S. at 15-16; Sinan L., supra, at *5, quoting Burlington, 471 U.S. at 374; Rairdan M., By and Through Kerry M., v. Solanco School Dist. 1998 WL 401637, *4-7 (E.D.Pa. 1998) (if District’s IEP is deemed inappropriate, then Court moves to second prong of test and must decide if private placement is appropriate; if private placement is then deemed appropriate, Court moves to third prong of test and considers equities. “Whether

to order reimbursement and at what amount is a question determined by balancing the equities.” Burlington, 736 F.2d 773,801 (1st Cir. 1984), *affirmed on other grounds*, 471 U.S 359 (1985).

In 1997, a dozen years after Burlington the Individuals with Disabilities Education Act, specifically authorized tuition reimbursement for private school placement. The IDEIA, effective July 1, 2005, is the reauthorized version of IDEA and contains the same provision:

- (i) In General. - Subject to subparagraph (A) this part does not require a local education agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free and appropriate public education available to the child and the parents elected to place the child in such a private school facility.
- (ii) Reimbursement for private school placement.- If the parents of a child with a disability, who previously received special education and related services under the authority of public agency, enroll the child in a private school without the consent of or referral by the public agency, a court or hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment. 20 U.S.C 1412(a)(10)(C)(ii)

Florence County Sch. Dist. Four V. Carter, 114 S. Ct. 361 (1993) had earlier outlined the Supreme Court’s test for determining whether parents may receive reimbursement

when they place their child in a private special education school. The criteria are: 1) whether the district's proposed program was appropriate; 2) if not, whether the parents' unilateral placement was appropriate and 3) if so, whether the equities reduce or remove the requested reimbursement amount.

Case law has established that the private school placement selected by a parent, where the District's program is inappropriate, does not need to conform to federal or state IDEA regulations. Florence County 4 School District v. Shannon Carter; 126 L.Ed.2d 284 (1993). Therefore the teachers do not have to meet state requirements and the students do not have to have IEPs generated by the school. Under the federal IDEA as interpreted by the United States Court of Appeals for the Third Circuit in Obertiv. Board of Educ. Of Borough of Clementon School Dist., 995 F. 2d 1204 (3rd Cir. 1993) [Student] is presumed to be entitled to the least restrictive environment , that is, the educational setting appropriate to his/her needs that maximizes interaction with nondisabled students. However, when a District has failed to provide an appropriate program, the fact that the private school is not the least restrictive environment is not relevant. See, for example, Rose v Chester County I.U., No. 95-239 (E.D of PA., May 6, 196), aff'd 114 F.3d 1173 (3rd Cir. 1997) and Rairdan M. v. Solanco School District, 97-CC-5864 (E.D.Pa 1998).

Compensatory Education

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 the student is receiving only trivial educational benefit, and the district fails to remedy the problem. The period of compensatory education granted should be equal to the period of deprivation, excluding the period of time reasonably required for the district to act accordingly.

Ridgewood Board of Education v. M.E. ex.rel. M.E., 172 F.3d 238 (3d Cir.1999); M.C. v. Central Regional School District, 81 F. 3d 389 (3rd Cir. 1996). As set forth below in connection with the discussion establishing a lack of a FAPE, the Student is entitled to compensatory education for a period equal to the deprivation less the reasonable period available to the District to have rectified the infractions resulting in the denial of FAPE. As the District knew or should have known, as outlined below, that interventions and strategies were not reasonably calculated to confer more than trivial benefit, on or about September 15, 2007, the compensatory award is calculated from December 15, 2007 in order to take into account a reasonable period of cure.

Was the program and placement the District offered to The Student for the 2007/2008, 2008/2009 and fall semester of 2009/2010 school years appropriate?

To satisfy the first prong of the tuition reimbursement test under Burlington-Carter, Student must establish that the School District did not offer a FAPE. Having been found eligible for special education, the Student is entitled by federal law, the Individuals with Disabilities Education Act as Reauthorized by Congress December 2004, 20 U.S.C. Section 600 et seq. and Pennsylvania Special Education Regulations at 22 PA Code § 14 et seq. to receive a free appropriate public education (FAPE). A FAPE is defined in part as: individualized to meet the educational or early intervention needs of the Student; reasonably calculated to yield meaningful educational or early intervention benefit and Student or child progress; provided in conformity with an IEP.

As previously noted, a Student's special education program must be reasonably calculated to enable the child to receive meaningful educational benefit at the time that it was developed. (Board of Education v. Rowley, 458 U.S. 176, 102 S. Ct. 3034 (1982); Rose by

Rose v. Chester County Intermediate Unit, 24 IDELR 61 (E.D. PA. 1996)). The IEP must be likely to produce progress, not regression or trivial educational advancement [Board of Educ. v. Diamond, 808 F.2d 987 (3d Cir. 1986)]. Polk v. Central Susquehanna IU #16, 853 F.2d 171, 183 (3rd Cir. 1988), cert. denied, 488 U.S. 1030 (1989), citing Board of Education v. Diamond, 808 F.2d 987 (3rd Cir. 1986) held that “Rowley makes it perfectly clear that the Act requires a plan of instruction under which educational *progress* is likely.” (Emphasis in the original). The IEP must afford the child with special needs an education that would confer meaningful benefit. The court in Polk held that educational benefit “must be gauged in relation to the child’s potential.” This was reiterated in later decisions that held that meaningful educational benefit must relate to the child’s potential. See T.R. v. Kingwood Township Board of Education, 205 F.3d 572 (3rd Cir. 2000); Ridgewood Bd. of Education v. N.E., 172 F.3d 238 (3rd Cir. 1999); S.H. v. Newark, 336 F.3d 260 (3rd Cir. 2003) (District must show that its proposed IEP will provide a child with meaningful educational benefit). The record is replete with procedural and substantive denial of a FAPE. I begin with the most glaring: inappropriate maladaptive behaviors and ineffective use of behavioral supports is the recurrent disturbing theme in this case. The District cites the use of behavioral technology (data collection) but demonstrates the clear lack of sufficient knowledge of how to apply procedures to positively affect behavior change and often sought “other” explanations for the Students continuing escalations.

The evidence does not support the District’s contentions that the Student’s behaviors in the Fall of 2008 were due to a malfunctioning cochlear implant and a change to a gluten-free diet. [NT 309]. The implant began malfunctioning on October 23, 2008. [NT 247]. By October 27, 2008, the equipment was repaired. [S-29 at p.20]. October 23rd was a Thursday. The Student returned to school on Monday, October 27 with a functioning

implant. Thus, the Student had a malfunctioning cochlear implant for, at most, 2 school days (October 23 and 24). [NT 784-786]. Parent ceased using the gluten-free diet around October 10, 2008. [NT 786]². Behavioral escalations are constant from 2007 through 2009.

Additionally the evidence does not support the classroom teacher's testimony that the Student's behavior was improving in the Fall of 2009. The Student was still flopping in the chair, exhibiting noncompliance and some aggression. [P-31 at p.8; NT 471]. The wraparound provider observed the Student in the District in September 22, 2009. [NT 1046]. The wraparound interviewed the classroom teacher and typed the information gathered into her software program shortly after the interview. [NT 1046]. On September 22, the classroom teacher told the wraparound provider: "Teacher reports that there is a lot of noise-making done by the Student and she truly believe that this is all attention-seeking. The teacher sees no triggers except that the Student does not want to do work. When Student doesn't want to do something, Student will make noises, turn Student's body away from you, will verbally say "No," crawl around the room and hide under the table. The staff in the classroom believe that the Student wants you to chase Student and they do not do that anymore. There was an incident this past week in which the Student was gnawing at Student's hand between the thumb and index finger. The teacher assured me, just as she assured the teacher (sic) that Student was not hurting []self, did not break any skin nor did Student bleed. The staff in the room all believe this was attention-seeking. Teacher reports that this biting is brand new." [P-36 at p.2; NT 1049-1050]. The wraparound provider believes, based upon her observation that The Student could not function in a general education classroom without 1:1 support. [NT 1052].

Even in light of the above description occurring as late as September of 2009, no FBA is conducted or plan put in place to reduce and redirect maladaptive behaviors and promote the acquisition of functionally relevant replacement behaviors.

In academic domains progress is trivial at best and instruction is set to a bar lower than demonstrated non-verbal ability. The record does not support meaningful progress commensurate with potential in either the 2007/2008 or 2008/2009 school years. During

² Judicial notice of the 2008 calendar is taken.

this 2007/2008 school year. According to The classroom teacher, the District began using Project Read with the Student in the Fall of 2007. [NT 260-261]. Students must achieve 90-94% to be at an instructional level. [S-11 at p.1; NT 362-363]. The hope is that the student will reach an instructional level at Level A, and then move on to Level B and then up through the levels. [NT 295]. The Project Read data show that The Student never reached the instructional level on any Unit:

Date	Mastery Level	Exhibit Reference
Undated	Unit 1 – 84%	S-11 at p.11
Undated	Units 2 and 3 – Less than 76%	S-11 at p.13
May, 2008	Units 4 through 7 – 67%	S-11 at p.16

With respect to language arts progress, the District points to the fact that The Student improved in letter recognition of upper case and lower case letters. [NT 299-300; S-11 at pp.9-11]. The District concedes The Student did not make progress in letter sounds. [NT 300]. The Student was receiving 1:1 instruction in letter recognition from the verbal behavior therapists. [NT 474]. So, the only area in which Student made progress, Student was receiving 1:1 instruction. The March, 2007 IEP had a cooperation goal in the verbal behavior program. At the time that goal was written, the ABLLS data indicated that The Student had already demonstrated mastery in that area. [NT 1299-1302; S-5 at 38]. In September, 2007, the verbal behavior consultants did not update the ABLLS testing. They also did not initially have The Student’s program book containing all baseline data. [NT

1335-1336]. Therefore, they had no baseline data for several of the goals that they were addressing and there was no program in place for the first six weeks of first grade. [NT 1303, 1336]. Because there are no data prior to February 2008 on many aspects of the ABLLS. [NT 1311]. In any area after Column H on the ABLLS chart, we have no idea what progress, if any, The Student made prior to February, 2008. [NT 1316]. A comparison of the present levels in The Student's 2008-2009 IEP to the goals in the 2007-2008 IEP shows either insufficient information to determine progress (due to lack of baseline data) or a lack of progress: The Student had the following goal: "The Student will count by rote to 100 and will count up to 20 objects using one-to-one correspondence." [S-5 at p.31]. There is nothing in S-5 that indicates Student's present level of performance with respect to this particular goal, so there is no baseline. However, by February 2008 the present level was: "The Student is able to currently count up to 14 . . . [Student] is able to count 12 objects using 1:1 correspondence." [S-7 at p.4; NT 258].

The Student had an academic goal of identifying numbers 1 through 50 with 100% accuracy. [S-5 at 30]. There is no baseline and no progress reporting on this goal. However, in January 2008, on the verbal behavior goal of identifying numbers 1 through 100 with 100% accuracy, the progress report was: "The Student can identify #'s 1-11, 15, 17, 19 and 25." [S-6 at p.4].

During the 2008/2009 school year, similarly, the record does not support the classroom teacher's testimony that The Student's IEP for 2008-2009 and 2009-2010 IEP's were appropriate or that The Student made appropriate progress: In 2008-2009, the goal related reading is: "The Student will be able to read a book at the Preprimer level (A, B, C and/or D) with 90% word recognition and 80% comprehension." Level A is the

introductory level, given to students who were just beginning to read. [NT 295]. The way this goal is written, The Student could meet the goal for word accuracy by improving a mere 10% on a Level A passage by February, 2009 (the middle of second grade year). The classroom teacher testified that prior to the Fall of 2009, the District used a combination of District reading kits, along with Project Read. In the Fall of 2009, the District began using an Edmark reading program. [NT 340]. The only records of Project Read assessments are located at S-11 at pages 10 through 14 and show no progress. [NT 260]. The reporting for the annual goal “The Student will be able to read and write the sounds represented by the letter symbols for all consonants and short vowels: a, e, i o and u with 100% accuracy on three trials” seems unrelated to the goal. The progress report is “The Student is able to recognize all upper and lower case letters. [Student] is able to recognize 24/26 letter sounds (with the exception of e and q).” [S-12 at p.3]. By January, 2009, Student could say 25/26 letter sounds and recognize 24/26 letters (reflecting no improvement from the previous June 2008 report). [S-14 at p.6]. The Student apparently surpassed the goal of reading 25% of the Dolch Preprimer sight words, but the goal was not revised. [S-12 at p.4]. Student regressed from December, 2007 to January, 2008 in ability to read sight words with accuracy. [S-14 at p.7]. In September, 2009, the District began using the Edmark program. [S-53 at pp.1-3; NT 349]. There is no explanation of how The Student’s performance in this program compares to performance on the Dolch sight word list. The chart on page 1 of S-55 represents data from non-research based reading kits implemented by the District. That data does not show mastery at any level, except for 100% word accuracy at Level A in October 2008. [S-55 at p.1]. In February, 2008, The Student could count up to 14 by ones and 40 by tens [S-7 at p.4]. By June of 2008, Student could count up

to 17 by ones and 60 by tens. [S-12 at p.8]. By January, 2009, we do not know how high Student could count by 1's consistently, because the data reflect Student's ability to count *inconsistently*. [S-14 at p.11]. In February, 2009, the data indicate that Student could count by 1's to 39 on one trial. The reporting indicates regression in May 2009, when The Student could count to 26, 28, and 29 by 1's. In September 2009, Student could count to 39 by 1's but only on one trial. In November 2009, Student could count to 43, but only on one trial. [S-49 at p.1] In January, 2009, the progress reporting indicates that Student could identify numbers 1-50 with 100% accuracy on 3/3 trials. [S-14 at 10]. However, in June, 2009, Student could not identify numbers 1-50 expressively. [S-27 at p.3]. Although June 2009 progress reporting indicated that "[d]uring the last three weeks, The Student was able to independently request information from peers and adults using "WH" questions 8 times," [S-27 at p.8], Student was not doing that consistently in January, 2010. [NT 642]. In fact, the progress reporting from June of 2009 was inconsistent with the speech/language testing in January, 2010. [NT 645-646, 647; S-27 at p.19].

The scores on reading testing completed by the District in December, 2009 were inconsistent with what The Student demonstrated as skills in January, 2010. [NT 715]. The District reported that The Student had mastered sounds in January, 2008 that Student did not appear to have mastered in January, 2010. [NT 736]. Even though she was the case manager and purportedly able to testify as to The Student's progress, The classroom teacher either would not or could not defend the statement in the 2009-2010 IEP that "Project Read has been a successful program for teaching sound symbol correspondence to The Student." [S-18 (2009-2010 IEP) at p.4]. When asked for an explanation, The classroom teacher stated that someone else had written that for the IEP. [NT 261]. The

classroom teacher does not know whether she aligned The Student's 2009-2010 IEP goals to the general education academic standards or the alternate academic standards. [NT 253-254]. There was no discussion of the PASA at the February, 2009 IEP meeting. [NT 201-202, 803]. However, the IEP indicates that The Student will be taking the PASA. [NT 202; S-18 (2.25.2009 IEP) at p.10]. From the time that Dr. F tested The Student in 2007 to the Spring of 2010 (when Dr. P tested Student), the gap between The Student's ability and achievement widened. [NT 491]. The District did not implement the Student's IEP appropriately with respect to assistive technology. At all relevant times, The Student's IEP indicated that Student needed assistive technology. [S-5 at p.15, S-9 at p.4, S-18 at p.3; NT 249-250]. Notwithstanding this fact, the District never completed an assistive technology evaluation on The Student. [NT 250] nor requested such prior to September 17, 2009. [P-41 (emails) at p.76, S-38 (request for AT evaluation); NT 251, 341-342; NT 251].

The ESY programming for 2008 and 2009 was not individualized and provided no educational benefit to The Student. The only "progress reporting" related to ESY was a generic letter (addressed to "Dear Parents") at the end of the program for each program year. [S-13, S-30]. The February 28, 2008 and February 25, 2009 IEPs state: "The Annual Goals and, when appropriate, Short Term Objectives from this IEP that are to be addressed in the child's ESY program are:" followed by a blank. [S-9 (2.28.2008 IEP) at p.33; S-18 (2.25.2009 IEP) at p.28]. In the Summer of 2008, every Tuesday and Thursday, The Student was denied access to the pool with the rest of the children "because of behavioral concerns." [S-13]. Which were never addressed or targeted.

Accordingly, pursuant to the attached order, the Student is entitled to compensatory education.

Is the Unilateral Placement at Private School an Appropriate Placement?

Having determined that the District’s offer was inappropriate, the analysis turns to the propriety of the program offered by Private School. In so assessing the same standards apply as did to the District’s program. The program at Private School need not be the optimal or best program, only one which confers meaningful benefit. The small size of the private placement in physical plant and ratios as well as the intensity of the individual instruction and supportive attention given to this Student resulted in significant reductions in maladaptive behavior. (NT689)

Academically the testimony establishes that The Student made meaningful progress in reading while at Private School, as follows:

The Student’s progress in reading is reflected on P-14 at p.9. [NT 691]. Mrs. T used Wilson Foundations and the QRI-IV, both research-based methods, to assess The Student’s progress. Student’s results were:

	January 2010	April 2010
Initial sound recognition	62%	88%
Phoneme blending	38%	75%
Phoneme segmentation	13%	88%
QRI-IV Examiner word list	60% Preprimer (frustrational)	80% Preprimer (instructional) 70% Primer (instructional)
QRI-IV Reading Passage	Preprimer decoding frustrational	Preprimer decoding with pictures instructional Preprimer comprehension independent Preprimer overall instructional
QRI-IV Retelling	Recalled 1 idea	Recalled 6 ideas

The District assessments were not based upon research based assessments but rather the Districts own procedures (NT 354-355;947)

Gains in speech and social skills were also noted (NT 1162-1178; P-52; NT638-639) Four months of instruction at the private placement produced greater academic, behavioral and socially significant gains than two and one half years of hypothesis and assessments by the District. For this Student’s needs, the topography of the program offered by Private

School is appropriate.

As more fully set forth in the discussion regarding credibility, nothing in the record supports weighing the equities in favor of the District. The full analysis is satisfied and reimbursement is ordered.

CREDIBILITY OF WITNESSES

Hearing Officers are empowered to judge the credibility of witnesses, weigh evidence and, accordingly, render a decision incorporating findings of fact, discussion and conclusions of law. The decision should be based solely upon the substantial evidence presented at the hearing. Spec. Educ. Op. No. 1528 (11/1/04), quoting 22 PA Code, Sec. 14.162(f). See also, Carlisle Area School District v. Scott P., 62 F.3d 520, 524 (3rd Cir. 1995), cert. denied, 517 U.S. 1135 (1996). Quite often, testimony or documentary evidence conflicts; which is to be expected as, had the parties been in full accord, there would have been no need for a hearing. Thus, part of the responsibility of the Hearing Officer is to assign weight to the testimony and documentary evidence concerning a child's special education experience.

Hearing Officers have the plenary responsibility to make "express qualitative determinations regarding the relative credibility and persuasiveness of the witness". Blount v. Lancaster-Lebanon Intermediate Unit, 2003 LEXIZ 21639 at *28 (2003). This is a particularly important function, as in many cases the Hearing Officer level is the only forum in which the witness will be appearing in person.

Although the testimony of all the witnesses was carefully considered, the

credibility of the following witnesses will be specifically commented upon here:

Mother: Clearly one could not hope for a more dedicated and loving mother and this Hearing Officer is profoundly admiring of this Parent's relentless pursuit of necessary support for her child. It is also clear that the mother was invested in the District program and maintained faith in the Districts collaborative efforts including the Districts proposal to seek private placement. The Parent's sincerity in working with the District is corroborated as well as is her decision that unilateral placement was the only appropriate choice.

Parent Expert: Dr. P testified that she was asked to assess current cognitive, academic and behavioral status. She was asked for programmatic recommendations, and was not limited to recommending Private School. [NT 424-425]. She did not provide the BASC questionnaire to District personnel because they are not instruments designed to be used retrospectively. [NT 426, 471-472]. Because of that, she interviewed the teacher to get a sense of the Student's behaviors at Elementary School. [NT 427-428]. If the District had rating scales completed while the Student was there, Dr. P would have reviewed them. [NT 471-472]. Dr. P reported accurately parts of the Private School program that were of some concern to her. [NT 441-445]. Notwithstanding these concerns, she still recommended Private School as a placement for the Student. She solicited input from both Elementary School and Private School staff as part of completing her report. [NT 445]. She reported that the classroom teacher had told her that the Student's behavior improved in the Fall of 2009. [NT 471].

Classroom Teacher: Mrs. R's testimony was inconsistent. Regarding the PASA, she testified that the IEP Team did not discuss it at the February, 2009 meeting. [NT 201]. When she

saw that the IEP for February, 2009 indicated that the Student would be taking the PASA, she said it was discussed, but not in great detail. [NT 202]. Teacher testified that she believed that, applying the six factors outlined by the Pennsylvania Department of Education, the PASA was appropriate for The Student. However, she does not know what those factors are. [NT 203]. In September, 2009, in response to a parent inquiry regarding bruising to the Students knees, the teacher reported to Parent that she had “not observed nor had any behaviors reported to me that would have affected the Student’s knees.” [P-11 at p.1]. yet, the teacher reported to an outside evaluator from a wraparound provider during the same time frame, that, when The Student wanted to avoid work, Student “will verbally say ‘no’, crawl around the room and hide under the desk. [P-36 at p.2]

Notwithstanding the fact that the documentary evidence and testimony establishes that The Student was in fact crawling on the floors and hiding under the desk, Mrs. R hid this fact from Parent. Mrs. R testified that S. S. completed the undated³ Functional Behavioral Assessment report marked as Exhibit 17A at the time of The Student’s reevaluation in February, 2009. [NT 314, 319-320, 355-356]. However, on February 24, 2009, Mrs. R wrote to Ms. S, requesting the FBA. Ms. S replied: “The FBA is finished and the results were the bar graphs I showed you and C (sic).” [P-41 at p.149; NT 356]. In addition, in October, 2009, Mrs. R wrote to the Principal at Elementary School: “We requested a full FBA from C last February and still have nothing.” [P-41 at p.58].

Special Education Director: Dr. V’s testimony was not credible: He could not explain satisfactorily why he sent out several letters stating categorically that the District did not

³ Ms. S testified that it was her normal practice to date her reports, so the creation of an undated document was unusual. [NT 1389].

have a program that could meet the Student's need. [NT 1236-1237]. He testified on direct that at the time Parent requested placement at Private School, he had observed and assessed the appropriateness of the programming at that school. [NT 1200]. Dr. V's testimony was impeached by his testimony in a previous hearing. Following the impeachment the District stipulated that he had only reviewed the Private School website as of July 21, 2009. In fact, he did not observe the program at Private School until after August 25, 2009. [NT 1212]. Therefore, his testimony that he had observed Private School as of August 24, 2009 was inaccurate. He testified that he had a bias against Private School solely because of the distance [NT 1218], but Private School is the same distance from the District as another private school to which the District not only referred this Student, but required the Student to go through admission evaluations. He could not explain why, after sending referral letters to several schools, he refused to look at the one school that accepted the Student. More interestingly, he testified that notwithstanding sending letters to private schools containing verbiage that an evaluation by the private school was necessary as Elementary School could not provide an appropriate program for the student that Elementary School is and always was an appropriate placement.

CONCLUSION

The District's offer of a FAPE in the IEP and NOREP dated 8/31/06 was legally sufficient to raise to the level of a FAPE in that it conferred only trivial benefit, if any benefit at all.

The IEP was replete with procedural and substantive violations, most notably with respect to the lack of appropriate behavioral supports under the laws. Hence the first prong

of the Burlington- Carter Analysis is met. The second criterion is also met through documented demonstrable academic and behavioral progress of the Student at Private School, not previously enjoyed by Student. The equities weigh heavily in favor of the parent, who credibly testified with respect to her cooperation and collaboration and, in fact trust of the District, hence satisfying the third prong of the analysis.⁴

ORDER

In accordance with the forgoing findings of fact and conclusion of law, the District is hereby **ORDERED** to take the following actions:

1. Provide the Student with full days of compensatory education for the following periods:
 - a. Each day school was in session from December 15, 2007 through the last day of the 2007/2008 school year;
 - b. Each day school was in session during the 2008/2009 school year;
 - c. Each day school was in session during the fall semester of 2009/2010 school year.
 - d. The summers of 2008 and 2009, for a twelve week period in each year
2. The compensatory education award shall be measured and provided in accordance with the following terms and conditions:
 - a. The value of the award shall be computed by reference to the total cost per day to educate a child in a full-time autistic support class in the District, measured by the proportional cost of the salary and fringe benefits of a full time autistic support teacher in each separate period listed above. The compensatory education award shall include the proportional cost of speech/language,

⁴ The curious behavior of the District regarding their referral for private placement and one hundred and eighty degree turn is again noted but only with respect to credibility considerations and referencing the equities do not bear in their favor.

occupational therapy services, physical therapy, audio logical support and services of the Instructional Support staff member as quantified by the IEP dated 2/28/2008 for all periods.

- b. The Student's Parents shall determine the specific type of compensatory education services, which will be limited to academic and/or psychological/counseling/behavioral services/designed to meet Student's identified needs;
- c. Parents may use part of the compensatory education award to pay for the services of knowledgeable, independent educational consultant to help them choose the appropriate compensatory education services, provided, however that any such consultant may derive no financial benefit from the services s/he recommends or from the providers of such services;
- d. The compensatory education services shall be in addition to, and shall not be used to supplant, educational services and/or products/devices that should appropriately be provided by the School District through Student's IEP to assure meaningful educational progress.
- e. Compensatory education services may occur after school hours, on weekends and/or during the summer months when convenient for the Student and Parent.
- f. The School District shall reimburse Parent and tuition and transportation (at the federal mileage rate of .50/mile) for the Student's attendance at Private School in the Spring 2010 semester.

It is further ORDERED that any claims or issues not explicitly considered or adjudicated in this order or the accompanying decision are deemed to be denied and dismissed.

Dated: 8/30/2010

Gloria M. Satriale

Gloria M. Satriale, Esq.,
Special Education Hearing Officer