

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

DUE PROCESS HEARING

Name of Child: R.L.
ODR #00605/09-10 KE

Date of Birth:
[redacted]

Dates of Hearing:
April 13, 2010
June 21, 2010
June 22, 2010
June 29, 2010 (telephonic)

OPEN HEARING

Parties to the Hearing:
[Parent[s]]

Norristown Area School District
401 N. Whitehall Road
Norristown, Pennsylvania 19403

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Giovanni Campbell, Esquire
100 S. Broad Street Suite 1530
Philadelphia, Pennsylvania 19110

Scott Wolpert, Esquire
400 Maryland Drive PO Box 7544
Fort Washington, Pennsylvania 19034

July 18, 2010

July 31, 2010

Linda M. Valentini, Psy.D., CHO
Certified Hearing Official

Background and Procedural History

Student¹ is an eligible student with a classification of autism and speech/language impairment who was formerly enrolled in the Norristown Area School District (hereinafter District); the Parents withdrew Student from the District and enrolled Student in a cyber charter school on August 6, 2008 prior to the beginning of the 2008-2009 school year. Student's mother and father (hereinafter Parents) requested this hearing on December 31, 2009 to address their concerns that Student had been denied a free appropriate public education for the 2006-2007 and the 2007-2008 school years.²

The District sought the application of the two-year statute of limitations under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 et seq. The Parents asserted that one or both exceptions to the IDEA's regulatory time limits existed. The first hearing session was exclusively devoted to testimony regarding whether the exceptions were applicable. At the conclusion of the testimony this hearing officer held that neither exception existed, and explained her reasoning on the record [NT 207-217], ruling that this matter would cover the period from the beginning of January 2008 to the end of the school year in June 2008. Although counsel were allowed considerable time to negotiate a settlement in light of the relatively brief potential recovery period at issue, the parties could not come to an agreement and the hearing was reconvened.

For the reasons presented below I find for the District.

Issues

1. Did the District deny Student a free appropriate public education from the beginning of January 2008 to the end of the school year in June 2008?³
2. If the District denied Student a free appropriate public education, is the District required to provide compensatory education to Student and if so in what kind and what amount?

Specific Delineation of Issues

As detailed in the sections of the Parents' Complaint addressing the time period at issue [S 22], and in the Parents' Written Closing Statement, the specific concerns the Parents raised are: Did the District deny FAPE by developing an IEP and not conducting a

¹ The decision is written without further reference to the Student's name or gender to provide privacy even though this was an Open Hearing.

² The Parents also sought to pursue a claim related to Extended School Year (ESY) services in the summer of 2008. However, as the District offered ESY for that time period and this ESY offer was approved by the Parents although ultimately not utilized, this ESY claim was not considered at the hearing.

³ Additional disagreements about the program and placement being prepared for 3rd grade were detailed in the Complaint but are not addressed here, as Student was withdrawn from the District on August 6, 2008 and the IEP and NOREP were never implemented. [S 22]

functional behavioral assessment; by not training school staff on Tourette's Syndrome; by scolding Student for making noises related to Tourette's Syndrome; by not funding a Sensory Integration Praxis Test evaluation (SIPT); by disregarding expert reports and information, specifically from the District-funded independent educational evaluation (IEE) [4/08], the independent occupational therapy evaluation [4/08], and the private assistive technology evaluation [5/08]; and, by refusing to allow a TSS to enter school to assist the Student near the end of the 2007-2008 school year.

Findings of Fact

Background:

1. Student's primary disability category is autism; a secondary disability category is speech/ language impairment. [P 97]
2. Student was in second grade during the 2007-2008 school year. [S 1]
3. In or about January 2008, at the second half of second grade, the District learned that Student was diagnosed with Tourette's syndrome.⁴ [NT 43]
4. Student was absent from school for a total of 26 school days during second grade. During the period January 1, 2008 to the last day of the school year in June, Student accrued 12 of those absences. [NT 370-372; S 11]

FBA:

5. A psychiatric evaluation completed in May 2007, near the end of Student's first grade school year, provided a specific description of Student's behaviors. The psychiatric evaluation report was considered by District staff working with Student during second grade. [NT 276-277, 280, 352; P 56]
6. Student's first grade teacher met with Student's assigned teachers for the second grade prior to the beginning of second grade and discussed Student's behaviors and strategies that were effective and ineffective to address them. [NT 278-280]
7. The Autistic Support Teacher met with Student's BSC (wraparound behavioral health services provider) at the beginning of the second grade school year to discuss Student's behaviors at home and in school and strategies for addressing those behaviors. [NT 280-285, 340-341, 538]
8. The Autistic Support Teacher reviewed Student's detailed treatment plan written by the BSC. This treatment plan, dated August 24, 2007 contained detailed current information regarding Student's diagnosis, strengths, medications, behavioral concerns, defined problem behaviors, defined baseline behaviors, target behaviors, objectives, replacement behaviors and methods in addressing

⁴ Although not noted with precision in the record it seems that the Parents may have learned this around the same time or shortly before.

- those behaviors. All this information was available to and considered by the District staff who worked with Student during the second grade school year. [NT 544-545, 567; P 64]
9. Student's Autistic Support Teacher during the period in question, in addition to regular education and special education state certification, in August 2007 completed all coursework toward becoming a certified behavior analyst, which credential she will receive pending successfully passing her boards examination in September 2010. She holds a Master's Degree, and separate from her District employment she provides home ABA programming for children. [NT 518-519]
 10. Student's Regular Education Teacher during the period in question has taught in general education classrooms for 27 years. In addition to her academic and work-related credentials, she has a 14-year-old daughter with autism and has obtained considerable training in the area of autism. She participated in founding an equine therapy program for children with autism. [NT 266-267; HO 2]
 11. District staff followed a consistent approach in addressing Student's behaviors during second grade and engaged in constant contact and communication about effective strategies to address Student's behaviors. [NT 278, 283, 297-298, 537, 547]
 12. The Autistic Support Teacher and the Regular Education Teacher communicated almost daily either face-to-face or through email or phone about Student's social skills sessions and what was occurring in the general education classroom. [NT 285, 537]
 13. Student rarely had tantrums during second grade. [NT 500, P 117]
 14. Student demonstrated "much" improvement in behaviors from first to second grade, the behaviors in second grade were not severe and were appropriately addressed by school staff. Negative behaviors had "dramatically decreased". [NT 251-254, 279, 318-319, 540, 543-546]
 15. The great majority of Student's behaviors of concern in second grade centered around calling out in class instead of raising Student's hand, and telling others, including the teachers, what to do. District staff understood the triggers for these behaviors, mainly directions, and their functions, which were mainly task-avoidance or control issues. [NT 273, 331-332, 352-353, 539, 542]
 16. In May 2007 the evaluating psychiatrist did not recommend a functional behavioral analysis [FBA], and an FBA was not recommended by any professional working with Student until the independent evaluator recommended one in her report that was not received by the District until May 2008. [NT 285, P 56, P 94]

17. The Autistic Support Teacher, who has completed ABA training and has performed FBA's on autistic students did not believe that an FBA was needed to appropriately program for Student during the second grade school year based on the nature, severity and frequency of Student's behaviors in school. [NT 543, 545-546, 553, 558]
18. Although the Parents had requested a functional behavioral assessment [FBA] at the end of first grade and data was being collected during the first part of second grade by the Autistic Support Teacher who had the specialized training to conduct such assessments, as of January 2008 the Parents refused to allow the District to continue with performing the FBA until all staff, including the individual conducting the FBA, were trained on Tourette's Syndrome. The Parents specifically sought the FBA to address Tourette's symptoms rather than Student's autism-related behaviors. The Special Education Supervisor contacted the Intermediate Unit to locate an individual trained about Tourette's syndrome to conduct the FBA, but the IU had no persons or suggestions to offer at that time. [NT 231-235, 376-378, 380-382, 552; P 8, P 67]
19. The Autistic Support Teacher supported conducting an FBA in the beginning of Student's third grade school year, as moving to third grade with a new teacher and new classmates after having the summer off would have been a major transition for Student. [NT 554]

Tourette's Syndrome Training:

20. In addition to requesting that all staff be trained in Tourette's syndrome, at the January 2008 IEP team meeting the Parents also requested that Student's peers be trained on Tourette's syndrome. The District arranged for a March 2008 training by the Tourette's Association in response to this request. [NT 377-378; S 18]
21. The second grade and third grade classes were selected for the training with a view toward that year and the next year. In addition to all second and third grade children, the regular education and special education second and third grade teaching staff, special area team members, the program support specialist, the supervisor of elementary special education and the school principal attended, as did Student's mother. Approximately 220 to 240 students attended. [NT 333, 379; S 18]
22. Student stood up in front of the group after the informational video and told the other students that Student had Tourette's. [NT 333, 380]
23. The District also planned for a training for all school staff, taking into account trainer availability and the need to clarify expectations of the Parents. A representative from the Tourette's Association was present for the June 5, 2008 IEP team meeting. Immediately following the June 5, 2008 IEP meeting the principal arranged that in August 2008 on the first day staff returned from their summer break the Tourette's Association would give a presentation. However,

this training was canceled, as Student was withdrawn from the school. [NT 380-381, 580; S 18]

Inappropriate Scolding/Behavior Plan:

24. Student's second grade regular education teacher credibly testified that she did not improperly scold Student for making noises in class, but rather redirected Student appropriately and was careful not to increase Student's anxiety. [NT 329-330]
25. As for other students under the classroom behavior management plan, Student received a consequence of missing two minutes of recess time for an infraction. This happened once in the second grade school year. When the Parents objected to loss of recess Student's consequence was changed to 2 minutes loss of computer time. [NT 245-246]
26. Student had an individual behavior improvement plan with positive incentives. Self-monitoring to develop self-sufficiency and independence was introduced in the latter part of the period in question. Student was given visual cues to assist in self-monitoring. [NT 247-248, 287-288]
27. One visual reminder for Student addressed "making noises" and was placed on Student's desk chart but not calculated into daily points. The item was discussed with Student and then placed to discern whether Student had awareness of or could inhibit vocal tics. [NT 345-348, 559-560]
28. Student's individual plan was created in consultation with experienced teachers, the BSC and TSS workers and in consideration of additional evaluation information to which the team had access. [NT 249-250, 282-283]

Sensory Integration Praxis Test:

29. The District considered the Parents' request that Student be given the Sensory Integration Praxis Test ("SIPT") in January-February 2008. The Supervisor of Special Education spoke with the District's occupational therapy provider representative (Austill's Rehabilitative Services) and to the Director of the Parents' private occupational therapy provider agency (Total Approach), and also gathered information from Student's teachers and the therapist working with Student in school. [P-82]
30. The Supervisor of Special Education noted that Student's most recent occupational therapy report (January 2008) stated Student's "sensory processing needs are not highly affecting [Student's] ability to participate in school activities" and that Student "is demonstrating some ability to self-regulate in terms of [Student's] sensory processing needs". [P 82]
31. After investigating the purposes of and need for this test, the District determined that the SIPT was not needed to identify/address Student's educational needs, and

this was communicated to the Parents by the Supervisor of Special Education on February 19, 2008. A NOREP was issued. [P-82]

32. The District's Occupational Therapist prepared a written summary⁵ dated April 1, 2008 containing an analysis of assessment/observations of Student and resultant findings regarding Student's skills and needs, with corresponding suggested goals, objectives, specially designed instruction, and treatment parameters (frequency and duration). The summary was presented at the May 21, 2008 IEP meeting. [S 16]

Consideration of Evaluations:

33. The Parents would not give permission for the District to conduct a reevaluation during the second half of the 2007-2008 school year. The Parents and the District settled on having a District-funded independent neuropsychological evaluation, but the evaluation was not begun until April 2008 and the report was not available until May 2008. The IEP team reviewed this District-funded independent neuropsychological report. [NT 355-356, 460-461; P 72, P 79]
34. The IEP team reconvened on June 5, 2008 to continue the May 2008 IEP team meeting, and the District's occupational therapist did attend this second session. The IEP meeting notes from that date specifically reference the IEP team's discussion of the independent occupational therapy evaluation. [NT 330; S 16]
35. At the May 21, 2008 IEP meeting the District was given a report of a private assistive technology evaluation. The report and its recommendations were specifically discussed at that IEP team meeting. The Regular Education Teacher disagreed with implementing some of the recommendations as it was near the end of the school year, and agreed with others. [NT 305-309, 333-336; P 98).

TSS Worker:

36. One of the TSS workers assigned to Student through the [local] County IU's wraparound (behavioral health) services engaged in unacceptable behavior such as divulging confidential information about other students, discussing students' disabilities with the parents of other students, using students' names and phone numbers in documentation and communicating with a parent about communications that occurred specifically between students. The worker's actions resulted in complaints by parents and serious concerns by school personnel, who communicated those concerns to the worker's supervisor. The worker received a verbal warning from her supervisor and, based on further incidents in the school setting, the [local] County Intermediate Unit removed her from Student's case. [NT 311-312, 314, 389-390, 752]
37. Student did not like being near to this particular TSS worker in school. [NT 313, 533-534]

⁵ On April 28, 2008 the Parents approved the Occupational Therapist's participation in this fashion rather than in person. [S-16]

38. During the second grade school year, Student had two other TSS workers and the District had no problem with these TSS workers. Student was more productive in class with one of these other two workers. [NT 276, 313, 388]
39. The regular education teacher had daily communication with the TSS workers. [NT 285, 340]

Educational Program:

40. An IEP dated June 7, 2007 [second grade IEP] governed Student's second grade school year. This IEP identified Student's needs and addressed the needs through goals and specially designed instruction, including social skills instruction and speech and language services to develop Student's pragmatic communication. [S-1]
41. The second grade IEP contains behavioral goals addressing pragmatic communication, self-regulation, and focus/attention to task. [S-1]
42. The second grade IEP contains specially designed instruction including but not limited to behavioral strategies consisting of preferential seating, visual cues for Student, visual cues for the class, a visual schedule, visual checklists, a token economy individualized for Student and the use of specific preferred rewards, reinforcers, a sensory diet and social skills instruction. [NT 288-296; S-1]
43. All individuals working with Student were aware of Student's IEP SDI's and the regular and autistic support teachers offered consultation to all as needed. [NT 298]
44. The Autistic Support Teacher met with Student twice weekly for sessions of 30-45 minutes. Sessions centered on direct instruction, either one to one or in a small group with another peer. The instruction utilized social stories, role playing, discussion of social skills and emotions, and working on generalization to develop Student's social skills. At the Parents' request auditory processing skills were also taught during the sessions. [NT 520-527]
45. To assist Student in developing social skills Student was assigned or was allowed to choose a peer buddy for certain activities such as eating with Student at the peanut-free table.⁶ [NT 289-290, 299-300]
46. Student developed favorable peer relationships during second grade. [NT 300, 327-328]
47. The Autistic Support Teacher provided written and oral reports to the Parents about Student's social skills instruction and progress. [NT 535-536]

⁶ Student has a peanut allergy. The school nurse would check the chosen buddy's lunch to be sure there were no peanut products. [NT 289]

48. In second grade Student received 30 minutes of speech/language therapy, 30 minutes of occupational therapy and 30 minutes of physical therapy per week. [NT 268]
49. For the second half of the period in question (March to June) Student also received SRA reading instruction from the itinerant learning support teacher. [NT 268]
50. The Regular Education Teacher believed that she and Student's mother did well together, and had meaningful and productive communication with back and forth contacts. [NT 298-299]

Educational Progress:

51. The District-funded IEE conducted in April 2008 found Student's Full Scale IQ to be 91⁷, at the 27th percentile, as assessed by the Wechsler Intelligence Scale for Children Fourth Edition [WISC-IV]. Student had varying strengths and weaknesses, some above and some below the full scale level. [P 94]
52. Despite the fluctuations, the examining independent psychologist found that the evaluation results represented "an adequate reflection of [Student's] current levels of cognitive and academic functioning". [P 94]
53. The April 2008 IEE found that Student demonstrated above-average achievement in word reading, spelling and numerical operations, average achievement in math reasoning and low average achievement in reading comprehension and written expression as assessed by the Wechsler Individual Achievement Test Second Edition [WIAT-II]. [P-94]
54. A comparison of Student's grade equivalents earned on the Woodcock Johnson Reading Mastery Test from May 2007 (end of first grade school year) to April 2008 (toward end of second grade school year) demonstrates meaningful educational progress in that word identification skills moved from 2.7 to 4.4, word attack skills moved from 5.1 to 9.3, word comprehension skills moved from 3.7 to 4.3, and passage comprehension skills moved from 3.1 to 3.3. [P 94]
55. A comparison of Student's performance on the Pennsylvania Terra Nova testing in April 2007 and in April 2008 demonstrated meaningful educational progress in reading as Student moved from Terra Nova Level 11C to Terra Nova Level 12C, in mathematics as Student moved from partial mastery to mastery, and overall in reading and math as by April 2008 Student achieved mastery of five of seven Pennsylvania academic standards. [P 50, P 95]
56. A comparison of Student's DIBELS assessments from the end of the 2006-2007 school year to near the end of the 2007-2008 school year demonstrated

⁷ An IQ of 91 is at the lower end of the Average Range (IQ 90-109).

- meaningful educational progress in that Student moved from reading 54 words per minute and a developmental reading assessment level of 18 to reading 76 words per minute and a developmental reading assessment level of 20. [S 1; P 97]
57. As documented in report cards, Student advanced in reading skills from Level I to Level L in a guided reading program, showed proficiency or advanced ability in all categories of writing skills, and by the third marking period of the 2007-2008 school year, was proficient or advanced in nineteen of twenty four mathematics skill categories. [NT 317; P 105]
58. Although Student's progress in regard to reading comprehension and mathematics problem-solving had slowed recent to the May 2008 IEP meeting and was so noted in the IEP, the IEP team addressed this slowed progress through the addition of reading and math goals in the IEP. [NT 240, 339, 550-551, 563-565; S-16]
59. Student made meaningful progress in social skills and peer interaction during the second grade school year. [NT 327-328, 555-556; S 16]

Discussion and Conclusions of Law

Burden of Proof: In November 2005 the U.S. Supreme Court held that, in an administrative hearing brought under the IDEA, the burden of persuasion, which is one element of the burden of proof, is properly placed upon the party seeking relief. Schaffer v. Weast, 126 S. Ct. 528, 537 (2005). The Third Circuit addressed this matter as well more recently. L.E. v. Ramsey Board of Education, 435 F.3d. 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006). The party bearing the burden of persuasion must prove its case by a preponderance of the evidence. This burden remains on that party throughout the case. Jaffess v. Council Rock School District, 2006 WL 3097939 (E.D. Pa. October 26, 2006). As the Parents asked for this hearing, the Parents bear the burden of persuasion. However, application of the burden of persuasion does not enter into play unless the evidence is in equipoise, that is, unless the evidence is equally balanced so as to create a 50/50 ratio. In the instant matter, the evidence was not in equipoise.

Credibility: 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 shall be based solely upon the substantial evidence presented at the hearing.⁸ Quite often, testimony or documentary evidence conflicts; this 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

⁸ 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).

determinations regarding the relative credibility and persuasiveness of the witnesses”. Blount v. Lancaster-Lebanon Intermediate Unit, 2003 LEXIS 21639 at *28 (2003). This is a particularly important function, as in many cases the hearing officer level is the forum in which the witnesses will be appearing in person. Credibility will be addressed in the Discussion section below.

Special Education Foundations: Special education issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 (“IDEIA” or “IDEA 2004” or “IDEA”), which took effect on July 1, 2005, and amends the Individuals with Disabilities Education Act (“IDEA”). 20 U.S.C. § 1400 *et seq.* (as amended, 2004).

Special education is defined as specially designed instruction...to meet the unique needs of a child with a disability. Specially designed instruction means adapting, as appropriate to the needs of an eligible child ...the content, methodology, or delivery of instruction to meet the unique needs of the child that result from the child’s disability and to ensure access of the child to the general curriculum so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children. 34 C.F.R. §300.26

Having been found eligible for special education, 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). 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 Individualized Educational Program (IEP). 20 U.S.C. §1401(9); 34 C.F.R. §300.17 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)). An IEP must be crafted in such a manner that, provided it is implemented, there is a reasonable degree of likelihood, although not a guarantee, that the student will make educational progress.

Districts need not provide the optimal level of service, maximize a child’s opportunity, or even a level that would confer additional benefits, since the IEP as required by the IDEA represents only a basic floor of opportunity. Carlisle Area School District v. Scott P., 62 F. 3d at 533-534.; Hartmann v. Loudoun County Bd. of Educ., 118 F.3d 996, 1001 (4th Cir. 1998). What the statute guarantees is an “appropriate” education, “not one that provides everything that might be thought desirable by ‘loving parents.’” Tucker v. Bayshore Union Free School District, 873 F.2d 563, 567 (2d Cir. 1989). More recently, the Eastern District Court of Pennsylvania ruled, “districts need not provide the optimal level of services, or even a level that would confer additional benefits, since the IEP required by the IDEA represents only a basic floor of opportunity.” S. v. Wissahickon Sch. Dist., 2008 WL 2876567, at *7 (E.D.Pa., July 24, 2008), citing Carlisle. In addition to the other IEP requirements in DEA, if a child’s behavior impedes his/her educational

progress, the school district must develop a behavior program that assists in 1) eliminating the inappropriate behaviors and 2) develops good behaviors. 20 U.S.C. 1414(d)(3)(B).

With reference to compensatory education, recently, in Mary T. v. School District of Philadelphia, 575 F.3d 235 (3d Cir. 2009), our Third Circuit court reiterated that a student is entitled to compensatory education under the IDEA when “an IEP fails to confer some (i.e., more than *de minimus*) educational benefit to the student.” (Quoting *M.C.*, 81 F.3d 389, 395 (3d Cir. 1996)). Although the IDEA authorizes courts to award “such relief as the Court determines is appropriate” 20 U.S.C. § 1415(h)(2)(B), compensatory education is an appropriate remedy only when a school district has failed to provide a student with FAPE. Lester H. v. Gilhool, 916 F.2d 865, 871-73 (3d Cir. 1990) as the purpose of compensatory education is to replace those educational services lost because of the school district’s failure. (*Id.*)

Discussion

In order for this hearing officer to find a denial of FAPE and award the relief sought, Student’s parents must present a preponderance of convincing evidence that Student was denied the opportunity to derive meaningful educational benefit from an appropriate special education program that provided a “basic floor of opportunity”. Education is more than academics, and for Student it includes learning and practicing socialization skills, and improving language and motor skills. The Parents in this proceeding failed to meet their burden of persuasion, one element of the burden of proof. Rather, testimony and documentary evidence supported the District’s assertion that it had provided Student with an appropriate program that met the requirements of the IDEA.

It is clear that Student made meaningful academic, language and social progress in second grade despite considerable absences that resulted in missing nearly 15% of the available instructional time that year. This progress is attributable to the school staff’s working intensively with Student, collaborating with the BSC [FF 7, FF8] and with the Parents, and implementing an appropriate IEP.

Student’s Autistic Support Teacher testified at this hearing and presented as an exceptionally well-qualified individual. In addition to regular education and special education state certification, she participated in Penn State University’s 2-year Applied Behavioral Analysis training program and in August 2007 completed all coursework toward becoming a certified behavior analyst which credential she will receive pending successfully passing her boards examination in September 2010. Separate from her District employment she provides home ABA programming for children. [FF 9] She worked with Student several times a week, frequently spending 20-30 minutes observing Student in class before beginning instruction that focused on social skills and auditory processing. [FF 44] She and the regular education teacher spoke about

Student several times a week, sometimes for 15 or 20 minutes at a time. [FF 12] On the rare [three] occasions in second grade when Student had a behavioral incident she came to the school and provided assistance; when Student was absent she would rearrange her schedule to be able to make up missed sessions. This witness's thorough and eminently credible testimony addressed several issues raised by the Parents in their complaint. She established that Student's behavior in second grade was "much improved" over that in first grade. [FF 14] She explained that a formal FBA was not necessary in second grade because the staff in consultation with herself already understood the antecedents and functions of Student's behaviors and had an effective behavior plan in place. [FF 15, FF17] She testified that she met with Student's wraparound BSC and reviewed the current detailed treatment plan prepared by the BSC. [FF 7, FF 8] She explained that, nevertheless, she had acceded to the Parents' request and started data collection for an FBA but stopped when the Parents made it clear that the FBA had to be performed by someone with experience with Tourette's syndrome. [FF 18] She explained that the phrase "no noises" was added to support Student's practicing suppression of vocal tics and was not part of the reward/cost behavior plan. [FF 27] Finally she clearly and emphatically affirmed that when it was received in May 2008 all the team members read the independent psychologist's report of her April 2008 evaluation. [FF 33] This witness's testimony was given great weight because of her multi-faceted qualifications, her thorough knowledge of Student, and her clear and unhesitant responses to all questions posed on direct examination and on cross examination.

Student's Regular Education Teacher likewise presented as a very credible witness whose testimony was given considerable weight. In addition to her academic and work-related credentials, she shared that she has a daughter with autism and that she founded an equine therapy program for autistic children. [FF 10] This individual described a very well-thought-out and thorough behavior support plan and close staff cooperation on Student's behalf. [FF 26, FF 28] This witness conveyed a sense of warmth toward Student throughout her testimony and it was noted that she smiled affectionately when speaking about Student's acquiring friends in class.

The Special Education Supervisor for Elementary School testified to specific factual issues. She recounted the Parents' asking for an FBA at the end of 1st grade and at the beginning of 2nd grade, and recalled that the data collection had begun, but that in January of 2nd grade the Parents stipulated that the FBA should be performed by someone with Tourette's Syndrome experience. She recalled calling the Intermediate Unit to ascertain whether there was someone to do the FBA who could meet the Parents' stipulation and being told that the IU did not have anyone who qualified. [FF 18] She testified to the fact that in March 2008, only two months after having been informed about Student's new diagnosis, the school arranged and paid for two informational sessions given by the Tourette's Association to the second graders and the third graders and many available school staff. [FF 20, FF 21] She testified that the District was arranging with the Tourette's Association for a school-wide staff training on the first faculty in-service day in August 2008 and explained that making this training part of the required agenda would ensure that all the adults working in school

with Student would be aware about and trained to address Student's symptoms. [FF 23] Her testimony went directly to the fact of the District's addressing Student's newly diagnosed Tourette's syndrome and their responsiveness to the Parents' input.

The School Principal established that at the January 2008 IEP meeting the Parents stated their expectation that the planned FBA be conducted by someone with training in Tourette's syndrome. [FF 18] She established that by March 2008 the District had arranged for a total of between 220 and 240 students in second and third grades, along with a number of staff, to receive awareness training through the Tourette's Association. [FF 20, FF 21] She established that another training session for the entire school staff was planned and arranged for the first faculty in-service day in August 2008 but that this was canceled when Student was withdrawn from the school. [FF 23] Finally she established that the Parents had declined to sign a Permission to Evaluate [PTE] in January 2008 and that although the District agreed to fund an IEE the psychologist's evaluation was not completed until April 2008 and the report was not available to the District or the Parents until May 2008. [FF 33]

Student's mother testified in this hearing. She clearly is committed and devoted to her child but her testimony was troublesome in some regards. The overarching impression she conveyed was that she was not willing to acknowledge that the District had done anything right with regard to Student. She became testy on cross-examination, and her rigid adherence to promoting the view that Student was ill-served in school led to some testimony that seriously eroded her credibility. For example, when improvement on test scores was pointed out she replied, in a skeptical tone, "on *that* test" and she hedged rather than agreeing that she had extensive communication with the school even though the communication was documented. It appeared that she had formed an alliance with one of the TSS workers (who also testified) and the conflict this TSS worker had with school staff may have contributed to unfairly coloring mother's perception of her child's educational experience. The most unfortunate diminishment of the mother's credibility was her testimony, not offered until rebuttal, that a considerable time after being taken from the District Student disclosed a memory of being put into a room alone at school with the door shut. Mother, who had been a tenacious advocate for her child, could not provide a credible explanation for why she did not immediately contact the District administration or any school staff when Student made the allegation, despite her previous vigorous communication on Student's behalf. Further, upon testifying under questioning that the Student's alleged disclosure was known to the Parents and to their attorney at the time the hearing request was filed, she could not explain why it was not included in the rather lengthy and quite detailed Complaint. Providing this poorly developed unsupported testimony as part of the record in this case significantly detracted from, rather than enhanced, the mother's credibility. A final facet of this hearing officer's difficulty finding much of mother's testimony to be credible was the spuriousness of a document, pre-marked P 119, that the Parents submitted to their counsel to be included in their evidence binder. This document is a photocopy of the dismissed TSS worker's handwritten purported re-copying of portions of a 2007-2008 home/school daily communications book, the original of which inexplicably disappeared toward the end of the school year. The TSS

worker testified that she condensed the content of the original document when she copied it over in her own handwriting, and although the TSS worker testified that she captured the main ideas when she re-wrote the book, her copy does not contain various entries from the Parents and from other TSS workers assigned to the case during the year. [NT 645-648] The Parents' obtaining a copy of this document of questionable origin, and their subsequent decision to attempt to submit it into evidence, casts considerable doubt upon their commitment to providing reliable information to this fact-finder.⁹

The TSS worker testified in a telephonic session as she was on vacation on what was to be the last day of testimony and her testimony was relatively brief. She came across as an earnest individual who seemed to try to answer questions exactly. She and the mother have formed a relationship beyond the formal boundaries of the ordinary TSS/parent alliance [NT 662-664]. Given this factor, and the circumstance that she was removed from her position with Student following conduct that the District found inappropriate, little weight was given to her testimony, the content of which would not have added significantly to the evidence even if it were credited. Her testimony did explain that her reworking of the TSS/Parent communication notes was for purposes of fulfilling an academic requirement of a course she was taking.

Looking at the record as a whole and the findings of fact outlined above, with reference to the specific points encompassed by the issue "Did the District deny Student a free appropriate public education from the beginning of January 2008 to the end of the school year in June 2008?" it is noted that: a) the Parents did not present credible testimony or evidence themselves or from any professional with specific expertise to support their assertions that Student required an FBA during the period in question; b) testimony and documentary evidence provided by the District directly refuted the Parents' assertions that school staff were not given training in Tourette's Syndrome after the District learned of the diagnosis in January 2008; c) the Parents' assertion that Student's regular education teacher "scolded" Student for making noises related to vocal tics was unsupported; d) the Parents did not present credible testimony or evidence themselves or from any professional with specific expertise to support their assertions that Student required the Sensory Integration Praxis Test during the period in question; e) testimony and documentary evidence provided by the District supported its claim that the IEP team and school staff considered the evaluation reports by the independent neuropsychologist, the independent occupational therapist and the independent assistive technology professional; and f) credible testimony supported the District's actions in regard to one of the TSS workers who was ultimately removed from her position working with Student by her supervisor who was not a part of District administration or staff.

⁹ As the original notebook was reportedly lost toward the end of the 2007-2008 school year, the authenticity of P 119's contents as they relate to the original cannot be established with any certainty, and therefore the document was not considered. For purposes of clarity it remains in the record as it (but not its content) was referenced at length.

In light of the preponderance of testimonial and documentary evidence, the conclusion that must be reached in this matter is that the District provided Student a free, appropriate public education in the least restrictive environment in accord with the IDEA during the statutory time period in question and that therefore Student is not entitled to compensatory education.

Order

It is hereby ordered that:

1. The District did not deny Student a free appropriate public education from January 2008 to the end of the school year in June 2008.
2. As the District did not deny Student a free appropriate public education, the District is not required to provide compensatory education to Student.
3. The District is not required to take any further action.

Any claims not specifically addressed by this decision and order are denied and dismissed.

July 31, 2010

Date

Linda M. Valentini, Psy.D., CHO

Linda M. Valentini, Psy.D., CHO
PA Special Education Hearing Officer
NAHO Certified Hearing Official