

*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:** J.D.

**Date of Birth:** [redacted]

**Hearing Dates:** May 17, 2010, May 24, 2010, May 25, 2010, June 17, 2010, June 29, 2010, June 30, 2010 and August 16, 2010

**ODR File No.:** 00665/0910KE

**School District:** Pottstown Area School District

### **CLOSED HEARING**

<b><u>Parties:</u></b>	<b><u>Representatives:</u></b>
Parent[s]	<b><u>Parent Attorney:</u></b> Carole Hendrick, Esq Attorney at Law 3927 Mill Road Collegeville, PA 19426
Pottstown School District	<b><u>School District Attorney:</u></b> Karl A. Romberger, Esq Sweet, Stevens, Katz & Williams LLP 331 East Butler Avenue New Britain, PA 18901

**Date Record Closed:** September 11, 2010

**Decision Date:** October 2, 2010

**Hearing Officer:** Gloria M. Satriale, Esquire

## **INTRODUCTION AND PROCEDURAL HISTORY**

This case concerns the provision of a Free Appropriate Public Education (hereinafter “FAPE”) for Student, an eligible [elementary school aged] student, who resides with Student’s mother in the Pottstown Area School District (hereinafter referred to as “District”) and who has been identified as eligible for special education services due to a diagnosis of autism. This action challenges the actions of the District (hereinafter referred to as “District”) in failing to provide a Free Appropriate Public Education (hereinafter referred to as a “FAPE”) to the Student during the 2006/2007; 2007/2008 school years including applicable Extended School Year Services (hereinafter referred to as “ESY”) and seeks compensatory education for that time frame. The District maintains the provision of a FAPE at all times relevant hereto. A Motion to Limit Time filed by the District was GRANTED thereby limiting the scope of this proceeding to events occurring from January 16, 2008 through the end of the 2007/2008 school year only<sup>1</sup>.

Due process concerning the current matter was filed with the Office for Dispute Resolution on January 16, 2010.<sup>2</sup> The resolution meeting was waived. A due process hearing was conducted in this matter on May 17, 2010, May 24, 2010, May 25, 2010, June 17, 2010, June 29, 2010, June 30, 2010 and August 16, 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:

---

<sup>1</sup> The complaint originally sought relief for the 2006/2007 and 2007/2008 school year, claiming compensatory education in excess of two years. The District filed a Motion to Limit the time frame pursuant to 34 C.F.R. §§300.507 and 300.511(f). Following written submissions and argument on the record, a ruling was made granting the District’s motion on the basis that Parent admitted the primary reason she did not file a complaint within the Statute is that she did not have money for a lawyer. Secondly, Parent rests her ability to seek relief beyond the Statute because she was too intimidated to file/following through with a complaint prior to January of 2010. Neither assertion falls within the proscribed exceptions. 20 USC 1415 (f) (3) (D). Parent later asserted that she could not have filed a complaint because the District withheld information regarding restraints applied to the Student. The Parent acknowledged in writing notice of potential restraint as of February 27, 2008 (P194; NT 113). As a result of the evidence presented, the District was found not to have misrepresented or withheld information regarding the student’s special education program, and, therefore the scope of the hearing and any potential recovery were limited to a period after January 16, 2008 – two years from the filing of the complaint. The evidence also clearly established the Parent’s knowledge of alleged violations and her ability to seek relief through due process in that, among other evidence, she filed a complaint in October 4, 2007 which was later withdrawn. A request to receive evidence prior to the applicable time period as necessary in order to understand the background of the case was granted.

<sup>2</sup> The original complaint was amended following a successful sufficiency challenge by the District.

P-169, P-170, P-171, P172, P-173, P-174, P-179, P-180, P-182, P-183, P-184, P-185, P-190, P-191, P-192, P-194, P-195, P-197, P-198, P-203, P-204, P-205, P-206, P-209, P-210, P-217, P-222, P-223, P-225, P-228, P-230, P-231, P-246, P-249, P-252, P-253, P-254, P-255, P-256, P-259, P-260

- c. Exhibits were submitted and accepted on behalf of the School 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-12, SD-14, SD-16, SD-17, SD-19, SD-20, SD-21, SD-22, SD-23, SD-24, SD-25, SD-26, SD-27, SD-28, SD-29, SD-30, SD-31, SD-36, SD-39, SD-40, SD-41, SD-42, SD-47, SD-49, SD-56, SD-57, SD-59, SD-61, SD-62, SD-63, SD-65, SD-66, SD-68, SD-69, SD-73, SD-86, SD-93, SD-94, SD-96, SD-102, SD-105, SD-107, SD-109, SD-122, SD-124, SD-125, SD-130, SD-134, SD-136, SD-139, SD-140, SD-142, SD-143, SD-145, SD-147, SD-148, SD-149, SD-150, SD-151, SD-152, SD-154, SD-155, SD-156, SD-157, SD-158, SD-159, SD-161, SD-162, SD-163, SD-164, SD-165, SD-166, SD-166A, SD-166B
- d. Exhibits were accepted by stipulation as follows:  
P-253, P-254, P-255, P-256, P-259, P-260

For the reasons that follow, I find in favor of the School District.

## **ISSUES**

The issues presented at this hearing included the following:

1. Did the District develop appropriate IEPs for Student that were reasonably calculated to provide meaningful educational benefit?
2. Did Student make meaningful educational progress?
3. Did the District violate parental procedural and participatory rights, and if so, did the violation rise to a substantive denial of a FAPE?
4. Whether compensatory education is appropriate (and, if so, how much and of what nature)?

## **STIPULATED FINDINGS OF FACT**

1. The Student is a student with a disability within the meaning of the Individuals with Disabilities Education Act, IDEA, 20 U.S.C. § 1401 due to identification as a child with Autism.
2. The Student resides with the Mother in the School District, “hereinafter referred to as the District”
3. The Student’s date of Birth is [redacted].

4. The District is a recipient of Federal Funds and is the LEA responsible for the delivery of a FAPE pursuant to Federal law.

## **FINDINGS OF FACT**

1. The Student's father resides in [another state]. He has shared legal custody and is a member of the Student's IEP team but does not possess physical custody or visitation rights. ( P 183; NT 508)
5. Prior to the Student's enrollment in the District Student participated in an early intervention program and was receiving wrap around services, including behavioral therapy, through [a] County MHMR. Student had been treated under this program for three years. (P-167; P-168; P-169; P-170; P -171; P- 172; SD- 1; SD- 8; SD-10)
6. The Student has significant deficits in language/communication skills; self help skills; social interaction and possesses a number of maladaptive behaviors requiring positive behavioral supports.
7. Mother attended a transition meeting in January 2006 with the District's Elementary School Special Education Supervisor, wherein mother outlined needs of the Student and offered documentation supporting behavioral, self care, social, language and communication needs. The District presented a Permission to Evaluate form which the Mother signed. (NT 42-48)
8. Pursuant to the Permission to Evaluate, an evaluation by the District's psychologist was required to be completed on or before April 27, 2006. (P-185)
9. The District's psychologist did not observe or evaluate the Student prior to April 27, 2006. Contact with the Mother was not initiated until on or about April 20, 2006. The subsequently issued evaluation report was based upon a review of records and assessments dated 2004 from the [redacted] County Intermediate Unit only. No current observation was conducted or assessment administered. (NT 48-51; SD 4)
10. A second records evaluation was performed by a second District psychologist, in July, 2006. The records included an independent evaluation that had been completed by Dr. S in May, 2006. (NT 52; SD 4; SD 12 ; SD 10) Dr. B's report included information regarding the Student's behavioral needs by and through referencing and incorporating Dr. S's report and conclusions; a report prepared by the District's speech

therapist; a report prepared by the District's occupational therapist and information from the first District psychologist.

11. At the IEP meetings held on July 28 and August 6, 2006 the IEP team reviewed the ER report and received information regarding the Student's behavioral needs from the Student's behavioral therapist. (NT 716; NT 1553; SD 13)
12. The District identified the Student's educational needs, as of August 6, 2006, to include full time autistic support classroom, occupational therapy, speech therapy and counseling services. SD 13. Student's educational program included improving pre-writing skills, visual motor control, self-care skills, self regulation and sensory integration (body awareness, motor planning, bilateral coordination, postural control). SD 13.
13. The August 6, 2006 IEP did not address any of the Student's behavioral needs. (NT 56, 58-59; SD 13)  
There was no plan to perform a functional behavioral assessment. (NT 59; SD 13; SD 17)
14. The August 6, 2006 IEP was not based upon the Student's individual needs. There was no individualized assessment of what strategies would work for the Student's needs. (NT 1369-1370; NT p 28-30, p 166-117, 122-123)
15. The autistic support classroom in which the Student was placed was designed with specially designed instruction intended to be globally applied and included a generic list of strategies applicable to meet the needs of all students in the District's Autistic Support Program.
16. The District established an Autistic Support Team made up of all professionals and para- professionals connected with intervention/instruction of students within the autistic support class. This team met with regularity in order to discuss global programmatic as well as student specific issues with the goal of refining the program and increasing instructional consistency.

17. Within days of the beginning of the 2006/2007 school year the Student was having serious behavioral issues including dangerous behavior while on the van to and from school. (NT 62-63; SD 17; NT 61; NT p 32-33; P 210)
18. The subsequent meeting held by the District to develop behavioral strategies to address the Student's aggressive behaviors was not supported by a functional behavior assessment nor was the developed plan based on any individually assessed strategies.
19. The District placed a 1:1 aide on the van to support the behavioral needs of the Student; however the aide was not given training. The van driver threatened to take the [children] on the van to the police station if they did not behave. (NT87)
20. The District identified "Behaviors that impede [Student's] learning or that of others" as a special consideration in the Student's IEP however did not perform a required Functional Behavior Analysis.
21. The goals and objectives in the Student's March 23, 2007 emulated the preceding IEP with the exception of the addition of an appended Behavior Improvement Plan. (SD 13; 22)
22. The IEP stated that the Student would receive speech therapy "3 times a week for 30 minutes/session. Speech sessions cannot be made-up when clinician absence, student absence, school program or closing interferes with scheduled times." (SD 22)
23. The IEP did not provide adequate related services and failed to remediate loss of service due to unavailability of the clinician (SD 22)
24. The Student attended an ESY program following the 2006/2007 school year during which Student demonstrated continued behavior problems including elopement.
25. The District routinely scheduled IEP meetings with unreasonable notice (e.g. invitation dated 9/20/09 for a 9/24/09 meeting) or was unreasonably inflexible (e.g. demanding prescheduled meeting be held the day [a family member] died).

26. The Student continued to demonstrate significant behavior problems on the van and in the classroom. ( NT 1557, 1558, 1561). The District did not keep data sufficient to know what precipitated a behavior; how long the behavior was sustained; what method was used to de escalate a behavior; how or why it would chose an intervention. Behaviors included hitting, kicking, screaming and verbal aggressions (NT 110-112; NT 559-565; 1496; P 209; SD 155)
27. The Student required a TSS during the school day and behavior showed some improvement when the TSS was with Student. (NT 1565; 1582; P 191) The TSS recorded data on the Student's behaviors.
28. In November, 2007, the District requested continued TSS hours. A treatment team meeting was held at the District to discuss the need for TSS hours on November 7, 2007.
29. The TSS left her position on December 18, 2007, just before the Winter Break/Christmas holiday from school. NT 1594-1595. A new TSS worker was being introduced on January 16, 2008 however the District said the TSS was no longer needed. (NT 1506; 1507; 1595).
30. The District unilaterally determined that there would be no TSS permitted to assist the Student during the school day. There was no notice to Mother or the Behavior Specialist nor was there an IEP meeting convened to consider the appropriateness of the decision. (NT 101-102; P 195)
31. Although the District discontinued TSS services, the Student had available 1:1 support which was utilized most of the school day. (NT 1643).
32. Although communications were often threatening and even legal in nature, communications between the parties were frequent. (SD 3; 26; 27; 28; 31; 33; 34; 35; 36; 37; 38; 39; 41; 42; 43;44;45; 46; 47; 51; 52; 53; 54; 55; 56;57; 58; 59; 60; 61; 61; 63; 67; 68; 69; 70; 71; 72; 73; 75; 76; 77; 78; 79; 80; 81; 83; 86; 89; 94;95; 105; 121;122; 123; 140; 148; 154; 155; 158; 159; P 182; 183; 188; 192; 193; 195; 194; 210; 214; 215; 216; 217; 218).
33. The District was hostile to Parent. (SD-59; SD-64; SD-69; SD-83; P-222; P-194; NT113; NT133; NT557-558)

34. Parent was hostile to the District. (SD-59; SD-64; SD-69; SD-83; P-222; P-194; NT113; NT133; NT557-558)
35. At some unidentified and unknown number of times the Student was physically restrained by District staff. The District did not notify Mother of the restraints. Mother did not agree that the District could physically restrain the Student. (NT p 108, 111, 114; NT 1441, 1445; SD 13; SD 17; SD 19; SD 22; SD 65; SD 147)
36. The District did not convene an IEP following restraints performed on the Student.
37. The District, mostly by the school principal, restrained the Student several times during the 2006/2007 and 2007/2008 school year. (NT 260)
38. Restraints were performed without any policy or procedure written or otherwise. (NT 565; NT569; NT574)
39. Restraints were performed by individuals who were not trained in any crisis prevention intervention procedures. (P-222)
40. Parent had knowledge of the potential use of restraint by February 2008. (NT 113; P 194)
41. IEP meetings were not convened following the incidence of the application of a restraint. (NT 335-337). Notice to the parent regarding application of restraint was inconsistent.
42. Following application of one of the restraints the Student was treated and released from medical treatment at a local hospital for strain.
43. The IEP dated April 16, 2008 enunciated academic and behavioral goals which were objective, measurable and reasonably calculated to confer meaningful educational benefit; and sufficiently outlined present levels of academic and behavioral performance. (SD150)
44. The District presented a plethora of evidence involving behavior charts, data collection forms, behavior plans. (SD17, SD19, SD22, SD44, SD155, SD157, SD165, P167, P198-202, P204-206.
45. The Student did not achieve meaningful progress behaviorally during the 2006/2007 school year or during the 2007 ESY program.



46. A due process complaint was originally filed on October 4, 2006 and was withdrawn in February, 2007 for financial reasons.
47. An IEP meeting was held on April 16, 2008 notwithstanding Mother's request for a new IEP date due to [a family member's] death the day before. Mother was extremely upset and distraught. (NT 1601)
48. The District obtained Father's signature only on the NOREP on April 16, 2008 and began to implement the IEP notwithstanding Mother's rejection of the IEP.
49. The IEP dated April 16, 2008 included objectively measurable academic and behavioral goals reflecting expected percentages of performance and noting data collecting procedures. Current levels of performance were outlined and provided a basis for the formulation of the long and short term goals. The IEP also included statements regarding the Student's inclusion with same age peers. (SD147)
50. The student made adequate progress behaviorally and academically in the 2007/2008 school year (SD150, SD155, SD165, SD 167; NT 1506; 1507; 1509).
51. The Student did not require specialized instruction in Math or Reading and was taught utilizing the regular curriculum. ( SD 147; 1486; 1487; NT 1512)
52. The Student demonstrated an overall average of 70 - 100 % mastery of academic goals by April of 2008. (SD 147; NT 978; 979; 1109; 1471;
53. The Student was at or near grade level in most academic domains by April of 2008. (SD147; NT 1457;)
54. The District filed a criminal complaint against Mother on May 30, 2008. P122.
55. Mother enrolled the Student in the Cyber School for the 2008/2009 school year.
56. In September 2008 District employees testified on behalf of Father in a custody action in the [redacted] County Court of Common Pleas. P 259; P260.
57. Mother reported the District's physical restraint of the Student to the police. NT 133-135; P 197.

58. Contemporaneous data corroborated the teacher's testimony regarding data collection procedures and the reduction of targeted behaviors. (SD 167).

59. Data collection summarized in the Behavior Improvement Plan appended the April 2008 IEP demonstrated a significant reduction in "incidents of aggression": 1.5 per week in April 2008 down from a high of 4.83. (sd 147; NT 1479)

## **DISCUSSION AND CONCLUSION OF LAW**

### **Burden of Proof**

A parent who believes that a school has failed to provide a FAPE may request a 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 school district. *Schaffer v. Weast* U.S., 126 S. Ct.528, 163L. Ed.2d 387 (2005). *In Re J.L and the Ambridge Area School District, Special Education Opinion No. 1763 (2006)*. Because a 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 United States 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*, 546 U.S. 49, 126 S.Ct. 528

(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. That party in this case is the District. For the reasons more fully set forth below, the Parent has failed to meet her burden and; thus, this decision is in favor of the District.

### **The Right to a Free and Appropriate Public Education**

The Individuals with Disabilities Education Act (“IDEA”) requires that a state receiving federal education funding provide a “Free Appropriate Public Education” (“FAPE”) to disabled children. 20 U.S.C. § 1412(a)(1). In Pennsylvania, the Commonwealth has delegated the responsibility for the provision of a FAPE to its local school districts. By Stipulation, the parties acknowledge the District’s receipt of Federal funds and its obligation under Federal law to provide this student with a FAPE (Stipulated finding # 4).

***Did the District develop appropriate IEPs for the Student which was reasonably calculated to provide meaningful educational benefit?***

The statutory obligation to provide for the educational needs of children with disabilities was recently summarized by the Court of Appeals for the 3<sup>rd</sup> Circuit as follows:

The Individuals with Disabilities Education Act (“IDEA”) requires that a state receiving federal education funding provide a “free appropriate public education” (“FAPE”) to disabled children. 20 U.S.C. § 1412(a)(1). School districts provide a FAPE by designing and administering a program of individualized instruction that is set forth in an Individualized Education Plan (“IEP”). 20 U.S.C. § 1414(d). The IEP “must be ‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’ ” *Shore Reg’l High Sch. Bd. of Ed. v. P.S.*, 381 F.3d 194, 198 (3d Cir.2004) (*quoting Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182-85 (3d Cir.1988)).

*Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3<sup>rd</sup> Cir. 2009)

The centerpiece for the implementation of FAPE is the IEP. *S.H. v. State-Operated Sch. Dist. of the City of Newark*, 336 F.3d 260, 264 (3d Cir.2003). The IEP consists of a detailed written statement developed for each child summarizing the child’s abilities, how the disability affects performance, and measurable annual goals. *Id.*

The IEP specifies the special education services and supplementary aids the school will provide the child, explaining how these will allow the child to progress. *Id. Damian J. v. School District of Philadelphia*, 2008 WL 191176 (E.D.Pa. Jan. 22, 2008) at \*1, FN.2. School districts provide a FAPE by designing and administering a program of individualized instruction that is set forth in an Individualized Education Plan (“IEP”). 20 U.S.C. § 1414(d). One of the assertions of the Parent is that the District failed to individualize its program to the needs of the Student and rather designed a template program of specialized instruction applicable to the entire classroom. The classroom teacher and classroom aide testified that many of the visual supports and specially designed instruction applied to the entire classroom . This testimony would seem to support the Parent’s suspicion, however there was nothing in the evidence demonstrating that the particular interventions which were utilized for many of the students in the classroom were not equally effective for this student. In fact many of the strategies identified as effective for this student are widely accepted best practices for many students on the spectrum (e.g. task analysis; priming; pictorial schedules; visual supports; schedules and systems of reinforcement) ( SD 147). Particular individualization is clearly evident (SD 147). Although the annual goals remain similarly drafted over the two applicable IEP’s , the benchmarks closely and accurately reflect stated progress and incorporated and advanced the student’s present levels of performance. (SD 147).

Additionally, a legally sufficient IEP must contain a statement of the special education and related services and supplementary aids and services to be provided to the child...and a statement of the program modifications or supports for school personnel that will be provided for the child to advance appropriately toward attaining the annual goals (and) to be involved and progress in the general curriculum...and to be educated and participate with other children with disabilities and nondisabled children; an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class... CFR §300.347(a)(1) through (4). The IEP’s from 7/26/06 and 3/23/07 are substantively duplicative with the exception of an added “BIP” Behavior Improvement Plan (hereinafter referred to as a “BIP”). Although this BIP appears to be a template and is devoid of baseline data and unsupported by a Functional Behavior assessment, the increase in the District’s attention to the

behavioral needs of the student is appreciable and notable. (SD 13; 22). Annual goals in the 2007 IEP continue to lack objective measurability. At this point in the student's tenure at the District, the comparative evidence demonstrates the District's continued efforts to acquire didactic knowledge but is clearly lacking in applied competencies. Again, liability for a failure of a FAPE, if any, during this period falls outside the period applicable to this hearing. (see footnote #1).

The IEP at issue is the most thorough of all of the District IEP's written for this student. While improvement in a District's IEP writing ability is not a factor for consideration in determining the sufficiency of an IEP, appreciable differences in IEP's is demonstrable of the District's attention to individualization, specificity and objectivity. The student's IEP contains enumerated frequencies of implementation of interventions/SDI's and services, is objectively measurable citing expected percentages of performance and noting data collection procedures (specificity of data collection methodologies, however, is lacking). Details for including the student with same age peers is noted and the frequency of exposure is recommended to be increased.

Finally, the IEP "must be 'reasonably calculated' to enable the child to receive 'meaningful educational benefits' in light of the student's 'intellectual potential.'" Shore Reg'l High Sch. Bd. of Ed. v. P.S., 381 F.3d 194, 198 (3d Cir.2004) (quoting Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 182-85 (3d Cir.1988)). 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). Evidence of academic and behavioral progress in the year preceding the student's withdraw from the District was uncontroverted by the Parent and was, in fact, supported by Parent's own witnesses (NT 1610-1636). The student's academic progress averaged between 70 – 100 per cent in mastery of goals from the preceding IEP to the current and testing placed Student at the lower end of grade level on most assessments at the end of first grade in math, language arts, and speech. (SD 34; 48; 93; 147; 167; P 203 NT 990,

1443, 1470-1479; ). Behaviorally, progress was slower with aggressions decreasing only, on average, by one episode per week, however the District was slow in implementing a proper behavior plan<sup>3</sup>. (SD147, NT 983-1009). The Behavior consultant testified that, by the time the TSS services ceased,<sup>4</sup> episodes of aggression had declined even further. (NT 1610). Even if behavioral progress is deemed minimal, failure to make minimal progress in one area does not constitute a denial of FAPE. In Re Casey S., Pa. SEA No.1364 at 3-4 (June 4, 2003).

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). The purpose of the IEP is not to provide the “best” education. The IEP simply must propose an appropriate education for the child. Fuhrman v. East Hanover Bd. of Educ., 993 F. 2d 1031 (3d Cir. 1993). (See also Board of Education v. Murphysboro v. Illinois Bd. of Educ., 41 F.3d 1162 (7<sup>th</sup> Cir. 1994) (Under the IDEA a District must follow the procedures set forth in the act, and develop an IEP through procedures reasonably calculated to enable the child to receive educational benefits. Once the district has done this the court cannot require more; the purpose of the IDEA is to open the door of public education to handicapped children, not to educate a child to his/her highest potential), citing Rowley, 458 U.S. at 206-07.)

The District’s assertion of a provision of a FAPE at the floor of opportunity required by the law, is supported by the record and demonstrated in the progress made by the student, in both academic and behavioral domains, and is uncontroverted by the Parent.

***Did the District violate parental procedural and participatory rights, and if so, did the violation rise to a substantive denial of a FAPE?***

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 FAPE in order to hold the district responsible for any procedural glitches--such as the instant issue of

---

<sup>3</sup> The window of scrutiny is so narrow that it is difficult to predict whether the behavioral interventions, without further development and sophistication by the District would stand the test of time.

<sup>4</sup> Although, following a gap in the provision of TSS service resulting from an inability to staff the position, the District elected to discontinue TSS support, 1:1 support for the student was maintained. (NT 1643)

difficulty with delivering related services.

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 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.

Here it is important to make the distinction between *significantly impeding* a parent's opportunity to participate in the decision-making process regarding the provision of a FAPE and *retaliation*<sup>5</sup>. Much of the evidence presented by the parent in seeking to make a claim that she was precluded from meaningful participation in the IEP process was tantamount to harassment and retaliation<sup>6</sup> rather than establishing an impediment to participate or failure to provide information. Interestingly, notwithstanding how reprehensible the conduct of both parties became<sup>7</sup>, meetings were conducted, correspondence exchanged and requests for information complied with. The District even adapted data collection sheets and daily logs and schedules as discussions evolved in an attempt to provide increasing amounts of requested information. (*compare* P 190; 207; 210;) (SD 105; 154; 155; 156; SD 3; 26; 27; 28; 31; 33; 34; 35; 36; 37; 38; 39; 41; 42; 43;44;45; 46; 47; 51; 52; 53; 54; 55; 56;57; 58; 59; 60; 61; 61; 63; 67; 68; 69; 70; 71; 72; 73; 75; 76; 77; 78; 79; 80; 81; 83; 86; 89; 94;95; 105; 121;122; 123;

---

<sup>5</sup> Notwithstanding Counsel to Parent's representation during a pre-hearing conference that a claim for retaliation was **not** a claim being made in this proceeding, counsel made a Motion during the third session to include a claim for retaliation. Following argument, a determination was made that a claim for retaliation was not raised in either the originally filed or amended complaint and could not be raised pursuant to section 501 (i) of the Due Process hearing Manual. (SD166; NT 485-507)

<sup>6</sup> A finding that the District retaliated against the Parent is not made here and consideration of such a claim was expressly precluded in this proceeding as not properly raised.

<sup>7</sup> The historical course of conduct by both of the parties as well as their conduct during these proceedings is a circumstance that cannot escape comment. While the emotional and highly charged and intense nature of parenting and educating a child with challenges is acknowledged, the extent to which the parties allowed their adversarial relationship to escalate is unparalleled.

140; 148; 154; 155; 158; 159; P 182; 183; 188; 192; 193; 195; 194; 210; 214; 215; 216; 217; 218; NT 548-549;554;709;727; 788-789; 828-829;-835; 994;).

Further the District asserts that, even if the District did not provide the level of detail desired by the Parent, they are not required to share a level of detail rising to the provision of curricula, lesson plans or explanations regarding how lessons are taught. Although the District is legally correct, perhaps it is this attitude that contributed to the perceived communication issues on the part of the Parent.<sup>8</sup> { *See, e.g., A.K. v. Alexandria City Sch. Bd.*, 409 F.Supp. 2d 689, 693-94 (E.D. Va. 2005) (rejecting parents' argument that they were unable to have meaningful participation in the IEP process based on, among others, that "specific programs were not disclosed by [the school] at the IEP meeting," and that "no clear picture had been presented as to what services were available and how they [would] be provided to A.K."). *In re Matthew K.*, Pa. SEA No. 1329 (2003) ("IEPs are not lesson plans and should be practicable, efficient documents."); *In re Matthew F.*, Pa. SEA No. 1306 at 10 (holding the IEP does not need to resemble a detailed set of lesson plans, something that is far beyond the legal requirement); *In re Scott C.*, Pa. SEA No. 1108 (2001) ("The IEP is not a lesson plan and Scott's IEP need not rise to that level."); *In re Aisha C.*, Pa. SEA No. 1088 ("The parent is reminded that the IEP is not a teaching plan, nor a curriculum. It is a plan for specially designed instruction and related services.) I do not find that the parent was impeded from participating in the process and in any event, no deprivation of a FAPE resulted from the communication difficulties real or perceived.

***Whether compensatory education is appropriate (and, if so, how much and of what nature)?***

Although 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 Student in this matter has been found to have made progress that was more than trivial during the applicable time frame covered by this proceeding. Therefore, compensatory education is not an available remedy. *Ridgewood Board of Education v. M.E. ex.rel. M.E.*, 172 F.3d 238 (3d

---

<sup>8</sup> The testimony of the Parents advocate would seem to support this theory in that she testified to the "many basic miscommunications and misunderstandings between the parties". (NT557)



## **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.<sup>9</sup> 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 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 only forum in which the witnesses will be appearing in person. Although the credibility of all witnesses was carefully considered, the credibility of certain witnesses is specifically commented upon.

Not surprisingly, the credibility of the School Principal, Supervisor and the Mother were equally tainted by, not only the reciprocal filing of criminal complaints against each other, but also by the verbal and non-verbal expressions of their obvious disdain for each other during the hearing<sup>10</sup>.

Although the testimony of the Father was sincere and heartfelt, little credibility could be ascribed to his opinions as he has not had interaction with or observation of the student for some time and was apparently relying

---

<sup>9</sup> 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).

<sup>10</sup> Both parties were cautioned several times during the hearing regarding inappropriate conduct. Following several instances of verbal and non-verbal aggressions against each other, notwithstanding the request to maintain a dispassionate and respectful proceeding, both parties were informed that all would be removed from the hearing room at the next outburst. (see e.g. NT 1314,1315).

blindly upon the representations of District personnel. It is also of note that District personnel testified on Father's behalf during a custody proceeding involving the Student's Mother and Father.<sup>11</sup>

Most of the relevant testimony was elicited from the classroom teacher and classroom aide who were able to outline the foundation of the class and speak to the specific modifications applied to this student. Each was forthcoming with both the strengths and limitations of their own professional expertise as well as the program and the student. Their constant attention and interest in further improving programming was evident and, perhaps, in light of the complete disenfranchisement between the administrators and parent, the factor resulting in the progress achieved.

Particularly pivotal credible testimony was offered by the Parent's Behavior Specialist who had worked with the student the longest and possessed the most autism specific training of any of the individuals testifying. The Behavior Consultant was found to be experienced and very knowledgeable with regard to developing, coordinating and implementing Student's behavioral program. Her sincere and sensitive understanding of Student's educational needs and the antecedents to and the consistent implementation of the positive intervention plan to control of Student's behaviors, made her credible in her assessments of progress within the District program.

Although her testimony highlighted what this Hearing Officer agrees are a number of areas in which the District made mistakes/could have orchestrated change better, and was not particularly forthcoming or cooperative, she clearly indicated that the student was making progress. (NT 1610; 1619; 1636).

## **CONCLUSION**

Seven full day hearing sessions, over 1,700 pages of testimony and hundreds of pages of exhibits belies the straightforward legal analysis regarding the minimum threshold necessary for the District to meet its responsibility under the law. The factual presentation of this case was constantly overshadowed and burdened by the parties' inability to conduct themselves appropriately and through the introduction of evidence of their past

---

<sup>11</sup> Although father shared legal custody with the Student's Mother, the father had no physical custody or visitation rights to the Student. (P186).

personal and legal entanglements. As the District's evidence of progress, both academically and behaviorally was uncontroverted, the Parent has not met the burden of proof necessary. Accordingly, I find in favor of the District

### **ORDER**

In accordance with the forgoing findings of fact and conclusion of law, the District provided a FAPE to the Student for the period of January 16, 2008 until Student was removed from the District through the provision of a legally sufficient IEP which was reasonably calculated to render meaningful progress and, in fact, resulted in progress that was more than trivial.

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: October 3, 2010

*Gloria M. Satriale*

Gloria M. Satriale, Esquire

Special Education Hearing Officer