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.

IN THE PENNSYLVANIA OFFICE FOR DISPUTE RESOLUTION

DECISION AND ORDER

ODR No. 01539-1011 AS

Child's Name: M.M.
Date of Birth: [redacted]

Dates of Hearing:
December 10, 2010; February 3, 2011; February 4, 2011; February 9, 2011

OPEN HEARING

Parties to the Hearing:	Representative:
Parent[s]	Sonja Kerr, Esquire Public Interest Law Center of Philadelphia 1709 Benjamin Franklin Parkway, 2nd Floor Philadelphia, PA 19103
The School District of Philadelphia	Jennifer Nestle, Esquire Assistant General Counsel School District of Philadelphia 440 North Broad Street, Suite 313

Date Record Closed: March 25, 2011
Date of Decision: April 15, 2011[1]

Hearing Officer: Brian Jason Ford, Esquire

INTRODUCTION

This due process hearing was requested by the Parent on behalf of her child, the Student, against the District on September 10, 2010.[2] The Parent raises a number of issues, described below, all of which arise under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq. (IDEA). In general, the Parent alleges that the

[1] Decision deadline extended upon the request and consent of the parties to address potential post-hearing motions.
[2] Except for the caption of this Decision and Order, all identifying information about the Student, including age, gender and school, have been omitted in favor of generic terms. This is done to protect the Student's privacy - despite the fact that this was an open hearing.

Student has spent years outside of the neighborhood school in a highly restrictive, over enrolled Autistic Support (AS) classroom. That classroom, which is the only AS classroom in the Student's school building, is supposed to serve students between kindergarten and second grade. After second grade, students are transferred to different school buildings that house AS classrooms that range from third to fifth grade. This process is known as "upper leveling" and is done without IEP team participation. Placement decisions are made and parents are informed after the fact. Non-disabled students normally attend the Student's school building from kindergarten through eighth grade.

It so happens that the Parent believes that the Student's AS teacher is a remarkably good teacher. By all accounts, she is. The Parent opposes any effort to remove the Student from that teacher's classroom while simultaneously arguing that the classroom should not be over enrolled and that the Student should have greater opportunities for inclusion. Despite the teacher's good faith efforts, the Parent contends that over-enrollment and lack of inclusion have deprived the Student of FAPE. The Parent also contends that the upper leveling process, as applied to the Student and Parent, violates the IDEA.

Issues concerning the upper leveling process and the classroom's over-enrollment in this case are substantively identical to claims raised by another parent, represented by the same attorney, in a different case - ODR No. 01541-1011 AS. After considerable pre-hearing discussions, it was determined that the two cases would be heard together so that identical evidence and testimony need not be presented twice. The Parent's explicit consent to this procedure must be noted.

ISSUES

The following issues were presented for the Hearing Officer's consideration:

1. May the District transfer the Student out of the Student's current Autistic Support classroom to an Autistic support classroom in another school building?
2. Should the Student's educational program be altered to provide greater and meaningful opportunities for inclusion with non-disabled peers?
3. Must the District increase supports and staff training in the school building that the Student currently attends to enable the Student's continued enrollment with greater opportunities for inclusion?
4. Is the Student entitled to compensatory education to remedy a denial of a free appropriate public education from September of 2008 through the present?

In the Complaint, the Parent also seeks a finding that the District has deliberately misled the Pennsylvania Department of Education (PDE) with regard to inclusionary practices in the school that the Student currently attends. The Student and Parent's standing to bring claims concerning the District's reports to PDE that do not specifically concern the Student is tenuous. Regardless, throughout this hearing, the Hearing Officer has been clear and consistent that only claims regarding this Student's and Parent's rights under special education laws would be considered.

FINDINGS OF FACT

OVER-ENROLLMENT

Student is a third grade student who currently attends an Autistic Support (AS) classroom in one of the District's elementary schools.

The District serves students on the Autism spectrum, in part, though AS classrooms. These classrooms generally break into classrooms for students who, age-wise, are in kindergarten through second grade (K-2 AS classroom), and then for students who are in third through fifth grade (3-5 AS classroom).

The elementary school that the Student attends houses a K-2 AS classroom, but not a 3-5 AS classroom. The K-2 AS classroom is the only AS classroom in the elementary school that the Student attends. N.T. 102, 107-108.

During this due process hearing, evidence and testimony was presented regarding investigations by the Pennsylvania Department of Education, Bureau of Special Education (PDE/BSE) into the AS classroom's over-enrollment. There is considerable evidence that the District was less than forthright with PDE/BSE in reporting the actions that it took to bring caseloads into compliance. *See e.g.* J-2, N.T. 413-416. The investigation was the result of another parent's complaints to PDE/BSE. That other parent testified, but had little to offer about the Student specifically. Further, PDE/BSE's efforts to ensure compliance with special education laws are beyond the hearing officer's jurisdiction and the District stipulated that the classroom was over enrolled. The hearing officer's task is to determine if the Student was denied FAPE as a result of the over-enrollment (among other things). Facts relating to the over-enrollment were presented for this purpose.

Similarly, testimony was presented by both the District and a representative of the Philadelphia Right to Education Task Force concerning concerns that were raised about over-enrollment and about how the District structures its AS programs. Although this background knowledge is helpful, in terms of the individual Student's right to FAPE, it is not probative. The questions in this case concern whether the Student has been denied FAPE - not whether the District's AS programs as a whole are structurally flawed. The structure of the District's AS program, both in terms of over-enrollment and "upper leveling" (described below) are relevant only to the extent that they impact upon the Student's rights under the IDEA on an as applied basis.

Caseloads in full-time and supplemental AS classrooms are limited to eight students. 22 PA Code § 14.105(c)(2). The Student spends nearly the entire day in the AS classroom. There is only one teacher assigned to the AS classroom. Consequently, the maximum number of students that may be enrolled in the AS classroom is eight.

The K-2 AS classroom in the elementary school that the Student attends has been over enrolled since the 2008-2009 school year through the present. N.T. 110, 672. At times, there have been as many as 11 students assigned to the AS classroom. Currently, 10 students are enrolled in the AS classroom.

The principal of the elementary school that the Student attends does not have training in special education in general or inclusion in particular. The principal defers to special education administrators regarding special education matters. N.T. 270-272. Nevertheless, the principal understood that the AS classroom in his building was over enrolled, but had no authority to hire additional aides. N.T 279. The principal made no request that the District stop sending students to the over enrolled classroom, and has no authority to stop the flow of students. N.T. 218.

The primary teacher in the AS classroom expressed serious concerns about the class' over-enrollment to her superiors in the fall of 2008. There were 10 students in the classroom at that time. N.T. 110-113. When the class size increased again during the 2008-2009 school year, the teacher expressed her concerns again to the building principal, explaining that over-enrollment was detrimental to the students. N.T. 121-124. During the same period of time, the teacher received assistance from untrained, non-professional employees (a non-pejorative term of art) and volunteers, whose presence did not contribute to the Student's education. N.T. 125. In the words of the primary teacher, during this time she was "spread too thin." N.T. 128.

The AS classroom in the elementary school that the Student attends is taught by one teacher. A second teacher was hired at the start of the 2009-2010 school year, but she left about one month after starting. J-2 at 47. A replacement was not hired. N.T. 285-287. Moreover, during her brief stay, the second teacher was asked to substitute in other classrooms. J-4, N.T. 75. Although the second teacher gave glowing testimony about the primary AS classroom teacher (as did all witnesses), the second teacher resigned in disgust over conditions in the classroom and what were perceived as administrative roadblocks to providing adequate instruction. *See* N.T. 77, 83.

While the second teacher was hired, the District divided the students in the room onto each teacher's caseload. However, the second teacher was out of the AS classroom more than she was in it. N.T. 177-179. There is no evidence to suggest that the Student benefited from the second teacher's presence, or that the second teacher altered the impact of over-enrollment in any way.

During both the 2008-2009 and 2009-2010 school year, the Student did not spend time in regular education despite the fact that the Student's IEP called for 8.39 and 9.08 hours per week in regular education, respectively, in each year. J-1, N.T. 84-94, 183-198. During this time, there was inadequate staffing to support the Student in regular education. *Id.* Similarly, the Student did not participate in physical education after an ad hoc, uncoordinated attempt to send the student to gym class failed. N.T. 194-198.

Despite the foregoing, the Student's primary AS teacher testified that the Student is making progress, albeit less progress than the Student could make if the class was not over enrolled. N.T. 413-416.

As a result of the communications between the District and PDE/BSE, the District offered 50 hours of compensatory education to the Student via a Notice of Recommended Educational Placement (NOREP). These hours were restricted to supplemental autistic support during the summer of 2010. J-1. Believing both that the offered level of support was inadequate to enable the Student's participation in the summer, and that the offered compensatory education was an inadequate remedy for the harm suffered as a result of the over-enrollment, the Parent rejected the NOREP.

"UPPER LEVELING" PRACTICES

If students who attend the elementary school that the Student attends require an AS classroom after second grade, they are transferred to a school that houses a 3-5 AS classroom. N.T. 478.

Not all students who transfer out of the elementary school that the Student attends into a 3-5 AS classroom are transferred to the same school building. Instead, placement decisions are based on a number of factors, the most significant of which is total classroom enrollment.

When a student in the District reaches the end of his or her building age level, he or she is moved to another building. This process is referred to as "upper leveling." N.T. 675.

In the elementary school that the Student attends, non-disabled children start in kindergarten and transfer to another building after fifth grade unless the family moves, the parents request a building transfer or the student is moved for disciplinary reasons. N.T. 675-676.

In contrast, in the elementary school that the Student attends, students who require the support of an AS classroom are upper leveled after second grade because there is no 3-5 AS classroom in that building. N.T. 676.

The Student's Individualized Education Program (IEP) team met at the end of the 2009-2010 (2nd grade) year. The IEP team concluded that the Student continued to require placement in an AS classroom. The IEP team did not discuss the Student's building assignment.

The District's Executive Director (Director) of the Office of Specialized Instructional Services (OSIS) is one of the highest level administrators charged with the implementation of the District's special education policies - reporting only to the Deputy Chief of the OSIS, the Chief Academic Officer and (presumably) the Superintendent. N.T. 467-468.

The Director explained that the District's practice is that IEP teams do not make building placement determinations. Rather, IEP teams develop IEPs by examining students' present educational levels, setting goals and determining what complement of special education programs students need. After IEPs are drafted, the District issues a NOREP. The NOREP contains a form that parents use to either approve or disapprove the IEP and, if disapproving, select a form of dispute resolution. A building assignment is then made *after* parents approve the NOREP. N.T. 484-493.

The building assignment is not made by a student's IEP team and parents are not involved in the process. Rather, the District's divisional directors make the building assignment "pretty much unilaterally" and inform parents of their decisions by letter shortly before the start of the school year. *Id,* N.T. 547. Neither a NOREP nor a procedural safeguards letter is sent at this time. *Id.*

Both IEPs and NOREPs specify the building that the Student is assigned to. The Director explained that those indicators refer only to the students' building assignment at the time that the documents are generated.

The Student's IEP indicates assignment to an AS classroom at the supplemental level, meaning that the Student should receive special education supports and services provided by special education personnel for less than 80% but more than 20% of the school day. 22 PA Code § 14.105(c)(1)(iii). However, upon reviewing the IEP, the Director concluded that the Student's IEP should have classified the Student's placement as full-time AS because the Student is spending more than 80% of the school day in the AS classroom. N.T. 530-531. Consistently, the Director testified that it would be inappropriate to count the amount of time that a student spends in a hallway moving from class to class as time in regular education. N.T. 551. Rather, these calculations are made by comparing the amount of time that a student actually receives regular education instruction to the amount of time that a student actually receives special education instruction. Unfortunately, it appears that individuals charged with drafting the Student's IEP did not understand this which, perhaps, led to the inaccurate designation on the Student's IEP. Regardless, whatever the reason, the designation was wrong.

EDUCATIONAL PROGRESS

1. The Student was first evaluated for early intervention (EI) services in January of 2006 and was found eligible as a student at that time. J-1.

2. The Student's first school-aged evaluation is dated May 11, 2007. At that time, the District listed the Student's primary disability category as Mental Retardation (MR) with a secondary disability category of Speech/Language Impairment. More specifically, the evaluation report notes that, "[f]or educational purposes, [Student] should be classified as an educable, mentally retarded child with autistic

characteristics." J-1, pp. 37-43. Reading the term "*educable*, mentally retarded" in a document drafted in 2007 is disquieting.

3. For kindergarten, the Student was assigned to an elementary school that is described in documents as the Student's neighborhood school. *See* J-1 at 39. The District contends, and the Hearing Officer finds, that the kindergarten school is the Student's neighborhood school, despite some testimony suggesting that the student actually lives closer to another elementary school. *See* N.T. 199-200. The Student's first school-aged IEP and NOREP were drafted at the propertied neighborhood school on September 19, 2007. This IEP calls for 8.39 hours per week in regular education and establishes seven annual goals for the student. J-1 at 54-72.

4. The Student was reevaluated at the neighborhood school in May of 2008 (May 2008 RR) and [Student's] disability category was changed to Autism with a secondary disability of Speech or Language Impairment. J-1 at 82-92. After the May 2008 RR, a new IEP and NOREP were issued, recommending placement in an AS classroom, with 8.39 hours per week in a regular education classroom. The Parent approved the NOREP on June 8, 2008. J-1 at 93-94. This IEP identified 14 annual goals for the Student. J-1 at 93-128.

5. The District avers that there is no AS classroom in the Student's neighborhood school; there is no evidence to the contrary. The Student was transferred to the elementary school that the Student currently attends, and was placed in an AS classroom per the IEP in September of 2008 for first grade. J-1 at 134.

6. Progress reports for the Student were generated in kindergarten, but were not shared with the AS classroom teacher (the same teacher taught the student in the AS classroom in first and second grade). N.T. 370; J-1 at 74-75.

7. The IEP drafted after the May 2008 RR followed the student from the Student's kindergarten school building to the school that the Student currently attends, and the AS classroom teacher attempted to implement that IEP. However, the teacher believed that the IEP was "shooting pretty low" for the Student. Moreover, the teacher did not understand some parts of the IEP due to confusing and poorly drafted goals. When the teacher was given the kindergarten progress report, she testified that the Student's presentation at the start of first grade did not match the report. N.T. 372-395. In terms of demeanor at the hearing, it is clear that the teacher wanted to put some distance between herself and the IEP that followed the Student into her classroom.

8. The Student met the behavioral objective of not having temper tantrums almost immediately at the start of the 2008-2009 school year. N.T. 385-389.

9. There is scant documentation concerning the Student's progress during the 2008-2009 school year, and what little there is is not objective. *See* J-2 at 143-149. However, the Student's teacher was candid and forthright about the progress that

she observed during this time. The Hearing Officer found the teacher to be highly credible and deserving of the high regard in which *both the Parent and the District* hold her. The teacher testified that the Student could count through 20 and possibly 30, write lowercase letters, exhibited few classroom behaviors and made gradual improvements globally. N.T. 248-253.

10. The Student met 11 out of 14 annual goals during the 2008-2009 school year, but these goals targeted 50% to 70% mastery. J-1 at 143-151. As such, a report that goals were met does not indicate that the Student made meaningful progress.

11. Some of the progress that the teacher observed was based on her work on a one-to-one (1:1) basis with the Student, despite the fact that the teacher felt that there was no way to indicate the Student's need for 1:1 support in the IEP at that time, and despite the fact that she could not work with other students in the over enrolled classroom while she provided 1:1 instruction to the Student. N.T. 254-255; 398-399.

12. The teacher testified that the Student would require an aide for any type of inclusionary education, but that the Student has never had an aide. Consequently, the Student spent almost no time outside of the AS classroom in first grade. N.T. 353-355, 405.

13. A new IEP was prepared for the Student in May of 2009 and implemented with the Parent's approval at the end of the Student's first grade year. *See* N.T. 253, J-1, 160. The AS classroom teacher, who was the principal author of that IEP, testified that the present education levels in the May 2009 IEP were accurate. *Id.*

14. A new IEP and NOREP were drafted for the Student on June 4, 2009. These documents recommend continuation of the Student's placement in the AS classroom, but with an increase to 9.08 hours per week in a regular education classroom. Annual goals were cut from 14 to five. J-1 at 150-184. The new IEP did not provide 1:1 support. The June 2009 IEP was implemented during the Student's second grade (2009-2010) school year. For this period of time, the AS classroom teacher testified that the Student made progress on the Student's goals. N.T. 259; J-1 167-176. The teacher also prepared Progress Monitoring Reports in the 2009-2010 school year. *See* J-1 at 186-188. The teacher testified that the Student did make progress towards those goals that were not actually met in the 2009-2010 school year. N.T. 424. At the same time, the teacher's testimony reveals that the Student's progress was hindered by over-enrollment in the classroom, no coordinated effort was made to include the Student with non-disabled peers, and the Student did not spend time in regular education as contemplated in the operative IEP. There is virtually no evidence on the record that contradicts the AS classroom teacher's testimony concerning the 2009-2010 school year. The teacher is highly respected by both parties and utterly credible.

15. Sometime in the spring of 2010, the AS classroom teacher learned that the Student was slated to be transferred back to the Student's home region to an elementary

school that the Student had not previously attended. The same information was provided to the Parent. N.T. 432,623-624. This information is not indicated in any IEP or NOREP. The transfer was not recommended by the Student's teacher. N.T. 413. Similarly, the transfer was not discussed with the Parent. At the end of the summer of 2010, the Parent was informed that the Student was assigned to a different school that, according to the Parent, is located two hours away from the Student's home.

16. On the first day of school, transportation did not arrive to bring the Student to the assigned school. The Parent then brought the Student to the school that the Student attended in first and second grade. The Student was accepted there, and remains there currently. The Student has attended the current school through the duration of these proceedings because the District agrees that placement is pendent under the IDEA's stay-put rule, 20 U.S.C. § 1415(j).

17. After this due process hearing started, the District proposed transferring the Student to a different elementary school than the one it would have transferred the student to at the start of the 2010-2011 school year. This is the District's third proposed building assignment since the end of the 2009-2010 school year. Some testimony was provided regarding the resources available at this recently proposed placement, as well as the Student's ability to remain in that school until eighth grade and the proximity of the school to the Student's home. N.T. At 654. Testimony about this placement was taken over the Parent's objection. The Parent argues that placements offered after the instant hearing was requested are not relevant. Moreover, the Parent opposes all of these transfers, arguing that the Student should remain in the Student's current school until the Student ages out after fifth grade. The Parent very clearly wants the Student to remain with the current teacher.

LEGAL STANDARDS

THE BURDEN OF PROOF

The United States Supreme Court has determined that parents who request special education due process hearings must bear the burden of persuasion. *Schaffer v. Weast*, 546 U.S. 49 (2005). As such, parents who request due process hearings must substantiate their claims by preponderant evidence and cannot prevail if the evidence rests in equipoise. *See id*; *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006).

THE OBLIGATION TO PROVIDE FAPE

The IDEA requires the states to provide FAPE to all students who qualify for special education services. 20 U.S.C. §1412. This requirement is met by providing personalized instruction and support services to permit the child to benefit educationally from the instruction. *See Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982). The Third Circuit has interpreted FAPE to require

"significant learning" and "meaningful benefit" - something more than trivial or *de minimis*. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999).

The procedures and safeguards established by the IDEA must also be followed. *See Rowley*, 485 U.S. 176. As such, school districts provide FAPE through the development and implementation of an IEP, which must be "'reasonably calculated' to enable the child to receive 'meaningful educational benefits' in light of the student's 'intellectual potential.' " *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). IEPs must include present levels of educational performance, measurable annual goals, a statement of how the child's progress toward those goals will be measured, and the specially designed instruction and supplementary aids and services which will be provided, as well as an explanation of the extent, if any, to which the child will not participate with non-disabled children in the regular classroom. 20 U.S.C. § 1414(d); 34 C.F.R. §300.320(a). First and foremost, of course, the IEP must be responsive to the child's identified educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. §300.324. Nevertheless, "the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date." *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993).

THE LEAST RESTRICTIVE ENVIRONMENT

The IDEA statute and regulations provide that an eligible child is entitled to be educated in the least restrictive environment (LRE) appropriate for the student, i.e., one in which the student is, to the maximum extent appropriate, educated with children who are not disabled. 34 C.F.R. §300.114(a)(2)(i). In order for a proposed placement to meet LRE requirements, school districts must, at a minimum, assure that placement decisions are "made by a group of persons, including the parents and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options" §300.116(a)(1); are "determined at least annually" §300.116(b)(1); are " based upon the child's IEP" §300.116(b)(2). In addition, unless an eligible child "requires some other arrangement, the child [must be] educated in the school he or she would attend if not disabled" - that is, the child's neighborhood school. §300.116(c).

The United States Court of Appeals for the Third Circuit provided additional guidance for applying LRE requirements in *Oberti v. Board of Education*, 995 F.2d 1204 (3rd Cir. 1993). In accordance with *Oberti*, the first step in evaluating a program and placement to determine whether it meets LRE criteria is an assessment of whether the student can be educated satisfactorily in the regular classroom with supplementary aids and services. See also *Greenwood v. Wissahickon School District*, 571 F.Supp.2d 654 (E.D. Pa. 2008). In making that determination, a school district is required to consider the full range of aids and services available, with the goal of placing the student with a disability in the regular classroom as much as possible. Consideration must also be given to the unique benefits that a student with a disability will derive from placement in a regular classroom, and those benefits must be compared to the benefits likely to be derived from a more segregated setting. Finally, the district must determine whether there are

likely to be any negative effects upon the education of the other children from placement of a particular student with a disability in the regular classroom.

Second, if education outside of the regular classroom for all or part of the school day is found necessary, the proposed placement must be evaluated to determine whether it provides for contact with non-disabled peers to the greatest extent appropriate. In *Oberti*, the court noted that the continuum of placements mandated by the IDEA is designed to assure that a school district does not take an "all or nothing" approach to the placement of a student with a disability, but considers using a range of placement options to assure that the unique needs of each child are met. A school district's obligation to place an eligible student in the least restrictive environment does not diminish its responsibility to educate an eligible student appropriately. *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 390 (3rd Cir. 2006).

SCHOOL BUILDING SELECTION

Both parties acknowledge - and the District relies upon - cases in other jurisdictions concluding that school districts have "significant authority to select the school site, as long as it is educationally appropriate." *White ex rel. White v. Ascension Parish Sch. Bd*., 343 F.3d 373, 382 (5th Cir. 2003); *see also A.W. v. Fairfax County Sch. Bd.*, 372 F.3d 674 (4th Cir. 2004).

Courts in the Third Circuit have considered a similar issue: placement in the neighborhood school. In *S.H. v. State-Operated Sch. Dist.*, 336 F.3d 260 (3d Cir.2003), the Third Circuit concluded that the IDEA includes a preference for children to attend their neighborhood schools, but only if the children can be "satisfactorily educated" in that placement. *Id* at 272 (quoting *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 535 (3d Cir.1996)); *see also Cheltenham Sch. Dist. v. Joel P.,* 949 F.Supp. 346, 351-52 (E.D.Pa.1996)*, aff'd 135 F.3d 763 (3d Cir.1997).*

The issue of placement in the neighborhood school was most recently considered in *Lebron v. North Penn School Dist.*, --- F.Supp.2d —, 2011 WL 601621 (E.D.Pa., 2011). In *Lebron*, in the context of neighborhood school placement, Judge Brody concluded that "geographical proximity is a factor that districts must consider, but they have "significant authority to select the school site, as long as it is educationally appropriate." *Id* at *10 (quoting *Whit*e, 343 F.3d at 382 and citing *A.W.*, 372 F.3d 674 and *McLaughlin v. Holt Public Schools Board of Education*, 320 F.3d 663, 772 (6th Cir.2003))

This jurisprudence regarding placement in the neighborhood school is relevant to this issue *sub judice*: placement selection in general. In reaching conclusions about neighborhood school placement, Judge Brody agreed with courts in other jurisdictions that vest school selection authority in public school districts. Even *T.Y. v. N.Y. City Dep't of Educ.*, 584 F.3d 412, 420 (2d Cir.2009) is cited in *Lebron. Lebron* at *10. In *T.Y.*, the Second Circuit found that an IEP need not specify the school location.

Neither the Third Circuit nor the Eastern District has explicitly adopted the holding in *T.Y.* and, despite the foregoing, a school district's authority to select the school site is not absolute. As the Parent notes in her closing brief, "even though school administrators ultimately decided which school [the students in *White* and *T.Y.* were placed in], the parents were integrally involved in the process…" Closer to home, in *Lebron*, the parents were informed of the school district's building selection as part of the IEP development process. The school building was discussed by the student's IEP team, the building was reflected in the student's IEP and the final building choice was presented to the parents with the IEP in the form of a NOREP that they could reject. The NOREP itself explained why the selection was made and why the parents' preferred school building was rejected. *Lebron* at *10, footnote 14. In short, the *Lebron* placement decision was made by an IEP team with substantial parental participation for the purpose of enabling the implementation of the IEP. The level of parental participation in *White* was similar. *See White*, 343 F.3d at 376.

The extent of parental participation in the decision-making process is important. The IDEA requires school districts to use procedures that afford parents an "opportunity … to participate in meetings with respect to the identification, evaluation, *and educational placement of the child*, and the provision of a free appropriate public education to such child…" 20 U.S.C. § 1415(b)(1) (emphasis added). Similarly, parents must receive prior written notice whenever a school district proposes to the educational placement of a child. 20 U.S.C. § 1415(b)(3). The IDEA explicitly details the type of information that must be contained in such prior written notice at 20 U.S.C. § 1415(c). This includes an explanation of why the change is proposed, what other options were considered and why those other options were rejected. *Id*.

In Pennsylvania, the NOREP is the document that provides the prior written notice to parents that is contemplated by the IDEA. As explained by the Pennsylvania Training and Technical Assistance Network (PaTTAN), "The NOREP explains the recommended educational placement or class for [a] child, and explains [parental] rights." http://parent.pattan.net/iep/WhatisaNOREP.aspx. Moreover, the United States Supreme Court has recognized that parents have a right to receive prior written notice whenever a school district intends to alter a student's "program *or* placement." *Honing v. Doe*, 484 U.S. 305, 311-12 (1988)(emphasis added); *see also Petties v. District of Columbia,* 238 F.Supp.2d 114, 123 -124 (D.D.C., 2002). *Petties* does not stand for the proposition that a school building change is a change in placement *per se. See Petties* at 123-124. Rather, a school building change could be a change in placement depending on the particular facts of any case. *Id*. Consequently, without prior written notice, parents would lose the right to contest building changes and argue that such changes fundamentally alter their children's educational program. The District Court explicitly found that parents could contest such changes and so they must receive prior written notice in satisfaction of 20 U.S.C. § 1415(c) in advance of any building change.

The logic of *Petties* is correct. Sometimes FAPE can only be provided in particular school buildings. This was the situation in *Lebron*. There, building assignment was part and parcel to the provision of FAPE. Sometimes FAPE can be provided in several

locations that house identical programs in equal proximity to a child's home. Under these circumstances, school districts have broad authority to make a building selection. Yet in all cases, parents have the right to argue that building selection (or reassignment) will yield a depravation of FAPE, and so parents must receive IDEA-compliant prior written notice in advance of any such change.

REMEDIES

In a recent decision, Hearing Officer Skidmore summarized what compensatory education is and, if owed, how it can be calculated:

> It is well settled that compensatory education is an appropriate remedy where a school district knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only trivial educational benefit, and the district fails to remedy the problem. *M.C. v. Central Regional School District*, 81 F.3d 389 (3d Cir. 1996). Such an award compensates the child for the period of time of deprivation of special education services, excluding the time reasonably required for a school district to correct the deficiency. *Id*. In addition to this "hour for hour" approach, some courts have endorsed an approach that awards the "amount of compensatory education reasonably calculated to bring him to the position that he would have occupied but for the school district's failure to provide a FAPE." *B.C. v. Penn Manor School District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006) (awarding compensatory education in a case involving a gifted student); see also *Ferren C. v. School District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010) (quoting Reid v. District of Columbia, 401 F.3d 516, 518 (D.C.Cir.2005) (explaining that compensatory education "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA.")) Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

M.J. v. West Chester Area Sch. Dist., ODR No. 01634-1011AS at 13-14 (Skidmore, 2011). In *M.J.*, with a dearth of evidence concerning what position the student would be in but for the denial of FAPE, the Hearing Officer applied the *M.C.* hour-for-hour standard.

In general, a procedural violation of the IDEA does not warrant an award of compensatory education. However, when a procedural violation is alleged, "a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies (I) impeded the child's right to a free appropriate public education; (II) significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a free appropriate public education to the parents' child; or (III) caused a deprivation of educational benefits." 20 U.S.C. § 1415(f)(3)(E)(ii). Hearing officers may also order school districts to comply with the

IDEA's procedural safeguards even if a student's right to FAPE has not been violated. 20 U.S.C. § 1415(f)(3)(E)(iii).

In addition to compensatory education, the Third Circuit has recently affirmed that hearing officers have broad discretion to award equitable relief that furthers the purposes of the IDEA upon consideration of all relevant factors. *See Ferren C. v. School District of Philadelphia*, 612 F.3d 712 (3d Cir. 2010). In *Ferren C.*, the Third Circuit determined that "in each case, a court will evaluate the specific type of relief that is appropriate to ensure that a student is fully compensated for a school district's past violations of his or her rights under the IDEA and develop an appropriate equitable award." *Id* at 720. There is no reason why this should not apply at the due process level.

DISCUSSION

DENIAL OF FAPE

In this case, the Parent seeks compensatory education to remedy a denial of FAPE that occurred starting in September of 2008 and continues to this day. This encompasses all of the 2008-2009 (1st grade) and 2009-2010 (2nd grade) school years, and the portion of the 2010-2011 school year that has passed while this hearing has been pending.

Preponderant evidence demonstrates that the Student was denied FAPE during this period. FAPE was denied in three ways: First, the Student spent the entirety of the time in an over enrolled classroom. The Student's teacher testified that the over enrollment had a direct, negative influence on the Student's education. Second, the Student received no inclusionary instruction despite the fact that the IEPs called for some - albeit trivial - amount of regular education. Taken as a whole, the evidence strongly suggests that none of the Student's IEPs were implemented with fidelity and, by and large, the Student's progress was not measured objectively. Third, and perhaps most importantly, the District has undertaken no effort to determine the extent to which the Student may be educated with non-disabled peers or how the Student's dependency on restrictive AS programs could be reduced.

At the same time, the Student's teacher testified credibly that the Student did make progress during the period of time in question. This honest-but-subjective impression does not ameliorate the foregoing deficiencies. Despite the teacher's extraordinary efforts to educate the Student with limited supports and resources, the teacher is incapable of knowing how the Student can be included, and how such inclusion could be increased over time - not because the teacher is unskilled or uncaring but because of a lack of assessment and objective data collection. Moreover, for much of the 2008-2009 school year, the teacher was asked to implement an IEP that did not make sense to her, and the mere fact that the Student achieved goals targeted at the 50% to 70% level does not indicate *meaningful* progress.

As in *M.J. v. West Chester*, there is little to no evidence in the record of this proceeding concerning the position that the Student would be in but for the foregoing depravations

of FAPE. It is also difficult to calculate an hour-for-hour compensatory education award because there is no evidence to suggest how much time the Student should have been included but was not. Similarly, there is no evidence to suggest that every moment that the Student spent in the over enrolled AS classroom constituted a denial of FAPE. The Parent demands the maximum amount of compensatory education, but does not specify what she believes that maximum amount is. The District argues that if compensatory education is awarded, it should be limited to the 50 hours that the District offered in response to the PDE/BSE investigations.

The District's argument concerning the limitation on the compensatory education award is unpersuasive. PDE/BSE determined that the classroom was over enrolled, but did not determine the amount of compensatory education that should be offered. Both the amount of and the restrictions on the 50 hour offer came from the District, not PDE/BSE, and the Parent rejected that offer. The offer is no more binding than a rejected settlement agreement. Of course, rejecting the District's argument does not help determine how much compensatory education the Student should be awarded.

In light of all of the foregoing, the Hearing Officer finds it equitable to award three (3) hours of compensatory education for each day that school was in session from September 10, 2008 until other provisions of this decision described below are fully implemented.

DENIAL OF PARENTAL PARTICIPATION

Under the legal standard described above, the District violated the Parent's right to participation by reassigning the Student to a different school building without sending IDEA-compliant prior written notice. In this case, the violation did not result in a substantive denial of FAPE because the reassignment was never actually carried out. Rather, to comply with the IDEA's stay-put rule, the Student has actually remained both in the building and in the classroom that the Parent prefers.

Despite the fact that FAPE was not deprived, the District will be ordered to comply with the IDEA's procedural safeguards. Although the Hearing Officer lacks authority to order wholesale changes to the District's procedures, it is well within the Hearing Officer's authority to compel the District to issue a NOREP and a Procedural Safeguards Notice every time it proposes a building reassignment for *this* Student. The District is encouraged to alter its procedures on a broader scope, if only to avoid a plethora of identical claims from similarly situated students.

BUILDING SELECTION

Currently, the pendency of these proceedings is the only thing holding the Student to the current building and classroom. It would be potentially retaliatory for the District to reassign the Student to a different building for the remainder of this school year - even using proper procedures. The District has made no such proposal, but the Hearing Officer shall exercise his equitable authority to enjoin any such effort.

The Parent argues that the Student should be allowed to remain in the current school building until the Student ages out of elementary school with non-disabled peers. This argument includes a demand that the District must add services and supports, including personnel, to the current school to enable the Student's participation there with greater inclusion. The District argues that it is beyond the Hearing Officer's authority to compel the creation of classes where none exist, and that there is no AS support in the current building from grades three to eight. Both arguments are unpersuasive. The District is wrong because hearing officers may order school districts to provide the services that are required for the provision of FAPE, even if school districts do not already possess those services. The Parent is wrong for two reasons: First, if a school district can provide FAPE in one school building but not in another, the school district is justified in assigning the student to the building in which he or she will be appropriately educated (provided that transportation to that building does not result in a denial of FAPE in and of itself). Second, the Student is in third grade; it is impossible to know what the Student's needs will be in eighth grade, so it is improper to enter a five-year injunction on building transfers.

As described above, the Student's current needs are unknown - particularly in regard to inclusion. This information is critical to building selection. Perhaps the Student could receive FAPE in the neighborhood school? Perhaps the Student must remain in the current school until an appropriate transition plan is developed? Perhaps the Student must remain in full-time AS support and the District must place the Student in an AS classroom with a legally compliant caseload? None of these questions can be answered without a current, objective evaluation. Consequently, the District will be ordered to fund an independent educational evaluation (IEE) for the Student. Timelines for IEE and subsequent IEP development and building selection are described in the Order that follows.

CONCLUSION

The Student has been denied FAPE for the period starting on September 10, 2008 through the present. To remedy this denial, the Student shall be awarded three (3) hours of compensatory education for each day that school was in session from September 10, 2008 through the date of this Decision and Order. Compensatory education shall continue to accrue at the rate of three (3) hours per day that school is in session until an IEE is completed, as per the terms of the Order below. The District shall also be ordered to comply with the IDEA's procedural requirements by sending prior written notice to the Parent before any school building reassignment.

ORDER

And now, this 15th day of April, 2011, it is hereby ORDERED that:

1. The Student is awarded three (3) hours of compensatory education for each school day that the District was in session from September 10, 2008 through the date of this ORDER.

2. Compensatory education shall continue to accrue at the rate of three (3) hours per school day that the District is in session until the actual completion of the IEE described in this ORDER, unless the Parent takes any unreasonable action to hinder the completion of the IEE. If the Parent takes any such action, compensatory education shall cease to accrue as of the date of such action.

3. To determine the Student's placement for the 2011-2012 school year, the parties shall be ordered to follow this procedure:
   a. The Student shall receive a comprehensive IEE at the District's expense, to be completed no later than June 1, 2011. The evaluator will be chosen by the District from a list of no less than five (5) evaluators who are acceptable to the Parent. The evaluator shall be contracted immediately so that in-school observations can occur during the current school year, if necessary. The evaluator shall transmit the IEE and all drafts thereof to both parties simultaneously.
   b. The Student's IEP team shall meet to review the IEE and draft an IEP for the 2011-2012 school year. The IEE review and IEP development meeting may occur simultaneously. After such meeting or meetings, but no later than July 1, 2011, the District shall propose an IEP with a NOREP indicating the Student's placement (services and building assignment).
   c. The Parent shall then return the NOREP, clearly indicating approval or disapproval, no later than June 13, 2011. If disapproving, the Parent must also select a form of dispute resolution.

4. The hours of compensatory education are subject to the following conditions and limitations: The Parent may decide how the hours of compensatory education are spent. The compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product or device that furthers the goals of Student's current or future IEPs. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the District through the Student's IEP to assure meaningful educational progress.

It is FURTHER ORDERED that any claims not specifically addressed by this decision and order are denied and dismissed.

/s/ Brian Jason Ford
Hearing Officer