

This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

Pennsylvania

Special Education Hearing Officer

DECISION

Child's Name: M.Z.

Date of Birth: [redacted]

Dates of Hearing:
October 13, 2009, December 4, 2009,
March 9, 2010, March 10, 2010,
April 26, 2010

CLOSED HEARING

ODR No. **10169-0809-AS**

Parties to the Hearing:

Parent[s]

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Date Record Closed:

June 4, 2010

Date of Decision:

June 19, 2010

Hearing Officer:

Cathy A. Skidmore, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

Student¹ is currently a late teenaged eligible student who resides in the Norristown Area School District (District). Student is eligible for special education and related services by reason of mental retardation and oppositional defiant disorder (ODD). This matter was originally assigned to Hearing Officer Deborah G. DeLauro who conducted two hearing sessions, issuing a ruling relative to the applicable statute of limitations period on October 19, 2009. (Hearing Officer Exhibit (HO) 1) Specifically, Hearing Officer DeLauro determined that the parents had not (1) filed their complaint within two years of the date they knew or should have known of the alleged actions forming the basis of their complaint (October 1, 2003), or (2) established that the District intentionally misrepresented that it had resolved the problem forming the basis of their complaint or withheld required information it was required to provide. Thus, the substantive portion of the hearing was limited to claims relating to the time period between June 8, 2007 and June 8, 2009 (the date on which the complaint was filed). The case was subsequently reassigned to this hearing officer on December 18, 2009. After a conference call with counsel on January 7, 2010, two additional hearing sessions were scheduled. Those two sessions were conducted in March 2010, and one additional hearing session was made necessary due to the illness of one of the witnesses. The record closed on June 4, 2010.

In accordance with the October 19, 2009 ruling on the statute of limitations, the parents presented evidence on their claims challenging the provision of a free, appropriate public education (FAPE) to Student for the 2007-08 and 2008-09 school years.² The District defended those claims, asserting that it had provided FAPE to Student throughout that time period. For the following reasons, I find in favor of the parents and Student with respect to a portion of the time periods involved in this case.

ISSUES

1. Whether the District failed to appropriately and comprehensively conduct adequate and timely functional behavioral assessments of Student between June 8, 2007 and June 8, 2009;
2. Whether the District failed to provide FAPE to Student by failing to develop and implement appropriate Individualized Education Programs (IEPs) between June 8, 2007 and June 8, 2009;
3. If the District denied FAPE to Student, is Student entitled to compensatory education and, if so, in what amount.

¹ The name and gender of the Student are not used in this decision in order to preserve the Student's privacy.

² The 2008-09 school year claim includes the summer of 2009. The parties reached an agreement on the program for the 2009-10 school year. (Notes of Testimony (N.T.) 12-13)

FINDINGS OF FACT

1. Student was born on [redacted] and resides in the District with Student's parents. Student has a history of hydrocephaly with resulting cognitive, motor, and visual functioning deficits, as well as a seizure disorder. (Notes of Testimony (N.T.) 16, 89, 163, 680, 996-97; Parent Exhibit (P) 14; School District Exhibit (S)³ 1)
2. Student was enrolled in the District in the summer of 2000 and was determined to be eligible for special education and related services for the 2000-01 school year, Student's third grade year, with placement in full time life skills support. (SD 5, 8, 11, 12) Student's IEP for that year noted, among other things, Student's frequent refusal to complete assigned tasks and a need to improve behavior and cooperation. Student's program that school year was focused on reading readiness and math readiness goals and objectives, as well as occupational therapy (OT), physical therapy (PT), and speech/language therapy (SLT). (SD 8, 12, 14, 16)
3. The District conducted an evaluation of Student in October 2001. The comprehensive evaluation report (CER) included parental input which identified a need to improve behavior at times. (S 17) Student's IEPs for the 2001-02 and 2002-03 school years made little reference to addressing Student's behavior but continued to focus on reading readiness and math readiness in addition to OT, PT, and SLT. (SD 8, 18, 20)
4. In Student's October 2003 and October 2004 IEPs, Student's program emphasized functional reading, writing, and math skills, and also addressed behavior with a goal toward compliance with increased on-task behavior and decreased acting-out behavior. These IEPs also included OT, PT, and SLT. (S 23, 24)
5. The District conducted a psychiatric/neurological evaluation in March 2005. Student was reportedly "very noncontrollable in school" and "frequently refuse[d] to do school work," (S 28 at 1), and Student's behavior had significantly deteriorated at school. The psychiatrist recommended medication for Student's high levels of anxiety, and also suggested that Student be permitted to call Student's mother from school as a reward for appropriate behavior. In a subsequent psychological consultation, this evaluator agreed that Student exhibited an anxiety disorder. (N.T. 163-66; S 28, 29)
6. Student's IEP developed in April 2006 indicated that Student's behavior had improved from the prior year but stated a need to improve time on task and to decrease acting out

³ The District's exhibits were originally marked using Bates stamp pagination, with each exhibit identified with a separate exhibit number. Before the hearing concluded, the parties were advised of a new policy of the Office for Dispute Resolution (ODR) for marking exhibits, and the District's exhibits in this case did not comport with the new requirements. In order to comply with the ODR policy as well as to permit meaningful review of the voluminous record which referenced the Bates stamp pagination throughout the transcript, this hearing officer requested that the District renumber its exhibits in accordance with the new ODR policy while also retaining the Bates stamp on each page. The District complied with this request.

behavior. Student “often refuse[d] to perform requested tasks” and was “often defiant.” (S 33 at 6) Annual goals addressed early reading, writing, and math skills, as well as speech/language, telling time to the half hour, identifying coins and their values, and responding to verbal prompts. OT and PT were listed as related services in addition to SLT. Student’s placement was part-time life skills support at the District’s middle school (S 33)

7. Despite some improvement at the beginning of the 2006-07 school year, Student’s behavior was inconsistent and by the middle of that school year Student would rarely leave the classroom. When that occurred, Student would stay in the classroom and the teacher would ignore Student. Student’s refusal to participate generally lasted for the entire class period. (N.T. 686-87; S 38 at 3)
8. Student’s special education teacher for 2006-07 and 2007-08 used a classroom behavior plan promoting learning through positive reinforcement and rewards rather than punishment. There were 6 classroom rules: listen when others talk, follow directions, keep hands, feet, and objects to oneself, work quietly, show respect for property, and work and play in a safe manner. The teacher also used a “five-minute plan” for some students, including Student, which was a method of data collection to track behaviors. (N.T. 717-19; S 38)
9. Student was re-evaluated in March 2007. The re-evaluation report (RR) noted that Student often refused to do work which was demonstrated in the classroom observation included in the RR. The parents identified Student’s needs to include behavior issues and refusing to complete assignments and go to classes. Student’s then-current teacher identified refusal to leave the classroom as a significant problem. (N.T. 681-83; S 35)
10. A new IEP was developed in March 2007. The box to indicate whether Student demonstrated behaviors that impede his/her learning or that of others was not checked, although that omission was an error. Under Student’s Present Levels of Academic Achievement, the IEP reported the results of the Brigance Inventory of Basic Skills (Brigance) in September 2006, at which time Student “refused to read sight words [and] refused to identify numbers,” although Student did identify, count, and give the value of some coins. Student also refused to tell time. The IEP also reported on Student’s variable performance with respect to the various goals in the prior IEP as well as frequent refusal to participate in SLT. The only need identified was to improve functional reading, writing and math skills. (N.T. 684-88, 709; S 36)
11. The March 2007 IEP included reading goals (identifying words, answering “wh” questions about a story), writing (copying a cursive signature), and math (identifying numbers 1-50, counting objects from 1-20) and functional skills (telling time to the half hour, identifying coins and bills and their values, and counting pennies), as well as a goal to actively participate throughout the school day. SLT, OT, and PT were listed as related services. Student’s placement remained part-time life skills support, and Student had the same special education teacher for the 2006-07 and 2007-08 school years. (N.T. 665, 710-13; S 36)

12. The IEP team determined that a functional behavioral assessment (FBA) should be conducted. (N.T. 709-10) Student's then-current special education teacher provided information to the behavior specialist on Student's non-compliance, noting Student's refusal to do work "most of the school day." (S 38 at 3) The teacher described that behavior as throwing papers on the floor and saying "no" or "never;" yelling, crying, and/or becoming physically aggressive, and refusing to leave the room for special classes, lunch, and small group sessions. (S 38 at 3) Student's teacher also stated that "[D]uring the 2005-06 school year [Student] spent most of the year laying on the floor in the back of the room," (S 38 at 3), and she "let [Student] work when [Student] wanted." (S 38 at 3) When Student refused to participate, the teacher would redirect Student only 10% of the time because doing so usually caused more problems. (S 38 at 7) In response to the question, "If the student engages in the problem behavior do you provide one-to-one instruction to get the student back on task?" the teacher wrote, "Never. I have 13 other students who want to learn. I focus on them and occasionally ask [Student] to participate during the lesson." (S 38 at 8)
13. The behavior specialist went to observe Student on the last day of school, June 11, 2007. Student refused to attend a graduation ceremony with the class that day and spent the time lying on the floor. The behavior specialist provided an overview of the information submitted for the FBA and hypothesized that Student's noncompliance served a single function: to escape or avoid uninteresting or difficult activities. Student's special education teacher agreed with the hypothesis with respect to escaping uninteresting activities but did not believe that tasks were too difficult for Student. The behavior specialist determined that another FBA should be conducted in the fall of the 2007-08 school year. (N.T. 720-23; S 40)
14. At the start of the 2007-08 school year, Student remained in the same life skills classroom in the middle school as in the prior year. There were 12 students in the class and the teacher had a paraprofessional in the classroom. Student's IEP team met in September of that school year to discuss Student's problematic behaviors. Student's parents requested a second paraprofessional in the classroom but the District did not believe one was necessary. Student had academic classes (social studies, math, spelling, and reading) in the classroom, and went to science class in another room. Student was to have lunch in the cafeteria but often refused to go. Student also had free time immediately after lunch back in the classroom. The class also worked on some vocational and life skills activities in the classroom. (N.T. 536, 739-41, 753-60, 766-69, 816, 870, 897-900, 909-10, 918; S 42)
15. During that 2007-08 school year, Student's parents took Student to school in the morning and Student rode the bus home. Student sometimes would exhibit noncompliance at home and refuse to go to school. Additionally, the parents had concerns with the time the morning bus arrived because of Student's medication schedule, as well as with Student's ability to navigate the steps on the bus. Transportation to school was an unresolved issue for much of the 2007-08 school year. (N.T. 744-47, 774-76, 882-86, 895-97, 930-33, 965-70; P 12, 35; S 41)

16. In October of 2007, Student began going to another life skills classroom three afternoons per week for three periods: spelling, specials, and vocational activities. There were no more than 11 students in the classroom at any given time, and two paraprofessionals assisted the teacher in that classroom. This classroom had a posted schedule for all students, and the teacher tried various strategies to help Student with transitions which were difficult for Student. The teacher in this classroom recognized that Student would become non-compliant when asked to perform non-preferred activities and sometimes became verbally aggressive or would “roll into a ball and refuse to work.” (N.T. 420) Spelling was a preferred activity while gym was not; Student would often refuse to go to gym class. The vocational workstations were also generally a preferred activity. (N.T. 410-15, 420, 422, 425-26, 427-28, 446-47, 558-59; S 98)
17. Since Student did not have a behavior plan at the beginning of the 2007-08 school year, both special education teachers used the five-minute plan and Student worked for reinforcers, which typically only worked for a short period of time before Student did not find the item reinforcing. Verbal and visual prompting including picture schedules were also employed, and Student was prepared for transitions. Student demonstrated “very challenging” behavior during that school year when Student would “shut down” and it would take considerable time to get Student back on schedule and a significant amount of individualized attention. Student would also sit down in the hallway and refuse to return to the classroom, sometimes becoming physically aggressive, requiring the teacher to obtain assistance from other professionals in the school building. (N.T. 426-28, 431-34, 574-75, 707-09, 714-15, 739-41, 870-77)
18. The five-minute plan, which was utilized in both the 2007-08 and 2008-09 school years, consisted of the teacher (or a paraprofessional) continually monitoring Student to determine whether Student reported to a designed area, kept Student’s head up, had all materials in place, and engaged with those materials independently or with support. Results were recorded in five-minute intervals. Student was determined to be actively participating only if all of these elements were present for the entire five-minute period, but Student generally either was participating or was not participating. Information from the data collected in the five-minute plan was shared with the parents on a daily basis. (N.T. 475-78, 548-49, 562-67, 574-76, 617, 654, 668-69, 689-97, 719-20, 822-27, 844, 890-93; P 13, 15; S 116, 119)
19. Student was also evaluated for home-based behavioral services in October 18, 2007. The psychologist who conducted this evaluation diagnosed Student with Depressive Disorder Not Otherwise Specified, ODD, Moderate Mental Retardation, Hydrocephaly, and asthma. He recommended services from a Behavioral Specialist Consultant (BSC) and Mobile Therapist (MT) as well as continued services through the IEP. The parents did arrange for MT and BSC services. (N.T. 973-77; P 14)
20. A different behavior specialist from the local intermediate unit conducted an FBA in October and November 2007. The specialist obtained information from Student’s parents and primary teacher. The behavior was defined in terms of noncompliance, verbal aggression, and physical aggression. Student was observed for one 30-minute period and data was collected on Student’s delayed response to a teacher directive and refusal to

initiate or complete a task. Student was on task an average of 16.6% of the time. Additionally, data was reported on Student's compliance (participation) between September 4 and October 30, 2007, which varied widely but indicated some noncompliant behavior on 35 of the 38 days. Antecedents and consequences were also set forth in the FBA, as were listings of the educational impact of the behavior and what previous interventions had been employed. As did the prior behavior specialist, the evaluator hypothesized that Student exhibited noncompliance or verbal or physical aggression to avoid a nonpreferred task demand. (N.T. 568; S 44)

21. The behavior specialist developed a behavior support plan (BSP) for Student, using the data from the 38-day period as a baseline. The specialist recommended that reinforcers for Student be identified. The BSP contained protocols for Student's refusal to comply with a request or demand, refusal to get up from the floor, and refusal to participate, as well as for verbal and physical aggression. Additionally, the BSP set forth a number of antecedent strategies, replacement behaviors, and consequences as well as suggested accommodations and recommendations for changes to the learning environment. Consistency between the home and school environments was also emphasized. (N.T. 673-76, 703-05, 726-29; S 43)
22. Strategies in the BSP which were implemented by the end of November 2007 included use of a picture schedule, a timer set to warn Student of transitions, and use of embedding of non-preferred tasks between preferred activities. Student's teachers continued to use the five-minute plan for recording data as well as reinforcers for appropriate behavior. Additionally, the teachers used a "planned ignoring" strategy wherein Student's negative or inappropriate behaviors were ignored and attention was withheld until Student demonstrated appropriate behavior. (N.T. 428-35, 471-73, 484-88, 616-17, 622-23, 628-29, 701-03, 706-07, 729-37, 829-30)
23. Student's IEP progress reports for the first two reporting periods of the 2007-08 school year reflect that Student had limited progress in reading sight words due to behaviors, limited progress in copying a cursive signature because of refusal to comply, limited progress in telling time because Student did not willingly participate, and limited progress in identifying money and counting pennies because Student did not put forth proper effort and performance was inconsistent. More positively, Student was answering "wh" questions with 90% accuracy, identifying numbers 1-50 with varying accuracy (68-96%), and counting objects with varying accuracy (50-100%). Student's progress on the active participation goal was reported as inconsistent, ranging from 11-100%. PT and OT progress were also rather limited due to Student's refusal to participate. (N.T. 784-96; P 8, 34; S 104)
24. The District completed four accident/injury reports as a result of Student's physically aggressive behavior between January and March 2008. Student scratched the wrist of a staff member assisting Student in the restroom, scratched the teacher's hand when she attempted to assist Student from the parents' car in the parking lot and again on another day when the teacher was preparing the class for dismissal, bit the teacher's hand when she tried to move Student into the classroom, and scratched the nurse's arm when she attempted to assist in moving Student from the floor of the hallway. (N.T. 436-41, 844-

47; S 49, 58) Charting of Student's compliant behavior for the 2007-08 school year was quite variable. (N.T. 596-99; S 97, 120)

25. The District conducted a psychiatric re-evaluation of Student in February 2008 due to Student's increased resistance to directives from the parents and Student's teachers. Student's physical aggression at school had reportedly decreased, however, and the psychiatrist did not make any recommendations to change Student's medication or behavioral plan. (S 54)
26. Student's IEP team met on March 3, 2008. Information in the Present Levels of Academic Achievement included information on Student's goals during February 2008, and also noted that Student frequently refused to participate in SLT sessions. For the first time, Student's IEP contained transition services since Student was then [of transition age], and a Vocational Interest Inventory reflected Student's interests in laundry service, personal service, and clerical work. Student's post-secondary education and training outcomes provided for Student's participation in functional skills training and specifically functional academics (sight word identification, calculator use, and time and money skills) as well as life skills. This portion of the IEP also provided for Student to work on vocational skills in the classroom and to be part of the cafeteria cleaning team. Student's IEP goals addressed reading sight words, answering "wh" questions based on a story, performing single-digit addition and subtraction with a calculator, matching coins and bills to their value telling time to the half hour, and counting pennies. There were also goals for demonstrating vocational skills and actively participating throughout the school day, and related services in PT, OT, and SLT were also specified. A number of program modifications and items of specially designed instruction were also included. (N.T. 760-66; S 55)
27. Student's BSP was also revised with an addendum dated March 3, 2008. The behavior specialist noted that the "[d]ata indicate minimal progress in the reduction of number of incidents of noncompliant behavior" and recommended an additional strategy to prevent the behavior. Specifically, Student would be asked to complete several small tasks with a high probability of compliance before a request would be made to complete a task with a low probability of compliance (i.e., embedding). (N.T. 592-93, 770-71; S 55 at 41-44)
28. At that March 3, 2008 IEP meeting, the parents learned that Student had not been receiving PT four times a month but instead had only had one PT session each month since April 2006. The Notice of Recommended Educational Placement (NOREP) proposed to continue Student's part-time life skills support placement and OT, PT and SLT services. The parents did not approve the NOREP because it did not include an extra paraprofessional in the classroom, and further because Student's transportation and PT services were not being provided.⁴ (N.T. 76-77, 772-73, 796-97, 802-04, 809, 811, 879-85; S 51)

⁴ As of the date of the last hearing session, the PT hours had not been made up despite the District's offer to provide them. (N.T. 954-57; S 125)

29. Student's IEP progress report for the last reporting period of the 2007-08 school year reflected Student's limited progress in sight word reading based on performance at 70% accuracy and a refusal to participate in sight word reading for the entire month of May; mastery at 95% accuracy in answering "wh" questions when Student participated; limited progress in math skills due to widely varying performance (100% accuracy with 1:1 assistance in March compared to 0% independently in April) and refusal to participate for the entire month of May; limited progress in telling time because Student refused to follow directions in May and averaged only 10% accuracy in March; limited progress in money skills based on a low percentage of accuracy (27%) and choosing the wrong answer; and limited progress in counting based on a very low percentage of accuracy (13%) and a refusal to comply. In vocational skills, Student was exhibiting independent mastery of vocational skills and particularly cafeteria cleaning. On the goal of active participation throughout the school day, Student's performance varied from 16-100% daily. (P 33; S 105)
30. The parents filed a due process complaint in July 2008 because the transportation issue had not been resolved. They subsequently requested an independent educational evaluation (IEE) and an independent speech and language evaluation. (N.T. 190-94; S 67, 75) The District agreed to fund the cost of the independent evaluations which were conducted in September and October 2008. The parents agreed to waive re-evaluation by the District and the IEP team determined the IEE would be used to develop a new IEP. (S 78, 80, 84, 87) In late July 2008, Student's special education teacher contacted the Director of Special Education to plan for Student's return in the fall and specifically to develop a fire drill evacuation plan to ensure Student's safety. The plan which was developed specified who would be responsible for Student during an emergency fire drill. (N.T. 502-05, 521-23, 571-78, 577-81, 624-27, 941; S 73, 79, 91)
31. Student's placement for the 2008-09 school year was the same life skills classroom where Student had been attending three afternoons a week. This program was more vocationally oriented throughout the school day, and academic tasks were linked to vocational activities. Nevertheless, Student started out that school year with noncompliant behavior, verbal aggression, and throwing materials onto the floor, and Student refused to go to gym class. Student also continued to experience difficulty with transitions and exhibited anxiety. The teacher continued to use the strategies in the BSP including the use of a timer, reinforcers, a picture schedule, and the five-minute plan, as well as embedding non-preferred activities between preferred activities. As the school year progressed, however, Student began to demonstrate improved behavior and was responding to the BSP at school. The District also communicated with the parents on a regular basis and emphasized the importance of maintaining consistency with behavioral consequences and reinforcements between home and school. (N.T. 448-52, 455-57, 461-64, 470-75, 481-82, 485-93, 498-500, 509-10, 518-19, 539-40, 574-77, 606; S 98)
32. Student worked on a number of vocational skills during the 2008-09 school year. The teacher started the school year by working with Student on reporting to a work station and beginning a task with simple directions. Student's class worked on job preparation skills such as work schedules, filling out job applications, and using the telephone, as well as money skills. Student also worked on the cafeteria cleaning team two days per

week which required Student to use a picture schedule to prepare for and complete the assigned work. Other classroom vocational activities included participation on the laundry team one day per week when Student would collect, launder, and hand out the school shirts to all students. The class also participated in a trip to a community supermarket in conjunction with a cooking activity preparing a Thanksgiving lunch. (N.T. 462-70, 498-500; S 76)

33. Student's first progress report for the 2008-09 school year reflected Student's performance when behavior was "on task" or "in check," and notes that Student required frequent verbal reminders to complete assigned tasks. Student showed improvement in the ability to follow a daily schedule. However, Student was noted to choose not to participate in activities, although Student was by then required to complete work missed and had reportedly shown some improvement in active participation. In speech/language, Student generally required verbal prompting to participate particularly when off task or noncompliant. (N.T. 540-42; S 98, 103)
34. Student's second progress report for 2008-09 (issued in March 2009) reflected that Student was participating in reading and math with more consistency than in the prior reporting period. Student showed improvement in speech/language goals, decreased resistance to PT, and increased participation in OT. (N.T. 544-46; S 103)
35. The District, for the first time, offered an extended school year (ESY) program for Student for 2009. The parents agreed with the recommendation for ESY but did not approve the NOREP, believing the program should have more hours or days. (N.T. 554-57, 957-61; S 90)
36. Student's IEP team convened on March 6, 2009 to develop a new IEP. The box to indicate whether Student demonstrated behaviors that impede his/her learning or that of others was not checked. Results of the January 2009 Brigance administration were reported in addition to Student's performance on reading, spelling, math, time, and money skills, progress on speech/language goals and in PT and OT. Present levels of functional performance were reported through average percentages of active participation throughout the school day (ranging from 84-90% between September and December 2008) with a noted improvement in Student's ability to follow a daily schedule and transition between activities. (S 92)
37. The District transition coordinator attended the March 2009 IEP meeting. This IEP also indicated that a Vocational Interest Inventory reflected interests in laundry service, personal service, and clerical work, while the parents reported Student's interest in cleaning, gardening, and serving others. A vocational evaluation indicated Student's needs to include following a work schedule, communicating needs to a supervisor, following directions and working on assigned duties. Student continued to work on the cafeteria cleaning team two days per week. (N.T. 529-34; S 92)
38. The transition portion of Student's March 2009 IEP contained a goal to participate in functional academic, job preparation, and vocational classes through a number of activities in the special education classroom. Academic goals addressed telling time to

the half hour, sorting coins and bills, reading functional sight words, counting pennies and matching the amount to a price tag, and demonstrating vocational skills with no more than 2 verbal prompts. Student also had a goal for making a journal by using pictures each day to identify Student's feelings, as well as an active participation goal. Also new to Student's program was a goal to use a break card. Various program modifications and items of specially designed instruction were provided, and related services were identified for OT, PT, and SLT. Student's placement was full time life skills support in the same classroom where Student had been attending the afternoon sessions three days per week, with the same special education teacher, two paraprofessionals, and ten other students. (N.T. 448-49, 531-32, 534-38, 535-37; S 92)

39. Student's third progress report for the 2008-09 school year (issued in June 2009) continued to reflect Student's more consistent participation in reading and math. In vocational activities, Student was completing more tasks and assignments with independence and exhibited consistency in reporting to the cafeteria cleaning team. Notably, Student was reportedly following the daily schedule and demonstrating compliance and willingness to participate in all classroom activities for the April, May, and June 2009. (N.T. 537-41; S 103)
40. The parents filed a due process complaint on June 8, 2009. Five hearing sessions were held at which the following exhibits were admitted:

School District Exhibit Nos. 1, 5, 7, 8, 11, 12, 14, 16, 17, 18, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, 31, 33, 35, 36, 37, 38, 40, 41, 42, 43, 44, 49, 50, 51, 52, 53, 54, 55, 56, 58, 66, 67, 70, 73, 75, 76, 78, 79, 80, 82, 83, 84, 86, 87, 88, 90, 91, 92, 97, 98, 99, 101, 102, 103, 104, 105, 112, 113, 114, 115, 116, 118, 119, 120, 123, and 125;
Parent Exhibit Nos. 6, 8, 12, 13, 14, 15, 16, 17, 32, 33, 34, 35, 36;
Hearing Officer Exhibit Nos. 1, 2, 3.

This hearing officer reserved ruling on the admission of School District Exhibit No. 126, a summary of Student's progress reports for the 2007-08 school year, based upon the parents' objection. While it is apparent that this exhibit does not reflect Student's progress as a whole for that school year, S 126 is admitted and was considered in conjunction with the testimony regarding the information it contains.

DISCUSSION AND CONCLUSIONS OF LAW

At the outset, it is important to recognize that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden in this case rests with the parents who requested the hearing. Nevertheless, application of this principle determines which party prevails only in cases where the evidence is evenly balanced or in "equipoise." The outcome is

much more frequently determined by which party has presented preponderant evidence in support of its position.⁵

The IDEA requires the states to provide a “free appropriate public education” (FAPE) to all students who qualify for special education services. 20 U.S.C. §1412. In *Bd. of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that this requirement is met by providing personalized instruction and support services to permit the child to benefit educationally from the instruction, providing the procedures set forth in the Act are followed. However, procedural violations can support a claim for relief only if those violations impeded a child’s right to receive FAPE, or significantly impeded the parents’ opportunity to participate in the decision-making process concerning provision of FAPE to the child, or caused a deprivation of educational benefit. 20 U.S.C. §1415(f)(3)(E)(ii); 34 C.F.R. §300.513(a)(2). The *Rowley* standard is met when a child’s program provides him or her with more than a trivial or *de minimis* educational benefit. *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3d Cir. 1988). The Third Circuit has interpreted the phrase “free appropriate public education” to require “significant learning” and “meaningful benefit” under the IDEA. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999).

Under the IDEA and its implementing regulations, an IEP for a child with a disability 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.

The first issue is whether the District conducted an appropriate and comprehensive FBA during the relevant time period. Where, as here, a student’s behavior impedes that child’s learning or the learning of others, the IEP Team must “consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.” 34 C.F.R. §300.324(a)(2)(i); *see also* 20 U.S.C. § 1414(d)(e)(B). Pennsylvania regulations further require that “[b]ehavior support programs and plans must be based on a functional assessment of behavior and utilize positive behavior techniques.” 22 Pa. Code § 14.133(b).

There is no one form of FBA, and a variety of informational publications as well as tools related to FBAs are available through the Pennsylvania Department of Education and the Pennsylvania Training and Technical Assistance Network (www.pattan.net). The parents contend that the District failed to gather sufficient information from a variety of settings about Student’s behavior and specifically about the antecedents and setting events, the consequences

⁵ Hearing officers are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D.Pa. 2009). This hearing officer found each of the witnesses to be generally credible, except as specifically noted in this decision.

and functions of the behavior, and whether the behavior is a result of an underlying condition or skill deficit. (Parents' closing argument at 19-24)

The District provided no explanation for why no FBA was even attempted before the end of the 2006-07 school year. Given Student's well known and significant problematic behaviors in the form of aggression and frequent refusal to attend to tasks or leave the classroom that school year, which clearly impeded Student's ability to learn, it is quite evident that a formal assessment was not only strongly indicated as a matter of sound educational practice at least by the time of the March 2007 IEP meeting (Finding of Fact (FF) 6, 7, 9, 10), but also was required under the law. The frustration experienced by Student's 2006-07 special education teacher over Student's behavior is obvious from a review of the questionnaire she filled out for the behavior specialist (FF 12), and was even more apparent in her testimony. Additionally, the decision of the behavior specialist to observe Student on the last day of school for purposes of an FBA and expect to obtain any meaningful information is highly questionable and constitutes, in this hearing officer's opinion, a half-hearted attempt at best.

The FBA which was completed in the fall of 2007, however, did provide some useful information in formulating a behavior plan. (FF 20) Although this behavior specialist only conducted one observation of Student, that observation was supplemented by data collected over a 38-day period as well as information from Student's teachers. (FF 20) The FBA set forth antecedents and consequences, the educational impact on Student, and a hypothesis of the function of behavior. (FF 20) Student's primary special education teacher also generally agreed with the hypothesis that Student's problematic behaviors served the function of escaping or avoiding uninteresting or non-preferred tasks. (FF 13) As a whole, this hearing officer concludes that FBA, while certainly belated, was not inappropriately conducted in November 2007. The utility of the BSP which followed and responded to the FBA will be discussed *infra*.

The second issue is whether the District denied FAPE to Student by failing to develop and implement appropriate IEPs between June 8, 2007 and June 8, 2009. The parents challenge the IEPs in question on two bases: failure to adequately address Student's behavior, and failure to focus on vocational skills and transition.

With respect to Student's behavioral needs, the record supports the conclusion that Student's behavior impeded Student's access to educational [benefit] from the very beginning of the 2007-08 school year and that the District was well aware of Student's behavioral needs long before then. (FF 6, 7, 9, 10, 12, 13) The BSP which was developed and implemented in November 2007 was not adequate for Student's needs. (FF 23, 24 26) Even the behavior specialist who developed the BSP acknowledged in March 2008 that the plan had produced "minimal" effect on Student's problematic behavior. (FF 27) This conclusion is well supported in the record, as Student continued to refuse to participate in various activities throughout the remainder of the school year which significantly impeded educational progress (FF 14, 23, 26, 29), and had engaged in four incidents of physical aggression necessitating accident/injury reports between January and March 2008. (FF 24) Furthermore, careful review of the November 2007 BSP reveals that the behavioral strategies set forth therein had been used by Student's special education teachers for some time, without success, before the BSP was even developed. (FF 8, 16, 17, 18) For example, the BSP provided a protocol that when Student

would lie on the floor and refuse to get up, the teacher should remove eye contact (i.e., ignore Student's problematic behavior). (S 44 at 10) Student's teachers had routinely tried ignoring Student when displaying problematic behaviors (FF 7, 12), yet this strategy was clearly ineffective since the consequence was to permit Student to escape the task or demand. The BSP also recommended identifying reinforcers for Student, yet Student's teachers had been continually searching for appropriate reinforcers for Student since they did not remain reinforcing very long. (FF 17) In short, the BSP appeared to do nothing more than set down in writing what Student's teachers had been doing all along before the BSP was developed.

The March 2008 addendum to the BSP recommended that requests to perform Student's non-preferred activities with a low probability of compliance be made only after completing several small tasks with a high probability of compliance (embedding). (FF 27) Once again, Student's teachers had been using the strategy of embedding throughout the 2007-08 school year even before the addendum. (FF 22) Thus, this was not a circumstance where implementation of a new intervention would be expected to take time and that Student would likely exhibit an increase in the problematic behavior. Moreover, even after the BSP addendum, Student's third trimester progress reports for the 2007-08 school year continued to reflect Student's refusal to participate in various activities, strongly suggesting that the BSP as revised was no more effective than the original. (FF 29) For all of these reasons, I conclude that the District failed to adequately address Student's behavioral needs for the entirety of the 2007-08 school year.

With respect to the 2008-09 school year, the parents' evidence is somewhat less convincing that Student's behavioral needs were not being addressed for the entire school year. The beginning of that school year started out as the prior year had ended, with refusal to perform tasks and participate in activities as well as verbal aggression. (FF 31, 33) Student's performance was variable, but Student was demonstrating more compliance in functional academic activities as well as OT, PT, and SLT, by the time of the March 2009 progress report. (FF 39) Also in March 2009, the IEP team worked on developing a new IEP which focused more extensively on vocational activities geared to Student's interests and needs. (FF 37, 38) It is also not insignificant that vocational activities, which played a greater role in Student's 2008-09 program, were much more preferred by Student than classroom-based academic instruction and practice. (FF 16, 29, 31) While it is difficult to determine the specific point in time when Student began deriving meaningful educational benefit during the 2008-09 school year, this hearing officer concludes that by March 6, 2009, the date of the IEP meeting and close in time to the second trimester progress report, Student's problematic behavior had been sufficiently addressed to enable Student to consistently participate in functional academics, vocational activities, and therapies.⁶

Additionally, and in a related argument, the parents contend that the District should have been focusing more on Student's vocational needs rather than on classroom-based academics, referring to the testimony of their experts. (Parents' closing argument at 24-29, 31-32)

⁶ Because the District was aware of Student's problematic behaviors since long before the BSP was developed and implemented, and further because the BSP remained largely unsuccessful for so long, I will not credit the District with a reasonable time period during which a new BSP might be expected to be ineffective.

The independent school psychologist who conducted the IEE in October 2008 assessed Student's cognitive ability and estimated Student's IQ to be 25 or lower. She also gathered information from the Behavioral Assessment for Children – 2 (BASC), parent interviews, a classroom observation, and a teacher interview and questionnaire. (SD 80; N.T. 237-48) This expert made a number of recommendations for Student's program, including: (1) a more vocationally oriented program with limited time spent on functional academic skills; (2) consistency in behavioral expectations between home and school; (3) an organized environment guided by simple schedules both at home and at school, with tasks broken down into steps and expectations made clear through simple directions. With respect to Student's IEPs, this expert suggested, among other things, that Student's functional math goals and objectives may be more easily taught to Student in a vocational setting, which would be more realistic and interesting to Student, particularly since Student had spent several years working on functional academic goals in the classroom, a setting to which Student did not react favorably, with very limited progress. (N.T. 250-51) The witness also opined that some of Student's IEP goals may be too difficult for Student, such as cursive writing (which the IEP team subsequently eliminated as a goal, N.T. 513) and telling time to the half-hour (which Student had been working on for several years with limited progress. (FF 6, 11, 23, 29, 38) With respect to the BSP, this expert again noted that if Student's programming were more vocationally oriented, Student's noncompliant behavior would decrease since Student enjoys helping others (N.T.251; S 80) Other suggestions such as identifying reinforcers for Student and breaking difficult tasks down into steps with positive reinforcement for completing each step are consistent with the BSP and the District's implementation of that plan.⁷ (FF 18, 21, 22, 27; S 43)

The parents also presented the testimony of the private speech and language therapist who conducted the independent speech/language evaluation in October 2008. She administered several language assessments including the Peabody Picture Vocabulary Test – Fourth Edition, the Test for Auditory Comprehension of Language - Third Edition, and the Oral and Written Language Scales (OWLS). (S 87) Student demonstrated significant receptive and expressive language deficits, and also exhibited weaknesses in many of the basic skills necessary for learning to read, such as phonological awareness. (N.T. 318-37; S 87) As did the independent school psychologist, this witness recommended that Student's functional academics and speech/language goals be incorporated into the vocational setting, and also emphasized that adults speak to Student using language which is appropriate and understandable given Student's underdeveloped language skills. (N.T. 343-47; S 87) The private speech/language therapist also recommended that Student receive at least two sessions of SLT per week while also embedding language goals into Student's daily activities and areas of interest. (S 87) While this witness' testimony regarding SLT is helpful to this hearing officer and should provide guidance to the IEP team, her opinion regarding deficiencies in Student's vocational programming in the IEP is less convincing given the witness' area of expertise.

This hearing officer has already concluded that the District's efforts to address Student's behavior were insufficient to permit Student to derive meaningful educational benefit for the entire 2007-08 school year and during the 2008-09 school year until March 6, 2009. I am also

⁷ On the other hand, this witness' criticism of the District's implementation of Student's IEP, including vocational activities and the BSP, is given less weight because she only observed Student in school on one occasion for no more than one hour.

persuaded that by the time Student began the 2008-09 school year, the focus of Student's programming was more properly related to vocational activities rather than classroom-based academic instruction. For example, Student had been working on a goal of accurately telling time to the half hour since at least April 2006, and Student's progress on the goal was highly variable. (FF 6, 11, 23, 29, 38) By the time the March 2009 IEP was developed, Student had a goal to choose the correct time to the half hour out of two digital answer choices with fading prompts, and was reportedly able on the Brigance to choose the correct answer out of two digital choices with 75% accuracy. (S 92) As another example of Student's performance on the Brigance at various times, Student identified 6 sight words in September 2004 which reflected an increase of 5 words from September 2003 (S 33), and in January 2009, Student identified only 3 out of 10 words on the pre-primer word list⁸ (S 92), despite goals to address sight word reading in the intervening IEPs. (S 36, 55) However, during the 2008-09 school year when Student's programming focused on vocational activities, Student began to show marked improvement in behavior and an increased willingness to participate in school. Accordingly, by the start of the 2008-09 school year, the District was doing exactly what the parents and their experts argue they should be doing: emphasizing vocational skills rather than academics in the classroom.

I am not persuaded, however, that the District should have immediately implemented a program of community-based activities for Student. While such a course would logically permit Student to have more realistic life experiences, it must be kept in mind that this is a student who, even during the first half of the 2008-09 school year, would frequently refuse to leave the classroom. (FF 31, 33) The parents' experts' recommendations for introducing more community-based vocational activities appear to be quite appropriate for current and future programming for Student, but I cannot conclude that the District denied FAPE to Student on this basis.

Additionally, the parents' contention that the District's transition programming was not individualized for Student lacks evidentiary support. Transition services are required to be individualized to a child's needs, and based upon the child's strengths, preferences, and interests. 20 U.S.C. § 1401(34); 34 C.F.R. § 300.43. Before the March 2008 IEP meeting when transition services were first addressed, the District conducted a vocational assessment and determined that Student had an interest in laundry service, personal service, and clerical work. Student worked on some generalized vocational skills such as reporting to a work station and beginning a task when given simple directions. (FF 14, 31, 32) Student also participated on the cafeteria cleaning team as well as the laundry team, both of which bore a relation to Student's vocational interests, and the record establishes that Student was successful in these activities. (FF 32, 36) The parents also argue that the transition goals in the March 2008 IEP are vague and general. While the transition goals set forth in Student's March 2008 IEPs could have been more specific, there is sufficient information in the IEP as a whole to determine, for example, Student's ability to tell time and identify sight words. (Parent's closing argument at 26) Additionally, Student's program included work on more preliminary job preparation skills which would apply to Student's more individualized vocational experiences. (FF 14, 31, 32)

Having concluded that the District did deny Student an appropriate education throughout the 2007-08 school year and until March 6, 2009 of the 2008-09 school year, relief is warranted.

⁸ Student refused to read sight words in a September 2007 administration of the Brigance. (S 55)

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.*⁹ Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

This hearing officer agrees with the parents that Student's problematic behavior pervaded Student's entire day. It would be next to impossible to calculate any hours during which Student's ability to derive meaningful educational benefit was not impeded by Student's behavior throughout this time period. *See Keystone Cent. School Dist. v. E.E. ex rel. H.E.* 438 F.Supp.2d 519, 526 (M.D.Pa.,2006) (explaining that the IDEA does not require a parsing out of the exact number of hours a student was denied FAPE in calculating compensatory education). Therefore, I will award full days of compensatory education for the entire 2007-08 school year and for the 2008-09 school year from the first day of school until March 6, 2009.

Next, to the extent that parents raise a claim challenging the ESY program for 2009, the evidence does not establish that the District denied FAPE to Student in the proposal. It is of course true that public agencies may not unilaterally limit the type, amount, or duration of ESY services. 34 C.F.R. § 106(a)(3). However, the only basis which the parents set forth for rejecting the ESY program for 2008 related to scheduling concerns. (FF 34) There was no evidence that the proposed ESY program failed to provide an appropriate program for Student, and I therefore cannot conclude that any remedy is warranted for ESY in the summer of 2009.

I also find that Student's parents have met their burden of establishing an entitlement to compensatory education for the missed PT services from April 2006 through the end of the 2008-09 school year.¹⁰ While the District argues that it made an offer to compensate the parents and Student for these missed services (S 125), the parents were under no obligation to accept that offer. As the District undisputedly failed to provide the hours of PT set forth in the relevant IEPs, I find that compensatory education is warranted to remedy that denial of service.

⁹ Compare *B.C. v. Penn Manor School District*, 906 A.2d 642 (Pa. Cmwlth. 2006), which rejected the *M.C.* standard for compensatory education, holding that "where there is a finding that a student is denied a FAPE and ... an award of compensatory education is appropriate, the student is entitled to an 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." *Id.* at 650-51. Here there was no evidence produced on what position Student would have been in had FAPE been provided and, upon consideration of Student's significant needs, this hearing officer elects not to speculate. I therefore conclude that the *M.C.* standard is the appropriate method of determining the amount of compensation education owed to Student in this case.

¹⁰ The District does not challenge the parents' claim for missed PT going back to April 2006 based upon the statute of limitations. Although the issues in this case were limited to the time period June 8, 2007 through June 9, 2009, it is undisputed that the parents did not know that the PT hours had been reduced until the March 8, 2008 IEP meeting (*see* District's closing argument at 32), and there is also no evidence to impute constructive knowledge on the part of the parents prior to that date.

Lastly, the parents challenge the District's failure to provide bus transportation for Student, and also its failure to develop an appropriate fire evacuation plan for Student during the 2007-08 and 2008-09 school years. While I do concur with the parents that the District was required to program for Student's unique needs for a safe fire evacuation plan and appropriate transportation to school, and indeed the District does not appear to disagree, the record does not support a conclusion that Student was denied FAPE by reason of any such omissions.

CONCLUSION

For all of the foregoing reasons, the District denied FAPE to Student for the 2007-08 school year and from the beginning of the 2008-09 school year through March 6, 2009. The District also denied FAPE for failing to provide PT services from April 2006 through the end of the 2008-09 school year. Student and the parents are entitled to compensatory education to remedy this denial.

ORDER

1. Student is awarded compensatory education in the form of PT hours in an hour-for-hour remedy for all missed PT hours from April 2006 to the end of the 2008-09 school year.
2. Student is awarded full days of compensatory education for each day of the 2007-08 school year, and full days of compensatory education for each day of the 2008-09 school year from the first day of school through and including March 6, 2009.
3. With the exception of the PT hours, Parents, in consultation with the other members of the IEP team, may decide how the hours of compensatory education are spent, provided that the Parents shall make the final determination in the event of disagreement between them and the School District members of the IEP team. 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 Student's IEP to assure meaningful educational progress.
4. Compensatory education services may occur after school hours, on weekends and/or during the summer months when convenient for Student and parents. The hours of compensatory education/fund for compensatory education services/products/devices created by this provision may be used at any time from the present to beyond Student's 21st birthday, if necessary.

Cathy A. Skidmore

Cathy A. Skidmore
HEARING OFFICER

Dated: June 19, 2010
ODR No. 10169-08-09-LS