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

Pennsylvania

Special Education Hearing Officer

DECISION

Student's Name: R.J.

Date of Birth: [redacted]

ODR No. 13352-1213KE

CLOSED HEARING

Parties to the Hearing:	Representative:
Parents	Benjamin Geffen, Esq. Sonja Kerr, Esq. Public Interest Law Center of Philadelphia 1709 Benjamin Franklin Parkway Philadelphia, PA 19103 Catherine V. Wigglesworth, Esq. Dechert, LLP Cira Centre 2929 Arch Street Philadelphia, PA 19104
School District of Philadelphia 440 North Broad Street Philadelphia, PA 19130	Brian Subers, Esq. Fox Rothschild, LLP 10 Sentry Parkway Blue Bell, PA 19422

Dates of Hearing:	February 13, February 19, March 27, April 1, April 10, and April 17, 2013
Record Closed:	May 1, 2013[1]
Date of Decision:	May 8, 2013
Hearing Officer:	Brian Jason Ford

[1] The record of this matter closed upon receipt of the parties' closing briefs.

Introduction

This matter arises under Individuals with Disabilities Act (IDEA), 20 U.S.C. § 1400 *et seq*. and Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 701 *et seq.* The Student and Parents[2] claim that the School District of Philadelphia (District) has denied the Student's right to a free appropriate public education (FAPE). More specifically, the Parents claim that the District has failed to place the Student in a least restrictive environment (LRE) and has failed to provide appropriate communication services including appropriate assistive technology. (NT at 33).[3]

Issues

1. Did the District deny the Student a FAPE by failing to place the Student in the LRE?

2. Did the District deny the Student a FAPE by failing to provide appropriate communication services including appropriate assistive technology?

Res Judicata and the Law of the Case

The instant matter is not the first hearing between these parties. The Parents requested a due process hearing against the District alleging that the District failed to educate the student in the LRE and failed to provide appropriate assistive technology from February 14, 2010 through June 13, 2012. These claims resulted in a due process decision by Hearing Officer William F. Culleton, Jr. Esq. CHO. *See R.J. v. Sch. Dist. of Philadelphia*, ODR No. 2861-1112KE (July 12, 2012). That decision (Decision 1) was issued on July 12, 2012.

In Decision 1, Hearing Officer Culleton explicitly found that the District "did not fail to educate student in the least restrictive environment to the maximum extent appropriate during the relevant time, February 14, 2010 to June 13, 2012." *Id* at 21. Hearing Officer Culleton also explicitly found that the District "during the relevant period, did not deprive student of a FAPE by failing to provide appropriate assistive technology."[4] *Id*. Further, Hearing Officer Culleton explicitly declined to order the District to place the student in a less restrictive environment, provide a FAPE, or provide assistive technology. *Id*. These orders were consistent with Hearing Officer Culleton's conclusion that the Student's IEP was substantively appropriate, despite some procedural deficiencies. *Id* at 19-21.

Regarding procedural defects, Hearing Officer Culleton found that the IEP inaccurately reported the amount of time that the Student spent in regular education. Moreover, Hearing Officer Culleton found that the District committed a procedural error by

[2] Except for the cover page of this decision, identifying information has been omitted to the extent possible.
[3] Throughout this decision, citations are formatted as follows: NT stands for Notes of Testimony - i.e. the transcript of these proceedings. P-# refers to the Parents' exhibits, S-# refers to the school district's exhibits, J-# refers to joint exhibits, and H-# refers to the Hearing Officer's exhibits.
[4] In context, the "relevant period of time" is February 14, 2010 to June 13, 2012.

unilaterally changing the type of speech and language therapy provided to the Student "from all group therapy to a mix of group and individual therapy." *Id* at 21. To rectify the procedural defects in the IEP, Hearing Officer Culleton ordered as follows:

> "The district is ORDERED to convene IEP meeting within the first 10 school days of the 2012-2013 school year, discuss with the Parent the recommended allocation of speech and language therapy hours between group and individual settings, explain the reasons for the recommendation, consider the parents input and concerns, and, then 10 days following the IEP meeting what are herein, amend the prevailing IEP to reflect the IEP team's allocation of these hours."

Id at 22.

In light of Decision 1, claims concerning placement in the LRE or the provision of assistive technology (as part of communication services or otherwise) arising before June 13, 2012 are barred by the doctrine of *res judicata*.

Claims arising after June 13, 2012 are not barred. This does not mean, however, that Hearing Officer Culleton's decision has no bearing on such claims. I have no authority to disturb Hearing Officer Culleton's decision, nor would I. Special Education Hearing Officers' decisions are appealable to any court of competent jurisdiction. The Parents have appealed Hearing Officer Culleton's decision to the U.S. District Court for the Eastern District of Pennsylvania. Until such time as a court changes or sets aside the facts as found by Hearing Officer Culleton, those facts constitute the law of this case. In short, I am quite appropriately bound by the facts that Hearing Officer Culleton found.

The Parents argue that the ordinary *res judicata* and law of the case doctrines do not apply in special education due process hearings. Their theory is that strict application of these doctrines would preclude parents and students from ever bringing a second due process hearing once a hearing officer has issued an adverse decision. I respectfully, but strongly, disagree with the Parents' analysis. One would not expect any student's needs to remain stagnant over time and, for that reason, students' IEPs are likely to change year-to-year (if not more frequently). The fact that a Hearing Officer may conclude that an IEP is appropriate is not determinative in subsequent cases – provided that there is some evidence that the student's needs, or district's services, or both have changed over time.[5] Further, and perhaps more importantly, a Hearing Officer's conclusion that an IEP is reasonably calculated to offer a FAPE when it is issued has no impact upon subsequent claims that the IEP was not implemented. To whatever extent the IEP considered by Hearing Officer Culleton was not implemented after June 13, 2012, Decision 1 is not relevant to this case.

Findings of Fact

[5] Evidence of no change over time may also demonstrate a denial of FAPE, as the IDEA requires something more than stagnation.

1. The parties agree that the Student, who has cerebral palsy, qualifies for the rights and protections of the IDEA as a student with a disability.

2. In Decision 1, Hearing Officer Culleton considered an IEP, found it to be substantively appropriate despite procedural errors, and ordered the Student's IEP team to correct those errors by specifying the allocation of the Student's speech and language therapy minutes between group and individual sessions. *See above*, Decision 1 at 22.

3. The IEP that was the subject of Hearing Officer's Culleton's order to correct procedural errors was entered into evidence in this case as Exhibit S-1.

4. Hearing Officer Culleton issued Decision 1 on July 12, 2012. *Id.*

5. The first day of the 2012-13 school year in the District was September 7, 2012.

6. The district issued an "Invitation to Participate in the Individualized Education Program (IEP) Team Meeting or Other Meeting" on September 19, 2012. S-3.

7. The Invitation explains: "This meeting is not an annual IEP meeting. This meeting is to discuss and adjust [Student's] speech minutes." *Id*.

8. The Invitation scheduled the meeting for the next day, September 20, 2012. *Id*.

9. The Student's mother signed the Invitation on September 19, 2012, indicating that she would attend the meeting on September 20, 2012. *Id*.

10. The IEP team met on September 20, 2012. During the meeting, the District produced an amended version of the IEP that Hearing Officer Culleton had ordered the team to correct. (S-4).

11. The IEP considered by Hearing Officer Culleton and the IEP circulated at the September 20, 2012 meeting are substantively identical except as follows:
    a. A goal for the Student to "pick up the [Student's] meal from the cafeteria..." was removed. (S-1 at 18).
    b. A toileting goal was added. (S-4 at 18).
    c. Speech/Language Therapy was changed from 750 minutes of group therapy per IEP term to 600 minutes of group therapy and an additional 300 minutes of individual therapy per IEP term. *Compare* S-1 at 29 *with* S-4 at 28.

12. Both the IEP that Hearing Officer Culleton considered (S-1) and the amended IEP of September 20, 2012 (S-4) say that the Student will receive a supplemental level of support (meaning that the Student will spend 40% to 79% of the school day inside of a regular education classroom). Both IEPs also include PENNDATA Reporting that says the Student will spend only 7% of the day inside a regular classroom.

13. Both IEPs explain that the Student will be educated in a Multiple Disabilities Support classroom when outside of the regular education classroom. (S-1, S-4).

14. The Student's mother initialed the amended IEP in a number of places (S-1) and also approved the amended IEP on September 20, 2012 by signing a Notice of Recommended Educational Placement (NOREP) and indicating approval. (S-5).

15. On September 28, 2012, the District sought the Parents' consent to reevaluate the Student by issuing a "Permission to Reevaluate - Consent Form." (S-6). The purpose of the reevaluation was to maintain the Student's eligibility for occupational therapy and physical therapy. The Student's mother signed the form, providing consent, on October 1, 2012.

16. The District sent a "Parent/Guardian Input Form" with the Consent Form. (S-6). The Student's mother signed and dated the Input Form on October 1, 2012, but did not respond to the questions on that form. (S-6).

17. The Student's amended IEP (S-4) was set to expire by its own terms on November 28, 2012.

18. The District issued an invitation to an annual IEP team meeting on November 2, 2012.[6] The Student's mother signed the invitation, indicating that she would participate, and returned the invitation to the District. The meeting was scheduled for November 13, 2012. (S-7).

19. The IEP team meeting convened as scheduled. Present at the meeting were the Student's mother, a special education teacher, the District's LEA representative, and the District's Speech-Language Pathologist. (S-8 at 2).

20. The District circulated an IEP during the meeting that was an update of the amended IEP of September 20, 2012.[7]

21. The IEP presented during the meeting of November 13, 2012 included updates to sub-sections of the Student's Present Levels of Academic Achievement and Functional Performance. *Compare* S-4 at 8-9 S-8 at 8-11.

22. A goal for the Student to increase classroom participation (S-4 at 16) was changed to focus on communication with classmates during "morning circle." (S-8 at 18) Similarly, the toileting goal (S-4 at 18) was replaced with a broader communication

[6] Originally, the invitation was not for an annual IEP team meeting. This error was corrected by hand, and the correction was initialed by the Student's mother.

[7] The IEP's date of creation still read "09/20/2012" and, printed at the bottom of each page, the IEP says "IEP Amendment 09/20/2012" with a blank for "Parent/Guardian Initial." Those pages are initialed by the Parent in the same places and, more likely than not, were carried over from the prior, amended IEP.

goal, but still targeted the Student's ability to request use of the bathroom. (S-8 at 20).

23. A worksheet tracing goal (S-4 at 20) was removed in the November 13, 2012 IEP.

24. A goal calling for the Student to "...identify numbers 1-5 with 3 out of 5 trials at 60% [sic]..." (S-4 at 22) was removed in the November 13, 2012 IEP.

25. A goal calling for the Student to "... expand [] vocabulary skills using varied modalities to respond "WH" questions with four out of five trials at 80% [sic]..." (S-4 at 24) was expanded in the November 13, 2012 IEP to target the Student's ability to "place real life pictures in order of their sequence..." (S-8 at 28).

26. A goal calling for the Student to complete portions of a computer game or program (S-4 at 26) was replaced with a goal for the Student to remain on task and show active engagement with a "teacher designated or student generated computer program, touchscreen computer or regular computer with a switch..." (*Compare* S-4 at 26 *with* S-8 at 29).

27. No evidence was presented to suggest that the Student mastered any of the goals that were removed from the September 20, 2012 amended IEP by the November 13, 2012 IEP. What evidence there is (in "Reports of Progress") is not compelling given an overall lack of specificity, but shows that the Student never reached more than half way to mastery. *See, e.g.* S-13, P-17, P-18.[8]

28. The same evidence, however, generally indicates that the Student was making progress towards IEP goals from the measured baseline. *Id*.

29. Other goals were added to the IEP of November 13, 2012. These goals targeted the Student's ability to throw away trash and clean the Student's area after meals, sort objects by function or category, and demonstrate an understanding of quantity (one, all or none). (S-8 at 21, 24, and 26).

30. Program modifications, specially designed instruction (SDI), related services (including the designation of group and individual Speech/Language Therapy hours), and supports for school personnel are identical. *Compare* S-4 at 28-29 *with* S-8 at 31-32.[9]

---

[8] Some progress reports assess the Student's progress compared to baseline data taken on November 1, 2012. (S-14). As this decision is released on May 8, 2013, that seems unlikely. Overall, testimony reveals that the District is plagued by technological problems that are a significant hindrance to proper IEP development. The PENNDATA sections of IEPs, described later in this decision, is just one example. Remedies notwithstanding, the District is obligated to comply with all of the IDEA - including the procedural requirements. To whatever extent such technological problems result in IDEA violations, substantive or procedural, pointing out a software glitch is not a defense.

[9] The anticipated dates of service were pushed forward one year, with an expected termination date of November 12, 2013. As such, the District offered the same modifications, SDIs, related services, and supports for school personnel for another year.

31. The "Type of Support" (i.e. Supplemental) and PENNDATA sections of the two IEPs are identical. *Compare* S-4 at 33-36 *with* S-8 at 36-38.

32. During the IEP team meeting on November 13, 2012, the District gave the Student's mother a NOREP to approve the IEP circulated at that meeting. The Student's mother approved the IEP via the NOREP the same day. (S-10).

33. On November 16, 2012 (three days after the annual IEP team meeting), the District sent a Reevaluation Report (RR) to the Parents. (S-9). This was *not* the RR that the Parents provided consent for on September 28, 2012. *See* FF #14 *above*. Rather, the purpose of this RR was completed at the Parents' request to determine if the Student would benefit from a barrier-free school. (S-9 at 1). The RR is watermarked "Proposed" on every page. (S-9).

34. The RR concludes that the Student would benefit from a barrier-free school.[10] (S-9 at 8). To reach this conclusion, the evaluator reviewed the Student's records, teacher and therapist input, observations of the Student, and an "Evaluation of Functional Mobility." (S-9). The RR explains, *inter alia*, that:
    a. The Student uses a personal wheelchair for all mobility outside the classroom,
    b. The Student can transfer into and out of the wheelchair with minimal assistance, and
    c. The Student can walk with a gate trainer up to 100 feet.

35. Generally, evidence and testimony reveal that the Parents and the Student's teacher were in frequent communication. *See, e.g.* S-11, S-12, S-15, S-16, P-22.

36. Professional service logs kept by the District's Speech/Language Pathologist show inconsistent progress to a point that no pattern of progress or regression can be discerned. (S-17). Moreover, for purposes of analysis, the "Progress Indicator" on the service logs are too subjective to be useful. *Id*, *see also* S-18.

37. The Student received report cards. (S-16). Grades reported on report cards were not calculated in any objective way, and do not relate to any progress or regression towards IEP goals.

38. The Parents obtained an independent educational evaluation (IEE-1), specifically an "Augmentative Communication Evaluation," for the Student. (P-32).

39. IEE-1 had three purposes: 1) to determine if the District had provided appropriate assistive technology, 2) to determine if the District had provided an "organized communication system" such that the Student received "significant learning and meaningful benefit," and 3) to determine if the Student should "receive

[10] Around that time, the Student's mother had expressed an interest in exploring other placement options for the Student, including a barrier-free school within the District. *See* S-11.

compensatory education for the lack of appropriate training and support received, in order to develop a functional communication system." (P-32 at 1).

40. To the extent that purpose of IEE-1 is to resolve questions of law, it is unpersuasive. Further, IEE-1, on its face, presupposes that the Student has not received appropriate training and support to develop a functional communication system. In context, IEE-1 was clearly developed, in large part, for the purpose of this litigation (as opposed to assessing the Student's current needs and making program or placement recommendations to the IEP team).

41. A portion of IEE-1 is nothing more than a critique of Hearing Officer Culleton's Decision 1. (P-32 at 15-18).[11]

42. The probative value of IEE-1 and the credibility of its author are both tainted by the foregoing factors.

43. The author of IEE-1 observed the Student at home and recorded interactions with the Student. Video recordings of those interactions were shown during the hearing and are made part of the record of these proceedings at P-9a through P-9g.

44. The videos show the Student engaged in various activities, most notably a basketball game in which the Student would remain kneeling near the same spot, and would either catch, pass or shoot a ball into a net. The author of IEE-1 provided an iPad with software that enabled the Student to say various words and phrases by touching icons. The words and phrases could be changed depending on the activity that the Student was performing.

45. The author of IEE-1 testified that the Student readily adopted the iPad and could use the software in a matter of minutes. The videos revealed that the Student likely had an interest in the iPad and, perhaps with training, may be able to use the iPad with great success. However, the videos did not show the fast adoption and accurate, independent use of the technology that the author of IEE-1 testified to. At best, the videos revealed the author's testimony to be exaggerated and, at worst, misleading. The credibility of IEE-1's author is further diminished by these factors.

46. Despite the diminished credibility of IEE-1 and its author, IEE-1 reports in-school observations of the Student that are generally consistent with the testimony of the Student's teachers and therapists. (P-32 at 3-9).

[11] Use of an IEE to provide legal argument and analysis is improper. "While courts sometimes accept expert evaluations of a student in IDEA actions, these evaluations should not present legal analysis." *Lebron v. N. Penn Sch. Dist.*, 769 F. Supp. 2d 788, 794-795 (E.D. Pa. 2011) (citing *Moorestown Twp. Bd. of Educ. v. S.D.*, No. 10-0312, 2010 U.S. Dist. LEXIS 109856, at *12-13 (D.N.J. Oct. 15, 2010) (rejecting expert evidence in IDEA action insofar as the testimony constituted legal analysis). *See also Bethlehem Area Sch. Dist. v. Zhou*, 2011 U.S. Dist. LEXIS 111215, 4 (E.D. Pa. Sept. 27, 2011); *Coleman v. Pottstown Sch. Dist.*, 2012 U.S. Dist. LEXIS 22384, 26 (E.D. Pa. Feb. 21, 2012) ("[expert] opinion on whether the administrative hearing officer appropriately applied the law is not a proper subject for an expert evaluation.").

47. The Parents obtained an independent educational evaluation (IEE-2) for the Student. The IEE-2 report was completed on February 6, 2013. (P-29). IEE-2 does not include information from a questionnaire submitted by the evaluator to the Student's teachers. The teachers were instructed by the District to not complete the questionnaire.[12]

48. The Parents' evaluator observed the Student in school, reviewed records, and interviewed the Parents. Generally, IEE-2 concludes that the Student could be included to a greater degree, that the District has taken no steps to plan for such inclusion, and that teachers and District staff are too quick to help the Student perform tasks that the Student can complete without assistance. (P-29).

49. The evaluator concluded that the Student will neither improve upon or generalize those tasks that the Student can complete independently unless the District fades support and includes the Student to a greater extent. (P-29).

50. IEE-2 refers to a large number of resources that provide information on inclusionary practices. (P-29).

51. During the 2012-13 school year, the Student is educated in a multiple disabilities classroom. That classroom travels, as a whole, to regular education classes for Music and Physical Education. The class also traveled to a regular education Art class from the start of the school year through the beginning of March, 2013, and to Science thereafter. The multiple disabilities classroom is educated with non-disabled peers during these specials.

52. The Student has incidental contact with non-disabled peers in the school's hallways, during assemblies and on community outings. (NT 353-356).

53. The Student communicates in several ways. The Student knows and uses some American Sign Language (ASL) signs. The Student has also created a number of non-ASL signs to communicate. The Student, on occasion, attempts to communicate verbally. Such attempts are relatively rare and difficult to understand.[13]

---

[12] The Student's IEEs have been an issue throughout this hearing. The District has taken a hostile attitude towards the independent evaluators, even in the context of litigation. The Parents, at various points during the hearing, sought orders requiring the District to allow the evaluators to observe the Student. The Parents also sought orders requiring the District to complete the independent evaluators' forms and questionnaires. I denied some of those motions upon determining that some of the proposed questionnaires crossed into the realm of discovery, which is not provided in these administrative proceedings. I explained to the parties, however, that the District may not challenge the validity or accuracy of IEEs based on their failure to contain information that the District has refused to provide.

[13] There is no single citation in the record that establishes the Student's various means of communication. Every witness testified at considerable length about how the Student does and does not communicate, and nearly every document has some information about the Student's communication abilities and needs. It is a challenge to find any part of the record of this proceeding that does not in some way relate to the Student's communication. My findings regarding the Student's communication are, therefore, based on the record as a whole.

54. As further means of communication, in school, the District provides intermittent access to a “Tech/Speak 32.” This is a device that can be attached to the Student’s wheelchair or used by the Student away from the wheelchair. The device has 32 buttons in a grid. Pictures are overlaid on top of the buttons. When the Student pushes a picture/button, the device speaks a corresponding word or phrase.

55. There is no consistency with which the Tech/Speak 32 is provided to the Student in school. Sometimes the device is attached to the Student’s wheelchair, sometimes not. Sometimes the device travels with the Student for specials, other times it remains in the multiple disabilities classroom.

56. The District has provided the same overlay for the Tech/Speak 32 for the entirety of the 2012-13 school year. This means that the Student has access to the same 32 words and phrases whenever the device is available. The words and phrases are not changed to match what the Student is likely to communicate based on the situation or task at hand. The Tech/Speak 32 is designed so that the overlay can be changed to match the situation in which it will be used.

57. The Student receives direct, 1:1 instruction in the use of the Tech/Speak 32. This instruction is provided during Speech/Language therapy sessions, and is limited to developing a correlation between the programmed word or phrase and the corresponding button. *See, e.g.* NT at 443-446, 1156-1157. Specifically, the S/L Pathologist will ask the Student to press a button to determine if the Student knows which button to press in response to the prompt. *Id*.

58. All evidence indicates that the Student does not use the Tech/Speak 32 to enable reciprocal communication with teachers, therapists or school personnel in school.

59. The District is not providing ASL instruction to the Student. None of the Student’s teachers are fluent in ASL.

60. The Student has occasional access to an iPad in school. It is not clear that the iPad is being used to facilitate communication, or that the Student has received any instruction regarding how to use the iPad for communication or any other purpose.

61. When the Student receives group Speech/Language therapy. These sessions address social greetings and skills, maintaining eye contact, and verbal expression. Group therapy activities include greetings, identifying each other’s names, identifying and matching pictures, and facilitated communication. (NT at 1040-1041).

62. The Student also receives individual Speech/Language therapy. Individual sessions address greetings, social skills and multi-modal communication. The individual therapy sessions consist of a greeting song, a matching/association activity, and direct instruction with TechSpeak 32 (as described above). (NT at 1042-1043).

63. The Student's Speech/Language Pathologist has provided significantly more hours of therapy than the Student's IEP requires. The Student's IEP calls for 600 minutes of group S/L therapy per IEP term, which equates to 10 hours per school year.[14] The IEP also calls for an additional 300 hours of individual S/L therapy per IEP term, which equates to 5 hours per school year. Both the Pathologist's testimony and her service log book show that about 12.5 hours of S/L therapy were provided between September of 2012 and January of 2013.

64. The S/L Pathologist clearly and credibly testified that the Student requires more than 10 hours of individual and 5 hours of group S/L therapy per school year. The S/L Pathologist's testimony was ambiguous as to how many more hours the Student requires. At one point, the testimony suggests that the Student requires 900 to 1200 minutes per IEP term. (NT at 1004). At other points, the S/L Pathologist testified that the Student was currently receiving a sufficient quantity of S/L therapy because [the Student] is provided with more therapy than the IEP requires.

65. The S/L Pathologist declined to give an opinion as to how many hours per week of therapy would be appropriate for the Student. The District forces the S/L Pathologist to express necessary hours in terms of minutes per IEP term.

66. In theory, S/L Therapy services could be discontinued at any time because the number of hours of service called for in the Student's IEP has already been exceeded. In practice, the S/L Pathologist testified that she will continue to provide services into the indefinite future. *See* NT at 963-964.

67. No evidence or testimony suggests that the Student is physically incapable of going into regular education classrooms, assuming supports are provided.

68. If the Student were placed into regular education classrooms for academic instruction in core subject areas (Math, Reading, etc.), the actual work that the Student would complete would have no relationship to the instruction provided to the non-disabled classmates. The Parents' expert explained that an alternative curriculum would likely be required. (NT at 825-826).

Legal Principles

The doctrine of *res judicita* and its application to this case is discussed above. Other legal principles are also important to this case.

[14] In this case, the Student's IEPs do not break with the school year. In a technical sense, the IEPs call for a number of minutes of therapy over the lifetime of the IEP. It is helpful to think about the real world implications of such numbers by translating the IEP term to a school year. Regardless, the number of hours called for in the IEP have no correlation to the number of hours that the Student actually has received.

The Burden of Proof

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, 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). The party seeking relief must prove entitlement to their demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. *See N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), citing S*hore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this particular case, the Paretns are the party seeking relief and must bear the burden of persuasion.

Free Appropriate Public Education (FAPE)

As stated succinctly by former Hearing Officer Myers in Student v. Chester County Community Charter School, ODR No. 8960-0708KE (2009):

> Students with disabilities are entitled to FAPE under both federal and state law. 34 C.F.R. §§300.1-300.818; 22 Pa. Code §§14.101-14 FAPE does not require IEPs that provide the maximum possible benefit or that maximize a student's potential, but rather FAPE requires IEPs that are reasonably calculated to enable the child to achieve meaningful educational benefit. Meaningful educational benefit is more than a trivial or *de minimis* educational benefit. 20 U.S.C. §1412; *Board of Education v. Rowley*, 458 U.S. 176, 73 L.Ed.2d 690, 102 S.Ct. 3034 (1982); *Ridgewood Board of Education v. M.E. ex. rel. M.E.*, 172 F.3d 238 (3d Cir. 1999); S*troudsburg Area School District v. Jared N.*, 712 A.2d 807 (Pa. Cmwlth. 1998); *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3rd Cir. 1988) *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031 (3d Cir. 1993); *Daniel G. v. Delaware Valley School District*, 813 A.2d 36 (Pa. Cmwlth. 2002)

The essence of the standard is that IDEA-eligible students must receive specially designed instruction and related services, by and through an IEP that is reasonably calculated at the time it is issued to offer a meaningful educational benefit to the Student in the least restrictive environment.

Placement in the Least Restrictive Environment

Both federal and Pennsylvania law requires the placement of the student with a disability in the least restrictive environment (LRE). Specifically:

> Each public agency must ensure that—

(i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and
(ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

34 C.F.R. § 300.114(a)(2).

The Third Circuit has adopted a two-part test to determine whether the LRE requirement is satisfied. That test flows from *Oberti v. Bd. of Educ. of Clementon Sch. Dist.*, 995 F.2d 1204 (3d Cir. 1993), and has been characterized as follows:

> First, a court must determine "'whether education in the regular classroom, with the use of supplementary aids and services, can be achieved satisfactorily.'" Id. at 1215 (quoting Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048 (5th Cir. 1989). Second, if "placement outside of a regular education is necessary for the child's educational benefit, it must evaluate 'whether the school has mainstreamed the child to the maximum extent appropriate . . . .'" T.R., 205 F.3d at 578 (quoting Oberti, 995 F.2d at 1215).

Lebron v. N. Penn Sch. Dist., 769 F. Supp. 2d 788, 799 (E.D. Pa. 2011)

Compensatory Education

Hearing Officer Skidmore has provided the best distillation of current compensatory education jurisprudence in Pennsylvania:

> It is well settled that compensatory education is an appropriate remedy where a [LEA] knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only a trivial educational benefit, and the [LEA] fails to remedy the problem. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Such an award compensates the child for the period of deprivation of special education services, excluding the time reasonably required for an [LEA] 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 [a student] to the position that [he or she] would have occupied but for the [LEA's] failure to provide a FAPE." *B.C. v. Penn Manor Sch. 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. Sch. 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 that the would have occupied but for the school district's violations of the 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. District, ODR No. 01634-1011AS (Skidmore, 2011)

Discussion

It is helpful to see how the different issues in this case change over time. I will begin this discussion with an examination of the very start of the 2012-13 school year. Decision 1 is particularly important for that period of time. I will then consider the communication services issue over two periods of time: September 21 to November 13, 2012 and then November 14, 2012 through the present. Finally, I will address the LRE issue.

Start of the 2012-13 School Year to September 20, 2012

Hearing Officer Culleton issued Decision 1 on July 12, 2012. Therein, the District was ordered to convene the Student's IEP team, discuss the allocation of speech and language therapy hours, and revise the Student's IEP to reflect the team's determination. The IEP team was to convene within the first ten school days of the 2012-13 school year, and the IEP was to be amended within 10 days of the meeting.

I have no authority to enforce Hearing Officer Culleton's Order. However, the record supports a finding that the IEP considered by Hearing Officer Culleton was revised on the tenth school day of the 2012-13 school year. Consequently, the IEP considered by Hearing Officer Culleton was in place from the start of the 2012-13 school year through September 20, 2012.

Hearing Officer Culleton has already determined that the IEP in place during the first 10 school days of the 2012-13 school year is substantively appropriate. I cannot and will not disturb that determination. No evidence was presented to prove that the IEP was not implemented during these 10 school days. Consequently, I find that the Student was not denied a FAPE from the start of the 2012-13 school year to September 20, 2012.

Communication Services – September 21, 2012 to November 13, 2012

The IEP team convened on September 20, 2012 to satisfy Hearing Officer Culleton's Order. The resulting IEP was in place from September 21 to November 13, 2012. It is not for me to determine whether the actions taken by the IEP team satisfy Hearing Officer Culleton's Order. Rather, my task is first to determine whether the resulting IEP satisfied the IDEA's LRE requirement and offered appropriate communication services and, second, to determine if the IEP was properly implemented.

Compared to the IEP considered by Hearing Officer Culleton, the IEP of September 20 changed in three ways. *See* FF #11, *above*. Neither the toileting goal nor the goal for

the Student to clean up after meals is directly applicable to the issues raised in this case: placement in the LRE and provision of appropriate communication services. The change to the Student's S/L Therapy hours, however, directly relates to the issues.

The most credible testimony concerning the change to the amount of S/L therapy hours came from the S/L Pathologist. The S/L Pathologist testified that the amount of S/L therapy *as expressed in the Student's IEP* is insufficient and was insufficient at the time the IEP was offered. Moreover, from the very start of the 2012-13 school year, the S/L Pathologist has provided a greater quantity of S/L Therapy than the IEP calls for. Taking the S/L Pathologist's testimony as a whole, I am persuaded that the Student requires at least the amount of S/L therapy that is actually being provided, and would very likely benefit from more. Further, given the severity of the Student's needs, I find that it is inappropriate to indicate the amount of therapy that the Student will receive in hours per IEP term. The IEP must report the number of group sessions that the Student will receive per week, the number of individual sessions the Student will receive per week, and the duration of those sessions. Expressing the services in hours per IEP term yields a needlessly confusing number that, in this case, had no bearing on the services that the Student actually received.

Although the Parents have proven that the amount of S/L therapy provided in the Student's IEP is insufficient, they have not proven that the amount of S/L therapy that the Student actually received is insufficient. As noted above, the S/L Pathologist provided more hours of S/L therapy than the IEP calls for during the first half of the 2012-13 school year. The S/L Pathologist continues to provide this amount of services through the present day. Evidence suggesting that the Student requires more hours of S/L therapy than the Student actually receives is not preponderant. Therefore, the insufficient hours of S/L therapy provided by the IEP did not result in a denial of FAPE in this case.

The *hours* of S/L therapy notwithstanding, the Parents argue that the S/L therapy itself was and is inappropriate. To support this argument, the Parents point to the fact that the Student is learning to identify the buttons on the Tech/Speak 32 as opposed to using the device for reciprocal communication. I am not persuaded that the Student can use a Tech/Speak 32 (or any other device) to enable reciprocal communication before learning how the device works. All evidence and testimony suggests that the Student's ability to demonstrate understanding of the correlation between the buttons on the device and the corresponding words and phrases is inconsistent at best.

Instruction in communications devices is not the only purpose of the S/L therapy. Similarly, the allegation in this case is that the District failed to provide appropriate communication services, of which assistive technology is only one part. This is a broader claim than what Hearing Officer Culleton considered.[15]

[15] In addition to LRE, the issue before Hearing Officer Culleton was whether the District deprived the "Student of a FAPE by failing to provide appropriate assistive technology." *See* ODR No. 2861-1112KE.

Both parties agree that the Student has severe communications needs. The evidence and testimony in this case preponderantly demonstrate that the services provided by the District did not improve the Student's ability to communicate. However many hours of services were provided and whatever assistive technology was made available, no evidence indicates that the Student's ability to communicate improved to any meaningful degree or with any meaningful consistency. What evidence and testimony there is concerning the Student's actual ability to communicate indicates extreme variability at best. I commend the S/L Pathologist for taking detailed, objective progress notes. (S-17). Unfortunately, no pattern of progress can be derived from those notes, and the evidence and testimony in this case demonstrate that the District took no action in response to them.

In this particular case, the inefficacy of the communication services provided through the amended IEP of September 20, 2012 is not determinative. IEPs are not judged in hindsight. Particularly in light of Decision 1, I am not persuaded that the District should have known that the contemplated services would not yield meaningful progress on the day that the IEP was offered. At some point, however, the District must be charged with the knowledge that the communication services were not improving the Student's ability to communicate. The question, therefore, becomes whether the District should have known that the communication services offered through the September 20, 2012 IEP were inappropriate before that IEP was replaced November 13, 2012.

I am not persuaded that the District must be charged with knowledge that services offered for about 37 school days were ineffective to the point of being inappropriate. The amended IEP of September 20, 2012 was in effect for less than two months. I must find that the communication services offered through that IEP were reasonably calculated to provide a meaningful educational benefit at the time they were offered because the Parents have not proven otherwise. Similarly, the Parents have not proven that the District knew or should have known that the communication services were ineffective at any time before November 13, 2012.

In sum, except for the hours of S/L therapy, the Parents have not proven that the communication services offered in the amended IEP of September 20, 2012 were not reasonably calculated to provide a FAPE at the time they were offered. The Parents have proven that the number of hours of S/L therapy offered through the IEP were insufficient, but have not proven that this insufficiency resulted in a substantive denial of FAPE. The Parents have proven that the actual communication services offered through the IEP were ineffective, but have not proven that the District should be charged with that knowledge before November 13, 2012. For these reasons, the Parents have not proven a denial of FAPE resulting from inappropriate communication services from September 20, 2012 to November 13, 2012.

Communication Services – November 14, 2012 to Present

The foregoing analysis changes after November 13, 2012. The District convened an IEP team meeting on November 13, 2012. The resulting IEP was implemented from

November 14, 2012 through the present. The S/L Pathologist attended the IEP meeting on November 13, 2012. The IEP includes updated information regarding the Student's communication needs. As described above, IEP goals were changed to include a greater focus on communication. Yet, despite this, the actual communication services that the Student received did not change in any substantive or meaningful way.

The number of hours of Speech/Language therapy called for in the IEP of November 13, 2012 remained unchanged. The lack of any relationship between the hours called for in the IEP and the actual hours that the student received also remained unchanged. Again, the Student received more Speech/Language therapy than the IEP called for. Consequently, the IEP's inaccuracy did not yield a substantive denial of FAPE.

Even so, what progress data exists continues to indicate the same dramatic inconsistencies observed before November 13, 2012. The Student's IEP team certainly had an opportunity to discuss the Student's actual progress and communication needs during the IEP team meeting, but no substantive changes were made. This failed opportunity is the point at which the District had information about the Student's actual lack of progress (if not on paper then in the presence of the S/L Pathologist at the meeting). The IDEA compels the District to take action under these circumstances. Specifically, the District was obligated to either use the information on hand to change the Student's communication services or to seek additional information to determine what should be changed. The District took neither action, and the Student's ability to communicate did not improve.

The Student's ability to communicate should improve with the provision of appropriate services, and neither party argues to the contrary. Neither party argues that the Student's ability to communicate has peaked. This room for progress, together with the fact that the Student did not make progress, the fact that the District knew or should have known about the Student's lack of progress from November 13, 2012 onward, and the District's inaction on this knowledge all yield a denial of FAPE for which compensatory education is owed.

The record does not establish the amount of compensatory education that will put the Student in the position that the Student would be in but for the denial of FAPE. Therefore, I cannot use the *B.C. v. Penn Manor* calculation. Also, there is very little on the record of this case to say what amount of communication services the Student should have received. Such information is necessary for the *M.C. v. Central Regional* calculation. The best evidence on the record to make this calculation is the testimony of the S/L Pathologist. This testimony suggests that the actual hours of services that the Student receives is the bare minimum, and should be increased. *See, e.g.* NT at 1004-1011. Currently, the Student actually receives 30 minutes of group and 30 minutes of individual S/L therapy per week, and the individual sessions should be increased by at least 30 minutes. *Id*. Therefore, in a dearth of evidence, I conclude that the Student is entitled to 1.5 hours of compensatory education for each week that the District was in session from November 14, 2012 through the present. Compensatory education shall

continue to accrue at the same rate until communication services that are reasonably calculated to be appropriate are offered by the District.

Alleged Failure to Place the Student in the LRE

Like Hearing Officer Culleton before me, I am not persuaded that the District has violated its obligation to place the Student in the LRE. I reach this conclusion for largely the same reasons as Hearing Officer Culleton did. Although there is evidence establishing that the District did not use the inclusion preparation methodology recommended by the Pennsylvania Department of Education (S-2, S-3), there is no legal mandate to use such methodology. Further, the facts illustrate that the Student's IEP team, including the Parents, has considered a number of placement options for the Student – including more restrictive options at the Student's mother's suggestion.

The Parents correctly argue that the Student need not earn the right to placement in the LRE by demonstrating success in restrictive environments. At the same time, the IDEA does not require the Student's failure in an inappropriate placement simply because it is less restrictive.[16] Rather, the IEP team must determine what placements could be appropriate, and then choose the least restrictive of those placements. In this case, the Parents have not proven that any less restrictive placement is appropriate for the Student, or could be made appropriate with the provision of additional supports.

There is evidence that, literally, the District could put the Student in a regular education classroom and instruct the Student there. Were that to happen, even with the highest level of support, the Student's instruction would have no resemblance to the regular education provided to the rest of the class. Testimony from the Parents' evaluator suggests that the Student would have to use a separate curriculum. No evidence suggests how the Student would benefit from placement in a classroom in which the Student would be educated in physical proximity to non-disabled peers, but not *with* non-disabled peers.

Further, when greater inclusion has been tried, such efforts have failed. *See* Decision 1; *R.J. v. Sch. Dist. of Philadelphia*, ODR No. 2861-1112KE (July 12, 2012) at 11. No evidence was presented to suggest that the Student's needs and abilities have changed in any way since Hearing Officer Culleton reached that conclusion. In fact, it is the lack of change that supports the Parents' claims for compensatory education for denial of appropriate communication services.

Finally, the notation on all of the Student's IEPs that the Student is receiving a supplemental level of special education is inaccurate. The District has counted the Student's incidental contact with non-disabled peers while moving from class to class as time spent in regular education. This is inconsistent with IDEA requirements and with common sense. Testimony suggests that the authors of the Student's IEPs believe that

[16] Some testimony from IEE-2's author suggests that she believes special education laws require students to fail in less restrictive placements before more restrictive placements are tried. Although I give no weight to any of the witnesses' legal conclusions, this analysis is wrong.

they may not check the “full time” placement box under any circumstances. There is also no basis in reality for the PENNDATA reporting. Although the PENNDATA reporting may flow from a software error, the “supplemental” designation flows from a lack of training and the systematic dissemination of incorrect information. In this case, these gross procedural errors did not result in a substantive denial of FAPE. The record indicates that the Parents were active members of the IEP team, and understood the Student’s actual level of inclusion. The Student is not entitled to compensatory education for these errors because they are procedural, but these errors will be addressed in the order below.

For the foregoing reasons, I find that the District has not violated the Student’s right to placement in the LRE.

Conclusion

Two issues are presented in this case. First, the Parents allege that the Student was denied a FAPE resulting from the District’s failure to provide appropriate communication services. I find that the communication services were inappropriate, and the District had reason to know of their inappropriateness from November 13, 2012 through the present. To remedy this denial of FAPE, I award 1.5 hours of compensatory education for each week that the District was in session from November 14, 2012 through the present, accruing at the same rate until the District offers appropriate communication services. Second, the Parents allege that the Student was denied a FAPE resulting from the District’s failure to place the Student in the least restrictive environment. The record does not support this allegation and, for the reasons stated above, I find that the District did not violate the Student’s right to placement in the LRE.

ORDER

And now, May 8, 2013, it is hereby **ORDERED** as follows:

1. From November 14, 2012 through the present, the District violated the Student’s right to a FAPE by failing to provide appropriate communication services; and

2. The Student is awarded 1.5 hours compensatory education for each week that school was in session from November 14, 2012 through the present; and

3. Compensatory education shall continue to accrue at the rate of 1.5 hours for each week that school is in session until such time as the District offers appropriate communication services; and

4. The Parents 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 the 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 through the Student's IEP to assure meaningful educational progress; and

5. No dollar-per-hour cap on compensatory education is established and Parents may apply compensatory education regardless of any per-hour cost; and

6. Compensatory education shall not be used to offset the cost of tuition at any private placement.

7. Within 60 school days of this order, all District-employed members of the Student's IEP team must receive no less than one (1) hour of direct training in the proper way to calculate and report the level of a student's inclusion for IEP purposes. All District employees who are likely to be members of the Student's IEP team in the 2013-14 school year must receive the same training. The person or persons providing such training shall not be employees of the District.

It is **FURTHER ORDERED** that any claim not specifically addressed in this order is **DENIED** and **DISMISSED**.

/s/ Brian Jason Ford
HEARING OFFICER