

*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.B.

Date of Birth: [redacted]

Date of Hearing: March 6, 2014

## CLOSED HEARING

ODR File No. 14593-1314KE

### Parties to the Hearing:

#### Parents

Parent[s]

#### School District

North Hills School District  
135 6<sup>th</sup> Avenue  
Pittsburgh, PA 15229

### Representative:

Charles E. Steele, Esquire  
Steele Schneider  
Lawyers Building  
428 Forbes Ave., Suite 700  
Pittsburgh, PA 15219

Michael J. Witherel, Esquire  
Witherel & Associates  
966 Perry Highway  
Pittsburgh, PA 15237

Date Record Closed:

March 11, 2014

Date of Decision:

March 26, 2014

Hearing Officer:

Cathy A. Skidmore, M.Ed., J.D.

## **INTRODUCTION AND PROCEDURAL HISTORY**

Student<sup>1</sup> is an elementary school-aged student in the North Hills School District (hereafter District) who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).<sup>2</sup> Student's Parents filed a due process complaint against the District asserting that it denied Student a free, appropriate public education (FAPE) under the IDEA, as well as the federal and state regulations implementing those statutes.

The case proceeded to a due process hearing which convened in a single session,<sup>3</sup> at which the parties presented evidence in support of their respective positions. The Parents sought to establish that the District failed to provide Student with FAPE with respect to Student's communication and behavioral needs for the time period in question. The District maintained that its special education program, as offered and implemented, was appropriate for Student.

For the reasons set forth below, I find in favor of the Parents.

## **ISSUES**

1. Whether the District denied Student FAPE during the 2012-13 and 2013-14 school years by failing to appropriately program for Student's communication and behavioral needs; and
2. If it did so, is Student entitled to compensatory education and, if so, in what amount?

## **FINDINGS OF FACT**

1. Student is elementary school-aged and is a resident of the District. Student is eligible for special education by reason of autism; Student is also essentially nonverbal. (Notes of Testimony (N.T.) 22-23, 27, 68-69; Joint Exhibit (J-) A)
2. Student received early intervention services including speech/language and occupational therapy prior to the age of three. At some point Student began attending preschool five days per week. (N.T. 69-70)
3. Student was evaluated by the local Intermediate Unit (IU) in the fall of 2009. An Evaluation Report (ER) dated October 30, 2009 noted a number of needs including,<sup>4</sup> among other things, a communication system to include total communication strategies. The Individualized Family Service Plan (IFSP)/Individualized Education Program (IEP)

---

<sup>1</sup> In the interest of confidentiality and privacy, Student's name and gender are not used in the body of this decision.

<sup>2</sup> 20 U.S.C. §§ 1401 *et seq.*

<sup>3</sup> The District's motion to dismiss was denied at the start of the hearing. (Notes of Testimony (N.T. 9)

<sup>4</sup> Because the issues for this hearing were limited to communication, including assistive technology, and behavior (N.T. 19-20), this decision will focus on those areas.

included an Outcome/Goal for a multi-modal communication system of signs, pictures, and verbalizations. (School District Exhibit (S-) 4A; Parent Exhibit (P-) 5)<sup>5</sup>

#### Communication and Behavior

4. While in preschool, Student began using an iPod app, iCommunicate, at home and at the preschool. With that app, Student can access images to select them to convey phrases such as “I want [object].” (N.T. 85-86)
5. Student demonstrated an ability to perform some functions with an iPad such as swiping the screen and scrolling during preschool. (N.T. 37, 84-86)
6. Student was privately evaluated by a speech/language pathologist in January 2012 and began receiving individual, private speech/language therapy once per week for thirty minutes. The sessions are provided in a room where other therapists and children are present. The speech/language pathologist has established joint attention with Student on a regular basis. Student is able to use a communication book<sup>6</sup> to express “I want” and “All done” with a choice of activity or object. Student at times independently initiates “I want [activity]”. Using the same book, Student is also able to express “yes” and “no” (using a checkmark for yes and an “X” for no), some colors and numbers, “open” and “close,” and phrases such as “I’m hungry.” Student also responds to Student’s name by turning toward the speaker. Student has expressed wants and needs in this manner and responded to Student’s name since the fall of 2012 (beginning of Kindergarten). (N.T. 26-30, 42-43, 48-50, 51-53, 55-56, 91)
7. In private speech/language therapy sessions, Student typically uses the communication book to ask to do a sensory activity for a few minutes and is able to communicate “all done” with that activity. (N.T. 27-28, 31)
8. Student uses a similar communication book at home. Student is able to communicate wants and needs at home using the book, as well as respond to Student’s name by turning Student’s head toward the person speaking. Student has demonstrated these abilities at

---

<sup>5</sup> S-4 is a binder of several documents with tabs. S-4 is not numbered consecutively; however, for ease of discussion, this hearing officer considers S-4 as containing a number of sub-parts based on the tabs separating the documents: S-4A (Evaluation Report of October 30, 2009 and IFSP/IEP of October 2011); S-4B (Re-evaluation Report of October 31, 2012); S-4C (2012-13 IEP); S-4D (2013-14 IEP); S-4E (Progress Reports, First Grade); S-4F (Examples of Lesson, undated, and Examples of Schedule, undated); S-4G (Agency Report, undated but referencing incidents of November 21, 2013 and December 16, 2013); S-4H (Behavior Charts 10/11); S-4I (Advocate Letter of December 30, 2013); and S-4J (Due Process Complaint, which is identical to J-A). S-4A pp. 13-35 is identical to P-5 pp. 1-23, but P-5 is more complete as it includes additional information from the early intervention program provider from October 2011 (P-5 pp. 24-27). For clarification to the parties, the separately provided set of IEP goal tracking sheets for fall 2013 is included as part of S-4E. It must be noted that the lack of organization of the District’s documents, which were duplicative of several of the Parents’ exhibits, were unnumbered, and did not comport with the Generally Applicable Prehearing Directions, presented a challenge to proper consideration of the record in this case.

<sup>6</sup> This witness did not use the term “Picture Exchange Communication System” (PECS), but she described her use of Boardmaker® (N.T. 29-30) which is commonly used with PECS. Student’s mother described the family’s use of PECS (N.T. 73) as did Student’s teacher (N.T. 184). The witness’ demonstration of the use of the communication book was consistent with PECS.

home since the beginning of the Kindergarten school year in the fall of 2012. (N.T. 73-74, 90-91)

9. Student is able to verbalize and produce sound at times, and Student's mean length of utterances has increased over the past two years. Student does not generally initiate verbalizations, although Student has occasionally done so at home. (N.T. 27, 34-35, 71, 92-93, 99-100)
10. Student does engage in problematic behaviors at times, including when Student wishes to avoid a task or activity. Student also displays behaviors such as crying, clenched fists, and stiff body movements when Student is expressing frustration; these behaviors and others such as moaning can also be attempts to communicate. (N.T. 35-36, 71, 82-84, 91-92, 111)

#### Kindergarten Year

11. Student entered the District for the Kindergarten year in the fall of 2012-13 into a life skills program. Transition prior to Student's enrollment included meetings with the District's Kindergarten teachers over the summer of 2012, and preparation for Student's entry to a new classroom through use of social stories. (N.T. 74-77, 117-18; P-3 p. 1; S-4C p. 24)
12. Student's IEP developed in June 2012 for the 2012-13 school year indicated under Special Considerations that Student had needs with respect to communication and assistive technology devices and/or services, but not behavior. A need to increase functional communication skills was also noted. Annual goals addressed needs including following two-step directions, attention to task, and matching objects and pictures. Program Modifications and items of Specially Designed Instruction related to communication and behavior included language modeling and an "alternative communication device." Student was to have a 1:1 full time paraprofessional and speech/language support 21 times/quarter for 20-25 minutes. (S-4C)
13. The Parents advised the District at the time of the transition planning for Student's entry into Kindergarten that Student was receiving private speech/language therapy. They also advised the District that Student was using an iPod and the iCommunicate app, as well as an iPad. (N.T. 77-78, 86-87)
14. The District conducted a re-evaluation of Student in the fall of 2012 and issued a Re-evaluation Report (RR) dated October 31, 2012. Input from Student's then-current teacher reflected that Student had difficulty attending to activities and was easily distracted, requiring one-on-one support throughout the day. It was also noted that Student exhibits frustration through moaning or crying, tears, clenched fists, and stiff body movements, "struggl[ing] to communicate [Student's] wants and needs." (P-3 p. 3) Other teachers similarly reported, among other things, distraction and a lack of attention to task, inability to follow instructions, and behavior distracting to peers. (P-3<sup>7</sup> pp. 2-3)

---

<sup>7</sup> S-4C is identical to P-3; references are to P-3 only.

15. With respect to communication, Student's 2012 RR also reflected little communicative intent, and very limited ability to communicate wants and needs or answer questions. Student could, however, use pictures of objects or activities to name vocabulary and actions at times. Student was rarely demonstrating joint attention skills or using the iPod effectively for communication at school. The RR noted that, "It is important for [Student] to learn some communication skills in order to participate with teachers and peers throughout [the] educational environment." (P-3 p. 5) A classroom observation described Student's negative behaviors during Circle Time and a resulting attempt to allow Student to express wants and needs with an iPod, which was largely unsuccessful. (P-3 pp. 4-6)
16. On the Assessment of Basic Language and Learning Skills (ABLLS) in the fall of 2012, Student demonstrated significant weaknesses in cooperation (requiring physical assistance for all tasks); making requests ("When [Student] is upset staff will start the sentence ["I want"] in the hopes of gaining an answer that will soothe [Student]") (P-3 p. 9); and following classroom routines and transitioning from one activity to another. (P-3 pp. 8-10)
17. Teacher recommendations in the RR included behavioral support, strategies to manage inattention and impulsivity, and communication supports. Student was determined to be eligible for special education on the basis of Autism and a Speech//Language Impairment. (P-3)
18. Student's 2012-13 IEP was revised in October and November 2012 following completion of the RR. The Special Considerations note that Student has communication needs, but does not exhibit behaviors that impede his/her learning or that of peers; no need for assistive technology was noted. Elsewhere in this IEP, however, Student's difficulties with attention, focus, and staying seated are noted as well as Student's frequent frustration during the school day and need for full-time one-on-one support. Identified needs included increasing the ability to follow classroom rules and increasing the ability to express wants and needs. (P-1<sup>8</sup> pp. 4-7)
19. Communication goals in the revised 2012-13 IEP related to demonstrating joint attention skills and responding to Student's name. Program Modifications and items of Specially Designed Instruction included acknowledgement of vocalizations, facial and body expressions, and gestures as communication; consistent expectations with logical consequences and frequent praise and positive reinforcement; and reminders to stay on task. (P-1 pp. 13, 16-17)
20. The Parents sent Student's iPod to school in Kindergarten, but the District had little success with Student using this device. (N.T. 87-88)

---

<sup>8</sup> P-1 is virtually identical to S-4B pp. 27-54; references are to P-1 only. The one page that is part of P-1 but not S-4B pp. 27-54 relates to post-secondary transition planning, which is not applicable to Student.

## First Grade Year

21. Student transitioned to a new District autistic support classroom for first grade, the 2013-14 school year. (N.T. 107-08, 189)
22. Student's autistic support class during the current 2013-14 school year is comprised of six children. In addition to the special education teacher, there are five paraprofessionals in the classroom. (N.T. 186)
23. Student's autistic support teacher uses PECS in the classroom with all students to provide a visual schedule. The teacher also uses a few signs, as well as an iPad as a motivating device. She tried unsuccessfully to use Student's iPod with Student for communication for approximately the first six weeks of the 2013-14 school year, as the Parents continued to send it to school. This teacher has been working to teach Student a few simple signs with hand-over-hand assistance, but Student does not yet recognize those few signs as a means of communication. (N.T. 94-95, 184-85, 195-97, 200)
24. Student's autistic support teacher uses a classroom behavior management system which is not reflected in Student's IEP. She recognizes Student's negative behavior can be a form of communication, and when Student exhibits negative behavior, she tries to explore what Student might want or need. However, if she perceives Student's negative behavior as frustration, she will redirect Student back to the task using PECS and make note of any triggering circumstances. A reward would follow Student's redirection back to task. The teacher sends home a behavior chart daily. (N.T. 187-89, 192, S-4H)
25. The District speech/language pathologist during the current, first grade school year did not work with Student previously but did observe Student during the summer of 2013. She starts each pullout session letting Student use an iPad. In this setting, the iPad is used as motivation rather than for communication, and Student is able to use the device with assistance. This pathologist did attempt to use the iPad with a communication app with Student several times without success. (N.T. 154-55, 156, 159, 160-61, 166-70, 199)
26. The District speech/language pathologist also uses a picture communication system very similar to that used by the private speech/language pathologist and in the home. Student is able to use phrases such as "I want" in those sessions. (N.T. 155)
27. The District speech/language pathologist is present in Student's first grade classroom on a daily basis to work with all of the students in that classroom. Information about this additional daily support is not set forth in the 2013-14 IEP. (N.T. 155-56, 161-62, 185; S-3)
28. The District speech/language pathologist found that Student demonstrated emerging, but not established, joint attention over the course of the 2013-14 school year as of the date of the hearing. (N.T. 169-72; S-3)

29. A new IEP was developed for Student in November 2013. As in the previous year, the Special Considerations section reflected communication needs, but no behaviors impeding Student's learning or that of others and no need for assistive technology devices/services. The Present Levels section of this IEP, in relevant part, establish that Student did not have sight word recognition, including Student's own name; Student did not express wants or needs and would become frustrated by this inability; Student could respond to yes/no questions only 20% of the time, although Student was able to select from a field of 4 pictures representing basic vocabulary using an iPad 60% of the time. Student had not yet established joint attention, despite use of a number of strategies for its development. Student was demonstrating an short attention span across all school settings (P-2<sup>9</sup>)
30. Needs identified in the November 2013 relating to communication and behavior included development of basic communication skills; increased attention to task; responding to yes/no questions; responding to, identifying, and saying Student's name. Communication goals in this IEP were to respond to yes/no questions when asked "Do you want [object]" or "Do you need [object]?" to respond to Student's name, identify Student's name in print, and state Student's name verbally when asked; and demonstrate joint attention. A behavioral goal addressed attending to tasks and objects. Program modifications and items of Specially Designed Instruction in these areas included acknowledgement of vocalizations, facial expressions, and body gestures as communication; consistent expectations with logical and meaningful consequences; and short (10-15 minute) periods of instruction and tasks. Student was to remain in the autistic support placement with speech/language services twice per week for 25 minute sessions. (P-2)
31. Student demonstrated inconsistent behavior between the beginning of September and the middle of October 2013. Progress on Student's IEP communication goals (responding to Student's name, demonstrating joint attention, and responding yes or no to the questions "Do you want [object]" or Do you need [object]") between September and December 2013 was extremely limited<sup>10</sup> and similarly inconsistent. (S-4E)
32. As of the date of the due process hearing, the District speech/language pathologist had not observed a private speech/language therapy session despite the Parents having given their permission for an exchange of information. (N.T. 39, 114, 157-58)

## **DISCUSSION AND CONCLUSIONS OF LAW**

### **General Legal Principles**

Broadly stated, the burden of proof consists of two elements: the burden of production and the burden of persuasion. 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.*

---

<sup>9</sup> S-4D is identical to P-2; reference is made only to P-2.

<sup>10</sup> The IEP goal tracking sheets that included the goal for providing yes/ no responses is confusing and unclear as to whether the data were for responding to yes/no questions or attending to task.

*Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case rests with the Parents who requested this hearing. Courts in this jurisdiction have generally required that the filing party meet their burden of persuasion by a preponderance of the evidence. *See Jaffess v. Council Rock School District*, 2006 WL 3097939 (E.D. Pa. October 26, 2006). Nevertheless, application of these principles 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.

Hearing officers, as fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also 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 and the testimony as a whole on matters important to deciding the issues in this case was essentially consistent.

### Relevant IDEA Principles

The IDEA and state and federal regulations obligate school districts to locate, identify, and evaluate children with disabilities who need special education and related services. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a); *see also* 22 Pa. Code §§ 14.121-14.125. The IDEA sets forth two purposes of the required evaluation: to determine whether or not a child is a child with a disability as defined in the law, and to “determine the educational needs of such child[.]” 20 U.S.C. § 1414(a)(1)(C)(i).

Once a child is determined to be eligible for special education, the IDEA requires the states to provide a “free appropriate public education” (FAPE). 20 U.S.C. § 1412. In *Bd. of Educ. 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. 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).

Local education agencies, including school districts, meet the obligation of providing FAPE to eligible students through development and implementation of an Individualized Education Program (IEP), which is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’ ” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). 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). Most critically, the IEP must be appropriately responsive to the child’s identified educational needs. 20 U.S.C. §



1414(d); 34 C.F.R. §300.324. Where a student's behavior impedes his or her learning, 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)(3)(B), 22 Pa. Code § 14.133.

### The Parents' Claims

The Parents contend that the District has failed to program appropriately to address Student's communication (including assistive technology) and behavioral needs. They seek an order directing the District to perform an assistive technology assessment and a functional behavioral assessment, as well as an award of compensatory education.<sup>11</sup>

There was little evidence presented relating to Student's Kindergarten year. It is clear that Student was demonstrating continued needs in the area of communication, and the IEPs for that school year addressed that specific need. It is also evident that Student was exhibiting problematic behaviors, but again the IEPs for Kindergarten addressed that need. It must also be remembered that Student was just entering the District, was attending a new classroom in a new location, and likely required some period of time within which to adjust to the new environment. Especially considering Student's age and development, it is difficult to ascertain whether the District programmed appropriately for those specific needs in the Kindergarten year, and I must conclude that the Parents failed to meet their burden with respect to the Kindergarten year.

By the beginning of the first grade year, however, the evidence is not lacking. It is evident that Student continued to demonstrate significant communication and behavioral needs. With respect to communication, Student was still exhibiting minimal communicative intent at school and had not established joint attention; continued an inability to express wants and needs or answer questions; and had improved only slightly in answering yes/no questions. (P-1, P-2) With respect to behavior, Student's attention to task was the same as at the beginning of the Kindergarten year, and Student was unable to function in the classroom without full-time, one-on-one support. (*Id.*) Student's problematic behaviors, whether attributable to a lack of functional communication or some other reason, did not diminish. (*Id.*)

The District professionals working with Student appeared to be competent, experienced, and dedicated, as well as genuinely caring about Student. There has been no assertion in this hearing that the IEP goals were unresponsive to Student's needs. However, the District's various approaches to working with Student to engage in functional communication are perplexing. Student came to school with an iPod during the Kindergarten year and the first six weeks of the first grade year, and the District had been advised that Student was using it in other environments. Yet, despite very limited success with Student using the iPod to communicate at school, it is not apparent that anyone took any steps to investigate whether, and how, Student was using the device in other environments for communication. (*See, e.g.*, N.T. 197-98) This failure is striking in light of the consistent recommendations that Student develop a functional communication system.

---

<sup>11</sup> N.T. 20; *but see* notes 13 and 14, *infra*.

Furthermore, different District staff have used varied approaches to responding to Student's efforts to communicate, such as moaning. Student's school speech/language pathologist responded to Student's moaning by trying to engage Student with PECS, and occasionally the iPad, to identify what Student wanted; and, doing so would decrease the moaning behavior "once in a while." (N.T. 177-78) Other times she would simply redirect Student to a preferred task. (N.T. 178-79) Student's teacher responded to Student's moaning or similar behavior by redirecting Student with PECS to return to the current task. (N.T. 187-89) This one means of communication that Student did have at school was, thus, plainly ineffective, since the response to that behavior varied greatly.

It is clear that Student demonstrates much better communication skills in private speech/language therapy and at home than at school. While it is to be expected that Student would be more successful with people whom Student knew than with a new therapist, it is fortunate that both speech/language pathologists would view an exchange of information and observations of the other's sessions as valuable.<sup>12</sup> What is of concern is that it was not done before.

Given Student's significant communication needs, the very limited progress on functional communication skills at school, as well as Student's demonstrated ability to use assistive technology for communication outside of the school environment but not within it, this hearing officer is persuaded that an assessment of Student's assistive technology needs is necessary at this time.<sup>13</sup> Such an assessment can provide information on Student's former and current assistive technology experiences as well as whether and how assistive technology may benefit Student's ability to communicate effectively at school. The IEP team will be directed to reconvene upon completion of the assessment and discuss any recommendations in order to make revisions to the IEP with respect to communication. The District is in the best position to determine what assistance it may need to accomplish this assessment appropriately, and, in the event assistive technology is determined to be appropriate for Student, what, if any, training its staff may need.

The request for a functional behavioral assessment is a closer call.<sup>14</sup> It is very apparent that the District believes Student's problematic behaviors are merely efforts by Student to communicate, and do not rise to the level of interfering with Student's learning or that of Student's peers. The District's expert opined that no behavioral assessment was necessary, but his opinion was dependent to a large extent on the IEP team's decision not to identify behavior in the Special Considerations section of the 2012-13 and 2013-14 IEPs. (N.T.134-35) This witness also never observed Student. (N.T. 133, 140) It is also noteworthy that even the testimony by

---

<sup>12</sup> For example, a discussion between the speech/language pathologists about Student's responses to yes/no questions would likely have yielded useful information, such as whether using a check mark and an "X" was more successful than using the written words "yes" and "no" (N.T. 52, 163-64), in light of Student's limited sight word recognition skills.

<sup>13</sup> This conclusion does not indicate disagreement with the speech/language pathologist's recommendation that such an assessment was not necessary in November of the 2013-14 school year. (N.T. 153-54, 156-57) It is not clear to this hearing officer whether the District has already agreed to conduct an assistive technology assessment, so this issue is addressed in the event it has not been resolved. (See HO-1 and HO-2)

<sup>14</sup> It is not clear to this hearing officer whether the District has already agreed to conduct a functional behavioral assessment, so this issue is addressed in the event it has not been resolved. (See HO-1 and HO-2)

one of the Parents and their speech/language pathologist conceded that Student's difficult behaviors were often a means of communication. (N.T. 35-36, 71, 82-84, 91-92, 111) Upon consideration of the record as a whole, including information that Student's behavior was distracting to peers in the past, and at times disruptive to Student's learning, as well as the lack of success in the autistic support teacher's informal efforts to determine the function of Student's behaviors (N.T. 187-89), this hearing officer concludes that a functional behavioral assessment of Student is also necessary at this time. Such an assessment will provide the IEP team with a foundation for understanding Student's behaviors and their function(s). The District shall not be required, however, to conduct a full functional behavioral analysis unless the results of an Indirect or Simple functional behavioral assessment<sup>15</sup> suggests otherwise; nor can a conclusion be reached on this record that Student did, or does, require a behavior support plan. To the extent that the Parents seek compensatory education for the failure to develop a behavior support plan, therefore, this claim must be resolved in favor of the District.

### Compensatory Education

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

As mentioned above, there is little evidence for the Kindergarten year. With respect to the first grade year, the record supports a conclusion that Student was denied appropriate programming with respect to communication needs. The difficulty is ascertaining what is an equitably appropriate award of compensatory education to remedy the deprivation. Student has been provided fifty minutes per week of speech/language therapy in addition to an undetermined amount of push-in services each day, and made limited progress in this important area. Despite the fact that Student's inability to communicate existed throughout the school day, given Student's significant needs, Student would still be in the early stages of communicating wants and needs, responding to Student's name, and answering simple questions at school, even if the programming had appropriately addressed functional communication from the beginning of the

---

<sup>15</sup>See, e.g.,

<http://www.pattan.net/category/Resources/PaTTAN%20Publications/Browse/Single/?id=4dc09560cd69f9ac7f130000> (last visited March 26, 2014).

2013-14 school year. Additionally, the record does not establish a lack of *any* meaningful educational benefit to Student.<sup>16</sup> On balance, this hearing officer concludes that one hour per day for every day of school that Student attended during the 2013-14 school year, until the recommendations from the assistive technology assessment are incorporated into and implemented into Student's IEP, is an appropriate award of compensatory education.

The hours of compensatory education are subject to the following conditions and limitations. Student's 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 communication 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. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parents. The hours of compensatory education may be used at any time from the present until the end of the 2015-16 school year.

One other point meriting discussion is the District's suggestion throughout the hearing that the Parents agreed to the IEPs, including the Special Considerations sections. (*See, e.g.*, N.T. 204) The law is crystal clear that "a child's entitlement to special education should not depend upon the vigilance of the parents[.]" *M.C. on Behalf of J.C. v. Central Regional School District*, 81 F.3d 389, 397 (3d Cir. 1996). Parents also need not request IEP meetings to express continued concerns with their child's program; they have the right to file a due process complaint, as was done in this case. Nevertheless, this child is very young, having just begun Student's school career, and the parties will need to work together well into the future. This hearing officer sincerely hopes that the parties are able to put this disagreement behind them and move forward toward continued collaboration on Student's educational program.

## **CONCLUSION**

Based on the foregoing findings of fact and for all of the above reasons, this hearing officer concludes that the District did not appropriately program for Student's communication needs. The District will be required to conduct an assistive technology assessment and an indirect functional behavioral assessment, and provide compensatory education.

---

<sup>16</sup> It merits repeating that the Parents' challenges to the 2013-14 program in this hearing were limited to communication, including assistive technology, and behavior.

## **ORDER**

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District shall, within five days of the date of this Order, seek Parental permission for an assistive technology assessment of Student. The assessment process shall begin within a reasonable time, and not more than ten days, after receipt of Parental permission.
2. Within thirty days of commencement of the assistive technology evaluation, Student's IEP team shall meet to discuss whether revision should be made to Student's educational program to address functional communication needs. The IEP team may agree to an alternative time frame for meeting or revising Student's IEP based upon how much time the assistive technology assessment takes and the recommendations resulting from that assessment.
3. The District shall, within five days of the date of this Order, seek Parental permission for an indirect functional behavioral assessment of Student. The assessment shall begin within a reasonable time, and not more than ten days, after receipt of Parental permission.
4. Upon completion of the functional behavioral assessment, or within thirty days of the date of this Order, whichever is sooner, Student's IEP team shall meet to discuss whether revision should be made to Student's educational program to address behavioral needs, including development of a behavior support plan. The IEP team may agree to an alternative time frame for meeting or revising Student's IEP.
5. To the extent that the parties may have already reached an agreement on an assistive technology assessment and/or a functional behavioral assessment, that agreement shall control.
6. The District shall provide Student with one hour per day of compensatory education to address Student's communication needs for every day Student attended school from the first day of the 2013-14 school year and until the team evaluates the recommendations from the assistive technology assessment and begins to implement any revisions to the IEP, subject to the conditions and limitations set forth above.

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

*Cathy A. Skidmore*

---

Cathy A. Skidmore  
HEARING OFFICER

Dated: March 26, 2014