

*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

ODR No. 15242-1415AS

Child's Name: D.F.

Date of Birth: [redacted]

Dates of Hearing: 9/11/14, 9/24/14

### CLOSED HEARING

Parties to the Hearing:

Representative:

Parent[s]

Parent Attorney

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Date Record Closed:

October 3, 2014

Date of Decision:

October 18, 2014

Hearing Officer:

Anne L. Carroll, Esq.

## **INTRODUCTION AND PROCEDURAL HISTORY**

Student, who currently attends an IU emotional support classroom housed in an elementary school in a neighboring district, received a diagnosis of autism spectrum disorder (ASD) from a medical facility during the spring of 2012. Subsequently, the District issued a psycho-educational evaluation report in which it determined that Student is IDEA eligible. Although the District concluded that autism is Student's primary disability, it identified emotional disturbance as a secondary disability category and placed Student in emotional support classrooms with no autistic support services at all until the middle of the 2013/2014 school year..

Student's behaviors deteriorated significantly by the end of the 2012/2013 school year, culminating in hospitalization for mental health treatment in the spring of 2013. When the District denied Parents' request for placement in a private school that specializes primarily in educating children with behavior issues arising from ASD and ED, they agreed to the current IU ES classroom for the 2013/2014 school year. Student's behavior difficulties increased again as the year progressed, resulting in hospitalization again at the end of the 2013/2014 school year.

When the District again denied Parents' request for the private school placement, they filed a due process complaint in July 2014, seeking compensatory education for the past two school years, as well as placement in the private school. The hearing was held over two sessions in September. For the reasons that follow, including the District's failure to evaluate Student for all educational needs associated with ASD, limited AS services and ineffective behavior interventions that the District did not make a reasonable attempt to improve before the due process complaint was filed, Parents' claims are granted in all respects.

## ISSUES

1. Has the School District failed to provide an appropriate placement for Student with sufficient supportive services to meet Student's needs?
2. If not, should the District be ordered to provide compensatory education for any time in the past?
3. If so, for what period, in what amount, and in what form should compensatory education be awarded?
4. Should the School District be ordered to fund the private school placement for Student that Parents selected, in that it is appropriate and will meet Student's needs?

## FINDINGS OF FACT

### Background

1. Student, an [elementary school age] child, born [redacted], is a resident of the School District and is eligible for special education services. (Stipulation, N.T. pp. 15, 16)
2. Student has been identified as IDEA eligible in the disability categories of autism and emotional disturbance in accordance with Federal and State Standards. 34 C.F.R. §300.8(a)(1), (c)(1), (4); 22 Pa. Code §14.102 (2)(ii); (Stipulation, N.T. p. 16)
3. Student exhibits significant sensory issues and needs in home and community settings, including sensitivity to bright light, heat and noises, as well as difficulty going to unfamiliar places, resulting in behaviors that range from agitation and avoidance (*e.g.*, hiding under the table in a restaurant) to explosive outbursts. (N.T. pp. 31, 32)
4. In the late summer of 2011, just as Student was beginning 1<sup>st</sup> grade, Student was referred by a behavioral health agency for an evaluation to determine whether medical necessity supported behavior rehabilitation services. Parents were seeking an evaluation to determine whether Student has an autism spectrum disorder (ASD) (N.T. pp. 39; S-1 pp. 1, 2)<sup>1</sup>
5. Student's history of noncompliance, inattention, impulsivity, mood dysregulation and anxiety, resulting in severe impairment of functioning in school, as well as behavior difficulties at home were cited as the reason for the evaluation referral. The evaluation report included descriptions of a short attention span, poor concentration, shutting-down,

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<sup>1</sup> Commendably, the parties agreed to use primarily the School District's exhibits in this matter, which avoided an unnecessarily long and duplicative documentary record. Parents submitted a few additional exhibits not included in the district's exhibits.

aggressive/destructive, and self-stimulatory behaviors such as spinning in circles. (S-1 pp. 1, 2, 5, 6)

6. The evaluation consisted of a review of school records, including an undated and unattributed Checklist for Autism in Young Children and a Child/Adolescent Services Feedback form, an interview with Parents, an observation of Student, and administration of checklists/questionnaires (Child and Adolescent Needs and Strengths-Mental Health; Autism Treatment Evaluation; Connors Abbreviated Rating Scale). ( S-1 p. 2, )
7. Parents reported that the School District had not suggested an evaluation for special education services or accommodations, but did suggest that Parents keep Student at home at times due to significantly disruptive behaviors. (S-1 pp. 3, 9)
8. Parents and/or school staff also reported that Student exhibited significant difficulty with eye contact, with socializing, playing, and engaging in appropriate activities with peers. (S-1 p. 3)
9. Student's history included being molested by an intellectually disabled [relative] during the prior summer. Student and the [relative] were provided with therapy as soon as Parents learned of the abuse, and Parents reported it to the police. (N.T. pp. 57, 58; S-1 p. 4)
10. Although the licensed psychologist who completed the evaluation noted symptoms consistent with ASD, he concluded that Student's difficulties, including significantly disruptive behaviors and attention issues were due to an anxiety disorder and ADHD. The psychologist recommended that the School District consider an evaluation for an IEP or a §504 Plan and that Student be referred for an evaluation to rule out autism. (N.T. pp. ; S-1 pp. 10—12)
11. Parents attempted to obtain an autism evaluation from a regional medical school and hospital, as recommended in the behavioral health agency evaluation report, but a long waiting list delayed the evaluation until April, 2012. The evaluator, a doctoral level licensed psychologist, certified school psychologist and professor of psychiatry, was unable to complete formal testing due to Student's unmanageable behaviors in the unfamiliar setting. (N.T. p. 41; S-4 pp. 1, 3 )
12. Based upon Student's history, her clinical observations and scores on the Checklist for Autism Spectrum Disorder and the Gilliam Asperger's Disorder Scale completed by Parents and Student's teacher, the evaluator diagnosed Student with ASD at a high functioning level, specifically, Asperger's Disorder. The evaluator noted that Student exhibited numerous characteristics of ASD, including problems with social interactions, perseveration, somatosensory disturbance, atypical development, including difficulty with reciprocal conversation and pragmatic language and atypical speech patterns, mood disorder, attention problems and disregard for safety. (N.T. pp. 41, 42; S-4 pp. 1, 2)

13. The evaluator recommended that the District provide Student with autism support services through an IEP, and that Student continue to receive intensive wrap around services through the behavioral health agency. She also made numerous recommendations for school interventions and strategies to address Student's symptoms and needs arising from ASD, including inattention, disruptive behaviors and resistance to engaging in school work. (N.T. pp. 41; S-4 p. 3)

### School District Evaluation and Services, 2011/2012, 2012/2013 School Years

14. Although a school evaluation of Student was first recommended in the August 2011 behavioral health agency evaluation, the District did not complete an evaluation of Student for IDEA eligibility until after Student received the ASD diagnosis, and after Student's disruptive behaviors in 1<sup>st</sup> grade, despite TSS services through the behavioral health agency, resulted in a disciplinary expulsion hearing, after which Student was placed on homebound instruction for approximately two months. (N.T. p. 42, 44, 45; P-1 p. 2, P-6 p. 2, S-3 p. 1, S-5 p. 2, S-35 pp. 1—4)
15. The District's evaluation placed Student's intellectual functioning in the average to high average range, with academic achievement in the average range in all areas other than math fluency, which was below average. The BASC-II (Behavior Assessment System for Children-Second Edition) checklist completed by Student's teacher placed Student in the "clinically significant" range for aggression and atypicality and the "at risk" range for hyperactivity, conduct problems, withdrawal, adaptability, social skills and leadership. (S-5 p. 8)
16. Student's teacher and Parents completed different autism rating scales. Parents' results indicated a very high likelihood of ASD, while the teacher's assessment placed student below the threshold for an ASD diagnosis. The private evaluator's ASD diagnosis was referenced in the District's evaluation but the District's ER did not include the evaluator's description of the characteristics Student exhibited that are typical of children with ASD, or any of her recommendations for the school setting. (S-5, S-35 p. 4)
17. The District evaluation did not include a speech/language or an occupational therapy (OT) evaluation, and made no recommendation for further assessments in those or any other areas, and no additional evaluations have been conducted. Student's teacher completed an "indirect" functional behavioral assessment (FBA) by completing an FBA inventory, which indicated that the likely function of Student's behaviors was to escape demands, and that significant behaviors were likely to occur at every point in the daily schedule, at any time Student was asked to complete a task or was given a direction. (N.T. pp. 339, 377; S-5 p. 4)
18. Although the District ultimately concluded that Student's primary disability category was autism, with emotional disturbance as the secondary category, it determined that Student's serious behavior issues were more closely related to the ED disability category, and recommended full time emotional support (ES) services in an ES classroom. The

IEP team concluded that Student's inconsistent behaviors required that Student have no contact with non-disabled peers at that time. The District informed Parents that there was no autistic support (AS) classroom available in the District or the IU for an academically high functioning Student with ASD. (N.T. pp. 46, 344, 392, 393; S-5 p. 4, S-6 p. 28, S-7)

19. The IEP the District subsequently developed in May 2012 included behavior goals and an "informal" behavior support plan. Physical restraint was included in the SDI and in the behavior plan, to be used when Student's behaviors created a threat to Student, peers or staff. The behavior plan also included withholding breaks for the remainder of the school day if Student was non-compliant in returning to task after a break, time-outs in a quiet area if Student's behaviors escalated. (N.T. pp. 342, 343; S-6 pp. 16—18, 24—26)
20. The replacement behaviors that Student was to develop to meet the IEP goals were taught primarily during a daily 30 minute period of social skills instruction, as well as teacher modeling of appropriate behaviors and other social skills instruction throughout the school day. As a related service, Student was to receive 90 minutes/month of social work services, divided into two 45 minute periods/month. The social work services were delivered as whole group instruction to the entire ES class of 6—8 students, and consisted of teaching anger management techniques, coping strategies, discussing feelings, communication and peer relationships. (N.T. pp. 341, 342; S-6 p. 26)
21. During the 2012/2013 school year, Student's ES teacher documented numerous incidents of severe behaviors (physical aggression, property destruction), beginning in September 2012, abating in October and early November, increasing again from late November through February 2013, and escalating again at the end of April. The teacher believed that the early behavior incidents reflected difficulty transitioning back to school in a new classroom, and were followed by a significant improvement in behavior once Student learned the daily schedule and classroom expectations. (N.T. pp. 349, 350, 385; P-6 pp. 9—68, S-35 pp. 14—39, 45—48)
22. During the brief period in in the fall of 2012 when Student was not exhibiting extreme behaviors, Student's IEP was revised to increase the criteria for meeting the IEP goals from 80% to 100% because Student had made progress in reducing outbursts, controlling anger, task completion, following directives, and compliance. Student's outbursts had been reduced from several times/day to 1—2 times/week. Student continued to engage in almost every undesirable behavior listed on a behavioral health checklist that the teacher completed. Only physical aggression, property destruction and tantrums were reduced to monthly frequency. Student exhibited many less intense behaviors on a weekly, daily or hourly basis. When outbursts occurred, they would last from 30—40 minutes. (N.T. pp. 346—349; S-8 pp. 5, 7, 11, 12, S-35 pp. 11—19)
23. The District relied on the TSS services Student received from the behavioral health agency to manage Student's behaviors during the 2012/2013 school year. Due to agency staffing difficulties, several different TSS workers were assigned to Student, including two with the same name as the [relative who had] abused Student. Parents believe that the staff changes, as well as the name similarity, may have contributed to the escalation

- of Student's behaviors, including the appearance of sexualized behaviors. (N.T. pp. 58, 59, 371)
24. Student's teacher agreed that the TSS staff inconsistency had a negative effect on Student's behaviors, but also suggested that Student attending family holiday gatherings at which the [relative] was present caused Student's behavior escalation that began late in November and persisted through the middle of March. (N.T. pp. 354, 358, 359)
  25. From the beginning of the 2012/2013 school year, Parents were frequently called to pick Student up before the end of the school day due to Student's behaviors that could not be brought under control. (N.T. pp. 51, 52, 351)
  26. After the regression in Student's behaviors began in late November 2012, Student's IEP was revised to return the criteria for goal mastery to 80% and the ES teacher began using unspecified "different ideas" to help Student cope with anger. In a February IEP revision, the District proposed including Student in "specials" (art, music, gym) with regular education peers as a motivator. (N.T. pp. 355, 357, 360, 378; S-9 pp. 3—5, S-10)
  27. By late March 2013, Student's aggressive behaviors had increased so substantially that Parents were called to pick Student up from school early on a daily basis. Student was initially placed on homebound instruction before being admitted to a partial hospitalization day program at a mental health facility for 3—4 weeks. Student's medications were adjusted during the program. (N.T. pp. 59—62, 361; S-11, S-12, S-13, S-15)
  28. Upon Student's discharge, an IEP meeting was convened which included staff from the partial hospitalization program, as well as District staff and Parents. The present levels of academic performance reported in the new IEP, including report card grades, indicated that Student was making academic progress. Student's scores on a standardized test of academic achievement were in the average range with the exception of a below average score for math fluency in subtraction. Student's teacher believed that Student was on grade level at the end of the school year, and reported that Student was doing well in all academic subjects. (N.T. pp. 62, 361, 364—369; S-14, S-16 pp. 4—9)
  29. There was no change to the IEP goals included in previous IEPs. Student's teacher could not recall whether revisions were made to Student's behavior plan at or after the April IEP meeting, or whether any additional behavior strategies were identified and implemented. Comparison of the behavior plan in the November 27, 2012 IEP revision and the behavior plan dated May 2, 2013 shows no difference. (N.T. pp. 361, 362; S-9 pp. 5, 6, S-18 pp. 4, 5)
  30. Rewarding Student for completing tasks and demonstrating other expected behaviors during the 2012/2013 and 2013/2014 school years was based upon classroom behavior strategies, including point charts, a token economy, not an individual schedule of reinforcement or systematic identification of incentives that Student was willing to work for. (N.T. pp. 344, )

31. In early May 2013, the District's Director of Special Education contacted an Intermediate Unit autism specialist requesting an observation because "the parents have been very frictional." The Director misstated Student's primary disability category as ED, with the "autism label as secondary." (N.T. pp. 362, 363, 389, 393, 394; S-35, p. 50)
32. The consultant did not observe any negative behaviors during the May 21, 2013 observation and asked to return for a second observation. The consultant returned on May 30, and again did not observe any significant behaviors. The consultant requested time to meet with Student's school team to answer questions related to autism and how symptoms of that disability might manifest in the ES classroom. No meeting was held. Student's teacher discussed Student with the autism consultant "very briefly." (N.T. pp. 363, ; S-35 pp. 55—58 )
33. During the 2012/2013 school year, 9 incidents of physical restraint were documented by the District between January and May 2013. Incidents of Student's removal from the classroom to the quiet room were not documented. (N.T. pp. 352, 353; P-2, S-19)
34. In January 2014, Student's treating physician at a mental health facility wrote to the District reporting his concerns, based upon his observations of Student, that the ES placement was not effectively meeting Student's needs and recommending a classroom setting specializing in supporting high functioning students with ASD. (N.T. p. 71; P-3)
35. When Student was having a bad day, behaviorally, Student could sometimes attend to academic instruction either in the morning or the afternoon. Since difficult behaviors of varying intensity occurred every day, the teacher could not recall whether there was ever a day during the 2012/2013 school year in which Student could attend to academic instruction for the entire day. (N.T. pp. 369, 371, 372)
36. Despite the ES teacher's acknowledgement that Student's behaviors regressed during the 2012/2013 school year, frequent reports of aggressive and extremely disruptive behaviors, the instances of restraint, removal to the "quiet room," and of Parents having to take Student home early, progress monitoring on Student's IEP behavior goals for the second marking period suggested that Student was "normally very well mannered," will calm down and "have a great day" after initial outbursts upon arriving at school and that Student would comply with requests on some days, while on other days, Student would complain, talk back and become aggressive in response to demands. During the second marking period, Student was reported to have met two of the IEP goals with 85% success and one with 84% success. The progress reports acknowledged regression during the 3<sup>rd</sup> marking period, but reported 80%--88 % success in meeting the IEP goals during the 4<sup>th</sup> marking period. In preparing the progress reports, the teacher relied on daily monitoring sheets completed by the para educator assigned to her classroom or that she completed. The data sheets were divided into half hour or hourly increments. (N.T. pp. 372, 373; S-29 pp. 4—9)



37. During the summer of 2013, Parents learned of a private school for students with severe behavior problems, including children with both ASD and ED, and requested that the District consider placing Student there for the 2013/2014 school year. The District's Director of Special Education informed Parents that a more restrictive public placement had to be attempted first. The District recommended, and Parents approved, Student's placement in an IU ES class located in a neighboring school district. District staff continued to believe that Student's behaviors were related to the ED disability category rather than to ASD. (N.T. pp. 64—67, 106—108, 377, 395, 396, 411, 414; S-20)

### IU Emotional Support Placement/ 2013/2014, 2014/2015 School Years

38. When the 2013/2014 school year began, Student's IEP was revised to adapt to the IU classroom, resulting in three somewhat different behavior goals and specially designed instruction (SDI). Several weeks later, the IEP was again revised to provide two hours/week of itinerant autistic support as a related service, as well as to include consultation between the autistic support teacher and Student's ES teacher. (N.T. pp. 244, 400, 401; S-16, S-21 pp. 10—13)
39. The AS services, did not begin until the end of January 2014, due to unavailability of staff. During the summer of 2014, the District provided compensatory time to cover the period from the date the IEP was approved until the date AS services began. Although Student appeared to be successful in learning the strategies presented during the AS pull-out sessions, Student did not demonstrate an ability to apply the techniques outside of the teaching sessions.(N.T. pp. 85, 86, 88, 89, 401, 402; S-23, S-33)
40. During the 2013/2014 school year and continuing in the present school year, Student has been taught replacement behaviors through social skills instruction for 30—35 minutes/day, with reinforcement throughout the school day, and in pull-out sessions with the autistic support teacher. The ES teacher focuses on de-escalation strategies, cooperation with peers and adults and anger management strategies. (N.T. pp. 235, 236)
41. To motivate positive behaviors, Student has an individualized point sheet with a five minute reinforcement schedule. If Student earns a specified number of points, Student can earn [ ] minutes of break, including either a sensory break or a game with a peer or adult. Student also participates in the classroom point sheet which allows Student to earn play money during hourly intervals to purchase items at the end of the week. Student appeared to be motivated by certain preferred games and adult attention. (N.T. pp. 239, 240; S-29 p, 10)
42. In addition to disruptive behaviors, Student sometimes withdrew from instruction by putting his/her head down on the desk or sleeping. (N.T. pp. 242, 243)
43. At the beginning of the 2013/2014 school year, the IU autism specialist observed Student in the new placement and produced a report incorporating his observations from the end of the previous school year and the additional observation. The report noted Student's

sensory seeking behaviors, difficulty with prioritizing tasks (executive function, decision-making), difficulty with transitions/managing interruptions of preferred tasks, with group work and with coherence (maintaining primary focus rather than getting lost in details). The consultant noted that ignoring off task behaviors/refusal to participate in group work appeared to be an effective strategy and recommended further observation and consideration of meeting Student's sensory needs, as well as further consideration of whether Student's behavior issues were related to ASD or a social maladjustment disorder. (N.T. pp. 395; S-22)

44. Parents noted a worsening of behaviors at home after Student began attending the IU ES classroom, possibly from imitating the behaviors of other students in the classroom. (N.T. pp. 72, 73)
45. In December 2013, the District Special Education director canceled a meeting to discuss a potential change of placement for Student to the private school that Parents again requested after an increase in behaviors, noting that the Director wanted the name and contact information of a therapist who worked with Student during the summer and recommended the private placement. He stated that he wanted the contact information in order to "squash this for good." In a series of e-mails from early November to mid-December, among District staff and Student's special education teacher, the special Education Director noted that Student had recently been sent home before the end of the school day, "which usually sparks this conversation." (N.T. pp. 66, 67, 399, 400; S-35 pp. 71—76)
46. During the 2013/2014 school year, 8 incidents of restraint were reported between September and December 2013. Between September 2013 and May 2014, 12 incidents were reported in which Student engaged in significant behaviors and was removed to an alternate location and/or Parents were requested to pick Student up before the end of the school day. The teacher did not document every incidence of removing Student to a different room. Parents also received daily reports of problem behaviors from Student's TSS. There were infrequent reports of a good day at school. (N.T. pp. 75—78, 248—250; S-28)
47. Student's behaviors in the 2013/2014 school year followed a pattern similar to the previous school year with frequent behaviors at the beginning of the school year, diminishing toward the middle of the school year and escalating again toward the end of the school year. (N.T. p. 256)
48. Parents believe that physical restraint and isolation are not only ineffective, but worsen Student's behaviors rather than having a calming effect. Parents frequently noted evidence of serious self-injurious behaviors on Student's head and face when called to take Student home early. (N.T. pp. 33, 34, 50, 51, 78)
49. Student's behaviors worsened considerably after a medication change ordered by a doctor. Parents had no input into the decision to prescribe a different mood stabilizer. Due to the uncontrollable behaviors, Student spent several weeks in an in-patient mental

health program during the spring of 2014 and was later readmitted to the partial hospitalization program for approximately two weeks. (N.T. pp. 79—84; S-27, S-30)

50. Progress monitoring on Student's IEP goals during the 2013/2014 school year showed inconsistent behaviors throughout the school year, with no measurable overall progress. Although Student showed some progress at times during the school year in identifying emotions, learning and using coping strategies within structured teaching sessions, as well as on IEP goals, Student was unable to generalize the skills to use in other settings. Student's behavior regressed during the last marking period, culminating in the inpatient and partial hospitalization admissions. (N.T. pp. 256, 257; S-29 pp.11—19)
51. Despite Student's frequent inability to attend to instruction for an entire school day due to problem behaviors, Student remained on grade level, academically. At times, the ES teacher needed to allow Student extra time to complete work. (N.T. pp. 257, 258, 261—263 )
52. At the end of July 2014, soon after Parents submitted their due process complaint, the District revised Student's IEP to add a personal care assistant (PCA) to accompany Student during the school day due to concerns that consistent TSS services through the behavioral health agency would be unavailable. The District has also added consultation with a board certified behavior analyst (BCBA) in order to obtain current and updated information about Student's behaviors. (N.T. pp. 402, 403; S-31 pp. 20, 21)
53. On September 3, 2014, a few days before the due process hearing began, the District issued a permission to reevaluate (PTRE), requesting Parents' consent to begin the mandated triennial evaluation. Included among the proposed assessments are a comprehensive speech evaluation and an OT sensory evaluation. The District's decision to request a reevaluation was triggered by pre-hearing resolution discussions. (N.T. pp. 404, 405, 407, 408; S-34)
54. The limited information available from a few days at the beginning of the current school year demonstrated that after the first day, behavior incidents were noted on each of the next three days, including having to spend some time out of the classroom. By the date of the second due process hearing session, Student's teacher noted a significant improvement in Student's behaviors. Student is currently accompanied by two adults throughout most of the school day, a PCA and a TSS. (N.T. pp. 233—235; P-4, P-5)

### Additional Services Parents Obtained

55. Through the mental health facility to which Student was admitted at the end of both the 2012/2013 and 2013/2014 school years, Parents have recently begun taking Student to a doctor specializing in ASD. After a referral by the new doctor, Parents secured the services of an occupational therapist (OT), who has provided suggestions for sensory strategies and techniques that are more effective for managing Student's behaviors at home and in community settings. Strategies that Parents used in the past, such as taking Student for walks, had become ineffective. (N.T. pp. 32—34, 36, 91, ; S-)

56. The OT has also noted issues with Student's posture and fine motor skills, such as pencil grasp and use of eating utensils, that she is addressing. (N.T. pp. 37, 38; S-)
57. Student reported being reprimanded by the classroom aide in the IU ES class for failing to produce written work that was as neat as expected. Student experienced "meltdowns" while doing homework when Student realized that it would not meet the aide's neatness standards. (N.T. p. 37)
58. Student has recently been approved for speech/language therapy through the behavioral health agency, but due to a backlog, therapy had not begun by the time the due process hearing ended. Parents have noted regression in the clarity of Student's speech. (N.T. pp. 35, 3)

### Proposed Private School Placement

59. Parents are requesting placement in a Pennsylvania licensed private special education school specializing in educating children with significant behavior issues arising primarily from ASD, and ED. The private school develops IEPs for its students. When there is a dual diagnosis, a student might be placed in either an ES or an AS class, depending upon the most significant symptoms, but the needs associated both disabilities are addressed regardless of the classroom assignment. (N.T. pp. 95, 170, 171, 179, 180, 184, 190, 210, 217, 218)
60. The private school's academic curriculum is aligned with Pennsylvania state standards and is the same or similar to instruction found in public school districts. All teachers are Pennsylvania certified teachers. To address behavior and other needs of students with ASD, the private school staff is trained in the techniques of applied behavior analysis (ABA). The school also employs BCBA's and behavior consultants and occupational therapists, as well as speech/language therapists to address communication needs. Each student enrolled in the private school is assigned a behavior consultant to work with the student for whatever number of hours is necessary to effectively manage the student's behavior. The behavior consultants are also trained to assist with academics as needed. Crisis workers are also available as needed. (N.T. pp. 171—174, 177—179)
61. The private school addresses sensory needs at each of its several locations under the supervision of an occupational therapist. Sensory diets and accommodations, such as special seats that provide movement, are available for use in the classroom in addition to sensory equipment in a separate room. (N.T. pp. 174—176)
62. The school assigns the equivalent of PCAs to all students who need 1:1 support, and most of the students do require that level of support. Parents are sometimes asked to come to the school if a child has escalated behaviors at the end of the day that make riding the bus dangerous, but parents are not asked to remove the child before the end of the school day. When parents are asked to transport a child, the school staff discusses the incident with

parents. The school invites parents to be involved with the school and provides parent training (N.T. pp. 176, 177, 213, 215)

63. The private school's goal is to extinguish behaviors of concern that brought a student to the private school and teach replacement behaviors so that the student can return to a public school placement as soon as possible. (N.T. pp. 172)
64. To monitor the effectiveness of a student's behavior plan, the private school takes extensive contemporaneous data by recording every instance of a problem behavior, as well as the antecedent to the behavior and the consequence/result of the behavior. Behavior management is a dynamic process that also requires extensive analysis of the behavior data. (N.T. pp. 186, 187)
65. One of the reasons that Parents requested the private school placement at the beginning of the 2013/2014 school year was the availability of OT and speech/language services that Student could have received during the school day, without missing school, and that Student could have obtained without waiting for a medical referral and for therapy slots to become available. (N.T. pp. 68, 69)
66. From discussions with the private school Regional Director of Education, Parents understood that the private school has a classroom in a neighboring county that includes students who are academically high functioning. The private school's inclusion of students at all levels of academic and behavioral functioning was confirmed by the private school's director during his hearing testimony. (N.T. pp. 69—71, 171, 178)

## **DISCUSSION AND CONCLUSIONS OF LAW**

### General Legal Standards/Burden of Proof

The IDEA statute provides that a school-age child with a disability is entitled to receive a free appropriate public education (FAPE) from his/her school district of residence. 20 U.S.C. §1400, *et seq.*; 34 C.F.R. §300.300; 22 Pa. Code §14. The required services must be provided in accordance with an appropriate IEP, *i.e.*, one that is “reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress.” *Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982); *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 249 (3<sup>rd</sup> Cir. 2009). “Meaningful benefit” means that an eligible child’s program affords him or her the opportunity for “significant learning.” *Ridgewood Board*

*of Education v. N.E.*, 172 F.3d 238 (3<sup>RD</sup> Cir. 1999). Consequently, in order to properly provide FAPE, the child's IEP must specify educational instruction designed to meet his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. *Rowley; Oberti v. Board of Education*, 995 F.2d 1204 (3<sup>rd</sup> Cir. 1993). An eligible student is denied FAPE if his program is not likely to produce progress, or if the program affords the child only a "trivial" or "*de minimis*" educational benefit. *M.C. v. Central Regional School District*, 81 F.3d 389, 396 (3<sup>rd</sup> Cir. 1996); *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F. 2d 171 (3<sup>rd</sup> Cir. 1988).

The IDEA statute and regulations also provide procedural safeguards to parents and school districts, including the opportunity to present a complaint and request a due process hearing in the event special education disputes between parents and school districts cannot be resolved by other means. 20 U.S.C. §1415 (b)(6), (f); 34 C.F.R. §§300.507, 300.511; *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d at 240.

In *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005), the Supreme Court established the principle that in IDEA due process hearings, as in other civil cases, the party seeking relief bears the burden of persuasion. Consequently, because Parents have challenged the District's placements and past services provided to Student, Parents were required to establish the violations they alleged and that were identified at the beginning of the due process hearing.

Although the burden of persuasion remains with the party that files a due process complaint throughout the proceedings, the Supreme Court it did not specify in the *Schaffer* case which party must produce evidence at various points in the proceeding. Consequently, although a school district will prevail if a parent fails to present sufficient evidence to justify a conclusion

that the district violated the IDEA by whatever action or failure to act that the parent contends was inappropriate, that does not mean that a school district has no obligation to present evidence at a due process hearing. Allocating the burden of persuasion affects the outcome of a due process hearing only in that rare situation where the evidence is in “equipose,” *i.e.*, completely in balance, with neither party having produced sufficient evidence to establish its position.

*Ridley S.D. v. M.R.*, 680 F.3d 260 (3<sup>rd</sup> Cir. 2012).

#### Appropriateness of the District’s Placements/Services

Review of the record in this matter leaves no doubt that the District failed to meet the IDEA standards for providing Student with an appropriate educational placement and sufficient appropriate services reasonably likely to result in meaningful educational progress from the time it identified Student as IDEA eligible through the present. Although the appropriateness of the District’s initial evaluation is not explicitly at issue in this case, its inadequacies cannot be ignored, since the District’s failure to fully assess all areas of potential need arising from Student’s disabilities was the original misstep that resulted in inadequate and inappropriate services for Student.

The District had access to the report of the evaluator who first diagnosed Student with ASD in the spring of 2012. In her report, she noted the many autism characteristics that Student displayed, including sensory and language issues, and provided recommendations for meeting Student’s needs in the classroom. (FF 11) The District, however, apparently ignored all of the report except the diagnostic conclusion, which it adopted in determining that Student’s primary disability category is ASD. (FF 18)

The District’s obvious uncertainty about how to determine a placement and appropriate services for Student following its evaluation should have triggered further exploration, including

obtaining the services of the IU autism specialist at that time, rather than two years later. Moreover, the District should have requested a consultation for the purpose of assisting it in meeting all of Student's needs, not for the primary purpose of minimizing Student's autism symptoms in the face of Parents' growing discontent with Student's complete lack of behavioral progress. (FF 31) It is reasonable to assume that if a consultation had been requested at the time Student was identified, and if there had been no "between the lines" message to the autism consultant that the District needed him to approve the services it was providing to Student, an IU consultant might have suggested both an OT and speech/language evaluation, both of which are almost universally conducted by school districts when ASD is suspected or revealed by an initial evaluation.

There was nothing inherently wrong in the District's determination that an ES classroom rather than an AS classroom was an appropriate placement for Student, but the District appears to suggest that such placement relieved it of the need to further explore whether needs arising from ASD also impacted Student's classroom behaviors. There is no reason, *e.g.*, that Student could not have been provided with OT services for both sensory and fine motor needs and/or speech/language therapy as related services while Student was assigned to an ES classroom, had Student been evaluated to determine if there were needs in those areas. For inexplicable reasons, however, the District appears to believe that its decision that Student's behavior needs could be met in an ES classroom precluded all consideration of related services often provided to students diagnosed with ASD.

Similarly, the District gave no consideration to providing autistic support services for nearly two years after identifying ASD as Student's primary disability category. Again, there is nothing inherently wrong in initially determining that Student also had significant needs arising



from the secondary disability category, ED. The unanswerable question is why the District believed that it should address Student's difficult behaviors only with interventions typically provided as ES services without considering, *e.g.*, whether Student might also need applied behavior analysis (ABA) services. Even when the District belatedly added autistic support services to Student's IEP, there is nothing in the record to suggest that the minimal itinerant AS services Student has been receiving for a few months are being provided in accordance with ABA principles and techniques.

The greatest overall difficulty for the District is not what it might have done or should have done from the beginning, but why Student's complete lack of consistent progress prompted no change in the services the District provided to Student. The District made much of a brief period in the fall of 2012 when it appeared that Student had met the IEP goals. It should quickly have become apparent, however, that the progress was short-lived. The District could not, of course, have known at the time that the temporarily improved behaviors were part of a pattern of inconsistency that Student has shown over the past two school years. The history of Student's inconsistent behaviors also makes it impossible to reasonably conclude that the few weeks of improved behaviors at the beginning of the current school year, as reported by Student's teacher, signal the beginning of meaningful progress.

The District has suggested that outside factors over which the District had no control negatively impacted Student's behaviors, and disrupted the progress Student was making. Even if that were an accurate assessment, which really cannot be determined with any degree of reasonable certainty, it ultimately doesn't matter. The District must provide appropriate behavior services to Student regardless of any outside factors. It may be that but for unforeseen circumstance, Student's behaviors may have shown a sustained improvement in the ES

classroom without the need for additional services, but neither past nor potential future circumstances alter the District's obligation to change its methods, if necessary, because Student has not made progress or regressed.

In short, the record establishes that Student made no meaningful progress toward improving behaviors that have interfered with Student's ability to function successfully in the school environment. Although Student has maintained grade level academic progress, that is unlikely to continue as academic demands increase if Student can only rarely attend to academic instruction for a full school day, as has occurred during the past two school years. Moreover, until Student's behaviors show significant improvement, substantive academic instruction in the regular education environment will remain impossible.

Finally, the evidence establishes that the District has relied far too heavily on restraint, isolation and actual exclusion from school to manage Student's behaviors when they become significantly aggressive and disruptive. The number of times the District has resorted to those techniques in the past two school years without attempting any significant changes in Student's behavior plan or seeking assistance from outside experts is, frankly, shocking.

### Remedies

#### Private School Placement

Having concluded that the District has not provided Student with a placement and services reasonably calculated to allow Student to make meaningful progress, the first question is whether the District can be ordered to provide a present or prospective private placement for Student when Parents are not seeking tuition reimbursement.

As discussed with counsel for the parties off the record before the due process hearing convened, such an order is within the power of a special education hearing officer to provide an

equitable remedy. *See Ferren C. v. School District of Philadelphia*, 612 F.3d 712, 718 (3<sup>rd</sup> Cir. 2010). Moreover, since the IDEA statute and regulations explicitly provide that a parent or school district may file a due process complaint concerning educational placement, and provide for a continuum of alternative placements, including special schools, there is no reason parents cannot seek, and a hearing officer cannot provide a remedy of that kind. 34 C.F.R. §§300.115(a), (b)(1); 300.507(a).

On the other hand, however, ordering the expenditure of public funds for a private placement should not be done lightly. Consequently, the private placement must be appropriate, *i.e.*, provide services reasonably likely to lead to meaningful educational progress. In addition, it should strongly appear that it is unlikely that the District program and placement can be sufficiently improved to provide appropriate services, and, therefore, that the private school program is necessary.

The situation presented by this case clearly meets those standards. The description of the private school program provided by its regional educational director suggests that it will amply meet Student's needs by providing the autistic support and OT services the District should have, but failed to provide to Student. In addition, the private school can determine whether Student has speech/language needs that should be addressed with therapy. The description of data collection to determine the effectiveness of behavior services and better identify antecedents of behavior far exceeds the vague and haphazard data collection described by District witnesses.

Finally, the history of the District's dealings with this family inspires no confidence that the District has the will or the capacity to effectively meet Student's needs. Speech and OT evaluations were suggested only after Parents filed a due process complaint, despite the ASD diagnosis and the sensory needs Student has exhibited. It took Parents' request for a private

placement to prompt the District to contact an IU autism specialist, who would have been available to the District from the time it determined that Student is IDEA eligible in the autism disability category, more than two years ago. In addition, the District relied on Parents to find appropriate related services through medical providers, delaying OT and speech/language services for Student for two years. In short, the District did very little to address Student's needs in the past, and inspires no confidence that it will not revert to its past practices once the spotlight of the due process hearing is extinguished.

Finally, Student has a serious need to receive intensive behavior services as soon as possible since much valuable time has been lost with the District's inappropriate services over the past two years. Student cannot afford to wait and see whether the District can get it right immediately. Student's enrollment in the private school will give the District time to assure that it can provide Student with an appropriate placement and services when Student returns to the District.

#### Compensatory Education

An eligible student who has received no more than a *de minimis* educational benefit is entitled to correction of that situation through an award of compensatory education, an equitable "remedy ... designed to require school districts to belatedly pay expenses that [they] should have paid all along." *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d at 249 (internal quotation marks and citation omitted). Compensatory education is intended to assure that an eligible child is restored to the position s/he would have occupied had a violation not occurred. *Ferren C. v. School District of Philadelphia*, 612 F.3d at 718, citing *Reid v. District of Columbia*, 401 F3d 516, 518 (D.C. Cir. 2005).

Compensatory education is awarded for a period equal to the deprivation and measured from the time that the school district knew or should have known of its failure to provide FAPE. *Mary Courtney T. v. School District of Philadelphia* at 249; *M.C. v. Central Regional School District*, 81 F.3d at 395; *Carlisle Area School District v. Scott P.*, 62 F.3d 520, 536 (3d Cir.1995). The school district, however, is permitted a reasonable amount of time to rectify the problem once it is known. *M.C. v. Central Regional School District* at 396.

In this case, compensatory education that meets the standards set forth above is an award of full days of compensatory education for the entirety of the 2012/2013 and 2013/2014 school years and the beginning of the current school year. Compensatory education will continue until Student begins attending the private school. In the event Student is not accepted at the private school, the compensatory education award will continue until such time as the District develops an appropriate educational placement and program that duplicates as closely as possible the services offered at the private school.

Full days of compensatory education, with no time excepted for the District to correct the problem, are warranted because the District evaluated and identified Student during the 2011/2012 school year, and, therefore, should have had an appropriate placement and services in place at the beginning of the 2012/2013 school year, including services to address ASD needs. The District took no steps to determine those needs, and without doing so, was unable to provide an appropriate placement. The testimony of the District witnesses made it very clear that they do not believe that services are needed to address Student's needs arising from ASD, because they do not believe that Student has such needs. In addition, the loss of educational benefit Student experienced due to the lack of appropriate behavior services pervaded Student's entire day most of the time during the two school years at issue. Good days were too few to allow for a

reasonable estimate of days that might be excluded, and the record indicates that lower level behaviors, at least, were present every day.

Moreover, Student will be awarded compensatory education for the days spent in the hospitalization settings during the 2012/2013 and 2013/2014 school years, since the District's acts and omissions substantially contributed to, if not entirely created the need for those programs.

### **ORDER**

In accordance with the foregoing findings of fact and conclusions of law, the School District is hereby **ORDERED** to take the following actions:

1. By October 31, 2014 submit an application to [private school] for Student's admission as a full time student for the remainder of the 2014/2015 school year.
2. If Student is admitted, collaborate with the private school and Parents to transition Student to the private school as soon as possible, with the private school and Parents making the final decision with respect to the pace of the transition.
3. Provide or fund any evaluations the private school staff believes are necessary to determine and appropriately meet Student's needs, including but not limited to speech/language and occupational therapy evaluations.
4. Directly pay Student's tuition at the private school for the 2014/2015 school year upon presentation of invoices from [the private school], and provide transportation to and from the private school every day that Student attends school.
5. Provide Student with full days of compensatory education (5.5 hours/day) for every day that school was in session from the first day of the 2012/2013 school year through the last day that Student attends school in the current placement, or in the event Student is not accepted at the private school, until a new IEP is developed and Parents approve the accompanying NOREP.
  - a. The compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product or device that addresses the needs arising from Student's identified and/or will assist him/her in overcoming the effects of his/her disabilities.

- b. The compensatory education shall be in addition to, and shall not be used to supplant, educational services and/or products/devices that should appropriately be provided by the School District through Student's IEP to assure meaningful educational progress.
- c. Compensatory education services may occur after school hours, on weekends and/or during the summer months when convenient for Student and Parents. The hours of compensatory education/fund for compensatory education services/products/devices created by this provision may be used at any time from the present to Student's high school graduation or 21<sup>st</sup> birthday, whichever occurs first, and may include reimbursement for uninsured/unreimbursed services that Parents provided and continue to provide for Student.
- d. Parents may use part of the compensatory education award to pay for the services of a knowledgeable, independent educational consultant to help them choose appropriate compensatory education services, provided, however, that any such consultant may derive no additional financial benefit from the services s/he recommends or from the providers of such services;

It is **FURTHER ORDERED** that if Student is admitted, [private school] shall be considered a District placement and shall remain Student's pendent placement after the conclusion of the 2014/2015 school year, and ¶ 4 above shall continue to be implemented until such time as:

- a. Student's IEP team, including Parents and members from both the private school and the District, develop an appropriate IEP for Student that can be implemented in an appropriate District regular or special education placement with appropriate supports and services, and Parents approve a NOREP for such placement, or
- b. Until Parents otherwise agree to return Student to a District recommended educational placement, or
- c. Until such time, if any, that Parents and/or the private school staff determine that [private school] is not appropriately meeting Student's educational needs and either Parents notify the District that they wish to withdraw Student from [private school] or the private school notifies the District of its intention to dis-enroll Student.

It is **FURTHER ORDERED** that in the event Student is not accepted by [private school] within ten (10) business days of learning of the non acceptance, the District shall obtain the services of an autistic support consultant to design an educational program for Student that duplicates as closely as possible the program offered by the private school, and any such

educational program and placement developed and implemented by the School District or by the Intermediate Unit on behalf of the School District, shall include regular consultation and oversight by a BCBA.

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

*Anne L. Carroll*

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Anne L. Carroll, Esq.  
HEARING OFFICER

October 18, 2014