

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. 15430-1415AS

Child's Name: O.S.

Date of Birth: [redacted]

Dates of Hearing: 12/18/14, 2/20/15, 2/24/15, 2/26/15
3/19/15, 3/20/15, 3/25/15

CLOSED HEARING

Parties to the Hearing:

Parents
Parent[s]

School District
Council Rock
The Chancellor Center
30 North Chancellor Street
Newtown, PA 18940

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

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June 23, 2015

June 29, 2015

Anne L. Carroll, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

Student in this case was identified as IDEA eligible as a young child due to autism and transitioned from early intervention to the District's kindergarten autism support program at the beginning of the 2012/2013 school year. Before the kindergarten school year began, an increase in behaviors and regression in Student's skills led Student's doctor to initiate trials of various medications that spanned most of Student's first school year in the District.

During the 2013/2014 school year, disagreements between the parties intensified and increased, centering on Student's IEP goals, generally, and particularly on the speech/language and occupational therapy components of Student's autism support program. Parents' concerns about Student's lack of progress/loss of language skills led them to resume a home program in ABA therapy with the same behavior therapist who had provided a component of Student's early intervention services. By the beginning of the 2014/2015 school year, Parents had enrolled Student in a private school for students with autism spectrum disorders. Parents submitted a due process complaint seeking tuition reimbursement for the private placement, as well as four hours of compensatory education/day for the 2012/2013 and 2013/2014 school years.

The due process hearing was held over seven sessions between mid-December 2014 and late March 2015. Due to serious and unavoidable personal and professional matters that significantly affected counsel, written closing arguments could not be submitted in this matter until mid to late June 2015, delaying the final decision.

For the reasons that follow, Parents are awarded a portion of the compensatory education they requested, as well as private school tuition reimbursement for the 2014/2015 school year.

ISSUES

1. Did the School District provide a free, appropriate, public education (FAPE) to Student during the 2012/2013 and the 2013/2014 school years?
2. If not, should the School District be required to provide Student with compensatory education, and if so, in what form, in what amount, and for what period(s)?
3. Did the School District offer an appropriate IEP and placement for Student for the 2014/2015 school year?
4. If not, should the School District be required to fund Student's private school placement selected by Parents for the 2014/2015 school year, in that it was appropriate for Student and there are no equitable factors that support denial or reduction of reimbursement?

FINDINGS OF FACT

Background/Pre-Enrollment

1. Student, [an elementary school-aged] 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 autism disability category, in accordance with Federal and State Standards. 34 C.F.R. §300.8(a)(1), (c)(1); 22 Pa. Code §14.102 (2)(ii). (Stipulation, N.T. p. 16)
3. Student reached developmental milestones as expected until approximately age 18—22 months, when Student lost previously acquired skills and began exhibiting self-stimulating behaviors. Student received a medical diagnosis of autism at age 28 months, and began receiving IDEA early intervention services. (N.T. p. 1859; S-7 p. 1)
4. The District's initial evaluation of Student, conducted in the winter of 2012 to prepare for Student's transition from EI to school age services, noted "further regression" in Student's skills since an evaluation in 2009 prior to beginning pre-school services. (S-7)
5. Student's age 3—5 EI services consisted of mornings in a typical nursery school and approximately 2.5 hours/day of afternoon, home-based ABA therapy/instruction delivered by a BCBA¹ and focused on language, cognitive and play skills. Student also received speech/language therapy, occupational therapy (OT), and physical therapy (PT). Student was accompanied by an aide in the typical pre-school setting and supported by the BCBA at the pre-school for generalization of skills. (N.T. pp. 45—47, 811, 812; S-6, S-7)

¹ Board Certified Behavior Analyst

6. In the final EI IEP, Student was described as using verbal communication to express wants and needs in the pre-school setting. Student needed prompts to communicate, and demonstrated inconsistent use of 1—3 word phrases that could be expanded with an initial sound cue prompt. The resulting 4—6 word sentences were described as memorized, not novel. Student’s communication overall was limited in content and variety. (S-6 p. 5)
7. As reported by the BCBA who provided the home-based program, Student was demonstrating no difficult behaviors and more expressive language with the BCBA in the home setting, with a strength in expressively labeling objects. Student had good attention to task in the home setting, but Student’s skills were not as strong in, and Student did not like, activities that required pointing to or picking up an object or picture. Student responded well to fast-paced instruction delivered with a high level of enthusiasm. (N.T. pp. 811, 813—823; P-3, S-6 p. 6)
8. The BCBA conducted frequent reinforcer assessments to determine what Student would be willing to work for, which changed frequently. Because food was frequently very reinforcing, she began using a token board, which required Student to perform 5 tasks to earn 5 tokens before receiving a small piece of food. Other reinforcement options included small toys or sensory objects. (N.T. pp. 823, 824)
9. At the end of Student’s last year in pre-school, the developmental pediatrician who made the autism diagnosis, and has been following Student since that time, recommended trialing various medications to determine whether treatment might improve Student’s focus and positively affect language skill development. The medication trials continued through the 2012/2013 school year. There were 27 medication changes between 9/14/2012 and 6/14/2013, including three courses of over the counter cold/allergy medications and, briefly, an antibiotic. (N.T. p. 35; S-20)

District’s Autistic Support Program/IEPs

10. The District’s coordinator of autistic support described the District’s program as “broad spectrum applied behavior analytic,” known as the Pyramid Approach Education Model, and further explained that the District uses the components of applied behavior analysis in instruction, data collection and analysis. (N.T. pp. 1984, 1990)
11. The District’s program emphasizes a functional approach, with the goal of promoting generalization of skills from the beginning of instruction. The District does not believe in teaching skills in isolation, due to concerns that children with limited cognitive ability will be unable to generalize the skills. Skills are assessed to determine whether they are important for the child immediately and in the future. (N.T. pp. 1986—1988)
12. Instruction is delivered by means of discrete trial training, task analytical instruction (sequential lessons) and incidental teaching. Specific methodology in different classrooms depends on students’ levels of needs and ability to respond to naturally occurring motivators. Instruction is delivered as errorlessly as possible, while giving the

child the opportunity to respond. The staff tries to be cognizant of prompt fading and cuing. Data is taken to make sure that the teaching methodology is working. (1989—1991)

13. Student's initial IEP was developed in February 2012, by District supervisory staff, after the transition evaluation was completed. It included goals and short-term objectives for increasing on-task behavior; for independently walking from the school entrance to the classroom; taking turns in play; counting items from 1—10; toileting skills; putting on/taking off coat; unpacking belongings on arrival and packing belongings to leave school; independently throwing away trash after snack and mealtimes; identifying first and last name; accessing playground equipment; completing a 3 step gross motor activity/simple game with no more than 2 verbal prompts; and four receptive/expressive language goals. (N.T. p. 1005; S-9)
14. For both kindergarten and 1st grade, Student was assigned to the class for the youngest autistic support students, with 5 and 6 students in the classrooms, respectively, along with the same teacher and three assistants. A 1:1 assistant was assigned to each grade level. (N.T. pp. 1003, 1004, 1036)
15. The daily schedule included an arrival routine, including walking to the classroom, unpacking, checking a picture schedule, bathroom and a 5—10 minute break, followed by a period of individual instruction. The next two periods were the inclusion morning meeting in the regular education classroom and the autistic support classroom morning meeting, followed by recess/snack, whole group instruction or specials with typical peers, lunch/recess. In the afternoon, there was smart board individualized instruction, whole group table top instruction, related services and recess/inclusion. (N.T. pp. 1034—1037)
16. A few weeks after the 2012/2013 school year began, Student's IEP was revised to add baselines to the goals. (S-12)
17. The IEP also provided for individual speech/language and physical and occupational therapy (OT) and classroom OT and speech/language support. The SDI included a compression vest, which was trialed several times, and remained available, but Student did not request it and the teacher did not see any positive effects when it was used. (N.T. pp. 1020—1022; S-9)
18. During the 2012/2013 school year, Student's day to day classroom behaviors and functioning were significantly affected by the frequent changes in medication. (N.T pp. 1012—1015, 1026)
19. Student's IEP was revised in March 2013 to provide for transportation for school and for the proposed ESY program for the summer of 2012, as well as additional goals and OT services to be implemented after an IEP meeting at the beginning of the 1st grade year. (S-16)

20. Student's IEP was revised again in October 2013, at the beginning of 1st grade. The existing functional and behavior goals remained, and a goal was added for independently staying with the group during community-based instruction. OT goals were added for independently eating with utensils and writing Student's first name on worksheets and craft projects. Academic goals were added for identifying colors (red, yellow, orange, green, blue, purple); shapes (square, triangle, rectangle, circle); numbers from 1—10; counting out items from 1—5; receptively identifying coins (penny, nickel, dime, quarter) and identifying all lower-case letters. (S-24 pp. 21—28)
21. In September 2014, after Parents enrolled Student in a private school, the District offered a final IEP that included, in addition to the goals in the previous IEP, goals for: responding to an adult's greeting/farewell; expressively identifying actions; receptively identifying pictures of items from a field of 2; verbally labeling pictures of items; following verbal directions to perform an action; imitating an action when modeled; cutting along a line, cutting a picture, cutting a bag open; independently following/manipulating a picture schedule to move to the next activity. The requesting goal was revised to provide for making a request vocally with appropriate volume and clarity or with an AAC (augmentative assistive communication device). (S-39 pp. 26—31)
22. For the 2014/2015 school year, Student would have been moved to a different classroom because of the change in grade level. There were 5 students in that classroom for the 2014/2015 school year, which is typically the maximum number. There are also 5 adults in the classroom, the teacher and 4 paraprofessionals, who rotate among the children daily to provide support. (N.T. pp. 710—712)
23. After the morning entry and unpacking, the students go to a regular education homeroom for morning meeting, accompanied by a paraprofessional or the teacher. After returning to the autistic support classroom, the students typically work on typing or matching skills on the computer, followed by a morning meeting in that classroom. There are typically 3—4 sessions of individual table-top instruction throughout the day to work on academic or other skills. Lunch is with the regulation peers from the students' homerooms, followed by small group activities in the classroom and time for social groups, including typical peers from homerooms coming into the special education classroom for an activity or game. There is also large group instruction and specials with typical peers. There is often an afternoon meeting and a reading group with the entire group, with instruction differentiated for varying reading levels. Related services providers deliver services within the classroom. (N.T. pp. 712—716)
24. Data is collected by the staff member who is with each student each day for each skill, including academic skills, and graphed to determine whether a child is making progress. Reinforcers are identified by interviewing parents, by observation and sometimes assessments based on offering choices. (N.T. pp. 719—722)

Additional Private Services

25. In February 2014, due to concerns about Student's progress, Parents hired the BCBA who had provided Student's EI home program to again provide home-based ABA services to Student. By that time, Student was no longer demonstrating the language and other skills the BCBA described in the winter of 2012, and Student was engaging in constant movement. (N.T. pp. 76, 77, 831—834)
26. The BCBA began the home program by working on receptive language skills, *i.e.*, directing Student to point to or give the instructor one item out of a field of two, since she was not seeing expressive verbal skills. The BCBA determined that Student needed to work on re-developing play and communication skills, and demonstrating knowledge of common household objects, and tried various strategies, such as visual/tactile cuing to elicit verbal responses. (N.T. pp. 837—839)
27. Student's home program was delivered for approximately 2.5—3 hours/week by two therapists under the supervision of the BCBA. Beginning in April, 2014, the home therapists began working on the goals in Student's 1st grade IEP, including eating with utensils, counting, identifying colors and shapes. As the services went on, goals for greeting others, using their names, and the token board were re-introduced, and a picture schedule was added to Student's program. Both the BCBA and Parents began to notice improvements in Student's skills. The BCBA continues to work with Student, although staffing issues have sometimes interrupted services. (N.T. pp. 77, 844—846, 863, 864, 874, 875)
28. The home sessions incorporate discrete trial teaching and periods of intensive teaching. Both instructional methods are used in ABA programs, an umbrella term that refers to a systematic way to change behavior that always involves identifying behaviors that are functional, providing a stimulus to elicit the behavior, following the response with a consequence, and keeping data to determine the effectiveness of the methods used to bring about the desired change in behavior. Modifications should be made to the program if the data shows little or no progress. Errorless teaching is also an instructional technique used in ABA programs, and positive reinforcement is an essential component. (N.T. pp. 844, 870—874)

District Speech/Language Services

29. The IEP that was implemented at the beginning of the 2012/2013 school year included four speech/communication goals: answering what, who, where, and when questions throughout the school day; increasing expressive language vocabulary by adding 15 new functional core language vocabulary words from a baseline of 3 new words; independently speaking in 1—3 word phrases when answering questions and requesting items/objects; receptively identifying (pointing to) 10 familiar people, 10 places and 10 community helpers. Since the IEP was developed in the winter before the school year began, baselines were added in September 2012. At that time, Student could identify no

school-based people or places or community helpers, and could not answer any “wh” questions (N.T. pp. 199, 217; S-9 pp. 24, 32—34, S-12 pp. 6, 12—14)

30. The speech/language pathologist who provided services to Student during kindergarten and 1st grade was not part of the early intervention team, and, therefore, did not participate in developing Student’s initial IEP and did not review Student’s early intervention records until the day of kindergarten orientation, when she also met Student and Parent for the first time. She did not speak with anyone who had provided early intervention services to Student, but understood from the record review that EI speech/language services were focused on receptive, expressive and pragmatic language skills. From the documents, she expected Student to be more verbal than Student appeared at the kindergarten orientation. (N.T. pp. 193—198, 214)
31. Student’s School District IEPs provided for 60 individual sessions of speech/language therapy per IEP term in 30 minute sessions. (S-9 p. 36, S-24 p. 32, S-39 p. 34)
32. The classroom team took data on Student’s speech/language goals throughout the school day. Although the speech/language pathologist was frequently in Student’s classroom and conducted the speech/language session in the classroom, she took data only during speech/language sessions. The speech/language pathologist did not review the data taken by staff in the classroom, to determine, *e.g.*, how many opportunities Student had to provide responses directed toward the speech/language goals throughout the school day. The data taken by the classroom staff and the speech/language pathologist was different. The speech/language pathologist generally spent one session per week working on IEP goals and the second session collecting data on the goals. She provided separate input for progress monitoring of the speech/language goals, including narrative reports, but did not create graphs of her data. (N.T. pp. 201—208, 221, 226, 227; S-26)
33. During the kindergarten school year, Student’s engagement in therapy sessions varied considerably from session to session, and, it was difficult for the speech/language pathologist to keep Student engaged. Student’s motivation also varied, and Student often left or attempted to leave the sessions. In consultation with the BCBA assigned to the kindergarten/1st grade classroom, she used various strategies, including food reinforcers and physical/gestural prompts paired with verbal re-direction to keep Student in the sessions. (N.T. pp. 211—216)
34. The speech/language pathologist noticed a significant improvement in Student’s behaviors and focus during the 1st grade year. (N.T. pp. 234, 235; S-26 p. 10)
35. In the late winter of the 2012/2013 school year, Student’s IEP was revised to remove the goals for answering “wh” questions, answering questions, increasing expressive language vocabulary and answering questions in 1—3 word phrases. The receptive identification goal was retained, and goals were added for receptively or expressively identifying personal information (grade, town, age, [sibling’s] name) and for independently requesting items/actions using spoken language or an AAC device. Those goals were retained in an IEP revision in October 2013, near the beginning of 1st grade year, with an

increase in the number of independent requests that Student was expected to make, and the additional goal requirement that Student would independently construct full sentences to make requests. (S-14 pp. 22, 26, 27, S-24 pp. 18, 20, 29)

36. In November of Student's 1st grade school year, the District initiated the SETT (Student Environment Task Tools) process to determine whether an AAC would benefit Student and which device would best meet Student's needs. In February 2014, the team recommended Proloquo2go, a software application accessed with an I-Pad. After the decision was made, teaching and encouraging Student to use the AAC became a significant focus of Student's speech/language therapy. (N.T. pp. 241, 242; P-26 pp. 7—11)
37. When Student's home ABA program began again in February 2014, Student had the I-Pad with the Proloquo2go to use at home, but the BCBA noticed that Student was not generating full sentences for each request, as intended to build expressive language skills, but was retaining the "I want" phrase from previous requests on the screen and adding only a single word to make subsequent requests. (N.T. pp. 835, 836)
38. Although the speech/language pathologist did not recall the BCBA bringing that to the attention of the school team, staff working with Student at school began clearing the message from the screen after each request, and that procedure was subsequently included in written suggestions for using the AAC in the District's May 2014 reevaluation report. (N.T. pp. 242, 243; P-26 pp. 8, 9, P-34)
39. During the 2013/2014 school year, the clarity and intelligibility of Student's speech noticeably declined. Low voice volume also contributed to increasing difficulty understanding Student's oral speech, which became a significant concern for Parents. They requested that the issue, which they described as an articulation problem, be addressed through speech/language services. (N.T. pp. 228, 236, 239, 1121)
40. The District interpreted Parents' desire to address Student's speech clarity/intelligibility issue as suggesting a need to work on Student's production of particular phonemes or speech sounds in isolation. The District speech/language pathologist termed the issues that she and other District staff also identified, and were the basis for Parents' concerns, speech clarity problems that arose from speech patterns such as adding a "schwa" to the end of a word with a rising inflection, and leaving off the ends of words, possibly based upon the strategy of providing the initial phoneme of a word as a cue to expand Student's expressive ability. (N.T. pp. 228, 229, 336)
41. Student's IEPs included no speech clarity goals. The speech/language pathologist stated that the IEP team decided to address the issue through a specially designed instruction because she was not collecting data on it and it was not something for which she had a program. The speech/language pathologist did not specify the specially designed instruction that addressed Student's speech clarity issue, and in generally describing "trying a few things," specifically referred only to strategies to increase Student's voice volume. She found those efforts were unproductive due to Student's lack of motivation

and understanding of cause/effect. She also had no success using repetition to encourage Student to finish the ending sounds of words because Student had difficulty with imitation and did not appear to understand why the therapist was repeating a word and expecting Student to repeat/duplicate the word. (N.T. pp. 236, 237; S-26 p 10)

42. In general, the speech/language pathologist felt that it was most important to honor Student's communication rather than correct its presentation. She was concerned that Student would become less inclined to speak if Student's verbal productions were constantly corrected. Since Student's verbal imitation ability was weak and Student did not respond well to attempts to remediate leaving the endings off words, the speech/language pathologist decided not to recommend identifying phonological processing as a need and adding a phonological processing goal to Student's IEP. (N.T. pp. 240, 241; P-26 pp. 10, 11)

Private Speech/Language Services/Evaluation

43. Beginning in January 2009, while Student was still receiving early intervention services, Parents also obtained twice weekly, 45 minute/session private speech/language services. From the beginning of her services, the private therapist noted gradual, consistent progress, with Student reaching the best performance level in the fall of 2011. In June of 2012, Student was using appropriate voice volume, used varied objects to complete sentences, and connected phrases with "and." (N.T. pp. 332, 333, 337—342; P-35)
44. At the end of August 2012, the private speech therapist was beginning to see regression in terms of Student's decreased ability to perform oral motor movements, less articulatory precision, shortened sentence length and less self-generated speech. (N.T. pp. 342—344; P-35)
45. An evaluation, including an articulation assessment, in December 2013 disclosed an articulation deficit, since Student had not acquired the sounds that emerge later in the language development process. The private speech/language pathologist also diagnosed a phonological processing disorder based upon Student's deletion of sounds in words and addition of the schwa at the end of a word. (N.T. pp. 345—349; P-35 pp. 28—30)
46. The private speech/language pathologist addressed the speech production/clarity/intelligibility issues by acknowledging Student's communicative intent when Student produced an incorrect or incomplete word, such as, *e.g.*, the substitution of "funna" for "fruit snack" by giving Student the requested item, but at the same time supplying the correct word, clearly and correctly pronounced. Even if a child's length of sentence and vocabulary increase, communication does not improve if unfamiliar listeners do not understand the words. (N.T. pp. 349—351)
47. In March and June 2014, the private speech/language therapist recommended IEP goals for increasing voice volume, final consonants, use of second syllable in multisyllabic words, production of long vowel and syllable closure to improve speech clarity. By

August 2014, the private speech/language therapist noted significant improvement in Student's verbal communication skills. (N.T. pp.356—359, 364; P-35 pp. 31, 32)

48. In August 2014, Parents obtained a speech/language evaluation from Children's Hospital of Philadelphia (CHOP). Through a combination of structured activities, therapeutic observations, Parent report and standardized testing, the evaluator identified a profound receptive and expressive language impairment. (S-31)
49. The evaluator noted that Student's speech production was characterized by phonological processes/simplifications that typically developing children ordinarily outgrow by age 4, such as final consonant deletion and consonant cluster deletion (*e.g.*, deleting a consonant from a blend—such as the “l” from “please”) Student was, however, stimulable for final consonants, and benefitted from clapping out the syllables in multi-syllabic words, verbal imitation, use of consonant-vowel-consonant syllables and visual-tactile cues to improve articulatory placement of sounds to improve speech clarity. (S-31 p. 5)

Occupational Therapy Services

50. At the beginning of kindergarten, the District occupational therapist identified sensory issues and functional self-help skills as needs that would be addressed through Student's daily routine. Student's sensory issues were manifested primarily by a constant need for movement. Although at first it appeared that movement was a means to help Student focus, and movement breaks were often necessary and helpful for Student, movement sometimes had the opposite effect, creating a need for more movement. (N.T. pp. 263—266, 268, 271, 284, 401, 403; S-8)
51. Children entering the District autistic support program are typically not assessed for specific fine motor skill needs for a period of several months to provide time for them to learn to be students. (N.T. pp. 274—276)
52. There were no explicit OT goals in Student's initial IEP, but OT services supported the IEP goals. Sensory input affects the ability to maintain on-task behavior. Self-care goals (toileting, taking coat off and putting it on, unpacking/packing belongings, throwing away trash after snacks/meals) require coordination/fine motor skills. (N.T. pp. 286—289, 296—298, 387, 388; S-9 pp. 20—35)
53. Student's IEP provided for 30 sessions of direct OT services at 30 minutes/session (app. 1 x/week). Student also received an hour/week of group OT/PT/speech/language therapy provided to the entire class. Specially designed instruction included OT-directed sensory-based activities in addition to the weighted vest. The therapist kept notes concerning Student's sensory processing and other OT issues, shared through consultation with the classroom team. (N.T. pp. 288—290; S-9 pp. 35, 36)
54. From working with Student during kindergarten, the occupational therapist learned that Student could be calmed from an overly-aroused state by providing sedentary, slow-movement fine motor activities. Providing quiet activities helped Student remain in

group instructional settings for a longer period. (N.T. pp. 293—295, 403; S-22 p. 10, S-28 p. 6)

55. Although Student had sufficient fine motor skills to complete tasks such as writing and cutting with scissors, Student resisted engaging in tasks that were not meaningful or motivating, such as handwriting or cutting out shapes. During group activities, such as craft projects, the occupational therapist supported Student's participation with hand over hand assistance. (N.T. pp. 299, 302, 303, 314, 315, 322, 323; S-22 p. 9, S-26 p. 18)
56. By the fall of 1st grade, Student's functional fine motor skills improved. Student was able to manipulate small game pieces and to manage opening snack packages and juice boxes, including using scissors to snip the ends of bags. Student could manage articles of clothing with minimal assistance and had developed the ability to eat independently with utensils, but needed prompts to do so. By the spring of 2014, Student had begun to develop greater interest in table-top activities and was able to remain seated and participate in tasks longer, providing an opportunity to reintroduce the kinds of school tasks that Student had previously resisted. (N.T. pp. 300, 301, 408; S-22 p. 9, S-26 p. 26, S-39 pp. 9,10)

Private School Program

57. The private special education school Student attended during the 2014/2015 school year had a total enrollment of 19 students, all diagnosed with an autism spectrum disorder. The school employs 13 special education teachers, 2 full time and 1 part-time BCBA's, 2 full time speech language pathologists and 1 full-time, 1 part-time occupational therapists. The school is based on ABA principles, and specifically, verbal behavior principles. (N.T. pp. 514, 700)
58. Each class has an average of 4—6 students, with a maximum of three teachers in each classroom, and a BCBA specifically assigned to each child. Student was in a class of four. (N.T. pp. 514, 515, 517)
59. To develop Student's IEP, the classroom teacher to whom Student was assigned conducted a VB MAPP assessment to establish Student's present levels of academic achievement and functional performance. (N.T. pp. 518, 520, 537, 538; S-50 pp. 5, 6,
60. The VB MAPP is a criterion referenced assessment organized by categories of skills that typically developing children are generally expected to acquire from age 18 months through middle childhood (app. age 8). Within each category at each level are blocks representing skills a child can perform. When a child is assessed, the blocks are shaded if the child has acquired the skill and left blank if not. The skill categories assessed for the private school IEP were mand (requests); tact (labeling); listener/responding/visual perceptual skills/matching to sample; social behavior/social play and echoics. The VB-MAPP assessment is used to provide a structured path toward strengthening skills, with the goal of ultimately eliminating all skill gaps, if appropriate for an individual child. (N.T. pp. 537, 538, 953, 697—699, 954; P-29 pp. 5, 6)

61. The “holes,” *i.e.*, skill deficits revealed by the assessment were the basis for Student’s 17 IEP goals and 4—6 short-term objectives for each goal. The VB-MAPP assessment is repeated every IEP year. (N.T. pp. 518, 520, 537, 538, 697; P-29 pp. 18—48)
62. Student’s daily schedule at the private school included 2 hours of intensive teaching or natural environment teaching in 6 increments of 10—30 minutes each, interspersed among sensory activities, related services, lunch and a snack. There are two periods of whole group instruction, a 15 minute morning period with a social story on a current theme, holiday, calendar, worksheet, and a 30 minute afternoon arts and crafts or game activity with peers, focused on taking turns and communication. Student followed an individual visual schedule to guide activities. (N.T. p. 552; S-50 p. 181)
63. Student’s IEP included speech/language goals for following two step directions and using the AAC to independently request 25 preferred activities, although vocalizations are emphasized in the classroom. There is also a goal for Student to correctly articulate 25 two syllable functional vocabulary words. That goal is implemented with frequent practice and repetition. There is a specific goal for independently identifying and requesting food items in the cafeteria. The IEP provided for 60 minutes/week of speech/language services. (N.T. pp. 556—558; P-29 pp. 40—43)

DISCUSSION AND CONCLUSIONS OF LAW

Due Process Hearing/Burden of Proof

The IDEA statute and regulations 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 235, 240 (3rd Cir. 2009).

In *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005), the U.S. 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, a component of the burden of proof, which also includes the burden of going forward with the evidence. The burden of persuasion is the more important of the two burden of proof elements, since it determines which party bears the risk of failing to convince the finder of fact that the party has produced sufficient

evidence to obtain a favorable decision. This rule is the deciding factor in a case when neither side produces a preponderance of evidence, *i.e.*, when the evidence on each side has equal weight, which the Supreme Court described in *Schaffer* as “ equipoise.”

When the evidence on one side has greater weight, it is preponderant in favor of that party, which has borne its burden of persuasion and prevails. When the evidence is equally balanced, the party with the burden of persuasion has produced insufficient persuasive evidence and cannot obtain a favorable decision.

As in most cases, however, the burden of persuasion did not affect the outcome in any respect, as the evidence was not equally balanced with respect to any of the issues identified for decision

FAPE--2012/2013, 2013/2014 School Years

Legal Standards/IEP, Meaningful Progress

Under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400, *et seq.*, and in accordance with 22 Pa. Code §14 and 34 C.F.R. §300.300, a child with a disability is entitled to receive a free appropriate public education (FAPE) from the responsible local educational agency (LEA) 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 at 249. “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 (3rd 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 (3rd Cir. 1993). An eligible student is denied FAPE if his/her 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 (3rd Cir. 1996; *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F. 2d 171 (3rd Cir. 1988).

Under the interpretation of the IDEA statute established by *Rowley* and other relevant cases, however, an LEA is not required to provide an eligible student with services designed to provide the “absolute best” education or to maximize the child’s potential. *Mary Courtney T. v. School District of Philadelphia*, at 251; *Carlisle Area School District v. Scott P.*, 62 F.3d 520 (3rd Cir. 1995).

Overview/Nature of the Dispute

Fundamentally, this case centered on the parties’ different beliefs and philosophy concerning the nature of a true or “strict” ABA program for addressing Student’s autism –related needs. Parents do not often prevail in these cases because of the broad discretion afforded school districts in selecting and implementing educational programs for the students they are responsible for educating. As discussed in greater detail, below, however, there is substantial research supporting the effectiveness of the type of intensive ABA services Parents were requesting. There was also a lack of evidence that provided a clear picture of exactly what features associated with ABA therapy, and particularly with the subset of ABA interventions associated with a verbal behavior program, the District was using and implementing with rigor and fidelity in delivering Student’s educational program. Although the District in this case did not completely “drop the ball” in terms of providing Student with an opportunity for meaningful progress, the evidence was nevertheless convincing that Student needed the kind of ABA

services available from the private school, and that the District had no intention—and saw no need to provide a rigorous program of that nature for Student.

2012/2013 School Year

Pre-Enrollment Background

Student's history is significant for development then loss of skills and functioning.

Medical and educational records disclose that Student appeared to reach expected developmental milestones until the middle of Student's second year, when Student lost previously acquired language skills, particularly, and began displaying repetitive, self-stimulating behaviors, which ultimately led to the autism diagnosis by a developmental pediatrician. (FF 3)

After Student began receiving early intervention services, and especially when Student was in the typical pre-school setting, Parents recalled a great deal of progress, particularly in language skills, which was confirmed by the private speech therapist who has provided services to Student throughout. (FF 43, N.T. pp. 1861, 1862) Parents acknowledged that behavior issues arose during the last year of the pre-school program that began "impeding some of [Student's] communications." (N.T. pp. 35, 1863, l.15) Nevertheless, Parents expected Student's performance to "accelerate" in the District kindergarten program. (N.T. p. 1865, l. 10)

Parents' recollection of Student's progress in the home setting, however, was not entirely consistent with reports of Student's functioning and performance in the pre-school environment as that period was ending. (FF 4, 6) At the time Student was evaluated (at age 33 months) prior to transitioning to age 3—5 pre-school services, the IU evaluator documented some skills within age appropriate limits, such as an understanding of color and shape concepts, identifying objects by function, matching color and shape, naming colors. (S-1 p. 4) In the months before Student enrolled in the District kindergarten program, the final pre-school IEP and the District's initial

evaluation report documented little, if any, further development of communication and other social skills, at least as observed in the school environment. Student's use of multi-word phrases in the pre-school setting, *e.g.*, was neither spontaneous nor novel, and verbal expressions of requests were sometimes disconnected from what Student actually wanted, or was trying to obtain.²

Concerned that the increase in behaviors was interfering with Student's language progress, Parents consulted with Student's developmental pediatrician and began medication trials during Student's last year in pre-school that continued through the kindergarten school year.

Consequently, when Student entered the District, the teacher met a child who was different than described in the documents she had reviewed, with a flatter personality and fewer skills than expected. (N.T. pp. 1012—1014) Student's behaviors and energy level could change, affecting Student's ability to participate in the program, depending upon the medication that was being trialed at a particular time and Student's reaction to it. (N.T. pp. 1016, 1017) Student's doctor asked District staff to provide data concerning Student's behaviors when medications started, changed and stopped, and also asked that an FBA be delayed while the medication trials continued. (N.T. pp. 1015, 1020; S-28 p. 1)

Those unusual circumstances compounded the difficulties inherent in transitioning from the very different early intervention program to school-based services, requiring Student to get used to a very different environment and different staff and peers. Transitions of that nature, alone, are notoriously difficult for children with autism spectrum disorders. Even with the best possible program in place, it would be reasonable to expect an initial period of little or no

² Student, *e.g.*, used the phrase "I want a hug" or "Can I have a hug?" to escape from tasks and also to obtain more of something, such as continuation of a game. (S-6 p. 5)

progress, and even regression, since a child with ASD ordinarily needs to “pair” with the staff who will be delivering instruction and other services in the new setting before the child is willing to engage in classroom routines and instruction, and in non-preferred tasks, in particular.

It is well documented in the record, including the testimony of both Parents, that Student’s loss of skills—or much slower rate of skill development, began before Student entered the District’s autistic support kindergarten program. Consequently, the loss of skills Parents described in kindergarten cannot be attributed to any alleged deficiency in the District program. The most that the District could be faulted for is not halting or reversing the decline that Parents acknowledged began, at the latest, in the last year of pre-school. Under the circumstances, however, that is unrealistic in light of the frequent changes in medication that affected Student significantly and unpredictably throughout the school year and the need to transition from pre-school services to the school-age kindergarten environment, which included a full day in school for the first time.

In addition, with the change in setting, creating the need to become acclimated to the public school environment, to become familiar with the building and the staff, and to develop appropriate school-based routines, the functional goals that comprised most of Student’s IEP for the kindergarten year were not inappropriate, and Student made meaningful progress toward the goals, in many instances reaching many of the short-term objectives. There is, therefore, no basis for an award of compensatory education during the kindergarten year based upon the nature of the IEP goals and lack of “academic” IEP goals.

2013/2014 School Year/Overall Educational Program, Progress

As is certainly expected in a case where there is such a substantial disagreement between the parties concerning how an eligible child should be educated that Parents withdrew Student

from the District for a private school placement, the parties have significantly divergent views on virtually every component of Student's program. Here, however, the underlying dispute, especially with respect to the overall program, is not so much over whether/ how much progress Student made on the IEP goals during the 2013/2014 school year, but over the significance of whatever progress there was, in terms of what Student gained. In other words, did Student meaningfully improve skills, and/or develop new meaningful skill that were, first, retained and used by Student over time in the same context in which the skills were learned, and, second, generalized to different areas where the skills are also useful. At the end of the day, as the saying goes, what matters with respect to progress are not the percentages or percentage increases of goal/objective attainment, but whether Student has acquired skills that permit better functional participation in family, school and community life despite the continuing challenges of Student's disability. And the true measure of skill acquisition is how readily Student uses the skills and in how many different ways/areas. In this context, that is the true test of "meaningful" progress.

The issue of meaningful progress in terms of an actual gain in the development and ability to use an essential functional skill is well-illustrated by Student's documented progress on the communication goal of independently requesting functionally appropriate items/activities 20 times throughout a school day. (S-24 p. 26) District progress sheets document 100% attainment of the short-term objective under that goal of requesting 15 items in several consecutive weeks by the end of the 2013/2014 school year. (P-10) Review of all the data sheets, however, discloses that with two exceptions (swing, outside), all requests were for food/drink items; that Student specifically requested only 18 different items, and that "more," without specifying the item, was a very frequent request. Consequently, although "on paper" Student moved from the

baseline of 10 requests to meet the 15 request objective on numerous occasions, in reality, meeting the objective was based almost entirely on Student repeatedly requesting the same few edible items, as Student's classroom teacher confirmed in testimony at the due process hearing. (N.T. pp. 223, 1107—1110) During the time progress on the goal was monitored, from mid-November 2013 to early June 2014, Student barely requested 20 different things in that entire period, of which only two were activities, each requested once. There were no item requests that were not edible, and on many days, the objective was reached only because "more" was counted as an item request. (*See, e.g.*, P-10 pp. 4, 6)

As illustrated by Student's progress on the communication goal, simply looking at the baselines and percentage changes associated with the IEP goals and objectives, is not an adequate means to measure Student's progress in terms of getting a picture of the gains Student actually made. A better measure is examining the skills Student displayed at the time the private school documented the skills Student was displaying using the criterion-referenced VB MAPP assessment at the beginning of the 2014/2015 school year for development of Student's IEP.

Although the District appeared quite unimpressed by the VB MAPP as an assessment tool and as a basis for choosing IEP goals for a child of Student's age the VB MAPP lists detailed components of the motor, language, play and social skills typically developing children ordinarily acquire naturally from 18 months through approximately age 8. Although goals directed toward reaching the top of the lowest level of the assessment, approximating the developmental level of age 36 months, may appear to represent minimal accomplishments for an elementary school age child, that is not so for a child significantly affected by an autism spectrum disorder. A typical child of 3—4 years of age can, *e.g.*, effectively communicate wants and needs, engage in reciprocal social communications, participate in simple play/leisure

activities alone, with adults and with peers. All of those things are taken for granted in families where all children develop typically, but are, no doubt, more obviously appreciated when they do not emerge naturally, since many ordinary family activities are limited, and more time and effort must be devoted to determining a child's wants/needs and other care-giving tasks.

Developing attention and focus in a group, self-care skills, identifying, matching common objects, places and people in the school setting, as well as colors, shapes, letters, numbers contribute to general life, leisure and communication skills and have a great deal of functional value, in terms of family and community life, such as, *e.g.*, for playing games and enjoying books, as well as functioning as pre-academic skills to prepare for formal academic instruction. Skills such as dressing/undressing, toileting, and displaying acceptable behaviors at home and in public places are also important and immediately functional. To that extent, therefore, the District's program and instruction was appropriate for Student during the 2013/2014 school year.

Other skills that the District emphasized as "functional," such as knowing demographic information are also important, but in a hierarchy of functional skills, are not as immediately useful. Consequently, and again in reference to the "big picture," there is insufficient evidence to conclude that the classroom instruction aspect of the District's 2013/2014 IEP was entirely appropriate and effective for Student during the 2013/2014 school year.

District staff was obviously not very receptive to Parents' desire for a verbal behavior-type program for Student, similar to the program offered by the private school. During the 2013/2014 school year, Parents described their request as a "strict" ABA program, featuring, particularly, intensive instruction using the discrete trial training method. District staff noted that discrete trial training is generally used for only a relatively brief period. That, however, is not always the case. As noted in information available from the Autism Initiative, a resource for

autism education and consultation available at no cost to all Pennsylvania school districts through the Pennsylvania Training and Technical Assistance Network (PaTTAN), although not all children need several intensive periods of individualized discrete trial training daily, many children do. An emphasis on fast-paced instruction, discrete trial training, natural environment teaching "mixing and varying" and errorless teaching as part of a systematic instructional program can be, and often have been, quite effective for children with very delayed skills, as Student in this case has. Moreover, the methods encompassed by Parents' request for different and more intensive services have a deep research basis establishing their effectiveness. It is the long-standing and unassailable research supporting the effectiveness of the type of very structured program that Parents' request for a "strict ABA program" was clearly meant to convey that differentiates the issue in this case from the type of methodology dispute with school districts in which parents generally do not prevail. It is certainly possible that the District's Pyramid Approach Education Model also has a research basis, but it was not provided as part of the hearing evidence or argument, and it is not part of the Autism Initiative information or reviewed on its PaTTAN site.

The organizing principles Pyramid Model may be better suited to children on the higher functioning end of the autism spectrum, or may work quite well for some children at the same level as Student. The District's instruction, however, did not work very well for Student during the 2013/2014 school year in a number of areas. District staff admitted that Student's progress was limited and slow, and, as noted, some of the progress that Student made did not result in much real development of or increase in skills, even where, as in the communication goal, the target skill would have been very functional, especially if generalized and used consistently. Although the communication goal was considered mastered, however, there appears to have been

no effort to expand Student's requests beyond a single class of items, and a limited number of items within the class. District staff testified that the underlying philosophy of the District's autistic support program is development of functional skills, and that the thrust of instruction is generalization from the beginning of the instructional process, but there is little evidence of any generalization of skills. Instead, the District focused on probes and trials to measure skills against the goal percentage in isolation to measure progress, without real consideration of the meaning of the measured progress in terms of what Student could do on a regular and consistent basis that had meaning and an important function if generalized.

The disconnect between Student's apparent and real progress with respect to the communication goal required examination of the underlying data to discern, but there are other instances of progress reporting in the record that are observable from a comparison of various sources purportedly reporting the same information. In one instance, Student made no progress in 1st grade identifying his/her grade. By the end of kindergarten, the District's progress reports indicated 100% mastery (S-19 p. 41) In 1st grade, for the same concept but a different named grade level, Student's baseline was identified as 9%, but at the end of the 2nd marking period, Student's grade level identification was "kindergarten" 100% of the time. At the end of the 3rd marking period, Student had advanced to 12% accuracy. (S-35 p. 90) Student's difficulty identifying grade level suggests it was a rote memory, not a conceptual, skill that developed in kindergarten, and it was certainly not generalized to the next grade level.

Moreover, although there were advances in skills, such as identifying lower case letters S-35 pp. 53, 81, mastery of a number of objectives in the 2013/2014 school year, such as identifying school-related common objects, school places and people, first and last name, and (S-39 p. 9), as well as considerable success in improving self-help and group participation skills (S-

3 p. 55—58, 66 87), in other areas, there were decreases in Student’s skills, some quite sharp, from kindergarten to 1st grade reports, or between the middle and end of 1st grade, suggesting significant lack of retention.³

Close examination of the District’s progress reports, especially with no information concerning whether there were fidelity checks to assure that data was collected with consistency, also raises questions about how much progress Student actually made, even looking at numbers alone, without considering the “big picture” in terms of the functional significance of the skills Student was being taught. With respect to identifying colors, *e.g.*, on one page, where the goal is expressed in terms of identifying six named colors, and progress is reported for marking period 1 only, the baseline is identified as 50% and on another page, where the objective is identifying the color yellow, and progress is reported for marking periods 2 and 3, the baseline is listed as 28%. (S-35 pp.34, 68) Similar large baseline discrepancies appeared on progress reporting pages for marking period 1 and on the pages for marking periods 2 and 3 with respect to identifying orange, red, and a square. (S-35 pp. 35, 69, 33, 67, 39, 70)⁴ With the anomalies in the District’s information, it is difficult to determine Student’s progress regardless of how faithfully the District graphed its data—the graphic representations are not meaningful if the underlying data is inaccurate, and where there are discrepancies, it is impossible to determine the accurate numbers.

³ Expressively Identifying age: Baseline=35%; 2nd Marking Period (MP) = 0%, with frequent practice opportunities and visual supports offered throughout the school day, 3rd MP = 13 % (S-35 p. 65); Counting: 1—Kindergarten 2nd MP = 69%, 1st grade 3rd MP = 47% (S-19 p. 4, S-35 p. 78); 2-- Kindergarten 2nd MP = 71%, 1st grade 3rd MP = 38% (S-19 p. 5, S-35 p. 79); 3—Kindergarten 2nd MP = 66%, 1st grade Baseline = 0 (S-19 p. 6, S-39 p. 8); 4-- Kindergarten 2nd MP = 67%, 1st grade Baseline = 0 (S-19p. 21, S-39 p.8); 5—Kindergarten 2nd MP-- 65%, 1st grade Baseline = 0 (S-19 p. 22, S-39 p. 8)

⁴ For reasons not disclosed by the record, progress monitoring reporting sheets are not included in S-35 for any time after the first marking period for identifying the colors blue and purple and the shapes circle, triangle and rectangle. There is also missing progress information for identifying numbers

Finally, with respect to graphing progress data, if graphs are used simply to visually represent the level of goal attainment, *i.e.*, as an alternative method to report progress, rather than as a means to determine whether instruction is effective—and as a basis for altering methods or adjusting goals if the graphed data shows little or no progress, then graphing is not used for the purpose intended in a “strict” ABA program. Here, although District staff testified that the data is used to guide instruction, there was no evidence of District-initiated adjustment of goals or objectives, or change in focus or intensity of instruction in response to the data the District collected and carefully graphed. As noted above with respect to the requesting goal, District staff was quite content to report significant progress when Student was requesting the same items repeatedly and not truly expanding expressive communication.

Specific Service Issues—2012/2013 & 2013/204 School Years

Speech/language

An issue that permeated the due process hearing, and emerged most saliently in the parties’ closing arguments, and especially in the additional reply and surreply arguments submitted by both parties centered on the intelligibility and clarity of Student’s speech, in terms of both volume and production/pronunciation of words, specifically, leaving off the endings of words, using word approximations and adding a letter/syllable to the ends of words (schwa). The issue was, unfortunately, framed by both parties as an “articulation” issue, which led to much testimony/discussion on the part of district witnesses concerning the inappropriateness of speech/language goals and services directed toward remediating articulation deficits in a young child diagnosed with both autism and an intellectual disability. It was apparent throughout the due process hearing, however, that the parties were talking at cross purposes—Parents were clearly not suggesting that Student needed or should have the kind of articulation therapy the

District insisted was the only service that would address an articulation disorder. Although Parents also used “articulation” as the term to describe the problems with Student’s lack of speech clarity and intelligibility, and did note a true articulation problem, Parents’ private speech therapist also diagnosed a phonological processing disorder as the source of those difficulties, and the issue was further explored in a private speech/language evaluation from CHOP. The phonological processing problem is clearly the issue that Parents believed the District should have addressed directly and specifically through speech/language services. Moreover, it is obvious from her testimony and from a May 2014 written summary of Student’s speech/language issues and needs that she was well aware of the true nature of Parents’ concerns about Student’s speech production. (FF 41) Nevertheless, it is also quite clear that the speech/language pathologist was of the opinion that nothing could or should be done to address that issue, presumably since Student could use the Proloquo2go AAC for expressive communication.

Nevertheless, for some reason, the parties found it necessary to make Student’s need for services to address articulation deficits a focus of the speech/language issues. To lay the matter to rest, the hearing officer accepted the District’s invitation to visit the ASHA⁵ website to confirm—or disprove—the opinion of the District witnesses with respect to the inappropriateness of articulation therapy, notwithstanding the hearing officer’s conclusion, based upon hearing the testimony in the first instance, and subsequent review of the evidence, that despite the terminology, articulation, as that term was used by the District was not the true focus of the speech/language dispute in this matter .

⁵ American Speech/language Hearing Association

The information available on the ASHA website was quite revealing with respect to the articulation issue, but most likely not in the way the District expected. Since it was obvious that the real issue was not “articulation” as the parties, and particularly the District defined it throughout the hearing, the ASHA website was searched with the term “phonological processing disorders,” resulting in information concerning a number of problems with speech production, including both articulation disorders and the broader category of “speech sound disorders” which includes the kinds of issues that affect Student in this case. Indeed, among the causes of speech sound disorders are developmental disabilities such as autism. Moreover, following a link found on the general information page about speech sound disorders led to a page that lists 24 separate sources of information or possible therapeutic approaches to speech sound disorders, of which traditional articulation therapy is only one.

Another link, to Preferred Practice Patterns, provides information concerning Speech Sound Assessment and Speech Sound Intervention that encompass both articulation and phonological processes/impairments to assist the affected person to acquire new speech production skills and strategies. In short, there is ample information on the ASHA website suggesting that there are many possible interventions in addition to traditional articulation therapy to address Parents’ concerns with Student’s speech intelligibility and clarity-as to which there was no dispute with respect to the existence and adverse impact of those issues on the ability to understand Student’s verbal communications. As noted, the dispute centered on use of the term “articulation,” and really, on the District’s insistence on defining that term in the narrowest possible sense, although it was abundantly clear that Parents were never suggesting that Student’s speech/language therapy should include, much less focus, on the production of sounds in isolation, as the District appeared to insist it must if Parents wanted to improve

Student's "articulation." Clearly, Parents were asking that speech/language services include a goal and strategies for improving Student's speech sound production, not the subset of that broad category known to speech/language pathologists as articulation.

As noted, it was quite obvious throughout the hearing that the parties were using a term to that did not accurately express the concepts at the heart of the issue. It should not be surprising that although the terminology disconnect was pointed out a few times during the testimony to no avail, it was not resolved. *See, e.g.,* N.T. pp. 246, 247.

This issue is significant in two respects. First, it is obvious that in terms of the specific issue whether Student's phonological processing issue should have been addressed, the District speech/language pathologist relied entirely on her personal beliefs that it was most important to "honor" Student's communicative intent, along with the lack of success of the limited strategies he had tried to address Student's speech clarity issue. It was not, therefore, a determination based upon a real team decision, including a real consideration of Parent concerns, and was not based on any formal or informal assessments of Student's language abilities and needs, or any exploration of the kinds of strategies that might be available to address those needs beyond what the speech/language pathologist could think of on her own. As noted, the ASHA website has a considerable amount of information that might have been helpful in developing a different approach. Moreover, similar, if abbreviated, information was available from the CHOP speech/language evaluation. The information in the CHOP report suggests that there are strategies beyond simply repeating the word that might result in some success with Student.

The second problem that this issue illustrates is the deep reluctance of the District's autistic support program staff, in general, to look to outside resources, including Parents and well-recognized professional sources for ideas and strategies to address Student's needs. That,

indeed, is an underlying theme of the entire case. The phonological processing issue establishes that speech/language services was not an exception to the District's overall, unshakeable belief that its service model is appropriate and adequate for all children with autism spectrum disorders that it serves.

With respect to speech/language services, there are also broader matters of concern. It was concerning that the data taken on IEP goals by the classroom staff and the speech/language pathologist was entirely disconnected. As with the delivery of the District's instruction in general, it was also difficult to get a sense of precisely what the speech/language therapist did during the services, and how her classroom consultation with the staff was at all helpful, in terms of helping Student generalize skills.

Based upon the overall lack of information concerning the speech/language services and whether Student made any meaningful progress based on those services, Student will be awarded compensatory education equal to the amount of speech/language services in Student's IEP for both the 2012/2013 and 2013/2014 school years.

Occupational Therapy

Parents' dissatisfaction with the occupational therapy services Student received from the District was centered primarily their disappointment with a lack of emphasis on developing school-related fine motor tasks, primarily cutting with scissors and writing. Parents also faulted the occupational therapist for not conducting formal OT assessments and for inadequate record keeping of Student's progress.

With respect to the OT aspect of the District's program, however, Parents have established, at the most, procedural violations with respect to the absence of formal assessments and lapses in record keeping, as well as a dispute over the focus of Student's services. None of

the issues raised by Parents, or the combination of them, are sufficient to support an IDEA violation based on inappropriate OT services. In this case, in fact, the absence of formal assessments does not even amount to a procedural violation, since it is clear that Student's sensory and motor needs for the early school years could be appropriately and adequately determined by observation and the sensory profile completed in connection with the transition evaluation prior to Student's enrollment in the District.

The record established that Student developed a number of important functional skills in the areas of self-care. (FF 56) Moreover, the District's occupational therapist developed a promising strategy for addressing Student's sensory needs that by the end of the 2013/2014 school year was apparently beginning to make a difference in Student's ability to participate more successfully in the kinds of academic tasks that Parents wanted to be a substantial part of Student's educational program. The evidence in the record relating to the OT aspect of the District's program established that the OT services not only provided Student with a reasonable opportunity for meaningful progress, but actually resulted in meaningful progress.

Tuition Reimbursement

Legal Standards

In *Burlington School Committee v. Department of Education of Massachusetts*, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985), the United States Supreme Court established the principle that parents do not forfeit an eligible student's right to FAPE, to due process protections or to any other remedies provided by the federal statute and regulations by unilaterally changing the child's placement, although they certainly place themselves at financial risk if the due process procedures result in a determination that the school district offered FAPE or otherwise acted appropriately.

To determine whether parents are entitled to reimbursement from a school district for special education services provided to an eligible child at their own expense, a three part test is applied based upon the *Burlington* decision and the later Supreme Court decision in *Florence County School District v. Carter*, 510 U.S. 7, 114 S.Ct. 361, 126 L.Ed. 2d 284 (1993). (See also 34 C.F.R. §300.148(c), codifying the criteria for private school reimbursement). The first step is to determine whether the program and placement offered by the school district is appropriate for the child, and only if that issue is resolved against the School District are the second and third steps considered, *i.e.*, is the program proposed by the parents appropriate for the child and, if so, whether there are equitable considerations that counsel against reimbursement or affect the amount thereof. *In Re: The Educational Assignment of Cindy D.*, Special Education Decision No. 994 (SEA, PA June 27, 2001). A decision against the parents results in a denial or, in some instances, reduction of reimbursement, particularly with respect to equitable considerations.

Private School/

Appropriateness of IEP Proposed for 2014/2015 School Year

Ordinarily, there is a separate discussion of the appropriateness of the District's IEP proposal and the appropriateness of the private school, but it should be obvious by now, that Parents well established that the private school program fulfilled Student's needs in a way that the District program does not, primarily because regardless of the specific goals in the District's last proposed IEP, the District would not have delivered instruction with the intensity and in the manner Student needs. Parents, therefore, met the first prong of the tuition reimbursement claim.

For a number of reasons, including no opportunity for inclusion with non-disabled peers, allegedly ineffective instruction, inadequate data collection and reporting, the District contends that the private school Student attended for the 2014/2015 school year is not an appropriate placement. The District's complaints about the private school instruction, however, essentially

come down to a methodology dispute, as discussed above—the District clearly does not favor a verbal behavior program, but likely does not understand the underlying principles, since the District has never taken advantage of the Autism Initiative services.⁶ It is well settled, however, that the private school selected by Parents does not have to meet District standards. As the Court of Appeals has stated,

A parent's decision to unilaterally place a child in a private placement is proper if the placement “is appropriate, i.e., it provides significant learning and confers meaningful benefit...” *DeFlaminis*, 480 F.3d at 276 (internal quotation marks and citation omitted). That said, the “parents of a disabled student need not seek out the perfect private placement in order to satisfy IDEA.” *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 249 n. 8 (3d Cir.1999). In fact, the Supreme Court has ruled that a private school placement may be proper and confer meaningful benefit despite the private school's failure to provide an IEP or meet state educational standards. *Florence County Sch. Dist. Four v. Carter ex rel. Carter*, 510 U.S. 7, 14-15, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993)

Mary Courtney T. v. School District of Philadelphia, 575 F.3d at 242.

Here, the private school instruction is based upon verbal behavior principles, an ABA-based instructional methodology that has a solid research basis, and is not only well known, but encouraged in Pennsylvania public schools. It is true that, regardless of the details of how many

⁶ Notably, although the District staff described its program as “based on ABA principles,” the description of the Districts’ ABA program did not include emphasizing a systematic approach to instruction. Although that may be implied, in the sense that *e.g.*, that school routines and school/community persons and places are targeted for first for learning, there does not appear to be an identified hierarchy of skills beyond functional life skills, as, for example, described on the VB MAPP assessment. From the District’s description of its use of ABA principles, it places the greatest emphasis on life function and immediate generalization of skills, meaning likely to be important for daily living and immediately used in a natural environment. Although, as noted, learning and generalizing life skills those are certainly important, there is no need or reason to limit instruction in that way, when there are many classes of things to learn the names and function of. In addition, District staff did not mention reinforcement as a significant component of its ABA instruction, but it is a key element to assure that a child becomes and remains willing to engage in instruction, and especially, comes to associate the instructor with good things, in order to build a basis for generalizing the good effects of contact with a teacher. As District staff noted, children with ASD ordinarily don’t respond to the same socially mediated motivators that typically developing children find rewarding.

Finally, when describing efforts to keep Student in the area where a lesson is being taught while apparently not teaching the replacement skill of requesting a break, they appear not to consider it important to remove or prevent the rewarding effects of immediately leaving the non-preferred activity by “bolting” or “eloping. Certainly, it is essential to teach a child an acceptable way to escape a demand, but unless the just as effective and more immediately rewarding means of getting the desired break is eliminated, there is little

minutes Student can sit and attend to individual or group instruction, Student's progress remained slow and limited at the time of the hearing —just as it was in the District, at best. On the other hand, however, there was hardly enough time for the program to show a lot of benefit by the time the District staff observed. Just as the District was entitled to a period of adjustment for Student in the kindergarten program—extended because of the medication trial, so is the private school. Moreover, the private school program has the additional advantage of the solid research basis underlying verbal behavior as an effective means of organizing an autistic support educational program. And it has worked for other students significantly affected by ASD. *See, e.g., In Re: A Student in the Tredyffrin-Easttown School District*, No 3127-1112 (SEA PA 2013)

Finally, although the District is correct that graphing the data collected during instruction and behaviors targeted for elimination, such as hitting, is a best practice for ABA progress assessment, the private school used a VB MAPP assessment, which also serves to visually represent Student's skill acquisition. It does not, however, track either unwanted behaviors or behaviors to be increased, such as time on task. Nevertheless, that is a lapse insufficient to support a conclusion that the private school program was inappropriate.

I conclude, therefore, that the private school program is appropriate for Student, and since there are no equitable factors suggesting that full reimbursement should be denied or reduced, Parents will be awarded the full cost of Student's tuition and transportation to the private school for the 2014/2015 school year.

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 712, 718 (3rd Cir. 2010), citing *Reid v. District of Columbia*, 401 F.3d 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 (3rd 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.

Parents requested four hours/day of compensatory education for both the 2012/2013 and 2013/2014 school years. As discussed above, in light of the circumstances during the 2012/2013 school year, including the difficulties naturally inherent in transitioning to school-age services, the school year long medication trials, as well as the reasoning behind beginning identifying school-orientation kinds of goals in Student’s initial IEP, the District’s program was not inappropriate for Student during the 2012/2013 school year.

The basis of Parents’ request for four hours of compensatory education daily for the 2013/2014 school year was not entirely clear. Presumably, it was based, in part, on inappropriate goals, insufficient and insufficiently intensive periods of individual instruction, and inappropriate speech/language and OT services. As discussed above, OT services were not inappropriate at any time. Speech/language services are compensated by providing an amount equivalent to the

amount specified in Student's 2013/2014 IEPs, since that is the measure that will most closely put Student in the position Student would have occupied if the violation had not occurred.

To follow that principle with respect to compensatory education for intensive 1:1 teaching, which was the District's true lapse with respect to overall special education services, an appropriate measure is two (2) hours/day, the amount of individual, intensive instruction provided in the private school program.

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. Provide Student with two (2) hours of compensatory education/day for every day school was in session and Student attended school during the 2013/2014 school year.
2. Provide Student with 1 hour of compensatory education for inadequate/inappropriate speech/language therapy for each week school was in session for the entire week or part of a week during the 2012/2013/ and 2013/2014 school years.
3. Reimburse Student's Parents for the costs of tuition, and unpaid additional costs, such as transportation, if any, for Student's enrollment in the [Private] School for the 204/2015 school year.

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

Anne L. Carroll

Anne L. Carroll, Esq.
HEARING OFFICER

June 29, 2015