

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

PENNSYLVANIA

SPECIAL EDUCATION HEARING OFFICER

DECISION

Child's Name: S. K.

Date of Birth: [redacted]

Dates of Hearing:
4/28/11, 6/8/11, 6/9/11, 9/23/11,
10/24/11, 10/28/11, 11/9/11, 11/11/11,
12/16/11, 1/19/12

CLOSED HEARING

ODR File No. 1548-1011AS

Parties to the Hearing:

Representative:

Parents

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179 North Broad Street
Doylestown, PA 18901

Upper Moreland Twp. School District
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Willow Grove, PA 19090

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Date Record Closed:

March 17, 2012

Date of Decision:

March 31, 2012

Hearing Officer:

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

INTRODUCTION AND PROCEDURAL HISTORY

Student¹ is a high school-aged student in the Upper Moreland Township School District (District) who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)² on the basis of autism and an intellectual disability. Student's Parents filed a due process complaint against the District in March 2011, asserting that it denied Student a free, appropriate public education (FAPE) under the IDEA and Section 504 of the Rehabilitation Act of 1973,³ as well as the federal and state regulations implementing those statutes, for the 2009-10 and 2010-11 school years and continuing through the present.

The case proceeded to a due process hearing convening over ten sessions,⁴ at which the parties presented evidence in support of their respective positions. The Parents sought to establish that the District failed to provide Student with FAPE throughout the time period in question, and that Student requires a residential placement. The District maintained that its special education program, as offered and implemented, was appropriate for Student.

For the reasons set forth below, I find in favor of the Parents on a portion of their claims.

ISSUES

1. Whether Student's program and placement during the 2009-10, 2010-11, and 2011-12 school years, including reading instruction, was and is appropriate for Student; and
2. If it was and is not appropriate, is Student entitled to compensatory education and, if so, in what form and amount; and
3. If it is not appropriate, does Student require a residential placement?

¹ In the interest of confidentiality and privacy, Student's name and gender, and, to the extent practicable, other potentially identifying details, are not used in the body of this decision.

² 20 U.S.C. §§ 1400 *et seq.*

³ 29 U.S.C. § 794.

⁴ Several hearing sessions scheduled for July and August 2011 were cancelled because the parties were earnestly exploring potential resolution of all issues. It became apparent in late August that, while the District's request for Student to undergo a psychiatric evaluation was agreed to by the Parents (N.T. 775-76), the remaining issues could not be resolved, and additional hearing sessions were scheduled based, in large part, on the availability of witnesses, the parties, counsel, and the hearing officer. In addition, by the time of the September 2011 hearing session, evidence regarding Student's needs and educational program for the 2011-12 school year was considered by both parties to be both relevant and important, requiring more testimony and exhibits than originally contemplated to ensure a complete record. Accordingly, the parties jointly requested, and were granted, a number of extensions of the decision due date. (*See, e.g.*, N.T. 234, 2460-61, HO-1, 3) While it is extremely unfortunate that this decision is issued a year after the due process complaint was filed, neither party has challenged or objected to the lapse of time.

FINDINGS OF FACT

Background

1. Student is a high school-aged student who resides in the District but attends an approved private school (APS) which provides educational services to students with disabilities who have learning and/or emotional needs. Student is eligible for special education by reason of autism and an intellectual disability.⁵ Student also has been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD). (Stipulation, Notes of Testimony (N.T.)⁶ 64, 503, 519, 2201; J-8 pp. 1, 57; P-35 p. 1)
2. Student was identified as eligible for speech and language therapy and occupational therapy before the age of two based upon delays in language, social skills, and mental development. Student began to receive special education upon entry to pre-school. (J-8 pp. 1-2)
3. Student's has a strength in verbal communication, and demonstrates motivation and enthusiasm to be successful across environments. (N.T. 68, 278, 552-53; J-8)
4. Student has difficulty with new situations, new people, and changes to routine, typically responding with verbal disruption through vocalizations and yelling or screaming. Transitions are also difficult for Student. (N.T. 534, 554, 635, 1804)
5. Student frequently engages in "self talk" when other people are present. Student finds this behavior to be soothing. Student's peers notice the self talk and it affects Student's relationships with them. (N.T. 83-84, 416-17, 711-12, 811, 1041, 1836, 2016-19, 2140, 2142, 2488-89; *see also, e.g.*, J-8 pp. 45-46)
6. Student sometimes acts aggressively when asked to complete tasks that Student does not want to complete, but typically in the school setting Student does not use physical aggression. (N.T. 105-06, 553-54)
7. Student's behavior fluctuates between compliance and noncompliance, and Student can also be impulsive. Student often perseverates on topics or situations. (N.T. 536-37, 554-55, 599, 621, 635-37, 956-58, 1025-27, 2017-20, 2140, 2142, 2274; *see also, e.g.*, J-8 pp. 45-46, 48)

⁵ All references to mental retardation in the record will use the term intellectual disability consistent with Rosa's Law, Pub. L. No. 111-256, 124 Stat. 2643 (2010); *see* 20 U.S.C. § 1401(3)(A)(i).

⁶ References throughout this decision to the exhibits in this case are designated as follows: Joint Exhibits (J-); Parent Exhibits (P-); School District Exhibits (S-); and Hearing Officer Exhibits (HO-). Where exhibits are duplicative (*e.g.*, P-6 is the same as the first 44 pages of J-8), reference will be made to the Joint Exhibit if applicable, and otherwise generally to only one party's exhibit. The exhibits of the parties admitted into evidence are set forth in HO-2.

8. Student also has Sensory Integration Disorder which is manifested in, among other ways, Student's sensitivity to closing and removal of specific items of apparel. Student has removed those items of apparel in settings outside of the home such as the mall, at school, and once in a vocational setting. (N.T. 72-73, 85-87, 1767-68, 1770, 1829; J-8 pp. 2-3, 5, 17; P-18 p. 24)
9. Beginning in approximately 2002, the family obtained behavioral services in the home including a Therapeutic Support Staff person for 15-20 hours per week. The Parents did not believe that Student benefitted from those services, and also found there was insufficient time during the week to have that support provided in the home. (N.T. 967-70, 972-73)
10. Student began receiving private reading tutoring sometime in 2004. In August 2004, the Parents and District entered into a settlement agreement wherein, among other things, Student's then-current placement was determined, and the District agreed to fund private reading tutoring services provided to Student for two hours each week outside of the school day. The District also agreed to continue to pay the reading tutor for thirty minutes per month of consultative services. (N.T. 120-21, 832-33, 2209; J-1)
11. The reading tutor used a multisensory approach with Student, with readers at Student's instructional level supplemented by stories of interest to Student. The tutor worked on reading fluency, reading comprehension, spelling, vocabulary, and accuracy, using phonics and decoding strategies in addition to a variety of other approaches, in one-hour sessions. (N.T. 265-66, 278, 285, 291, 336-43, 346-48, 352-53, 367-69, 384)
12. [I]n the fall of 2008 [and into early 2009], Student [developed an eating disorder and was hospitalized for two days [redacted]. Shortly thereafter, Student was evaluated for an eating disorder by a facility that treats that condition, and recommendations for treatment were made. (N.T. 124-26, 846-48, 894, 951-55, 2224-27; J-4 p. 7; P-4 p. 21; S-21)
13. In February or March 2009, the District's social worker recommended that Student be evaluated psychiatrically because Student was discussing Student's concerns about weight with her. The social worker and District Director of Special Education were concerned at that time that Student might try to harm Student's self. The family had not by then made arrangements to follow up on the eating disorder evaluation or recommendations. (N.T. 2219-23, 2225-27, 2338-42, 2376-77, 2595-99; J-8 p. 48; S-21, S-27)
14. In February 2009, the District sought permission from the Parents to conduct a re-evaluation of Student. The parties subsequently selected independent evaluators to conduct neuropsychological and psychiatric evaluations. (N.T. 2214-17; J-8)
15. Around this time, the District discussed possible residential placements with the Parents and contacted several in the area. (N.T. 2219-22, 2228; P-4 p. 1, S-2)
16. Beginning in March 2009, a family-based mental health services agency became involved with Student and the Parents. Primary concerns of the family were Student's symptoms of an eating disorder and occasional suicidal ideation. Student at that time was

exhibiting a focus on weight, exercise, and digestion/elimination, and engaging in binge eating; Student also started chewing then spitting out food. Suicidal ideation was described generally as thoughts of self-harm and statements about dying. (N.T. 106-07; P-30 pp. 4-5, P-43)

17. As part of the family services, a mobile therapist came to the home once or twice each week. The mobile therapist and an assistant worked with Student and the family on concerns with Student's weight, hygiene, and behavior. (N.T. 97-98, 101-03, 119-20; P-30, P-43)
18. The mobile therapist also took Student and the family out into the community to work on behavioral concerns that the family experienced with Student outside of the home setting. Student was very concerned about Student's weight around this time, and refused to work with the mobile therapist or assistant. After several months, the family believed that Student's behaviors were worsening rather than improving and asked that these services be discontinued. Discharge diagnoses as of August 2009 were Pervasive Developmental Disorder – Not Otherwise Specified (PDD-NOS), Dysthymic Disorder, Bulimia, and Mild Intellectual Disability. (N.T. 103-05, 107-09, 842-43, 856-57, 860-62, 890-91, 897-98; P-30 pp. 7, 29, P-43; S-30 pp. 2, 5)
19. By the end of the 2008-09 school year, Student had been prescribed several different medications by a psychiatrist and by Student's pediatrician for Student's mental health symptoms. None of those medications was successful for Student. (N.T. 76-81; J-8 p. 47)
20. The parties were involved in a due process hearing in April 2009 after a dispute over extended school year services (ESY) for the summer of 2009. (N.T. 2210-12; P-3)
21. Pursuant to a settlement agreement in June 2009, Student attended an ESY program over that summer that provided Student with vocational opportunities. The parties further agreed that the District would fund the private tutor for services (reading and math) over that summer. (N.T. 136-39, 833-36; J-3)
22. The June 2009 settlement agreement, which followed a screening by the APS, further provided that Student would be re-evaluated, to include a full-time diagnostic program and placement at the APS for 45 school days at the beginning of the 2009-10 school year. (J-3; P-4 pp. 2-)
23. The Parents⁷ completed an application for admission to the APS for the start of the 2009-10 school year. In that form, the Parents noted that Student was currently experiencing an "eating disorder" (J-4 p. 8) and had been hospitalized for [that condition]. The Parents indicated their concerns with Student's obsessive-compulsive thoughts about weight, personal hygiene, sensory concerns, teasing by other children, and being socially appropriate; they also noted that Student had expressed feelings of self-harm. (J-4 pp. 1-14)

⁷ Student's mother was more actively involved in many aspects of Student's education, but the plural will be used where it appears that one parent or the other was acting on behalf of both.

24. Student's Parents described Student's eating disorder as a behavior where Student would chew and spit out food. Student's explanation for this behavior was a concern over Student's weight. (N.T. 95-96, 215, 903-04, 906-07, 919-20, 961-63)
25. Student briefly saw a private psychologist in the summer of 2009 but that therapy was not successful. Student also saw a private psychiatrist on one occasion sometime in 2009. (N.T. 850-55, 958-59, 974-75)
26. The Parents completed a Pre-Enrollment Information form in August 2009 for the APS. An "eating disorder" (J-4 p. 16) was listed as a past or current eating problem. (J-4 pp. 15-21)

2009-10 School Year

27. As agreed, Student began attending the APS at the beginning of the 2009-10 school year. Student's Parents visited the APS before Student began attending there. At the time, the APS had both residential and non-residential (day) programs, and Student's Individualized Education Program (IEP) team was also considering a residential placement for Student. (N.T. 74-76, 2231-32; J-3)
28. Student was placed into a life skills program at the APS, which included both classroom- and community-based programming. The students work on safety skills, social skills, functional academics, and activities of daily living, as well as vocational "soft skills." (N.T. 499-501)
29. During the 2009-10 school year, Student's vocational activities included cleaning at two different locations off-campus. (N.T. 626)
30. Student started the 2009-10 school year with an IEP developed in October 2008 and revised in September 2009. According to the revised IEP, Student would not be provided with reading instruction at the APS with the exception of listening comprehension activities; Student would continue to be provided with reading instruction from the private reading tutor. Student was, therefore, not instructed in reading, nor assessed by the APS reading specialist, upon Student's entry into the school. (N.T. 823-24, 2069-71, 2086-87, 2154-55, 2208-09, 2233, 2237-40, 2428, 2603-05; J-5)
31. The IEP as revised in September 2009 also provided that Student would participate in a full speech and language evaluation; a math assessment would be administered from which goals would be determined; the location was changed to the APS; one-on-one assistance was removed; and Student's placement was full-time special education. (J-5)
32. Student was accepted into the APS for the 45-day diagnostic placement. Student experienced anxiety, such as difficulty sleeping, over whether the APS placement would continue beyond the 45-day trial period. At the end of the 45 days, Student wanted to stay at the APS, and the IEP team and APS determined it was an appropriate placement for Student. The parties memorialized their agreement to this placement in November 2009. (N.T. 90-92, 94-95, 698-700, 828-29, 2217-18, 2231-33, 2236-37, 2600-01; J-2, J-9 p. 7, J-16)

33. Student was evaluated by a licensed clinical social worker at the APS at the start of the school year to determine whether Student would benefit from individual counseling, and whether Student's needs could be met at that placement. The social worker developed goals for Student to improve the ability to manage stress and to improve social skills. (N.T. 685-86, 689-90, 696-98; J-29 pp. 4-5)
34. The reading tutor administered an Informal Reading Inventory (IRI) in September 2009. At that time, Student was instructional at a second grade reading level. With respect to Words in Isolation, Student's scores were somewhat consistent from a March 2009 administration of the IRI, but were also somewhat variable. The reading tutor explained that Student's performance [redacted] was variable throughout the time they worked together. (N.T. 260-63, 325-26; J-6; P-27 pp. 5-6)
35. The results of the September 2009 IRI were provided to the District in October 2009. That is the only information the reading tutor ever provided to the District in writing on [the] work with Student or Student's progress. (N.T. 297-99, 304, 307, 391, 2425-26, 2609-10, 2747-49; J-6; P-27 pp. 5-6)
36. Student's IEP team met again in October 2009 and developed an action plan. Among other things, the Parents gave permission for Student to participate in the APS classroom reading program. (J-7)
37. The APS reading specialist administered an IRI and the Swassing-Barbe Modality Index to Student in November 2009 with the permission of the Parents. According to this IRI, Student was instructional at the second grade level (modified to include look-backs with prompting), and the Swassing-Barbe Modality Index indicated that Student's strength was in the kinesthetic modality. These results were consistent with those obtained by the private reading tutor, although the APS reading specialist had not been provided with those results prior to [these] assessments. The Parents also agreed that once baselines in reading were established, IEP goals would be developed to address reading and Student would be provided with reading instruction at the APS. The private reading tutor would provide monthly consultation to the APS reading specialist. (N.T. 2073-77, 2091, 2101, 2105, 2150-52; J-9, J-10; P-29 pp. 29-33; S-10)
38. An Independent Educational Evaluation (IEE) Report issued in the fall of 2009. This report included a neuropsychological evaluation and a psychiatric evaluation for educational purposes. (J-8)
39. The independent psychologist who contributed to the IEE observed Student in a vocational setting and also administered cognitive testing (Wechsler Adult Intelligence Scale – Fourth Edition (WAIS-IV) and the Woodcock-Johnson Tests of Cognitive Abilities - Third Edition (WJ-III-COG)); achievement testing (Woodcock-Johnson Tests of Achievement - Third Edition (WJ-III-ACH)); the Wide Range Assessment of Memory and Learning – Second Edition (WRAML-2); the Comprehensive Test of Phonological Processing (C-TOPP); and the Beery-Buktenica Developmental Test of Visual-Motor Integration (Beery VMI). [The evaluator] also obtained information using the Behavior

Assessment System for Children, Second Edition (BASC-2) and the Adaptive Behavior Assessment System, Second Edition (ABAS II), as well as several other measures. (J-8)

40. Cognitively, Student's Full Scale IQ was in the Well Below Expected Level/Extremely Low Range, with a Verbal Comprehension Index score slightly higher than the other subtests (Below Expected Level/Below Average Range), but Student did demonstrate expressive and receptive language weaknesses. Student's cognitive efficiency, fluency, and processing speed scores were also Well Below Expected Level. Student's overall concentration and attention, based on the WAIS-IV, subtests from the WJ-III-COG, and the WRAML-2, scored at Well Below Expected Levels. (J-8 pp. 10-16, 27-28)
41. Assessment of language using the CTOPP also reflected a relative strength for Student, but weaknesses were noted particularly with respect to listening ability, verbal conceptualization, reasoning, phonological processing, phonological awareness, and phonological memory. (J-8 pp. 18-21)
42. With respect to memory and learning processes, Student demonstrated significant weaknesses, scoring in the Well Below Expected Level on assessment of memory skills, particularly in short-term memory and working memory skills. Student did show less difficulty with material presented in a pictorial format and when not overwhelmed by too much information at a time. (J-8 pp. 21-25)
43. Assessment of Student's executive function revealed significant weaknesses in problem solving, fluid reasoning, and planning skills, as well as short-term memory, inhibition, and behavior self-regulation. (J-8 pp. 25-27)
44. Achievement testing yielded results in the Well Below Expected Level in all areas of reading skills, writing and spelling skills, and mathematics skills based on the WJ-III-ACH compared to peers of Student's age. Using the QRI, the independent psychologist determined that Student was instructional at a first to second grade reading level, exhibiting weaknesses with phonics, sight vocabulary, fluency, comprehension, and understanding of word meanings. This psychologist explained that due to Student's weak memory skills, Student should be provided reading instruction that did not focus on phonemic awareness and phonics but instead taught Student to learn whole words or sight words. (J-8 pp. 28-34)
45. The BASC-2 rating scales by one of the Parents and three teachers revealed scores in the clinically significant or at-risk range on the Hyperactivity and Attention Problems Scales. Student demonstrated difficulties in all aspects of attention. (J-8 pp. 16-17)
46. Assessment of Student's sensorimotor/visual spatial skills based on subtests from the WAIS-IV and the WJ-III-COG, as well as the Beery VMI, reflected scores in the Well Below Expected Level. (J-8 pp. 17-18)
47. The private psychologist assessed Student's adaptive behavior skills using information from the BASC-2, the ABAS II, and interviews and observations, concluding that Student presented with significant weaknesses in all areas of adaptive skills, including language skills, social skills, functional academics, self-direction, independent

functioning, and practical skills (health, safety, self-care, and responsible behavior) at home and in the community. (J-8 pp. 34-36)

48. The private psychologist made a number of educational recommendations for Student, including a small group, structured learning environment; a focus on functional academic, social, and prevocational/vocational skills; direct instruction in reading in a systematic, coordinated, multisensory program throughout the school day; direct instruction in daily living skills; direct instruction in mathematical skills using a multisensory approach; direct instruction in written expression with functional materials; and vocational counseling. This psychologist made suggestions for instructional strategies to address memory and pragmatic language skills as well as social, personal, and emotional adjustment. She also provided recommendations for the home. (J-8 pp. 40-44)
49. The private psychiatrist opined in the IEE that the APS could be a positive, supportive environment for Student, but also suggested that the Parents may wish to consider its residential program (which existed at the time). [The psychiatrist] also suggested some medications which had not been tried with Student before, but the Parents were not interested in pursuing that as an option. Additionally, the private psychiatrist opined that while some of Student's characteristics of autism could also be symptoms of schizophrenia, she believed that these features were related to autism rather than schizophrenia. (J-8 pp. 45-51)
50. The District issued a Re-evaluation Report (RR) in November 2009 following the private evaluations. The RR summarized much of the information in the IEE as well as previous evaluations, and included observations by Student's then-current teachers at the APS where Student had reportedly adjusted well. Results of an occupational therapy evaluation were also reported, reflecting difficulties with sensory processing, fine motor skills, and organizational skills. A speech and language evaluation reflected needs including pragmatics, social skills, and expressive and receptive language. This RR also included the results of the testing by the APS reading specialist. (J-8 pp. 53-93)
51. The RR concluded that Student was eligible for special education by reason of autism, mild intellectual disability, and ADHD, and summarized Student's educational strengths and needs. Additionally, the RR made a number of recommendations for Student's educational programming. (J-8 pp. 93-94)
52. At the time of the November 2009 RR, Student was demonstrating difficulty with diet and meal routines, refusing to eat lunch even after bringing food items to school. (J-8 p. 58)
53. The Parents did not agree with the independent psychologist that Student should not be provided with phonics instruction. The Parents believed, and still believe, Student does apply phonics strategies when reading. They also disagreed with the conclusion that Student should be taught in multiple ways, as well as the recommendation for services in the home. (N.T. 838-43)

54. After the November 2009 reading assessments by the APS, the APS reading specialist began to work with Student using the Edmark program, a multisensory program using drill and repetition to teach sight words and build automaticity, reading fluency, and reading comprehension; it does not involve decoding or phonics. This reading specialist had Student read sight words on Edmark word lists to determine what words Student knew. Student was thereafter provided weekly 30-minute sessions including review and practice. The reading specialist provided narrative information to the Parents about what Student was doing in the Edmark program. (N.T. 2080-88, 2091-94; P-29 pp. 21, 27)
55. The APS has a school-wide behavior plan for all students, wherein students are taught specific global expectations (be responsible, be flexible, be cooperative) as well as five universal expectations (appropriate voice volume, appropriate language, respect of personal space, respect of property, and following directions). Students earn tickets for showing cooperation, flexibility, and responsibility in a token economy system. Tickets may be redeemed at a school store or for other rewards. When inappropriate behavior occurs, students may be prompted to engage in appropriate behavior, or redirected, or staff might work with a student who was not behaving in accordance with expectations. Written Incident Reports are usually prepared so the team is informed of all behaviors, but consequences do not necessarily follow Incident Reports. Also according to the school-wide plan, students must meet specific criteria for weekly rewards, and must incur fewer than a specified number of behavioral Incident Reports in a particular period in order to participate in a field trip. (N.T. 456-57, 514-16, 1009, 1013-20, 1027-28, 1125-26, 1130-33, 1321, 1323-26, 1345-48, 1512-16, 1561-62, 1621-22, 1971-73; P-14 p. 1, P-16 p. 38, P-36, P-37, P-39 pp. 13-15)
56. The behavioral expectations are the same across all environments at the APS, but are not identically defined in various settings. Rule-violating Behaviors are classified into Levels 1, 2, and 3 with consequences varying in severity depending on the classification. (N.T. 1324-25; P-37)
57. Consequences that follow inappropriate behaviors are generally tailored to the situation. If a student exhibits consistent behaviors that result in Incident Reports, staff works to either conduct an FBA, conduct a functional behavior analysis,⁸ or make changes to any existing behavior plan. (N.T. 1020, 1174-75, 1177, 1327-28, 1342, 1349-50)
58. The school-wide positive behavior support program is a three-tiered model. The majority of students at the APS (80%) are in Level 1, with the least amount of support; approximately 15% fall into Level 2, where students are provided with classroom-wide or

⁸ The private BCBA who testified for the Parents described the difference between an FBA and a functional behavioral analysis as follows. “[I]f it’s really complicated to figure out the function of a behavior, we may do what’s called a ‘functional analysis,’ which directly involves manipulating the environment to see what circumstances evoke behavior....The distinction in our [BCBA] field is that when you do a functional behavior assessment, you can formulate a hypothesis. It’s your best guess of what the behavior is. If you’re doing an analysis, you’re actually testing that hypothesis. So in any situation when you’re unsure, sometimes when you think the behavior may be multiply controlled or behavior is very significant, a behavior analyst might be more likely to do a functional analysis.” (N.T. 1201-02)

individual support; and the smallest tier (5%) is in Level 3, encompassing students who are at risk for school failure because interventions provided in the first two tiers are not sufficient. (N.T. 1321-24)

59. APS staff take and monitor data on individual student performance as well as the effectiveness of the school-wide behavior support program. (N.T. 1328-31, 1333-35; P-37)
60. The APS utilizes behavior strategy sheets, which are “like a short form” of a positive behavior support plan (PBSP), specifying strategies and de-escalation techniques to be used on a consistent basis for a particular student. Where a student exhibits a behavior that is frequent or intense, a PBSP is developed that includes replacement behaviors as well as strategies and interventions. (N.T. 1004-06, 1412-14)
61. Student participated in counseling with the social worker once a week. By January 2010, Student demonstrated a decrease in stress and anxiety at school, due in part to Student’s knowledge that the APS had accepted Student after the diagnostic placement. The social worker reported some progress on Student’s ability to manage stress, and had been working with Student to recognize some impediments to social skills/peer relationships. Student continued to demonstrate progress on these goals through the end of the 2009-10 school year. (N.T. 701-05, 713-16, 721-22; J-29 pp. 10-11, 28-29, 48-49)
62. Student’s Parents approved the Notice of Recommended Educational Placement (NOREP) in January 2010 for the APS. (N.T. 820-21, 2237; J-11)
63. Throughout 2010, Student was engaging in particular behaviors (described at N.T. 69, P-12 p. 1, and P-16 p. 2) related to personal hygiene in the home setting which were of significant concern to the Parents. Student did not exhibit these particular behaviors in the APS or in other settings outside of the home. (N.T. 69, 1157, 1502-06, 1913, 2675-76)
64. Progress reports for January 2010 reflected that Student was demonstrating minimal competency on Student’s IEP goals, a slight improvement from the baselines in November 2009. Progress was also reported with respect to Student’s sight word recognition through reading therapy by the reading specialist, and improvement in receptive and expressive language skills. The occupational therapist reported variable performance with respect to personal hygiene, fine motor skills/handwriting, and use of calming strategies. (J-29 pp. 6-17)
65. The IEP team, including the Parents, met in February 2010 and, among other things, agreed to extend the then-current IEP to April 30, 2010. APS staff also discussed Student’s reading instruction and occupational therapy, as well as a behavioral assessment, with the Parents. (N.T. 876; J-17 pp. 1, 6-7)
66. At a subsequent February 2010 IEP meeting, the team developed goals and objectives for Student’s ESY program for 2010, which were focused on problem-solving/social skills, personal hygiene, sight word reading, and reading comprehension. Student would also be

provided with weekly occupational and speech therapies and counseling. The Parents did not approve the NOREP for ESY services at that time. (J-17, J-20; P-7)

67. Student's IEP team met to develop a new IEP for Student in March 2010. This IEP did not include a provision for reading instruction by the private tutor. (N.T. 878-81, 883-84, 2242-43, 2246-47, 2674; J-23)
68. The March 2010 IEP indicated that Student exhibited behavior that impeded Student's learning or that of others. Present levels of academic achievement and functional performance for reading/language arts, mathematics, occupational therapy, speech, behavior/affective goals, and functional skills were reported. Goals addressed needs for problem-solving/social skills/handling emotions, personal hygiene, sight word reading using the Edmark program, reading comprehension, listening comprehension, functional math skills, and speech/language. Program modifications and items of specially designed instruction related to an integrated program addressing social-emotional needs throughout; small group and individual instruction; adapted materials as needed; use of personal hygiene checklists; strategies to reduce self-talk; frequent repetition and review; use of a calculator and assistive technology; chunking of information; time for processing; and focus on one concept/skill at a time. Related services included counseling and speech and occupational therapy. (J-23)
69. Parental concerns for the March 2010 IEP included continuation of the private reading tutor and vocational programming. This IEP had a transition goal for Student to obtain part-time employment upon graduation. Student's IEP team believed that, due to concerns about Student's hygiene and the need for prompting to stay on task, Student would not likely be able to work at a full-time job. The ESY services in this IEP were the same as those from the February 2010 meeting. (N.T. 1612-13; J-23 p. 14)
70. The Parents did not approve the NOREP accompanying the March 2010 IEP because there was no provision for the private reading tutor, and they also indicated their desire to explore residential placements. (N.T. 174-75, 880-83, J-25; S-26 pp. 6-7)
71. The APS behavior analyst conducted a functional behavior assessment (FBA) in March and April 2010 regarding Student's self-talk and off-task behaviors. This FBA included observations as well as interviews with teachers and related service providers. The Parents gave permission for the FBA to address self-talk and "focusing issues" (P-24 p. 23). (N.T. 1021, 1079-80, 1082-84; J-26; P-24; S-3)
72. The APS BCBA determined after the April 2010 FBA that Student's self-talk did not interfere with Student's learning or ability to participate in vocational activities. (N.T. 1010-11, 1107-10)
73. Recommendations for Student by the APS BCBA following that FBA⁹ related to sensory strategies, a variety of prompts, and reinforcement for appropriate behavior. The BCBA did not recommend or create a behavior strategy sheet because she believed all of the

⁹ The document entitled "Functional Behavior Assessment" from April 2010 is two pages in length, with a signature line on the third page. (J-26)

recommendations were already in Student's IEP. (N.T. 1085-89, 1105-07, 1145; J-26 p. 2; P-24 p.2)

74. Progress monitoring reports from April 2010 (the first quarter for this IEP) revealed slight progress on all of Student's IEP goals. The social worker reported that Student had met two of three objectives related to managing stress, and some progress on improving social skills. Progress was also reported with respect to Student's sight word recognition through reading therapy by the reading specialist. The occupational therapist provided anecdotal notes of somewhat variable performance with respect to personal hygiene, fine motor skills/handwriting, posture, use of calming strategies, organization, and typing skills. (J-29 pp. 18-33)
75. Student's progress using the Edmark reading program at the APS over the course of the 2010-11 school year improved from a baseline of 83% to 88-97% on the word lists. (N.T. 2106-07; J-29 p. 43)
76. Progress monitoring reports from June 2010 revealed progress toward almost all of Student's IEP goals. The social worker reported that Student had maintained progress on all of the objectives related to managing stress, and made some progress on improving social skills. Progress was also reported with respect to Student's sight word recognition through reading therapy by the reading specialist. The speech and language therapist was working with Student on identifying emotions; auditory processing skills; completing the personal hygiene checklists; problem solving/social skills; and a social skills group. The occupational therapist provided anecdotal notes of somewhat variable performance with respect to personal hygiene, fine motor skills/handwriting, posture, use of calming strategies, organization, and typing skills. (J-29 pp.34-49)
77. Over the course of the 2009-10 school year, Student received approximately fourteen Incident Reports for Student's behavior. Conduct reported ranged from personal hygiene concerns to noncompliance to one verbal threat. The reports indicate that Student was generally redirected for these behaviors, or it is unclear what if any consequence followed. The Parents were not provided with copies of these documents at the times they were created. ((N.T. 806-07; P-33 pp. 1-30)
78. Student's ESY program for 2010 focused on reading, as well as hygiene using the personal hygiene checklists developed by the IEP team for use both at home and at school. These checklists included wearing all appropriate clothing items. The reading tutor did provide reading instruction to Student during ESY in the summer of 2010. (N.T. 156-59, 173-74, 320-21, 2494-96, 2498; J-20, J-23, J-24, J-25)
79. In June 2010, Student spent a weekend at a residential program located within Pennsylvania which the Parents were considering. There was subsequent agreement among the members of Student's IEP team that that placement was not appropriate for Student. (N.T. 162-65; P-15 p. 19; S-8 pp. 1-4)
80. An interagency meeting convened in June 2010. At that time, the participants identified Student's needs as (a) eating issues; (b) self-care related to transition; (c) academic

progress; (d) anxiety; and (e) employment/transition. (N.T. 178-80, 2250-51, 2255-58; J-35 p. 2)

81. ESY Progress Reporting for 2010 indicated that Student “frequently” or “sometimes” engaged in behaviors such as starting and completing tasks, handling frustration appropriately, accepting feedback appropriately, and being aware of how behaviors can affect others. Student essentially maintained progress on the goals of the IEP, increasing or decreasing accuracy by only 10%. (J-32)
82. A second interagency meeting convened in August 2010. The team developed an action plan to address the five needs identified in June. Specifically, the principal of the APS would investigate possible resources to serve students with eating issues and special needs; the Parents would let the other team members know of the family’s interest in home-based services or an evaluation of Student’s eating problems; and transition activities were agreed upon. (N.T. 177-81, 1704-07, 2367-69, 2392-97, 2257-61, 2263-65, 2699-2701, 2730-31; J-35)
83. The Parents declined the home-based services discussed in the interagency meeting based upon the family’s negative experiences with similar services in the past including during the spring and summer of 2009. They also declined evaluation of Student’s eating problems. (N.T. 182-83, 984-86, 2264-65)
84. The private reading tutor administered a Qualitative Reading Inventory (QRI) in August 2010. At that time, Student was frustrational at level 4 with words in isolation; and on reading passages, Student was instructional with word recognition at levels 2, 3, and 4. (N.T. 269-70; P-27 pp. 3-4)
85. The private reading tutor was no longer providing services to Student by the end of August or beginning of September 2010. By letter of September 7, 2010, the District advised the reading tutor that it would no longer fund [these] services. (N.T. 255, 281, 887-88; P-27 p. 2)
86. The Parents explored a residential placement in another state during the summer before the 2010-11 school year, visiting there with Student. Student expressed wavering thoughts about this new placement, some days believing it would be a good change, and other days concerned about the uncertainty of the new situation. (N.T. 534-36, 576-77; P-16 p. 17, P-28 p. 2)
87. Student spent a week in that out of state residential placement during the summer of 2010. Student exhibited noncompliance when asked to perform tasks that Student did not want to do, yelling at staff. Student was accepted at that placement; however, there was no determination made at that time on whether Student would attend that placement. (N.T. 778-81, 987-88)
88. The APS closed its residential program in the fall of 2010. (N.T. 730)

2010-11 School Year

89. Student's special education teacher for the 2010-11 school year is certified in special education. (N.T. 404-05)
90. For the 2010-11 school year, Student was in a transitional living program with six other students. This class is focused on life after high school. Student worked on functional academics (math including money and telling time, and reading including reading comprehension), participated in daily living activities, attended special classes, went on community outings, and went to vocational settings. Student also worked with a reading specialist from the APS for one hour per week. (N.T. 406-12, 510, 513, 586-89, 1390-91)
91. Student's March 2010 IEP, as revised in August 2010, was implemented at the start of the 2010-11 school year. Minor revisions were made. In the Present Levels of Academic Achievement and Functional Performance, it noted that information given to the family regarding transition; a goal to improve employability skills (through using the personal hygiene checklists and remaining on task) was added; a few program modifications/items of specially designed instruction were added (providing opportunities to use coping strategies to reduce self-talk; providing opportunities to practice writing personal information; providing opportunities to generalize safety skills; and daily communication between home and school); and parent training through a home-based contractor funded by the District would be provided two mornings a week with consultation between that contractor and the occupational therapist. (N.T. 521-22, 531-32, 568-70; J-34, J-36 pp. 1, 10, 32, 34, 35, 36 (*compared with J-23*))
92. Student started the school year with weekly sessions with the same social worker as in the prior school year. Student discussed concerns about the possible change to the out of state residential placement. After October 2010, Student had contact with the social worker only for a weekly social skills group that ended during the first semester. The APS Head of Clinical Services was assigned to work with Student after October 2010. (N.T. 724-25, 727, 729-31, 734-35, 739-40; S-12 p. 4)
93. Student thereafter began meeting weekly with the APS Head of Clinical Services, who is also a school psychologist. Student sometimes also went to see this therapist on Student's initiative. In those sessions, Student and the therapist worked on developing skills and strategies for Student to manage anxiety, as well as how to appropriately interact with peers. This weekly therapy continued throughout the remainder of the 2010-11 school year. (N.T. 511, 1860, 1864-65, 1875-78, 1883-90, 1902-06)
94. Student began seeing the APS reading specialist twice each week for 30-minute sessions at the start of the 2010-11 school year. (N.T. 2097-98, 2142-43)
95. Student's special education teacher communicated with the Parents daily through email over the course of the 2010-11 school year. (N.T. 584-85, 615-16, 867)

96. The special education teacher used a classroom behavior support plan where students earn tickets for positive behavior such as helping other students and completing homework. (N.T. 516-18)
97. Student did not have a formal behavior plan for the 2010-11 school year. (N.T. 518, 577-78)
98. During the 2010-11 school year, Student performed cleaning tasks in several different vocational settings, including a [retail] store and a church. Student has also worked at an animal shelter, a location Student liked because Student enjoys playing and working with dogs. In these experiences, Student was focusing on learning “soft skills,” such as arriving on time, following directions, and engaging in problem-solving, which could be generalized to other environments. (N.T. 500, 505-09, 1746, 1750-51, 1753-55, 1790)
99. A job coach transported Student and the other students to the vocational settings, and remained on the site to ensure that all of the students were prepared to work and to provide instruction where needed. For a time, Student had a one-on-one aide also accompany Student to the animal shelter for safety reasons. By May 2011, the one-on-one aide no longer accompanied Student to the animal shelter and Student’s behavior there appeared to improve. (N.T. 1751-52, 1755-57, 1764-65, 1776, 1790)
100. All students who travel to participate in the vocational placements, including Student, adhere to a hygiene check which generally ensures that the students are properly dressed. The Career Education Coordinator also determined whether Student was wearing the specific items of apparel. (N.T. 1767-68, 1769-70)
101. The job coach takes data on the students’ performance in the vocational settings. (N.T. 1774, 1785-89)
102. Student used the personal hygiene checklists during the 2010-11 school year, in the morning upon arrival to school and before going out on a community outing or to a vocational setting. With respect to wearing specific items of apparel, Student was not permitted to go out into the community or to a vocational setting unless dressed in those clothing items. Student sometimes resisted performing all of the personal hygiene tasks on the checklists, particularly at the beginning of that school year, and occasionally removed specific items of apparel during the school day. (N.T. 415-16, 418-21, 440-41, 461-67, 479, 538-39, 541-43, 549-52, 644, 668, 2498-2501, 2542-43, 2545; P-12 p. 20)
103. Another FBA was conducted in October 2010 to observe Student’s noncompliance and off-task behaviors, particularly in vocational settings, as well as self-talk, based on concerns of staff over those behaviors. As part of that FBA, the BCBA reviewed the incident reports between September 2009 and September 2010, and determined the number of incidents in addition to calculating the amount of time that Student missed educational programming due to the incidents. (N.T. 1032-38, 1049-50; S-13)
104. The FBA also included a student interview, several observations where data on the targeted behavior was taken, and input from several teachers, a teacher’s assistant, and related service providers. This information revealed that Student was demonstrating the

target behaviors at home and at school, and identified possible motivating operations and antecedents as well as consequences and functions. There was no separate discussion of these elements with respect to the discrete behaviors targeted in the FBA. (N.T. 1050-64, 1067-77; S-13)

105. The APS BCBA again determined that Student's self-talk did not interfere with Student's learning or ability to participate in vocational activities. (N.T. 1010-11, 1049-50)
106. One of the recommendations in the October 2010 FBA was for a psychiatric assessment prior to implementation of any formal behavior support plan. The APS BCBA thought it was important to obtain additional information about Student before using an intervention which might be detrimental to Student's mental health. Consequently, [the APS BCBA] did not make any recommendations for addressing these behaviors other than to redirect Student for off-task behavior and offer assistance with difficult tasks. (N.T. 1043-44, 1048, 1155, 1183; *see also* N.T. 1369-73, 1433, 1453-54, 1458 ; S-13)
107. No behavior strategy sheet or PBSP was developed for Student following the October 2010 FBA because of the need for additional information, as well as the fact that the recommendations from the April 2010 were included in Student's IEP. The APS BCBA also did not conclude that Student's self-talk and noncompliance was significant enough to warrant a strategy sheet or PBSP. (N.T. 1048-51, 1111-15, 1191; J-52)
108. During the first half of the 2010-11 school year, Student's special education teacher noticed Student chewing and spitting out food on a few occasions. Student occasionally did not eat at all during the school day. (N.T. 446-47, 453-54, 575-76, 598, 668; P-16 pp. 3, 19)
109. In the fall of 2010, Student continued to exhibit in the home setting the particular behaviors (described at N.T. 69, P-12 p. 1, and P-16 p. 2) related to personal hygiene which were of significant concern to the Parents. (N.T. 69, 2765-76, 2735-36)
110. In November 2010, Student's IEP team reconvened to revise Student's IEP. At that time, the District proposed a one-on-one aide for Student to assist with safety concerns as well as Student's anxiety, behaviors, and personal hygiene. The Parents did not agree with this suggestion, and Student similarly did not believe this support was necessary and sometimes refused to go to the classroom because of the aide. Student was provided with a one-on-one aide despite the Parents' objections. (N.T. 189-92, 450-51, 557-58, 573-74, 581, 638-39, 641; J-41, pp. 1, 9; J-45)
111. Also in November 2010, the IEP team believed that the APS was no longer an appropriate placement for Student because of Student's eating problems, and, by early 2011, the team agreed to, and subsequently did, explore residential placements for Student.¹⁰ (N.T. 209-17, 574-76, 579-80, 923-25, 1915-16, 1993-96, 2430-34, 2441-44, 2676-82, 2684-86, 2688-93, 2735-36; J-41 p. 9, J-54, J-55)

¹⁰ A due process complaint filed by the Parents in October 2010 was dismissed without prejudice to provide the parties with the opportunity to explore placement options for Student. (P-1, P-2)

112. The IEP team also recommended in November 2010 that Student have a psychiatric evaluation. The APS BCBA developed a one-page Behavioral Strategy Sheet noting motivators; antecedents/triggers; target behaviors (self-talk and off-task behavior); and recommended strategies (redirection, offers of assistance with tasks, and offers to talk when Student was anxious or upset). (N.T. 577-78, 2682-84, 2731-32, 2740, 2743-44; J-39, J-42; J-46)
113. Progress monitoring reporting in November 2010 reflected that Student had met a goal related to problem solving/social skills; maintained progress on the use of the personal hygiene checklists; met the sight word goal and nearly achieved another sight word goal; maintained progress in listening and reading comprehension; met two of the functional math goals and made progress on the other; met one goal to identify and express feelings; and maintained progress on auditory processing and memory skills. The social worker reported that Student had maintained progress or regressed on all of the objectives related to managing stress, and maintained progress on improving social skills. The occupational therapist provided anecdotal notes on Student's use of the personal hygiene checklists, use of relaxation strategies, and fine motor skills. In the vocational settings, Student reportedly had not met any of the job expectations. (J-43; P-18)
114. On December 14, 2010, the Parents disapproved the NOREP based on the most recently revised IEP, stating their disagreement with the parental training in the home, the one-on-one aide, and elimination of the private reading tutor services. (J-45)
115. Student exhibited an increase in the frequency of problematic behavior, particularly noncompliance and verbal threats, in January 2011 when compared to the number of Incident Reports between September 2009 and December 2010. Student also spent more time in "time out" during January and March 2011. (N.T. 476-78, 1489-90, 1492; J-52 pp. 2-3, S-14)
116. The APS Director of Clinical and Behavioral Services became involved with Student by January 2011 after the increase in problematic behavior. She opined that the January spike in behaviors was due to the addition of the one-on-one aide, and a subsequent but similar spike in March 2011 was due to a change of the one-on-one aide and increased self-talk related to the Parents' continued exploration into residential placements. (N.T. 1343, 1432, 1489-93)
117. The APS relied on the Incident Reports created for Student in evaluating Student's increase in problematic behavior. However, Incident Reports which were marked "FYI" were not considered. Some of the descriptions in the Incident Reports themselves strongly suggest that the "FYI" designations were incorrectly used on various occasions and, as a result, occurrences of problematic behavior which should have been counted and considered but were not. (N.T. 1034-35, 1349-50, 1401-02, 1419-20, 1449-50, 1565-66; P-34, P-38)
118. The District provided information to the out of state residential placement in January 2011, specifically referencing Student's eating disorder. (N.T. 2435-38, J-56)

119. The Parents responded to the District's information by providing the out of state residential placement with a "Certificate of Health" signed by a Certified Registered Nurse Practitioner, who stated that Student "had an eating disorder in the past ... [and the] issues with eating do not involve bingeing or purging." (P-9 p. 5) At the time, a health screening at the APS reflected that Student's Body Mass Index was in the overweight range. (P-9 pp. 4-5, 10)
120. In February 2011, the District proposed an evaluation of Student for an eating disorder. The Parents did not agree to this evaluation. (N.T. 192-93; J-46, J-47)
121. Data was collected in February, March, and a part of April 2011 on Student's perseveration and off-task behaviors. The results indicate that Student exhibited a high frequency of both behaviors in early February and sporadically through the month of March, particularly with respect to perseveration in March. Comments by Student during this time period indicated a number of days on which Student was unhappy with the one-on-one aide and/or was concerned about Student's weight or with changing schools. (N.T. 484-86; J-52 p. 4, S-17)
122. Progress monitoring in February 2011 reflected that Student had improved on the previously achieved goal related to problem solving/social skills; improved on the use of the personal hygiene checklists; improved on the previously achieved sight word goal and maintained progress on the other sight word goal; maintained progress in listening and reading comprehension; met one functional math goal and improved on one previously achieved; improved on the previously achieved goal to identify and express feelings; and met the goals on auditory processing and memory skills. The occupational therapist again provided anecdotal notes on Student's use of the personal hygiene checklists, use of relaxation strategies, and fine motor skills. In the vocational settings, Student reportedly performed essentially the same as in the prior report with respect to job expectations. The APS school psychologist then working with Student reported that Student had regressed in the goal to manage stress and made no progress on the goal to improve social skills. (J-48; P-18; S-25 pp. 1-2)
123. In or about February 2011, the Parents continued to explore the residential placement for Student in the other state, and Student continued to vacillate on wanting to attend and not wanting to attend. Student traveled there to spend another week at this placement in the spring of 2011. Upon arrival at the location, Student was very resistant to getting out of the car. After the Parent left, Student ingested an item [and] required hospital treatment. Student told the Parent afterward that Student did that because the staff was directing Student to do things such as personal hygiene tasks and chores that Student did not want to do. This placement was no longer an option for Student after that visit. (N.T. 197-98, 218, 778, 783-89, 987-88, 2440, 2444; P-14 pp. 1-2, 10-17, P-16 pp. 35-36, 41; S-31)
124. Student returned to the APS and the Parents believed Student's behavior subsequently declined. (N.T. 790-92, 798-800)
125. A new IEP was developed in March 2011 following two meetings. The completed IEP as of March 31, 2011 reflected as a special consideration that Student exhibited behaviors

that impeded Student's learning or that of others. One major change to the prior IEP was that the use of the personal hygiene checklists was no longer a goal. Other changes to reading and math goals reflected Student's progress on the prior goals. (N.T. 601-07; J-51)

126. The March 2011 IEP included Present Levels of Academic Achievement and Functional Performance, with the reading level based on a more recent Burns-Roe IRI described as second grade but "with modifications" (J-51 p. 5), *i.e.*, if Student did not know the answer to a question, Student was given an opportunity to review the passage again to locate the answer. Listening comprehension skills were also at a third grade level, an increase from second/third grade level in previous assessment. A Key Math test reflected that Student was at an overall grade level of 3.1, up from a 2.7 grade level the previous year. Information was also provide with respect to Student's daily living skills, self-talk, compliance with directions, use of calming strategies, counseling with the school psychologist, speech/language therapy, and occupational therapy, as well as performance in the vocational setting. (J-51; N.T. 2113-15)
127. Parental concerns were identified as placement and the level of services. The IEP specified Student's strengths related to enjoyment of reading, using the computer, participating in the Transitional Living Program, maintaining a few peer relationships, and Student's physical fitness. Needs were identified in expanding vocabulary, reading a schedule, remaining on and completing tasks, using coping strategies, cooking, listening comprehension, functional reading including reading comprehension, functional math skills, regulating emotions, and organization and social skills. (J-51 p. 10)
128. The March 2011 IEP included postsecondary goals similar to those in prior IEPs. Specific goals related to remaining on task, using coping strategies and managing stress, listening comprehension, reading comprehension, sight word reading, functional math skills, independent living skills (cooking), auditory memory and auditory processing skills, regulating emotions, shifting from one task to another, organizational skills, requesting assistance, wearing appropriate apparel for vocational settings, and performing specific tasks at the animal shelter. Program modifications and items of specially designed instruction included adapted materials, a highly structured program, small group and individual instruction, counseling, visualization and verbalization strategies for comprehension, a multisensory approach for teaching vocabulary, use of a timer, opportunities for developing and using calming and coping strategies, and provision of personal hygiene checklists. As related services, Student would also be provided with speech therapy, occupational therapy, counseling, and parent training in the home in the mornings. (J-51)
129. At the March 2011 meetings of Student's IEP team, representatives of the APS indicated that it could provide Student with an appropriate program and placement, in contrast to the IEP team's opposite conclusion in the fall of 2010. (N.T. 202, 613, 2444-46, 2449-50)
130. The Parents did not agree with the parent training in the home. They also did not approve the March 2011 IEP because they did not believe that the APS placement was

appropriate; that the IEP sufficiently addressed Student's needs with respect to activities of daily living; that the transition plan was adequate; that the reading instruction in the IEP was appropriate; that Student's behaviors were appropriately addressed; and that Student required a one-on-one aide. (N.T. 612; P-7 pp. 71-72)

131. After the March 2011 IEP, Student's special education teacher kept anecdotal notes about Student's compliance with the personal hygiene checklists. However, since that was no longer an IEP goal, there was no progress monitoring or formal record of how effective it was for Student. (N.T. 420-21, 463-64, 543-45, 605-06)
132. The APS school psychologist reported in late March 2011 that Student was demonstrating progress on all objectives for the goal to manage stress and on the goal to improve social skills. (S-25 pp. 3-4)
133. Student started seeing another private psychologist in early 2011 once per week. (N.T. 858-60)
134. The Parents did not approve the April 2011 NOREP. (N.T. 208)
135. Progress monitoring in April 2011 reflected that Student had maintained progress on the previously achieved goal related to problem solving/social skills; essentially maintained progress on the use of the personal hygiene checklists; maintained progress on the previously achieved sight word goals; maintained progress in listening and reading comprehension; maintained progress on the functional math goals; maintained progress on the previously achieved goal to identify and express feelings; and maintained or slightly improved upon the previously achieved goals on auditory processing and memory skills. The occupational therapist again provided anecdotal notes on Student's use of the personal hygiene checklists, use of relaxation strategies, and fine motor skills. In the vocational settings, Student reportedly slightly improved or performed the same as in the prior report with respect to job expectations. The APS school psychologist then working with Student reported that Student had made progress on the goals to manage stress and improve social skills. (S-35 pp. 29-47; P-18)
136. At the time of the first due process hearing in April 2011, Student was engaging in problematic behaviors at home. Those included noncompliance, removal of certain items of apparel, refusal to engage in personal hygiene activities, and the other particular behaviors related to personal hygiene which were exhibited in the home throughout 2010. (N.T. 69-73, 114)
137. At the end of the 2010-11 school year, the Parents were advised that Student was not able to attend a field trip because Student had incurred eleven incident reports in that three-month period. Those incidents related to Student's elopement, verbal disruptions, and refusal to comply with the personal hygiene checklists. (N.T. 456-59)
138. The private reading tutor administered another QRI in May and June 2011. Student showed some regression from August 2010 in words in isolation at the second and third grade level. With reading passages, Student showed some regression at the first and second levels. (N.T. 267-72; P-27 pp. 3-4, P-27A)

139. Student has expressed suicidal thoughts, as recently as approximately March 2011. (N.T. 88-90, 132-34, 733-34)
140. Throughout the time periods in question, Student has expressed anxiety about a change of placement, vacillating between wanting to make a change and not wanting to make a change. (N.T. 230, 451-52, 534-36)
141. Progress monitoring in June 2011 reflected that Student remained on task for seven minutes when performing cleaning chores with fewer prompts (2 from 4) with some variability; demonstrated variable performance in using coping strategies; had nearly met the listening comprehension goal; had mastered the reading comprehension goal; had improved from the baseline on one functional math goal and essentially maintained progress on the other; maintained or improved progress on reading sight words; met one of two career education goals of performing specific tasks correctly in the animal shelter setting; made progress in regulating emotions, shifting tasks, and using organizational skills when compared to the baselines; made progress on wearing proper attire in the vocational setting compared to the baseline. Student also worked on independent living skills (cooking), auditory memory and auditory processing skills, and other career education goals (seeking assistance and using appropriate voice volume). Student was not able to transfer the skill discussed in therapy to manage stress to other settings, but made progress in using coping strategies when compared to the baseline. The occupational therapist again provided anecdotal notes on Student's use of the personal hygiene checklists and use of relaxation strategies. In the vocational settings, Student reportedly slightly improved or performed the same as in the prior report with respect to job expectations, which remained below criteria for meeting expectations. (S-35 pp. 50-88)
142. Over the course of the 2010-11 school year, Student received approximately 50 Incident Reports involving Student's behavior. Conduct reported included noncompliance, verbal disruptions, removal of particular items of clothing, disrespect of staff, elopement, and several occasions of chewing and spitting out food or other behavior relating to eating at school. The reports indicate that consequences generally were redirection for these behaviors, and on a few occasions Student was removed from the setting. The Parents were not provided with copies of these documents at the time they were written but were sometimes informed of the behaviors via other means. (N.T. 806-07; P-33 pp. 33-163, P-38 pp. 1-2)
143. During the 2010-11 school year, Student participated in a program at the APS wherein the students were introduced to using public buses. This program was provided in 5 35-minute sessions, mostly on the APS campus. A SEPTA bus was made available at the APS for the students to view and board. The program concluded with a field trip. (N.T. 1628-29)
144. The Parents continued to explore residential placements for Student over the spring and summer of 2011. They located a residential placement located in yet another state and visited there. Student was anxious about this placement possibility before the visit, again vacillating between wanting to go and not wanting to go; however, Student was not

resistant to going to this placement upon arrival. On the first night, Student was noncompliant during a community outing. The next day, Student was aggressive toward a staff member, and the director called the Parent to retrieve Student. This placement did not accept Student because of the aggressive behavior. (N.T. 792-97, 816-18, 934-35, 988, 1956-57, 2277-78)

145. During the summer of 2011, Student continued to participate in the vocational program at the animal shelter as part of the 6-week ESY program. Student did well in that setting during that summer and wearing the specific apparel was not a concern. Student also worked on remaining on task with specific chores, using coping strategies, listening comprehension skills, and functional mathematics skills. (N.T. 1766-68, 1769-711797, 1801; S-35 pp. 1-2)
146. Student received one Incident Report in the summer of 2011 which was for noncompliant behavior. Student was redirected and apologized to the staff members involved. (P-34 pp. 158-59)
147. Student had another psychiatric evaluation in the summer of 2011 at the request of the District. This private psychiatrist reviewed previous records and obtained information from the Parents which noted, among other things, that Student was exhibiting behaviors similar to that reported to the family-based services agency in the spring of 2009. He also interviewed Student together with one of the Parents. This psychiatrist agreed with the diagnoses of Autism and Intellectual Disability, and further opined that Student has “further psychiatric complications which include an atypical eating disorder.” He did not find that Student could be diagnosed with ADHD because of the autism diagnosis. This psychiatrist recommended a rigorous behavioral therapy which is integrated between home (through mental health services) and school. (S-33 p. 7) (N.T. 2448-49, 2732; S-33)

2011-12 School Year

148. Student returned to the APS at the beginning of the 2011-12 school year. On the first day that Student returned, Student was aggressive toward another student on the bus. The APS did not discipline Student for this incident, although the Parents did impose a consequence. (N.T. 790-91, 798-800, 802-03, 809-10; P-34)
149. Student showed resistance to attending the APS at the beginning of the 2011-12 school year. (N.T. 809)
150. The Parent asked for another FBA after the bus incident and gave permission. (N.T. 803-05; P-34 pp. 16-17)
151. After a suicidal threat in the fall of 2011, Student was hospitalized overnight at a psychiatric facility. Student’s discharge diagnoses included Major Depression and Generalized Anxiety Disorder. Student began taking psychotropic medication and the Parents had arranged for Student to be seen by a psychiatrist. The APS’s Head of Clinical Services was not able to speak with anyone from the psychiatric facility to obtain information about Student’s treatment, nor was she provided with specific information

about Student's new medication. However, Student's teacher was advised that Student was taking medication. (N.T. 976-82, 1942, 1950-51, 1954-55, 2039; P-42 pp. 3, 15-16; S-38, S-42 p. 2)

152. By October 2011, Student was demonstrating less anxiety and perseveration over eating problems at the APS. Body image and weight were no longer topics that Student would frequently raise in therapy sessions, although Student did mention them at times. However, Student brought appetite suppressants to school on one occasion in the fall of 2011. (N.T. 1535, 1921-22, 1967-68, 1997, 2027; P-34 p. 12, P-42 p.2)
153. The APS's Career Education Coordinator opined that Student has demonstrated a better ability to work independently in the vocational settings beginning with the end of the 2010-11 school year and continuing through the fall of 2011. Student no longer had the one-on-one aide accompany Student to any of the vocational sites by the end of 2011. In an interim report on Career Education progress for the first quarter of the 2011-12 school year, Student met expectations in the restaurant vocational setting with respect to self-regulation, but remained below expectations in independently performing skills showing flexibility, organization, self-care, self-monitoring, and communication. At the animal shelter, Student met expectations with respect to self-regulation, organization, self-care, and communication; Student needed improvement in the areas of flexibility and self-monitoring. (N.T. 1797-98, 1802-03, 2273, 2456-57; S-36)
154. The personal hygiene checklists have continued to be used during the 2011-12 school year. (N.T. 2500, 2521, 2550, 2575, 2577)
155. By the end of the first quarter of the 2011-12 school year, Student significantly exceeded expectations independently in self-regulation, flexibility, and organization at the restaurant vocational setting; and had variable performance that did not meet expectations with respect to self-care, self-monitoring, and communication. At the animal shelter, Student met expectations with prompting in organization; and had variable performance that did not meet expectations in all other areas. (S-41)
156. Student does not have the skills to safely navigate through the community independently. The APS does not provide formal travel training for students. (N.T. 1629-32, 1909-10, 2022-23)
157. In the fall of 2011, Student was participating in vocational opportunities at a local restaurant as well as at the animal shelter. Student no longer had the one-on-one aide accompany Student to the animal shelter site. At the restaurant, Student helped set up tables and ready the premises for business. There was also an upcoming opportunity for Student to work in a department store as a third vocational setting. Student is required to interact with the job coach, peers, and staff in all of these locations. (N.T. 1645-46, 1689, 1772, 1776-77, 1789, 1835, 1848-49; P-41)
158. Between the start of the 2011-12 school year and the latter half of October 2011, APS staff wrote approximately 13 Incident Reports involving Student's behavior. Conduct

reported generally involved noncompliance and/or verbal disruptions, and consequences usually involved redirection for these behaviors. (P-38)

159. Student's behavior at the APS and in the vocational settings can and does impact Student's future participation in the vocational settings. By way of examples, when Student engaged in aggressive behavior in a particular class, Student did not go to the vocational location that day; and, when Student engaged in problematic behavior at the animal shelter, Student was not permitted to go there on the next scheduled date. (N.T. 1791-92; P-16 pp. 1, 24, P-39 p. 1, P-42 p. 7; S-42 pp. 1-2)

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

Broadly stated, the burden of proof consists of two elements: the burden of production and the burden of persuasion. At the outset, it is important to recognize that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005);¹¹ *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case rests with the Parents who requested this hearing. Courts in this jurisdiction have generally required that the filing party meet their burden of persuasion by a preponderance of the evidence. *See Jaffess v. Council Rock School District*, 2006 WL 3097939 (E.D. Pa. October 26, 2006). Nevertheless, application of these principles determines which party prevails only in cases where the evidence is evenly balanced or in "equipoise." The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position.

Hearing officers are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009). This hearing officer found each of the witnesses to be generally credible and the testimony as a whole on matters important to deciding the issues in this case was essentially consistent. Credibility of particular witnesses is discussed further as necessary.

IDEA Principles

The IDEA requires the states to provide a "free appropriate public education" (FAPE) to all students who qualify for special education services. 20 U.S.C. §1412. In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that this requirement is met by providing personalized instruction and support services to permit the child to benefit educationally from the instruction, providing the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase "free

¹¹ The burden of production, "*i.e.*, which party bears the obligation to come forward with the evidence at different points in the proceeding," *Schaffer*, 546 U.S. at 56, relates to the order of presentation of the evidence.

appropriate public education” to require “significant learning” and “meaningful benefit” under the IDEA. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999).

Local education agencies, including school districts, meet the obligation of providing FAPE to eligible students through development and implementation of an Individualized Education Program (IEP), which is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’ ” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). Under the IDEA and its implementing regulations, an IEP for a child with a disability must include present levels of educational performance, measurable annual goals, a statement of how the child’s progress toward those goals will be measured, and the specially designed instruction and supplementary aids and services which will be provided, as well as an explanation of the extent, if any, to which the child will not participate with non-disabled children in the regular classroom. 20 U.S.C. § 1414(d); 34 C.F.R. §300.320(a). Most critically, the IEP must be appropriately responsive to the child’s identified educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. §300.324. Nevertheless, it has long been recognized that “the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date.” *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993). The IDEA further requires that eligible students be educated in the “least restrictive environment” which permits them to derive meaningful educational benefit. 20 U.S.C. § 1412(a)(5); *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572, 578 (3d Cir. 2000).

The Parents’ Claims

The Parents challenge the appropriateness of Student’s educational program from the 2009-10 school year to the present. Specifically, they contend that the District has denied, and continues to deny, FAPE to Student with respect to (1) Student’s behavioral needs; (2) Student’s reading instruction; and (3) Student’s transition services. They also claim that Student requires a residential placement.

With respect to behavior, a number of witnesses for both parties presented testimony by qualified professionals. The APS board-certified behavior analyst (BCBA) has a Bachelor’s degree in sociology with a minor in special education and a Master’s degree in ABA, became a BCBA in 2007, and had four years’ experience as a behavior analyst. (N.T. 998-1002, 1118-20) The APS Director of Clinical and Behavioral Services has a Bachelor’s degree in psychology and sociology and a Master’s degree in social services, was enrolled in a BCBA certification program, and had fifteen years’ experience in working with people with disabilities in various facilities. (N.T. 1317-20) The private BCBA who testified on behalf of the Parents is a self-employed consultant with Master’s degrees in occupational therapy and ABA who has approximately four years’ experience providing direct ABA services as well as consultative services. (N.T. 1195-99) This hearing officer found the testimony of each of these witnesses to be credible; however, that of the private BCBA was more persuasive and compelling overall.

The first FBA in April 2010 purported to assess Student’s self-talk primarily, and also addressed off-task or distracted behaviors. (Finding of Fact (FF) 71) Although the APS BCBA did obtain information from a variety of sources (P-24), the FBA itself, at only two pages in length, is strikingly sparse. (J-26) As the private BCBA observed and convincingly explained,

the two behaviors of concern were not operationally defined, lacking information on the behaviors' dimensions, frequency, durations, and amount of time that elapses before behavior occurs and between behaviors. (N.T. 1214-15) Specifically, "Self-Talk" was vaguely defined as "[a]ny instance of [Student] talking out loud to [self]." (J-26 p. 2) "Distracted" behavior was imprecisely defined as "[a]ny time that [Student] is attending to a task or activity that is not the designated task or activity." (*Id.*) This witness also explained, again persuasively, that the data obtained during this FBA (using momentary time sampling) did not provide an accurate representation of the behaviors which were targeted. (N.T. 1267-70)¹²

The FBA in October 2010 was more detailed in some respects. Similar to that in April, this FBA was conducted due to concerns with Student's self-talk and compliance. "Self-Talk" was simply defined as "[Student] engages in conversations with [Student's] self." (S-13 p. 6) "Off-Task Behavior" was defined as "Student ignores adult direction, does not wait for instruction, cries and/or continues engaging in a preferred task." (*Id.*) This time, momentary time sampling was used for "On Task" behavior and Interval Recording (10 second intervals) was used for Self-Talk. (*Id.* pp. 12-16) As in April, these definitions were lacking in specificity such that another observer would be able to objectively determine whether Student was or was not engaged in the target behaviors.

Also troublesome in the October 2010 is the inclusion of the graphs based on Incident Reports between September 2009 and September 2010, since it is doubtful how accurate and complete those reports are, and reliance on that information likely resulted in an underreporting of behaviors that should have been counted. (N.T. 1034-40; S-13; FF 117) The determination of the APS BCBA that Student's behaviors did not interfere with Student's learning was based in part on an apparent but erroneous assumption that the Incident Reports for Student which were not marked as "FYI" were the only occurrences of problematic behaviors throughout that time period that took time away from Student's learning. (*Id.*) This conclusion is also in marked contrast to the concerns of the staff regarding Student's self-talk and noncompliant behavior that prompted the second FBA. (FF 103) The record is replete with clear evidence that Student's behavior throughout the time periods in question caused Student to miss instructional time, vocational opportunities, and community-based outings on more than a *de minimis* basis. (FF 71, 77, 102, 103, 104, 115, 121, 137, 142, 146, 158, 159) It is difficult to imagine a more concrete example of impeding educational opportunity when a student is not available for instruction and participation in the curriculum. Simply put, this hearing officer cannot agree that Student's behavior does not impede Student's learning.

¹² In her testimony, this witness cited John O. Cooper, Timothy E. Heron, and William L. Heward, Applied Behavior Analysis (2nd ed. 2007), a reference with which this hearing officer is familiar. While this hearing officer does not mean to imply that she has expertise in ABA, she would note that the testimony by this witness was not only compelling, but is also consistent with this hearing officer's basic understanding of ABA practice in defining and measuring target behaviors as well as with the cited text. *Id.* at 65-69, 88-95. See also S-40 pp. 9-18 (Pennsylvania Department of Education, Bureau of Special Education, Functional Behavior Assessment (FBA) Process (2009) (available at <http://www.pattan.net/category/Resources/PaTTAN%20Publications/Browse/Single/?id=4dc09560cd69f9ac7f140000>) (last visited March 29, 2012).

Where a student's behavior impedes his or her learning, the IEP team must "consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior." 34 C.F.R. § 300.124(a)(2)(i); 22 Pa. Code § 14.133. The District and APS professionals continued to maintain, as of the due process hearing, that Student did not need an individual PBSP. (N.T. 1187-91, 1445-46) Although this opinion appears to contravene policy and practice at the APS (FF 57, 60), this might be an arguable position if the plan of intervention that was in place for Student actually and appropriately addressed Student's behaviors.¹³

Student attended the APS which had a school-wide plan; a classroom plan also was used and Student had a behavior strategy sheet as of November 2010. (FF 60, 96, 112) The difficulty with the District's position is that all of those measures, taken together, did not prove to be successful in addressing Student's behaviors. The APS school-wide plan was dependent, in large part, on the accurate maintenance of a reliable system for reporting incidents of problematic behavior.¹⁴ Moreover, although there appears to be a protocol for instituting a higher level of behavioral intervention, including conducting FBAs and developing PBSPs (FF 57, 60), it is very apparent that the behavior plan that existed for Student has proven to be ineffective at managing Student's behaviors. Little, if any, discernible change occurred when the behavior strategy sheet was created in November 2010, particularly since, as the APS BCBA explained, it did not add anything new. (FF 107, 112) Thus, the "behavior plan" that was utilized was no more effective after November 2010 than before. Additionally, there was scant evidence on classroom-wide behavior plan used during the 2010-11 school year or its effectiveness for Student and, as such, this element of Student's programming does not transform the behavior plan into an appropriate one. Stated another way, there is no evidence that Student's behaviors were improving but, rather, the record supports the conclusion that Student's behaviors as a whole were growing increasingly worse.

Thus, the evidence is preponderant that the District failed to adequately assess the impact of Student's behavior on Student's ability to participate in the educational programming, including vocational activities, and provide appropriate interventions to address that behavior. The District will be ordered to conduct a new and comprehensive FBA for Student and thereafter

¹³ This hearing officer is mindful of the concern of the District and APS staff that Student should undergo another psychiatric examination before implementing any new behavioral interventions. (FF 106, 112) Nonetheless, as described above, the October 2010 FBA was flawed in a number of respects, providing little more useful information than what had been disseminated in the April 2010 FBA. Furthermore, now that a new psychiatric evaluation has been completed, and notwithstanding the psychiatric hospitalization in the fall of 2011 discussed *infra*, those professionals did not appear to change their viewpoint (N.T. 1187-91, 1445-46) even though there is nothing in the private psychiatric report which would suggest that behavioral interventions should not be implemented for Student; on the contrary, he clearly suggests a program that includes behavioral components across the home and school environments. (S-33)

¹⁴ Interestingly enough, the testimony of the APS Director of Clinical and Behavioral Services on whether the school-wide plan included consequences such as denial of permission to go on community outings contradicted that of all other witnesses familiar with the plan as well as certain documentary evidence in the record. (N.T. 1402-03; *cf.* FF 55) While this hearing officer does not find that this inconsistency renders her testimony incredible, it does suggest that her understanding of the school-wide plan is less than complete and that her testimony should be accorded less weight on this subject than that of others.

develop an appropriate, individualized, PBSP for Student that prioritizes and addresses Student's behaviors.¹⁵

There is, however, one area that the Parents categorize as behavioral that the District and APS have conceded they cannot and will not address: Student's eating disorder. The Parents characterize the problem as a behavior limited to Student chewing then spitting out food. (FF 24) They did present limited testimony by the private BCBA that this behavior is one that could be addressed through ABA intervention following an FBA. (N.T. 1221-22, 1240-41) Nevertheless, there is significant evidence on this record, from as late as the fall of 2011, that strongly suggests that the concerns about Student's eating habits go far beyond it manifesting as a simple behavior that could be easily addressed in an educational setting. (FF 13, 16, 18, 52, 63, 109, 136, 142, 147, 152; J-8; S-33) Contrary to the Parents' assertion, the August 2009 psychiatric report did not dispel the possibility that Student's concerns about weight and eating were related to Student's mental health. (J-8 pp. 45-51) As late as June 2011, the independent psychiatrist described Student as having "psychiatric complications which include an atypical eating disorder." (S-33 p. 7) Furthermore, there has been an even more recent, significant event involving Student's mental health that compels extreme caution before undertaking any new behavioral intervention. (FF 151) The statement in early 2011 by a person who is not a medical doctor that attempted to minimize the concern (FF 119) is simply insufficient to overcome the substantial evidence to the contrary. Indeed, the private BCBA appeared to agree that Student's history of [eating disorder] would need to be carefully considered before attempting any intervention. (N.T. 1283-84) For all of these reasons, this hearing officer will not order the District to address this particular concern of the Parents which is clearly well beyond its expertise and that of the APS.¹⁶

The next area challenged by the Parents is Student's reading program. Specifically, the Parents disagree with the District's conclusion that Student should again be provided with reading instruction that includes a phonics component. This claim also presents a circumstance where a number of qualified professionals testified credibly, but the weight to be accorded their testimony guides this hearing officer's conclusion on this specific issue.

The Parents' private reading tutor has a Bachelor's degree in elementary education, a Master's degree in education, and is a reading specialist; she also had many years of experience teaching reading and language arts to students in remedial reading programs before becoming self employed to provide tutoring services. (N.T. 252-54, 310) The APS reading specialist has a Bachelor's degree in special education, a Master's degree in reading, and is a certified Wilson¹⁷

¹⁵ Student's behaviors cannot likely all be addressed in an initial PBSP but rather must first be prioritized to identify, and provide intervention for, those which are the most challenging. Based on the record as a whole, it appears to be undisputed that Student's most challenging behavior is non-compliance; however, that is a determination that must be made by the IEP team following a thorough and current assessment and input by all team members. (See N.T. 1242, 1290-91, 1296)

¹⁶ Of course, should it be determined in the future after Student's mental health is more stabilized that this concern can be addressed through behavioral intervention in the educational setting, the IEP team can and should consider doing so.

¹⁷ The Wilson Reading Program is a highly structured, multisensory reading program using Orton-Gillingham principles. A summary of the program by the What Works Clearinghouse, an initiative of the

reading instructor with five years' experience teaching special education. (N.T. 2049-56, 2064-65) The District's Director of Special Education has degrees in education and psychology, is certified as a special education teacher, reading specialist, principal (K-12), and supervisor of special education, and has many years' experience teaching reading and special education. (N.T. 2194-98)

The private reading tutor opined that Student needed to work on sight words and word attack skills, use the "code of language" to spell regular words (N.T. 257), and learn to read words in passages rather than in isolation. (N.T. 257-58) She believes that Student needs instruction in phonics and decoding because while Student uses context clues, combining that strategy with another, such as decoding, make Student a "better reader." (N.T. 259-60) Consistent with this witness' testimony, Student's mother opined that she believed Student used in the past and still uses phonics. (FF 53) However, the private reading tutor lacked data to support Student's ability to acquire and use phonics skills and, indeed, testified that Student's performance with her was variable. (N.T. 325-26; FF 34) She also had not worked with Student since the late summer or early fall of 2010 except to administer a QRI. (FF 85) It is also not insignificant that this witness has no background in special education.

The APS reading specialist, who has experience in both special education and teaching reading, testified very persuasively that students need at least a low average cognitive ability in order to benefit from phonics-based reading instruction which requires students to use memory skills. (N.T. 2061) She also expressed her opinion that in her work with Student, Student does not generally use phonics skills. (N.T. 2134) She agreed, wholeheartedly, with the conclusion of the independent psychologist who conducted the neuropsychological evaluation portion of the fall 2009 IEE that Student would not benefit from further instruction using phonics due to Student's significant weaknesses in working memory, processing speed, and executive functioning skills, as well as Student's cognitive ability. (N.T. 2126-30, 2155-57, 2161-63, 2165) The District's Director of Special Education, also a convincing and highly qualified witness with experience in both special education and herself a reading specialist, concurred. (N.T. 2419-24, 2613-14).

Both parties focused on different aspects of, and phrases in, the fall 2009 IEE report and, thus, it merits quoting in full the independent psychologist's conclusion on whether phonics instruction would be beneficial to Student:

[Student] has significant weaknesses with phonological processing skills, including rapid automatic retrieval, phonological awareness and phonological memory. These underlying weaknesses make it difficult for [Student] to quickly and effortlessly identify words as well [as] to apply word analysis skills to unknown words. The implications for instruction are that [Student] will likely have difficulty decoding new and longer words because [Student] has problems retaining the word parts in [Student's] memory and because [Student] has difficulty discriminating and manipulating sounds. Moreover, [Student's] lack of automaticity exacerbates the problem as [Student] is then not able to

U.S. Department of Education's Institute of Education Sciences, can be found at <http://ies.ed.gov/ncee/wwc/InterventionReport.aspx?sid=546> (last visited March 29, 2012).

utilize [Student's] working memory for higher cognitive processes involved in reading and writing. [Student] will need direct and intensive instruction in word analysis, sight vocabulary and fluency in order to make reading a more automatic process. While [Student] needs this intensive instruction, care needs to be taken not to present [Student] with too much information at a time and to keep the language and memory demands of the task at a basic level so as not to overwhelm [Student].

(J-8 p. 21) Although this witness did not testify, her explanation quoted above, considered together with the compelling testimony of the District Director of Special Education and APS reading specialist, as well as the record as a whole, supports the District's conclusion that phonics need not be part of Student's reading instruction in order to be appropriate, and outweighs the testimony of the private reading tutor. It may well be that Student has learned some beginning phonics skills, and continues to use them to this day. However, this hearing officer concludes that the evidence is preponderant that including phonics instruction in Student's reading program, at least as of the fall of 2010, was and is not necessary to provide Student with FAPE. See *K.C. ex rel. Her Parents v. Nazareth Area School District*, 806 F.Supp.2d 806, 813 -814 (E.D. Pa. 2011) (noting that, "while parents play a role in the development of an IEP, parents do not have a right to compel a school district to provide a specific program or employ a specific methodology in educating a student.") Moreover, the record establishes that Student has made appropriate progress in reading with the instruction that has been provided during the time period in question. (N.T. 432-24, 589-92, 2107-11, 21118-20, 2145-47; FF 54, 64, 74, 75, 76, 113, 122, 135) For all of these reasons, the record supports the conclusion that the reading program provided to Student from the start of the 2010-11 school year is appropriate.

There is one other aspect of the reading program that must be addressed, as there was some question as to whether the private reading tutor's services should have been provided pursuant to principles of pendency. (See N.T. 31-33)¹⁸ The IDEA contains a provision stating that, during the pendency of due process proceedings, "unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement." 20 U.S.C. § 1415(j). This provision is often referred to as "stay put." "The Supreme Court has described the [stay put] language as 'unequivocal,' in that it states plainly that 'the child shall remain in the then current educational placement.'" *Id.* (quoting *Honig v. Doe*, 484 U.S. 305, 323 (1988) (emphasis in original)).

At the time the due process complaint was filed in this matter in March 2011, a year had elapsed since the March 2010 IEP which, for the first time, proposed elimination of the private reading tutor services. (FF 67, 70) Even acknowledging the October 2010 due process complaint dismissed without prejudice, which was filed very soon after the private reading tutor services ceased, the conduct of the parties since the fall of 2010 was more akin to an agreement to provide alternate reading services by the APS reading therapist through a whole-word or sight word approach instead of phonics, than to a challenge to programming which would serve to invoke pendency. It is also noteworthy that the District, which retained the obligation to provide Student with FAPE, had no progress reports or other data to evaluate the reading instruction that

¹⁸ The Parents appear to have abandoned this claim in their closing argument; however, in an effort to be thorough, reasons for denying this relief are explained herein.

was being provided by the private reading tutor after the fall of 2009. (FF 34, 35) Furthermore, as explained above, the record supports the conclusion that the reading instruction that was and has been provided was and is appropriate for Student. Accordingly, this hearing officer find no basis on which to award a remedy for the District's termination of the services of the private reading tutor.

The final area that the Parents claim has not been appropriately addressed is that of transition. Specifically, the Parents contend that the District did not adequately consider and provide appropriate transition services with respect to Student's behavior, travel training, safety, and activities of daily living including Student's personal hygiene.

A transition plan is a "set of activities" based on the student's needs and is created to help the disabled student move from school to post-school activities. ... [A] transition plan is not a strictly academic plan, but relates to several post-secondary skills, including independent living skills and employment. A district is not required to ensure a Student is successful in fulfilling all desired goals. The IDEA is meant to create opportunities for disabled children, not to guarantee a specific result. Furthermore, transition services should be evaluated under the FAPE standard as set forth earlier in this document.

K.C., *supra*, 806 F.Supp.2d at 822 (citations omitted).

This hearing officer is compelled to agree with the Parents. For all of the same reasons described above, Student's clear behavioral needs have not been appropriately addressed and the District will be ordered to remedy this deficiency in the program. Of particular concern is the decision to remove the goal of using the personal hygiene checklists from Student's IEP, thereby precluding any systematic monitoring of Student's progress on that very evident and important need for future independence. (FF 125) Student's safety in the community is also an undisputed concern both now and in the future, which is exemplified by the District's insistence on providing Student with a one-on-one aide and inclusion of safety goals in Student's IEP. (FF 110; N.T. 1825-26 (describing why Student must understand safety in, and transitioning to, vocational settings; "[s]afety is anywhere.") Lastly, Student's need for training on how to safely and independently travel throughout the community, a prerequisite to Student attempting to obtain part-time employment (a goal for Student) has clearly not been satisfied and must be addressed. (FF 143, 156) *Cf. K.C.*, *supra*. Accordingly, the District will be required to convene Student's IEP team to address each of these programming components as part of Student's transition services.

Remedies

The next question is what relief is warranted. It is well settled that compensatory education is an appropriate remedy where a school district knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only trivial educational benefit, and the district fails to remedy the problem. *M.C. v. Central Regional School District*, 81 F.3d 389 (3d Cir. 1996). Such an award compensates the child for the period of time of deprivation of special education services, excluding the time reasonably required for a school

district to correct the deficiency. *Id.* In addition to this “hour for hour” approach, some courts have endorsed a scheme that awards the “amount of compensatory education reasonably calculated to bring him to the position that he would have occupied but for the school district’s failure to provide a FAPE.” *B.C. v. Penn Manor School District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006) (awarding compensatory education in a case involving a gifted student); *see also Ferren C. v. School District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010) (quoting *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C.Cir.2005) (explaining that compensatory education “should aim to place disabled children in the same position they would have occupied but for the school district’s violations of IDEA.”)) Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

This hearing officer finds little if any evidence to support a determination of what position Student would have been in had Student been provided with appropriate educational programming throughout the time period in question. Thus, this hearing officer concludes that the *M.C.* standard is the appropriate method of determining the amount of compensatory education owed to Student in this case.

The difficulty is in determining the number of hours for which FAPE was denied, particularly since Student’s non-compliant and off-task behaviors severely limited Student’s access to the educational program. Student’s tendency to perseverate on specific events, such as those prompting Incident Reports, undoubtedly contributed to the amount of time that Student was not available for instruction or vocational activities. The Parents suggest that four hours per day for the two years’ prior to the filing of the due process complaint is an appropriate amount of compensatory education. (Parents’ Closing at 40) Although Student’s progress on IEP goals has been somewhat variable and inconsistent, the evidence supports the conclusion that Student did derive some meaningful educational benefit throughout the time periods in question. Importantly, the Parents do not suggest otherwise. Nevertheless, had Student’s behavior been appropriately addressed throughout, Student would without a doubt have derived more educational benefit during the time period in question and made better progress toward, or achieved mastery of, IEP goals.

The District must be afforded a period of time for reasonable rectification, particularly since the APS was a new placement for Student in September 2009. This hearing officer equitably estimates that approximately one half of Student’s school day¹⁹ is a reasonable approximation of the amount of time for which Student was not receiving meaningful educational benefit. *See Keystone Cent. School District v. E.E. ex rel. H.E.*, 438 F.Supp.2d 519, 526 (M.D. Pa. 2006) (explaining that the IDEA does not require a parsing out of the exact number of hours a student was denied FAPE in calculating compensatory education). For the reasonable rectification period, this hearing officer further concludes that the District knew, or should have known, that the educational program provided to Student was inappropriate in some respects at least by the end of 2009, and, thus, should have taken steps by no later than the start of the second half of the 2009-10 school year to remedy the deficiencies. Accordingly, three

¹⁹ Pursuant to the Pennsylvania School Code, school districts are required to provide a minimum of 990 hours of instruction to students in grades 7-12. 22 Pa. Code § 11.3. This equates to a 5.5 hour school day which will be rounded up to provide an even number.

hours of compensatory education will be awarded for each day that school was in session from the start of the second semester of the 2009-10 school year, for every day that the District schools were in session through the 2010-11 and 2011-12 school years, until such time as an appropriate IEP is implemented. This award does not include compensatory education for any ESY programs since the record establishes that those programs were appropriate for Student to maintain skills and participate in desired vocational opportunities. (FF 78, 81, 145)

The hours of compensatory education are subject to the following conditions and limitations. Student's Parents may decide how the hours of compensatory education are spent. The compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product or device that furthers the goals of Student's current or future IEPs. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the District through Student's IEP to assure meaningful educational progress. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parents. The hours of compensatory education may be used at any time from the present until the date of Student's 26th birthday.

There are financial limits on the parents' discretion in selecting the compensatory education. The costs to the District of providing the awarded hours of compensatory education must not exceed the full cost of the services that were denied. Full costs are the hourly salaries and fringe benefits that would have been paid to the District professionals who provided services to the student during the period of the denial of FAPE.

The last issue is the Parents' request that this hearing officer order the District to provide Student with a residential placement. As explained above, the IDEA mandates that eligible students be educated in the "least restrictive environment" permitting them to derive meaningful educational benefit. 20 U.S.C. § 1412(a)(5); *T.R., supra*. The question is "whether full-time placement may be considered necessary for educational purposes, or whether the residential placement is a response to medical, social or emotional problems that are segregable from the learning process." *Kruelle v. New Castle County School District*, 642 F.2d 687, 693 (3d Cir. 1981). Stated another way, this hearing officer must consider "whether residential placement is part and parcel of a 'specially designed instruction to meet the unique needs of a handicapped child[.]'" *Id.* at 694.

There appears to be no dispute that consistency in behavioral expectations, interventions, and consequences across environments is critical to successful management of Student's problematic behaviors. Virtually every witness and evaluator has recommended behavioral programming in the home as well as at school. The Parents point to their prior ineffective experiences with home-based services as proof that a return to that option would similarly not succeed. (FF 9, 18) However, it has now been three years since any sort of home-based programming has been tried, which also pre-dates the current APS placement, and since that time Student's needs have changed, and not insignificantly. Moreover, the most concerning behaviors that the Parents wish to have addressed are not seen in the educational or vocational environments. (FF 63, 109, 136) Despite the conclusion that the District has not appropriately programmed for Student's behavioral needs, there is no evidence in the record to support a conclusion that it is not able or willing to do so. Indeed, as discussed above, Student has been

making some educational progress despite the deficiencies in the District's program, which, unlike *Kruelle*, indicates that residential placement is not educationally necessary. Another further particular consideration is that Student's previous reactions to residential placements have been less than agreeable and, indeed, was so detrimental on one occasion that medical intervention was required. (FF 123, 144) This hearing officer must conclude that the Parents have failed to meet their burden of proving that a drastic leap from a day program where Student lives at home, to a residential placement in an unknown location, is required in order for Student to be provided with FAPE.

As it did in the March 2011 IEP (J-51), if the Parents are in agreement, an in-home component (ideally provided in conjunction with outside agency services) should be included in Student's revised IEP in order to provide continuity and consistency in programming addressing Student's behavior.

Section 504 Claims

The Parents' complaint also raised a claim under Section 504. The obligation of a local education agency to provide a "free appropriate public education" is substantively the same under Section 504 and under the IDEA. *Ridgewood, supra*, at 253; *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa.Comm.w. 2005). Because all of the Parents' claims have been addressed pursuant to the IDEA, there need be no further discussion of their claims under Section 504.

Dicta

This hearing officer makes the following additional observations. Student's Parents are clearly very loving, devoted parents who are seeking the best education that can be provided to Student as Student gets closer to age 21. Their dedication and advocacy are commendable. The District and APS staff have also demonstrated genuine caring and concern for Student's educational program and success. It is quite fortunate, and remarkable, that as of the final hearing sessions in this case, the parties were conducting team meetings to continue collaboration on Student's educational program. Student is nearing the age when the District will no longer have an obligation to provide any programming at all to Student, and the parties' cooperation is critical to giving Student the best possible chance at future independence. The parties have been successful in the past in resolving their differences amicably, and the direction in this decision that the parties convene a meeting of Student's IEP team to revise Student's program will provide them with an immediate opportunity to continue this positive working relationship which can only be in Student's best interests.

CONCLUSION

For all of the foregoing reasons, this hearing officer concludes that the District did deny FAPE to Student for the 2009-10, 2010-11, and 2011-12 school years, and that Student is entitled to compensatory education; that the District must conduct a new and comprehensive FBA; that the IEP team must be reconvened to revise Student's IEP; and that a residential placement for Student at public expense is not warranted.

ORDER

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

1. The District failed to provide FAPE to Student during the 2009-10, 2010-11, and 2011-12 school years, and Student is accordingly entitled to, and the District is ordered to provide, compensatory education in the form of three hours of appropriate parentally-selected compensatory education for each day that the District schools were in session, from the first day of the second semester of the 2009-10 school year, the entire 2010-11 school year, and the 2011-12 school year until such time as an appropriate IEP is developed and implemented, subject to the conditions and limitations set forth above.
2. The District is ordered to begin a comprehensive functional behavior assessment of Student within ten days of the date of this order, and thereafter (within a reasonable time) convene a meeting of the IEP team to develop a PBSP for Student.
3. The District is ordered to reconvene Student's IEP team within fifteen days of the date of this order to revise Student's IEP to address Student's necessary transition services (daily living/personal hygiene, travel services, and safety needs) consistent with the above discussion.
4. The District is not ordered to take any further action.

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

Cathy A. Skidmore

Cathy A. Skidmore
HEARING OFFICER
CERTIFIED HEARING OFFICIAL

Dated: March 31, 2012