

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

Pennsylvania

Special Education Hearing Officer

DECISION

ODR No. 15757-1415AS

Child's Name: T.H.

Date of Birth: [redacted]

Dates of Hearing: 2/23/15, 3/10/15, 4/17/15

CLOSED HEARING

Parties to the Hearing:

Parents

Parent[s]

School District

Pleasant Valley

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Brodheadsville, PA 18322-2002

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

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June 5, 2015

June 18, 2015

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INTRODUCTION AND PROCEDURAL HISTORY

Student in this case began attending District schools in kindergarten but withdrew to attend a cyber charter school in 7th grade. Due to a diagnosis of ADHD in 1st grade, Student began receiving accommodations through a §504 /Chapter 15 Service Plan. Parent first requested an IDEA evaluation in 2010, which resulted in the District's conclusion that Student was not IDEA eligible.

After a second evaluation conducted at Parent's request in the fall of 2012, the District concluded that anxiety significantly interfered with Student's educational progress by preventing regular school attendance, and identified Student as IDEA eligible in the emotional disturbance (ED) and other health impairment (OHI) disability categories.

Parents initiated a due process complaint on January 2, 2015, seeking compensatory education beginning February 3, 2011 and alleging, first, that they could not reasonably have known until January 2013, when the District offered an IEP based upon the 2012 evaluation, that the District had violated its child find obligation, and thereby had previously denied Student a FAPE by finding Student ineligible for special education services after the 2010 evaluation. Parents also alleged that the District failed to provide a FAPE to Student from the time it offered the first IEP in January 2013, and at the due process hearing, sought requested compensatory education to the end of the 2012/2013 school year.

Parents' claims were limited by a ruling on the record to the two year period beginning January 2, 2013 through the end of the 2012/2013 school year, since Parents knew or should have known of the action that formed the basis of the child find claim more than two years before the complaint was filed. Because the District failed to adequately address Student's

needs, particularly the anxiety which it identified as the primary basis for Student's IDEA eligibility, Student is awarded full days of compensatory education for the period in dispute.

ISSUES

1. Did the School District's December 2012 evaluation correctly identify Student's disabilities, and more importantly, all educational needs arising from Student's disabilities?
2. Did the School District develop appropriate IEPs that addressed all of Student's disability-related needs?
3. If not, is Student entitled to an award of compensatory education?
4. If compensatory education is due, in what amount, in what form and for what period should compensatory education be awarded?
5. Did the School District fail to identify Student as a child with a disability under IDEA at the time of the first evaluation in September 2010, and therefore, was Student denied a FAPE for the period before an IEP was in place?
6. Is a "child find" claim, if any, barred by the IDEA two year statute of limitations?

FINDINGS OF FACT

1. Student, a [middle-teenaged] child born [redacted] is a resident of the School District and is eligible for special education services. (Stipulation, N.T. pp. 13, 14)
2. Student has been identified by the District as IDEA eligible in the Emotional Disturbance (ED) and Other Health Impairment (OHI) disability categories, in accordance with Federal and State Standards. 34 C.F.R. §300.8(a)(1), (c)(4), (9); 22 Pa. Code §14.102 (2)(ii); (Stipulation, N.T. p. 15)
3. Parent first requested an evaluation of Student in the winter of 2010. She returned a signed permission to evaluate form (PTE) on March 11, 2010, citing concerns about Student's reading skills, social skills, fear of heights and being bothered by sounds. Parent also stated her belief that Student needed counseling. (N.T. pp. 296, 302, 303; S-22)¹

¹ Commendably, both parties agreed to use only the exhibits submitted by the School District in this matter, which avoided an unnecessarily long documentary record. The exhibits are designated by the letter "S" followed by the exhibit number.

When the exhibits were offered and admitted into evidence, the final exhibit group was S-30—S-44. In reviewing the record, however, Exhibit numbers S-37 and S-38 were designated "reserved" on the exhibit list, *i.e.*, there were no documents with those exhibit numbers. Correcting the record, therefore, to reflect the documents that actually

4. The District issued its evaluation report (ER) on September 3, 2010, approximately 6 months later, at the beginning of the 2010/2011 school year. The only standardized assessment administered to Student, the WISC-IV,² placed Student's intellectual ability in the average range. Based upon curriculum-based assessments and teacher input, Student's academic achievement/ instructional level was estimated to be approximately six months below grade level. (S-24)
5. Student's homeroom teacher described Student as "stressed out and nervous all the time; quiet and shy; hesitant; not initiating contact with peers; does not work well independently; constantly seeks help from adults; easily distracted; frequently off-task and not paying attention." (S-24 p. 2)
6. Student's Mother completed a behavior rating scale³ that placed Student in the "clinically significant" range for anxiety and withdrawal and "at risk" for depression, internalizing problems, attention problems, behavioral symptoms, social skills, leadership, activities of daily living and adaptive skills. Parent reported that Student almost always worried about school work and making mistakes. (S-24 p. 5)
7. The ER noted that Student met or made adequate progress toward a list of classroom academic/work habit/ behavioral expectations, including some, such as working independently, attention to task and staying on task, that were also identified elsewhere in the ER as areas of concern and need. The ER concluded that although Student had a disability due to an ADHD diagnosis, and that Student was instructionally a half year behind grade level placement, Student was not displaying a need for specially designed instruction, and, therefore was not IDEA eligible. (S-24 pp. 2, 5—7)
8. At the time of the 2010 evaluation, Student was receiving accommodations through a §504 plan to address the academic/organizational effects of ADHD. The ER recommended that the accommodations continue. (S-24 pp. 3, 7)
9. The explanation of the non-eligibility determination in the ER included a reference to the negative effect of the high level of absences on Student's academic performance and progress, but no mention of the role, if any, of the school anxiety noted by both Student's teacher and Mother on Student's performance and/or absences, although the school psychologist who conducted the evaluation noted that one of Parent's reasons for requesting the evaluation was Student's anxiety. (S-24 pp. 1, 2, 7)
10. Student's §504 Plan remained in effect with at least one update offered by the District and approved by Parent in May 2012, toward the end of 5th grade. (S-34)

exist, the following exhibits are admitted into evidence: S-1—S-17; S-22; S-24; S-30—S-36; S-39—S-44; HO-1, HO-2.

² Wechsler Intelligence Scale for Children-Fourth Edition

³ Behavior Assessment System for Children-Second Edition (BASC-2)

11. The accommodations to address Student's needs in the May 2012 Plan were: a) preferential seating—in an area near instruction, near a positive role model, in proximity to teacher to enhance time on task and to minimize distractions; b) reminders, prompts, cues—to stay on task, to review work prior to turning it in, to take breaks as needed, to enhance appropriate social interactions, to be receptive toward peer input; c) checks for—maintaining organization of papers and materials, comprehension before test administration, test completion; d) short term and positive reinforcement/feedback for—on-task behaviors, appropriate peer interactions, initiating social interactions; e) monitor progress and work frequently during class; f) teacher selection of group members when working in cooperative learning groups; g) restatement of directions to ensure comprehension; h) extended time for tests, quizzes (up to 150%, at teacher discretion); i) testing in a small group setting; j) homework—discuss homework assignment book /agenda, w/daily teacher checks, opportunity to participate in check-in/check-out program. (N.T. p. 311; S-34 pp. 2, 3)
12. In September 2012, at the beginning of 6th grade, Parent again requested an evaluation, citing concerns that Student was “falling behind in math,” was not “socially confident,” could not “look other adults and children in the eyes during social interactions” and that Student was “very anxious about school and social situations.” (N.T. p. 313; S-1 pp. 1, 2)
13. The District issued a PTE,⁴ repeating the concerns on Parent's written evaluation request, and proposing an evaluation that would include a review of records, achievement testing, curriculum-based assessments, information from parents and teachers, direct observation, student interview, psychiatric evaluation, and behavior checklists. Parent signed the consent form on October 21, 2012. (N.T. pp. 314, 161—163; S-1 pp. 3, 5)
14. The psychiatric component of the District's evaluation was conducted by a board certified child, adolescent and adult psychiatrist who contracts with the local Intermediate Unit to perform evaluations of school-age students residing in school districts within the IU geographic boundaries. (S-2)
15. Based upon his observation and interview of Student during an office visit, noting lack of eye contact and engagement, as well as Parent reports of Student's socially inappropriate behaviors/responses, social immaturity and longstanding sensory and self-stimulatory behaviors, the psychiatrist concluded that Student exhibited symptoms of a high functioning autistic spectrum disorder. The psychiatrist found no evidence of oppositional or defiant behavior. He described a Student “who very much walked to the beat of a different drummer, and to a certain extent, was off in [Student's] own world.” (S-2 pp. 2—5)
16. The psychiatrist also described Student as “high strung and tightly wound.” In light of Parent's report of difficulties with school attendance, he noted that Student might benefit

⁴ Although the District issued a permission to evaluate (PTE) rather than a permission to reevaluate (PTRE), and described the 2012 evaluation as a an initial evaluation, it is actually a reevaluation, since an initial evaluation for IDEA eligibility was conducted in 2010, notwithstanding the conclusion at that time that Student was not IDEA eligible.

from a low dose of medication, such as Xanax, to address that issue, and suggested following up with Student's treating psychiatrist. (S-2 pp. 5, 6)

17. The psychiatrist diagnosed Student with pervasive developmental disorder, not otherwise specified (PDD/NOS), generalized anxiety disorder and attention deficit/hyperactivity disorder (by history). The psychiatrist saw a positive prognosis based upon Student's apparently above average intelligence, along with psychologically sophisticated Parents who were aware of Student's condition and diligent in seeking an appropriate diagnosis and care, including medication trials and psychiatric treatment to manage symptoms. The psychiatrist also felt that although compromised, Student's social skills were improving with maturity. (S-2 pp. 2, 3, 5)
18. In addition to considering medication to address the school anxiety issue, the psychiatrist recommended participation in an after school program for students with high functioning autistic spectrum disorders to address socialization, which he believed would be beneficial for Student. (S-2 pp. 5, 6)
19. The District's evaluation report was issued on 12/21/12. Parent input for the evaluation again noted Student's high level of anxiety and continuing difficulty with peer social interactions. Teacher input was notable for consistent descriptions of Student's high level of need for re-direction and support to successfully complete work, difficulty in retaining and applying previously learned concepts, and reluctance to participate in class. Student's teachers recommended that Student receive additional support in the classroom. Teachers also universally noted Student's high number of absences. (S-3 pp. 1, 2)
20. The school psychologist did not re-administer a standardized assessment of cognitive ability, relying on the results of the 2010 WISC-IV, which placed Student in the average range for cognitive functioning. (S-3 p. 3)
21. Student's academic achievement was assessed in the areas of reading and math by means of both a standardized achievement test⁵ and curriculum based measures, and in writing with the standardized test only. Student's academic performance was below grade level in all areas, and there is a significant discrepancy between many of the WIAT-III sub-test scores and Student's average IQ score.⁶ Student's PSSA scores from the spring of 5th grade were also reported in the ER. Student's scores in reading and writing were in the Basic range and in the Below Basic range in math. (N.T. pp. 186—189; S-3 pp. 3—6)

⁵ WIAT-III (Wechsler Individual Achievement Test-Third Edition)

⁶ The District school psychologist reported a number of sub-test scores but did not report reading, writing and math composite or overall scores. Consequently, although it appears that there may be an ability/achievement discrepancy suggestive of learning disabilities, that would be impossible to determine based on this record. Moreover, although the District concluded that lack of progress could not be attributed to lack of instruction, that is also by no means certain. Not only was Student absent frequently, it is impossible to tell how much benefit Student derived from group instruction, given Student's level of anxiety and level of individual support needed. With respect to academics, therefore, Student may indeed have been affected by lack of instruction, notwithstanding well-qualified teachers delivering good instruction to the class as a whole.

22. On the WIAT-III reading sub-tests, Student's scores were below average in word reading and average in reading comprehension and oral reading fluency. Student was below the 6th grade instructional level on one District fall assessment and below the 6th grade benchmark on another. Student was considered instructional in reading at the 5th grade level at the time the ER was issued in late December 2012. (S-3 pp. 3, 4, 6)
23. In writing, all of Student's WIAT-III sub-test scores were in the below average to low range, with three standard scores between 63 and 66, more than two standard deviations below the mean of 100 (Average scores on the WIAT III fall between 85 and 100). Student's highest sub-test score was spelling, with a standard score of 80, at the 9th percentile. No curriculum-based assessments were reported for writing, but Student's reading and language arts teachers noted Student's unwillingness to attempt writing tasks and low ability to express thoughts in writing. (S-3 pp. 2—4)
24. All of Student's WIAT-III math sub-test scores were also in the below average to low range. Student's highest sub-test score was numerical operations, with a standard score of 84, at the 14th percentile. On curriculum-based assessments given in December 2012, Student was able to solve the following percentages of problems involving grade-level math concepts: 74%/ 2nd grade; 54%/3rd grade; 11%/4th grade; 3% /5th grade; 5% /6th grade. (S-3 pp. 4, 5)
25. The District school psychologist interviewed Student, who expressed no liking for anything about school, or any favorite or least favorite subject, because Student found the work hard in all areas. Student indicated that s/he had no friends. Although Student was cooperative and attentive during the evaluation, was willing to attempt all tasks that were presented and was responsive to questions, Student did not initiate any conversation with the evaluator. (N.T. pp. 162, 163; S-3 p. 3)
26. Parent again completed a BASC-2 behavior rating scale. Her ratings placed Student in the "clinically significant" range for anxiety, depression, withdrawal and somatization, and in the "at risk" range for hyperactivity, atypicality, social skills, leadership, activities of daily living and functional communication. (N.T. p.; S-3 p. 5)
27. The school psychologist did not ask Student's 6th grade teachers to complete the BASC-2 teacher rating scales because she believed that the results would not be valid due to Student's high number of absences. The school psychologist also believed that asking Student's teachers from the previous school year to complete the behavior checklists would have provided outdated information. (N.T. pp. 164, 167, 168; S-3 p. 5)
28. The BASC-2 Manual states that for valid ratings, "[T]he respondent should have had a considerable amount of contact with the child. A month of daily contact or 6 to 8 weeks of several-days-a-week observation should be sufficient." (HO-2 p. 2) Based upon Student's attendance record from the 2012/2013 school year, and reference to a 2012 calendar, there were 6 weeks in which Student attended school for 3 or more days each week between September 5 and Friday 11/16/12, and an additional 3 weeks in which Student attended at least 2 days of school during that period. Beginning with 11/19/12

through the beginning of the winter holiday, Student stopped attending school. (S-35 pp. 1, 2)

29. Although the school psychologist reviewed and integrated all of the information gathered as part of the evaluation, including the psychiatric evaluation, and agreed with the psychiatrist's diagnosis of an autism spectrum disorder, specifically, pervasive developmental disorder, she concluded that based on Student's functioning in the school setting, Student met the IDEA criteria for emotional disturbance, but not autism, because anxiety rather than autistic symptoms, as described in the IDEA regulations, most significantly impacted Student in the school setting. (N.T. pp. 165, 166, 192, 193; S-3 p. 6)
30. The school psychologist did not conduct any specific autism assessments, or recommend a speech/language evaluation to determine whether Student's social skill issues might be related to pragmatic language deficits or other communication needs, although acknowledging that possibility in light of the psychiatrist's autism diagnosis. (N.T. pp. 190—192; S-3)
31. Under the ER "Behavioral Information" section, the school psychologist stated that, "The anxiety that [Student] experiences in school and other social situations is adversely affecting [Student's] educational performance because it is preventing [Student] from coming to school and receiving instruction." Parent told the school psychologist that Student was not attending school due to anxiety, and the school psychologist otherwise understood that Student's absences were often due to anxiety about coming to school. (N.T. pp. 169—172, 266, 312; S-3 p. 6)
32. The ER concluded that Student should be identified as IDEA eligible in the emotional disturbance (ED) disability category, with other health impairment (OHI) as a secondary disability category. (S-3 p. 6)
33. The ER also made the following recommendations to Student's IEP team for special education supports and services: a) learning support services, with measurable annual goals in written expression, math and social skills; b) specially designed instruction (SDI) to include all of the accommodations in the existing §504 Plan; c) additional academic SDI in the form of graphic organizers and editing checklists during writing assignments and example problems provided for math; d) social skills instruction; e) SDI to address Student's anxiety, in the form of the opportunity to leave the room and meet with a trusted adult when feeling anxious, and the opportunity to leave the classroom and go to a "safe" place when feeling anxious. (S-3 p. 7, S-34 pp. 2, 3)
34. Due to Student's anxiety disorder, as well as a medical evaluation that occurred around the same time as the District's psycho-educational evaluation, which resulted in a suspected diagnosis of Marfan's Syndrome, requiring a brace, Parent, supported by the statement of one of Student's treating physicians, submitted a request for homebound instruction on December 17, 2012, which was approved by the District. (S-2 p. 3, S-31)

35. Acknowledging that Student would not be attending school for a period of time due to the homebound instruction request, the ER further recommended that an incentive plan should be initiated to encourage Student's regular school attendance when Student was able to return to the school building. (N.T. pp. 211—213; S-3 p. 7)
36. Student's IEP team met on January 15, 2013 and proposed an IEP that included a math and a writing goal, each with several components/ short-term objectives, and a social skills goal. The IEP provided for an itinerant learning support placement with most instruction delivered in the regular education classroom (Student to be outside of the regular education classroom for 1 hour/day). No related services were recommended. The IEP was to be implemented while Student was on homebound instruction. (N.T. p. 208; S-5 pp. 19—22, 26, 28—31)
37. The IEP math goal and objectives, at the 3rd grade level, included adding coins/making change, telling time, measurement, adding/subtracting three digit whole numbers, reading and interpreting graphs, finding perimeter and area of a rectangle, identifying and extending patterns, rounding whole numbers to the nearest tenth, identifying 2 and 3 dimensional figures, mastering basis multiplication and division facts. (S-5 pp. 19, 20)
38. Student's writing goal was to produce a four sentence paragraph, including a main idea/topic sentence and four detail sentences, with editing for proper grammar, capitalization, punctuation and spelling. (S-5 p. 21)
39. The social skills goal provided that Student would "interact appropriately" with peers in 4 out of 5 opportunities, defined as making appropriate comments and "being amiable." Neither the term "amiable" nor the criteria for meeting either component of that goal/objective are defined or described in the IEP. The SDI section of the IEP provides for social skills instruction to be delivered one time in each six day cycle in the regular and special education classrooms. There is no further description of the content of the instruction, the amount of time it was to take, or who was to provide the instruction. (S-5 pp. 22, 24)
40. The remaining SDI incorporated the recommendations from the ER with a few additions: word banks and matching for tests, with limited choices; use of a calculator; tests read to Student upon request; short answers to replace essays; multiple choice answers with no more than three choices, assistance with organization/reorganization; chunking of long-term projects; prompts to expand written expression; agenda book/homework log; reduced homework assignments grading for content only, not mechanics for every subject except writing; clarification of written responses before grading. (S-3 p. 7, S-5 pp. 23—26, S-34 pp. 2, 3)
41. Parent's homebound services request was renewed in February 2013, and according to District enrollment records, continued until March 21, 2013. At that time, District records indicate that Student transferred to a cyber charter school from March 22 until April 30, 2013, but there is no record of Student receiving any educational services from another local education agency during that period. The District's Special Education

Supervisor acknowledged that the records could reflect a lack of clarity concerning Student's enrollment/attendance at that time.⁷ (N.T. pp. 409, 608; S-12 p. 1, S-32)

42. From the beginning of homebound instruction in January 2013, Parent recalls no home-based educational services from the District, other than through the District's online cyber academy and a math tutor who came to the home for approximately an hour/week. District enrollment records indicate that Student was formally enrolled in the District's cyber academy on April 30, 2013 and continued there until the end of the school year. (N.T. pp. 344, 356, 357, 504; S-12 p. 1)
43. Student's special education case manager identified a regular education teacher who was to provide 5 hours/week of homebound instruction to Student from January 2, 2013 until the NOREP approving the January 2013 IEP was signed by Parent on January 15, 2013. The case manager identified the "math tutor," a special education teacher, as Student's homebound instructor from the time the IEP was in place until homebound instruction ended. The instruction was provided at the library for 5 hours/week, not at Student's home. (N.T. pp. 406—411; S-5 p. 37)
44. Student's IEP team met in May 2013 to develop an IEP for delivery of special education services in the cyber academy. The IEP was identical to the January 2013 IEP except that Student was expected to be instructed within the regular education cyber academy format for the entire school day, with daily resource room attendance and modifications to the SDI to account for differences in the setting and delivery of instruction in the cyber academy. (N.T. pp. 82, 83, 228—231, 429 ; S-7, S-36)
45. The District cyber academy is designed for completely independent, at-home learning, with no live instruction at all, except for specified help periods, when a student can log in to speak with a teacher. Students are expected to attend a daily online homeroom and are encouraged to participate in online office hours. Special education students are to attend the on-line resource room to receive remedial instruction and any other assistance with assignments. The cyber academy's procedure is to send messages and information, including student attendance information, to parents and to the District at least weekly. Students who do not log into homeroom are marked absent even if they later log on to complete online assignments. (N.T. pp. 502, 505, 520, 521, 525, 572, 580; S-41)
46. When the District's cyber academy director is informed that a student wants to transition to the cyber academy, his ordinary procedure is to meet with the parents to explain procedures and complete the intake process. The entirely independent learning format for regular instruction is not explained in detail to parents during the pre-enrollment process (N.T. pp. 502, 510, 513—515, 525, 571, 580, 582, 618, 619; S-39, S-41)
47. Student did not complete the required assignments during enrollment in the District cyber academy during the last six weeks of the 2012/2013 school year. Student continued to have difficulty remaining on task and grasping concepts. Student is easily overwhelmed

⁷ The Special Education Supervisor testified that "[Student] returned to [the School District] from homebound on 4/30/13 and remained until the end of the school year, which was 6/6/2013." (N.T. pp. 604, 605)

by academic tasks. Without in-person support, Student's anxiety surrounding school-related tasks prevents completing academic work assignments, whether online or in a classroom. The assignments that Student completed were done with Parent's help. Parents' emails to teachers for additional assistance were not returned. Student did not log onto the resource room to receive online instructional support. Parent was not aware of that option. (N.T. pp. 288, 356, 392—397, 526, 540—545, 621, 622; S-43)

48. The District's director of the online academy, who tracks participation of students enrolled in the District's online academy, knew of Student's absences from regular instruction, non-participation in the resource room and incomplete assignments, and stated that he contacted Parent to try to get Student on track. In similar circumstances, the director sometimes notifies the guidance counselor, the special education supervisor or the case manager who is responsible for implementing a special education student's IEP, but did not do so in Student's case. (N.T. pp. 506, 507, 517, 522, 523, 526, 569, 594)
49. The online academy director expects that ordinarily, the academy resource room teacher would contact a special education student's case manager directly if a student is not participating in the resource room or is having difficulties that can't be addressed effectively through the online resource room and that the special education staff from the District and the online academy would address the issues. (N.T. p. 573)
50. Parent did not recall receiving any of the written information described by the cyber academy director, or an explanation of how the District cyber academy would work for Student, recalled no contact with the cyber academy special education teacher, no telephone calls from the cyber academy director, or any contact with him, other than when Parents picked up the equipment to use for the cyber academy.. (N.T. pp. 618—620; S-39, S-40, S-41, S-42)

DISCUSSION AND CONCLUSIONS OF LAW

Legal Standard

The IDEA statute provides that a school-age child with a disability is entitled to receive a free appropriate public education (FAPE) from his/her school district of residence. 20 U.S.C. §1400, *et seq.*; 34 C.F.R. §300.300; 22 Pa. Code §14. The required services must be provided in accordance with an appropriate IEP, *i.e.*, one that is “reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress.” *Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982); *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 249 (3rd Cir. 2009). “Meaningful benefit” means that an eligible

child's program affords him or her the opportunity for "significant learning." *Ridgewood Board of Education v. N.E.*, 172 F.3d 238 (3RD Cir. 1999). Consequently, in order to properly provide FAPE, the child's IEP must specify educational instruction designed to meet his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. *Rowley; Oberti v. Board of Education*, 995 F.2d 1204 (3rd Cir. 1993).

An eligible student is denied a FAPE if his/her program is not likely to produce progress, or if the program affords the child only a "trivial" or "*de minimis*" educational benefit. *M.C. v. Central Regional School District*, 81 F.3d 389, 396 (3rd Cir. 1996); *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F. 2d 171 (3rd Cir. 1988).

Appropriate Identification of Disability Category/Disability-Related Needs

Parents' first area of disagreement with the District's actions in this matter centers on the District's decision to identify Student in ED and OHI disability categories and not the autism category. It is true that in light of the record, that decision is questionable. The District determined at the outset that its evaluation should include a psychiatric evaluation, and the IU psychiatrist who completed that component of the District's evaluation identified a high functioning autism spectrum disorder, with which the District did not disagree. (FF 13, 17, 14, 15) The District administered no rating scales or other types of assessments to confirm or suggest that the diagnosis was erroneous. (FF 30) Indeed, the District affirmatively agreed with the diagnosis, but nevertheless concluded that the classroom impact was not significant enough to support autism as a disability category supporting Student's IDEA eligibility. (FF 29)

The problem for the District, however, does not arise from refusing to identify Student in the autism disability category, or even to further explore the psychiatrist's conclusion by means of autism rating scales that the District school psychologist could have administered. The record

leaves no doubt, and the District recognized, that Student had social skills and peer relationship needs, but those needs were not fully and thoroughly explored in light of the autistic symptoms Student was displaying, as described by the psychiatrist. Student clearly needed a speech/language evaluation to determine whether pragmatic language and other communication issues characteristic of autism spectrum disorders were adversely affecting Student's school functioning and could have been addressed through speech/language related services. The school psychologist acknowledged that such issues could have been affecting social skills/peer relationship issues. (FF 30) The "could" is what should have triggered a further PTE for a speech language evaluation, which is the only means of determining whether a possible or potential need exists. The District, therefore, did not sufficiently consider and evaluate all of Student's needs suggested by the information it compiled through its 2012 evaluation.

IEP/Special Education Services to Address Disability-Related Needs

Although the District's lapses in failing to fully evaluate and identify all of Student's needs were serious, the heart of the District's violations in this matter lies in its failure to adequately and appropriately address the significant needs it did identify.

The District's primary argument and indeed, its drumbeat theme in this matter, was that it could not be faulted for not providing services to Student because Student failed to come to school to receive the services that could have been provided. That argument, however, is fundamentally flawed because the IEP offered by the District provided neither an appropriate special education placement nor sufficient services, supports and instruction to meet Student's special education needs, as identified by the District's own evaluation, without even considering the insufficiently identified needs. After thorough analysis of the IEP, it is obvious that even if Student had attended school with few or no absences from January to June 2013, it would have

made no difference to Student's opportunity for meaningful progress because the January 2013 IEP was so fundamentally flawed and inadequate, and so utterly lacking in sufficient appropriate supports and services, with respect to both academic instruction and social skills development, that Student's absence was essentially a non-issue.

Anxiety

The District identified Student's primary disability as anxiety in its December 2012 evaluation report, and explicitly stated that the anxiety was interfering with Student's education by preventing Student from coming to school. (FF 31) Although there may be a basis to disagree with the District's decision to select ED as the primary IDEA eligibility category for Student, and as noted above, to fault the District for failing to fully explore potential needs arising from an autism spectrum disorder, such as potential language/communication issues, the problems based upon the District's failure to fully evaluate, consider and address needs related to autistic symptoms, in essence, have to "get in line" behind the more immediate anxiety needs that were identified by the District, and were the primary basis for its determination of Student's IDEA eligibility.

The District is correct, to a degree, in pointing to attendance as a key issue from which other problems flow, since if Student did not attend school, the District could not deliver services to address either academic or social deficits. The problem for the District, however, is that in identifying Student's anxiety as the primary basis for IDEA eligibility and the underlying reason for Student's limited school attendance, (FF 31), the District had an obligation to effectively address that issue. Moreover, it was obvious from the ER input of Student's 6th grade teachers, from the interview with Student, from Parent's testimony and evaluation input, and even from teacher input provided for the District's initial evaluation in 2010, that the source of Student's

debilitating anxiety was not primarily social anxiety and peer relationships, as the reason for Student's reluctance to attend school, but was most significantly related to academic performance. (FF 5, 6, 12, 19, 47)

The District's January 2013 IEP, however, did nothing to address Student's pervasive and debilitating anxiety. There were no special education supports or related services designed to address Student's anxiety in order to permit Student to attend school regularly and benefit from regular instruction in the school setting, or to address special education areas of need, notably below grade level academic skills and social issues. Despite teacher input and recommendations noting Student's high level of need for academic support, which was also identified in the 2010 evaluation, the District never took into account how much Student's overriding anxiety adversely affected Student's academic progress. The 2012 ER explicitly stated, however, that Student's "inability to learn cannot be explained by intellectual, sensory or health factors" as the basis for designating ED as Student's primary disability category. *See* S-3 p. 6; 34 C.F.R. §300.8(4)(i)(A).

To address Student's significant and overriding anxiety, the only supports provided in the January 2013 IEP were opportunities for Student to leave the room for a "safe" place and/or to meet with a "trusted" adult. Those options do nothing to address the underlying issue of how to help Student overcome the anxiety sufficiently to come to school in the first place. Moreover, neither the ER nor the IEP provides any description of, or insight into how to identify the "trusted" adult or the "safe place" or take into account the constancy and pervasiveness of Student's anxiety in the school setting. Nothing in the information available to the District at the time the ER was compiled and the IEP developed suggested that the anxiety Student experienced was a feeling that overcame Student from time to time, and that a brief "time out" might relieve

it. Moreover, the evaluation report and the psychiatric report strongly suggest, that Student does not develop a rapport any more easily with adults than with peers, yet there is no evidence that the District had formed any plan for selecting and taking steps to help Student build a relationship with someone who could become the “trusted adult.” That should have been a critical consideration, along with determining how meeting with a “trusted adult” would relieve significant anxiety for a child who would not initiate a conversation with a trained psychiatrist and school psychologist during evaluation sessions.

Finally, the only recommendation to address Student’s non-attendance at school, found in the ER, was development of an incentive plan to increase school attendance after homebound instruction ended. There was no reference in the recommendations section of the ER to addressing the anxiety that the school psychologist had identified as preventing Student’s school attendance. If anxiety that prevented school attendance was the basis for the emotional disturbance disability that established Student’s IDEA eligibility, an incentive plan to increase school attendance would be no more likely to succeed than an incentive plan to encourage an orthopedically impaired child to climb the steps to a school building—other supports must be put in place to overcome the involuntary effects of a disability.

IEP Goals/Placement

The January 2013 IEP provided two academic goals, presumably to be implemented primarily in the regular education classroom, since the IEP and NOREP provided for itinerant special education services, with Student to be in the regular education classroom for all but one hour each school day, despite an ambitious math goal at the 3rd grade level, and Student was in 6th grade at the time. The record provided no detail concerning how the goals were to be implemented in terms of modified instruction.

Overall, the District utterly failed to grasp the depth and seriousness of Student's needs. Under the section for present levels of functional performance, the December 2012 ER states that "[Student] demonstrates appropriate functional performance in the classroom." The basis for that conclusion is impossible to discern from the factual information in the remainder of the report, especially from teachers, who, without exception, described a Student who exhibited great difficulty sustaining attention, remaining on task, completing work independently, participating in classroom activities and interacting appropriately, or at all, with peers. In the beginning of middle school, Student's teachers universally noted Student's high level of need for support and recommended more classroom support.

Moreover, Student's academic performance in writing and math were well below average and expected levels. Even in reading, where Student's WIAT III standardized test scores were in the average range in several areas, Student's instructional level was a year below grade level. It is difficult to see how the teacher descriptions of the characteristics Student exhibited in the classroom and Student's academic performance led to the conclusion of "appropriate classroom functioning," unless the "functioning" refers only to the absence of disruptive behaviors and does not take into account academic and social performance. It is also impossible to conclude that the two academic IEP goals could have effectively addressed Student's significant academic deficits and provided an opportunity for meaningful educational progress.

Social Skills Goal

The January 2013 IEP social skills goal of "being amiable" could be a paradigm example of an unmeasurable—and undefinable goal. It is impossible to imagine how such a goal might be measured and, indeed, if it could be measured how it would help Student build peer relationships. It is a conglomeration of words signifying nothing substantive. The social skills

instruction listed in the SDI lacks any content or detail. As noted above, further evaluation was needed to determine whether related services, such as speech/language services, or possibly, a social skills program similar to the psychiatrist's recommendation should have been provided to Student.

Appropriate Placement

Even without fully exploring all needs arising from all areas of potential disability, the District had a plethora of information available in January from which it could have begun to address Student's significant academic deficits in math and writing, which was a major source of Student's anxiety. Student's 6th grade teachers all identified virtually the same underlying academic needs, notably an extreme need for significant support in completing academic tasks. And all teachers recommended that Student receive increased academic support. At the time the January 2013 IEP was developed, the District had received a request for homebound instruction, due in part, to Student's high anxiety. Student's need to be instructed at home was a golden, but missed, opportunity for the District to effectively address both Student's anxiety and academic difficulties by providing a short-term instruction in the home special education placement rather than the limited homebound instruction available for regular education students.

The District had another opportunity to provide an instruction in the home special education placement at the time Student's homebound instruction prescriptions ended near the end of March 2013. The District's Special Education Supervisor testified that could have been done, but she believed it was not appropriate for Student. (N.T. p. 616). She provided no reason for that opinion, however, and, therefore, it is impossible to rely on it.

Since Student apparently continued to experience significant anxiety that prevented school attendance, for which the District offered no help despite acknowledging it as the basis

for Student's IDEA eligibility, Parent had no real choice but to enroll Student in the District cyber academy. There, Parent and Student were left, essentially, to fend for themselves, despite disability-related needs that continued to interfere with Student's ability to benefit from instruction.

Had the District convened an IEP team meeting to propose instruction in the home, however, the District could have provided Student with the level of services necessary to address Student's academic needs, initially, that were closely related to Student's anxiety, as the District recognized in identifying ED as Student's primary disability category. Once Student began making progress, academically, it may have been easier to address Student's anxiety related to school attendance, including social anxiety.

Although instruction in the home is on the continuum of placements provided by the federal IDEA regulations, (34 C.F.R. §§ 300.39(a)(i), 115(b)(1)), it is a restrictive educational placement, ordinarily reserved for students with serious medical conditions who cannot leave home to attend school. Nevertheless, the Pennsylvania Department of Education/Bureau of Special Education recognizes that under some circumstances, an IEP team may agree to a short-term instruction in the home placement. *See* Instruction Conducted in the Home Basic Education Circular (BEC), revised June 30, 2005 and reviewed July 1, 2009 at p. 2. This situation would have been such an appropriate circumstance. Here, Student's medical reason for a temporary excusal from school for homebound instruction under 22 Pa. Code § 11.25 for medical reasons was also the basis for Student's IDEA eligibility. Intensive special education services to address Student's anxiety both indirectly, through remedial academic instruction and support, and directly, through related services, such as counseling, and developing a re-entry plan for school attendance, were necessary to address Student's disability-related needs and might have allowed

Student to return to school successfully. At that point, the District might have been able to address Student's social skills needs, although that still could not have been done appropriately through the January 2013 IEP, for the reasons discussed above.

As it was, Student did not receive sufficient instruction to address significant academic deficits through either homebound instruction or the District cyber academy—but Student also would not have received appropriate and sufficient special education services through the IEP, had Student been attending school during that period.

In short, the underlying problem with Student's lack of educational and social progress in this case was not that Student could not receive services because Student was not attending school. Even leaving aside the major issue that Student was not attending school regularly because of high anxiety that the District recognized as Student's primary disability symptom but did nothing to address, if Student had managed to attend school regularly, the IEP was inadequate and inappropriate and provided no reasonable opportunity for meaningful progress academically, or in social skills, the two areas of need that the District explicitly identified. In addition, regardless whether the District was correct or incorrect in its decision not to identify Student in the autism disability category, the District recognized the accuracy of the psychiatrist's autism diagnosis, yet failed to fully consider and evaluate whether Student had special education needs arising from autism characteristics, such as pragmatic language issues, which may also have affected Student's social skills and peer relationship issues.

Since Student's unaddressed disability needs pervaded the entire school day in that such needs prevented both school attendance and adversely affected academic learning—and because Student's needs would have remained unaddressed and still pervaded the entire school day because Student would not have received sufficient and appropriate services if Student had

attended school, and because Student was not receiving sufficient appropriate services before the January 2013 IEP was put in place, Student will be awarded full days of compensatory education for every day that school was in session from January 2, 2013 until the end of the 2012/2013 school year.

Child Find Claim/Statute of Limitations

Although a ruling was made on the record at the first hearing session with respect to the issue of Parents' entitlement to assert claims dating to February 3, 2011 and the claim was barred because of the IDEA limitations period, that matter will be addressed briefly.

The IDEA statute and the federal regulations provide that a proper due process complaint "must allege a violation that occurred not more than two years before the date the parent or public agency knew or should have known of the alleged action which forms the basis of the complaint." 20 U.S.C. §1415(b)(6)(B); 34 C.F.R. §300.507(a)(2). The regulations further provide that "A parent or agency must request an impartial hearing on their due process complaint within two years of the date the parent or public agency knew or should have known about the alleged action which forms the basis of the complaint." 34 C.F.R. §300.511(e), based upon 20 U.S.C. § 1415(f)(3)(c). The two year limits on the subject matter of a due process complaint and on the time for submitting a complaint, however, are subject to the exceptions found in §300.511(f): "...The timeline does not apply to a parent if the parent was prevented from filing a due process complaint due to (1) specific misrepresentations by the LEA that it had resolved the problem forming the basis of the due process complaint or (2) the LEA's withholding of information from the parent that was required under this part to be provided to the parent." 34 C.F.R. §300.511(f); 20 U.S.C. Section 1415(f)(3)(c).

In this case, Parents did not claim an exception, but relied on the “knew or should have known” language in the IDEA statute and regulations. In reality, however, Parents argued that “knew or should have known date” should be read as the “realization date.” Parents argued that the two year limitations period was not triggered when they received the initial evaluation from the District that concluded that Student was not IDEA eligible, but only when they understood that the District’s initial conclusion was likely erroneous.

Although given the similarities between the evaluation reports and the consistency of Student’s characteristics and needs observed from a comparison of the two evaluation reports, it is quite possible that Parents could be correct that they might have established a child find violation, the law is clear that the statute of limitations begins to run when parents are aware of the action that underlies the complaint, not when they realize that the action was likely a violation.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, the School District is hereby **ORDERED** to provide Student with full days of compensatory education for every day that school was in session from January 2, 2013 until June 6, 2013, the last day of the 2012/2013 school year.

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

Anne L. Carroll

Anne L. Carroll, Esq.
HEARING OFFICER

June 18, 2015