

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

DUE PROCESS HEARING

Name of Child: T.G.

ODR #15986 / 14-15 AS

Date of Birth:
[redacted]

Dates of Hearing:
September 29, 2015
October 21, 2015
November 9, 2015

CLOSED HEARING

Parties to the Hearing:
Parent[s]

Representative:
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Date Record Closed:

December 5, 2015

Decision Due Date:

January 14, 2016

Date of Decision:

December 17, 2015

Hearing Officer:

Linda M. Valentini, Psy.D., CHO
Certified Hearing Official

Background

Student¹ is an early teen-aged eligible student attending 8th grade in the District and receiving special education programming under the Individuals with Disabilities Education Act [IDEA]² and Pennsylvania Chapter 14. Student's current eligibility classifications are emotional disturbance and specific learning disability. Student is also a qualified handicapped person / protected handicapped student under §504 of the Rehabilitation Act of 1973 (29 U.S.C. §794)³ and Chapter 15 of the Pennsylvania Code.

The Parent asked for this hearing, alleging that the District denied Student a free, appropriate public education (FAPE) and seeking compensatory education for Student from the 6th grade school year (2013-2014) through the present. Additionally the Parent seeks that the District change Student's classification from emotional disturbance to autism as defined under the IDEA, and that the IEP be amended accordingly.

A preliminary hearing session was held subsequent to the recent ruling of the Third Circuit in *G.L. v. Ligonier Valley Sch. Dist. Authority*, 115 LRP 45166, (3d Cir Sept. 22, 2015) to address the date the Parent knew or should have known of the action that formed the basis of her complaint (KOSHK date). The KOSHK date in this matter was determined to be May 9, 2013. As the written complaint /request for hearing was filed on March 9, 2015 the Parent was in compliance with the IDEA's 2-year Statute of Limitations on filing a hearing request. A copy of the Interim Ruling is attached to this decision as an Appendix.

Issues

1. Did the District deny Student a free, appropriate public education in the areas of reading, language arts/written expression, mathematics and transition planning from the 6th grade to the present, and if so is Student entitled to compensatory education, and in what form and amount?
2. Is Student's current placement sufficiently supportive to enable Student to make meaningful progress?
3. Should the District classify Student as a student with autism?

¹ This decision is written without further reference to the Student's name or gender, and as far as is possible, other singular characteristics have been removed to provide privacy.

² 20 U.S.C. §§ 1400-1482.

³ 29 U.S.C. § 794.

Findings of Fact⁴

1. Student was adopted by the Parent in October 2009 at eight years of age, after living with Parent in foster care from age 2 ½. Prior to that time, Student had changed homes a number of times, and was subjected to physical abuse by biological parents and caretakers. At the time of the adoption both Student's first and last names were changed. [Vol IA: NT 14-15, 39, 41-42, 49; S-1]⁵
2. As a very young child Student exhibited mental and behavioral health issues including developmental delay and difficulty with social skills. In 2007 at age 5 Student was diagnosed with Adjustment Disorder with Mixed Disturbance of Emotions and Conduct and the evaluating psychiatrist also noted a history of Attention Deficit Hyperactivity Disorder (ADHD) and Depression. However, the psychiatrist did not report considering⁶ a diagnosis of Pervasive Developmental Disorder (PDD) or Autism⁷. [S-1]
3. Student attended a typical preschool located in the local YMCA, receiving Early Intervention services (speech and language therapy, physical therapy, and occupational therapy) at that location.⁸ There is no record of an Autism or PDD diagnosis attached to the Early Intervention services. [NT 179; S-2]
4. For the 2007-2008 year Student enrolled in the District's Kindergarten and quickly demonstrated daily physically and verbally aggressive and defiant behavior, as well as age-inappropriate behaviors such as rolling around on the carpet, eating non-food items and throwing tantrums. Interventions were ineffective and Student was soon referred for a multi-disciplinary evaluation. The Evaluation Report (ER) was issued on February 14, 2008. [S-2]
5. Cognitive testing revealed that Student's cognitive ability was in the Low Average Range (IQ 89)⁹ with a notable deficit in processing speed (Index Score 73). School readiness was in the broadly average range at the 37th percentile. [S-2]

⁴ The testimony of every witness, the content of each exhibit, as well as the parties' written closing statements, were reviewed and considered in issuing this decision, regardless of whether there is a citation to particular testimony of a witness or to an exhibit.

⁵ Unless a citation to a transcript is specifically identified as 'Vol IA' the transcript referenced is either Volume I B, Volume II or Volume III. However, when citations from both Volume I A and Volume I B are associated with a particular finding of fact both Volumes are identified.

⁶ The hearing officer, a Pennsylvania licensed psychologist/certified school psychologist notes for the reader that under the DSM-IV when a diagnosis was under consideration but without enough evidence to support the diagnosis the evaluator would list the diagnosis as a "rule out" (for example, 'R/O Pervasive Developmental Disorder') meaning that more information was needed to either confer the diagnosis or to rule it out.

⁷ At the time Student was evaluated the classifications of PDD and Autism were included in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders – Fourth Edition (DSM-IV). The current Manual (DSM-5) has folded these and other autism-related disorders into the category of Autism Spectrum Disorder (ASD).

⁸ The District's Kindergarten paperwork does not contain information about Student's receiving the Early Intervention services, but there is no reason to doubt the Parent's testimony in this regard.

⁹ On the bell-shaped curve the standard score ranges are as follows: Below 69 is deficient, 70-79 is borderline, 80-89 is low average, 90-109 is average, 110-119 is high average, 120-129 is superior, and 130+ is very superior.

6. Behavior rating scales completed by the Kindergarten teacher and Parent found multiple clinically significant indicators of behavioral difficulty. [S-2]
7. The District school psychologist and a [local] Intermediate Unit behavior specialist conducted observations of Student. Neither noted arm flapping (a stereotypical behavior sometimes seen in autistic children), nor was this type of behavior reported by the classroom teacher. [NT 551; S-2]
8. The District found Student eligible for special education as a student with an emotional disturbance and the ER recommended part-time emotional support programming, a positive behavior support plan, and social skills instruction. [S-2]
9. In March 2008 a District occupational therapist evaluated Student and the assessment of sensory functioning did not find difficulties in sensory integration, another characteristic often seen in autistic children. The evaluator recommended occupational therapy to address difficulty with fine motor tasks. [S-3]
10. Student's emotional support teacher provided input for the occupational therapy evaluation and described Student as "extremely outgoing" a characteristic unlikely in a child with autism. [NT 553-554]
11. The District completed a tri-annual reevaluation in January 2011 (3rd grade). The Reevaluation Report (RR) noted that Student was previously receiving medication for ADHD and Depression. [S-6]
12. Cognitive ability assessment again found Student to be functioning in the Low Average Range (IQ 81) with a continued deficit in progressing speed. [S-6]
13. Academic achievement testing showed solidly average scores for word attack, letter-word identification, passage comprehension, broad reading, spelling, applied math problems and broad math. However, Student's performance on fluency tasks in these areas was in the low average or low range, fluency being compromised by the core deficit in processing speed. [NT 504; S-6]
14. For purposes of the reevaluation Student's teacher completed Behavior Assessment Scales for Children, Second Edition (BASC-2) rating scales. The teacher's endorsements of the items queried resulted in clinically significant ratings on the behavioral symptoms index, externalizing problems composite (hyperactivity, aggression, conduct problems) and internalizing problems composite (depression, somatization). [S-6]
15. The January 2011 reevaluation resulted in Student's being deemed still eligible for special education under the category of emotional disturbance. [S-17]
16. In 5th grade, Student's reading achievement was slightly below the benchmark expected for that grade. The teacher noted Student was making progress consistent with low

average cognitive ability and did not believe a replacement curriculum [specially designed instruction] was needed at that time. However, outside the parameters of the IEP Student received the regular education intervention of an additional thirty minutes per day of reading instruction with a reading specialist. [NT 41-43]

17. In 5th grade, although Student was still instructional in math at a 5th grade level Student's math was slightly below the benchmark expected for grade. The teacher did not believe that a math replacement curriculum [specially designed instruction] was needed at the time. [NT 47-48]
18. Student's deficits in organization were targeted under the IEP in 5th grade through direct occupational therapy services, as well as through strategies such as "check-in" at the beginning of every day with the special education teacher. Assignment completion was tracked daily as part of Student's positive behavior support plan. In most months Student completed over 90% of assignments appropriately. [NT 48; S-8]
19. By 5th grade (2012-2013), Student was meeting behavioral expectations across all school settings with only minor redirection and prompting. Student followed classroom routines without reminders, was receptive to feedback, could discuss problems calmly and appropriately, and accepted consequences with little or no argument. [S-8]
20. In 5th grade, Student's greatest area of year-to-year improvement was in the area of demonstrating appropriate social skills. From September 2011 through January 2013 using a respectful tone of voice, completing assignments appropriately and staying focused, and following initial directions were recorded as being consistently met at 90 percent or above, and no data point fell below 83 percent. [S-8]
21. From September 2011 through January 2013 the recorded number of "problem episodes" per month was consistently 0 or 1, with the exception of October 2011 when there were three and October 2012 when there were two. At the time of the 5th grade January 2013 IEP meeting, the Parent noted her satisfaction with Student's program and support, although she continued to have concerns about peer interaction and about the peer pressure Student would face in the coming middle school year. [S-8]
22. However, toward the end of 5th grade, on May 9, 2013, the Parent disapproved the Notice of Recommended Educational Placement (NOREP) that was issued to plan for Student's transition to the middle school. Parent wrote on the NOREP, "I do not feel that [Student's] educational needs have been met even with excellent support from [Student's] teachers. [Student] is not prepared for middle school." [S-10]
23. In response to the Parent's concerns, the District convened a meeting wherein the Parent was given a copy of the Procedural Safeguards along with an explanation of that document. [NT 136]

24. At that meeting the IEP team addressed Student's transition to middle school. The elementary school emotional support teacher collaborated closely with the emotional support teacher at the middle school on Student's transition. [S-12]
25. Going into 6th grade in the middle school the IEP provided that Student would receive daily check-in and check-out sessions with the emotional support teacher in the emotional support middle school classroom, and IEP team discussion focused on adding a [same gender] role model to Student's academic day. Student's math instruction was changed to a small group special education class. Student's language arts (reading and written expression - RELA) instruction was delivered in a regular education classroom co-taught by a regular education teacher and a special education teacher, and Student was given the assistance of emotional support instructional assistants. [NT 426-428, 457, 511; S-12]
26. At time the IEP for 6th grade was being prepared, the Parent indicated that she wanted Student to attend a private school [Private School]. [S-12]
27. The District issued a second NOREP at the end of the IEP meeting. On June 3, 2013 the Parent returned the second NOREP indicating that while she did not approve of the IEP, she was "not contesting [it] at this time." [S-13]
28. Student's transition to middle school for the 2013-2014 6th grade year was facilitated by the District's effecting a building transfer of personnel, having the same emotional support instructional assistant work with Student's 6th grade emotional support teacher as had worked with Student's 5th grade emotional support teacher. Although the transition from elementary school to middle school is challenging, especially for emotional support students, Student's transition to middle school went "okay" for the first few months of 6th grade. However, Student's behaviors began to deteriorate. [NT 426, 429-430. 509]
29. On November 19, 2013, the District sought written parental permission to complete a reevaluation of Student. On January 6, 2014, after seven weeks, the Parent provided verbal permission. Although the District went ahead with the reevaluation based on this verbal permission, the Parent did not provide written permission until February 10, 2014. [S-16]
30. Once it received the Parent's verbal permission, the District began the reevaluation and completed the reevaluation report (RR) on January 24, 2014, well before the allotted 60 calendar days. The (RR) included a record review, present behavioral and academic levels, cognitive ability assessment, academic achievement assessment, and behavioral rating scales. [S-17]
31. The RR noted Parent's specific concern around math skills, noting that Student could not effectively make change or count money [S-17]
32. Student's NWEA (MAP) testing showed Student's score in language usage was 202, a 22-point increase from September but only bringing Student to the 11th percentile as compared with same age children. Student's score in math was 204, a 10-point increase

from September but only in the 17th percentile. Student's lexile (readability score) for September was in the 15-165 range, approximately equivalent to a 1st grade reading level. [S-7]

33. In contrast to the MAPS testing, standardized academic achievement testing with the Woodcock Johnson Test of Achievement – Third Edition (WJ-III), a well-established and well-recognized nationally normed assessment instrument showed Student in the Average range (90) for Broad Reading, in the Extremely Low range (67) for Broad Math, and in the Well Below Average range (72) for Broad Written Language. Subtest scores were as follows: Letter-Word Identification Average (94) Reading Fluency Well Below Average (72), Passage Comprehension Average (92). As in the past, reading fluency was affected by Student's core deficit in processing speed. In the math subtests Calculation was Extremely Low (63), Math Fluency was Well Below Average (75) and Applied Problems was Well Below Average (79). In Written Expression Writing Samples was Low Average (87), Writing Fluency was Well Below Average (71) and Spelling was Well Below Average (74). [NT 504; S-17]
34. Student's emotional support teacher completed the Connors-3 rating scale and her endorsements yielded clinically significant ratings for attention, learning problems, executive functioning, and peer relations. At risk ratings were registered for hyperactivity, impulsivity, defiance and aggression. [S-17]
35. A review of Student's positive behavior support plan showed a consistent pattern of increases in percentages of accomplishment from the September score to the January score in each area monitored, but with a striking dip during the months of October, November and December as follows: Be There, Be Ready: S 73.25%, O 54.38%, N 30%, D 62.6%, J 87.5%; Be Responsible: S 64.7%, O 47%, N 28%, D 66%, J 78%; Be Respectful: S 77.5%, O 52%, N 30%, D 72%, J 90%; Be Safe: S 79%, O 62%, N 31%, C 73%, J 97%; Follow Directions: S 75%, O 52%, N 30%, D 67%, J 88%.¹⁰ [S-17]
36. Based on the RR the District found that Student continued to be eligible for special education under the classification of emotional disturbance. Given that there was a significant difference between Student's cognitive ability and Student's expected academic achievement scores based on ability Student also qualified for a secondary classification of specific learning disability in math and written expression. [S-17]
37. The Parent agreed with the results of the reevaluation and approved a NOREP adding the secondary eligibility category of specific learning disability. [S-18]
38. The IEP team convened on February 10, 2014 following completion of the RR to craft a new annual IEP. [S-20]

¹⁰ This pattern is fascinating, and the record does not provide any explanations but leads to the hypothesis that some situation[s] in school or at home was/were affecting Student during the period of the dips.

39. The IEP provided for continuation of math instruction in the small group special education setting. [S-20]
40. Because Student's scores in reading remained in the average range, except for fluency, the IEP team did not recommend specially designed instruction in reading. The IEP provided for continuation of the co-taught setting (both a regular education teacher and a special education teacher in the regular education classroom) for reading/language arts (RELA). The District did not move Student's instruction in written expression to a small group setting [NT 512; S-20]
41. An instructional aide to accompany Student to science and social studies was also continued. [S-20]
42. An FBA and behavior plan from 2013 were incorporated into the IEP without revision as the team found it to be still appropriate. [S-20]
43. Student's reading score on the PSSA improved from 4th to 6th grade as follows: Spring 2012 Below Basic; Spring 2013 Below Basic, Spring 2014 Basic. Mathematics remained at the Below Basic level all three years¹¹ [P-8]
44. Concerned about the possibility of Student's failing language arts (which ultimately did not happen) and about a notice she had received about summer school, on July 28, 2014 the Parent wrote to the director of special education indicating that she had seen little or no positive change in social skills or academics since Kindergarten. Further, the Parent notified the District that she was removing Student from the District and placing Student in a military school because it had the "structure, discipline, and academic plans" that she believed were lacking at the middle school. . [NT 76, 94; S-22]
45. At this time although she had previously agreed with the January 2014 RR the Parent also wrote that she found the RR "insufficient and inappropriate" and on the advice of her advocate asked the District to provide public funding for an Independent Educational Evaluation [IEE]. [NT 67; S-22]
46. The District convened a meeting and agreed to fund the IEE. [S-23, S-24]
47. Another IEP meeting was convened on August 27, 2014 at the start of 7th grade to discuss the Parent's concerns and her notice of intent to pursue private placement. Two IEP revisions were made to the SDI but the Parent remained intent upon placing Student outside the District. [NT 157; S-27]
48. A few days after the start of the 2014-2015 school year (7th grade) the Parent withdrew Student from the District and placed Student in a military school, a private residential school without special education supports. The results of the IEE were not yet available at the time the Parent removed Student from the District. [NT 158]

¹¹ Since the exhibit only contains the cover page the actual numerical scores are not in evidence. This omission is mentioned because sometimes a student is just a point or two from the next higher category.

49. Student soon exhibited inappropriate behavior in military school, breaking a hand-held game, breaking two iPads and on one occasion hitting another student over the head with a gaming console. Student had disproportionate reactions to normal day to day social interactions. After about three months the military school determined that Student's learning and behavioral needs could no longer be supported in that setting and asked the Parent to remove Student. [P-3]
50. Student re-enrolled in the District at the end of November 2014. Student struggled with the transition, having missed units in all classes. Student did not want to participate in class and had difficulty with assignment completion. Additionally Student appeared to be "fragile", crying frequently and [wearing specific clothing to school] every day. [NT 213, 219]
51. The District sought to convene an IEP team meeting soon after Student's return but the meeting was not held until February 26, 2015, having been rescheduled several times due to severe weather as well as requests for rescheduling from the Parent. The team eventually met and developed a new annual IEP. [S-33]
52. The new IEP contains a revised positive behavior support plan. [S-33]
53. The IEP team discussed Student's performance in Language Arts noting Student had failing grades in the second marking period, mainly due to assignments not being completed and also due to Student's having missed an entire unit at the start of the year in a scaffolded program. The IEP team decided to keep Student in the co-taught RELA class until the IEE was complete. [NT 213, 440, 450; S-31]
54. Student was recommended for homework club with the learning support teacher to catch up on work after school on Monday, Tuesday, and Wednesday, but the Parent did not want Student to attend. [S-44]
55. On February 27, 2015, the District received the evaluation by the independent evaluator. A corrected version was received on March 3, 2015. On March 9, 2015, before the IEP team could be convened to consider the independent evaluator's report, Parent filed her due process complaint in this matter. [S-34, S-36]
56. The independent evaluation found Student's full scale cognitive score to be in the Low Average Range (84), consistent with the District's previous assessments. Again, as in previous assessments processing speed was a decided deficit, in the Extremely Low Range (62). [S-34]
57. The independent evaluator used the Kaufman Test of Educational Achievement – Second Edition (KTEA-II Form A) a nationally normed well established assessment instrument to assess academic achievement. Student's scores in reading were all in the Average Range: Letter and Word Recognition 97, Reading Comprehension 94, Reading

Composite 94. Student also achieved the following average scores: Nonsense Word Decoding 90, Word Recognition Fluency 96, and Decoding Fluency 91. [S-34]

58. On the Kaufman Student's math scores were uniformly low as follows: Math Concepts and Applications 64, Math Computation 70, and Math Composite 66. [S-34]
59. Kaufman results for written expression were also low: Written Expression 67, Spelling 68. [S-34]
60. Student's January 2014 academic achievement results on the District-administered WJ-III and the February/March 2015 academic achievement results on the independent evaluator-administered KTEA-II mirrored one another with reading in the average range while math and written expression were both low relative to Student's cognitive ability. [S-17, S-34]
61. The NWEA progress reporting of trends from Fall 2013 through Spring 2015 shows a very robust increase in reading skills (1st percentile to 51st percentile), very little increase in math skills (5th percentile to 13th percentile) and minimal increase in written expression skills (1st percentile to 8th percentile).¹² [NT 364 – 365, 367; S-30]
62. The District has been using the Springboard Curriculum to provide Student's RELA instruction. Both the independent evaluator who observed Student in school during a writing task and the 7th grade RELA teacher expressed the concern that this curriculum is too demanding and that it is not appropriate for Student. [NT 245-246, 265, 367-369; S-30, S-33, S-34]
63. The independent evaluator who has frequently evaluated students with autism concluded that Student has autism based upon the Gilliam Autism Rating Scale, the BRIEF, the BASC as well as a record review, her observations of Student in school and an interview with the Parent. She concluded that Student fit the DSM-5 diagnostic criteria for autism given deficits in social-emotional reciprocity, non-verbal communication, and maintaining and understanding relationships. [NT 229, 239-243]
64. The Parent declined to attend a meeting with the District to consider the independent evaluation. [S-38; S-40]
65. The District completed a reevaluation on April 28, 2015 in light of the independent evaluation and recommendations. The RR includes multiple observations by the school psychologist, and by an autism consultant from the [local] IU. The RR continued to find Student eligible under the disability category of emotional disturbance, and the District considered but ultimately rejected the independent evaluator's diagnosis of autism. [NT 519; S-39]

¹² The reader should note that in the first three months (September, October, November) of the 2014-2015 school year (7th grade) Student was out of the District in residential military school and that during December and presumably January Student was adjusting to being back in the district having missed the first third of the year's instruction across the board.

66. On May 22, 2015, the District convened the IEP team to consider the IEE report and the District's new RR. The Parent did not attend. A new IEP was developed. [S-41]
67. The May 22, 2015 IEP includes the following changes from the February 2015 IEP: revision of the social skills goal; added an organization goal; added direct instruction on coping skills and pro-social strategies at least once per week; direct instruction in organization; and SDI for a research-based reading and language arts curriculum delivered in a special education setting. [S-41]
68. The May 22, 2015 IEP provided that Student would receive all core academic subjects (reading, writing, and math) in a small group special education setting. The remainder of the day Student is included in the regular education classes, but has the support of instructional assistants for academic classes. Student also has 50 minutes per day in the resource classroom for academic support, social skills, and organization instruction. [NT 455, 476]
69. At Parent's request the IEP team was again convened on September 11, 2015 at the start of 8th grade. Counsel attended on behalf of both parties. Notably the Parent or her counsel did not request any changes to the IEP at that IEP meeting. [NT 176; S-45]
70. In October 2015, Student was hospitalized upon the recommendation of Student's private therapist due to threats made while in therapy. Prior to Student's hospitalization there were no signs of difficulty at school. [NT 119-122, 453]
71. Student received no new diagnoses from the inpatient unit. Student's discharge paperwork contains no recommendations regarding school. The paperwork indicates the reason for hospitalization was aggressive behavior, poor impulse control, and suicidal ideation. No such aggressive behaviors had been seen in the public school environment. Student's medications were adjusted during the hospitalization. [NT 202, 526-527; S-46]
72. Student's social skills instruction is not based on any specific social skills curriculum, rather it is "eclectic". [NT 10-11]
73. The independent evaluator underscored the critical importance of social skills instruction for Student that is organized and systematic and has a hierarchy of goals. [NT 262-264]

Legal Basis and Discussion

Burden of Proof: The burden of proof, generally, consists of two elements: the burden of production [which party presents its evidence first] and the burden of persuasion [which party's evidence outweighs the other party's evidence in the judgment of the fact finder, in this case the hearing officer]. The burden of persuasion lies with the party asking for the hearing. If the parties provide evidence that is equally balanced, or in "equipoise", then the party asking for the hearing cannot prevail, having failed to present weightier evidence than the other party. *Schaffer*

v. Weast, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006); *Ridley S.D. v. M.R.*, 680 F.3d 260 (3rd Cir. 2012). In this case therefore the Parent asked for the hearing and thus bore the burden of proof. As the evidence was not equally balanced the Schaffer analysis was not applied.

Credibility: During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make “express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses”. *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003); *see also generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). I found the witnesses to be generally credible, and although I do not accept the independent evaluator’s opinion that Student is on the autistic spectrum I recognize that professional minds may disagree on this point. The important information that the independent evaluator brought out is that Student most likely requires speech/language services and certainly does require systematic social skills instruction.

Issue: Did the District deny Student a free, appropriate public education in the areas of reading, language arts/written expression, mathematics and transition planning and if so is Student entitled to compensatory education, and in what form and amount?

The District denied Student FAPE in the area of mathematics and written expression, and Student is entitled to compensatory education services in these areas.

FAPE: Special education issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 (“IDEIA” or “IDEA 2004” or “IDEA”), which took effect on July 1, 2005, and amends the Individuals with Disabilities Education Act (“IDEA”). 20 U.S.C. § 1400 *et seq.* (as amended, 2004). “Special education” is defined as specially designed instruction...to meet the unique needs of a child with a disability. ‘Specially designed instruction’ means adapting, as appropriate to the needs of an eligible child ...the content, methodology, or delivery of instruction to meet the unique needs of the child that result from the child’s disability and to ensure access of the child to the general curriculum so that Student or she can meet the educational standards within the jurisdiction of the public agency that apply to all children. C.F.R. §300.26

In *Board of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034, 3051 (1982), the U.S. Supreme Court articulated for the first time the IDEA standard for ascertaining the appropriateness of a district’s efforts to educate a student. It found that whether a district has met its IDEA obligation to a student is based upon whether “the individualized educational program developed through the Act’s procedures is reasonably calculated to enable the child to receive educational benefits.”

Benefits to the child must be ‘meaningful’. Meaningful educational benefit must relate to the child’s potential. *See T.R. v. Kingwood Township Board of Education*, 205 F.3d 572 (3rd Cir.

2000); *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999); *S.H. v. Newark*, 336 F.3d 260 (3rd Cir. 2003) (district must show that its proposed IEP will provide a child with meaningful educational benefit).

However, a school district is not required to maximize a child's opportunity; it must provide a basic floor of opportunity. See *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290 (7th Cir.), *cert. denied*, 488 U.S. 925 (1988). In a homespun and frequently paraphrased statement, the court in *Doe v. Tullahoma City Schools* accepted a School District's argument that it was only required to "...provide the educational equivalent of a serviceable Chevrolet to every handicapped student." and that "...the Board is not required to provide a Cadillac..." *Doe ex rel. Doe v. Bd. of Ed. of Tullahoma City Sch.*, 9 F.3d 455, 459-460 (6th Cir. 1993)

The Third Circuit has adopted this minimal standard for educational benefit, and has refined it to mean that more than "trivial" or "*de minimus*" benefit is required. See *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 1179 (3^d Cir. 1998), *cert. denied* 488 U.S. 1030 (1989). See also *Carlisle Area School v. Scott P.*, 62 F.3d 520, 533-34 (3^d Cir. 1995), quoting *Rowley*, 458 U.S. at 201; (School districts "need not provide the optimal level of services, or even a level that would confirm additional benefits, since the IEP required by IDEA represents only a "basic floor of opportunity"). It is well-established that an eligible student is not entitled to the best possible program, to the type of program preferred by a parent, or to a guaranteed outcome in terms of a specific level of achievement, as noted in several recent federal district court decisions. See, e.g., *J. L. v. North Penn School District*, 2011 WL 601621 (E.D. Pa. 2011) Thus, what the statute guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving parents.'" *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2^d Cir. 1989).

Transition Plan: At age 14, a special education student's IEP must include a transition plan that includes appropriate measurable postsecondary goals related to training, education, employment, and, when appropriate, independent living skills. 22 Pa. Code §14.131(a)(5) "Transition services" are defined as a coordinated set of activities for a child with a disability that: (a) Is designed to be within a results-oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child's movement from school to post-school activities, including postsecondary education; and (b) Is based on the individual child's needs, taking into account the child's strengths, preferences, and interests; and includes: (i) Instruction; (ii) Related services; (iii) Community experiences; (iv) The development of employment and other post-school adult living objectives; and (v) If appropriate, acquisition of daily living skills and provision of a functional vocational evaluation. 34 CFR §300.43(a)

Student's last IEP pertinent to the hearing record was completed May 22, 2015 at an IEP meeting that the Parent did not attend. Another IEP meeting was convened at the Parent's request on September 11, 2015. At that meeting the Parent and her counsel did not request any changes to the May 22nd IEP, including addressing the transition portion of the IEP. As of September 11, 2015 Student had not yet turned 14. In October 2015 Student was psychiatrically hospitalized for concerning behavior outside the school setting. Student is currently back in the District and presumably the IEP team met upon Student's discharge from the hospital. At that meeting the

IEP team would have been responsible for including transition planning into Student's program. Student's IEPs prior to the time Student turned 14 were not inappropriate because of lack of transition planning or insufficient transition planning.

Although Student was identified from an early age as being eligible for special education under the classification of emotional disturbance, Student was not identified as having a specific learning disability until 6th grade. In Kindergarten, despite continuing significant behavioral issues that were present earlier, Student's school readiness was assessed as being within the broadly average range. Three years later, on standardized testing Student was achieving solidly average scores for word attack, letter-word identification, passage comprehension, broad reading, spelling, applied math problems and broad math, with fluency in these areas being low as a function of slow processing speed. In 5th grade when Student's reading scores were slightly below benchmark expectations but not impaired to the point of requiring specially designed instruction the District provided 30 minutes of additional reading instruction daily with a reading specialist. In math Student was instructional at the 5th grade level, but slightly below benchmark. Specially designed instruction was not deemed necessary.

Student made progress and received appropriate instruction in reading/language arts and in math through 5th grade. Identification of Student's emergent specific learning disability was not made until the reevaluation of January 2014 (6th grade). The District sought permission to perform this evaluation in November 2013 but the Parent did not give permission until January 2014, seven weeks later. Notably this was only verbal parental permission but the District admirably did not elevate form over substance and began the evaluation, not waiting until written permission was finally given in February, a total of 10 weeks after the District's initial request for permission to reevaluate Student. Accordingly, the District did not have the data upon which to revise Student's math and written expression instruction until late January 2014 and the IEP team could not meet until mid-February 2014 due to weather and the Parent's requests for rescheduling. This hearing officer finds that the program offered to Student through the February 2014 IEP was not appropriate in the area of providing specialized instruction in math, and also in written expression, as the RELA co-taught class and its Springboard curriculum were insufficient to address Student's very poor writing skills. The IEP crafted on May 22, 2015 and reviewed in September at a meeting with the parties and their respective counsel corrects these deficiencies. Accordingly compensatory education services will be awarded for time periods to be specified in the Order.

Compensatory Education: Compensatory education is an appropriate remedy where an LEA knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only a trivial educational benefit, and the LEA fails to remedy the problem. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996); *Ridgewood Education v. N.E.*, 172 F.3d 238, 250 (3d Cir. 1999). *Ridgewood* provides that a school district has a reasonable period of time to rectify a known issue. Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990). Courts in Pennsylvania have recognized two methods for calculating the amount of compensatory education that should be awarded to remedy substantive denials of FAPE. Under the first method ("hour for hour"), which has for years been the standard, students may potentially receive one hour of compensatory education for each hour that FAPE was denied. *M.C. v. Central Regional*. An alternate, more recent method ("same

position”), aims to bring the student up to the level where the student would be but for the denial of FAPE. *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 523 (D.D.C. 2005); *B.C. v. Penn Manor Sch. District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006); *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 (M.D. Pa. 2014); *Ferren C. v. Sch. District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010)(quoting *Reid* that compensatory education “should aim to place disabled children in the same position that they would have occupied but for the school district’s violations of the IDEA.”). The “same position” method has been recently endorsed by the Third Circuit in *G.L. v. Ligonier Valley Sch. Dist. Authority*, 115 LRP 45166, (3d Cir Sept. 22, 2015) although the court also cites to *M.C.*

The “same position” method, while essentially ideal, has significant practical problems in that unless the parents produce a credible expert to testify about what is needed to bring the child up to the same position he or she would occupy but for the denial of FAPE the hearing officer is left with having to craft a remedy based on educated estimation. Although on several occasions this hearing officer has been able to do so with relative confidence, the instant matter does not present such an opportunity. Therefore the default “hour for hour” approach will be used. Student is entitled to compensatory education services in mathematics and written expression from March 1, 2014 when the results of the district’s February RR were available through the last day of school in June 2014, and from January 2015 after Student returned and adjusted to the District after the military school placement through the last day of school in June 2015. Given that the IEP revisions made in May 2015 and reviewed in September 2015 were appropriate no compensatory education shall be awarded for the current school year.

Issue: Is Student’s current placement sufficiently supportive to enable Student to make meaningful progress?

Student’s current program and placement is generally sufficiently supportive to enable Student to make meaningful progress, but additional services in the area of speech/language and social skills need to be provided.

In accord with the foregoing discussion, Student’s last IEP revision done in May 2015 and reviewed by the parties and their respective counsel is appropriate. Given Student’s specific learning disability in mathematics and written expression the IEP team must track progress carefully and revise the IEP as deemed necessary if progress is not being recorded. Student’s reading skills are on par with and even somewhat above what would be predicted based on cognitive ability and is not an area of deficit. Student is functioning well in the area of behavior and this should be celebrated given the inauspicious early beginnings in Student’s life. In order for the program and placement to be appropriate Student must receive a research-based systematic program of social skills instruction, and Student must receive such speech/language services particularly in the area of pragmatics as will be deemed to be necessary by the speech/language pathologist.

The most striking aspect of the record in this hearing officer’s estimation, given Student’s early social history, is Student’s very unlikely success in the area of behavior. Acknowledging that behavior problems in the home may be present and are expected given the social history, the District and the Parent are due very substantial commendation for bringing this child to the point where inclusion in a regular public school setting is proceeding with very few problems, even considering that Student had to readjust to the public school environment after the unfortunate

failed military school experience. In order for Student to remain successful in the least restrictive environment of a regular public school the parties are encouraged to put aside their differences and engage in future ongoing cooperation for Student's benefit.

Issue: Should the District classify Student as a student with Autism?

Student should not be classified as a student with Autism, and the classifications of emotional disturbance and specific learning disability in mathematics and written expression remain appropriate. However, Student's needs in the areas of speech/language and social skills have not been appropriately addressed.

In the Parent's written closing argument Parent counsel makes the important point that a label is not necessarily determinative of the services a student receives. However the Parent's argument then posits that the autism label is important in that the "diagnosis is so closely associated with the significant social function and language deficits that [Student] demonstrates".

This hearing officer, based upon many years of clinical experience working with young children, gives heavy weight to Student's very early history of abuse and repeatedly disrupted relationships with caregivers, as well as early evaluation data and school reports, and concludes that there are other diagnoses/factors than the neurological disorder of autism that account for Student's presentation throughout the years. These diagnoses/factors predominantly support the classification of emotional disturbance. That having been said, this hearing officer agrees with the Parent that "the District has not sufficiently addressed [Student's] deficits in language use and social functioning" and finds reasonable the Parent's alternative consideration, "The DSM-5 criteria for autism recommends that individuals who have marked deficits in social communication but do not otherwise meet the criteria for autism should be evaluated for social (pragmatic) communication disorder."

The District's failure to utilize any standardized assessment to determine Student's speech and language needs is inappropriate, particularly where, as here, it has been acknowledged by teachers and evaluators who have worked with the student that Student has difficulty with pragmatic language. A speech/language evaluation will be ordered so as to determine Student's specific needs in this area.

Section 504: Finally, with respect to any Section 504 claims, this hearing officer notes that the obligation to provide FAPE 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. 2005). Because all of the Parent's claims have been addressed pursuant to the IDEA, there need be no further discussion of any claims under Section 504.

Order

It is hereby ordered that:

1. The District has not provided FAPE in the areas of written expression and mathematics.

The District shall provide Student with 30 minutes per school day of compensatory education services in the area of tutoring in written expression for every day Student was in school during the regular academic year, excluding summer school, as follows: from March 1, 2014 through the last day of school in June 2014; and from January 1, 2015 through the last day of school in June 2015. The total amount of hours of tutoring in written expression shall not exceed 90 hours. The hours shall be valued at the usual and customary rate for private tutoring by a teacher certified in middle school English in the geographical area in which the District is located. The hours may be used at any time that is convenient for the Student and the Parent, but must be used before the day Student begins 11th grade.

The District shall provide Student with 30 minutes per school day of compensatory education services in the area of tutoring in mathematics for every day Student was in school during the regular academic year, excluding summer school, as noted above. The total amount of hours of tutoring in mathematics shall not exceed 90 hours. The hours shall be valued at the usual and customary rate for private tutoring by a teacher certified in middle school mathematics in the geographical area in which the District is located. The hours may be used at any time that is convenient for the Student and the Parent, but must be used before the day Student begins 11th grade.

2. The District has not provided Student FAPE in the area of speech/language services.

Within 60 calendar days of the date of this Order, the District must conduct a thorough speech/language evaluation of Student's skills in the areas of receptive language, expressive language and pragmatic language and prepare a written report of the evaluation. No more than ten school days subsequent to the completion of this evaluation the IEP team must meet to consider the evaluation and to add speech/language services into Student's IEP as per any recommendations of the speech/language evaluator.

3. The District has not provided FAPE in the area of social skills instruction.

Within 20 school days of the date of this order the District must select and purchase a research-based integrated program of social skills instruction appropriate for Student's age. The District must deliver this program with fidelity in accord with the personnel qualifications, the manner and the frequency specified in the publisher's instructions.

4. Student remains properly classified under the IDEA as a student with emotional disturbance and a specific learning disability in math and written expression.

Any claims not specifically addressed by this decision and order are denied and dismissed.

December 17, 2015

Date

Linda M. Valentini, Psy.D., CHO

Linda M. Valentini, Psy.D., CHO
Special Education Hearing Officer
NAHO Certified Hearing Official

APPENDIX

PENNSYLVANIA
SPECIAL EDUCATION HEARING OFFICER
LINDA M. VALENTINI, PSY.D., CHO

INTERIM RULING
KNOWN OR SHOULD HAVE KNOWN DATE

Re: T.G. vs. Quakertown Community School District
ODR # 15986/ 14-15 AS

This interim ruling follows a preliminary hearing held subsequent to the recent ruling of the Third Circuit in *G.L. v. Ligonier Valley Sch. Dist. Authority*, 115 LRP 45166, (3d Cir Sept. 22, 2015).

The IDEA statute of limitations requires a parent to request a due process hearing within two years of ‘the date the parent...knew or should have known about the alleged action that forms the basis of the complaint.’ (emphasis added) 20 U.S.C. §1415(f)(3)(C). That date is commonly referenced as the ‘KOSHK’ date. The Parent in the instant matter filed a request for a due process hearing on March 9, 2015, asking for “full days of compensatory education from the 2011-2012 through the 2014-2015 school year, to date”. [S-36]

In his opening statement Parent’s Counsel explained, “[the Parent] asked for an independent evaluation ... because of her concerns that [Student]’s needs may not be completely and thoroughly identified and that [Student]’s programming may not be appropriate for [Student]’s needs.” The independent evaluation report was issued on or about January 24th, 2014 [S-17]. Upon receipt of the independent evaluation, counsel continued, “[the Parent] then became convinced...that [Student] was being denied an appropriate education, and has been denied an appropriate education, and this is identified by the precipitous drop in [Student]’s level of achievement as compared to the 2011 evaluation and the [independent evaluation]”. However, per the Prior Written Notice provisions of the IDEA, section 1415(c), an LEA “action” is the identification, evaluation, placement or provision of FAPE to the Student. In this formulation, FAPE is the services promised or delivered – not the meaningful progress that either does or does not result.

In her testimony the Parent referred again and again to her ongoing concerns about [Student]’s program for reading, writing and math during the entirety of [Student]’s educational career [e.g. NT 86, 94]. However, on May 9, 2013 she took a definitive documented step when she checked that she disapproved the NOREP providing for “Itinerant Emotional Support offered at [Student]’s home school...” writing, “I do not feel [Student]’s educational needs have been met even with excellent support from [Student]’s teachers - [Student] is not prepared for (public) middle school”. Under “I request” Mother checked the box titled ‘due process hearing’. [S-10]. However, on June 3, 2013 the Parent signed another NOREP, again offering Itinerant Emotional Support, but this time creating and checking her own box that said “I do not approve but am not

contesting at this time” [S-13]. The fact that the Parent at that time did not follow through with her May 9, 2013 intent to request due process is of no import. I conclude that the action complained of is the May 9, 2013 NOREP, offering Itinerant Emotional Support. As the Parent knew of this NOREP on the day of its issuance, her KOSHK date is May 9, 2013. The due process complaint was filed on March 9, 2015 a date twenty-two months later but still within two years of the date of issuance and Parent’s rejection of the District’s NOREP. To the extent that the complaint alleges any other District action which Parent contests, and to the extent that any such other action occurred prior to March 9, 2013, such action is time barred. The District has shown that Parent admitted knowledge and concern about all other such actions, but Parent has failed to advance any evidence regarding the date on which Parent knew or should have known of any such action. On this record, I conclude that all such actions are time barred.

Date

Linda M. Valentini, Psy.D., CHO

October 15, 2015

Linda M. Valentini, Psy.D., CHO
Special Education Hearing Officer
NAHO Certified Hearing Official