

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: D.W.

ODR #16267/14-15 AS

Date of Birth: [redacted]

Dates of Hearing:

June 17, 2015

July 3, 2015

August 5, 2015

CLOSED HEARING

Parties to the Hearing:

Parent[s]

Representative:

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School District of Philadelphia

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Date Record Closed:

August 13, 2015

Decision Due Date:

September 7, 2015

Date of Decision:

August 15, 2015

Hearing Officer:

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

Background

Student¹ is an early teen-aged child residing in the School District of Philadelphia (hereinafter District) who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA) and Pennsylvania Chapter 14 under the current classifications of autism and speech/language impairment. As such, Student is also a qualified handicapped person / protected handicapped student under §504 of the Rehabilitation Act of 1973 (29 U.S.C. §794), the federal regulations implementing §504 (34 C.F.R. §§104.32—104.37), and Chapter 15 of the Pennsylvania Code. Student attended 7th grade in the 2014-2015 school year and has been educated in Student's current school (hereinafter current school) since 5th grade. Student has been in a combination of supplemental learning support and general education programming.

Believing that Student requires an autistic support placement which is not available at Student's grade level at the current school, in December 2014, half-way through 7th grade, the District sought to move Student to another school building (hereinafter proposed school) and change the program/placement to full time autistic support with some inclusion in general education. The Parents objected and asked for this hearing because they believe that the proposed program/placement is not appropriate and, furthermore, that Student should not be moved for one year and then have to transition to another school for 9th grade. Additionally, although they favor the location of the current school and wish Student to continue there in learning support rather than autistic support, they do not believe that Student's program has offered a free appropriate public education (FAPE), nor do they believe that the proposed IEP for 2015-2016, implemented in any setting, offers FAPE. They are requesting compensatory education and that an appropriate IEP be developed for implementation in the current school.²

Having considered all the evidence provided to me I find in favor of the Parents.

Issues

1. Is the program/placement the District offered to Student for the 2015-2016 school year appropriate?
2. Was Student's program appropriate during the 2014-2015 school year, and if not is compensatory education due from March 25, 2015³ to the end of that school year?

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 The program/placements in the two school buildings are different from one another. However, for ease of reference the terms "current school" and "proposed school" are used to designate both location and program/placement.

³ To settle a dispute regarding a complaint the Parents filed in November 2014, the parties entered into a settlement agreement on January 21, 2015 [P-40]. The Parents wanted the period of potential recovery for the current complaint to begin on January 22, 2015. In a private pre-hearing conference the hearing officer determined that an equitable start to the recovery period was March 25, 2015, given delays in scheduling

3. If compensatory education is due, in what form should it be offered and in what amount?

Stipulation

For purposes of Section 504 claims the District agrees to stipulate that it receives federal funding. [NT 33-34]

Findings of Fact

1. Student is an early teen-aged student residing in the District. Student will be in 8th grade during the 2015-2016 school year. [NT 35]
2. Student is currently eligible for special education services under the categories of autism and speech/language impairment; Student has been identified as an eligible child since kindergarten. [NT 36; S-1, P-15]
3. Student has been enrolled in the current school since 5th grade. [P-2, P-13]
4. Student is a quiet, cheerful, and approval-seeking child who needs minimal redirection and does not engage in behaviors that are disruptive to peers or to the teaching process. [NT 236, 251, 582, 594, 939-940]
5. A reevaluation report issued by the District lists Student's general intellectual ability score as 53 which is in the mild to moderate range of intellectual disability. [NT 405, 432-434]
6. A private psychologist tested Student's cognitive ability using the Leiter which assesses non-verbal cognitive skills. On the Leiter Student achieved a cognitive ability score of 86 which is in the low average range of intellectual ability. The private psychologist also assessed Student's cognitive ability with the Stanford Binet, which requires verbal and non-verbal responses. On the Stanford Binet Student scored in the low 60's, in the mild range of intellectual disability. [NT 546, 557-559, 634; P-2, HO-1]
7. The District's psychologist opined that Student will likely be two to three years behind in academics, and that progress is demonstrated by making gains regularly throughout the year. The private psychologist believes that using the low 60's IQ score, Student may likely reach the 6th grade level upon graduation. [NT 456, 566-567, 635]
8. The private psychologist found that Student has a learning disability. The District disagrees with this finding, attributing Student's academic struggles to deficits in

IEP meetings that were largely attributable to the Parents' and their Educational Consultant's schedules and to allow the District a reasonable rectification period .

- expressive and receptive language and autism rather than to a discrepancy between ability and achievement. [NT 410, 452-454, 460-461; P-2, P-20]
9. Student has been served under an April 2013 Individual Education Plan (IEP) as it was the last IEP approved. The Parents rejected all subsequent proposed IEPs. [P-9, P-10, P-12]
 10. Student has been receiving supplemental learning support programming at the current school with more time spent in general education than special education classes. [NT 147; P-7, P-9]
 11. Student has difficulties in the areas of reading decoding and spelling (encoding). [NT 37-38]
 12. These difficulties affect reading comprehension and written expression. Student can more easily understand a passage that is read to Student and more easily compose thoughts/ideas if someone else writes them down. [NT 39]
 13. Student requires a small-group, intensive, multi-sensory, sequential instruction program for reading with demonstrated effectiveness for students with language impairments. [NT 565-566, 929-930; P-2, P-3]
 14. Although Student likes math, word problems are difficult and application of math skills in the real world, changing money for example, presents with difficulty. [NT 40-41]
 15. Student requires a small-group, intensive, multi-sensory, and sequential instruction program for math with demonstrated effectiveness for learners such as Student. [NT 927; P-3].
 16. The Parents expressed concerns about reading, writing and math to the school on the Parent/Guardian Input Forms completed in January 2013 and April 2014. [P-25]
 17. Student has difficulty engaging in conversations unless the topic is of special interest to Student. [NT 41]
 18. Student has had long-standing issues with anxiety that are expressed overtly by rubbing and scratching self and twisting/pulling out hair (trichotillomania). [NT 42, 126; P-10]
 19. The Parents expressed concern about these anxiety-related behaviors on an additional Parent/Guardian Input Form completed in April 2014. [P-25]

20. As a child with autism, Student requires training in fundamental social skills such as initiating conversation with peers and understanding social cues. [NT 717-719, 738]
21. The District informed the Parents that it could not provide social skills training at the current school and that this service had to be obtained elsewhere. After a long application/waiting list process the Parents were able to enroll Student in twice-weekly social skills training at an agency specializing in children with autism. [NT 43, 45, 109-110; P-42]
22. Parents have arranged for private speech/language therapy for Student once per week. [NT 45; P-42]
23. Parents have concerns that the amount of speech/language therapy services provided to Student in school is not sufficient. In its most recent proposed IEP the District increased its offer from 600 minutes per IEP term to 900 minutes per IEP term (90 minutes per month). [NT 509-511; P-11, P-12]
24. A private speech/language therapist conducted an evaluation and found Student to have speech and language deficits in the areas of language processing, specific language, pragmatic language, and articulation. [P-4]
25. Student requires individual speech/language therapy to address semantics, vocabulary, syntax, and inferencing⁴; Student requires small group speech/language therapy to address social skills and pragmatic language deficits. [NT 763-64; P-4]
26. The private speech/language therapist provided a report in June 2015 that recommended 2 ½ hours (150 minutes) of speech therapy per week; the District did not have access to this report, prepared for litigation purposes, when drafting its IEP. [NT 809-810; P-4]
27. Parents' educational consultant, who is a psychologist and not a speech/language therapist, nevertheless has a broad background of education and experience in global aspects of autism and psycholinguistics. She believes that 90 minutes (1 1/2 hours) of speech/language therapy weekly would be appropriate for Student. [NT 846-850; P-3]
28. Parents believe that the general education curriculum is not being modified for Student. When Student comes home with homework the Parents have to break it down for Student and this can take several hours. [NT 43-44, 78-80]

⁴ Although the private speech/language therapist also opined that Student needed to work on articulation the Parents' educational consultant did not see articulation as an issue; given the need for addressing other areas of deficit I agree with the educational consultant on this point.

29. The Parents want Student to be educated in the general education environment as much as possible. [NT 112-113]
30. According to Student's schedule at the current school Student receives 45 minutes per day of English/Language Arts instruction in the general education classroom and 45 minutes of Corrective Reading per day in a special education learning support classroom. There are seven children in Student's chronological grade cohort in the corrective reading class and Student is in the middle of the group instructional levels. Smaller group instruction for reading fluency is provided. (NT 49-50, 148-149, 220, 222; P-7,).
31. General education English/Language Arts is a 90-minute instructional block. Student leaves the English/Language Arts classroom after 45 minutes and goes to a special education classroom for corrective reading. Student does not receive any instruction in the material that was taught but Student missed in the second 45-minute segment of English/Language Arts. [NT 157]
32. According to Student's schedule at the current school Student receives 45 minutes per day of math instruction in the general education classroom and 45 minutes per day of Corrective Math in a special education learning support classroom. There are 25 children in the general education classroom and there are seven children in the corrective math class. [NT 49-50, 148-149, 150-151; P-7]
33. General education Math is a 90-minute instructional block. As with the English/Language Arts, Student leaves the general education math classroom after the first 45 minutes and goes to the special education classroom for corrective math. Student does not receive any instruction in the material that was taught but Student missed in the second 45-minute segment of math. [NT 157]
34. According to Student's schedule at the current school Student receives 45 minutes of instruction in written expression per day in the special education classroom. There are six children in this class. [NT 49-50, 148; P-7]
35. Student receives instruction in science and social studies for 45 minutes per day on alternate weeks in the general education classroom. However, the entire science/social studies block is 90 minutes, so as was the case for English/Language Arts and Math, Student is pulled out of the science and social studies classes after the first 45 minutes to go to the special education Written Expression class. [NT 49-50, 153; P-7]
36. The special education teacher attempts to catch Student up on the 45 minutes of science/social studies Student misses by finding out from the teachers what main concepts were presented and then going over these and any homework materials assigned with Student for about 10 to 15 minutes before Student goes to lunch. The special education teacher does not instruct Student in the content that was missed, so if new content was introduced in the second part of the science/social

- studies block Student would not receive instruction in that content. Student does not get instruction in what Student missed. [NT 154-156]
37. Both the private psychologist and the Parents' educational consultant testified credibly that Student requires one-to-one "push in" services in the general education academic classrooms. This service should be provided by a special education teacher, or by a general education teacher or teaching assistant trained and supervised by the special education teacher. The special education teacher and the general education teacher must work together to modify the curriculum for Student. [NT 570, 646, 857- 860]
 38. Student's specials are provided 45 minutes per day in the general education setting. [NT 49-50; P-7]
 39. The last IEP agreed-upon via signed Notice of Recommended Educational Placement (NOREP) was dated April 4, 2013. [NT 57-58; P-9]
 40. At an IEP meeting on December 17, 2014 the District proposed the change in programs and schools. The Parents expressed concerns about Student changing schools, but indicated that they might consider an autistic support program if it were delivered at the current school. [NT 63-64, 114-115, 685, 694-695; S-15, P-10, P-24]
 41. The District sought to change Student's school because it believed that Student, as a child with autism, required a blended autistic support /general education placement and the current school did not have an autistic support program at Student's grade level. [NT 64-65, 94-95, 159-160, 245-246, 683, 696, 703, 724 728, 1037, 1058; P-24]
 42. In the past students at the current school in 6th through 8th grades who were autistic were placed in supplemental learning support because they did not require push-in autistic support services. Student has not received push-in autistic support services or push-in learning support services in the general education classes or the special education classes. [NT161-162]
 43. Student's 7th grade special education teacher acknowledges that the program offered at the current school did not offer FAPE. [NT 159]
 44. Student has not received any one-to-one academic instruction at the current school. [NT 162]
 45. Student has not received any counseling services at the current school. [NT 164]
 46. Student has not received any social skills training at the current school. [NT 164]

47. The Parents visited the proposed school on January 5, 2015 and rejected the NOREP after the visit. [NT 65-67, 978, 989, 994-1001; P-10]
48. In January 2015, the District was provided with a written report of a private psychological evaluation conducted in October 2014⁵. [P-2]
49. Following two IEP meetings, one on March 24, 2015 and the other on March 30, 2015 the District proposed two IEP drafts. Despite the Parent's continued opposition to the change in schools, the final IEP draft dated April 30, 2015 was designed to be implemented at the proposed school. [NT 61, 106, 170, 871; S-26, P-11, P-12, P-20, S-27]
50. The April 30, 2015 draft IEP was essentially the same as offered in March 2015 but speech/language services were increased from 600 minutes per IEP term to 900 minutes per IEP term. Thirty minutes of counseling weekly was also added. [P-11, P-12]
51. At the March IEP meetings the District focused on the IEP being offered for the proposed school. The District did not offer the option of implementing the proposed IEP at the current school. [NT 872-874]
52. The NOREP issued on April 30, 2015 called for placement in a supplemental autistic support classroom at the proposed school. The Parents rejected the NOREP and checked the box indicating that they were requesting a due process hearing. [NT 56-57; P-12]
53. The District posits that the proposed school would offer a smaller special education classroom with a teacher and an aide, with more intensive instruction in math and reading as well as functional academics, integrated social skills training and some community outings, similar to a life skills class. [NT 164-166, 938]
54. The Parents are opposed to Student being placed in the autistic support classroom at the proposed school. [NT 139-140]
55. The Parents are opposed to Student's changing schools for one year when Student will have to change again to enter 9th grade. Student does not do well with transitions and has taken a while to become adjusted to a new school. Both the current school and the proposed school end with 8th grade. [NT 75-76]

Discussion and Conclusions of Law

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,

⁵ The delay in issuing a written report was attributed to the private psychologist's busy workload. [NT 448-449, 623-624]

in this case the hearing officer]. In special education due process hearings, 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 the Parents 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). Student’s mother testified at the hearing. Although her descriptions of her child’s struggles were credible, I did not find her credible when she claimed not to be aware of which IEP the team was implementing despite attending all her child’s IEP meetings, volunteering at the current school about ten hours a week, and acknowledging that the team can only implement the last agreed upon IEP. [NT 57-60, 90-92]. All witnesses appeared to be testifying to the best of their recollections. The expert witnesses called by the Parents (psychologist, educational consultant, speech therapist) offered persuasive testimony about the deficiencies in the District’s programming for Student, and their testimony was not outweighed by that of their counterpart District witnesses who held opposing views and expressed them in a clear and respectful manner. The private psychologist’s testimony offered detailed information about Student’s strengths and needs as well as many suggestions for what would constitute an appropriate program for Student. This witness, as was her prerogative, presented best-case scenarios for what Student’s programming should look like. Although many of her suggestions are in line with what will be presented below, I do not adopt her recommendation for a full time one-to-one teaching aide. The private speech/language therapist likewise presented a wealth of information that will be useful for developing a good IEP. Again, however, her recommendations about the amount of speech/language services Student requires weekly seemed to represent a best-case scenario, while the Student’s entitlement is to only an appropriate program. The Parents’ educational consultant, while highly critical of the proposed placement, offered balanced recommendations for what an appropriate program should look like. Her review of the proposed IEP was helpful in identifying the glaring weaknesses in that document that rendered it inappropriate. The professional counterparts on the District’s side were generous in their responses and although they presented the District’s position as best they could they simply could not salvage the District’s program or placement. Staff of the proposed school did the best they could while not knowing Student, not having drafted the IEP, and not having a clearly established program ready for Student to enter in September 2015. However, of particular note, the special education liaison at the proposed school was a most effective witness and presented with justifiable

pride many positive aspects of that school as a whole. Her testimony was imbued with the spirit and love of teaching that characterizes the best teachers.

Standards for a Free Appropriate Public Education: Under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400, *et seq.*, and in accordance with 22 Pa. Code §711.1 *et seq.* and 34 C.F.R. §300.300, *et seq.* a child with a disability is entitled to receive a free appropriate public education (FAPE) from the responsible local educational agency (LEA). A FAPE is "an educational instruction specially designed . . . to meet the unique needs of a child with a disability, coupled with any additional 'related services' that are 'required to assist a child with a disability to benefit from [that instruction].'" *Board of Education v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982); *Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 127 S. Ct. 1994, 167 L. Ed. 2d 904 (2007) (citing 20 U.S.C. § 1401(29)); see also 20 U.S.C. §§ 1401(9), (26)(A). The IDEA requires that children with disabilities be educated with non-disabled peers, "to the maximum extent appropriate..." 20 U.S.C. 1412(a)(5)(A).

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, 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.

Discussion

FAPE for the Relevant Period for 7th Grade:

I hold that Student was denied FAPE in 7th grade during the relevant period.

The IDEA requires that children with disabilities be educated with non-disabled peers, “to the maximum extent appropriate...” 20 U.S.C. 1412(a)(5)(A). Relying on Student’s entitlement to the Least Restrictive Environment (LRE), the Parents have wanted Student to receive as much instruction as possible in the general education setting (NT 112-113). The District has attempted to comply with the statutory requirement and the Parents’ wishes by crafting a program that placed Student in general education for two 45-minute academic periods and one 90-minute academic period a day in addition to general education specials and lunch. Unfortunately, with all due respect to the Parents’ position on inclusion, as was their duty as educational professionals the District staff failed to recognize that the law requires that the LRE be in the *least restrictive environment that is appropriate for the child*. In this case the program Student was offered during the relevant period was not appropriate. Although they approached the issue from different perspectives, witnesses for the Parents (private psychologist, educational consultant – see NT 576, 580, 856-857) and for the District (7th grade special education teacher, special education supervisor, psychologist - see NT 278, 399-402, 465-465, 685, 727) all credibly testified that in order to receive FAPE Student requires *less* academic instruction in the general education environment, and when instruction is provided in the general education setting, Student requires individual support.

It does not take an expert to discern the flaws in the Student’s 7th grade program; there is so much wrong with the program Student was receiving that it is difficult to know where to begin.

First, Student who has at best low average range non-verbal cognitive ability and an arguable learning disability in addition to autism and speech/language impairment, was sitting without push-in support in general education English/Language Arts, Math, Science, and Social Studies classes at the 7th grade level. Whether or not the IEP team adopts the additional exceptionality of a learning disability, so long as the IEP is appropriate to address Student’s areas of need the categorization is not so important. Regardless of categorization, the District had Student’s lower scores on cognitive functioning on record and should have identified the need for one-to-one push-in support in academic general education classes and follow-up individual or small group support for those subjects in a special education setting.

Second, although all the aforementioned general education academic classes were provided in 90-minute blocks, Student was removed from all these classes at the 45-minute mark and pulled into Corrective Reading, Corrective Math, and/or Written Expression classes for the second 45-minute part of the block. Student missed the second

half of each of the general education periods and there was no attempt to instruct Student in the content of these missed half-blocks. Hence, for three periods a day Student was left with what is almost certainly an imperfect understanding of the content for which Student *was* in the general education classes, and no exposure at all to the half-classes Student missed. The special education teacher candidly testified that in regard to science and social studies she took ten to fifteen minutes of Student's lunch period to be sure Student knew what the homework assignments for these classes were, but that she did not instruct Student on the content that Student missed.

Third, the untenable situation of Student sitting in classes that Student very likely did not understand well, missing half the content, and then having to do home assignments in the bargain led to the Parents' credible perception that Student's work was not modified. Mother testified to the necessity for sometimes hours of working on homework with the Parents attempting to "break down" the work for Student.

Fourth, although anxiety is frequently a by-product of autism and/or speech/language difficulties, it is almost certain that the program to which Student was subjected exacerbated the anxiety level. Student's anxiety was visible, manifested in self-injurious behavior. There was no counseling offered to address Student's anxiety.

Fifth, as a child with autism and concomitant pragmatic language issues, Student received no school-based social skills training and insufficient school-based speech/language services.

Finally, and not surprisingly, Student did not make meaningful educational progress. Although the District posits that Student has made some progress in reading, including building fluency and improving the ability to answer comprehension questions; in math computation skills including division skills; and in written expression to the point of writing a paragraph, the analysis of progress or lack thereof brought out in the record and beautifully synthesized in Parents' closing brief compels the conclusion that Student has not made meaningful progress in reading or in math or in written expression. [NT 167, 216, 238, 240-243; P-5, P-21, P-31, P-36; Parents' Closing Brief pp. 22-25]

Given that Student was denied FAPE in 7th grade during the relevant period and that the deficiencies permeated the entire day, Student is entitled to 6 hours of compensatory education per day exclusive of homeroom but including lunchtime⁶ (9:00 am to 3:00 pm) for each day Student was in attendance from March 25, 2015 to the last day in June of the 2014-2015 school year.⁷

⁶ Student received 10 to 15 minutes of inadequate "teaching" at the beginning of the lunch period, and because of the lack of social skills development was likely not benefitting from this opportunity for interaction with nondisabled peers.

⁷ I am specifically excluding ESY. The District issued a NOREP for ESY at the end of the school year while the hearing was ongoing. The Parents rejected the offer. The hearing did not include any testimony about the proposed/rejected ESY program. [NT 726-727; S-52]

Proposed School:

I hold that the proposed change to an autistic support classroom is inappropriate, and a change in school is unnecessary.

Location: To its credit the District admitted that Student's program in the current school was inappropriate. However, its solution, moving Student to another school building and into an autistic support placement was likewise inappropriate. Before I explain why the proposed school is not appropriate for Student, I offer the following observation about the proposed school. As noted under the Credibility section, the special education liaison at the proposed school presented heartfelt and credible testimony about the advantages that the proposed school offers. (See testimony NT 976-1066). If for some legitimate reason Student were being offered an appropriate program/placement at that school (i.e. a supplemental learning support program with appropriate related services) the location issue would be a much closer call, with just slightly more weight given to the current school simply because a move for one school year with a Student with transition issues is not ideal other than for a compelling reason. The following points therefore are directed to the proposed program/placement and not to the actual proposed school building/location itself which as described by its special education liaison appears to offer features we would hope to see in all schools.

Program/Placement: Turning to program/placement, although the record amply supports the position that in order to receive FAPE Student certainly requires less time in general education and more time in special education, there is no compelling reason that Student requires the even more restrictive environment of an autistic support classroom. The District reasoned that the autistic support classroom in the proposed school is needed because Student is autistic; because it would allow Student to receive academic instruction in a smaller group of children, approximately six; because social skills training would be available in that classroom; and, because that classroom offers community field trips to assist in transition to the real world.

In fact, the learning support instruction offered at the current school was done in a group of six or seven students. Further, the District's belief that Student needed the type of functional academics that seem remarkably similar to those provided in a life skills program is not supported in the record. Additionally, the District's position that social skills instruction could be provided in the autistic support classroom at the proposed school but not incorporated into Student's program at the current school demonstrates that Student's program at the current school was not individualized for Student but rather that Student was the classic square peg being pounded into the round hole. There are research-based packaged social skills programs that can be provided by a school counselor at the current school, and certainly also can be provided one-to-one or in a very small group by the autistic support teacher who leads the class for the younger students, or by the speech/language pathologist. It defies reason that in a population of seventh and eighth graders there are not at least a few children in the current school who could profit from social skills coaching. Finally there is no support in the record for Student needing school-sponsored community field trips in order to receive FAPE.

Proposed IEP:

I hold that the proposed IEP for the 2015-2016 school year is inappropriate regardless of the location where it would be implemented.

I concur with the Parents' educational consultant that the goals and objectives are not appropriate as written as they are not clear and in most cases not measurable. Even special education personnel at the proposed school experienced being at a loss to discern exactly what the goals and objectives meant – (see for example NT 169, 294-295 299, 300-307, 335-373, P-12). I also concur with the private speech/language therapist that even the offer of 900 minutes per IEP term (ten months), which equates to 90 minutes per month or approximately 22.5 minutes per week, is insufficient. Finally I find the lack of any explicitly proposed one-to-one instruction and formal social skills training likewise renders the proposed IEP inappropriate.

Aside from the deficiencies of the four corners of the proposed IEP it is impossible to decipher exactly what Student's program would look like at the proposed school, perhaps because the IEP was written by a staff member at the current school. The teachers from the proposed school contradicted one another and the special education liaison, the sample roster was as confusing to me and to the District witnesses as a house of mirrors, the autistic support class size was unclear, the functional level of the would-be classmates was unclear, the instructional programs that would be employed were unclear and the recitals of time to be spent in special education versus general education did not fit into the hours of a school day. As of the last session of the hearing the District had not identified which autistic support classroom Student was being offered. The record is replete with illustrations of these uncertainties and contradictions too numerous to recount. (See for example NT 120-121, 169, 226, 278, 349-352, 363-367, 372-374, 565-566, 882, 927-930, 983-986, 1015-1016, 1061-1066, P-8 and P-12)

Dicta - Elements of an Appropriate IEP:

Although I will not substitute my judgment for that of the IEP team, based on the record as a whole I offer the following recommendations in order that 1) Student has an appropriate IEP going forward in September; 2) there may not have to be further litigation around 8th grade given the prior settlement agreement and this due process hearing regarding 7th grade; 3) the team can concentrate on writing goal[s] for each area of need that are clearly stated, have baselines, and are measurable in such a way that Parents can understand them and educators can implement them and provide meaningful progress monitoring; 4) the IEP team can begin as early as possible to plan for Student's high school IEP and the transition to high school.

Assuming eight 45-minute periods a day in the current school as in the school year just ended:

An appropriate IEP for Student should include a daily combination of small group (six or seven students) and one-to-one instruction in the learning support environment for a period of Reading, a period of English/Language Arts/Written Expression, and a period of Math. Reading, Math and Written Expression should be taught using research based programs that have been found appropriate for children with Student's constellation of needs.

An appropriate IEP for Student should include daily inclusion in the general education classroom for the entire double period of science and social studies with push in support. The individual providing the push in support may be a special education learning support teacher or another general education teacher. In order that Student not stand out among peers, the individual providing the push in support does not have to cover Student alone, but as in the excellent model described by the special education liaison at the proposed school and in line with the thinking of the Parents' educational consultant, be generally available for all the students in those classes but specifically available for Student. [NT 458, 732, 858-860, 1010-1013]

An appropriate IEP for Student should include at least two 45-minute periods per week of one-to-one instruction covering the material taught and the (modified) assignments given in the science and social studies general education classrooms.

An appropriate IEP for Student should include two 45-minute periods of small group (two students) and individual speech/language therapy per week. The 90 minutes of weekly speech/language therapy should address pragmatic language/social skills on an ongoing basis in addition to other areas of need.

An appropriate IEP for Student should include one 45-minute period of individual counseling with the guidance counselor to address social skills, anxiety issues, and other issues of concern to Student including preparation for transitioning to high school.

An appropriate IEP for Student should include daily inclusion in the general education classrooms for specials.

An appropriate IEP for Student should include a complete daily lunch period with general education peers.

An appropriate IEP for Student should include support services for the general education teachers, special education teacher and guidance counselor for a 20 minute per month consultation with the autistic support teacher assigned to the school.

An appropriate IEP for Student should include support services for the general education teachers, special education teacher and guidance counselor for a 20 minute per month consultation with the speech/language therapist working with Student in the school.

An appropriate IEP for Student should include collaboration as often as needed between the special education teacher, the push-in teacher and the general education teachers to modify curriculum materials for Student including worksheets, tests/quizzes and homework assignments.

Section 504 and ADA: Student's eligibility under the IDEA is uncontested; as a child with a disability, Student is also a qualified individual with a disability under section 504, based upon the record in this matter. 42 U. S. C. §12102 (1)(A)(limits major life activity); 42 U. S. C. §12102 (2)(A)(learning is major life activity). The evidence is preponderant that Student's impairments substantially limit Student's learning. With respect to the Section 504 claims, I note 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 the Parents' claims have been addressed pursuant to the IDEA, there need be no further discussion of their claims under Section 504. Parents also assert their claims under the Americans with Disabilities Act, 42 U.S.C. §12101, *et seq.* (ADA). I do not believe that I have authority over ADA claims and decline to address them. As such, therefore, the Parents have exhausted their administrative remedies in this regard.

Conclusion

The testimony of each witness and each document admitted into the record was considered in preparing this decision, whether or not the testimony or the document is cited herein. I find that the record fully supports the Parents' position on all issues before me as articulated in the following Order.

Order

It is hereby ordered that:

1. The program/placement the District offered to Student for the 2015-2016 school year is not appropriate. Student shall remain at the current school.
2. No later than August 28, 2015 the IEP team shall meet and develop an appropriate IEP for Student to be implemented in the current school taking the above recommendations into serious consideration.
3. Student's program was not appropriate during the 2014-2015 school year, and compensatory education is due in the amount of 6 hours per day for every day Student was in attendance at school from March 25, 2015 to the last day in June of the 2014-2015 school year.

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

August 15, 2015

Date

Linda M. Valentini, Psy.D., CHO

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