

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

Pennsylvania

## Special Education Hearing Officer

### DECISION

Child's Name: C.H.

Date of Birth: [redacted]

Dates of Hearing: 5/23/11, 5/24/11, 5/25/11

### CLOSED HEARING

ODR File No. 1639/1011KE

Parties to the Hearing:

Representative:

Parent[s]

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Schuylkill Valley School District  
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Date Record Closed:

June 15, 2011

Date of Decision:

June 30, 2011

Hearing Officer:

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

## **INTRODUCTION AND PROCEDURAL HISTORY**

Student<sup>1</sup> is a middle-school-aged student in the Schuylkill Valley School District (hereafter District) who is eligible for special education under the Individuals with Disabilities Education Act (IDEA).<sup>2</sup> Student's Parents<sup>3</sup> filed a due process complaint against the District asserting that it denied Student a free, appropriate public education (FAPE) under both the IDEA and Section 504 of the Rehabilitation Act of 1973 (Section 504)<sup>4</sup> from the time period beginning with the start of the 2008-09 school year through the present and including the summer of 2011.<sup>5</sup>

The hearing convened over three sessions at which both parties presented evidence in support of their respective positions. Following review and consideration of the entire record, the Parents' claims will be denied.

## **ISSUES**

Whether the District offered and provided a free, appropriate public education (FAPE) to Student from the beginning of the 2008-09 school year through the extended school year (ESY) program offered for the summer of 2011;

Whether any portion of the Parents' claims are barred by the statute of limitations; and

If the District did deny Student FAPE, is Student entitled to compensatory education and, if so, in what nature and amount; and, is Student entitled to any other remedy for future programming?

## **FINDINGS OF FACT**

1. Student is a middle-school-aged student who resides with the Parents within the District. The District is a recipient of federal funds as defined by Section 504. (Notes of Testimony (N.T.) 41-42)
2. Student is eligible for special education as a student with intellectual disability (ID) (formerly mental retardation (MR)) at the moderate level and a speech/language

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<sup>1</sup> In the interest of confidentiality and privacy, Student's name and gender are not used in the body of this decision.

<sup>2</sup> 20 U.S.C. §§ 1401 *et seq.*

<sup>3</sup> Reference is made to Parents when the Parents were acting together or where one was acting on behalf of both, except where otherwise noted.

<sup>4</sup> 29 U.S.C. § 794.

<sup>5</sup> Prior to the initial hearing session, the Parties requested and were granted leave to proceed under the ordinary timelines applicable to IDEA claims without bifurcation of the summer program for 2011, which was initially scheduled on an expedited basis pursuant to 22 Pa. Code § 14.132(e). (Hearing Officer Exhibit (HO) 1)

impairment. Student was first evaluated by the District in March 2007 during first grade after Student transitioned from early intervention to school-aged programming. (N.T. 171-72; Parent Exhibit (P) 3)

3. Student is verbal but also uses gestures to communicate. Student's speech can be difficult to understand, particularly by those who are not familiar with Student. (N.T. 77, 98, 348-49, 465; P 18)
4. Student has had individual speech/language therapy three times per six-day cycle since the start of the kindergarten school year. Student has also consistently been provided with occupational therapy (OT) and physical therapy (PT). (N.T. 568, 573-74; P 3)
5. Additionally, Student was provided with weekly private speech/language therapy following an independent April 2006 evaluation, based upon significant receptive and expressive language delays. (N.T. 47-51; P 12, P 14, P 16)
6. Student began attending school in the District in first grade (2006-07). In December 2006, Student's classroom was approved to participate in Pennsylvania's Verbal Behavior Project through PaTTAN.<sup>6</sup> The Parents were advised that the class would use the Assessment of Basic Language Skills (ABLLS) as its curriculum guide, and they gave permission for Student to be assessed using the ABLLS. (N.T. 66, 84-85, 379; P 33 at 34)
7. Sometime prior to September 2008, Student was evaluated for use of a ChatPC, an augmentative communication device,<sup>7</sup> and the recommendation was made that Student have access to the device to widen Student's vocabulary beyond Student's natural speech to an age-appropriate level. (N.T. 51-52, 187-88, 609-12, 614-15; P 18)
8. A behavior plan was implemented in October 2008. Progress reports during the 2008-09 school year (third grade) reflected an overall decrease in challenging behaviors, with refusals, flopping to the floor, and putting Student's head down identified as the most significant. (S 3, S 6, S 9)
9. The local intermediate unit (IU) conducted testing of Student's hearing in January 2009 which revealed a mild hearing loss in the left ear. A report of that assessment noted that Student's access to education would be impacted by this hearing loss. (N.T. 55; P 27; S 2)

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<sup>6</sup> Pennsylvania Training and Technical Assistance Network: <http://www.pattan.net/>. This hearing officer has some familiarity with verbal behavior. The Pennsylvania Verbal Behavior Project focuses on teaching specific pragmatic language skills through one-on-one discrete trial training using methods applicable for students of all ages. The methodology is grounded on the analysis of verbal behavior based upon the work of B.F. Skinner as well as general principles of applied behavioral analysis. More information about the Pennsylvania Verbal Behavior Project is available at <http://pattan.net-website.s3.amazonaws.com/files/materials/instructional/docs/DVD-Guidebk411007.pdf> (last visited June 28, 2011).

<sup>7</sup> One of Student's Parents gave a demonstration of the ChatPC which was very helpful to this hearing officer. (N.T. 210-12)

10. In late January or early February 2009, Student received the ChatPC device which has been used at home, at school, and out in the community for functional communication. Typically Student will try to communicate verbally before using the ChatPC. Student sometimes uses the device with prompting and sometimes retrieves and uses it independently. (N.T. 52-53, 77, 97-98, 102-03, 187-89, 296-97, 619-20; School District Exhibit (S) 3, S 7)
11. The District and Parents met in March 2009 for a biennial re-evaluation of Student and to consider whether any assessment was necessary. The team determined it would not conduct any testing. Student was in a regular education classroom with adaptations, accommodations, and specially designed instruction to meet Student's needs. At that time, Student was using a combination of vocalizations, signs, and gestures to communicate and was beginning to use two- to three-word phrases. Student had also begun to demonstrate difficult behavior to avoid tasks at school and a behavior plan was developed which was effective in increasing desired behaviors and decreasing problematic behaviors. Needs identified in this evaluation report were to improve basic academic skills, adaptations to content area (science and social studies) instruction in the general education curriculum, improvement of receptive and expressive language skills, improvement in gross motor skills, and the following accommodations and specially designed instruction: use of a visual schedule with reinforcement after completing 2-3 activities, math instruction using a co-teaching model, and of use of a keyboard overlay and one-click mouse for computer activities. (N.T. 593-94; P 4; S 5)
12. Once the ChatPC was obtained, Student's family and the District worked to get it set up to be usable for Student. An IU consultant was first trained on the device in September 2009, and met approximately once each month with Student's teacher and other team members over the course of the 2009-10 school year for additional training. (N.T. 189-92, 202-06, 615-16, 630-32; P 33 at 30-34; S 12, S 15, S 21)
13. At the beginning of the 2009-10 school year, the Verbal Behavior Project changed from using the ABLLS to the Verbal Behavior Milestones Assessment and Placement Program (VB-MAPP). The two programs are based upon Skinner's theory on behavioral analysis of language. Both the ABLLS and VB-MAPP are guides for instruction, and both instruments measure essentially the same skills. Students are assessed using the VB-MAPP twice each school year, once during the first half and once during the second half. Between those assessments, the District collects data on the various skills and sends home reports on that data approximately every five weeks and at least quarterly. (N.T. 249-51, 253-58, 262, 267-70, 293-94, 388; P 28, P 30, P 38)
14. Student's IEP team met several times in the fall of 2009 to develop an IEP for Student. Goals addressed speech/language (imitation of sight words and two-word phrases), communication (labeling and intraverbals), reading (sight words), math (identifying and reproducing numbers, identifying paper money, and improving readiness skills), gross and fine motor skills, and behavior. Program modifications/specially designed instruction included repetition of new concepts and tasks, natural environment teaching, use of computer programs, assistive technology (ChatPC) and a picture schedule. The

IEP also included PT, OT, and speech/language therapy, and a one-to-one aide. (P 9; S 13, S 14, S 17, S 23)

15. During the 2009-10 school year, in addition to the Verbal Behavior classroom, Student was in a regular education class for social studies and science with modifications and accommodations on tests. (P 5)
16. Student's IEP was revised in February 2010 to provide for ESY services for 2010, and again in March 2010 to increase the expectations for several of the goals (*e.g.*, increasing the expected number of sight words and two-word phrases). (S 30)
17. An audiological evaluation in the spring of 2010 revealed a mild bilateral hearing loss. The audiologist made recommendations to accommodate Student in the classroom, including preferential seating, minimization of background noise, clearly spoken and written directions, restatement of questions and answers, and checking for understanding of instruction and directions. (P 5; S 33)
18. The District conducted a re-evaluation of Student in May of 2010 to aid in Student's transition to middle school, and a re-evaluation report (RR) issued. A number of assessments were conducted: cognitive and achievement testing, as well as adaptive behavior, speech/language, and OT assessments. The RR continued to conclude that Student was eligible for special education on the basis of ID (MR) and speech/language impairment. (N.T. 595-603; P 5; S 41)
19. The May 2010 RR noted that Student had displayed avoidance behaviors over the course of the 2009-10 school year, including refusal, flopping, and putting Student's head down. A functional behavior assessment (FBA) revealed a range of an absence of all three behaviors from 87% of the time during the first quarter to 97% of the time during the fourth quarter. (P 5; S 41)
20. VB-MAPP results reported in the RR reflected that Student had demonstrated all skills in level 1, many skills in level 2, and some skills in level 3. (P 5; *see also* P 28; S 41)
21. Needs noted in the RR included improvement of basic academic skills in reading, math, and receptive and expressive language; continued speech/language therapy, OT, and PT; and small group, specially designed instruction at Student's academic level. (P 5; S 41)
22. Student's IEP was again revised in May 2010 to make changes to OT goals and increase the expectations for several of the goals (*e.g.*, increase the number of action pictures to be labeled correctly from 40 to 75). A new reading goal was added for correctly producing the initial sound of all 26 letters both expressively and receptively. (S 37)
23. Progress reports for the 2009-10 school year on the vocal imitation goals reflected an increase in imitation of functional/sight word goals from 45 words in November 2009 to 146 functional sight words in June 2010 (no accuracy given) based on a goal of 80 words (which increased to 140 words in March 2010); and an increase in imitation of two-word phrases from 14 two-word phrases in November 2009 to 22 two-word phrases in June 2010 (no accuracy given) based on a goal of 20 phrases (which increased to 30 phrases in

March 2010). In the area of articulation, the progress reports reflected an increase in saying functional/sight words clearly from 45 in November 2009 to 102 in April 2010 (no accuracy given). On the labeling goal, Student increased the number of action pictures correctly identified from 50 in November 2009 to 62 in June 2010, based on a goal of 40 action pictures (which increased to 75 in May 2010). On the intraverbals goal, Student increased the number of appropriate fill-in-the-blank responses with a sight/functional word from 18 in November 2009 to 30 in June 2010 (no accuracy given) (S 56, S 57, S 58, S 59)

24. On the reading goal for the 2009-10 school year, progress reports indicated an improvement in recognition of sight words and phrases using the Edmark Program, which focuses on sight words and reading comprehension, from a baseline of 10 words in November 2009 to 36 words in June 2010. Also by June 2010 Student could read sentences of up to 19 words, was reading paragraphs of 5-7 sentences in length, and was answering simple comprehension questions. (*Id.*)
25. In motor skills, Student's 2009-10 school year progress reports reflected that Student mastered the goals in gross motor activities by April 2010. In fine motor skills, Student displayed inconsistent improvement in copying letters, phrases, and numbers correctly. (*Id.*)
26. On Student's math goals for the 2009-10 school year, progress reports demonstrated that Student demonstrated improvement in identifying numbers, identifying paper money, and reproducing numbers, although progress was generally inconsistent. (*Id.*)
27. Behavior progress reports for the 2009-10 school year reflected a general trend of decreased problematic behaviors (refusals, flopping, and Student's head down). (S 24, S 27, S 34, S 44, S56, S 57, S 58, S 59, S 88, S 89, S 90, S 91, S 92, S 93, S 94, S 95, S 96, S 97, S 98)
28. The Parents requested an Independent Educational Evaluation (IEE) in the summer of 2010. The District agreed to fund an IEE. (S 45, S 46, S 47, S 49)
29. Student was provided ESY services during the summer of 2010. Student worked on math and reading goals, and a speech/language goal, and behavior was also monitored. While Student did not master any academic goals, Student did not show regression academically or behaviorally. (N.T. 414-15, 453-54; P 33 at 8-10; S 38, S 60)
30. During the 2010-11 school year, Student repeated fourth grade. Student was in the learning support classroom for 3½ hours per day, which is the Verbal Behavior classroom. For the remainder of the school day Student had homeroom/What I Need (WIN) time (which includes some socialization with peers), specials (computer, library, art, music, and physical education), lunch, recess, science or social studies. Student had a one-to-one aide who was with Student all day, except that after the middle of the school year the aide no longer accompanied Student to lunch. Student's day was a structured routine and Student used a picture schedule. (N.T. 224, 227-28, 241, 273-77, 326-28, 333-35, 336, 361-62, 378)

31. Beginning in September 2010, Student's then-current learning support teacher was provided with training by the IU on the ChatPC. (N.T. 294-96, 405, 417; S 99 at 1)
32. Student's IEP was revised in September 2010. Goals addressed imitation of sight/functional words and two-word phrases; labeling and intraverbals; sight word recognition; initial sound production for all 26 letters; math (identification and reproduction of numbers, identification of paper money, and readiness skills); gross and fine motor skills; and behavior. Program modifications and specially designed instruction included repetition of new concepts and tasks, communication through verbal language, natural environment teaching, use of computer programs, assistive technology (ChatPC), use of a picture schedule, minimization of background noise, preferential seating, review of instructions/directions and a check of comprehension of instructions/directions, restating answers and questions provided by classmates, and use of books with matching pictures for reading. The IEP also included PT, OT, and speech/language therapy, and a one-to-one aide, with OT recommended twice per week, with one pull-out session and one inclusive session for thirty minutes each. (N.T. 418-19, 513-14; P 8; S 79, S 80, S 81)
33. Student's learning support teacher monitored Student's spontaneous vocalizations, and worked with Student on building two-word phrases during the 2010-11 school year. (N.T. 283-86)
34. An independent auditory language processing evaluation was conducted in October 2010. This evaluation confirmed Student's receptive and expressive language delays, articulation difficulties, and minimal hearing loss. The audiologist recommended an FM assistive learning device, auditory training through the Fast ForWord Language program, intense language therapy, an augmentative communication device, structure and routine in the school day, a "carefully chosen reading program" using the Association Method at a nearby private school (P 20 at 8), preferential seating, repetition of instructions, additional time to respond to questions and avoidance of calling on Student unless Student volunteered, notice to the Parents of specific questions to be asked of Student the next day, homework strategies at home, praise at home and in school, confirmation to Student that teachers and therapists understood Student's difficulties with comprehension and verbalization, and regular hearing re-evaluation. The audiologist also suggested that teachers be articulate and use inflectional cues. (N.T. 54; P 20)
35. The Parents obtained a private occupational therapy evaluation in October 2010 which revealed a sensory processing disorder impacting Student's ability to regulate attention and focus on tasks, follow directions, engage in appropriate play activities and motor tasks, engage in self-help independently, and derive information from a multisensory environment. This OT evaluation included recommendations for OT with a sensory integrative approach, PT, speech/language therapy, sensory activities throughout the day, consistency in approaches and expectations across environments, repetition of instructions, limitation on visual distractions, use of visual reminders and a timer, as well as suggestions for seating in the classroom. In addition to OT recommendations, a sensory diet was suggested, for incorporation in the school day. (N.T. 54; P 22)

36. Student was evaluated by an independent school psychologist in October 2010, and an Independent Educational Evaluation (IEE) report was issued. This evaluator observed Student at school on several occasions and administered a number of assessments. The IEE reflected weaknesses in basic language processes, attention/executive processes, sensorimotor function, visual/spatial function, memory processes, and social perception, as well as behavioral regulation and metacognitive processes. Achievement and adaptive and emotional/behavioral functioning levels were noted as low. The IEE identified language as Student's primary academic deficit. (P 24)
37. The IEE evaluator recommended a "language immersion program" for Student where language is taught through a specialized curriculum. (P 24 at 17) She also suggested that the IEP team consider full-time special education programming or changes to the inclusionary placement in regular education classes, and that a speech/language pathologist be assigned as Student's teacher throughout the day in addition to a full-time aide. (*Id.* At 18) This evaluator further recommended ESY services for Student for all aspects of Student's educational program, and made additional suggestions for specific instructional programs, specially designed instruction, goals, and related services. (P 24)
38. Student's reading program for the 2010-11 school year again was the Edmark Program focused on sight words and reading comprehension. Student worked on Level 1 of Edmark throughout the 2010-11 school year, increasing sight word recognition from 34 words in November 2010 to 50 words in March 2011. There are 150 words in Level 1, then a student moves on to Level 2. Student's learning support teacher added Student's Edmark sight words to the ChatPC. (N.T. 228-31, 237, 240, 381-83, 413-14, 473; S 87 at 5)
39. For math during the 2010-11 school year, Student used Distar Math, and Touchmath was also introduced. Student worked on counting and adding, (N.T. 397-400)
40. Student attended science and social studies classes in the regular education classroom during the 2010-11 school year. In science class, the teacher provided instruction to the class, and approximately every three days had the children work in groups typically performing experiments. The science teacher modified and adapted Student's work for the class through consultation with the learning support teacher, and Student's aide worked on those tasks with Student. Student benefitted from socialization in the science class, but rarely used the ChatPC in that classroom. (N.T. 329-33, 337-40, 342-43, 344-50, 357-59, 365-70, 440-41)
41. Student had individual speech/language therapy three times per six-day cycle during the 2010-11 school year. Student's speech/language therapist opined that Student had made the most progress over the 2009-10 and 2010-11 school years, demonstrating a decrease in problematic behaviors and an increase in socializing with peers and using two-word, and sometimes four-word, phrases. (N.T. 401, 568-70, 573)
42. Student was provided with occupational therapy (OT) twice per week for thirty minute sessions during the 2010-11 school year. (N.T. 513; P 33)



43. In October 2010, Student's Parents and the District attempted to install the Touchmath program on the ChatPC, but encountered difficulties with the ChatPC software. By late March or early April 2011, it was discovered that the original software from the ChatPC was not the correct software for the device. (N.T. 193-201, 207-10, 299-301, 303-09, 408-10, 616-17, 634-38)
44. Also in the fall of 2010, the District arranged for a trial of an FM system, despite an IU recommendation against it in December 2010. Sometime in the middle of the 2010-11 school year, Student's teachers and therapists began to use the FM system throughout the school day. (N.T. 340-41, 466, 559-60, 649-58; P 33 at 1-7; S 62)
45. Student's IEP team met in January 2011 after the IEE was completed, and the Parents provided a list of the IEE recommendations that they wished to see implemented. (N.T. 384-85; S 99 at 13-14)
46. The IEP team met again in February 2011. Present levels were updated, and parental concerns were added. The reading goal was changed to reflect a better estimate of Student's achievement in mastering sight words. Revisions were made through addition to the specially designed instruction in response to recommendations in the IEE which the Parents asked for: a sensory diet; a sequence of most- to least- prompting/assistance for fine motor skills; natural environment teaching; minimization of background noise; social skills group; calling on Student only when Student volunteered; notification to the Parents of a question Student would be asked the next day; explanation to Student of how the cause of Student's frustration was understood; and a task analysis of classroom routines. (N.T. 425-32, 505-06, 517; P 7; S 64, S 84, S 100)
47. The February 2011 IEP recommended the two thirty-minute weekly OT sessions be integrated or pull-out at the discretion of the therapist. The occupational therapist did not agree with the IEE recommendation to incorporate a Tomatis (brushing) protocol because Student did not demonstrate difficulty with sensory modulation. The occupational therapist also recommended that adaptive materials and supports, including prompts, be gradually faded to independence. (N.T. 516-18, 525-26, 538)
48. The Parents did not approve the February 2011 IEP. The Parents advised the District that they did not agree to the IEP for a variety of reasons including that it: set low expectations for Student, failed to adequately address Student's needs in functional communication particularly with respect to use of the ChatPC and spontaneous speech, and lacked authentic participation in the regular education classroom. They also shared concerns such as the effectiveness of the Verbal Behavior classroom for Student. (N.T. 437)
49. Progress reporting on the goals in the September 2010 IEP reflected as follows. In vocal imitation, Student increased imitation of functional/sight words from 182 in November 2010 to 194 in March 2011 (no accuracy given) based on a goal of 180 words, and imitation of two-word functional/sight word phrases from 27 in November 2010 to 48 in March 2011 (no accuracy given) based on a goal of 35 two-word phrases. In labeling, Student increased the number of identified action pictures from 72 in November 2010 to

95 in March 2011 (no accuracy given) based on a goal of 85 action pictures identified accurately. For intraverbals, Student increased the number of appropriate response to fill-in-the-blank statements from 35 in November 2010 to 61 in March 2011 (no accuracy given) based on a goal of “up to 50 phrases” (S 80 at 40). (S 80, S 87)

50. On the goal for reading sight words, Student increased recognition of sight words and phrases from 34 in November 2010 to 50 in March 2011 (no accuracy given) based on a goal to simply improve on that skill. For initial sound production of the 26 letters, progress is difficult to gauge as the reports are based upon graphs that are difficult to decipher, as Student either did produce the sound or did not. (S 80)
51. Progress on Student’s math goals for the 2010-11 school year are difficult to gauge as the reports are based upon graphs that are difficult to decipher, as Student either did or did not, *e.g.*, identify or reproduce the number or tell the correct time. (S 87)
52. In motor skills, Student’s 2010-11 school year progress reports reflected that Student made progress on the goals in gross motor activities accessing the locker independently and donning shoes and orthotic devices. In fine motor skills, Student displayed improvement in writing spelling words and in writing Student’s first and last name and telephone number. (S 80, S 87, S 101)
53. With respect to behavior, the District reported Student’s progress on behavioral goals during the 2010-11 school year noting that Student’s three main problematic behaviors remained refusal to do work, flopping, and putting the head down to avoid tasks. Student’s behaviors were monitored and charted every 15 minutes during the school day. Student exhibited few of the targeted behaviors over the course of the 2010-11 school year. Graphs of the behavior data were sent home to the Parents quarterly. (N.T. 313-19, 321-22, 375-76, 393-94, 412-13; S 87 at 21, 114-15)
54. The Parents filed a due process complaint on March 28, 2011. (P 1; S 75)
55. In May 2011, the Parents investigated the private school recommended by the independent audiologist for Student. (N.T. 58-60, 85-86; P 31)
56. The 2011 ESY program proposed addressed goals in all of Student’s areas of need as well as OT, PT, and speech/language therapy. At the due process hearing, the parties reached an agreement on ESY services pending this decision. (N.T. 669-71; S 84, S 86)
57. The following exhibits were admitted at the due process hearing:

P 1 – P 5, P 7, P 8, P 9, P 11, P 12, P 14, P 16, P 18, P 20 – P 31, P 33, P 36;  
S 2 – S 54, S 56 – S 71, S 75, S 79 – S 101; HO 1, HO 2.

(N.T. 15, 671-72, 674)<sup>8</sup>

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<sup>8</sup> All of these exhibits were admitted without objection, creating a rather voluminous record. However, a number of exhibits were never referenced in the hearing session, and this hearing officer accorded less

## DISCUSSION AND CONCLUSIONS OF LAW

Broadly stated, the burden of proof consists of two elements: the burden of production and the burden of persuasion. At the outset, it is important to recognize that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005);<sup>9</sup> *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case rests with the Parents who requested this hearing. Courts in this jurisdiction have generally required that the filing party meet their burden of persuasion by a preponderance of the evidence. See *Jaffess v. Council Rock School District*, 2006 WL 3097939 (E.D. Pa. October 26, 2006). Nevertheless, application of these principles determines which party prevails only in cases where the evidence is evenly balanced or in “equipoise.” The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position.

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

The IDEA requires the states to provide a “free appropriate public education” (FAPE) to all students who qualify for special education services. 20 U.S.C. §1412. In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that this requirement is met by providing personalized instruction and support services to permit the child to benefit educationally from the instruction, providing the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase “free appropriate public education” to require “significant learning” and “meaningful benefit” under the IDEA. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999).

Local education agencies, including school districts, meet the obligation of providing FAPE to eligible students through development and implementation of an Individualized Education Program (IEP), which is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’ ” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). Under the IDEA and its implementing regulations, an IEP for a child with a disability must include present levels of educational performance, measurable annual goals, a statement of how the child’s progress toward those goals will be measured, and the specially designed instruction and supplementary aids and services which will be provided, as well as an explanation of the extent, if any, to which the child will not participate with non-disabled children in the regular classroom. 20 U.S.C. § 1414(d); 34 C.F.R. §300.320(a). First and foremost, of course, the IEP must be responsive to the child’s identified educational needs. 20

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evidentiary weight to those than she might have had those documents at least been identified on the record.

<sup>9</sup> The burden of production, “i.e., which party bears the obligation to come forward with the evidence at different points in the proceeding,” *Schaffer*, 546 U.S. at 56, relates to the order of presentation of the evidence.

U.S.C. § 1414(d); 34 C.F.R. §300.324. Nevertheless, “the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date.” *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993).

Before proceeding to the substantive claims, it is necessary to determine whether any portion of the Parents’ claims are barred by the applicable statute of limitations. With respect to the statute of limitations, the IDEA expressly provides that parties must be afforded the opportunity to file a due process complaint alleging “a violation that occurred not more than two years before the date the parent or public agency knew or should have known of the alleged action which forms the basis of the complaint.” 20 U.S.C. §1415(b)(6)(B); *see also* 34 C.F.R. § 300.507(a)(2). In other words, a party “must request an impartial due process hearing on their due process complaint within two years of the date the parent or public agency knew or should have known about the alleged action which forms the basis of the complaint.” 20 U.S.C. § 1415(f)(3)(c); *see also* 34 C.F.R. § 300.511(e).<sup>10</sup> The IDEA also provides for two specific exceptions to the two-year limitation period, permitting claims beyond that timeframe to a parent who was prevented from requesting the hearing as a result of:

- (i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or
- (ii) the local education agency’s withholding of information from the parent that was required under this subchapter to be provided to the parent.

20 U.S.C. § 1415(f)(3)(D); *see also* 34 C.F.R. § 300.511(f). The burden is on the parent to establish that one of the exceptions applies, which similarly requires a “highly factual inquiry to determine if application of either exception is warranted.” *J.L. v. Ambridge Area School District*, 2009 WL 1119608 (W.D. Pa. April 27, 2009) at \*4. Additionally, “the IDEA’s two-year statute of limitations applies to claims made for education under § 504 of the Rehabilitation Act.” *P.P. ex rel. Michael P. v. West Chester Area School Dist.*, 585 F.3d 727, 737 (3d Cir. 2009).

For purposes of the statute of limitations, the District does not seek to limit the Parents’ claims from March 28, 2008 forward. (S 76 at 3) The Parents assert that they are entitled to proceed with their claims prior to March 28, 2009 based on the misrepresentation exception. (Parents’ Closing at 17-19) Specifically, they assert that the District misrepresented the extent of Student’s progress throughout the relevant time period, *i.e.*, from the beginning of the 2008-09 school year. (*Id.* At 18) However, to establish this exception, the statute requires a “specific misrepresentation.” 20 U.S.C. § 1415(f)(3)(D); *see also* 34 C.F.R. § 300.511(f). The burden of establishing an exception to the statute of limitations in these cases is not an easy one.

After review of the scant evidence which might support an exception to the statute of limitations, this hearing officer is not persuaded by the Parents’ reliance on *Draper v. Atlanta Independent School System*, 518 F.3d 1275 (11<sup>th</sup> Cir. 2008). There, the family did not have

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<sup>10</sup> There was no contention that the parents were unaware of any of the District’s actions at the time they occurred, such that it was necessary to make a determination of the knew or should have known date. For purposes of efficiency at the hearing, and because the statute of limitations could only impact a relatively short period of time (only a partial school year), evidence was permitted to encompass the entire 2008-09 school year rather than bifurcate the hearing.

sufficient facts necessary to know of the child's misdiagnosis and the precise nature of the disability. Here, while the Parents may very well disagree today that, in general, Student's progress from the beginning of the 2008-09 school year was not as positive as they understood it to be from various progress reports provided by the District during that time period, this hearing officer concludes that the evidence is insufficient to establish a specific misrepresentation that the District had resolved the problem forming the basis of the Parents' complaint which prevented them from filing for due process. The Parents did not assert the withholding exception and, thus, there need be no discussion of whether it applies. Accordingly, this hearing officer cannot conclude that the Parents have met the heavy burden of establishing an exception to the statute of limitations in this case.

Turning to the claim that the District denied Student FAPE during the portion of the 2008-09 school year which is not untimely, this hearing officer is compelled to conclude that the Parents have failed to present sufficient evidence that Student's educational program was inappropriate. There was little evidence in this voluminous record, testimonial or documentary, that related to the 2008-09 school year, including the summer of 2009. The only evidence that the educational program during that school year was not appropriate was the Parents' expert's general statement that it was not. While the Parents' expert was and is clearly qualified to render such an opinion, that statement was made without elaboration and, in fact, was given less than definitively when the witness tried unsuccessfully to locate the IEP document in question and could not confirm whether she had it in her possession. (N.T. 126-27) As the burden was on the Parents to establish a denial of FAPE, this hearing officer concludes that burden was not met for the time period through and including the summer of 2009.<sup>11</sup>

For the 2009-10 school year, Student was in the Verbal Behavior classroom for part of the school day and in regular education classes for social studies and science where Student was provided with modifications and adaptation on tests. Based on a change dictated by the Pennsylvania Verbal Behavior Project, the District changed from the ABLLS to the VB-MAPP as the guide for instruction as well as assessment of acquisition of pragmatic language skills. While the Parents may not have been aware that this change was made at the time (N.T. 56-57, 66-67), the record reflects that the District did provide them with progress reports on Student's goals on the IEPs during the course of that school year, thereby demonstrating that the information which both the ABLLS and VB-MAPP assess was provided to the Parents, at least once every five weeks during the 2009-10 school year. This hearing officer cannot conclude that Student was somehow deprived of FAPE on this basis.

The IEP developed in the fall of 2009 contained goals in speech/language, communication, reading, math, gross and fine motor skills, and behavior, all identified needs for Student. When Student mastered goals in that IEP, the team reconvened to revise those IEP goals consistent with Student's progress. A number of program modifications/items of specially designed instruction were included which were also directly responsive to the needs identified in the spring 2009 evaluation. Student was in regular education classes for science and social studies, where test modifications and accommodations were provided, as also recommended in

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<sup>11</sup> Before the hearing convened, there was a suggestion that the ESY claim for the summer of 2009 was not an issue for this hearing. This assertion was also stated on the record (N.T. 17), but the parties did not provide confirmation as of the time of the written closings were submitted.

that evaluation. Progress reports on Student's IEP goals were generally positive, demonstrating overall improvement in all goal areas including behavior.

The one circumstance of concern during that 2009-10 school year was the delay in use of the ChatPC. While this lapse of time is unfortunate and very likely frustrating to the Parents, and one might presume that Student would likely be more proficient in using the device had it been available sooner than it was, the record does not establish that the delay in initializing its use was solely attributable to the District, or that the steps taken to make it usable were unreasonable on its part. This hearing officer also cannot conclude that Student was deprived of FAPE because of this delay particularly since even today, Student uses the ChatPC inconsistently across environments, and also uses speech at school to effectively communicate.

In the spring of 2010, the RR and an audiological evaluation provided additional information to guide Student's IEP team. While some of the recommendations in the audiological evaluation were not immediately included in Student's newly revised IEP in May 2010, the needs identified in the May 2010 RR were not significantly different from those addressed in the IEPs implemented during the 2009-10 school year, and some of the goals were revised in the May IEP to reflect Student's progress in particular areas. With respect to ESY provided in the summer of 2010, Student worked on and maintained academic skills as well as behavioral expectations.

While the progress reporting for the 2009-10 school year may be considered less than optimal since, *e.g.*, accuracy of Student's performance on certain goals was not consistently provided, no educational program is perfect, and procedural errors cannot form the basis of a denial of FAPE without a substantive impediment to educational benefit or a significant impediment to meaningful decision-making by the Parents. 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2). When the evidence is viewed as a whole, this hearing officer concludes that Student's program during the 2009-10 school year, including the summer of 2010, was reasonably calculated to, and did, provide meaningful educational benefit to Student. The sole evidence to the contrary, provided by the Parents' expert, again failed to provide any explanation of how the program was deficient. (N.T. 126-27) For all of these reasons, this hearing officer concludes that this evidence was insufficient to meet the Parents' burden with respect to the 2009-10 school year and summer 2010.

The remaining time period is the 2010-11 school year as well as ESY for summer 2011. Student's September 2010 IEP included goals and specially designed instruction which were responsive to the most recent RR and the recent audiological evaluation. After the IEE and an independent auditory language processing evaluation in October 2010, the District proposed revisions to Student's IEP to include many, if not most, of the recommendations of those private evaluators, including the FM system. It is not insignificant that some of the specially designed instruction in the September 2010 IEP used language identical to that in the independent evaluations, such as notification to the Parents of a question Student would be asked the next day. The ChatPC continued to be used during the school day despite the difficulties encountered with its software, a circumstance which again cannot be attributed to the District.

There was no specific evidence that the particular programs used for math or any other subject were inappropriate for Student. Similarly, while the Parents did express concerns that Student was not making adequate progress in the Edmark reading program, there was also no evidence to demonstrate that Student's progress was less than meaningful, or what the expectation of Student's progress was that was not met. There was little if any suggestion that any of the OT, PT, or speech/language therapy was deficient in any respect, or whether and how Student's participation in the regular education curriculum and courses was inappropriate. While not determinative in and of itself, Student's progress on the various IEP goals over the course of the school year, particularly when viewed in the context of Student's needs, also suggests that Student's IEPs were appropriate and reasonably calculated to provide meaningful educational benefit. Further, with respect to ESY, the Parents' expert was not even aware of what program was offered by the District in order to give an opinion on whether it was appropriate. (N.T. 178) This hearing officer finds that the proposed ESY program is appropriate.

There are a few suggestions made by independent evaluators with which the District did not agree. Of those, the recommendation that Student be provide with a fulltime speech/language therapist was not adequately explained in the IEE, in the Parents' expert testimony, or by other evidence, and the District's testimony that such was not appropriate for Student's program was both credible and logical. (N.T. 571-72, 581-82) Similarly, the recommendation that Student's needs might be served in a particular private school was not explained by the private audiologist who first suggested this option (P 20 at 8), or by the Parents' expert who admitted only "slight" familiarity with this placement. (N.T. 176-77) Districts are required to consider recommendations in an IEE, but not necessarily acquiesce to each of them. 34 C.F.R. § 300.502(c)(1). This hearing officer finds that the District complied with this obligation.

Additional concerns expressed by the Parents and their expert included Student's failure to master all skills on the ABLLS and the VB-MAPP at Student's age (N.T. 123, 130, 135, 140-42). This opinion was given without apparent understanding that the District was no longer using the ABLLS by the beginning of the 2009-10 school year, and further fails to recognize that the Verbal Behavior program focuses on specific pragmatic language for students of all ages. This expert also opined that Student required an "integrated language immersion program" with the opportunity for socialization with same-age peers. (N.T. 123-24) Review of the record supports the conclusion that Student's placement in both the Verbal Behavior Classroom and the regular education classroom for content area classes provides both a program focused on language, as well as opportunity for meaningful participation and socialization with peers. With respect to Student's Parents' participation in making decisions regarding the educational program during the 2010-11 school year, as in the prior year, such circumstances do not amount to a denial of FAPE absent a "significant" impediment to parental participation in the decision-making process. 34 C.F.R. § 300.513(2). One of the major concerns asserted for the 2010-11 school year was that the District failed to involve the Parents in the decision to trial and implement the FM system. (N.T. 14, 31, 466-48) While very unfortunate, and perhaps an incident of an inappropriate lack of communication, the decision to take steps to trial and use an assistive technology device that the Parents and their evaluators requested cannot, in this hearing officer's estimation, establish a denial of FAPE under the circumstances presented.

For all of the foregoing reasons, this hearing officer concludes that the Parents did not meet the difficult burden of establishing that Student was denied FAPE by the District under the IDEA for the time periods in question. Consequently, there is no basis to consider any remedy.

The final issue relates to the Section 504 claims. This hearing officer observes 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). The Parents made no separate substantive arguments under Section 504. Because all of the Parents' claims have been addressed pursuant to the IDEA, there need be no further discussion of their claims under Section 504.

Lastly, this hearing officer makes the following observations. Student's Parents are clearly very loving and involved parents who are seeking the best education that can be provided. Their dedication and advocacy are commendable. It also merits mention that the District personnel who work with Student likewise demonstrated clear concern for Student, as well as professionalism in meeting Student's needs and collaborating with the family in doing so. Student has many more years in the District during which time the parties will need to collaborate as a team, and it is suggested that prompt completion of the setup process for the ChatPC, immediately followed by instruction for Student in the use of the device, may be a very logical place to start. It is the sincere hope of this hearing officer that the parties are able to set aside their current disagreement and continue to work cooperatively together for Student's future educational programming.

## **CONCLUSION**

For the foregoing reasons, this hearing officer concludes that the District did not fail to program appropriately for Student, and did not fail to offer and implement appropriate IEPs during the relevant time period. Consequently, there is no basis on which to award compensatory education or any other remedy.

## **ORDER**

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that the Parents' claims in this matter are **DENIED**. The School District need take no action in this matter.

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

*Cathy A. Skidmore*  
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Cathy A. Skidmore  
HEARING OFFICER

Dated: June 30, 2011