DECISION

COVER SHEET

DUE PROCESS SPECIAL EDUCATION HEARING

FILE NUMBER:	17044/15-16KE
RESPONDENT/SCHOOL DISTRICT (LEA):	Shamokin Area School District
SCHOOL DISTRICT COUNSEL:	Shawn Lochinger, Esquire
STUDENT:	A.P.
PARENT:	[Parent(s)]
COUNSEL FOR STUDENT/PARENT	Drew Christian, Esquire
INITIATING PARTY:	Parent
DATE OF DUE PROCESS COMPLAINT:	November 17, 2015
DATE OF HEARING:	March 3 and 4, 2016
PLACE OF HEARING:	School District Administrative Office
OPEN vs. CLOSED HEARING:	Closed
STUDENT PRESENT:	No
RECORD:	Verbatim-Court Reporter
DECISION TYPE:	Electronic
DUE DATE FOR DECISION:	May 9, 2016
HEARING OFFICER:	James Gerl, Certified Hearing Official

DECISION

DUE PROCESS HEARING

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PRELIMINARY MATTERS

A prehearing conference by telephone conference call was convened herein on December 18, 2015. As a result of said conference, a prehearing conference order was entered herein. Said Order is incorporated herein by reference.

Following the prehearing conference, counsel for the Petitioner filed an unopposed motion to extend the decision deadline of the hearing officer. The reason for the motion was that at the time of the conference, counsel estimated that four full hearing days would be needed, and the schedules of counsel, witnesses and the parties required additional time. In addition, many former school district employees who were going to testify for both parties had to be subpoenaed. Counsel also expressed a desire to submit written briefs. Good cause having been shown, the motion was granted, and the hearing officer's decision deadline was extended to May 9, 2016.

Prior to the hearing, counsel for the parties filed a joint prehearing memorandum. Such memorandum contained stipulations of fact and it defined the issues presented for purposes of this due process hearing. Said memorandum also contained information concerning exhibits and witnesses. The parties' joint prehearing memorandum is incorporated by reference herein.

Prior to the hearing, counsel for Respondent made a request for four subpoenas. Said request was granted, and four subpoenas were issued.

At the hearing, counsel for Petitioner objected to the hearing officer's ruling that documents would be admitted at the beginning of the hearing. Counsel objected to admitting documents into evidence that were not testified to. The formal rules of evidence applicable in court proceedings do not apply to special education hearings. See, Council Rock Sch Dist v MW by Marc W & Barbie W 59 IDELR 132 (ED Penna 7/24/2012); Anello v. Indian River Sch Dist 52 IDELR 11 (D. Delaware 2/6/2009). There is no requirement that only documents that are testified about can come into evidence at a special education hearing. Any such requirement would frustrate the flexibility of an administrative hearing. In addition, there can be no surprise because it is required that exhibits be disclosed prior to a due process hearing, and counsel for both sides should be sufficiently familiar with their opponent's exhibits to know the contents of any document that might be admitted into evidence. See 34 CFR §

300.512(a)(3). Moreover, an IDEA hearing officer is afforded wide discretion in conducting a due process hearing. Letter to Anonymous 23 IDELR 1073 (OSEP 1994); See, Schaffer v. Weast 546 U.S. 49, 126 S.Ct. 528, 44 IDELR 150 (11/14/2005); JD by Davis v. Kanawha County Bd of Educ 53 IDELR 225 (SD WVa 2009); Stancourt v. Worthington City Sch. Dist. Bd. of Educ. 44 IDELR 166 (Ohio App. Ct. 2005). Petitioner's objection was overruled.

Also near the beginning of the due process hearing, counsel for Petitioner filed a motion to recuse the hearing officer. The basis of the motion was that the hearing officer contracts with the Central Susquehanna Intermediate Unit to conduct due process hearings within the region covered by CSIU. The motion was denied because the parent failed to show actual bias. The discussion on the record concerning the motion is incorporated by reference herein. The legal standard is that an IDEA hearing officer enjoys a presumption of honesty, integrity and freedom from bias that may be overcome only by proving a substantial countervailing reason to conclude that the hearing officer was actually biased with respect to the party. See LC and KC on behalf of NC v. Utah State Bd. of Educ., et al., 43 IDELR 29 (10th Cir. 2005). In order to prevail on a motion for recusal of an IDEA hearing officer, a party must rebut the presumption of honesty and integrity and freedom from bias by a showing of conflict of interest or actual bias. Dell ex rel. Dell v. Township High School District 113, 32 F.3d 105, 21 IDELR 563 (7th Cir. 1994); Roland M. v. Concord School Comm., 910

F.2d 983, 16 IDELR 1129 (1st Cir. 1990); MN v. Rolla Public School District No. 31, 59 IDELR 44 (W.D. Missouri 2012); GM by Marchese v. Dry Creek Joint Elementary Sch. Dist., 59 IDELR 223 (E.D. Calif. 2012); Nickerson-Reti v Lexington Public Schs 59 IDELR 282 (D Mass 9/27/2012); ES & MS ex rel BS v. Katonah-Lewisboro Sch Dist 742 F.Supp.2d, 55 IDELR 130 (SD NY 9/30/2010). The federal regulations implementing the Individuals with Disabilities Education Act provide as follows… "A person who otherwise qualifies to conduct a hearing under … this section is not an employee of the agency solely because he or she is paid by the agency to serve as a hearing officer." 34 C.F.R. §300.511(c)(2); See Ch. 14, PA Code § 14.162(p)(1). In interpreting this regulatory section, the Office of Special Education Programs, the federal agency that administers IDEA, stated "…we believe that it is important to continue to clarify that a person's payment for serving as a hearing officer does not render that individual a public agency employee who is excluded from serving as a hearing officer. In many instances, public agencies retain hearing officers under contract. The fact that an individual is hired by a public agency solely for the purpose of serving as a hearing officer does not create an excluded employee relationship." Analysis of Comments to Federal Regulations, 71 Fed. Register 156 at p. 46705 (OSEP August 14, 2006). Petitioner had not shown actual bias or any other basis for recusal. Accordingly, the hearing officer denied the motion to recuse.

Near the end of the due process hearing, the hearing officer granted the unopposed motion of parent's counsel to withdraw without prejudice the allegations of the due process complaint concerning the current school year (2015-2016). Said allegations are not addressed herein.

Subsequent to the hearing, both parties filed written briefs and proposed findings of fact. All proposed findings, conclusions and supporting arguments submitted by the parties have been considered. To the extent that the proposed findings, conclusions and arguments advanced by the parties are in accordance with the findings, conclusions and views stated herein, they have been accepted, and to the extent that they are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the material issues as presented. To the extent that the testimony of various witnesses is not in accord with the findings as stated herein, it is not credited.

Personally identifiable information, including the names of parties and similar information is provided on the cover sheet hereto which should be removed prior to distribution of this decision to the public. FERPA, 20 U.S.C. § 1232(g) and IDEA § 617(c).

ISSUES PRESENTED

The following five issues were presented at the due process hearing, as identified by the parties during the prehearing conference and confirmed in their joint prehearing memorandum. The issues are as follows:

1. Did the school district properly evaluate the student?

2. Did the IEPs developed by the school district provide the student with a free appropriate public education?

3. Did Respondent violate IDEA by failing to educate the student in the least restrictive environment?

4. Did the school district violate the law by reducing the student's school day?

5. Did the school district violate the rules concerning discipline of students with disabilities?

FINDINGS OF FACT

Based upon the parties' stipulations of fact as contained in their joint prehearing memorandum or on the record during the hearing, the hearing officer makes the following findings of fact:

1. The student's date of birth is [redacted]. (Stip-1). (References to stipulations of fact are hereby referenced as Stip-1, etc.)

2. The student is currently in 5th grade. (Stip-2)

3. The student currently is placed in a private school in a nearby town by the school district. (Stip-3 and stipulation on the record)

4. The student was first enrolled in the school district for the 2013-2014 school year. (Stip-4)

5. The student attended both 2nd grade (2013-2014 school year) and 3rd grade (2014-2015 school year) at public schools in the school district. (Stip-5)

Based upon the evidence in the record, the hearing officer makes the following findings of fact:

6. The student was diagnosed with autism on May 4, 2009 in Pennsylvania. (P-1) (Exhibits shall hereafter be referred to as "P-1," etc. for the Parent's exhibits; "S-

1," etc. for the school district's exhibits; references to testimony at the hearing is hereafter designated as "T".)

7. On October 12, 2011, the student's former school district issued a reevaluation report for the student based upon an IEP team meeting to review data that was conducted on August 19, 2011. The report notes that at that time, the student was nonverbal and did not use words to communicate wants and needs. No understandable verbalizations were noted, and the student did not imitate any verbal models. The student could not follow one step directions. The student did not know colors or shapes and did not respond to any tasks related to matching or quantity. The report states that the student is unable to handle frustration without outbursts or aggressive behaviors. The report states that some of the student's scores fell within the "mentally retarded" range {now referred to in IDEA as "intellectual disability." IDEA § 602(3)}. The student's social skills, activities of daily living and functional communication skills were in the clinically significant range. The student demonstrated unusually poor expressive and receptive communication skills. (P-1)

8. The student has not been assessed, evaluated or reevaluated by the school district since the reevaluation report by the prior school district on October 12, 2011. The school district has not conducted a functional behavioral assessment of the student. The district has not conducted an IQ test of the student. (T. of special education teacher; T. of special education director; T. of mother; stipulation on the record)

9. When the student began the 2013-2014 school year, Respondent implemented the IEP from the previous school district. The school district issued a prior written notice on August 26, 2013 adopting the previous IEP. (T. of special education director; S-3)

10. During the first few months of the 2013-2014 school year, the student displayed many improper behaviors in the classroom and while receiving services from related services providers. (T. of special education teacher; T. of one on one aide; P-3; P-4)

11. The student's behaviors were severe and inappropriate when first arriving at the school district. In September 2013, the student's special education teacher was working with the student in a one on one setting. After the student had been told no, the student had a tantrum. The student became extremely frustrated when told no. At one point, the student thrust the student's head up forcefully and into the teacher's face, which broke the teacher's nose and gave the teacher a concussion. During the same tantrum, the student had been spitting on the floor. One of the classroom aides in the student's classroom slipped on some of the spit and broke her ankle. Both the special education teacher and the aide were treated at the emergency room. (T. of special education teacher)

12. As a result of the incident in which the teacher's nose was broken and the aide's ankle was broken during the student's tantrum, a meeting was held in September

2013 with the mother, the special education teacher, the special education director, the school principal, the special education director from the student's former school district and a worker from Children and Youth. At that meeting, it was decided at the suggestion of the director from the previous school district to reduce the student's school day by an hour to an hour and 15 minutes compared to the other students in the student's classroom. (T. of special education teacher; T. of special education director; T. of principal)

13. The school district did not issue a prior written notice concerning the reduction of the student's school day. (T. of special education director)

14. The student attended for a full school day for the first approximately three weeks of the 2013-2014 school year. The student's reduced school day remained in effect from the meeting in September, 2013 until the end of the 3rd grade school year (2014-2015). (T. of mother; T. of special education teacher)

15. On October 3, 2014, the student's mother signed an Agreement to Waive Reevaluation prepared by the special education teacher. The document notes that the student is "…making expected progress." The student's mother and the special education teacher had a brief discussion concerning the document. (P-5; T. of special education teacher)

16. On October 9, 2013, the school district developed an IEP for the student. Present at the meeting were a regular education teacher, a special education teacher, the

special education director representing the LEA, a speech language pathologist, the principal, an occupational therapist, and a case worker. The IEP notes that the student's present levels of performance in occupational therapy; speech and language; and academics. The present levels state that the student has severe behavior problems throughout the day. The IEP notes the student's high level of need in behavioral, motor, communication, self-help, sensory, academic and social challenges. The IEP includes an occupational therapy goal concerning pre-writing strokes. The IEP includes two speech therapy goals and five short-term objectives thereunder. The IEP includes a manding goal with two short-term objectives thereunder. The IEP also specifies additional specially designed instruction and program modifications involving a daily communication book, use of a structured environment, use of sensory techniques, combining verbal directions with visual cues, one to one and small group instruction, the opportunity to leave the room when needed, a one on one aide at all locations, and numerous other modifications and specially designed instruction. The IEP includes the related services of transportation, as well as speech language therapy 90 minutes per week and occupational therapy 180 minutes per month. The IEP provides for consultation between all staff who work with the student and the special education teacher. The IEP provides that the student is eligible for extended school year services. The IEP notes that the team considered the regular education classroom with supports and supplementary aids but rejected the option because the regular education

environment would inhibit the student's ability to make adequate educational progress, and that the student's behavioral, communication, academic and other challenges prevent Student's being in the general education classroom... Accordingly, the IEP team determined that the autistic support classroom was the least restrictive environment for the student. (P-3; T. of special education teacher)

17. The student's autism support classroom for the 2nd grade year in the 2013-2014 school year, for the first two weeks, consisted of approximately six students with a special education teacher and two adult aides. After the first two weeks of the 2013-2014 school year, the classroom composition was approximately six students with a special education teacher and four adult aides. One of the adult aides in the classroom was the student's one on one aide. (T. of special education teacher)

18. When the student started at the beginning of the 2013-2014 school year, beginning 2nd grade, the student had virtually no communication skills and problem behaviors were severe. (P-3; T of special education teacher; T of speech language pathologist; T of special education director; T of occupational therapist; T of one on one aide)

19. An IEP was developed for the student on October 6, 2014. Present at the meeting were the student's mother, a special education teacher, the special education director as the LEA representative, an occupational therapist, and a speech language clinician. No regular education teacher attended this meeting. The IEP refers to the

student's positive behavior support plan. The present levels portion of the IEP describes the progress that the student made during the previous school year. The present levels note that the student continues to have severe behavior problems. The IEP includes two occupational therapy goals and four short-term objectives thereunder. The IEP includes a goal for following directions and a short-term objective thereunder. The IEP includes two speech language goals and two short-term objectives thereunder. The IEP also includes manding goal and a short-term objective thereunder. In addition, the IEP contains two pages spelling out specially designed instruction and program modifications, including the use of a daily communication book, use of de-escalation and safe crisis management techniques, a structured environment, sensory techniques and strategies, one on one instruction and small group instruction, combining verbal directions with visual cues, one on one aide, and numerous other modifications. The IEP provides for the related service of transportation, as well as 180 minutes per month of occupational therapy and 90 minutes per week of speech language therapy. The IEP also provides for consultations between the speech language therapist, the occupational therapist and other staff with the special education teacher. The IEP provides that the student is eligible for extended school year services. The IEP team determined that the regular education classroom would inhibit the student's ability to make educational progress in view of the behavioral, motor, communication, self-help, sensory, academic and social challenges. Accordingly, the IEP team rejected the general education

classroom with supplementary aides and services and instead determined that the least restrictive environment for the student would be the autism support classroom. (P-6; T of special education teacher)

20. The student's autism support classroom for 3rd grade during the 2014-2015 school year consisted of approximately seven to eight students with a special education teacher and three adult aides. One of the adult aides was the student's one on one aide. (T of special education teacher)

21. On October 9, 2015, the school district developed a behavior intervention plan for the student. The plan was developed with the assistance of the Autism Initiative, which is a part of PaTTAN. The school district was awarded a competitive grant in order to work with the Autism Initiative. The plan states as a hypothesis that the primary function of the student's bad behaviors is socially mediated positive reinforcement in the form of adult attention and denied access. Phase one of the plan included immediate reinforcement when the student mands or signs for items or attention appropriately. Phase two included the staff systematically teaching the student to give up and wait for items or preferred activities. In addition, the plan specifies methods for how the team will engage the target behavior for reduction. The plan also includes a crisis management plan. The student's behavioral intervention plan was implemented across all phases of the student's school day during the student's two

school years in public schools at the school district. (P-4; T of special education teacher; T of special education director; S-35)

22. On March 25, 2015, there was an incident in the student's classroom. Another student became aggressive and pulled the student's hair and scratched the student's eye. The student's mother contacted the school district about the incident, but the special education director was handling another matter, and the school principal spoke with the mother. Later on March 25, 2015, the student's mother called the special education director, and the two had angry words. The special education director made a statement with which the mother took issue; the special education director stated that she had hoped that having had a child with a disability, the mother would be more understanding of other children with disabilities. The mother then became angry and cursed and yelled at the special education director. The school district convened a meeting on March 26, 2015 to discuss the incident in which the other student had become aggressive with the student. Present at the meeting were the mother, the school principal, the special education director and the special education teacher. At the meeting, the mother explained her dissatisfaction with the way the incident had been handled and her unhappiness with the special education director. The meeting began to get heated between the parent and the special education director, and the special education director removed herself from the meeting approximately a half hour after it had begun. The special education teacher and the principal agreed to look into

extending the student's school day. At the meeting, the principal brought up the fact that the student would have a different teacher for the next school year. The mother was unaware that the student would be moving to a new teacher and "was not okay with this." Placement at a private school for the next year was discussed, and those present agreed to monthly meetings for the remainder of the school year. The next meeting was scheduled for April 7. (S-12; T of special education director; T of special education teacher; T of principal)

23. On April 7, 2015, a meeting was held concerning the student. Present were the student's mother, the school building principal, the special education teacher, and the speech language pathologist. At the meeting, the principal noted the positive progress the student had made during the current school year. The speech language pathologist stated that the student's progress during the year had been "amazing," and that the student's speech and behaviors had both improved. The special education teacher stated that the student's problem behaviors are still being charted on a daily basis but that they continue to improve. The special education teacher suggested that the student attend a field trip to an amusement park in June. The student's mother consented to the field trip. The participants also discussed placement at a private school for the next school year. Transportation difficulties with regard to the extension of the student's school day were also discussed. (S-15; T of special education teacher; T of principal; T of special education director)

24. The student attended the field trip to the amusement park and the student behaved very well during the field trip. The student's good behavior included waiting on line at the amusement park which was an accomplishment for the student given the student's past behavior issues with waiting on line. (T of special education teacher; T of one on one aide)

25. Although the student was eligible for extended school year services, the student's mother decided not to send the student to extended school year program between the 2nd and 3rd grade years. As a result, there was some regression in the student's skills at the beginning of the 2014-2015 school year. (T of special education teacher; S-29; S-30)

26. The student's greatest need is communication. The student made excellent progress in communication and speech/language during both the 2013-2014 and 2014-2015 school years. When the student first started at the school district, one could not understand the student's speech. Later, the student's speech became much better. The student made a lot of progress by the end of the first year. By the end of the second year, the student was following cues and had a much better ability to focus. More of the student's words were understandable. By the end of the second year, the student would spontaneously say words while looking at a picture. When the student started in the school district, the student was not able to sign or mand. In the beginning,

the student would imitate signs. After that, there was a significant increase in the student's vocabulary. (T of speech language pathologist; S-6; S-11; S-15; S-26)

27. The student made good progress in occupational therapy under the 2013-2014 and 2014-2015 school year IEPs in the school district. At first, the student really feared transitioning from the classroom to occupational therapy. Eventually, the student would walk with the aide and go to the therapy sessions, and then later attend the sessions while the aide was outside the room in the hall. The student behaviors in occupational therapy decreased substantially during the 3rd grade year. The student made progress toward the prewriting stroke goal and the student passed and mastered the goal concerning using scissors independently. (T of occupational therapist; T of one on one aide; S-11)

28. The student made steady academic progress under the 2013-2014 and 2014-2015 IEPs. Although there was some regression in certain skills, overall, the student made great progress, especially in the areas of communication. The student mastered goals concerning sign language skills, matching and interacting with other students. The student's scores on the VB-MAPP progress monitoring went from an 8.0 at the beginning of the 2013-2014 school year to a 60.5 at the end of the school year. There was some regression after the student's mother decided not to have the student attend extended school year services, and at the beginning of the 2014-2015 school year, the progress monitoring VB-MAPP score was 43.5. By the end of the

2014-2015 school year, the VB-MAPP score increased to a 51.5. (T of special education teacher; T of speech language pathologist; P-3; P-6; S-29; S-30)

29. The student made progress on problem behaviors during the 2013-2014 and 2014-2015 school years, although they were still not under control by the end of the second school year. (T of special education teacher; T of speech language pathologist; T of one on one aide; T of special education director; S-15)

30. There was frequent and regular communication between the parent and the school district. The teacher and parent sent home a daily log concerning the student each day. The one on one aide for the student talked to the student's mother every day. (T of special education teacher; T of one on one aide; S-31)

31. The reduction of the student's school day at the school district was the result of the student's problem behaviors and the recommendation from the special education director at the student's previous school district. The reduction of the student's school day was not a punishment or the result of an infraction involving a code of student conduct. (T of special education director)

32. The school district did not sufficiently evaluate the needs of the student, and it did not evaluate the student in all areas of suspected disability. (Record evidence as a whole)

33. The IEPs developed by the school district for the student for the 2013-2014 and 2014-2015 school years were reasonably calculated to and did provide meaningful educational benefit. (Record evidence as a whole)

34. The autism support classroom provided by Respondent to the student for the student's 2nd and 3rd grade years (school years 2013-2014 and 2014-2015) were the least restrictive environment appropriate for the student. (Record evidence as a whole)

CONCLUSIONS OF LAW

Based upon the arguments of the parties, all of the evidence in the record, as well as legal research by the hearing officer, the hearing officer makes the following conclusions of law:

1. In conducting an evaluation, a school district must use a variety of assessment tools and strategies to gather relevant, functional, developmental and academic information about the child. The child must be assessed in all areas of suspected disability. A student must be reevaluated every three years. When conducting a reevaluation, a school district must review existing evaluation data including classroom based assessments and observations by a teacher and related service providers, and on that basis determine whether any additional data are needed to determine whether the student continues to be eligible, as well as to identify the child's special education and

related services needs. IDEA § 614(a) and (b); 34 C.F.R. §§ 300.304 – 300.305; 22 Pa. Code §§ 14.123 – 14.124.

2. To determine whether a child with a disability has been provided a free appropriate public education (hereafter sometimes referred to as "FAPE"), the United States Supreme Court has developed a two part test. The two part test involves first whether or not the school district has substantially complied with the procedural safeguards in the Act and second an analysis of whether the student's individualized educational plan (sometimes hereafter referred to as "IEP") is reasonably calculated to confer meaningful educational benefit. Bd. of Educ., etc. v. Rowley, 458 U.S. 178, 102 S. Ct. 3034, 553 IDELR 656 (1982); LE and ES ex rel. MS v. Ramsey Bd. of Educ., 435 F.3d 384; 44 IDELR 269 (3d Cir. 2006); Ridley School District v. MR and JR ex rel. ER, 680 F.3d 260, 58 IDELR 271 (3d Cir. 2012).

3. For a procedural violation to be a denial of FAPE under IDEA, a parent must show that the violation results in a loss of educational opportunity for the student, seriously deprives the parents of their participation rights, or causes a deprivation of educational benefit. IDEA § 615(f)(3)(e)(ii); 34 C.F.R. § 300.513(a)(2); Ridley School District v. MR and JR ex rel. ER, 680 F.3d 260, 58 IDELR 271 (3d Cir. 2012).

4. The law does not require a school district to maximize the potential of a student with a disability or to provide the best possible education. Rather, it requires that the student's educational plan provide the basic floor of educational opportunity.

Bd. of Educ., etc. v. Rowley, supra; Ridley School District v. MR and JR ex rel. ER, 680 F.3d 260, 58 IDELR 271 (3d Cir. 2012).

5. A school district must "…to the maximum extent appropriate (ensure that) children with disabilities…are educated with children who are nondisabled and that special classes, separate schooling or other removal of children with disabilities from the regular education environment occurs only if the nature or severity of the disability is such that education in the regular classroom with the use of supplementary aids and services cannot be achieved satisfactorily." 34 CFR § 300.114(a)(2); IDEA § 612(a)(5)(A); 22 Pa. Code §§ 14.145. In analyzing whether a student has been provided with the least restrictive environment, the Third Circuit has specified three factors to consider: 1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; 2) the educational benefits available to the child in a regular class with appropriate supplementary aids and services as compared to the benefits provided in a special education class; and 3) the possible negative effects of inclusion of the child on the education of the other students in the class. Oberti v. Bd. of Educ. of the Borough of Clementon Sch. Dist., et al., 995 F.2d 1204, 19 IDELR 908 (3d Cir. 1993).

6. IDEA imposes special rules restricting the ability of a school district to change the placement of a child with a disability as punishment for violating a code of student conduct. IDEA §615(k); 34 C.F.R. §300.530, et seq.; 22 Pa. Code §14.143.

Where a change of placement of a student with a disability is contemplated because of a violation of a student code of conduct, a school district must convene a manifestation determination meeting. IDEA §615(k)(4); 34 C.F.R. 300.530(e).

7. Where there has been a violation of IDEA, the hearing officer has broad equitable discretion to fashion an appropriate remedy. School Committee Town of Burlington v. Bd. of Educ., 471 U.S. 358, 369, 105 S. Ct. 1996, 556 IDELR 389 (U.S. 1985); Forest Grove Sch. Dist. v. T. A., 557 U.S. 230, 129 S. Ct. 2484, 52 IDELR 151 (U.S. 2009); Garcia v. Bd. of Educ. of Albuquerque Public Schools, 530 F.3d 1116, 49 IDELR 241 (10th Cir. 2008); In re Student with a Disability, 111 L.R.P. 40544 (SEA WV 2011); District of Columbia Public Schools, 111 L.R.P. 76506 (SEA D.C. 2011); School District of Philadelphia v. Williams ex rel. LH, 66 IDELR 214 (E.D. Penna. 2015).

8. Respondent failed to properly reevaluate the student and did not assess the student in all areas of suspected disability.

9. The IEPs developed by the school district for the student for the 2013-2014 school year and 2014-2015 school year were reasonably calculated to provide educational benefit and provided FAPE to the student.

10. Procedural violations committed by the school district in this case were harmless and did not result in a denial of FAPE.

11. The IEPs and educational placement for the student by the school district for the 2013-2014 and 2014-2015 school years placed the student in the least restrictive environment.

12. The decision by the school district to reduce the school day of the student did not result in a denial of FAPE or otherwise violate the law.

13. The decision to reduce the student's school day was not punishment for violation of a student code of conduct. The decision to reduce the school day of the student did not violate the discipline protections of IDEA.

DISCUSSION

1. Merits

1. Issue No. 1: Did the school district fail to properly evaluate the student??

There are four separate and distinct ways that a school district can violate IDEA. A violation may involve identification (eligibility or child find); evaluation; educational placement (which includes a number of items, including but not limited to least restrictive environment and disciplinary change of placement); and the provision of a free appropriate public education.

In the instant case, Petitioner contends that the school district failed to properly reevaluate the student. The parties agree that the school district has never assessed or evaluated the student, and that the last evaluation of the student was approximately four and a half years prior to the due process hearing when the student's previous school district reevaluated the student.

Thus it is clear that the student has not been reevaluated within three years as is required by IDEA. In its post-hearing brief, the school district contends that the student's mother executed a waiver of the reevaluation of the student. The parent in its post-hearing brief argues that the waiver is ineffective. The case law cited by the parent's post-hearing brief, however, is inapposite. The case cited involves waiver of the much more important right to file a due process hearing after a settlement. Thus the case is distinguishable and not applicable to these facts.

Although waiver of reevaluation is permissible under the law, as the school district contends in its post-hearing brief, sometimes other factors may compel a need for a reevaluation. Indeed, we are talking about the education of a child, "…a growing, learning, young person." John M. by Christine M. and Michael M. v. Board of Education of Evanston Township High School, District No. 202, 502 F.3d 708, 48 IDELR 177 (7th Cir. 917/2007). In the instant case, two other factors negate the agreement to not reevaluate: the student's improper behaviors, and the fact that the

school district had not evaluated the student in all areas of disability. Given the presence of these two factors, it was not acceptable for the school district to delay the reevaluation of the student for such a long period of time.

The student's problem behaviors were not completely under control. Although they had been improving noticeably, the student's behaviors were still sufficiently a problem that the school district continued to reduce the student's school day by an hour to an hour and 15 minutes each day. The district did not conduct a functional behavioral analysis of the student. Accordingly, it must be concluded that the student's behaviors were not adequately addressed by the school district and that a proper reevaluation must include a functional behavioral assessment to determine whether or not possible revisions to the student's behavioral intervention plan or IEP are appropriate.

Also significant in this case is the fact that the school district has not evaluated the student in all areas of suspected disability. IDEA §614(b); 34 C.F.R. §300.304(c)(4). The reevaluation report conducted by the previous school district noted that the student may suffer from "mental retardation." That term has now been replaced "intellectual disability." IDEA § 602(3). The record evidence reveals that district has never given the student an IQ test even though the special education teacher testified that there are nonverbal IQ tests that could be given to the student.

In her post-hearing brief, the parent contends that the student should have been made eligible in a separate category, such as intellectual disability. This argument misses the point however because a student's eligibility category is only relevant to eligibility. In this case, all parties concede that the student is eligible for special education. Services are not categorical under IDEA. IDEA does not concern itself with labels, but whether a student with a disability is receiving a free and appropriate public education; a disabled child's IEP must be tailored to the unique needs of that particular child. Heather S. v. State of Wisconsin 125 F.3d 1045, 26 IDELR 870 (7th Cir. 1997); Fort Osage R-1 School District v. Sims ex rel. BS 841 F.3d 996, 56 IDELR 282 (8th Cir. 2011). Regardless of the category of eligibility, each child with a disability is entitled to individually designed special education and related services. DB by LB v. Houston Independent School District 48 IDELR 246 (D. Tex. 2007); Pohorecki v. Anthony Wayne Local Sch Dist 637 F.Supp.2d 547, 53 IDELR 22 (N.D. Ohio 2009). The child's identified needs, not the child's disability category determines the services that must be provided to the child. Maine Sch Administrative Dist No 56 v. Ms W ex rel KS 47 IDELR 219 (D. Maine 2007); Letter to Anonymous 48 IDELR 16 (OSEP 2006); See also, analysis of comments (pertaining to federal regulations), 71 Fed. Register 156 at p. 46586, 46588 (OSEP August 14, 2006); In re Student With a Disability 52 IDELR 239 (SEA WV 2009); Letter to Audin 58 IDELR 51 (OSERS 2011); Letter to Brumbaugh 108 LRP 33562 (OSEP 2008).

Instead, however, the school district erred by failing to evaluate the student in an area of suspected disability. It is possible that an intellectual disability would cause the student to have educational needs in addition to those caused by the student's autism. No assessment has been conducted concerning those needs.

Because the student's behaviors were still not completely controlled and because the school district had never evaluated the student in one of the areas of suspected disability, the IEP team didn't have sufficient evaluative data about this particular "growing, learning young person." It must be concluded on these facts that despite the waiver signed by the parent, the school district violated IDEA by failing to reevaluate the student's educational needs or to conduct any assessments for a period of over four and a half years.

It should be noted that unlike FAPE issues, a violation of IDEA's evaluation procedural requirements may be actionable even where there is no resulting impact upon the student's educational benefit. See discussion of procedural FAPE violations below. Thus, even where, as here, the student made excellent progress on [IEP] goals, failure to comply with evaluation procedures may still be actionable. Progress alone does not justify such a long delay in reevaluating the student. It is concluded that the school district's failure to reevaluate the student violated IDEA.

2. Issue No. 2: Did the IEPs developed by the school district provide the student with a free appropriate public education?

The United States Supreme Court has developed a two part test to determine whether a child with a disability has been provided a free and appropriate public education (hereafter sometimes referred to as "FAPE"). The two part test involves first whether or not the school district has substantially complied with the procedural safeguards in the Act and second an analysis of whether the student's individualized educational plan (sometimes hereafter referred to as "IEP") is reasonably calculated to confer meaningful educational benefit. Bd. of Educ., etc. v. Rowley, 458 U.S. 178, 102 S. Ct. 3034, 553 IDELR 656 (1982); LE and ES ex rel. MS v. Ramsey Bd. of Educ., 435 F.3d 384; 44 IDELR 269 (3d Cir. 2006); Ridley School District v. MR and JR ex rel. ER, 680 F.3d 260, 58 IDELR 271 (3d Cir. 2012). The law does not require a school district to maximize the potential of a student with a disability or to provide the best possible education. Rather, it requires that the student's educational plan provide the basic floor of educational opportunity. Bd. of Educ., etc. v. Rowley, 458 U.S. 178, 102 S. Ct. 3034, 553 IDELR 656 (1982); Ridley School District v. MR and JR ex rel. ER, 680 F.3d 260, 58 IDELR 271 (3d Cir. 2012).

For a procedural violation to be actionable under IDEA as a denial of FAPE, the parent must show that the violation results in a loss of educational opportunity for

the student, seriously deprives the parents of their participation rights, or causes a deprivation of educational benefit. IDEA § 615(f)(3)(e)(ii); 34 C.F.R. § 300.513(a)(2); Ridley School District v. MR and JR ex rel. ER, 680 F.3d 260, 58 IDELR 271 (3d Cir. 2012).

In this case, the parent does not allege any substantive violations of IDEA. Instead, the parent argues that numerous alleged procedural violations denied FAPE to the student. Some of the procedural violations alleged by the parent are not actually violations of the law at all, but even assuming arguendo that all of the procedural violations alleged by the parent constituted violations of IDEA, there is no evidence in the record of any kind indicating that the violations resulted in a loss of educational opportunity for the student, or seriously deprived the parent of her participation right, or caused the deprivation of educational benefit for the student.

Instead, the evidence in the record overwhelmingly establishes that the student made good progress under the IEPs at issue. It was the unrebutted and credible and persuasive testimony of the student's teacher, the speech language pathologist, the student's one on one aide, the occupational therapist, and the special education director that the student made excellent progress under the 2013-2014 and 2014-2015 IEPs while the student attended school in the school district. This testimony is corroborated by the progress monitoring reports and the other documents in the records. The

testimony of said witnesses is credible and persuasive and is not contradicted in the record. It is concluded that the student clearly received meaningful educational benefit and clearly did not suffer a loss of educational opportunity as a result of the alleged procedural violations.

Petitioner argues in her post-hearing brief that the testimony of the witnesses other than the parent with regard to progress is invalid. The argument lacks merit.

Petitioner points to certain areas upon which the student regressed while working on IEPs at Respondent. Petitioner is correct that there are certain items and goals where the record supports that the student did regress. There are, however, many more areas in which the student made progress, especially in the two most important areas for this student, communication and behavior. The fact that the student did not master every goal in the IEP is not evidence of a denial of FAPE, especially where, as here, the student made excellent progress under the IEPs.

The testimony of the witnesses other than the parent concerning the student's progress under the IEPs is not contradicted in the record. However, to the extent that any testimony of the mother could be construed to contradict the evidence regarding progress, the testimony of the parent is less credible and persuasive than the testimony of the other witnesses as to this issue. The testimony of the mother, to the extent that it conflicts with any testimony of the other witnesses, is less credible and persuasive

based upon her demeanor, as well as other problems. There were contradictions in the testimony of the mother at the due process hearing that diminish her credibility. For example, the mother testified at the hearing that she was "very much in the dark" concerning the student's education. She later admitted, however, that she had daily communication with the student's aide. In addition, the documentary evidence includes a daily log which consists of 103 pages of communication between the parent and the school district concerning the education of the student during the 2014-2015 school year.

In addition, the testimony of the parent was not credible because she testified that she was unemployed because of the fear she suffered because the student was attending school at the school district. It was the unrebutted testimony of the student's teacher, however, that the parent became very upset when she learned that the student's teacher, who had worked with the student in the 2013-2014 school year and the 2014-2015 school year, would not be available to teach the student in the 2015-2016 school year. The documentary evidence supports the testimony of the teacher and not the parent in this regard. A document memorializing a meeting on March 26, 2015 states in part, "(The mother) was unaware that… (the student) would be moving to a new teacher and was not okay with this." It is concluded that the testimony of the mother that she lived in fear because of the student's experience at school is not credible or persuasive.

Accordingly, due to the demeanor of the mother while testifying and the internal and external conflicts as identified above, the testimony of the mother is less credible and persuasive than the testimony of the other witnesses.

The parent does not contend that she was denied meaningful participation in this case. It is concluded that any procedural violations were harmless. The following is a discussion of the procedural violations alleged by Petitioner herein. It should be noted, however, that to the extent that any of the following do constitute violations of IDEA, they are harmless procedural violations and not actionable denials of FAPE:

One alleged procedural violation identified by Petitioner in her post-hearing brief is an allegation that there were no goals for certain needs of the student. The failure to include all of the student's needs as goals in the IEP is not a violation of the Act. IDEA does not require that every need of a student must be addressed by a specific IEP goal. See, CLK and JK ex rel. CK v. Arlington School District, 113 LRP 53153 (S.D. N.Y. 2013). Indeed, as the speech language pathologist for Respondent testified, for students with many needs, you need to prioritize the greatest need. For this particular student, the greatest need was communication and that need was prioritized in the IEP. As a result of the prioritizing that need in the IEP, the student made great progress and received FAPE.

In addition, Petitioner argued that some of the goals in the student's IEP were not measureable. To the extent that any of the student's goals were not measurable, this is a harmless procedural violation. See discussion above.

In addition, Petitioner contends that Respondent violated IDEA by failing to have a regular education teacher attend the IEP team meeting for the student conducted on October 6, 2014. The requirement that a regular education teacher attend an IEP team meeting, however, only applies when the child is or may be participating in the regular education environment. IDEA §614(d)(1)(B)(i); 34 C.F.R. §300.321(a)(2). In the instant case, there was no regular education teacher present at this IEP team meeting, but there is no evidence in the record that the student was or may be participating in the regular education environment given the student's severe needs and behavioral issues. Accordingly, the failure to have a regular education teacher at the IEP team meeting was not a violation of IDEA.

Another procedural violation alleged by the parent concerns the fact that there is no citation in the IEPs to peer reviewed research for the teaching methodologies used. It should be noted, however, that a school district is only required to utilize peer reviewed research based methods to the extent practicable and that the choice of methodology is within the realm of the school district. Ridley School District v. MR

and JR ex rel. ER, 680 F.3d 260, 58 IDELR 271 (3d Cir. 2012). This is not a violation of IDEA.

Finally, Petitioner contends that the school district failed to give prior written notice of certain actions, including the decision to reduce the student's school day. The school district concedes that it failed to provide the required prior written notice of the reduced school day. As is noted above, however, the failure to give prior written notice in this case is a harmless procedural violation because of the student's substantial progress. See discussion above.

In conclusion, the procedural violations alleged by the parent herein are either not violations at all or else are harmless procedural violations which do not amount to a denial of FAPE. The parents' arguments in this regard are rejected. It is concluded that the school district provided FAPE to the student in the second grade (2013-2014) and third grade (2014-2015) school years.

3. Issue No. 3: Did Respondent violate IDEA by failing to educate the student in a least restrictive environment?

It should be noted that near the end of the due process hearing, the hearing officer granted the parent's unopposed motion to withdraw without prejudice the allegations of the due process complaint concerning the current school year (2015-

2016), including an argument that the student's placement during the current school year is not the least restrictive environment. Thus, the LRE argument before the hearing officer applies only to the student's separate class for the second and third grade school years.

A school district must "to the maximum extent appropriate ensure that children with disabilities are educated with students who are nondisabled and that special classes, separate schooling or other removal of children with disabilities with the regular education environment occurs only if the nature or severity of the disability is such that education in a regular classroom with the use of supplementary aids and services cannot be achieved satisfactorily." CFR § 300.114(a)(2); IDEA § 612(a)(5)(A); 22 Pa. Code §14.145.

The Third Circuit has adopted a three part test in determining a school district's compliance with least restrictive environment. In Oberti v. Bd. Of Educ. Of the Borough of Clementon Sch. Dist., et al., 995 F.2d 1204, 19 IDELR 908 (3d Cir. 1993), the court enumerated the three factor test: (1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class with appropriate supplementary aids and services as compared to the benefits provided in the special education class and (3) the possible negative effects of the inclusion of the child on the education of other student's

in the class. In the instant case, it is clear that the nature and severity of the student's disability compounded by problem behaviors is such that education in a regular classroom, even with the use of supplementary aids and services, could not be achieved satisfactorily. By contrast, the student was making good progress and receiving FAPE in the 8:1+4 (that is, eight students with one teacher and four aides) and later 6:1+4 special autism support classrooms at Respondent. Although the student's behaviors were improving, they continued to be a problem, and it is apparent that educating the student in a general education classroom would have a negative effect upon the student and others in the classroom.

No evidence in the record suggests that the student could progress on the IEP goals in a general education classroom or other less restrictive setting. In this case, the school district had already provided a 1:1 aide for the student while the student was at school, one of the most important supplementary aids and services. Even with the 1:1 aide, however, the student continued to exhibit problem behaviors.

Thus, it is concluded that the severity and nature of the student's disability made it impossible for the student to receive educational benefit in a general education classroom even with the use of supplementary aids and services. Moreover, given the student's improving but still problematic behavioral issues, it would have been difficult for the other students in a general education classroom to receive educational benefit

with the student being present. Thus, the IEP team appropriately concluded that the student's autistic support classroom was the least restrictive environment given the student's progress as well as the student's behavioral, communication and other challenges. In view of this analysis, it is concluded that the student was educated by the school district in the least restrictive environment during the student's the second and third grade school years.

4. Issue No. 4: Did the school district violate the law by reducing the student's school day?

The unrebutted evidence in the record reflects that the school district reduced the student's school day by an hour to an hour and 15 minutes for most of the two school years at issue. The reduction of the student's school day was an unorthodox and risky method for dealing with the student's problem behaviors. If the student had not made great progress under the IEPs, the reduction of the school day could well have been an actionable procedural violation.

Nonetheless, the evidence reveals that the student did in fact make great progress in the 8:1+4 and 6:1+4 special autism support classroom. Given the student's solid progress, it must be concluded that the student received a free appropriate public education despite the reduction of student's school day. Accordingly, it is concluded

that the reduction of the school day was a harmless procedural violation. See discussion above.

Petitioner also asserts in her post-hearing brief that the school district violated Section 504 of the Rehabilitation Act by reducing the student's school day. This argument is raised for the first time in the parents' post-hearing brief. The issue is not mentioned in the due process complaint; it was not mentioned during the prehearing conference for this case; and it was not listed as an issue in the parties' joint prehearing memorandum. The due process complaint does reference Section 504 but only in passing in the very beginning of the complaint in connection with the request for a hearing. Although the due process complaint was drafted by counsel and spells out all of the issues in great detail, it does not allege any specific Section 504 violation. The special education laws do not permit trial by surprise. 34 CFR § 300.511(d). Accordingly, the issue as to whether or not the reduced school day violates Section 504 is not properly before the hearing officer, and the argument must be rejected.

Even assuming arguendo that this issue is properly before the hearing officer, however, the parents' argument must be rejected. The parent has not offered any evidence that the student was excluded from participation and/or denied benefits of education as a result of discrimination by the Respondent. Ridley School District v. MR and JR ex rel. ER, 680 F.3d 260, 58 IDELR 271 (3d Cir. 2012); 29 U.S.C. § 794; 34

CFR § 104.33(b)(1); 22 Pa. Code § 15.3. There is no evidence in the record that students without disabilities were treated differently than the student. Petitioner's argument is rejected.

It is concluded that the shortening of the student's school day did not violate either IDEA or Section 504.

5. Issue No. 5: Did the school district violate the law by not following the rules with regard to discipline of students with disabilities?

Petitioner contends that the school district violated IDEA by failing to have a manifestation determination review meeting before reducing the student's school day. IDEA provides that a student with a disability may not be punished by means of a change of placement for violating a school code of student conduct because of conduct which is a manifestation of the student's disability. IDEA § 615(k); 34 CFR § 300.530(f); 22 Pa. Code §14.143. Where a change of placement of a student with a disability is contemplated because of a violation of a student code of conduct, a school district must convene a manifestation determination meeting. IDEA §615(k)(4); 34 C.F.R. 300.530(e).

In the instant case, it is undisputed that the school district reduced the student's school day by one hour to one hour and 15 minutes. There is no evidence in the record,

however, that the reduction of a school day constituted a punishment or was the result of a breach of a student code of conduct. Although the reduction of the school day may have been an unorthodox method for dealing with the student's behaviors, it was clearly not a punishment or the imposition of discipline in any way. Accordingly, the parents' argument in this regard is rejected.

It should be noted that in the due process complaint and the joint prehearing memorandum statement of issues, Petitioner argued that the shortening of the student's school day also violated state law concerning expulsion hearings required by the U. S. constitution. This argument is not raised again in Petitioner's post-hearing brief and therefore, it is waived.

Even assuming arguendo, however, that the argument had not been waived, an IDEA hearing officer is not a court of competent jurisdiction. An IDEA hearing officer has broad jurisdiction over numerous special education disputes, but not over general matters of state law not pertaining to special education. Specifically, although an IDEA hearing officer does have jurisdiction over an alleged disciplinary change of placement of a special education student for violating a code of student conduct, an IDEA hearing officer does not have jurisdiction over expulsion hearings required by the due process clause of the constitution. See Goss v Lopez 419 U.S. 565 (1975). Thus, even assuming

arguendo that the issue has not been waived, the argument is rejected on the basis of a lack of jurisdiction.

It is concluded that the school district has not violated the IDEA discipline rules.

2. Relief

An IDEA officer has broad equitable authority to impose appropriate relief upon finding a violation of IDEA. School Committee Town of Burlington v. Bd. of Educ., 471 U.S. 358, 369, 105 S. Ct. 1996, 556 IDELR 389 (U.S. 1985); Forest Grove Sch. Dist. v. T. A., 557 U.S. 230, 129 S. Ct. 2484, 52 IDELR 151 (U.S. 2009); Garcia v. Bd. of Educ. of Albuquerque Public Schools, 530 F.3d 1116, 49 IDELR 241 (10th Cir. 2008); In re Student with a Disability, 111 L.R.P. 40544 (SEA WV 2011); District of Columbia Public Schools, 111 L.R.P. 76506 (SEA D.C. 2011); School District of Philadelphia v. Williams ex rel. LH, 66 IDELR 214 (E.D. Penna. 2015).

The violation proven by Petitioner in the instant case involves the school district's failure to conduct a timely reevaluation and to fully assess the student. In the due process complaint, Petitioners seek a number of independent educational evaluations. Although IDEA gives the hearing officer the discretion to award an independent evaluation as relief where the facts so justify, in general, IDEA gives the

school district the first right to conduct an evaluation before an independent evaluation is required. See 34 CFR § 300.502(b)(1)(5). Here evaluations conducted by the school district are appropriate to remedy the specific violations of IDEA.

Because the school district's efforts to control the student's problem behaviors have not completely resolved the problem behaviors, despite some improvement, it is ordered that the school district conduct a functional behavioral analysis of the student and determine whether any changes to the student's behavioral intervention plan are necessary.

In addition, because the school district has not evaluated the student in all areas of suspected disability due to its failure to assess possible intellectual disability, it is ordered that the school district conduct a nonverbal IQ test of the student.

The school district is also ordered to conduct a full reevaluation of the student including: a review of existing evaluation data on the child, and the new functional behavioral analysis and nonverbal IQ test; any new information or evaluations provided by the parent; current classroom based local or state assessments and classroom based observations; and observations by teachers and related services providers. On the basis of that review and input, the IEP team will be required to identify what additional data, if any, are needed to determine whether the student remains eligible for special education and the educational needs of the child. See 34 CFR § 300.305.

ORDER

Based upon the foregoing, it is HEREBY ORDERED as follows:

1. The school district is ordered to conduct a functional behavioral analysis of the student within 30 days of the date of this decision;

2. The school district is ordered to conduct a nonverbal IQ test of the student within 30 days of the date of this decision;

3. The school district is ordered to conduct a full reevaluation of the student consistent with the instructions above within 60 days of the date of this decision;

4. The school district is ordered to reconvene the student's IEP team within 90 days of the date of this order to discuss whether any changes are needed to the student's educational program or behavioral intervention plan; and

5. All other relief requested in the instant due process complaint is hereby denied.

ENTERED: May 9, 2016

James Gerl

James Gerl, Certified Hearing Official
Hearing Officer