

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.

IN THE PENNSYLVANIA OFFICE FOR DISPUTE RESOLUTION

Final Decision and Order
ODR File No. 2330-1112AS

OPEN HEARING

Child's Name: C.D.¹
Date of Birth: [redacted]

Hearing Dates: 11/21/2011, 01/30/2012

Parties to the Hearing

Representative

Parents

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Record Closed: March 2, 2012

Date of Decision: March 2, 2012

Hearing Officer: Brian Jason Ford

¹ Other than this cover page, the child and parents names are not used to protect their privacy. "Parent" and "Student" is used instead. Other identifying information, such as the Student's gender, is omitted to the extent possible. Citation to the notes of testimony (transcript) are to "N.T.". Citations to exhibits are "P-#" for Parents' exhibits; "S-#" for School District's exhibits; and "J-#" for joint exhibits.

Introduction

The Parents requested the instant due process hearing pursuant to the Individuals with Disabilities Education Act, as amended 2004, 20 U.S.C. § 1400 *et seq.* (IDEA). They allege that the Bethel Park School District (District) has violated the Student's right to a free appropriate public education (FAPE). Specifically, the Parents allege that the Student's individualized education programs (IEPs) have not provided the type of social skills training and behavioral interventions that the Student requires. The Parents also claim that the Student's IEPs were not reasonably calculated to ensure that the Student could make meaningful educational progress in academic areas – and that meaningful progress was, in fact, not made.

For reasons detailed below, this Hearing Officer determines that the District has not provided the social skills training and behavioral supports that the Student needs, and that the District has not provided appropriate Math instruction leading to a denial of FAPE in that particular area. Remedies are awarded to correct these particular denials.

Issues

1. Was the Student denied FAPE from September 14, 2009 through the present?
2. Has the District offered an appropriate IEP to the Student?

The Parents argue that both questions should be answered in the negative, and demand compensatory education and an independent FBA. The District argues that both questions should be answered in the affirmative and that no remedy is owed.

Findings of Fact

1. Student is a [teen-aged] 8th grade student who attends one of the District's middle schools. The Student has been diagnosed with Pervasive Developmental Disorder (PDD), which is an autism spectrum disorder, and with Attention Deficit Hyperactivity Disorder (ADHD). There is no dispute that the Student is a student with a disability as defined by the IDEA and entitled to the substantive and procedural protections of that act.
2. The District completed a reevaluation report of the Student on March 4, 2010 (2010 RR). J-4.
3. The 2010 RR reports grade-level equivalent scores from the Math section of a Woodcock Johnson Test of Achievement that was administered on December 9, 2009. Although the Student was in sixth grade at that time, the Student's Math scores were as follows: Math Calculation 3.5, Math Fluency 2.0, Applied Problems 2.8, Quantitative Concepts 3.3.² A narrative description of the Student's Math skills

² These grade-level scores are not as meaningful as standardized scores that compare the Student to the normed sample. However, these grade-level scores are the only scores reported in the 2010 RR.

explains that the Student can add some denominations of change up to a dollar, and knows some multiplication. J-4 at 2.

4. The 2010 RR also provides information about the Student's Reading abilities. According to the 2010 RR, the Student started participating in a reading program called "Read 180" about 9 weeks into the 2010-11 school year. When that program started, the Student earned a lexile score of 304 on an initial screener. This corresponds to a below-basic reading level, roughly equal to the late first grade. By February 5, 2010, the Student's lexile score had increased to 455 (basic/mid second grade). The 2010 RR also reported improvement with sight words and reading comprehension while noting difficulties with grammar and punctuation. J-4 at 2.
5. At the time of the 2010 RR, the Student received core academics (Language Arts, Reading, Spelling and Math) in an autistic support classroom while attending Unified Arts, Social Studies and Science in regular education classrooms. The Student also received small group Speech and Language support once per week. The 2010 RR concludes that the Student should maintain current levels of support. See J-4.
6. The 2010 RR also notes that the Student received one-to-one (1:1) para-educator support throughout the school day. This statement was contradicted by witnesses who testified that an aide was assigned to the Student's classroom – not to the Student. See, e.g. NT at 324. This is an important, meaningful difference. As explained below, I find that 1:1 support was offered by the District, rejected by the Parents, and never implemented as indicated in the 2010 RR.
7. The 2010 RR contains no information or assessments about the Student's social skills or executive functioning. See J-4, NT at 165-166.
8. The Parents and various District officials approved the 2010 RR. J-4 at 6.
9. The Student's IEP team met on March 5, 2010 and developed an IEP for the Student (2010 IEP). The Student's Present Levels of Academic and Functional Performance as reported in the 2010 IEP were copied directly from the 2010 RR and, as such, include no information about the Student's social skills or executive functioning. J-5 at 5-7.
10. None of the goals in the 2010 IEP include baseline data. J-5 at 12-23.
11. Using the 2010 RR as a baseline, the Student had already mastered some of the Math goals contained in the 2010 IEP at the time it was offered. C/f J-4 and J-5 at 19.
12. With the exception of one goal to improve the Student's time on task and another goal to improve listening skills, all other goals addressed reading, writing and math. See J-5 at 12-23.
13. The 2010 IEP indicates that the Student will receive support from a personal care assistant in all classroom settings. As described above, the Student did not receive a 1:1 aide, but an aide was assigned to the Student's classroom.
14. The Parents requested an independent functional behavior assessment on August 31, 2011. P-2.
15. The Student's IEP team reconvened on January 14, 2011. During that meeting, the Student's IEP was revised to indicate that the Student would audit a regular education Unified Arts class. S-8.
16. Hand-written progress notes on the revised IEP at S-8 indicate that the Student was making significant progress towards, or had mastered, many reading and math

goals. Moreover, the notes – entered by the Student’s autistic support teacher – were quantified to the extent that the goals themselves were aligned to programmatic or curricular standards.

17. Reviewing the revised IEP at S-8, the autistic support teacher was able to clearly articulate exactly what work the Student was producing at the time the progress notes were drafted. See, e.g. NT at 369-382.
18. The Student’s IEP team reconvened on September 6, 2011 and made revisions to the Student’s IEP. J-9. Specifically, the IEP was revised to indicate that the Student exhibited behaviors that impede learning. Parental concerns were also added to the Present Levels section. The section of the IEP indicating what changes were made during the revision says that functional behavior assessment results were added. See J-9 at 2. However, the revised IEP does not include a functional behavior assessment even though the need for one as a matter of law is clearly indicated in the section of the document indicating that the Student exhibits behaviors that impede learning. See J-9 at 8.
19. The added parental concerns indicate that the Parents were concerned about the Student’s poor judgment during unstructured times, transportation and academic frustration.
20. The goals in the revised IEP were also changed. See J-9 at 16-22. Some, but not all of the goals now included baseline data.³ Also, through the goals, the revised IEP begins a self monitoring behavior program that targets compliance and assignment completion. J-9 at 22. This behavior program does not include social skills instruction.
21. Based on testimony, it is not clear whether the revised IEP at J-9 was approved or implemented. See NT at 196-197.
22. The Student has engaged in inappropriate behaviors in the school [redacted] on two separate occasions. First, on April 27, 2011 the Student [redacted]. J-12; NT at 206. Second, on May 10, 2011, [redacted]. *Id.* The Student was placed on “restricted status,” which involves direct supervision during unstructured times, for 10 days as a result of these incidents. See J-21, NT at 205.
23. After receiving consequences for behavioral incidents, the Student has not engaged in the same behaviors again. NT at 230.
24. After disciplinary incidents, the Student would speak with teachers and/or the building principal and, in the moment, the Student responded well to these conversations. NT at 209.
25. The Student’s report card of June 27, 2011 indicates that the Student was “auditing” Social Studies, Science and Music (meaning that the Student would attend and participate in these classes but would not be graded).⁴ During the same period, the

³ In some cases, the baseline data is confusing. For example, one Math goal reads as follows: “Given a baseline of 80% accuracy, [Student] will complete all aspects of the Consumer Math Banking independently at 95% accuracy.” On its own, this looks like an assignment completion goal. In context of short term objectives, it is clear that the goal expects the Student to write checks, use an ATM and balance a checkbook with 95% accuracy. It seems that the Student could complete these tasks independently at 80% accuracy at the time the goal was written. As discussed, this is not consistent with the Father’s highly credible testimony.

⁴ Some testimony indicates that the Student’s curriculum was modified in all classes beyond what is indicated in any of the IEPs. See NT at 233, 326-327.

Student earned As in Art and Physical Education; Bs in Tech Ed, Family and Consumer Science, Math and Reading; and was failing Life Skills (which the Student took Pass/Fail – see NT at 232).⁵

26. Auditing a course tends to indicate that the Student would have received a grade below a C had the course been taken for a grade. NT at 218.
27. The Student has been a patient of a pediatrician who is board certified in developmental and behavioral pediatrics (Developmental Pediatrician). The Developmental Pediatrician testified on the Student's behalf as an expert witness. NT at 27. The Student has been the Developmental Pediatrician's patient since May of 2009. J-23.
28. On August 8, 2011, the Developmental Pediatrician sent a letter to the District expressing her opinion that the Student exhibits poor judgment and does not understand the consequences of various actions. This, combined with the Student's desire to please peers and a heightened susceptibility to peer pressure, made the Student vulnerable. See J-23.
29. In the letter of August 8, 2011, the Developmental Pediatrician said that unsupervised exposure to other adolescents placed the Student in "immediate danger." In the letter the Developmental Pediatrician also opined that the Student, at the prompting of peers, could be [redacted] or could "be taught to be [redacted]." J-23 Consequently, the Developmental Pediatrician believed that the Student "requires a more restrictive environment for ... safety where [the Student] will not have any time alone with other adolescents without adult supervision. Additionally [the Student] is in need of more specialized training in [the Student's] educational program to maximize ... learning of practical skills regarding personal safety and avoiding criminal behavior." *Id.*
30. The Developmental Pediatrician's letter of August 8, 2011 does not explain how the Developmental Pediatrician formed the opinions contained therein other than referencing the over two-year doctor-patient relationship.
31. To date, the Student has not engaged in [redacted] behavior in school or anywhere else. NT at 28. Thankfully, none of the predictions about the Student's propensity to become [redacted] have been realized. As importantly, the Developmental Pediatrician's opinion that the Student may become [redacted] is based entirely on the Student's profile, not on any observed or reported behaviors. NT at 73-75.
32. The District completed an "Informal Functional Behavioral Assessment" on September 13, 2011. J-12. It is not correct to refer to this document as a functional behavioral assessment (FBA), informal or otherwise. Rather, this one page document was a review of records with some input from teachers. This records review identified two behaviors of concern: "(1) easily influenced by ... peers to engage in unsafe/destructive behaviors and (2) refusal to complete non-preferred activities and work." *Id.*

⁵ In special education, Life Skills is usually seen as a term of art describing a program and placement for lower functioning students. There is no indication that the Student participated in a typical life skills program. Testimony does not indicate what was covered in the Life Skills class appearing on the Student's report card.

33. The records review at J-12 indicates that the Student has a history of minor behavioral incidents. Both [redacted] incidents were also reported, but it is noted that those were the only two incidents that warranted disciplinary consequences. *Id.*
34. An actual FBA was not completed.⁶
35. On September 19, 2011, the District prepared a Positive Behavior Support Plan (PBSP) for the Student. The Parents were not advised that a PBSP was being implemented and are not listed as members of the team that drafted the document. *Id.* at 1. The Student's Mother testified that the Parents learned that the PBSP existed only as they were preparing for this due process hearing. NT at 115-117. However, the District did mail a copy of the PBSP to the Parent on September 14, 2011. I find that the Parents did receive the PBSP at that time even though the Parents do not recall receiving that document.
36. There is no evidence to suggest that the Parents approved the PBSP or any other proposed IEP revisions transmitted by the District on September 14, 2011.
37. None of the Student's IEPs call for explicit, direct social skills instruction.
38. The Student underwent an independent psychoeducational evaluation yielding an independent educational evaluation (IEE) of October 10, 2011. J-16. The author of that report, a school psychologist, testified as an expert on the Parents' behalf.
39. The IEE included a review of records and administration of the following standardized tests and questionnaires: Wechsler Intelligence Scale for Children, Fourth Edition (WISC-IV); Wechsler Individual Achievement Test, Third Edition (WIAT-III); and the Aggregate Neurobehavioral Student Health and Educational Review (ANSER).
40. The WISC-IV includes several sub-tests that yield composite scores in four categories and a full scale I.Q. score. The Student scored as follows (J-16 at 2):
 - a. Verbal Comprehension: 39 percentile - average range
 - b. Perceptual Reasoning: 61 percentile - average range
 - c. Working Memory: 18 percentile - low average range
 - d. Processing Speed: 2 percentile - borderline range
 - e. Full Scale: 21 percentile, low average range⁷
41. The WIAT-III also includes several sub-tests that yield composite scores. The Student scored as follows (J-16 at 3-4):
 - a. Oral Language Composite: 7 percentile - below average
 - b. Basic Reading Composite: 9 percentile - below average
 - c. Total Reading Composite: 3 percentile - below average
 - d. Written Expression Composite: 1 percentile - low

⁶ In their opening statement, the Parents indicate that the District offered to conduct a "formal" FBA, but that offer was rejected because, at the that time, the Parents had requested an independent FBA. Evidence and testimony on this point were never presented during the hearing. Had the Parents requested an independent evaluation of any kind, the District would have been obligated to either grant the request or request a due process hearing to prove the appropriateness of its own evaluation. To my knowledge, neither of these occurred. Regardless, the District's failure to request a due process hearing was not presented as an issue, and for purposes of this hearing, the only fact that can be found is that that the Student did not receive an FBA.

⁷ Generally, IQ is reported as a composite score. This hearing officer finds that percentile scores are more useful as they compare the student to the normative sample. However, the IEE reports that the Student's full scale composite IQ score was an 88.

- e. Mathematics Composite: 2 percentile - low
 - f. Math Fluency Composite: 0.2 percentile - low
42. On the ANSER, the Parents and teachers reported difficulties with attention. The Parents' ratings place the Student in the "severe" category while the teachers' ratings place the Student in the "moderate to severe" categories. J-16 at 4, 6.
 43. By comparing the WISC-IV and WIAT-III scores, the independent school psychologist concluded that the Student's academic performance is at a level significantly below the Student's abilities. NT at 260-264.
 44. The independent school psychologist recommended that the Student should receive all academic instruction in a highly structured, small group environment with minimal distractions. J-16, NT at 267. The independent school psychologist also recommended that the Student should have direct social skills instruction with structured opportunities to interact with typically-developing peers. J-16, NT at 268. In contrast, monitored interactions with non-disabled peers (as opposed to social skills instruction) would be only "mildly beneficial," as the Student is not expected to learn social cues through incidentally, even through monitored interactions. NT at 280-281.
 45. The IEE reveals that the Student's ability to read social cues, process new information and maintain focus are all impaired. The Student may have difficulty distinguishing between what is important and what is not, and may have the ability to project the long term consequences of any given action – despite a propensity towards attention-seeking behavior. J-16.
 46. The Student's mother (Mother) testified that the Student confided in her that the Student engaged in more negative behaviors in school than appear in the District's disciplinary records. The Student also reported to the Mother that the Student intended to engage in some negative, school avoiding behaviors that were never carried out. These behaviors are consistent with what the Mother described as the Student's increasing school anxiety and avoidance. See NT at 98-101, 107-108, 127-128.
 47. At one point, the Student intentionally attempted to [redacted]. See e.g. NT at 100-101. The District was aware of this incident.
 48. The Student has a fascination with [redacted] and sometimes makes up stories about [redacted] to gain peer attention and approval. NT at 102, 105-107. The Student does not have access to [redacted]. See NT at 102. Importantly, there is no evidence that the Student actually wants to carry out any of the made up stories, or has the capability of doing so.⁸
 49. The Mother believes that the Student would feel punished if the Student were placed in a full-time autistic support in the District's middle school. The Mother believes that the Student would not feel the same way about attending a private school that serves students with learning disabilities because the Student would not stand out in such a setting. NT at 108-109.⁹

⁸ For example, according to the Mother, the Student may not be able to understand that when a peer talks about [redacted], the peer is telling a bad joke. But even while the Student may become fixed on such a story, the Student takes no steps to carry out similar actions.

⁹ The District made a considerable effort on cross examination to challenge the Mother's contention that the Student would be less stigmatized in a private school for students with learning disabilities than in the

50. The Parents do not allow the Student to participate in extracurricular activities because such activities do not provide the type of supervision that the Parents believe that the Student needs. NT at 109-110.
51. An aide is assigned to the Student's autistic support classroom. Although that aide is not assigned to the Student specifically, the aide travels with the class when the students receive instruction outside the autistic support classroom. NT at 112-113.
52. In the past, the District was willing to discuss the need for an aide to supervise the Student during all unstructured time in school. The Parents rejected this, believing that the Student would feel stigmatized. NT at 128.
53. The Mother testified that she believes that the District has taken appropriate action to address the Student's behaviors after each incident, but that the District has not provided programming that would improve the Student's skills and abilities to prevent the reoccurrence of similar incidents. NT at 130-132.
54. Consistent with the Mother, the Student's father (Father) testified that he believes the Student currently requires a more restrictive placement that will focus on addressing the Student's negative behaviors before they occur. The Father is particularly concerned that, without such a placement, the Student's behaviors may escalate to a level of criminality. NT at 144-145.
55. The Father also corroborated much of the Mother's testimony. See, e.g., NT at 146 (concerning the Student's [redacted]), NT at 154, 157 (concerning the Parent's non-involvement with the development of the PBSP).
56. Regarding academic skills, the Father testified that the Student has difficulty telling time and has limited functional Math skills (i.e. the Father reported that the Student has only limited ability to count change, cannot write a check, and does not understand the relationship between a check and the balance of a bank account). See NT at 148-151. The Father also explained that the Student's reading ability is also poor, as the Student has difficulty reading a menu. NT at 152-153.
57. The Student is currently enrolled in a "consumer banking" program for Math and has been taking that course since March of 2011. NT at 157. The Father does not know enough about the consumer banking curriculum to express an opinion regarding its appropriateness. NT at 156.
58. The Parents obtained a second, independent educational evaluation (IEE-2) from a doctoral-level private evaluator on December 23, 2011 (between the first and second hearing sessions). P-5. IEE-2 was admitted during the hearing over the District's objection. See NT at 291-302.¹⁰

Student's current placement or a more restrictive placement within the District's middle school. The Mother's testimony regarding her expectations of how the Student would perceive such placements was consistent and well-reasoned. Ultimately, however, the Mother's perceptions in this regard are not a deciding factor in this case. The Parents neither demand private placement (or any specific placement for that matter) nor tuition reimbursement.

¹⁰ The Parents had retained the private evaluator to render opinions concerning the appropriateness of the Student's IEPs. The District challenged this during the first hearing session, as the evaluator had not actually assessed the Student at that time or prepared a report. As the District's challenge was debated, the Hearing Officer remarked that testimony (from experts or otherwise) was not needed to highlight procedural flaws in an IEP (such as the measurability of goals) because the Hearing Officer would read all admitted evidence and find such facts as supported by evidence. The Hearing Officer's remarks were not intended to preclude expert testimony concerning the substantive appropriateness of any IEP. The Hearing Officer also remarked that expert reports were not required for the presentation of expert

59. IEE-2 included testing designed by the private evaluator that is aligned to Pennsylvania Math standards. Strictly speaking, it is impossible to know whether the tests developed by the private evaluator are truly aligned with state standards. However, the private evaluator's impressive credentials suggest that the private evaluator certainly has the ability to draft such an assessment – even if that assessment is not standardized or normed. More importantly, this “curriculum-based” Math assessment produced results in line with all other evidence and testimony concerning the Student's Math abilities. Specifically, the Student was able to meet the majority of third grade math standards (24.5 out of 39) but could only meet five out of 39 fourth grade standards. P-5. Higher grade levels were not assessed. The Student was in eighth grade at the time of the test.
60. IEE-2 also includes a standardized math assessment. According to that assessment, the majority of the Student's Math skills range in the first and second percentile relative to same-aged peers (meaning that 98% to 99% of peers outperform the Student in most Math domains). P-5.
61. Despite the Student's Math curriculum in school, the Student had difficulty doing math with mixed coins. NT at 305.
62. IEE-2 also included the Gray Oral Reading Tests - Fourth Edition (GORT-4). This measures the Student's reading rate (speed) and accuracy. Rate and accuracy combined yield a reading fluency score. The test also assesses reading comprehension. The Student rated in the first percentile for rate, the 16th percentile for accuracy and below the first percentile for fluency, relative to same-aged peers. The Student's reading comprehension was rated in the 9th percentile. All of these scores combined place the Student below the first percentile in total reading ability, relative to peers. P-5.

Weight and Credibility Determinations

All witnesses testified to the best of their abilities. None attempted to obfuscate facts. This is not to say that all testimony is given equal weight as some witnesses were clearly more involved with the development and implementation of the Student's program and evaluations of the student than others. Some more detailed remarks regarding particular witnesses are required in this case.

During the Developmental Pediatrician's testimony, it was clear that the Developmental Pediatrician had considerable insight about the Student and the Student's disability. The

testimony, but that experts typically support their opinions with written reports in due process hearings. The Parents construed the Hearing Officer's remarks as a decision to preclude the private evaluator's testimony concerning the Student's IEPs, and also as the Hearing Officer's expression of a preference for written expert reports. IEE-2 was obtained with this understanding and was admitted under the Hearing Officer's authority to compel the production of additional evidence. Regarding the Parents understanding that the Hearing Officer had precluded the private evaluator's testimony concerning IEPs; the Hearing Officer corrected the Parent's understanding on the record of the second hearing session and offered to convene additional hearing sessions so that such testimony could be given. In correspondence subsequent to the second hearing session, the Parents declined the Hearing Officer's offer.

Developmental Pediatrician's testimony was quite helpful in that it helped the Hearing Officer to understand and appreciate the Parents' concerns. Also, the Developmental Pediatrician's testimony was both consistent with and fleshed out the warning letter of August 8, 2011. Without such testimony, that letter may otherwise seem conclusory, alarmist and hyperbolic. However, all of the Developmental Pediatrician's opinions were based on clinical observations. See NT at 92. The Developmental Pediatrician reviewed the results of a psycho educational evaluation that included normative testing only shortly before giving testimony at the due process hearing, and in preparation of that testimony.

The importance of clinical observations should not be downplayed; and sometimes too much stock is placed in standardized testing. At the same time, without any evidence to support the hypothesis, the Developmental Pediatrician's opinion about the Student [redacted] must be discounted. The Developmental Pediatrician's opinions regarding the Student's impulse control and susceptibility to negative peer influence is borne out by evidence and recognized in some of the District's own documents. See, e.g. J-12. But, in this forum, that evidence does not substantiate a prognostication that the Student will be [redacted] in the future.

The Student's autistic support teacher was knowledgeable about the Student's educational history and current program. It is clear that this teacher makes a significant effort to implement best practices and coordinate with his colleagues. This teacher clearly cares both about the Student and the teaching profession. The same can be said for the Student's current Social Studies teacher, who also testified.

The District's Director of Special Education, in contrast, had little involvement with the Student and did not implement programming or conduct evaluations. Her testimony regarding the transmission of documents to the Parents was credible even though it contradicted equally credible testimony from the Parents. Her testimony beyond this administrative function was given little weight.

Both parents testified credibly, and the Father's testimony was particularly candid and forthright. This Hearing Officer was impressed by the Parents' heartfelt expression of legitimate concerns. Although the Parents are laymen in the educational arena, their opinions were carefully considered, backed by experts, and based on a deep understanding of their child.

Legal Principles

I. The Burden of Proof

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). In this particular case, the Parents bear the burden of persuasion because they requested the hearing

and are seeking relief. The Parents must meet that burden by a preponderance of the evidence. See *N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), citing *Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). Under this standard, the Parents must prove entitlement to the demanded relief by preponderant evidence and cannot prevail if the evidence rests in equipoise.

II. The Right to an IEE at Public Expense

Parental rights to an IEE at public expense are established by the IDEA and its implementing regulations: “A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency...” 34 C.F.R. § 300.502(b)(1). “If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either— (i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or (ii) Ensure that an independent educational evaluation is provided at public expense...” 34 C.F.R. § 300.502(b)(2)(i)-(ii).

It should be noted that parents always have the right to obtain an IEE, even when an LEA is not obligated to fund it. See 34 C.F.R. § 300.502(b)(3).

III. The Right to a Free Appropriate Public Education

In the Third Circuit, IDEA-qualifying students receive FAPE through the implementation of IEPs that are reasonably calculated to confer a meaningful (more than trivial or *de minimis*) educational benefit. See *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982); *Shore Regional High School Bd. of Educ. v. P.S.*, 381 F.3d 194 (3d Cir. 2004); *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238 (3d Cir. 1999); *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3d Cir. 1988). What is meaningful for one student might not be meaningful for another, and so the appropriateness of any IEP is a fact-specific inquiry.

Students are denied FAPE either when their IEPs are not reasonably calculated to confer FAPE at the time they are drafted or when a well-drafted IEP is not implemented in significant part.

IV. Substantive and Procedural Violations

“In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies... impede the child’s right to a free appropriate public education; significantly impede the parents’ opportunity to participate in the decisionmaking process...; or ... caused a deprivation of educational benefits.” 20 U.S.C. § 1415(f)(3)(E)(ii). In other words, violations of the IDEA that do not result in substantive harm neither constitute a denial of FAPE nor warrant an award of compensatory education.

When violations are substantive (either because they are substantive in nature or because they are procedural violations that yield substantive harm) a remedy may be awarded. See e.g. *P.P. v. West Chester Area School Dist.*, 585 F.3d 727 (3d Cir. 2009); *M.C. v. Central Regional School Dist.*, 81 F.3d 389 (3d Cir. 1996).

Discussion

The Parents' conjectures about the Student's potential for [redacted] and criminal behavior are too speculative and too far removed from the District's obligations to educate the Student to be cognizable in an IDEA action. At the same time, it is well-established that the concept of education as envisioned in the IDEA goes well beyond pure academics; and the Parents' concerns about the Student's poor impulse control, susceptibility to negative peer influence, and inability to fully appreciate the consequences of negative behaviors are completely legitimate and consistent both with the Student's reported conduct and with testing. In light of the Student's long-standing diagnoses, documented behaviors, evaluation reports (both from the District and from independent evaluators) and the concerns that the Parents have consistently shared with the District, it is surprising that the Student is not receiving any sort of formal social skills instruction.

This Hearing Officer is persuaded that the Student has social skills deficits that are a direct result of the Student's autistic spectrum disorder. This manifests in the ways described by the Parents, and contributes to the Student's negative behaviors. The District, through IEPs, agrees that those behaviors impede learning. The Student's social skills are not expected to improve through incidental contact with typically developing peers, no matter how closely those interactions are monitored. Consequently, any appropriate IEP for the Student must include some amount of direct, explicit social skills instruction. The nature and quantity of any such instruction must be data-driven. To whatever extent that the Student's IEP team requires additional data to implement an appropriate social skills program, additional assessments are warranted. Further, FAPE was denied for periods of time during which the Student required but did not receive this instruction and a remedy will be awarded for this denial.

The need for a true FBA is also clearly established. It is extremely unfortunate that the Parties' legal wrangling has prevented an FBA from going forward. The fight about who should conduct an FBA has prevented an FBA from occurring. Under the legal standard articulated above, the Parents are not entitled to an independent FBA at public expense. The Parents dispute the appropriateness of a document that the District refers to as an "informal" FBA. That document is not an FBA at all. Rather, that document is a records review highlighting the need for an FBA. After that document was created, the District offered to conduct an FBA and the Parents rejected that offer, insisting upon an outside evaluator. Although this Hearing Officer appreciates the Parent's skepticism, no FBA was actually conducted and so the Parents are not disputing an evaluation. This sort of dispute is a statutory prerequisite to a publicly-funded IEE. However, in light of the clear need for an FBA, as an equitable remedy the District will be ordered to re-

issue an evaluation consent form by which the Parents may give permission for the District to conduct an FBA. Nothing in this Decision and Order is intended to preclude the Parents from requesting an independent FBA if they dispute the District's findings.

The results of the FBA should, of course, be used to generate a PBSP. The Student's current BPSP is inappropriate because it is derived from informal observations as opposed to a genuine FBA. The need for data-driven social and behavioral programming (not just academics) cannot be overstated. One would hope that a data driven PSBP, made part of an IEP that includes data-driven social skills instruction, will address the legitimate concerns about the Student's susceptibility to peer pressure. By all accounts, the District has responded appropriately to behavioral incidents as they have come up. A systematic, data-driven effort must now be made to discourage the Student's negative behaviors and not just react to them. Failure to provide an appropriate PBSP is also a denial of FAPE and a remedy will be awarded for this denial.

Evidence and testimony concerning the Student's academic performance is concerning and difficult to analyze in the context of a demand for compensatory education. On the one hand, all testing indicates that the Student is performing significantly below expectations, even given the Student's cognitive profile. On the other hand, the Student has made many important academic advances during the period of time in question. Again, the District is under no legal obligation to bring the Student to academic potential. The question is whether the Student's recent successes, particularly in the area of Reading, are meaningful for the Student.

I find that the Student has not made meaningful progress in Math. The Student has spent a significant period of time in a Math class that is intended to teach personal banking skills (counting money, making change, working with registers, etc.). Supervised classroom performance notwithstanding, the Student cannot exhibit these skills in clinical or real-world settings. The latter is the whole point of the class. The Student has been learning how to count coins since at least December of 2009. The Student's progress in Math has been *de minimis*. The Student's IEPs contained nearly identical Math goals over the period of time in question, illustrating that the District was aware of the Student's minimal progress despite some positive progress monitoring. A remedy will be awarded for this denial of FAPE.

In contrast, the Parents have not substantiated a denial of FAPE in Reading. The picture of the Student's progress in Reading is complex. The Student is unquestionably reading below grade level, and the Student's reading skills are below what should be expected based on standardized testing, given the Student's cognitive profile. At the same time, the Student is making strides within the Read 180 program. There is anecdotal evidence, mostly in the Father's testimony, that the Student's progress within Read 180 has not yet translated to a noticeable increase in reading skills outside of school. This might be expected, as progress with particular reading domains inside of a particular reading program do not always translate into a global reading improvement until certain milestones within the program have been reached. Similarly, progress from

level to level within Read 180 does not correlate with progress as measured on tests like the WIAT-III.

Although the quantity and quality of progress monitoring presented as evidence was underwhelming, there is no suggestion that the Student's reported progress in Read 180 is disingenuous or inaccurate in any way. Similarly, no evidence or testimony suggests that the Student's progress within the Read 180 curriculum is not meaningful. Consequently, this Hearing Officer cannot find that FAPE was denied in respect to the Student's Reading instruction. It must be noted, however, that this finding is made with a degree of caution. Going forward, progress monitoring within the Read 180 program alone may not be a sufficient indication of meaningful progress. Using existing standardized testing as a baseline, one would expect gains in the Student's reading ability over time that can be measured with assessment tools that are not part of the Read 180 program.

Similarly, the Parents have not substantiated a claim that FAPE has been denied in other academic subjects. One can reasonably conclude that the Student cannot read grade-level, subject-specific materials. That assumption alone does not prove that the Student is not learning the content of various courses through both active and passive participation in class. The Parents were involved in the decision that the Student should audit various classes. The lack of a grade in those classes does not substantiate a denial of FAPE just as poor marks in a graded class may not, by themselves, prove that FAPE was denied.

As dicta, the Hearing Officer notes that the Parents are clearly interested in a private school placement for the Student. The Parents have not demanded a private placement or any particular placement at all. Despite testimony and evidence concerning the type of learning environment that the Student needs, no placement demand has been made. This decision does not address issues that were not presented, and the Hearing Officer issues no decision about the District's ability to effectuate appropriate programming consistent with this Decision and Order.

An order consistent with the foregoing follows:

ORDER

And now, March 2, 2012, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that:

1. The Student was denied FAPE from the start of the 2010-11 school year through the present as a result of inappropriate Math programming. The Student is hereby

awarded one hour of compensatory education for each day that the District was in session during that period of time.

2. The Student was denied FAPE from the start of the 2010-11 school year through the present as a result of the District's failure to provide an appropriate PBSP and any formal social skills instruction. The Student is hereby awarded one hour of compensatory education for each day that the District was in session during that period of time.

It is **FURTHER ORDERED** that the District shall immediately seek the Parents' consent to conduct an comprehensive FBA. In the event that the Parents refuse to provide consent, the District will be held harmless for any subsequent failure to develop an appropriate PBSP.

It is **FURTHER ORDERED** that within fifteen (15) days of this Order, the Student's IEP team shall convene to determine if more information is required to implement an appropriate social skills program for the Student. If more data is required, the District shall seek the Parents' consent to conduct whatever evaluations may be required. Either upon completion of any such evaluations, or upon a determination that additional information is not required, the Student's IEP team shall revise the Student's IEP to include an appropriate social skills program.

It is **FURTHER ORDERED** that any claims not specifically addressed in this Decision and Order are denied and dismissed.

/s/ Brian Jason Ford
Hearing Officer