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

Pennsylvania

Special Education Hearing Officer

DECISION

Student's Name: B.N.

Date of Birth: [redacted]

ODR No. 2341-11-12-KE

CLOSED HEARING

Parties to the Hearing:	Representative:
Parents	Drew Christian, Esquire 801 Monroe Avenue Scranton, PA 18510
Abington Heights School District 200 East Grove Street Clarks Summit, PA 18411-1776	Angela J. Evans, Esquire Sweet, Stevens, Katz & Williams LLC 2 South Main Street, Suite 303 Pittston, PA 18640
Dates of Hearing:	November 7, 2011, January 4, 2012, January 5, 2012
Record Closed:	January 24, 2012
Date of Decision:	February 8, 2012
Hearing Officer:	William F. Culleton, Jr., Esquire

INTRODUCTION AND PROCEDURAL HISTORY

The student named in the title page of this decision (Student) is an eligible resident of the school district named in the title page of this decision (District), and attended a District elementary school, during the time relevant to this matter. (NT 15-16, 19-20.) Student is identified as a child with Autism pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA). (NT 15.)

Parents, named in the title page of this decision, assert that the District failed to provide a free appropriate public education (FAPE) to Student during the relevant time (defined below); Parents request compensatory education for that time, as well as prospective relief for the remainder of the 2011-2012 school year and thereafter. Parents further assert that the District failed to perform its promises under a settlement agreement in April 2011 that provided for certain behavioral services, thus failing to provide a FAPE to Student. The District asserts that it has provided a FAPE to Student, and that it is complying with and will comply with the settlement agreement.

The hearing was concluded in three sessions, and I admitted various documents into evidence.

ISSUES

1. Did the District fail to provide a free appropriate public education to Student during the relevant period of time from the first day after the end of the 2010-2011 school year[1] through January 5, 2012[2]?

[1] Originally, Parents sought compensatory education for denial of a FAPE from April 3, 2011 until January 5, 2012. (NT 33-34.) However, during the testimony of a District witness, Parents graciously withdrew their claim for relief with regard to the end of the 2010-2011 school year on grounds that the evidence might be found to be in equipoise and therefore they might be found not to have met their burden of proof. (NT 544-546.) Thus, the relevant period

2. Did the District fail to provide a free appropriate public education to Student in the least restrictive environment necessary to provide a free appropriate public education to Student?

3. Should the hearing officer order the District to provide compensatory education to the Student for all or any part of the relevant period?

4. Should the hearing officer enter an order providing prospective relief, particularly by ordering enforcement of the settlement agreement executed by Parents on April 2, 2011, or reformation of that agreement, insofar as compliance with that agreement is necessary in order to provide Student with a free appropriate public education?

FINDINGS OF FACT

1. Student is diagnosed with Pervasive Developmental Disorder, Not Otherwise Specified (PDD-NOS). (NT 36.)

2. Student can count to ten and identify some numbers within that range. Student can identify some letters and recite most of the alphabet. Student can identify some shapes and colors. (NT 36.)

3. Student has sensory issues; Student needs deep pressure and movement. Student is sensitive to clothing tags. (NT 37.)

4. Student acts out at home when in physical pain. Student runs, flops to the floor, rolls and kicks. (NT 37.)

BEHAVIOR SUPPORT

5. Student exhibited behavior that impeded learning during the relevant period, including tearing, ripping or throwing objects, flopping on the floor, eloping within the classroom and from the classroom, placing inappropriate objects in the mouth and disrobing. Student continues to display these behaviors with inconsistent participation in class activities. (NT 170-173, 310-317, 322-324; S-13, S-14.)

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for purposes of relief in this matter begins on the first day of summer break, the day after the last day of the 2010-2011 school year.

[2] The relevant period ends on the last day of hearings in this matter, which was January 5, 2012, by agreement of the parties. (NT 33-34.)

6. Student experienced pain and discomfort due to physical problems, especially problems with Student's teeth, during the relevant period. These problems exacerbate Student's inappropriate behaviors. (NT 255-256, 312-314, 524-525.)

7. The behavior of placing inappropriate objects in the mouth presented a choking hazard. A behavior intervention plan should prioritize interventions that address behaviors presenting a safety hazard, consistent with appropriate practice in behavior management. (NT 186-187, 572.)

8. The District did not address these behaviors through goals set forth in the IEP; it addressed some of these behaviors through a Positive Behavior Support Plan (PBSP) issued in January 2011 and revised in September and October 2011. (NT 174-177; S-3, 14, 24.)

9. The PBSP analyzed tearing or ripping or throwing objects, flopping and elopement. It did not analyze placing objects in the mouth or disrobing. The PBSP addressed two of Student's behaviors through goals: tearing or ripping or throwing of objects, and flopping. (NT 173-178; S-3, 14, 24.)

10. District personnel kept data on some of the behaviors of concern, including tearing or ripping or throwing of objects, flopping, elopement and placing items in the mouth. (NT 354-355; S-26, S-28 p. 7.)[3]

11. In October 2011, District personnel changed the data collection form at the request of the TSS provider agency, to add data gathering for behaviors that were not addressed by the PBSP, including aggression toward others and removal of clothing. (NT 206-207; S-23 p. 29-39.)

12. The PBSP goals were not measurable annual goals. The goals did not proceed from a base line for progress monitoring purposes While the goals provided for prompting faded to elimination, no data was kept on the fading of prompts. (NT 195-200, 432; S-24, 26.)

13. Progress was not monitored on positive events as formulated in the goals. Data was not kept on percentage of opportunities in which Student responded appropriately without tearing, ripping or throwing objects. Data was not kept on percentage of opportunities in which Student walked with the class without flopping on the floor. Rather, data was simply a count of incidents of tearing or ripping or throwing of objects, and a count of incidents of flopping. (NT 195-200, 432; S-24, 26.)

[3] The full exhibit S-28 was never authenticated, and there was no testimony to show that the graphs in that exhibit, pages 1 through 6, were true and accurate depictions of data taken appropriately on the behaviors depicted in those exhibits. (NT 741-744.) Therefore, after re-reading the transcript in this matter, I hereby exclude from evidence pages 1 through 6 of the exhibit. Page 7 is admitted into evidence, because it was authenticated by the District's behavior specialist. (NT 742.) However, it has limited relevance and weight, except to put in context the charts in S-26, because it refers to data on behaviors counted in the 2010-2011 school year, which is outside the relevant period.

14. Student did not meet Student's behavioral goal as set forth in the PBSP for tearing, ripping or throwing of objects. (NT 194-195, 398-399; S-24, 26.)

15. During the relevant period until the end of December, 2011, Student's behavior of tearing, ripping or throwing appeared to have decreased, based upon data collected by various staff in the Student's classroom. The data suggested that the behavior became more frequent during the first two months of school, and then declined. (S-23 p. 45, S-26 p. 1.)

16. Data taken before the start of implementation of the PBSP in January and February 2011[4] had indicated an average frequency for tearing, ripping and throwing objects of approximately 22 to 23 times per day; By the end of December 2011, the frequency had decreased to ten or fewer incidents over a period of about one month, and from September 7, 2011 to December 21, 2011, the frequency was below 22 for most data collected, except for about four days. (NT 484; S-13 p. 7, S-26 p. 1.)

17. During the relevant period until the end of December, 2011, Student's behavior of flopping to the floor appeared to have decreased, based upon data collected by various staff assigned to the Student's classroom. The data suggested that the behavior remained at a virtually constant average level during the first two months of school, and then declined. (S-23 p. 47, S-26 p. 3.)

18. Data taken at the start of implementation of the PBSP in January and February 2011 had indicated an average frequency for flopping of approximately 8 times per day; from September 7 to December 21, 2011, the frequency appeared to equal or exceed that average about 32 times and appeared to fall below that number about 24 times. (S-13 p. 7, S-26 p. 1.)

19. Student's teacher for the 2011-2012 school year reported subjectively that the Student's flopping behavior had improved in transitioning from the school van to the classroom in the morning; the teacher reported inconsistent improvement in the classroom during morning activities. (NT 282-283.)

20. During the relevant period until the end of December, 2011, Student's behavior of elopement appeared to have decreased, based upon data collected by various staff in the Student's classroom. The data suggested that the behavior remained at a virtually constant average level during the first two months of school, and then declined. (S-23 p. 44, S-26 p. 2.)

21. Data taken at the start of implementation of the PBSP in January and February 2011 had indicated an average frequency for elopement of approximately 4 times per day; from September 7 to December 21, 2011, the frequency appeared to equal or exceed

[4] The IEP also contained data from September and October 2010 for tearing, ripping or throwing, flopping, and elopement. The earlier data suggested much higher average incidence per day for these behaviors. (S-13 p. 7-8.) I find that later data, taken just before the start of the interventions in the PBSP in January and February, 2011, provide a more persuasive context in which to assess the meaningfulness of the changes depicted by graphs that cover the relevant period.

that average about 52 times and appeared to fall below that number about 6 times. These data indicate that Student's elopement behavior became worse during the relevant period. (NT 184, 390-392; S-13 p. 7, S-26 p. 1.)

22. Student's behavior of placing objects in the mouth did not improve during the relevant period. During the relevant period until the end of December 2011, Student's behavior of placing inappropriate objects in the mouth appeared to have remained virtually constant on average, based upon data collected by various staff in the Student's classroom. The data suggested that the behavior declined during the first two months of school, and then increased. (NT 210-211, 393; S-23 p. 46, S-26 p. 4.)

23. Data taken at the start of implementation of the PBSP in January and February 2011 had indicated an average frequency for placing inappropriate objects in the mouth of approximately 15 times per day; from September 7 to December 21, 2011, the frequency appeared to equal or exceed that average about 20 times and appeared to fall below that number about 36 times. (S-13 p. 7, S-26 p. 1.)

24. The teacher in charge of data gathering did not take into consideration the base lines established in the previous year. (NT 182-195.)

25. Data collection did not include antecedents or triggers for problematic behavior, nor was intensity or duration of behavior tabulated. (NT 183-184, 190-191; S-23 p. 29-39.)

26. Data was collected by all staff in the classroom, including persons who were assigned for a short time or substitutes, based upon written forms that defined the target behavior at the bottom of the form. (NT 200-204; S-23 p. 29-39.)

27. The Parent was unaware of any progress monitoring data with regard to behavior. (NT 79-80.)

28. Targeted behaviors and a change in the forms for data to be collected were determined by the Student's school personnel and the TSS provider agency without being discussed at IEP meetings or interagency coordination meetings. (NT 206-207, 209.)

PRE-ACADEMIC SKILLS

29. Student does not have age appropriate pre-academic skills, including naming shapes, letters and numbers. Student does know the names of colors. (NT 212-213, 300, 307.)

30. The IEP provided no baselines, goals or specially designed instruction or modification directed to teaching Student pre-academic skills such as naming shapes, letters and numbers. (NT 212-216, 346-349; S-13.)

31. The IEP provided two goals addressing sight word reading - a goal for teaching Student to pick out sight words from an array of three written words, and a goal for matching words to pictures. There were no goals to address sound-symbol relationship, decoding, fluency or comprehension. There were no peer-reviewed, research based teaching methodologies specified in the IEP regarding reading skills. (NT 225-227, 254; S-13.)

32. There were base lines for the sight reading skills in the present levels of academic performance section of the IEP; however, these base lines were formulated differently than the formulations used in the goals. Thus, the base lines could not be understood by Parent for purposes of tracking progress on the goals. (NT 475-479; S-13.)

33. Student made no progress in reading or pre-reading skill acquisition during the relevant period. (NT 300-301.)

34. The IEP provided two goals for counting. There were no measured base lines for these goals. The instruction on these goals was not research based during the relevant period until January 2011, when a research based program was initiated. (NT 227-232, 253, 342-343; S-13.)

35. The Student made no progress in mathematics during the relevant period. (NT 232-233, 283-285; S-13.)

36. Student has made no progress in printing Student's name; Student's performance is inconsistent and depends upon Student's ability to focus at any given time. (NT 298-300.)

37. The Student's teacher provides direct explicit teaching to Student using verbal behavior techniques for up to thirty minutes per day in two sessions per day. (NT 248-250, 309.)

38. The teacher is unclear as to the underlying principles of verbal behavior, suggesting that a verbal behavior classroom can be operated by providing verbal behavior teaching techniques in two time-limited sessions during the day, rather than throughout the day. (NT 248-250, 421-425, 482-483.)

39. The teacher learned about verbal behavior in two to four state-provided training sessions, two of which lasted for three days each; the teacher did not receive training or supervision in the classroom. (NT 339.)

40. The Student's TSS worker, who is not a certified teacher, assisted the Student's teacher by reviewing with the Student what the teacher introduced in the first instance. (NT 248-250, 309, 335-338, 419-420, 433-434, 759-60.)

41. Progress monitoring data was sent to Parents in late November or early December of the 2011-2012 school year. (NT 219-220.)

42. The Student's teacher did not seek an IEP team meeting to address Student's lack of progress in mathematics. There was no IEP meeting to consider the recommendations in the report of the BCBA retained pursuant to the settlement agreement. (NT 234, 435-438.)

TRANSPORTATION

43. The District transported Student on a van with approximately six to nine other students on it. (NT 71, 623-624; S-19.)

44. The Student exhibited a behavior of either removing the seat belt or slipping out of the fastened seat belt, and then moving about in the van while it was moving. Student displayed this behavior during the 2009-2010 school year, when Student was in kindergarten, and again at the beginning of the 2010-2011 school year, when Student was in first grade. (NT 38-40.)

45. During Student's kindergarten year, the District assigned an aide to ride on the van with Student and the behavior of removing or slipping out of the seat belt stopped. (NT 39.)

46. During Student's first grade year, the District utilized a physical lock on the seat belt buckle and Student stopped removing the seat belt. (NT 39-40.)

47. Transportation was referenced during an IEP meeting on September 8, 2011. The IEP team, with Parent participating, did not consider either providing an aide to ride on the van with the Student or using a seat belt buckle lock. (NT 52-53, 59, 66-68; P-8 p. 2.)

48. After the IEP meeting, District personnel notified Parent that the Student had exhibited behaviors while on the school van, including hitting other passengers, taking property from other passengers, throwing objects toward the wind shield, slipping out of the seat belt and disrobing. There also was an allegation that Student had tried to grab the steering wheel while on the van and out of the seat belt, and that Student threw another student's glasses into the windshield. (NT 54-55, 59, 65, 136-137, 626, 648-649; P-8 p. 2.)

49. On September 9, 2011, District personnel communicated to Parent that the District would not transport Student unless Student were placed in a safety vest that would hold Student in the seat during transport. (NT 54-59; S-22.)

50. The vest would restrict Student's movement while in the seat on the van. (NT 54-59.)

51. On September 20, 2011, the District prepared a transition plan for transitioning Student from wearing the vest to riding with only a seat belt. This plan specified that Student would be required to wear the vest attached to the van seat for three weeks

without inappropriate behavior, after which the vest would be removed in stages. If the Student should misbehave on the van after removal of the vest, Student would be required to resume wearing the vest attached to the van seat for another three weeks. (S-19.)

52. The transition plan contemplated removing the vest after three weeks and allowing the Student to ride on the van with a seatbelt on. (S-19.)

53. The District's behavior specialist designed a system that depended upon data collection by the van driver from memory of behaviors exhibited; the driver was expected to remember those behaviors and record them after transporting the Student, when the van was stopped. The validity of this method of data collection was inherently limited by the difficulties of observation while driving and memory limitations. Such data collection does not constitute appropriate practice for behavioral data collection. (NT 401-404, 442-448, 594-597.)

54. The driver was also expected to provide reinforcers when Student's behavior on the van was appropriate, according to the plan. This plan presented practical problems for the driver. (NT 406-412, 448-450, 635-637.)

55. The transition plan was not conveyed to the driver who had previously been assigned to drive student at the beginning of the 2011-2012 school year. (NT 627-629.)

56. The driver's supervisor tabulated data on Student's behavior while on the van for a short period of time at the beginning of the school year. This data was collected from the driver's oral reports made after the trips concluded. (NT 629-632, 652; S-17, 20.)

57. The transition plan was not conveyed to Parent before Parent filed a request for due process. (NT 64; P-8 p. 6.)

58. A separate behavior intervention plan provided for visual and verbal cues to indicate the rules to be followed on the van and rewards for Student's successful compliance. (S-7.)

59. The intervention and transition plans were developed without Parent's participation and without discussion by the IEP team leading to a decision by the IEP team. (NT 71, 401-402, 438-439, 677-684, 750-753, 755-757.)

60. The IEP team did not consider placing a third person on the van in order to conduct a behavioral intervention with the Student and keep the Student and other occupants safe at the same time. (NT 450-453, 653.)

SPEECH AND LANGUAGE

61. Student has needs in articulation, receptive language, expressive language, and pragmatic language. (NT 241-242.)

62. The IEP provided speech and language goals. (S-13.)

63. Progress monitoring data did not proceed from a base line; thus, it was not possible to tell whether or not Student made progress on the speech and language IEP goals during the relevant period. (NT 272-278; S-23 p. 6-24.)

64. The Parent was unaware of any progress monitoring data with regard to speech and language. (NT 79-80.)

OCCUPATIONAL THERAPY

65. The IEP provided occupational therapy goals and SDI addressing sensory needs. (S-13.)

66. Occupational therapy IEP goals did not have base lines. (NT 216-217.)

67. The IEP provided for direct Occupational Therapy (OT) services once per week for thirty minutes per week. (S-13.)

SOCIAL SKILLS

68. Student has significant social skills deficits. Student can participate in games with considerable prompting. (NT 234, 241-242, 307.)

69. The IEP provided one social skills goal for manding or requesting items from another person. No base line was established for this goal. Requesting items is listed as a strength in another section of the IEP. (NT 234-238; S-13.)

EXTENDED SCHOOL YEAR SERVICES

70. The Student was determined to be eligible for ESY programming for the summer of 2011. These services were to be provided at Student's school building by an autistic support teacher for five and one half weeks, four days per week. (NT 101-104, 496-503; P-5; S-5.)

71. The Parent did not remember discussing the Student's ESY goals at an IEP team meeting in February 2011; however, Parent was present at the IEP meeting and the IEP discussed at that meeting offered goals and related services to be provided at Student's school building. (NT 72, 100-101, 518-520; S-5.)

72. The February 2011 IEP provided for a set of goals for the skills of requesting, labeling, answering "what" questions, receptive language, socialization, sight word reading, counting, articulation, and visual motor skills. These goals were designed to

maintain Student's skills over the summer so that regression and recoupment would not provide such a challenge in the Fall as to set back Student's progress in those areas. (NT 500-502, 510-512; S-13 p. 31.)

73. Parents decided to send Student to a camp operated by a private agency for nine weeks, four days per week, because it would be more enjoyable for Student and because they had been dissatisfied with previous ESY programming from the District in previous summers. Parents believed that this was an ESY option approved by the District; however, District personnel did not ever assert that this was an ESY option – rather, the behavioral services agency staff told Parents that this was an ESY option. (NT 104-105, 110-113.)

74. The District conveyed to Parent a notice that designated the behavioral health service as the location of the ESY services for Student. The notice also referred to dates on which the District would provide transportation to the behavioral health service for summer programming. However, the District did not provide any services at that location. (NT 40-41, 72-73; P-5.)

75. The District offered to transport Student to summer camp for five and one half weeks, four days per week – fewer days than those on which the camp provided services. (NT 41-42; P-5; S-5 p. 29.)

76. The District's van driver stopped transporting Student to summer camp after the first day, reporting that this was due to Student's inappropriate behavior. (NT 43-45.)

77. The Student's Parent[5] requested an IEP meeting to discuss transportation to summer programming but the District did not convene an IEP meeting during the summer. (NT 45-48.)

78. Parent drove Student to the camp for some days, but hired a driver for two or three days per week after Student began to tantrum in the Parent's car while on the way to camp. (NT 48-52.)

LEAST RESTRICTIVE ENVIRONMENT

79. During the 2011-20121 school year, Student's IEP provided for Student's inclusion with non-disabled peers for 8 percent of the school day. (NT 74-76, 257; P-1 p. 35, P-7 p. 36.)[6]

[5] References to the Student's Parent in the singular refer to the Student's Mother unless otherwise indicated.

80. In practice, Student was included with non-disabled peers for more than 8 percent of the day: two twenty minute periods for recess and lunch, and for one special class four days per week, when staffing permitted and when Student did not decide to leave the inclusive settings. (NT 324-326.)

81. The Parent was unaware of any plan or effort to increase the amount of time for inclusion with non-disabled peers. (NT 75-76.)

82. TSS services were planned for full days, five days per week. From the beginning of school in the 2011-2012 school year until October 11, 2011, TSS staffing at school was inconsistent on Tuesdays and Thursdays. The District supplied an aide as a substitute for an absent TSS worker on one occasion. (NT 77, 170-171.)

83. From the beginning of the school year until October 10, 2011, Student was not included with non-disabled peers on Tuesdays and Thursdays at recess because TSS workers were unavailable. (NT 170-171, 257-259.)

84. Student was attending special classes up to one hour per day, but often asked to leave and left after a few minutes. TSS workers were expected to provide assistance with inclusion in these classes. (NT 261-263, 295-297.)

85. No additional supplementary aides or services were considered or utilized to support inclusion of the Student in regular education settings. (NT 266-267.)

DISCUSSION AND CONCLUSIONS OF LAW

BURDEN OF PROOF

The burden of proof is composed of two considerations: the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact (which in this matter is the hearing officer).[7] In Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of

[6] The first day's transcript mistakenly recorded that the Student was included for 80 % of the school day. Taken in context, and with reference to the IEP and corroboration from a subsequent witness, this is plainly an error; context the IEP and other witnesses make it clear that the Student was included for 8 % of the school day.

[7] The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact.

persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence[8] that the other party failed to fulfill its legal obligations as alleged in the due process complaint. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006)

This rule can decide the issue when neither side produces a preponderance of evidence – when the evidence on each side has equal weight, which the Supreme Court in Schaffer called "equipoise". On the other hand, whenever the evidence is preponderant (i.e., there is weightier evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. See Schaffer, above.

With regard to the merits of the Parent's claims in the present matter, Parents bear the burden of persuasion as required by the Supreme Court's decision discussed above. If the Parents fail to produce a preponderance of the evidence in support of their claims, or if the evidence is in "equipoise", the Parents cannot prevail under the IDEA.

LEGAL STANDARD: FREE APPROPRIATE PUBLIC EDUCATION

The IDEA requires that a state receiving federal education funding provide a "free appropriate public education" (FAPE) to disabled children. 20 U.S.C. §1412(a)(1), 20 U.S.C. §1401(9). School districts provide a FAPE by designing and administering a program of individualized instruction that is set forth in an Individualized Education Plan ("IEP"). 20 U.S.C. § 1414(d). The IEP must be "reasonably calculated" to enable the child to receive "meaningful educational benefits" in light of the student's "intellectual potential." Shore Reg'l High Sch. Bd. of Ed. v. P.S., 381 F.3d 194, 198 (3d Cir. 2004) (quoting Polk v. Cent.

[8] A "preponderance" of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. Dispute Resolution Manual §810.

Susquehanna Intermediate Unit 16, 853 F.2d 171, 182-85 (3d Cir.1988)); Mary Courtney T. v. School District of Philadelphia, 575 F.3d 235, 240 (3rd Cir. 2009), see Souderton Area School Dist. v. J.H., Slip. Op. No. 09-1759, 2009 WL 3683786 (3d Cir. 2009).

"Meaningful benefit" means that an eligible child's program affords him or her the opportunity for "significant learning." Ridgewood Board of Education v. N.E., 172 F.3d 238, 247 (3d Cir. 1999). In order to properly provide FAPE, the child's IEP must specify educational instruction designed to meet his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. Board of Education v. Rowley, 458 U.S. 176, 181-82, 102 S.Ct. 3034, 1038, 73 L.Ed.2d 690 (1982); Oberti v. Board of Education, 995 F.2d 1204, 1213 (3d Cir. 1993). An eligible student is denied FAPE if his program is not likely to produce progress, or if the program affords the child only a "trivial" or "de minimis" educational benefit. M.C. v. Central Regional School District, 81 F.3d 389, 396 (3rd Cir. 1996), cert. den. 117 S. Ct. 176 (1996); Polk v. Central Susquehanna Intermediate Unit 16, 853 F. 2d 171 (3rd Cir. 1988).

Under the Supreme Court's interpretation of the IDEA in Rowley and other relevant cases, however, a school district is not necessarily required to provide the best possible program to a student, or to maximize the student's potential. Rather, an IEP must provide a "basic floor of opportunity" – it is not required to provide the "optimal level of services." Mary Courtney T. v. School District of Philadelphia, 575 F.3d at 251; Carlisle Area School District v. Scott P., 62 F.3d 520, 532 (3d Cir. 1995).

The law requires only that the plan and its execution were reasonably calculated to provide meaningful benefit. Carlisle Area School v. Scott P., 62 F.3d 520, (3d Cir. 1995), cert. den. 517 U.S. 1135, 116 S.Ct. 1419, 134 L.Ed.2d 544(1996)(appropriateness is to be judged

prospectively, so that lack of progress does not in and of itself render an IEP inappropriate.) Its appropriateness must be determined as of the time it was made, and the reasonableness of the school district's offered program should be judged only on the basis of the evidence known to the school district at the time at which the offer was made. D.S. v. Bayonne Board of Education, 602 F.3d 553, 564-65 (3d Cir. 2010).

BEHAVIOR SUPPORT

The IDEA regulations require a local education agency to provide an Individualized Education Program (IEP) that must include functional goals designed to meet each of the child's needs that result from the child's disability. 34 C.F.R. §300.320(a)(2). The IEP must also describe how the child's progress toward meeting the goals will be measured, and when periodic reports on progress will be provided to Parent. 34 C.F.R. §300.320(a)(3). The IEP must set forth special education and related services, supplementary aids and services and program modifications to be provided in order to address all of the child's needs that result from the child's disability. 34 C.F.R. §300.320(a)(4). As noted above, the IEP must be "reasonably calculated" to enable the child to receive "meaningful educational benefits" in light of the student's "intellectual potential." Shore Reg'l High Sch. Bd. of Ed. v. P.S., 381 F.3d 194, 198 (3d Cir. 2004).

It is undisputed that Student displayed behaviors that interfered with Student's learning and that of others. (FF 5, 6.) I conclude by a preponderance of the evidence that the District's program for addressing Student's inappropriate behaviors was not reasonably calculated to provide an opportunity for meaningful educational benefit, and that it failed to provide meaningful benefit during the relevant period.

The District's program in the relevant period was based upon a Functional Behavioral Assessment and a Positive Behavior Support Plan, as required by state regulations. 22 Pa. Code §14.133(a). (FF 8.) However, these documents did not address all of the Student's behavioral needs. They did not provide a systematic and sequential approach to prioritizing the behaviors to be addressed. They did not provide measurable goals and indeed did not measure the goals that they set forth. Parents did not participate meaningfully in the development or implementation of the goals. The plans were implemented in a manner that cast doubt on the integrity of both the implementation program and the data that were derived from it.

The FBA addressed four behaviors of concern, all of which interfered with the Student's access to and progress in the curriculum: placing of inappropriate objects in the mouth; eloping, both within the classroom and from the classroom; tearing, ripping or throwing objects; and flopping to the floor. (FF 8, 9, 11.) The FBA assessed all of these behaviors as to antecedents, and functions, except the placing of objects in the mouth. (FF 8.) The PBSP addressed only two of these behaviors systematically through goals. (FF 8, 9.) The District set goals for the tearing, ripping and throwing behavior and the flopping behavior, but did not set goals for the placing of objects in the mouth and elopement. (FF 9.) There did not appear to be a rationale for this choice of goals, and I am concerned that the placing of objects in the mouth and elopement present a safety concern that ordinarily should be given priority. (FF 7.) The evidence did not disclose any plan for sequentially addressing the remaining behaviors.[9]

[9] Data was taken on the placing of objects in the mouth and the elopement behaviors, and the District asserted that these behaviors were addressed through accommodation or specially designed instruction. However, the only accommodation for the placing of objects in the mouth was the provision of a substitute object, a "chewy", and the provision of a salve for gum discomfort. There were a number of SDI for elopement, such as blocking, keeping a fast pace, time limits on activities, visual schedule teaching Student to request a break, and use of motivational techniques. (S-24.)

The Parent was not appropriately included in the design of the PBSP. The evidence is preponderant that there was little if any discussion at IEP meetings. (FF 28.) Data was collected on the simple incidence of behaviors of concern per day, but data was not collected on the PBSP goals as they were defined. (FF 13.) Although some raw data was sent home to Parents, the Parents did not receive tabulated or graphed progress monitoring data until December 2011, after due process was commenced. (FF 27.) The team did not reconvene when it became obvious that the Student was not progressing with regard to Student's problematic behaviors. (FF 28.)

The evidence did not disclose a data collection plan that was controlled for fidelity. As noted, the data collected did not correspond to or measure the goals set forth in the PBSP. The goals were not measureable as formulated, and the FBA and PBSP contained no baselines from which to measure progress. (FF 12.) The teacher in charge of data collection did not consider the significance of the baselines established a year prior to the data collection, and did not seem to be aware of the overall strategy for the PBSP or progress monitoring. (FF 12, 13, 24.) Data was collected by numerous staff from two different agencies, including one-time substitutes, without any visible system for assuring fidelity or consistency. (FF 26.)

Based upon a preponderance of the evidence, I conclude that the Student did not make meaningful progress during the relevant period with regard to Student's behaviors that interfered with learning. While the data suggested improvement in tearing, ripping or throwing, Student did not meet the PBSP goal for that behavior. (FF 14, 15, 16.) Student made little or no progress with regard to placing objects in the mouth, elopement, and flopping. (FF 17-23.)

I am skeptical of the graphs presented in evidence, and give them reduced weight as to Student's progress. The testimony revealed serious flaws in the data gathering system. The

teacher in charge of the data gathering, although sincere, was relatively inexperienced and did not demonstrate a firm grasp of either the principles of verbal behavior that the teacher was implementing, or the basic concepts of the IDEA's requirement for measurable goals and progress monitoring. (FF 24.) This individual was supervising data gathering by a constantly changing collection of staff, including substitutes and persons who were with Student in the classroom only briefly, and persons from two different agencies. (FF 26.) The record did not reveal any systematic controls for fidelity in program delivery or data gathering.

Some of the data showed actual behavioral regression during the relevant period. (FF 22.) To the very limited extent that the data showed progress, the larger context over time showed that the magnitude of any such progress was not "meaningful." (FF 14-23.)

The District argues that the Student's behavior of putting inappropriate objects in the mouth was due solely to dental and other discomforts. While the testimony indicated that such discomforts exacerbated Student's behavior, there was none that it was the sole cause, and there is no Functional Behavior Assessment to confirm this argument. (HO-2.)

These findings are based in part on my conclusion that reduced weight is to be assigned to the testimony of the District's behavior specialist. While I found this witness's testimony to be truthful generally, the witness repeatedly strained to defend the program provided to Student, in ways that were not fully supported by the record. For example, I found this defensive posture evident in the witness's defense of the District's failure to directly address elopement behavior through a separate goal and progress monitoring.

The specialist testified that the setting of most concern for elopement was transitioning outside of the classroom; however, neither the PBSP Assessment section nor the underlying

Functional Behavior Assessment (FBA) Summary (December 2010) to which the witness referred supports this assertion. On the contrary, the Summary stated that elopement is seen "usually" in the context of recess or intensive instructional activities. Its function was not escape in these circumstances, but access to a preferred objects or activities. Conversely, long transitions outside the classroom were an important setting noted in the Summary for flopping behavior. (NT 355-362; S-14; HO-2 p. 8, 14, 15, 23, 25.)

Moreover, the data tabulations presented in graph form did not separate instances of elopement within the classroom and during transitions in the hallway. (NT 362-367, 429-430.)[10] The data sheets presented in evidence (covering only the month of October) do not permit a conclusion that elopement was primarily problematic in the hallway; indeed, the data suggest to the contrary: there were numerous instances of elopement or attempted elopement in the classroom and at recess and lunch. (S-23 p. 29-39.)

The witness also suggested that progress should be assessed with reference to data collected during the FBA between September and November 2010, (HO-2), instead of data collected more recently, in January and February 2011, and reflected in the IEP Present Levels, (S-13 p. 7.) The latter data were taken at the inception of the PBSP. The witness did not disavow the latter data, and provided no cogent explanation as to why earlier data taken before any intervention should be given more weight than the later data when assessing the overall success of a program during the relevant period. I conclude that the later data are more significant for purposes of putting in

[10] The special education teacher for the Student's previous year (2010-2011 school year) did speculate that "perhaps" the setting of primary concern for elopement was transitioning in the hallway, consistent with what the District's behavior specialist asserted. (NT 488.) However, this credible witness made it clear that she could not aver that this was the preeminent setting for elopement without looking at the data. There was no evidence that there was data to support such an assertion; consequently, I give little corroborative weight to the teacher's speculative statement.

context the progress shown by the District's data, and for purposes of assessing whether such progress could be considered meaningful within the legal import of that word. (NT 427-428.)

The specialist similarly failed to provide a convincing explanation of why there was no goal and only one special accommodation for putting objects in the mouth, (NT 393-397) given that this behavior did not improve, (FF 22), and that at least two witnesses credibly indicated that the behavior constitutes a choking concern, (FF 7; NT 186-187, 430-431). The witness's response was varied. The witness first said that this was a behavior of concern identified by the TSS agency not the school, then indicated that elopement was a higher concern although the PBSP goal for this is attenuated at best, and the data gathering does not provide progress monitoring for this behavior. The witness indicated that there was a need to prioritize behaviors of concern; yet, it seems implausible that a behavior that presents a safety concern should be given lower priority, and there was no cogent explanation of why both elopement and placing objects in the mouth could not be given priority and addressed at the same time.

I gave some weight to the Parents' expert witness, also a BCBA, who assessed Student and made recommendations for Student's behavior and academic program. I found this witness to be credible and straight forward, as well as modest about the limitations of her data and knowledge. The witness has particularly extensive experience with designing behavior programs and because of this I gave weight to her recommendations with regard to behavior programming. I did factor in the witness' position as someone brought in by the parents for both programming and testimony purposes, but I found no evidence that this background colored her testimony in any way.

PRE-ACADEMIC SKILLS

I conclude by a preponderance of the evidence that the program for teaching pre-academic skills was not reasonably calculated to provide Student with a meaningful educational benefit during the relevant period. The evidence is preponderant that Student made no meaningful progress in pre-academic skills during that period.

The Student's IEP did not address Student's deficits in pre-academic skills such as naming shapes, letters and numbers. (FF 30.) It provided goals for two pre-academic skills: sight word reading and counting. (FF 31, 34.) None of these goals were measureable. (FF 32, 34.) The goals for reading were formulated differently from the available base lines. (FF 32.) There were no mathematics base lines. (FF 34.)

The teacher during the relevant period did not implement the IEP appropriately, for two reasons. First, the teacher clearly was unsure of the basic principles of Verbal Behavior, the methodology upon which the Student's class was based, and did not implement Verbal Behavior throughout the day. (FF 37, 38, 39.) Second, the teacher allowed TSS workers to deliver instruction, although these workers were assigned by a behavioral health agency and there was no evidence – or, from the evidence, there was not even an inquiry – as to whether or not these workers were qualified to teach or to serve as paraprofessionals. (FF 40.)

The District's behavior specialist was asked to – in a general way – endorse the adequacy of the current teacher's implementation of a verbal behavior methodology in the classroom. At first, the witness stated that verbal behavior was being implemented throughout the day, (NT 713), then, when asked to comment upon the teacher's ability to implement that methodology, the witness qualified his opinion, saying that verbal behavior was being implemented "on a

pretty consistent basis" in the classroom, (NT 714). When further pressed as to observations in the classroom, the witness stated that the teacher and classroom staff were implementing verbal behavior "to the best of their ability." (NT 715.) It was plainly a gracious and careful attempt to put the best face on a weakness in the District's program.

These deficiencies in the educational program are confirmed by the fact that the Student did not make any progress in pre-academic skills during the relevant period. (FF 33, 35, 36.) Some such skills were not addressed in the IEP at all. (FF 29, 30.) Where there were goals, there was no progress in the skills targeted. (32, 33.)

The Parent was not included appropriately in the IEP process with regard to pre-academic skills. As noted above, there were no meaningful base lines for the goals; thus, Parent was in no position to receive the progress monitoring that is contemplated by the IDEA – monitoring data that would enable a parent to see whether or not progress has been made. Moreover, the data was provided late, and only after the due process complaint had been filed. (FF 41.) The IEP team was not consulted when it became obvious that Student was not making academic progress. (FF 42.)

TRANSPORTATION

The District's obligations under the IDEA extend to the provision of transportation. Transportation is a related service that must be provided where needed in order to provide meaningful benefit from education. 34 C.F.R. §300.34(a). Moreover, the District has an additional duty under IDEA to provide identified students with an equal opportunity to participate in nonacademic services such as transportation. 34 C.F.R. §300.107(a), (b). Children with disabilities must be afforded the opportunity to participate with non-disabled children "to

the maximum extent appropriate to the needs [of such children]." 34 C.F.R. §300.117. The public agency must ensure that each child with a disability has the supplementary aids and services that the IEP team determines appropriate and necessary to allow for such participation. Ibid.

The IEP team is obligated to consider what supplementary aids and services or related services are needed to participate in nonacademic activities, 34 C.F.R. §300.320(a)(4)(ii), and to consider the need for positive behavioral interventions, supports and strategies, or assistive technology devices. 34 C.F.R. §300.324(a)(2)(i) and (v). The IEP team is required to revise the IEP as needed to address needs that are brought to its attention. 34 C.F.R. §300.324(b)(1)(ii)(C), (D) and (E). See also, 22 Pa. Code §14.131(a)(1)(i)(IEP must describe types of support to be provided in classroom and other settings, including positive behavior supports and interventions appropriate to children identified with autism.)

Pennsylvania regulations provide specific requirements for physical restraints, explicitly governing safety harnesses used in transportation. 22 Pa. Code §14.133(b)(iii) and (d). These devices may be used only when specified by an IEP, as determined by a qualified medical professional and agreed to by parents. 22 Pa. Code §14.131(d).

The evidence is preponderant that the District failed to perform its obligations under the IDEA and state regulations with regard to transporting Student to school. (FF 43-46.) The law provides that transportation is a related service intended to make it possible for a child to benefit from special education, and by implication, therefore, it must be provided at no cost to parents. However, this is not the only obligation that the IDEA imposes upon school districts. The IDEA gives the child a right to participate in transportation as a nonacademic service in which the child has a right to participate, not only equally, but also "to the maximum extent appropriate to the

[child's] needs … ." 34 C.F.R. §300.117. The District is required both to permit such participation and to provide appropriate supplemental aids and services that make such participation possible.

Both federal and state law, moreover, require the district to provide transportation and any needed supplemental aids and services through the IEP team planning process. The IDEA and its regulations plainly mandate this, as noted above. Also as noted above, the state regulations, specifically applicable to safety harnesses used in transportation require any such use to be decided by the IEP team and agreed upon by parents.

The evidence in this matter is preponderant that the District failed to comply with these obligations. Without any reference to the Student's IEP team, (FF 47, 48, 49, 59), it unilaterally decided that the Student would wear a safety vest, attached from the back to the van seat, as a condition of receiving the publicly funded transportation that Student needed and that was Student's right. (FF 49-51, 57.) When Parent declined to allow the use of this vest, the District simply declined to transport the Student. By these actions, the District the District failed to provide a FAPE to Student.

The District argues that its decision was based on safety concerns established and carefully recorded over about ten days of transporting Student without the use of the safety harness. (FF 48, 56.) I find that the safety concern was serious; nevertheless, the abrupt and highly restrictive method that the District used to address this concern was legally inappropriate. The District should have convened an IEP meeting immediately and sought a team determination

on how to transport Student safely[11]. Meanwhile, the District may have had alternatives to the approach that it utilized. For example, there is no evidence that it considered transporting Student alone in a small vehicle. There is no evidence that it considered placing one or more aides on the van to keep Student in the seat and address Student's behaviors with some of the behavioral techniques that it was using in the classroom to intervene in inappropriate behaviors. (FF 47, 59, 60.) There is no evidence that the District considered paying for private automobile transportation of Student.

Plainly, any of these alternatives would likely be more expensive than the solution the District imposed. However, cost is no justification for failure to follow the law. The evidence discloses another important concern. I conclude that learning to ride appropriately on a van is a life skill that is important to the wellbeing of the student, and should be taught.[12]

The evidence is preponderant that the Student cannot be taught that skill while in a safety harness; although some learning might be possible, eventually the Student would have to be removed from the harness in order to demonstrate that Student can sit safely on a moving van – even the District's "transition plan" provided for this after three weeks in the vest. (FF 50-52.) In my view, it is important for the child's future to provide the resources necessary in order to successfully teach appropriate van passenger behavior to Student. The evidence is preponderant that the District's plan for doing so was likely impractical and inadequate for that purpose. (FF

[11] I note that the Occupational Therapist (OT) assigned to Student opined that the use of the vest might be a positive reinforcement for Student; the OT would have had a chance to explain this to Parents at an IEP team meeting. Likewise, the van driver was forbidden from discussing the matter with Parent, though the two maintained a cordial, if awkward, relationship throughout; the driver could have explained her views in support of using the safety vest at an IEP meeting.

[12] The District's behavioral specialist described "behavioral cusps" that are behaviors whose mastery could open up larger vistas of life experience to a child. (NT 692-693.) In my view, being able to sit appropriately and safely in a van is similar to that kind of skill.

53-55, 58.) Thus, the District's approach failed to permit Student to participate in transportation "to the maximum extent appropriate to [Student's] needs … ."

I also have questions about the specialist's opinion with regard to the use of a safety vest. The specialist opined that the District's insistence on the vest was because safety had to take precedence over Student's need for learning appropriate skills. (NT 734-735.) However, the District spent some weeks at the beginning of the year gathering data on behavioral incidents that were occurring every day and all of which created safety concerns – thus tolerating a certain degree of risk. Its transition plan contemplated detaching the vest from the van seat after three weeks, and removing it altogether thereafter, thus again tolerating a certain degree of risk. The vest was never considered as a permanent solution; thus, the safety that it would provide did not override teaching concerns, even in the District's own planning.

In fashioning a remedy, I have considered the possibility of reimbursement to Parents for privately driving Student to school when the District conditionally refused to do so. However, the record simply is inadequate to support an award in this regard. The Parent frankly admitted that Parent could not remember how many days Parent drove Student or when other persons were hired to do so. There were no records of payments made. (NT 51-52, 117-118.) On the basis of this record, I cannot award reimbursement to Parents for their expenditures; however, I will order the District to comply with the law forthwith with regard to transporting Student safely and appropriately to school.

SPEECH AND LANGUAGE

The evidence is insufficient to justify a conclusion that speech and language services were inadequate. The record shows that the Student has speech and language needs, and that the

District provided speech and language therapy services pursuant to the IEP, which did state goals. (FF 61-64.) Although the Parent criticizes the IEP for lacking measureable goals, no expert testimony was elicited to confirm this. Therefore, I do not find a substantive failure to provide a FAPE on the basis of this record.

OCCUPATIONAL THERAPY

The evidence is insufficient to justify a conclusion that occupational therapy services were inadequate. The record shows that the Student has occupational therapy needs, and that the District provided occupational therapy services pursuant to the IEP, which did state goals. (FF 65-68.) Although the Parent criticizes the IEP for lacking measureable goals, no expert testimony was elicited to confirm this; even if the goals were not measureable, there was no evidence to show that this procedural deficit impaired the delivery of appropriate services. Therefore, I do not find a substantive failure to provide a FAPE on the basis of this record.

SOCIAL SKILLS

The record is sparse with regard to Student's social skills. There was evidence that Student has serious social skills deficits and needs. (FF 68, 69.) The District provided one goal to address requesting items, and the evidence was mixed as to whether Student made any progress in this skill. (FF 68, 69.) Given the Student's limited abilities and developmental needs, the record does not support a conclusion by a preponderance of evidence that the District failed to provide a appropriate services to Student with regard to social skills.

EXTENDED SCHOOL YEAR SERVICES

The IDEA, 20 U.S.C. §§1414(d), requires that the parents participate in development of the Individualized Education Program (IEP) for every child. The IEP must be developed by a team that includes the parents. 34 C.F.R. §300.320(a), 300.320(a)(1), 300.322. While an IEP may be revised without an IEP team meeting, this is permissible only with the agreement of the parents. 34 C.F.R. §300.320(a), 300.324(a)(4), (6).

ESY services must be provided through the IEP planning process with the participation of the parents. 34 C.F.R. §300.106 (b)(1)(ii)(ESY services must be provided in accordance with the child's IEP); 22 Pa. Code §14.132(a)(1)(during IEP meetings, school entities must determine the services to be provided).

As noted above, the Parents will prevail in their claims regarding ESY only if they can present a preponderance of evidence that the District failed to perform its obligations under the law. Here, I find that the Parents failed to provide a preponderance of evidence. At best, the evidence is in equipoise. Consequently, the Parents' claim regarding ESY services fails and I will award no relief with regard to this claim.

The evidence was sparse with regard to ESY services for the summer of 2011. The Parents' claim seems to rest upon a document sent to them by the District's director of special education, "confirm[ing]" that ESY services would be provided at the behavioral services program location. (FF 74.) The form lists dates on which the program is offered, although those dates do not line up with or equal the dates on which the behavioral services agency offered its summer camp. (FF 74.) The Parents also rest on evidence that the District agreed to transport Student to the Parents' selected location and camp program. (FF 75-78.)

While this evidence raises the inference that the District had made an offer of ESY services at the location of the other agency, other facts raise the contrary inference. The IEP that offered ESY services located them in the Student's school. (FF 70, 71.) No District personnel ever stated that the Student could receive ESY services at the agency's location. (FF 70, 71, 73.) There was no NOREP locating ESY services there. (FF 70, 73.) Thus, the evidence is in equipoise with regard to whether or not the District offered to provide ESY services at that location, and the Parents' claim must fail.

Parents also claim that the District's offer of ESY services was inadequate. On this point, the evidence is preponderant against the Parents' claim. The IEP shows that District personnel selected ESY goals to enable Student to maintain Student's skills over a wide range of needs, in order to limit regression in these skill areas so that Student would be able to recoup in the Fall without losing the gains of the previous year. (FF 72.) There was no evidence that this was an inappropriate approach or offer. Thus, the Parents' claims on this score must fail.

BREACH OF SETTLEMENT AGREEMENT

Parents urge me to interpret and enforce a settlement agreement between them and the District that provided for 150 hours of services of a Board Certified Behavior Analyst (BCBA) who also testified for Parents. I must decline to do so, due to a lack of jurisdiction.

A special education hearing officer's IDEA authority extends to making decisions "on substantive grounds based upon a determination of whether the child received a free appropriate public education." 20 U.S.C. §1415. Moreover, the due process procedure provided by the IDEA pertains only to "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child … ."

20 U.S.C. §1415 (b)(6)(A). I conclude that this statutory authority does not extend to the interpretation or enforcement of contracts, including settlement agreements. Therefore, I decline to exercise jurisdiction over this claim as a breach of contract claim.

LEAST RESTRICTIVE ENVIRONMENT

The District is obligated to ensure that the Student is educated with non-disabled children "to the maximum extent appropriate … ." 34 C.F.R. §300.114(a)(2). If education outside of the regular classroom for all or part of the school day is found necessary, the proposed placement must be evaluated to determine whether it provides for contact with non-disabled peers to the greatest extent appropriate. Oberti v. Board of Education, 995 F.2d 1204 (3rd Cir. 1993). In Oberti, the court noted that the continuum of placements mandated by the IDEA statute and regulations is designed to assure that a school district does not take an "all or nothing" approach to the placement of a student with a disability, but considers using a range of placement options to assure that the unique needs of each child are met.

In the present matter, there is no dispute that the Student is appropriately placed in a separate autistic support classroom. However, Parent challenges the amount of time in which the district has supported Student's inclusion in activities with non-disabled peers. Parent argues that the amount of time allocated to inclusion in the IEP is too small; that the Student lost inclusion time in September and October 2011 when TSS workers (whose role is to facilitate inclusion in special classes, recess and lunch periods) were absent and not replaced with District staff; and that the District failed to provide sufficient supplemental aids and services to support Student in inclusion settings. (FF 79-85.)

On the other hand, the District points out that the District in fact includes Student in more than the 8% of the school day provided by the IEP; that TSS coverage problems are now resolved, and that Student regularly refuses to continue in special classes, and attempts to elope from the lunch and recess settings. The question to be resolved, then, is whether or not the District has provided an appropriate plan for inclusion and sufficient support services to provide Student with the opportunity to benefit from inclusion to the "maximum extent appropriate."

I conclude that the District failed to provide adequate services for purposes of inclusion during the times in which Student was precluded from inclusion in recess due to the unavailability of the TSS workers. The obligation to include Student belongs to the District, not the behavioral services agency; thus, the district should have provided sufficient staffing to allow Student to go to recess with non-disabled peers on days on which the TSS agency failed to send staff.

The evidence is mixed with regard to the Student's inclusion in specials. This was not made a provision of the IEP; thus, I cannot conclude that this was deemed appropriate by the IEP team as a matter of least restrictive environment. While the repeated concession of District staff to Student's refusal to attend – or requests to leave – specials might in other contexts raise a red flag of concern for the adequacy of the supplementary supports and services, I cannot draw an adverse inference here. Student's behaviors were a serious problem and there was no evidence to suggest that it was inappropriate to allow Student to stay in specials to the extent of tolerance and no more.

CONCLUSION AND RELIEF TO BE ORDERED

In sum, the District's less than adequate services for behaviors, pre-academic skills and transportation, and the Student's lack of educational progress during the relevant period amount to a failure to provide a FAPE for that period of time. In addition, to the extent that Student was denied inclusion in recess when TSS services were not available, the District failed to provide such services in the least restrictive environment. I will order equitable relief in the form of compensatory education and an order that the District provide appropriate services through the IEP process with full participation by the Parents. Since I find a denial of a FAPE owed to Student, and since there was no evidence of additional discrimination on account of disability, I consider my decision on the application of the IDEA to encompass the Student's rights under section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

Applying equitable considerations to the award of compensatory education, I conclude that the failure to provide a FAPE was pervasive and affected every aspect of the school day. Therefore, I begin the calculation of compensatory education with an award of full school days. I also conclude that there was no evidence that the failure to provide a FAPE with regard to the Student's behavior and pre-academic skills deprived Student of the benefit of speech and language or occupational therapy services. Therefore, the hours provided for those services will be deducted from the full day award.

With regard to the least restrictiveness of the services provided, the only proven failure of the District was in not responding to the lack of TSS services at the start of the school year. I have considered providing a reasonable period for discovery with regard to this, but I have decided not to do so. This is not a situation where the District did not know that a service was

needed and responded after discovery of a deficiency in the services provided; rather, the District knew this Student's needs, and knew immediately that the TSS services were not being provided. Therefore, I will not discount further the full day compensatory education award for discovery with regard to TSS services.

With regard to transportation, I will add one hour per day to the award of compensatory education, to account for the Student's loss of an opportunity to learn appropriate behavior on a school van. While the Student got to school because Parents provided their own transportation, this substituted transportation did not fully substitute for the loss of educational opportunity for a child who clearly needed to learn appropriate behavior on the van.

The Parents have request prospective relief. I will order it. It is clear that the District has failed to utilize the IEP planning process appropriately, and that an order is needed to ensure that it will do so in the future. Moreover, due to the deficiencies in the behavior management and academic programs that I have found, it is necessary to order a complete review of those services and a revision of the IEP to the extent deemed appropriate by the IEP team, after taking into consideration certain enumerated concerns, which my order will specify. Moreover, in view of the equities in this matter, I will order the District to include the Parents' BCBA in the planning process.

Any claims regarding issues that are encompassed in this captioned matter and not specifically addressed by this decision and order are denied and dismissed.

ORDER

1. The District failed to provide a free appropriate public education to Student during the relevant period of time from the first day after the end of the 2010-2011 school year through January 5, 2012.

2. The District failed to provide a free appropriate public education to Student in the least restrictive environment necessary to provide a free appropriate public education to Student during recess periods from the beginning of school until October 11, 2011.

3. The District will provide compensatory education to the Student in the amount of full days of autistic support education for all of the relevant period, minus the number of hours actually provided in related services under the pendent IEP. Compensatory services will be at the rate that the District pays for one child in its full time autistic support placement. This rate will include the salaries and fringe benefits that would have been paid to the District professionals and paraprofessionals who provided services to the student during the period of the denial of FAPE.

4. Within ten days of this order, the District will convene an IEP meeting on a date convenient to Parents, in order to plan for a thorough review of the special education and related services provided to Student. The BCBA identified in the settlement agreement set forth in Exhibit P-2 will attend at District expense. The team will determine whether or not a re-evaluation is necessary, and what changes are needed in the behavior management program for the Student and the academic program of the Student to bring them into compliance with the IDEA consistent with this decision. The team shall also consider alternatives to the safety harness for controlling and extinguishing Student's behavior in the school van safely. A final IEP shall be provided to Parents within sixty days of either the meeting ordered herein or the results of any re-evaluation decided upon by the IEP team.

William F. Culleton, Jr. Esq.

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WILLIAM F. CULLETON, JR., ESQ.
HEARING OFFICER

February 8, 2012