

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

PENNSYLVANIA

SPECIAL EDUCATION HEARING OFFICER

DECISION

DUE PROCESS HEARING

Name of Child: M.M.
ODR #2490/11-12 AS

Date of Birth:
[redacted]

Dates of Hearing:
January 19, 2012
March 6, 2012

CLOSED HEARING

Parties to the Hearing:
Parents

Penn Manor School District
2950 Charlestown Road
Lancaster, PA 17603

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:
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March 27, 2012

March 31, 2012

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

Background

Student¹ is a grade-school aged eligible child classified as having Multiple Disabilities² who is enrolled in the Penn Manor School District [“District”].

The Parents filed a request for a due process hearing alleging that the District has not provided Student with a free appropriate public education [FAPE] from November 2, 2009 to the present, and that as a consequence Student has not made meaningful educational progress. They are seeking compensatory education for the denial of FAPE.

The District’s position is that Student has at all times been afforded with FAPE and that therefore no compensatory education is due.

Issue

Has the District failed to provide Student with FAPE during all or part of the period from November 2, 2009 to the present, specifically in the areas of reading, math, speech/language therapy, occupational therapy, and/or physical therapy, and failed to consider Student’s medical needs?

If the District denied Student FAPE, is Student entitled to compensatory education, in what form and in what amount?

Findings of Fact

1. Student is an eligible child who resides in the District and, after transitioning from a public special education preschool program, has been enrolled in a District public school since kindergarten. [S-1, S-4]
2. A September 16, 2011 re-evaluation of Student completed by the District provides a list of medical diagnoses as of the date of that report. The cumulative medical diagnoses provided as of that time, but not from Student’s entry into the District, are: [redacted], Attention Deficit Hyperactivity Disorder, Allergies [dust dogs and mold], Pervasive Developmental Disorder [cognitive, fine/gross motor, adaptive, social/emotional delays]³, On-Demand Language Planning Disorder,

¹ This decision is written without further reference to the Student’s name or gender, and as far as is possible, other singular characteristics have been removed to provide privacy.

² Student’s entry eligibility classifications were Other Health Impairment and Speech/Language Impairment. Student’s Multiple Disabilities include Autism, Intellectual Disability, and Other Health Impairment and within and among these these categories Student also has deficits in the speech/language and fine/gross motor areas. [S-8, S-9]

³Developmental information provided in an earlier evaluation however notes that developmental information includes crawling on time [7-12- months], walking early [before 12 months], speaking single words on time [before 12 months], and using phrases on time [13-18 months]. Toilet training was the only reported area of delay [4 to 5 years old]. [S-3] The mother noticed skill regression around age 4. [P-3]

- Sensory Processing Disorder, Scoliosis and Ligament Laxity, and Non-Perspiration [at risk for temperature-induced seizures]. [S-34]
3. Additional genetic/medical history concerns listed in a private evaluation report from December 2010 are [redacted], epigastric hernia, four myringotomy surgeries, C difficile infection, tonsillectomy and adenoidectomy, lack of hair growth, constipation, eczema, and oppositional defiant disorder. [P-3]
 4. In the first grade⁴ health problems significantly interfered with Student's attendance. Student was absent for 59 entire school days, and part-days equaling an additional 8 days, for a total of 67 days missed of an approximately 180-day school year. [S-15]
 5. In the second grade health problems again significantly interfered with Student's attendance. Student was absent for 65 entire school days, and part-days equaling an additional 14 days, for a total of 79 days missed of an approximately 180-day school year, 12 days more than the previous school year's absence record. [S-31]
 6. In the two-school-year period spanning first and second grades, Student missed a total of 146 days, or 81% of an entire school year. [S-15, S-31]
 7. To address Student's absences in May 2010 the Parents and the District agreed that when Student was absent for more than five consecutive days, the District would provide a Homebound Teacher for up to five hours per week if Student was well enough to engage in instruction. The Homebound Teacher, who also provided Student's Extended School Year [ESY] services, was trained specifically to teach Student and participated in one if not both group trainings with the Itinerant Autistic Support Teacher. When the need for homebound was about to be triggered the Homebound Teacher consulted with the Classroom Teacher on where Student had been in various areas the last time in school to ensure continuity. The Homebound Teacher also consulted with the Occupational Therapist. [NT 162, 166-170, 248]
 8. The Homebound Teacher noted that several planned sessions were cancelled because Student was having seizures and not feeling well, that sessions earlier in the period of absence from school, while Student was still ill, were not productive, and that even during the relatively productive home sessions, Student found it hard to focus. [S-39]
 9. To be sure that Student had not regressed in academic skills over a period of absence, the District raised the criteria for mastery to ascertain retention. For example, on a given skill trial administered upon Student's return, Student might have to have five correct responses instead of three. The District also emphasized consistency to ensure that after a period of absence Student returned into a schedule that was familiar. NT 246, 248]

⁴ Kindergarten absences are outside the relevant period.

10. After some of Student's absences, the District saw regression in such things as responses to reinforcement, ability to attend, and following a schedule, but did not see regression in already acquired academic skills. [NT 250]
11. During the periods of frequent, recurring absences, Student had difficulty being alert and focused even when physically in school. [NT 165-166]
12. As of September 23, 2010⁵ Student had already had two [redacted] episodes in school that academic year. A fall 2010 testing session with an independent evaluator had to be rescheduled because Student had become ill and could not attend school, could not focus and was under medical care. [NT 187, 202-204]
13. The independent evaluator, who has expertise in neuropsychology and school psychology, postponed Student's testing date because "on top of being ill", for "any child" with [redacted] "the consistency varied within days, within minutes and across time". [NT 204]
14. The District's experience with Student comports with the independent evaluator's statements about the variability of students [redacted]. Student's progress is inconsistent, in that one day Student can do a task with 100% accuracy and another day cannot. Given the vicissitudes of Student's availability for learning, the District set up and implemented regular progress monitoring in the 2009-2010 year to obtain a clearer picture of where Student was on any given task and what was needed to get Student to improve. [NT 60-62; S-13, S-14, S-16]
15. The independent evaluator acknowledged that Student's presentation and progress fluctuates significantly across days. Reviewing the educational record the independent evaluator noted that Student may exhibit 70-90% mastery of a goal on one day and then exhibit below 50% mastery on the goal several weeks later. [P-3]
16. During testing with the independent evaluator Student exhibited a significant amount of inattention, distractibility, low stamina/effort, work avoidance and a low tolerance for nonpreferred activity, rendering performance inconsistent across and within tasks. [P-3]
17. In the 2009-2010 school year and prior, Student was a different child than in the current 2011-2012 school year. Student had numerous absences, was suffering from [redacted], was largely non-verbal and was not focused on or engaged in the learning process. Accordingly, Student has been working on some of the same goals since November of the 2009-2010 school year and prior. [NT 35-36]

⁵ The day Student was observed by an independent evaluator.

18. Nevertheless, Student's IEPs were reviewed and revised frequently to address Student's needs. [S-10, S-25, S-2, S-37⁶]
19. Student's transition evaluation dated July 11, 2008, a re-evaluation report completed at the beginning of Kindergarten on November 25, 2008, and a re-evaluation report completed on May 11, 2009 at the end of Kindergarten all informed the first IEP in place during the relevant period. Although the reports carry information about difficulty with peer relationships, Student's behavior with peers was described as being intrusive and bossy as well as withdrawn. Student sought attention from adults in the school setting and engaging in appropriate behavior seemed motivated by observing the praise other children were receiving. The most recent of the three reports describes Student as "very social" during an observation in the school library, "moving to a different table to interact with peers and coming over to say hello to [the observer]". Careful reading of the report would not lead to giving a diagnosis of autistic spectrum disorder significant consideration. [S-3, S-5, S-8]
20. Behavioral needs that stand out in all three reports based on observation as well as structured inventories completed by the school staff and the mother are clearly related to issues of attention and focus, and there is a family history of ADHD that combines to support that diagnosis. [S-3, S-5, S-8]
21. The first relevant IEP does not provide for autistic support services. The Guidance Counselor provided social skills instruction to Student during the 2009-2010 school year. [NT 82-84; S-9]
22. Student's first IEP, dated May 22, 2009, in effect during the relevant period contained a review of medical concerns and included an emergency plan if needed to handle medical issues, contained present levels of academic and functional performance, listed strengths and needs, and carried goals in the areas of speech/language, new concepts [letters/words, numbers, time, money], fine motor [grapho-motor] and visual/ motor integration skills, gross motor skills [throwing/catching, accessing outdoor equipment], adaptive functioning [clothing, toileting], and school behaviors. Specially designed instruction [SDIs] provided a number of interventions including instructional, environmental, physical, verbal, nonverbal, social, and organizational strategies. Related services in the IEP were Speech/Language therapy 40 minutes per cycle, Occupational therapy 30 minutes weekly and 15 minutes consultative monthly, Physical therapy 120 minutes monthly. [S-9]
23. The second IEP of the relevant period was completed on May 14, 2010. At the end of first grade. Like the previous IEP, this IEP includes medical, present levels, and strengths/needs information. Goals are presented for concept acquisition and using learned concepts in conversation, reading, recognizing

⁶ S-10 is the annual IEP and S-25 is the final version of that IEP after periodic revisions. S-27 is the annual IEP and S-37 is the final version of that IEP after revisions. [NT 20-21]

- Student's written name, math, school behaviors, and gross motor/fine motor [including grapho-motor] skills. In comparison with the previous IEP, the SDIs in this IEP were more academic and also included interventions to promote social competencies. Imbedded instruction in social skills was included to help Student understand personal feelings and others' feelings. Related services in this IEP were Speech/Language therapy 40 minutes per cycle, Occupational therapy 30 minutes weekly and 15 minutes consultative monthly, Physical therapy 120 minutes monthly, a Personal Care Assistant 6 hours per day in school, and Adaptive Physical Education 35 minutes per cycle. [S-10]
24. Responsibility for social skills instruction was transferred from the Guidance Counselor to the Itinerant Autistic Support Teacher. [NT 84]
 25. In order to gain additional information to aid in programming the District issued a Permission to Evaluate on June 14, 2010. The Parents declined to give approval; instead they requested that the District fund an independent evaluation to which the District agreed. [NT 89]
 26. In May/June 2010 the District determined that a Functional Behavior Analysis would also be valuable in looking at Student's on-task behavior and sustained attention. [NT 89]
 27. The Parents gave permission for an FBA in August 2010 and the District conducted the FBA in October 2010. [NT 90, 93; S-17]
 28. The May 14, 2010 IEP was revised seven times, on May 28, 2010, on September 2, 2010, on September 9, 2010, on October 13, 2010, on November 1, 2010, on January 14, 2011, and on March 1, 2011. Revisions were made to areas such as present levels, progress monitoring, goals /objectives, SDIs, staff training, behavioral support and related services. [S-25, particularly pages 1 -3]
 29. Of note in the context of this hearing were the revisions addressing/increasing Autistic Support [9-2-10, 9-9-10, 11-1-10, 1-14-11], Vision Statement [10-13-10], Feeding Evaluation [11-1-10], adaptive seating [1-14-11, daily home-school log [1-14-11], discrete trial instruction for new skills [1-14-11], increased Occupational therapy time [1-14-11], changing Speech/Language therapy to one individual session and one social skills session [1-14-11], and 24 hours⁷ of ESY [1-14-11]. [S-25, particularly pages 1 -3]
 30. Information provided to the independent evaluator by the mother, and not contained in earlier reports issued by the Intermediate Unit or the District, lend support to a finding of a disorder on the autistic spectrum. These include unusual play with objects and toys; difficulty relating to people and events; verbal perseveration including repetition of scripts/movie lines; oversensitivity to temperature and to abrupt or loud noises; self stimulation including repetitive

⁷ More than 24 hours were in fact delivered in summer 2011.

- cutting and ripping papers and repetitive drawing of circles; hand-flapping and rocking. [P-3]
31. Further, the private evaluator had access to and cites a September 16, 2010 psychological evaluation report done in the context of Behavioral Health Rehabilitation Services that confers the diagnoses of Pervasive Developmental Disorder, NOS; Attention Deficit Hyperactivity Disorder combined type; and Oppositional Defiant Disorder. [P-3]
32. As part of the independent evaluation, the independent evaluator observed Student in school on September 23, 2010 between 11:00 and 11:55 a.m.⁸ She observed a letter and number identification activity and a grapho-motor activity in the classroom and part of a pull-out Speech/Language therapy session. She verbally shared some of her observations with the Director of Student Support Services. She submitted her written report in December 2010. [NT 182, 187-189; P-3]
33. At the hearing, the independent evaluator highlighted the concerns she had on the day of the observation. She testified that in her opinion Student has significant fine and gross motor weaknesses and when she observed in September 2010 she saw no consistency with regard to addressing the Student from a position at the right side or the left side. Student seemed to be at least right-hand preferred but sometimes hand-over-hand writing support was given from the right and sometimes from the left, thus interfering with the repetition and practice Student needs to learn a new skill. [NT 183-184]
34. The independent evaluator noticed that Student was using a typical chair with no arms, and Student had trouble maintaining a seated position as low muscle tone caused Student to slide off the chair. [NT 184]
35. The independent evaluator noted that she observed an appropriate speech and language session focusing on prepositions and using multisensory cues, visuals and modeling. The independent evaluator was concerned however that Student's Personal Care Assistant [PCA] was not present for the session and therefore would not be able to carry over that new learning back into the classroom. She inquired and learned that frequently the PCA took a break at that time. The independent evaluator did not know the schedules of the PCA, the Therapeutic Staff Support worker [TSS] or the Health Care Assistant [HCA]. [NT 184; 204-205]
36. The independent evaluator noted that when teaching reading the instructor did not have a consistent approach to gain Student's attention such as making Student look at a signal/eyes and then give a direct response. [NT 185]

⁸ The evaluator arrived at the school at 10:35 a.m., spoke with the Director of Student Support Services and Student's Classroom Teacher and then had a brief tour of the learning support classroom.

37. The independent evaluator observed that in the midst of learning letter recognition Student was asked to spell the word “am” suggesting that sequential teaching was not being employed. [NT 185-186]
38. When discussing Student’s autistic support that had begun in September 2010 with the District’s Director of Student Support Services, the independent evaluator recommended that consultative autistic support training be provided to staff for from two or three hours up to five hours a week depending on the individual needs of the specific personnel working with Student. [NT 192-193, 199, 205-206]
39. The independent evaluator noted that on the day of the observation Student was “pretty avoidant and not engaged”. [NT 185]
40. Following her observation the independent evaluator gave some feedback to the District staff and found the response collaborative and receptive. She shared the observation that Student needed to be approached consistently from the dominant side; that there needed to be consistent reinforcers and a visual schedule so Student could keep the reinforcers in mind; and that increased time for autistic support training for the staff was needed to address generalizing skills across settings, time and people, to address repeated errorless learning, and to address discrete trial learning. [NT 188-189]
41. The independent evaluator also discussed the importance of the planned FBA to discern motivators/reinforcers for Student, and the need for a research-based curriculum. [NT 189]
42. The independent evaluator engaged in a feedback session by telephone with the District and the Parents in January 2011. This meeting resulted in some changes to the IEP. The independent evaluator offered to write an Addendum to her report to clarify some questions that came up in the feedback session. [NT 146, 198-199; S-21]
43. The Itinerant Autistic Support Teacher testified that on September 23, 2010 the independent evaluator saw a snapshot that represented where Student was at the time, but that the independent evaluator did not see some of the things the District was getting into place. [NT 224-225]
44. The independent evaluator acknowledged that the observations about the District’s program were reflective of what she saw in September 2010, and that what she wrote in her December 2010 report about the program was based on what she saw back in September. She has not seen Student’s program since September 2010. She has not seen Student since her testing on November 9, 2010. [NT 199-200, 207; P-3]

45. The Itinerant Autistic Support Teacher made a number of attempts to connect with Student in the 2009-2010 school year,⁹ but because of Student's absences was not actually able to begin working with Student before the first few days of the 2010-2011 school year. [NT 215]
46. The Itinerant Autistic Support Teacher holds a master's degree in special education and has Pennsylvania certification in special education K through 12th grade. She has ten years of experience working with students on the autism spectrum in school districts and Intermediate Units, and spent two additional years training behavioral health service providers. [NT 183, 214]
47. By the end of September 2010, the Itinerant Autistic Support Teacher was working with Student and Student's team members about two hours a week. By early October, based on the FBA, her time spent working with Student's team increased. She included the family's home BHRS¹⁰ staff as well as Student's teacher, related service providers, paraprofessionals, and the Parents. Team training focused on the consistent use of interventions, data collection, and information tracking. [NT 216- 223, 238]
48. In addition to ongoing training, prior to receiving the written report of the independent evaluator, the District had arranged with the Itinerant Autistic Support Teacher for a three-to-four hour group training in November 2010, and another group training session was held in May 2011. The independent evaluator acknowledged the training favorably, giving the District positive feedback on the materials and the training. [NT 200, 209, 221-222]
49. The November training materials included a variety of Student-specific and disability-specific portions; based on the intervening programming and progress, the May training materials were specifically focused on Student in light of what had worked, what was coming next, and preparing staff for upcoming work with Student. [S-20, S-29]
50. Although Student's IEP had provided for 25 minutes of service by the Itinerant Autistic Support Teacher, by January 2011 she was providing upwards of three hours a week service for Student and Student's team and continued at this level

⁹ The record is unclear regarding the time that concerns around Student's having an autistic spectrum disorder arose. Given the information in the July 2008, November 2008 and May 2009 evaluation reports this would not have been a likely classification. The private evaluator's December 2010 report cites that the diagnosis of Pervasive Developmental Disorder was given in the context of a BHRS evaluation completed on September 16, 2010. The record does not reflect that the District had access to that report; it was not in the District's exhibits or in the Parents' exhibits. However, given that the District initiated Autistic Support Services in September 2010, and there had been some attempt to begin these services at some point in the previous school year, the District must have had some basis of knowledge either internally or from information provided by the Parents. The private evaluator concurred with the diagnosis of an autistic spectrum disorder following her own evaluation.

¹⁰ Behavioral Health Rehabilitative Services funded through mental health/behavioral health streams.

- through the 2010-2011 school year and into the current school year. [NT 223, 225]
51. When the Itinerant Autistic Support Teacher reviewed the independent evaluator's December 2010 report she found that what the District had been doing with Student's program was in line with the thinking of the independent evaluator. [NT 224-226]
 52. The independent evaluator had recommended discrete trial training of new skills and the Itinerant Autistic Support Teacher had already begun training team members to implement this. [NT 226-227]
 53. The independent evaluator had recommended that Student's ongoing education program be informed by findings from the ABLLS assessment system, and the Itinerant Autistic Support Teacher had already been basing instruction and training on the ABLLS. [NT 227-228, 244]
 54. The third IEP under consideration during the relevant period was developed on May 17, 2011, at the end of second grade. This IEP followed a somewhat different format in that most of the "present levels" information was joined with the relevant goal section, rather than at the beginning of the document, although there were also present levels in the introductory section. Goals were developed for time on task, processing and responsiveness to directions, knowledge of basic concepts across environments, use of learned concepts in conversation in a variety of social situations, reading of functional sight words, letter recognition, math, gross and fine motor and visual-motor skills, visual motor skills, adaptive [self-care] skills, and use of learned sensory strategies to increase attendance with decreasing prompts. SDI repeated previous items such as discrete trial training for new skills and added other items such as reinforcement throughout school day of itinerant autistic support teacher recommendations to address sensory, social, and behavioral needs, positive reinforcement for student initiated eye contact, and pairing with positive peer. The IEP also provided that all staff would be trained by the Occupational therapist and that all new staff would be trained by the Itinerant Autistic Support Teacher. [S-27]
 55. Related services in the May 17, 2011 IEP included Speech/Language therapy 40 minutes per cycle [one 20-minute individual pull out session and one 20-minute push in social skills session], Occupational therapy 220 minutes per month [160 minutes direct intervention and up to 60 minutes consultation with staff per month], Physical therapy 120 minutes per month, Consultative Vision Support 30 minutes per month, Consultative Itinerant Autistic Support up to 150 minutes per 6 day cycle, and PCA 6 hours per school day. [S-27]
 56. The only disagreement with the IEP that the Parents voiced was with the amount of Physical therapy; however, they agreed that services under the IEP should begin. [S-33]

57. The May 17, 2011 IEP had been revised four times as of the beginning of this hearing, on July 25, 2011, September 30, 2011, November 2, 2011, and December 15, 2011. Revisions were made to areas such as present levels, progress reporting, information and recommendations for autistic support and information/recommendations regarding feeding. [S-37, particularly pages 1 -3]
58. Because Student was having eating difficulty, in preparation for the November 2011 IEP revision meeting the District took data from September 2011 to November 2011 recording the amount of time staff spent trying to get Student to eat *vs.* the amount of time Student was actually eating. The District was working on interventions to assist Student in this area, and brought the feeding team into the IEP meeting to work on this area. [NT 67-68; P-5]
59. Of note for the purposes of this hearing, the related service of Speech/Language therapy was raised from two to three sessions per cycle [7-25-11], SDI modifications were made [9-30-11], support for school staff in the area of feeding was added [11-2-11], attaching supporting documents to the IEP was added [11-2-11], and trial of specialized chair was planned [12-15-11]. [S-37 particularly page 2]
60. The May 17, 2011 IEP as revised was accepted by the Parents in July 2011. At the time of the hearing the revisions outlined above were specifically a) Speech/Language therapy two sessions per cycle with the Speech/Language Pathologist and one session per cycle with the Speech/Language Pathologist and the Itinerant Autistic Support Teacher; b) SDI addition of a picture system for communicating; c) entire team including the Parents to be trained by the Feeding Team [Speech/Language Pathologist and Occupational Therapist] because of concerns of Student's time on task and need for prompts for eating; d) specialized chair [Rifton Chair] implemented at recommendation of the Feeding Team. [NT 104-113; S-37]
61. Student is currently a third grader placed in a District elementary school for most of the school day in a full-time learning support classroom with a total of ten children; the class is staffed with a teacher and a para-educator, and three of the children, including Student, have individual Personal Care Assistants [PCAs]. [NT 95-96]
62. Student is individually assisted by three adults – a Personal Care Assistant, a Therapeutic Staff Support worker, and a Health Care Aide. The District provides the PCA and the HCA, and the TSS is provided through the behavioral health funding stream. [NT 96, 130-131]
63. When introducing new skills to Student the staff uses discrete trial training to avoid overwhelming Student. [NT 127]

64. Reading instruction is embedded throughout Student's program, provided through the various activities across Student's school day, by all the individuals working with Student - classroom staff, one-to-one staff, and related services staff. [NT 119]
65. The Occupational Therapist's work on fine motor skills is extended through the Occupational Therapist's training of other staff working with Student. The Occupational Therapist also developed sensory diet advice for use by other staff, based on input from those staff. [NT 120-121, 132-134; S-32]
66. The District supplements the work of the Classroom Teacher on language skills with a combination of a Speech/Language Therapist and an Itinerant Autistic Support Teacher. [NT 105-107]
67. Student's social skills instruction is "authentic instruction" in that the staff use everyday situations to provide social skills instruction, for example turn-taking and making eye contact. [NT 124-125]
68. Reports of Student's progress during the 2009-2010 school year were provided by the Classroom Teacher, the Speech/Language Therapist, the Occupational Therapist, and the Physical Therapist. Student's performance fluctuated with health and attendance, and varied from skill to skill. [S-13, S-14]
69. During the 2010-2011 school year, Student demonstrated increasing success in ability to remain on task for four or more 15-minute intervals a day. Student met criteria for 75% of days in January 2011, for 88% in February, for 94% in March, and for 100% in April. In September 2011, surpassing all previous experience in school, Student was on task an average of 4.9 hours of each full 6.25-hour school day. [S-37]
70. The Itinerant Autistic Support Teacher noted that whereas previously progress was measured by minutes on task, Student is on-task more often than not so that now data is taken on time off-task. Student is significantly less dependent on repeated prompts by adults than in past years. [NT 232]
71. In the current school year, Student's attendance has been "remarkably better"¹¹ than in the previous two years. [NT 65-66]
72. Toward the end of the last school year and during the current school year Student made significant improvement in language skills, and Student's being able to tell staff wants and needs has made a big difference in Student's availability for learning. [NT 98]
73. Student initiates peer interaction and requests help from peers. [NT 233]

¹¹ Characterization used by Parent's attorney and confirmed by District witness at the first hearing session.

74. The Itinerant Autistic Support Teacher noted that the biggest leap is that Student is now much more verbal, and “with that expansion of receptive and expressive language there’s a lot more that we can do instructionally as well. So in many ways we’re dealing with a much, much different child right now than we were [in September 2010]”.
75. Following the independent evaluator’s recommendation in the December 2010 evaluation report that Student might benefit from using a communications board, in January 2011 the District asked the Parents’ permission to assess Student’s suitability for this intervention. However, by May 2011 when the Parents gave their permission and Student’s augmentative communication needs were able to be assessed Student’s language had improved to the point where Student did not need a picture communication system. (NT 128-129, 135-136; S-22.)
76. Student currently receives two different types of reading instruction, the Edmark program which is a functional sight word program and more recently, the Early Literacy Skills Builder which is a multisensory approach developed for children with more significant needs. Student has increased sight words from six in January 2011 to twenty-three as of January 2012 using Edmark, and is beginning to learn the sounds of three letters of the alphabet using Early Literacy Skills Builder. [NT 97-101]
77. A year ago Student would not have been appropriate for the Early Literacy Skills Builder program; Student was not developmentally ready and had a lower level of engagement with learning. [NT 103]
78. Whereas Student could not be in a reading group previously, as Student required one-to-one instruction, Student can now be instructed in a small group of three. [NT102]
79. Student can write Student’s first name with 100% accuracy using large block size letters and can write six letters of Student’s last name. [NT 98]
80. Math is Student’s biggest challenge. Student is working on counting with one-to-one correspondence. The District has initiated a new research-based math program, Saxon Math, because it suits Student’s need for repetition and practice. [NT 98-99]
81. Overall data from the first and second marking periods of the current school year shows progress in many, but not all skill areas and there is fluctuation. For example, sustained attention has increased significantly over previous years, but decreased slightly from the first to the second marking period in the current year. During the same period, Student demonstrates an increase in general knowledge of concepts, an increase in knowledge of functional sight words, a modest increase in math skills, a modest increase in pre-writing skills, an increase in fine

- motor skills, a decrease in the number of prompts needed for sustained participation in classroom activities, and an increase in gross motor skills. [P-9]
82. The school staff members working with Student meet with the mother monthly to go over Student's progress, showing her, for example, the backup data on trials, and the school team also meets among themselves monthly to go through Student's progress on goals and objectives and adjust as needed. [NT 98-99]
83. Written progress reports are sent to the Parents. Backup data from trials to assess Student's progress are kept in a separate binder at the school. [NT 40, 49, 50-51]
84. In summer 2010 Student was given 18 hours of ESY. Testimonial and documentary evidence was inadequate to establish what Student needed to maintain skill levels, and no information was provided about the Student's availability for learning during that summer. [S-10; S-16; S-38]
85. Based on the fact that Student acquires and retains information less well than peers, the independent evaluator opined that Student was at risk for regression over the summer and would need more time to recoup skills after the summer. She recommended that Extended School Year [ESY] be considered "to maintain continuity of intervention and facility maintenance and progression of skills." [NT 194, 207-208; P-3]
86. Following input and dialogue among the Parents, the private evaluator and the District, Student received ESY during the summer of 2011 for a total of 50 hours that included 40 hours of academic support and 10 hours of autistic support services. The ESY program for Summer 2011 also included Speech/Language goals and fine motor goals in addition to academic goals. [NT 68-69, 147-150; S-25, S-30, S-37, P-1].

Discussion and Conclusions of Law

Burden of Proof

In November 2005, the U.S. Supreme Court held the sister burden of proof element to the burden of production, the burden of persuasion, to be on the party seeking relief. However, this outcome-determining rule applies only when the evidence is evenly balanced in "equipoise," as otherwise one party's evidence would be preponderant. *Schaffer v. Weast*, 126 S. Ct. 528, 537 (2005). The Third Circuit addressed this matter as well more recently. *L.E. v. Ramsey Board of Education*, 435 F.3d. 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006). Thus, the party bearing the burden of persuasion must prove its case by a preponderance of the evidence, a burden remaining with it throughout the case. *Jaffess v. Council Rock School District*, 2006 WL 3097939 (E.D. Pa. October 26, 2006). Here, the Parents requested this hearing and were therefore, assigned the burden of persuasion pursuant to *Schaffer* and also bore the burden of production. The evidence was not in equipoise in this matter, as the Parents clearly more

than met their burden and prevailed, given the preponderance of their case and the resulting lack of evenly balanced evidence as between the parties.

Credibility

During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make “express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses”. *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003); See also generally *David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009).

Neither parent testified in this matter. The Parents called the District’s Director of Student Support Services and the psychologist who had completed Student’s private evaluation; the District called the Itinerant Autistic Support Teacher.

The District’s Director of Student Support Services, who has been in her current position in the District since July 2010, testified in detail, cordially and credibly on all points. She holds a bachelor’s degree in special education, a master’s degree in teaching and curriculum, and a doctoral degree in educational leadership. She holds Pennsylvania reading specialist certification, special education supervisory certification, and curriculum instruction supervisory certification. She is in the process of completing requirements for her superintendent’s letter of eligibility. Her testimony was given considerable weight, although with regard to the 2009-2010 school year it was of limited value because she was not in the District at that time. [NT 28-29]

The Itinerant Autistic Support Teacher’s testimony was reflective of her special expertise and was enhanced by her direct involvement with Student and Student’s program on an ongoing basis at the frequency of several days per week. She holds a master’s degree in special education and has Pennsylvania certification in special education, a decade of experience working in public educational settings with students on the autism spectrum, and spent two additional years training behavioral health service providers. Her testimony was given great weight in all respects other than the reason why autistic support services were not begun until September 2010.

The Private Evaluator’s testimony and her written report and Addendum were very helpful in painting a picture of Student and Student’s depth and variety of needs. Her description of the inconsistencies presented by students with [redacted] was particularly helpful in understanding Student’s academic functioning. She testified forthrightly and was cordial, and conveyed the impression of having approached her role as a collaborator with the District for Student’s benefit rather than as an adversary. Several factors diminished the weight of her testimony about perceived deficits in Student’s program, however. First, her direct observation of Student in school for about 60 minutes was conducted nearly one and a half years prior to her testimony; second, she has not seen the Student since almost that long ago; and third, she was not cognizant of the entire range of Student’s program at the time of her observation and afterwards.

Legal Basis

Special education issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 [IDEA] which took effect on July 1, 2005, and amends the Individuals with Disabilities Education Act. 20 U.S.C. § 1400 *et seq.* (as amended, 2004). Once disabled children are identified as being eligible for special education services the IDEA requires the State to provide them with a “free appropriate public education” [FAPE]. 20 U.S.C. §1412(a)(1), 20 U.S.C. §1401(9).

It is the explicit obligation of the hearing officer to base hearing decisions on the substantial evidence of record and upon a determination whether the child in question received FAPE. 20 U.S.C. §1415(f)(3)(E).

An "**appropriate**" education "is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons are met." 34 C.F.R. § 104.33(b)(1).

Special education is defined as **specially designed instruction**...to meet the unique needs of a child with a disability. Specially designed instruction means adapting, as appropriate to the needs of an eligible child ...the content, methodology, or delivery of instruction to meet the unique needs of the child that result from the child’s disability and to ensure access of the child to the general curriculum so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children. 34 C.F.R. §300.26.

School districts provide FAPE by designing and implementing a program of individualized instruction 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 benefit**”, a principle established by 30 years of case law. *Board of Education v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982); *Rose by Rose v. Chester County Intermediate Unit*, 24 IDELR 61 (E.D. PA. 1996); *T.R. v. Kingwood Township Bd. of Educ.*, 205 F.3d 572, 577 (3d Cir. 2000) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182, 184 (3d Cir. 1988); *Shore Reg'l High Sch. Bd. of Ed. v. P.S.*, 381 F.3d 194, 198 (3d Cir. 2004) (quoting *Polk*); *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3rd Cir. 2009); *Chambers v. Sch. Dist. of Phila. Bd. of Educ.*, 587 F.3d 176, 182 (3d Cir.2009); *Rachel G. v. Downingtown Area Sch. Dist.*, WL 2682741 (E.D. PA. July 8, 2011)

An eligible student is **denied FAPE** if the **IEP 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); *Polk*,

The Third Circuit explains that while an "appropriate" education must "provide '**significant learning**' and confer '**meaningful benefit**,'" it "**need not maximize the potential** of a disabled student." *Ridgewood*, 172 F.3d at 247 (3d Cir. 1999); *Molly L v.*

Lower Merion School District, 194 F. Supp. 2d 422 (E.D.PA 2002). An IEP must provide a “**basic floor of opportunity**”. There is no requirement to provide the “optimal level of services.” *Mary Courtney T. v. School District of Philadelphia; Carlisle Area School District v. Scott P.*, 62 F.3d 520, 532 (3d Cir. 1995), cert. den. 517 U.S. 1135, 116 S.Ct. 1419, 134 L.Ed.2d 544 (1996). What the statute guarantees is an “**appropriate**” **education**, “not one that provides everything that might be thought desirable by ‘loving parents.’” *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989). Citing *Carlisle*, Pennsylvania’s federal court in the Eastern District noted, “Districts need not provide the optimal level of services, or even a level that would confer additional benefits, since the IEP required by the IDEA represents only a basic floor of opportunity.” *S. v. Wissahickon Sch. Dist.*, 2008 WL 2876567, at *7 (E.D.Pa., July 24, 2008). The law requires only that the **plan and its execution** were **reasonably calculated** to provide **meaningful benefit at the time it was created**.

The IDEA authorizes hearing officers and courts to award “such relief as the Court determines is appropriate” 20 U.S.C. § 1415(h)(2)(B), and **compensatory education** is an appropriate remedy when a school district has failed to provide a student with FAPE *Lester H. v. Gilhool*, 916 F.2d 865, 871-73 (3d Cir. 1990) as the purpose of compensatory education is to replace those educational services lost because of the school district’s failure. [*Id.*]

Findings and Discussion

After carefully considering the testimonial and documentary evidence, I have reached the following conclusions in the context of Student’s disabilities, primarily Autism, Intellectual Disability, and Other Health Impairment with concomitant ramifications for speech/language, fine and gross motor, and attentional functioning.

First, Student’s medical status significantly impacted Student’s ability to attend school, to be attentive and focused in school even when physically present, and to be attentive and focused when instructed at home.

Second, Student’s periodic and recurrent unavailability for learning, whether physical or attentional, negatively affected Student’s progress.

Third, Student’s IEPs are appropriate in that they were reasonably calculated to provide meaningful educational benefit and have been living documents which, due to the receptiveness of the District and the diligence of the Parents, have been examined, evaluated and revised to meet Student’s unique needs.

Fourth, the related services of Speech/Language therapy, Occupational therapy, and Physical therapy offered to Student from November 2, 2009 to the present were appropriate in kind and amount at the time the IEPs were crafted and implemented. The fact that subsequent IEP revisions conferred more services does not mean that the higher level of services was appropriate at an earlier phase of Student’s development.

Fifth, in spite of Student's disabilities, medical needs and periodic unavailability for learning because of illness Student has made meaningful educational progress in light of Student's potential and this progress has been reported appropriately to the Parents.

Sixth, Student's burst of language competency during the current school year has made a significant difference in every aspect of Student's functioning and ability to benefit from the educational program and placement offered. This developmental leap has affected academics and socialization in a very positive direction.

Seventh, Student's greatly improved developmental skills in the areas of attention to task and focus have had a significant positive impact on Student's ability to profit from the program and placement offered.

There were two areas of concern that remain unresolved because there are lacunae in the information made available to me at the hearing and in the documents. First, it is unclear when the District was made aware that Student was diagnosed with an autistic spectrum disorder. While observational and testing data available to the District through re-evaluations in July 2008, November 2008 and May 2009 clearly support an intellectual disability, an attention deficit hyperactivity disorder, a speech/language disorder and an other health impairment, along with deficits in motor skills, there are only the very faintest of clues that need considerable stretching to support the proposition that Student would qualify as a child on the autistic spectrum. The August 15, 2008 IEP and the May 22, 2009 IEP both list Student's Medical Diagnoses; among the items on both lists is "Developmental Delays – cognitive, fine and gross motor, adaptive and social & emotional skills". The item does not say "Pervasive Developmental Disorder NOS" on either IEP. The May 14, 2010 IEP also provides a list of Student's Medical Diagnoses. However, on this IEP "Pervasive Developmental Disorder – Cognitive, Fine and Gross Motor, Adaptive and Social/Emotional delays" is listed. It seems that at some point during the 2009-2010 school year the specific autistic spectrum diagnosis was conferred, but the initial source of that diagnosis and the date that the District became aware of that diagnosis is not revealed in the record.¹²

Nevertheless, the District clearly gained the knowledge that Student was on the autistic spectrum at some point in the 2009-2010 school year and at some point the District decided to provide Autistic Support services and the former Director of Student Support Services engaged the Itinerant Autistic Support Teacher to begin. Unfortunately the Itinerant Autistic Support Teacher's efforts to connect with Student were frustrated by attendance issues; however, the question remains as to why the Itinerant Autistic Support

¹² The private evaluator had access to a BHRS evaluation done on September 16, 2010 that carried the diagnosis of Pervasive Developmental Disorder NOS, and behavioral reports provided by the mother for purposes of the December 2010 private evaluation are supportive of an autistic spectrum disorder. It is puzzling that the behaviors described by the mother do not seem to have been seen or recognized by preschool or by District staff. It is unknown whether the District had access to a November 3, 2010 private Occupational Therapy evaluation found at P-2 which notes that Student "is diagnosed with a pervasive developmental delay".

Teacher did not at least begin to consult with staff and why at least some direct services were not provided to Student.

I find that because of this lapse Student is entitled to compensatory education for the denial of Autistic Support Services for some nonspecific period during the 2009-2010 school year, after November 2, 2009. Given that neither party provided specificity as to when the District was informed that Student had been diagnosed with Pervasive Developmental Disorder and when the former Director of Student Support Services asked the Itinerant Autistic Support Teacher to begin working with Student, I am exercising my remedial authority and setting January 1, 2010 as the date the District had knowledge of Student's diagnosis. I am setting three hours per week as an appropriate amount of this service for Student at that time. Student is therefore entitled to 3 hours of Autistic Support Services for every week school was in session from January 1, 2010 to the end of the second week of June 2010. Excluding a spring break of one week, this period encompasses 21 weeks. I will not adjust the weeks to account for Student's absences since the Itinerant Autistic Support Teacher could have used the hours to train and consult with staff working with Student. Therefore the District shall provide Student with 63 hours [3 hours per week x 21 weeks] of direct or consultative Autistic Support Services, over and above the hours specified in then-current IEPs, to be used during the next three calendar years beginning with the date of this decision. These services may be delivered during the school year at school and/or at home, during breaks within the school year at home, and/or during the summer months at school or at home.

ESY services were scantily touched upon in the hearing. The summer 2011 ESY program of 50 hours over two-and-a-half months is deemed to be appropriate at that time in terms of number of hours and the services rendered given Student's significant needs. Since no useful evidence was given supporting or undermining the offer of the summer 2010 ESY program of 18 hours, I decline to disturb that aspect of Student's program at that time.

Order

It is hereby ordered that:

1. The District provided Student with FAPE during the entire period from November 2, 2009 to the present in the areas of reading, math, speech/language therapy, occupational therapy, and/or physical therapy, and did consider Student's medical needs.
2. The District failed to provide Student with FAPE from January 1, 2010 through the middle of June 2010 by not providing Autistic Support Services.
3. Student is entitled to compensatory education and is awarded 3 hours of Autistic Support Services for every week school was in session from January 1, 2010 to the end of the second week of June 2010. Excluding a spring break of one week, this period encompasses 21 weeks. Therefore the District shall provide Student with 63 hours [3 hours x 21 weeks] of direct or consultative Autistic Support Services, over and above the hours specified in then-current IEPs, to be used during the next three calendar years beginning with the date of this decision. These services may be delivered during the school year at school and/or at home, during breaks within the school year at home, and/or during the summer months at school or at home.

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

March 31, 2012

Date

Linda M. Valentini, Psy.D., CHO

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