

*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

ODR No. 2663-1112 AS

Child's Name: J.V.

Date of Birth: [Redacted]

Dates of Hearing: 1/24/12, 3/30/12,  
4/5/12, 4/12/12

### OPEN HEARING

Parties to the Hearing:

Parents  
Parent

School District  
Philadelphia  
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Philadelphia, PA 19130

Date Record Closed:

Date of Decision:  
Hearing Officer:

Representative:

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May 1, 2012

May 16, 2012  
Anne L. Carroll, Esq.

## **INTRODUCTION AND PROCEDURAL HISTORY**

This matter began in the spring of 2011 with a due process complaint that asserted an ESY claim for the summer of 2011, along with placement and program concerns, including Student's proposed re-assignment to a different elementary school for the 2011/2012 school year. Accordingly, after the ESY hearing, the remaining issues were given a new case number and a hearing was convened in June 2011.

By that time, the District had abandoned its plan to transfer Student to a different building, removing Parent's immediate concern for the 2011/2012 school year. The parties also announced that they had reached an agreement to resolve a transportation reimbursement claim and Parent's compensatory education claims through the end of the 2010/2011 school year. The case remained open, however, because Parent, did not consider the matters asserted in the original complaint to be entirely resolved. Ultimately, by agreement of the parties, Parent submitted an amended complaint that raised program/placement concerns that Parent alleged arose or continued during the 2011/2012 school year, the new complaint was given the above case number, and the 2010/2011 case was closed with remaining issues preserved in the new case. After a ruling on the District's motion to dismiss the new complaint and listing the matters to be included in the hearing, the first session on the new complaint was convened in January 2012, and the prior hearing records were incorporated into the current record.

After two additional sessions to take evidence and one brief session to discuss scheduling the final witness, the record closed with the parties' submission of final arguments on May 1. For the reasons that follow, the District is directed to assure that it complies with the IDEA least restrictive environment (LRE) requirements for placement, assure that Student's speech/language services are consistently delivered on a weekly basis, and to assure that missed services are replaced. Student will also be awarded compensatory education.

## ISSUES

1. Has the School District provided Student with an appropriate program of special education services during the 2011/2012 school year, including an appropriate level of inclusion in regular education classes with non-disabled peers?
2. Has the School District appropriately implemented Student's IEP and appropriately met Student's needs during the 2011/2012 school year by
  - a. providing an appropriate level of support in all school settings including a 1:1 aide;
  - b. providing the agreed amount of speech/language services and an appropriate level of services?
3. Did a lack of training for District staff result in a denial of FAPE to Student?
4. Is Student entitled to an award of compensatory education, and if so for what period, in what amount and in what form?<sup>1</sup>

## FINDINGS OF FACT

1. Student is a[n elementary school-aged] child, born [redacted]. [Student] is a resident of the School District of Philadelphia (SDOP) and is eligible for special education services. (Stipulation, TR pp. 12, 13 (5/25/11))<sup>2</sup>
2. Student has a current diagnosis of autism in accordance with Federal and State Standards. 34 C.F.R. §300.8(a)(1), (c)(1); 22 Pa. Code §14.102 (2)(ii). (Stipulation, TR p. 13 (5/25/11))
3. During the 2010/2011 school year, Student's placement was an autistic support (AS) class, with some inclusion in regular education classes. (Stipulation, TR p. 13 (5/25/11); J-6, pp. 1, 3)

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<sup>1</sup> The issues were delineated in a ruling issued on January 11, 2012 after considering the District's motion to dismiss the complaint and Parent's response. The parties included that ruling in the exhibits as J-28. The description of the issues to be heard is found at J-28, p. 1. *See also* N.T. pp. 79, 80

<sup>2</sup> The parties agreed to incorporate into the record of this hearing the transcript of the first hearing session held in ODR # 1744-1011 AS (ESY hearing held on May 25, 2011—*See* N.T. p. 6) The hearing transcript in this case, #2663-1112 AS, was continued from the final page of the 6/30/11 hearing session convened in ODR # 1925 10-11 AS (The original complaint, re-numbered after the ESY hearing/decision—N.T. p. 71) The testimony from the ESY case will be referenced as "TR p. (5/25/11)." The transcript of this case, which includes the 6/30/11 hearing session as part of the continuous record of this case, will be referenced as "N.T. p."

The parties also agreed to continue their commendable practice of submitting joint exhibits, adding new documents, sequentially, to the exhibits used originally in the ESY due process hearing. The same exhibit number, therefore, are use throughout to refer to the same documents. Specific exhibits are designated by the letter "J" followed by the exhibit number.

4. At the opening session of the hearing on June 30, 2011 the District offered and Parent accepted 1200 hours of compensatory education at a specified dollar value for past IDEA violations beginning two years prior to the date the original complaint was filed and extending to the end of the 2010/2011 school year. (N.T. pp. 7—9)
5. The District also stated its intention to locate an autistic support class for grades 3—5 at the elementary school Student was attending, and to have Student remain at that school through 5<sup>th</sup> grade, as Parent requested. Parent also accepted that offer, but noted continuing concerns with the policy of the District to re-locate students in need of autistic support services and noted her intention to remain a party to an ongoing federal district court action concerning the legality of the policy. (N.T. pp. 7—9, 31, 32, 36, 37, 44)

#### Educational Needs/ Speech-Language Services

6. The disability-related needs that most significantly interfere with Student’s educational progress, particularly in a regular education setting, are anxiety-based non-compliance/refusal to perform to the level of Student’s capability, difficulties with focus/remaining on task and weak communication skills. (T.R. pp. 171, 188, 197 (5/25/11); N.T. pp. 59, 61; J-32 pp. 3, 4, 5, 6, 11, 13, 14)
7. Because Student’s language deficits negatively impact educational performance, particularly in the larger setting of the regular education classroom., Student needs to improve receptive and expressive language skills in order to be fully successful in a regular education setting. (N.T. pp. 155, 156, 160; J-22 p. 8)
8. During the current school year, Student was scheduled to receive group speech/language therapy in two 45 minute sessions each week, delivered in the autistic support (AS) classroom. Consultative services were provided during September and direct services in October 2011, but not every week. (N.T. pp. 105, 114, 117, 163—165, 533—535, 546; J-21 p. 20)
9. The assigned speech/language therapist began a medical leave during the first week of November 2011 and from then until January 9, 2012 Student did not receive speech/language therapy because the District had no one on staff to provide those services. (N.T. pp. 106, 535)
10. The November 16, 2010 IEP that the District was implementing during the 2011/2012 school year, provided for 600 minutes of speech/language therapy per IEP term. (N.T. pp. 123, 124, 139, 140, 165, 166; J-21 p. 20)
11. Although the elementary school principal was concerned about the long delay in resuming speech language services during the fall of 2011, District staff considers the District in compliance with the IEP as long as the missing services are made up and Student receives the number of minutes specified for the IEP term. (N.T. pp. 106—108, 112—114, 116, 117, 120, 130, 528, 548, 551, 552)

12. The only annual goal related to speech/language in the November 2010 IEP was under the category “Life Skills—Interpersonal Communication.” The goal provided that by November 2011, Student would be able to communicate effectively in any school environment and across all speaking situations with teachers and peers with 8—10 trials for 5 consecutive sessions at 80%. (N.T. pp. 545, 546; J-21, p. 20)
13. The speech/language therapist did not report Student’s progress prior to beginning medical leave. Student’s special education teacher was responsible for reporting progress on the communication goal because it was considered an interpersonal goal. (N.T. pp. 544—546)
14. There is no record of specific assessments completed by District staff in January 2012 to determine whether the two month absence of speech/language services had an adverse effect on Student. (N.T. p. 107)
15. After an IEP meeting held in February 2012, Student’s speech/language therapy was increased to 1200 minutes per IEP term. (N.T. p. 288)

Placement/Participation in the Regular Education Classroom—2010/2011, 2011/2012

16. According to Student’s most recent reevaluation report (RR), dated 11/11/2010, and based upon experience, Student is able to successfully participate in grade level instruction with peers in the regular education setting, provided that Student has 1:1 assistance and support. (TR. pp. 164, 165 (5/25/11); N.T. pp. 58, 59, 154, 170, 171; J-6, pp. 3, 5)
17. Student began to be included in a grade-level regular education classroom during the second half of the 2010/2011 school year, beginning with approximately 1—1.25 hours of guided reading daily. (N.T. p. 334, 335)
18. In guided reading, a regular education teacher works with a small group of children (4—7) who are all at the same reading level and uses materials at the reading skill level of each group. The teacher works with each child individually to develop and monitor effective grade-level reading behaviors, *e.g.*, using prior knowledge and making connections, and takes notes on each child’s effective reading behaviors. Student’s regular education teacher for this year also emphasizes comprehension, accuracy, fluency and vocabulary skills during guided reading. (N.T. pp. 100, 101, 103, 354)
19. During the 2010/2011 school year, Student’s time in the regular education classroom was later increased by participation in the 100 Book Challenge, joining the regular education classroom for three additional 45 minute periods/week. The 100 Book Challenge is a more informal reading activity, for which students self-select books to read aloud to a tutor or someone at a higher reading level. (N.T. pp. 335, 336)
20. In planning for the 2011/2012 school year Student’s 2<sup>nd</sup> grade teacher noted that more sophisticated academic skills are needed in 3<sup>rd</sup> grade. The teacher suggested that

inclusion begin slowly and cautiously to avoid overwhelming Student and stimulating anxiety, as well as to assess how Student's social relationships developed in the regular education classroom. (T.R. p. 196; N.T. pp.61, 62, 341)

21. In consultation with Parent, the 2<sup>nd</sup> grade teacher recommended the regular education 3<sup>rd</sup> grade teacher she believed would be a good fit for Student. (N.T. pp. 48, 49, 343, 432)
22. The 2<sup>nd</sup> grade teacher considered guiding reading a good way to begin inclusion during the current school year, with reading gradually expanded and eventually adding science and gym. (N.T. pp. 49, 61)
23. At the beginning of the school year, Parent questioned when Student would begin to participate in a regular education class. Student's current AS teacher was unaware that a regular education teacher had been identified, was generally unaware of the extent of inclusion suggested for the current school year and of Student's experiences in the regular education classroom during the 2010/2011 school year. (N.T. pp. 209, 210, 217—219, 432; J-33 pp. 2, 3)
24. Student joined the regular education class for 30—40 minutes of guided reading daily beginning September 19, 2011. The several weeks delay was due in large part to the lack of an aide to accompany Student to the regular education class. (N.T. pp. 144, 145, 216, 369,432; J-33 p. 7)
25. Although a 1:1 aide specifically for Student did not begin until November 28, 2011 one of the AS classroom aides accompanied Student to the regular education classroom at all times and served as Student's 1:1 aide during that instruction but not in the AS classroom. Since November 2011, a 1:1 aide has been assigned to Student throughout the school day to assist with work, re-focus and re-direct Student. (N.T. pp. 95, 144, 170)
26. In order to avoid overwhelming Student, District staff intended to gradually increase Student's time in the regular education classroom as Student became more comfortable while monitoring Student's level of success in that setting. Adding shared reading and the 100 Book Challenge were considered, as well as including Student in the regular classroom for science. (N.T. pp. 99, 100, 104, 147)
27. By January 2012, Student was very comfortable in the regular education class, and the regular education teacher noted no disruptive behaviors in that setting. Student's AS teacher and the regular education teacher agreed that time in the regular education classroom should be increased for structured activities. (N.T. pp. 146,176—178, 364, 365)
28. In February 2012, after an IEP meeting, Student began joining the regular education class for shared reading,<sup>3</sup> increasing Student's participation in the regular education literacy block to 1.5 hours daily, 4 days/week.<sup>4</sup> (N.T. pp. 289, 348, 349, 373)

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<sup>3</sup> Shared reading is whole group instruction using grade level material in which the regular education teacher focuses on all literacy skills, spelling, grammar, reading fluency. The skills are then re-enforced in guided reading,

29. Student also began participating in science for 2 45 minute periods/week. The regular and special education teachers also discussed adding art, taught by the regular education for 45 minutes each week on Fridays. (N.T. pp. 289, 348, 384)
30. The teachers' goal for Student currently is to participate in the entire 2.75 hour literacy block in the regular education classroom, adding first the 100 Book Challenge and then writing instruction. The current regular education teacher did not know that Student participated in the 100 Book Challenge in the regular education setting during the 2010/2011 school year. (N.T. pp. 384—386)
31. The regular education teacher informally assesses Student's progress and provides input to the special education teacher for her progress reports, but Student does not participate in formal reading assessments administered to the students in the regular education class and the regular education teacher does not compile data on Student's progress. (N.T. pp. 374, 375, 378)
32. In the opinion of the regular education teacher, Student made some progress in reading comprehension in the regular education classroom during the 1<sup>st</sup> marking period, does well with vocabulary and accuracy, and particularly needs to work on fluency. Since that time, Student has made gradual progress in fluency, while continuing to need support, and has been able to stay on the same level as the guided reading group. Student also appears to have made progress in vocabulary and grammar (N.T. pp. 356, 357, 359, 360)
33. Student participates in class but sometimes needs prompting. Student gets along with peers in the class, but social interactions need to be facilitated and reinforced. (N.T. p. 365)
34. With respect to instruction in basic academic skills, the regular and special education teacher considered including Student in the regular classroom only for literacy, not math, although Student is reportedly on grade level and does very well in math in the special education classroom using the same math series as the regular education class, and a special education teacher pushes into the regular education class to instruct other students with IEPs. (N.T. pp. 149, 150, 202, 203, 396, 397)
35. In the opinion of the special education teacher, the regular education math class is too fast-paced for Student and includes a lot of individual work. She does not believe Student could handle the work, even with a 1:1 aide and could "shut down" if unsuccessful (N.T. pp. 149, 150)

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where the materials are differentiated for the skill level of each small group and may be at a lower level for some groups. (N.T. p. 354)

<sup>4</sup> On Mondays, Student receives speech/language therapy instead of participating in the regular education reading block. (N.T. p. 289)

36. The IEP dated 11/16/10 that was implemented during most of the 2010/2011 And 2011/2012 school years described Student's placement as "Supplemental/Autistic Support" and provided that Student was to be included in the regular education classroom for at least 40% of the day. (J-21 p. 28)
37. According to District policy, the highest level of special education services that should appear in an eligible student's IEP is supplemental and Student's placement has remained at that level during the current school year. (N.T. pp. 55, 176)
38. The percentage of time Student spent in the regular education classroom as calculated in the November 2010 IEP was 4%, based upon 27 minutes of inclusion during a 6.65 hour school day. (J-21 p. 28)

#### Progress Toward IEP Goals/ Progress Monitoring

39. Student's special education teacher is responsible for reporting Student's progress with respect to all IEP goals and academic skills generally, including reading instruction delivered in the regular education classroom. (N.T. pp. 194, 375, 546)
40. The special education teacher generally described Student's progress anecdotally, noting, *e.g.*, Student's strength in answering lower level reading comprehension questions and exhibiting difficulties with more complex questions. The teacher also noted that Student does well with certain skills such as reading and responding to various types of literature, has improved in decoding since the beginning of the school year, and in responding to questions after hearing a story. (N.T. pp. 195, 196, 199)
41. The teacher also reported that Student does well in math, is at grade level and making progress. The special education teacher uses Everyday Math, the same curriculum used generally at Student's grade level. (N.T. pp. 202—204)
42. For a formal progress report on IEP goals dated 12/4/11, the teacher used the baselines for each goal generated by a computerized IEP program, but did not know when and/or how the baselines were generated or what they measured. (N.T. pp. 234, 236, 238; J-30 pp. 4—6)
43. The percentages representing Student's progress toward the IEP goals listed in the November 2010 IEP, which the special education teacher used to monitor Student's progress, were based entirely on the teacher's observations of Student and the daily work Student completed. The teacher did not collect data on any of the IEP goals, did not use reading probes, standardized assessments or teacher-made tests. (N.T. pp. 226, 228—231, 238—240)
44. The goals on which the special education teacher reported Student's progress in December 2011 were also monitored in February and May 2011. The target for meeting all goals was 80% to be achieved by November 2011. The percentage of progress on each IEP goal as of the three reporting dates is listed below.



	<u>2/17/11</u>	<u>5/4/11</u>	<u>12/4/11</u>
Analyze, Interpret Literature	40%	57%	60%
Independent Reading	40%	60%	70%
Math	45%	79%	75%
Communication	40%	60%	50%
Classroom Related Work Skills	35%	62%	65%

(J-21 pp. 14, 16, 18, 20, 21, 22; J-30 pp. 1—6)

45. The current special education teacher did not discuss Student's levels with the teacher from the prior school year or otherwise compare Student's progress on skills between the spring and fall, 2011. Due to the lack of specific information concerning the skills that had been measured previously, Student's special education teacher could not be certain whether she was teaching new goal-related skills or re-teaching skills that Student had previously mastered. (N.T. pp. 226, 227, 229)
46. Standardized measures of achievement were last administered to Student as part of the evaluation conducted in the fall of 2010 and were reported in terms of grade level equivalents only. (J-6 p. 2)
47. In the Woodcock Reading Mastery Test, Student's achievement was below grade level for visual auditory learning and word comprehension. Otherwise, Student was at or above the 2<sup>nd</sup> grade level. (J-6 p. 2)
48. On the Key Math Diagnostic Assessment, Student was at or slightly above grade level with respect to Basic Concepts and Operations, and just below grade level with respect to Applications. (J-6 p. 2)

## **DISCUSSION AND CONCLUSIONS OF LAW**

This case ended in a most unusual procedural posture, in that the matters that this decision encompasses are considerably different from the issues in dispute in the case that was filed over a year ago, of which this case is a continuation. The due process hearing was completed under the third case number that emerged from the claims that originally included an ESY dispute concerning the summer of 2011, claims for denial of FAPE for two years preceding the date the complaint was filed and prospective relief in the form of an order that Student not be transferred to a different elementary school for the 2011/2012 school year based on the District's

automatic transfer policy. *See* J-10 p.12 (Complaint dated 4/26/11); J-23 pp. 6, 7 (Complaint dated 12/19/11).

The primary issues in the complaint filed on April 26, 2011 that directly affected the Student in this case were completely resolved by the beginning of the 6/30 hearing session on the case that remained after the decision on the ESY case. (F.F. 4, 5) Although that case continued until Parent filed a complaint in December 2011 that she termed an “amended complaint” (J-23), and although many of the allegations of procedural violations were reasserted, the substantive issues that were heard under the current case number centered on allegations of IDEA violations that occurred during the 2011/2012 school year.

The School District did not object to allowing a new complaint or to incorporating the transcripts from the prior hearings and documents offered as joint exhibits in those proceedings into the record of this case. The District did, however, move to dismiss the new complaint, resulting in a ruling in January 2012 that outlined the issues to be considered and decided with respect to the current complaint. (J-28)

As the result of the events described above and the additional testimony and documents produced at the January, March and April 2012 hearing sessions, the current dispute centers on whether the District met its LRE obligations with respect to Student; whether the admitted lapse in providing speech/language therapy from the beginning of the school year through the beginning of January 2012 constituted or contributed to a denial of FAPE to Student; whether Student made meaningful educational progress during the current school year and if not, what factors contributed to a substantive denial of FAPE.

### Burden of Proof

The IDEA statute and regulations provide procedural safeguards to parents and school districts, including the opportunity to present a complaint and request a due process hearing in the event special education disputes between parents and school districts cannot be resolved by other means. 20 U.S.C. §1415 (b)(6), (f); 34 C.F.R. §§300.507, 300.511; *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3<sup>rd</sup> Cir. 2009).

In *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005), the Supreme Court established the principle that in IDEA due process hearings, as in other civil cases, the party seeking relief bears the burden of persuasion. Consequently, because Parent challenged the District's actions relating to its provision of educational services to Student during the current school year, Parent was required to elicit sufficient evidence to establish the alleged IDEA violations that were identified as hearable issues.

The Supreme Court limited its holding in *Schaffer* to allocating the burden of persuasion, explicitly not specifying which party should bear the burden of production or going forward with the evidence at various points in the proceeding. Allocating the burden of persuasion affects the outcome of a due process hearing only in that rare situation where the evidence is in "equipoise," *i.e.*, completely in balance, with neither party having produced sufficient evidence to establish its position.

Here, allocating the burden of persuasion does not affect the outcome, since the record establishes that the District's actions violated IDEA requirements.

### LRE/Inclusion

The federal IDEA regulations provide that an eligible student's program is to be delivered in the least restrictive environment ("LRE") appropriate for the student, *i.e.*, one in

which the student is educated with children who are not disabled to the maximum extent appropriate. 34 C.F.R. §300.114(a)(2)(i). In order for a placement to meet LRE requirements, school districts must, at a minimum, assure that placement decisions are “made by a group of persons, including the parents and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options” §300.116(a)(1); are “determined at least annually” §300.116(b)(1); are “based upon the child’s IEP” §300.116(b)(2).

The United States Court of Appeals for the Third Circuit provided additional guidance for applying LRE requirements in *Oberti v. Board of Education*, 995 F.2d 1204 (3<sup>rd</sup> Cir. 1993). In accordance with *Oberti*, the first step in evaluating a program and placement to determine whether it meets LRE criteria is an assessment of whether the student can be educated satisfactorily in the regular classroom with supplementary aids and services. In making that determination, a school district is required to consider the full range of aids and services available, with the goal of placing the student with a disability in the regular classroom as much as possible. Consideration must also be given to the unique benefits that a student with a disability will derive from placement in a regular classroom, and those benefits must be compared to the benefits likely to be derived from a more segregated setting. Consideration must also be given to whether there are likely to be any negative effects upon the education of the other children from placement of a particular student with a disability in the regular classroom.

Finally, if education outside of the regular classroom for all or part of the school day is found necessary, the placement must be evaluated to determine whether it provides for contact with non-disabled peers to the greatest extent appropriate. 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. A school district’s obligation to place an eligible student in the least restrictive environment does not diminish its responsibility to educate an eligible student appropriately.

Parent argues, correctly, that the District failed to assure that Student was included in classes with non-disabled peers to the maximum extent appropriate. The record of this case establishes that with sufficient support, Student can successfully participate in grade level instruction in a regular education setting. (FF 16, 27, 32, 33) The record also establishes that despite a very successful, if limited, experience during the 2010/2011 school year and no indication that there are any negative consequences to either Student or peers from Student’s participation in the regular education classroom, it took the District more than half of the current school year to provide Student with more than a minimal opportunity to participate in the regular education classroom. (FF 24, 27, 28, 29)

In addition, Student’s special and regular education teachers limited Student’s substantive participation in the regular education class to reading and writing, determining that the goal for Student’s inclusion is expansion to the entire morning literacy block. (FF 30) The special education teacher determined, apparently unilaterally, that Student could not successfully participate in math instruction in the regular education classroom. (FF 34, 35) The special education teacher cited the “fast pace” of math instruction in the regular education classroom and the amount of individual work as the basis for her belief that Student would not be successful if Student participated in regular education math instruction. (FF 35) The factual underpinning for that belief, however, is unclear.

There was no evidence of a factual basis for the special education teacher's opinion that Student would be unsuccessful with regular education math instruction or otherwise corroborating that belief. The evidence, in fact, suggests that Student could successfully participate in math instruction in the regular education setting. First, the special education teacher testified that Student is on grade level and making progress in the same math series used in the regular education curriculum. (FF 41) In addition, Student is always accompanied by a 1:1 aide in the regular education setting, who could assist Student with individual work, if that is, indeed, a large component of the regular education math class. (FF 25) Finally, the autistic support special education teacher appeared to be unaware that a special education teacher "pushes in" to provide math instruction in the regular education class to which Student is assigned for inclusion. (FF 34) There is no evidence that the District staff considered whether Student could successfully participate in the regular education math class during the time that special education teacher provides instruction in the regular education setting.

The evidence in this record does not support the appropriateness of the District's limits on Student's participation in the regular education class based upon Student's individual needs and the instruction Student needs to achieve meaningful educational progress. Rather, the record strongly suggests that the District simply does not view "inclusion" as the IDEA statute and regulations envision the least restrictive environment mandate, *i.e.*, considering the regular education classroom as the "default" placement for IDEA eligible students, requiring continuous efforts to move Student from receiving academic instruction primarily in the autistic support classroom to the regular education setting for as much of the day as possible and consistent with assuring meaningful academic progress.

Participation in the regular education setting is not a “gift” to children with disabilities, a means to placate their parents, or something that can be tailored to the convenience of the School District. The requirement that IDEA eligible students must be educated with non-disabled peers to the maximum extent appropriate to the students’ needs is an absolute obligation requiring school districts to consider the regular education setting first when determining placement, and to seriously assess the supports and services required for the child to make progress in the regular education setting. Segregated settings are to be considered only when an eligible Student’s IEP team determines that full inclusion cannot satisfactorily be achieved. Token efforts to place Student in a grade level regular education classroom only for certain pre-conceived activities and when not unduly burdensome for the school staff are insufficient to meet the District’s LRE obligation.

The District’s failure to view regular education participation in the light required by the IDEA statute and regulations is illustrated by its failure to complete the series of questions included in Section VII—Educational Placement on every IEP form. The questions are designed to help the IEP team identify supports and services needed for successful participation in the regular education setting, including benefits and potential harms, yet that section was not completed by the District in recent implemented and proposed IEPs. (J-20 p. 29, J-21, p. 28; J-22 p. 26) Nothing in the record of this case suggests that the District used any other means to consider whether additional academic instruction in the regular education classroom, such as for math, can be satisfactorily achieved for Student with a full range of supplemental aids and services

The District does not appear to recognize that inclusion in regular education classes does not require that Student have the ability to participate in instruction exactly as non-disabled

peers. It is likely that Student will need supports and accommodations in the regular education setting in addition to a 1:1 aide, and may need supplemental instruction in the autistic support special education class. Potential difficulties that might arise with completely unmodified instruction is not, however, a sufficient basis for precluding Student's participation in the regular education setting for additional academic classes such as math.

In this case, Parent believes that Student needs the smaller setting of the autistic support classroom as a "home base" in light of Student's anxiety, and, therefore, does not request full inclusion. Nevertheless, there is a long continuum between a full-time autistic support class and full inclusion. Although the District describes Student's placement as "supplemental" autistic support, that is clearly an inaccurate designation, since Student's participation in regular education classes, even as increased since February 2012, does not approach 40% of the school day. (FF 36, 37, 38)

Parent's request that the District recognize its continuing responsibility for moving Student along that continuum each school year is reasonable, and nothing more than what the law unequivocally requires. Most important, however, the District must change its mind-set from considering how Student's time in the regular education classroom can most conveniently be increased to determining the amount of time Student absolutely needs to be in the autistic support setting in order to make meaningful progress in basic academic and language skills. As discussed in more detail below, the District also needs to assess Student's progress objectively to determine whether Student is making meaningful progress from the instruction Student receives in the regular education classroom. In light of the evidence strongly suggesting that Student can derive considerable academic as well as social benefits from participating in the regular education class, simply increasing Student's time in the regular education classroom cannot be



the only goal for inclusion in a regular education setting, or the full benefits of maximizing Student's instruction with non-disabled peers as contemplated by the IDEA statute and regulation will not be realized.

### Speech/Language Services

There is no dispute that Student has significant needs in the areas of receptive and expressive language, as well as pragmatic communication skills. (FF 6, 7) There is also no dispute that Student received minimal speech/language services during September and October of the current school year, and no services at all from November 2, 2011 to January 9, 2012. (FF 8, 9) The District recognizes its obligation to replace lost services, and has also recently doubled the amount of Student's speech/language services. (FF 15)

The record of this case, however, revealed a fundamental problem in that although the District recognizes the importance of speech/language services for Student, it appears to be more concerned with the appearance of compliance than with assuring that Student receives sufficient speech/language services to assure meaningful progress.

The District appears to take the position that specifying only 600 or 1200 minutes of speech/language therapy per IEP term, which works out to approximately 20—40 minutes per week, assuming an annual IEP, is not a problem, since the actual plan is to provide 90 minutes of speech/language services each week. (FF 8, 10, 15)

Consequently, although the District failed to provide services at all during most of the first half of the current school year, District staff believed for most of that time that the District would be fully compliant with its IEP obligations as long as the total amount of time for speech/language therapy specified in the IEP was provided within the IEP term. (FF 11) Clearly, if an IEP specifies only a minimal amount of services, it is much more likely that the

services can be replaced within the IEP term in the event of a problem such as occurred during the early part of this school year, in which there was a significant lapse in services.

The elementary school principal noted in her testimony that the IEP serves as a “guide” for providing services. (N.T. p. 118) Although that is true as far as it goes, the IEP is meant to a far more detailed guide than the District appears to consider it—much closer to an actual blueprint describing how the District will meet an eligible student’s identified needs rather than a general outline constructed to assure procedural compliance without regard to whether the needs are actually and appropriately met. *See Damian J. v. School District of Philadelphia*, 2008 WL 191176 (E.D.Pa. Jan. 22, 2008) at \*1, FN.2:

The centerpiece for the implementation of FAPE is the IEP. *S.H. v. State-Operated Sch. Dist. of the City of Newark*, 336 F.3d 260, 264 (3d Cir.2003). The IEP consists of a detailed written statement developed for each child summarizing the child's abilities, how the disability affects performance, and measurable annual goals. *Id.* The IEP specifies the special education services and supplementary aids the school will provide the child, explaining how these will allow the child to progress. *Id.*

The question Parent raised with respect to how she is supposed to determine how much speech therapy the District is actually supposed to provide to Student is legitimate. Under the District’s formulation, the most important issue is writing the IEP in a way that assures technical compliance with the document regardless of the reality of the services Student is actually receiving. There may be some circumstances in which the flexibility the District is trying to achieve is not detrimental to the provision of FAPE to an eligible student, but that’s not the case here, where Student’s ability to function successfully, particularly in the regular education environment, is highly likely to be negatively affected by inconsistently provided speech/language services, or by the substantial lapse in providing services that occurred during this school year.

In this case, the District compounded its error in failing to provide for speech/language services by also failing to make any attempt to determine how the break in services affected Student's overall school performance, and, therefore provide basis for determining how much speech/language therapy Student actually needs in order to make meaningful progress. (FF 13, 14) As discussed in more detail below, the District's failure to appropriately monitor Student's progress makes it impossible to determine with any degree of reasonable certainty the extent to which the lapse in speech services impacted Student.

#### Progress/Progress Monitoring

Parent's primary substantive basis for requesting an award of compensatory education in this case is that Student failed to make meaningful progress during the current school year. Based on evidence of Student's progress that is entirely within the District's control, it is, in fact, impossible to determine with certainty Student's progress toward IEP goals, or progress in the general education curriculum. District staff compiled no data from which Student's progress can be objectively determined, and had no idea of Student's levels with respect to any of the IEP goals at the time the progress report for the current school year was produced in December 2011 because the special education teacher did not know how the baseline used for the progress report was derived or the level of Student's skills at the end of the 2010/2011 school year. (FF 42, 43, 45; J-30 pp. 4—6)

Moreover, neither the special education teacher nor the regular education teacher administered any assessments to measure Student's progress in the general education reading curriculum. (FF 31, 32, 43, 46) It is impossible, therefore, to determine whether Student regressed, remained the same or advanced with respect to the academic skills last measured by

standardized assessments in the fall of 2010 or with respect to Student's IEP goals. (FF 46, 47, 48)

In the absence of any reliable current data, the only way to assess Student's progress for the current school year is to either rely on the teachers' anecdotal reports or to assume that the percentages reported by the special education teacher in the December 2011 IEP progress report are accurate. (FF 32, 33, 40, 41, 44) Although hardly an objectively reliable basis for determining progress, the percentages reported in the December 2011 progress report can at least be compared to two prior progress reports, and there was testimony that the special education teacher made some effort to base the percentages on her assessments of Student's work. (FF 43) It is more reasonable to measure Student's progress as of December 2011 against the progress Student made during the 2010/2011 school year, because the baselines the special education teacher used are meaningless in the absence of any concerning how those baselines were determined. (FF 42)

Using the percentages found in J-30, it appears that with respect to most of the IEP goals, Student made considerably more progress from the middle to the end of the 2010/2011 school year than during the first half of the current school year, advancing 17% during the second half of the 2010/2011 school year on the analyzing/interpreting literature goal and only 3% between the end of the 2010/2011 school year and December 2011. (FF 44) With respect to the math goal, Student advanced 34% between February and May 2011, and 4% between May and December 2011. Similarly, Student advanced 27% on classroom related work skills during the second half of the 2010/2011 school year and only 3% between May and December 2011. Student maintained the same level of progress, 10%, across all three reports with respect to

independent reading. That is particularly notable because Student was included in the regular education class for some reading instruction across all three reporting periods. (FF 17, 19, 24)

Also notable are the percentages reported with respect to the communication goal. During the second half of the 2010/2011 school year, Student advanced toward the IEP goal by 20%. During the first half of the current school year, when Student was receiving no speech/language services, Student lost 10% compared to the end of the 2010/2011 school year. (FF 44)

#### Denial of FAPE/Remedy

A child with a disability is entitled to receive a free appropriate public education (FAPE) from the responsible local educational agency (LEA) in accordance with an appropriate IEP, *i.e.*, one that is “reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress.” *Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982); *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 249 (3<sup>rd</sup> 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 (3<sup>rd</sup> Cir. 1999). Consequently, 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. *Rowley*; *Oberti v. Board of Education*, 995 F.2d 1204 (3<sup>rd</sup> 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 (3<sup>rd</sup> Cir. 1996); *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F. 2d 171 (3<sup>rd</sup> Cir. 1988).

Based upon the foregoing analysis of three major lapses in the District’s IDEA obligations in this case, and supported by limited progress on three IEP goals and a loss with

respect to one goal, the District failed to assure that Student received sufficient appropriate services and instruction to assure meaningful progress during the first half of the 2011/2012 school year. Student, therefore, is entitled to an award of compensatory education, an equitable remedy intended to assure that an eligible child is restored to the position s/he would have occupied if an IDEA violation resulting in a denial of FAPE had not occurred. *Ferren C. v. School District of Philadelphia*, 612 F.3d 712, 718 (3<sup>rd</sup> Cir. 2010), citing *Reid v. District of Columbia*, 401 F3d 516, 518 (D.C. Cir. 2005).

Compensatory education is awarded for a period equal to the deprivation and measured from the time that the school district knew or should have known of its failure to provide FAPE. *Mary Courtney T. v. School District of Philadelphia* at 249; *M.C. v. Central Regional School District*, 81 F.3d at 395; *Carlisle Area School District v. Scott P.*, 62 F.3d 520, 536 (3d Cir.1995). The school district, however, is permitted a reasonable amount of time to rectify the problem once it is known. *M.C. v. Central Regional School District* at 396.

In this case, it is difficult to determine the period for which compensatory education should be awarded, and how to make up for the services the District failed to provide. It is virtually impossible to determine how much the District's failure to provide more instruction in the regular education classroom and how much its failure to provide speech/language services during the first half of the current school year contributed to the limited progress Student made through December 4, 2011 the last date for which any objective measure of progress is available. It is, however, most reasonable to conclude that both factors had an effect on Student's general progress and pervaded the entire school day.

Full days of compensatory education will not, however, be awarded from the first day of school. The District is entitled to a brief period of adjustment to the new school year and to fully

implement services. In the absence of any more specific means to determine the length of that period, the beginning of Student's inclusion in the regular education class will be used as a reasonable starting point. Compensatory education, therefore, will be awarded beginning September 19, 2011. (FF 24)

If the LRE violation alone had resulted in a denial of FAPE, the period may have been lengthened, based upon the evidence that Student's participation in the regular education classroom should proceed slowly and cautiously to avoid overwhelming Student. (FF 20, 26) As noted, however, it is impossible to separate the effects of the lack of speech therapy through the first half of the school year from the effects of the LRE violation.

In addition, full days of compensatory education are warranted only through the time Student received no speech/language therapy at all and the time Student's time in the regular education classroom increased. If those violations had an adverse impact on meaningful educational progress, it is reasonable to assume that Student's progress would increase when speech/language services resumed and when Student began spending additional time in the regular education setting. Half days of compensatory education will be awarded from January 9, 2012 through the date of this decision and accompanying order. Should it appear from the end of the year progress reports, that Student's progress did not sufficiently improve to reach the level of meaningful progress, Parent will be permitted to seek additional compensatory education from January 9, 2012 through the end of the 2011/2012 school year.

Because a compensatory education award is designed to place the Student in the position s/he would have occupied absent the violations, use of the compensatory education award will be limited to the areas of progress and disability-related needs most affected by the District's violations, *i.e.*, speech/language services, social skills training, reading and math instruction.

Finally, although the District expressed its intention to replace speech/language services that Student missed from the beginning of the school year through resumption of services on January 9, 2012 no evidence was produced at the hearing, and no agreement regarding those services placed on the record. Consequently, the accompanying order will provide for those services. The award of compensatory education based generally on the failure to provide speech/language services is intended to remedy the effects of the missed services on Student's general academic and social progress, and is not intended to serve as a replacement for those services.

#### Additional Violation Allegations

Parent's allegations of IDEA violations included claims that the District failed to provide sufficient training in inclusion and/or autism. A lack of staff training can support an IDEA violation only if level and/or type of training adversely impacted Student's inclusion in the regular education classroom or Student's ability to make academic progress.

Parent did not make that link here. Although staff training was minimal, there was no evidence that Student was impacted by the lack of training. The evidence established that as to Student, specifically, the regular and special education teachers consulted regularly and that Student was comfortable in the regular education classroom. (FF 27) No other evidence was presented with respect to any denial of FAPE arising specifically from a lack of staff training, or how Student might have benefited had the staff been better trained.

As noted above, the District's LRE record in this case and apparent lack of full understanding of its LRE obligations resulted in the conclusion that the District did not fully comply with LRE requirements with respect to Student, and Student will be awarded compensatory education for that violation. There was no evidence, however, that the lack of



staff training with respect to autism or inclusion of special education students in the general education classroom was an underlying cause of the non-compliance issue.

Similarly, Parent did not establish that the District's failure to provide Student with a full-time aide from the beginning of the current school year through November 28, 2011 caused a denial of FAPE, and in any event, Student will be awarded full days of compensatory education for most of that period.

### **ORDER**

In accordance with the foregoing findings of fact and conclusions of law, the School District of Philadelphia is hereby **ORDERED** to take the following actions:

1. Convene Student's IEP team for the specific purposes of fully discussing and determining:
  - a. the amount of time Student should be included within the regular education classroom and identifying the supports and services needed to support meaningful academic, language and social progress within that setting;
  - b. the amount of speech/language services appropriate for Student's needs and expressed in terms of the amount of services to be provided on a weekly or monthly basis, not over an entire IEP term.
2. Provide Student with full days of compensatory education for every day that school was in session from September 19, 2011 through January 8, 2012.
3. Provide Student with half days of compensatory education from January 9, 2012 through May 16, 2012.
4. Provide Student with 90 minutes/week of compensatory speech/language services from the first day of the 2011/2012 school year through the week of January 2—6, 2012, provided, however, that any prior agreement of the parties or provision of replacement speech/language services by the District supersedes this portion of the order.

It is **FURTHER ORDERED** that the award of half days of compensatory education is not intended to preclude Parent from asserting an additional claim for compensatory education from January 9, 2012 through the end of the current school year, in a new complaint, should progress reports at the end of the year establish a lack of meaningful progress.

It is **FURTHER ORDERED** that the compensatory education award described in ¶¶ 1—3 is limited to obtaining additional speech/language services, social skills training, reading and math instruction.

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

Anne L. Carroll

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Anne L. Carroll, Esq.  
HEARING OFFICER

May 16, 2011