

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

Pennsylvania  
Special Education Hearing Officer

DECISION

Student's Name: R.J.

Date of Birth: [redacted]

ODR No. 2861-11-12-KE

OPEN HEARING

Parties to the Hearing:

Representative:

Parents

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Kate W. Ericsson, Esquire  
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Dates of Hearing:

March 28, 2012, May 14, 2012, May  
31, 2012, June 13, 2012

Record Closed:

July 3, 2012

Date of Decision:

July 12, 2012

Hearing Officer:

William F. Culleton, Jr., Esq., CHO

## INTRODUCTION AND PROCEDURAL HISTORY

The Student named in the title page of this decision (Student) is an eligible resident of the school district named in the title page of this decision (District). (NT 12-13.) The District has identified Student with Multiple Disabilities. (NT 12.) Parents assert that the District has failed to provide the Student with a free appropriate public education (FAPE), in the least restrictive environment to the maximum extent appropriate, as required by the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA). Parents seek an order to include Student in regular education to a greater extent, and to provide different assistive technology, as well as compensatory education for a period beginning on February 14, 2010<sup>1</sup> and ending on the day of the last hearing session, June 13, 2012. (NT 297-307.) The District asserts that it has provided a meaningful educational benefit in the least restrictive environment appropriate to Student's needs at all times.

The hearing was concluded in five sessions. The parties submitted written summations, and the record closed upon receipt of those summations.

## ISSUES

1. Did the District fail to educate Student in the least restrictive environment to the maximum extent appropriate during the relevant time, February 14, 2010 to June 13, 2012?
2. Did the District, during the relevant period, deprive Student of a FAPE by failing to provide appropriate assistive technology?

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<sup>1</sup> Parents originally sought relief for acts and omissions of the District that occurred or failed to occur more than two years prior to the date on which they filed for - that is, requested - due process. After devoting the first hearing session to the application of the IDEA's statutory limitation of actions, Parents withdrew all such claims. (NT 295.) Therefore, Parents concede that I will address only the District's actions or omissions during the period beginning on the day which is two years prior to Parents' date of filing for due process, February 14, 2010.

3. Did the District, during the relevant period, violate the procedural requirements of the IDEA and thereby impede the Student's right to a FAPE, significantly impede Parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to Student, or cause a deprivation of educational benefit?
4. Should the hearing officer order the District to place Student in a less restrictive environment, provide a FAPE, provide any assistive technology, or follow the procedural requirements of the IDEA?
5. Should the hearing officer order the District to provide compensatory education to Student for all or any part of the relevant period?

### FINDINGS OF FACT

1. Student was diagnosed at the age of ten months with an incurable but not degenerative neurological and muscular condition resulting in physical disabilities and delayed developmental milestones, including daily living tasks such as dressing and toileting. At age 5, Student was unable to walk. Student now speaks a very limited repertoire of words, and communicates mostly by gesture and using idiosyncratic signs. (NT 65; S-5, 12.)
2. Student was identified with Orthopedic Impairment at age 3, and received early intervention services as a toddler, physical therapy, occupational therapy and speech therapy. Student also was provided with a prone stander and a gait trainer by age five. Student has been enrolled in the District's schools since kindergarten. Student is currently in elementary school. (S-5, 9, 12.)
3. At age five, Student presented with significant delays in adaptive, cognitive and pre-academic skills. By age five Student was identified with Multiple Disabilities, Orthopedic Impairment and Speech or Language Impairment. By age six, Student was diagnosed with severe intellectual disability, then called mental retardation. (S-5.)
4. Student has been comfortable with and enjoyed being with other children since age 5; Student imitates other children's behavior. (S-5.)
5. Student's Early Intervention placement was full time multiple disabilities support. Student continued in this placement for kindergarten through second grade. (S-7, 10.)
6. The District's IEP dated January 2010 continued Student's placement in full time multiple disabilities support; the placement was outside of the neighborhood school in an elementary school that offered the multiple disabilities support classroom. The IEP also provided for occupational therapy as a related service. The IEP team, including the Parent, considered and rejected the alternative approach of offering

placement in the regular education classroom with supplementary aids and supports. (NT 85-86, 803; S-22, 24.)

7. By age eight, Student continued to be wheelchair dependent for most purposes, but was able to walk in a gait trainer for about 100 feet. Toileting and washing required hand over hand assistance. Student could feed self with spoon and fork and use a cup without handles. (S-22, 27.)
8. By age eight, Student was able to utilize a few basic words orally, and was delayed significantly in pre-academic and daily living skills. Student was able to recognize Student's name from an array of two separate cards, follow one step directions with prompting, point to some pictures and interact with teachers and peers utilizing minimal signs, gestures, vocalizations, picture cards and eye gazing, and used the sign for needing to visit the bathroom. (S-22, 27.)
9. By age eight, Student did not know colors, numbers or letters. Student understood object permanence, cause and effect, basic quantitative concepts and directional or positional concepts. Student was able to scribble using a pincer grasp and trace a straight line with moderate assistance. (S-22, 27.)
10. After an IEP meeting in November 2009, the District in January 2010 finalized an IEP that placed Student in full time multiple disabilities support. The related services section erroneously indicated that Student would spend part of the school day in a regular education classroom. When this error was detected, the IEP was amended with knowledge of the Parent, but without an IEP meeting. The team considered inclusion in regular education but rejected that alternative approach. (NT 173-174, 194, 641-644, 713, 884-891; S-22, 24, 29.)
11. By NOREP dated March 2010, the District declined to change Student's placement to a regular education environment with supplementary aids and services. The District did offer to have Student participate in a life skills support classroom for a literacy curriculum and for social opportunities. (NT 93-96; S-25.)
12. Parent approved the March 2010 NOREP. (S-25.)
13. Beginning in the middle of the 2009-2010 school year, Student participated in a life skills support classroom during one period per day, three to five days per week. In addition to the teacher and aide in that classroom, an aide from the multiple disabilities support classroom accompanied Student in the life skills support classroom. Student did not socialize spontaneously and made little progress socially, despite prompting by the teacher; Student did not make any academic progress in the life skills support class, despite differentiated instruction by the teacher. (NT 216-222, 760-774, 796.)
14. The January 2010 IEP offered measurable goals addressing physical maneuverability with the wheelchair, communication during classroom activities using multiple manual modalities, personal maintenance tasks, toileting and dressing, writing Student's first name using a pincer grasp, pointing to Student's name from an array

of three cards, matching pictures and objects, following one step directions, and recreation activities. (S-22.)

15. In Student's third grade year, Student inconsistently communicated by utilizing picture cards, a communication board and a single button programmable voice output device called a "Big Mac." Student could sort objects by two colors, and match objects to pictures, and choose activities from an array of two cards. (NT 586-587, 626-629; S-27, 29.)
16. Student's achievement increased in sorting from February 16, 2010 to June 21, 2010. In February, Student was able to sort two colors with support at 40% base line; in June, Student was able to sort up to four colors independently at 80% of trials. (S-30.)
17. Student was able to match same colors, letters and a picture in February at 40% base line, and at 80 % of trials in June. (S-30.)
18. Student's achievement in making and expressing choices increased in 2010, because Student began to chain two signs for a choice with substantial support by June 2010. However, Student was reported as not having achieved this skill by November 2011. (NT 648; S-30, 31 p. 5.)
19. Student's achievement in asking to use the toilet increased from February to June, 2010. In February, Student did not communicate the need to use the toilet; by June, Student was communicating, but not using words, picture or signs – rather, Student would stop activity and look at the teacher. (S-30.)
20. From February 2010 to June 2010, Student did not learn to write Student's name using a pincer grasp and the District's progress report did not indicate progress on this goal. (S-30.)
21. From February 2010 to June 2010, Student did not increase classroom participation pursuant to the IEP goal. (S-30.)
22. From February 2010 to June 2010, Student did not improve ability to perform personal maintenance tasks. (S-30.)
23. In May 2010, the Student's special education teacher attempted to elicit Parent's assistance in coordinating school and home in the use of a new assistive technology, a picture board that would be fastened to Student's belt for communication of wants and needs. Parent did not respond to the teacher and the initiative was abandoned. (S-31 p. 6, S-34 p. 1-4.)
24. By November 2010, Student was able to use a computer touch screen to select activities with occasional assistance. Student was able to select food in the cafeteria, eat independently and remove Student's trash with a prompt. Student was able to remove clothing and pull up pants in the bathroom, but remained dependent for toileting. Student was able to point to the colors red and blue correctly 50 % of the

time from a field of two with occasional use of a foil. Student was able to trace circular objects and straight line with minimal assistance. Student was using a few signs and pictures with consistency to express wants or needs and participated in circle time fully with communication supports. Student could point to Student's name from an array of three. Student recognized staff members in the classroom. (NT 606-609; S-29, 48.)

25. In November 2010, the District offered an IEP with assistive technology consisting of a computer touch screen. Student also utilized a tech talk device with four pictures, the single button device, "Big Mac", and pictures. (NT 660-661; S-29.)
26. The November 2010 offer classified the placement as supplemental multiple disabilities support; Student remained outside of the neighborhood school in an elementary school that offered the multiple disabilities support classroom. Inclusion in general education was considered and rejected, in part because it would reduce the amount of speech and language intervention and training that Student would otherwise have received in the multiple disabilities support classroom. Parent approved the placement. The change in classification did not increase the amount of inclusion of the Student, but it implied greater inclusion. (NT 225-228, 335-347, 651-652; S-29.)
27. As of February 2011, Student was able to trace a straight line with minimal assistance. By June 2011, Student was able to trace various shapes and Student's name with hand over hand assistance; Student was reported to "lead" when performing this activity. (S-30.)
28. By June 2011, Student mastered the goal for utilization of the computer touch screen or mouse. (S-30.)
29. The District conducted an assistive technology evaluation in November 2011 and Student was evaluated with an eight location recorded voice output communication device and then tried with a device utilizing 16 locations. The evaluator recommended introduction of a recorded voice output communication device, with the intention to expand Student's capabilities to use a 32 picture device. The evaluator did not recommend a dynamic device. The District met with Parent to discuss the results. (NT 694-697, 730-731, 815-818; S-31.)
30. In November 2011, Student was communicating at a higher level than peers in the multiple disabilities classroom. Student was able to make choices from three pictures on a table, and made some meaningful choices from a computer screen with eight locations. Student was considered an emerging communicator, and was just beginning to use symbols to communicate and had the potential to expand communications to chains of multiple symbols. This represented progress in communication. (NT 648, 694-697, 709-710, 592-594; S-31, 32.)
31. In November 2011, Student was able to undress with assistance and to dress with minimal supervision. Student had bowel control with occasional accidents, and

- communicated toileting needs with fair consistency. Student understood some directional and quantitative concepts. Student could identify body parts. (P-3, S-31, 32.)
32. In November 2011, Student knew two colors, was able to match pictures and objects, and recognized Student's own name from an array of three choices. (S-32.)
  33. In November 2011, Student was able to trace a straight line and a circular object with little hand over hand assistance. (S-32.)
  34. In November 2011 the District offered an IEP that placed Student in supplemental multiple disabilities support in the same non-neighborhood school that Student had been attending, with related services of speech and language therapy, physical therapy and occupational therapy. The IEP team considered and rejected the approach of providing regular education with supplementary aids and supports. (NT 713-714, 725-729, 841-844, 850-851, 868-869, 647-649, 652; P-3, S-32.)
  35. The District discussed the plan for Student's use of the voice output device at the November 2011 IEP meeting, noting that Student required prompting to use the device in class at first. The plan was to increase the number of pictures per device available to Student as Student made progress in using all of the pictures on the device. (NT 663-674; S-49.)
  36. In response to Parents' concerns, the November 2011 IEP provided a goal for Student to take lunch with regular education students. Parents declined to permit this due to concerns that it would not be implemented effectively. (NT 819-821, 864-865; S-32 p. 18.)
  37. The District considered including Student in a library class with typical peers, but this proposal was not implemented. (NT 828-829.)
  38. During the 2011-2012 school year, the District began bringing "typical" peer students to the music portion of Student's school day, once per week, in the multiple disabilities support classroom, in order to provide Student with some social access to typical students. (NT 230, 839-840.)
  39. The November 2011 IEP offered 750 hours of small group speech and language therapy. The District speech therapist unilaterally divided those hours into a combination of group and individual therapy, utilizing group time for training Student to use the voice output device. Parent was not included in this decision meaningfully. (NT 569-575; 882; S-32 p. 28.)
  40. The November 2011 IEP offered goals addressing requesting in the classroom setting using multiple manual modalities, personal maintenance activities, tracing and drawing, identifying numbers, responding to "wh" questions using multiple manual modalities, and participation in computer based activities. (S-32.)

41. The District re-evaluated Student in December 2011, continuing its classification of Student with multiple disabilities, orthopedic impairment and speech or language impairment. (S-33.)
42. In response to Parents' request, in December and January 2011, the Student's teacher began teaching Student to use a 9 location recorded voice output communication device. By May 2012, Student was being introduced to a 32 picture device. (NT 587-589, 599; P-3, S-34, 49.)
43. Student was given the opportunity to participate in the life skills support classroom for a mathematics class, with a one to one personal classroom aide. The teacher provided differentiated instruction focusing Student on number recognition. Student made no academic progress and interacted little with the students in that classroom. (NT 744-754.)
44. By January 2012, Student was identifying things we wear more than 50% of trials. (S-49.)
45. In February 2012, Student's teacher believed and had some data indicating that Student knew several colors and shapes, as well as weather conditions, such as rain. (NT 266-269.)
46. In May 2012, at home, Student was able to chain two and three concepts together to express a desire or need. Student's repertoire of signs had expanded by about six in two years. (NT 580-582; P-5, S-30, 31 p. 5, 49.)
47. The recorded voice output device was not available to Student consistently throughout the day. Student's speech language pathologist believed that it would be inappropriate to make the device the sole means of communication in school, and that a variety of modes of communication should be utilized in school and home. (NT 522, 528-530, 565-569, 723-724; P-2.)

## DISCUSSION AND CONCLUSIONS OF LAW

### BURDEN OF PROOF

The burden of proof is composed of two considerations, the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to



convince the finder of fact.<sup>2</sup> In Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence<sup>3</sup> that the moving party is entitled to the relief requested in the Complaint Notice. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006).

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

In the present matter, based upon the above rules, the burden of persuasion rests upon the Parents, who initiated the due process proceeding. If the Parents fail to produce a preponderance of the evidence in support of Parents’ claims, or if the evidence is in “equipoise”, the Parents cannot prevail.

#### PLACEMENT - LEAST RESTRICTIVE ALTERNATIVE

The IDEA requires states to ensure that children with disabilities will be educated with children who are not disabled, “to the maximum extent appropriate ... .” 20 U.S.C. §1412(a)(5)(A). The United States Court of Appeals for the Third Circuit has construed this

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<sup>2</sup> The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact (which in this matter is the hearing officer).

<sup>3</sup> A “preponderance” of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. Dispute Resolution Manual §810.

language to prohibit local educational agencies from placing a child with disabilities outside of a regular classroom, if educating the child in the regular education classroom, with supplementary aids and support services, can be achieved “satisfactorily.” Oberti v. Board of Ed. Of Bor. Of Clementon Sch. Dist., 995 F.2d 1204, 1207 (3d Cir. 1993). Each public agency must assure that a continuum of alternative placements is available, including special classes, resource rooms, supplementary services and special schools. 34 C.F.R. §300.115.<sup>4</sup> The Court noted a “tension” within the IDEA between the strong congressional policy in favor of inclusion, and the law’s mandate that educational services be tailored to meet the unique educational needs of the child. Oberti, 995 F.2d above at 1214.

Children with disabilities may not be removed from the regular educational environment unless “the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 20 U.S.C. §1412(a)(5)(A). In determining placement, consideration must be given to any potential harmful effect on the child or on the quality of services that he or she needs ... .” 34 C.F.R. §300.116(d). Removal is not permitted if the sole reason is “needed modifications in the general education curriculum.” 34 C.F.R. §300.116(e).

The Court in Oberti set forth a two part analysis for determining whether or not a local educational agency has complied with the least restrictive environment requirement. First, the court (or in this case the hearing officer) must determine whether or not the child can be educated satisfactorily in the regular education setting with supplementary aids and services. Second, the court must determine whether or not the agency has provided education in the

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<sup>4</sup> This continuum assumes a mandate to educate the child in “the school that he or she would attend if nondisabled.” 34 C.F.R. § 300.116(c). State regulations require school districts to ensure that “children with disabilities have access to the general curriculum ... .” 22 Pa. Code § 14.102(a)(ii).

general education setting to the extent feasible, such as inclusion in part of the general education classes and extracurricular and other school activities. Oberti, 995 F.2d above at 1215.

Addressing the first part of the Oberti analysis, the court must consider three things. First, it must determine whether or not the agency has given “serious consideration” to utilizing the full continuum of placements and supplementary aids and services. Id. at 1216. Next, the court must compare and contrast the educational benefits that the child can receive in the regular education and segregated settings, particularly considering the benefits of learning social and communication skills in the general education context. Ibid. Finally, the court must consider the degree to which the child’s behavior in the regular education setting is so disruptive that the child is not benefitting and that the behavior is interfering with the education of the other children in the general education setting. Id. at 1217. The Court emphasized that if supplementary aids and services would prevent these negative consequences, the determination of a negative effect on peers would not warrant removal from the regular education environment. Ibid.

Applying the Oberti analysis to the stipulated record and exhibits, I first inquire as to whether or not the District gave “serious consideration” to whether Student can be provided with a FAPE “satisfactorily” and “appropriately” while placed entirely in the general education classroom with supplementary aids and services. Such consideration must be more than a perfunctory nod toward the option of full inclusion, as the word “serious” implies. See, Blount v. Lancaster-Lebanon Intermediate Unit, 2003 WL 22988892 (W.D. Pa. 2003).

The record shows preponderantly that Student’s IEP team did consider and discuss in IEP meetings the alternative of inclusion in general education. The team repeatedly considered and rejected this alternative. (FF 5, 6, 10, 12, 26, 34.) Team members firmly concluded that Student would not be able to benefit from inclusion, either socially or academically. Ibid. The team

tested this conclusion by providing Student with an opportunity to participate in a life skills support classroom, with the assistance of an educational aide from the Student's placement, the multiple disabilities support classroom. (FF 14, 43.) Student did not benefit either socially or academically from this participation. Ibid. Although this was not general education, this experience validated the IEP team's conclusion that inclusion of Student in a general education classroom would not be appropriate, because the life skills classroom student body consisted of children who were functioning at a higher level both in terms of language use, academic achievement and social skill achievement. That Student was not able to benefit from inclusion in this more advanced classroom leads reasonably to the conclusion that Student would have been even less likely to benefit from inclusion in a regular education setting. The preponderance of the evidence showed that Student was unlikely to so benefit, and the District's attempt to enhance Student's opportunities for social growth in the life skills support classroom both corroborates the evidence to this effect and demonstrates that the District gave more than "perfunctory" consideration, Blount, above, to the option of inclusion in general education.

Arguably, the inference might be taken that the Student's lack of gain in the life skills support class was due to inadequate supplementary aids and services. Conceivably, the District may have assigned aides or teachers who were untrained and did not utilize research based practices while supporting inclusion in the life skills support class. The record does not support this hypothesis by a preponderance of the evidence. There was no substantial evidence to show that the aide or classroom teacher failed to implement appropriate inclusion support techniques while Student was in that classroom. The evidence shows that the environment into which Student was included was already highly supportive, small, and taught by special education teachers who differentiated both instruction (by providing one to one direct, explicit training to

Student) and curriculum (by teaching only the rudiments of letter and number recognition, at most). (FF 14, 43.) Thus, the record in this matter does not support an inference of inadequately implemented inclusion in the life skills support class.

Applying the second Oberti test, I conclude that the District's personnel did consider the relative value of inclusion as opposed to segregation for Student. In this case, the record preponderantly shows, District educators reached the entirely supportable conclusion that the balance weighed heavily against inclusion, because Student's needs were so great, and Student's rate of acquisition of skills was so slow, (FF 7-9, 15-24, 27, 28, 30-33, 44-46), that inclusion would take too much time and Student focus away from a more intensive, specially designed program of teaching.

Applying the third Oberti test, I conclude that Student's behavior did not pose a risk of disruption of a regular education classroom. District personnel readily admitted this at the hearing. This was not cited as their reason for segregation; rather, all District personnel relied upon the first two considerations in insisting on segregation.

Having concluded that the District appropriately decided to keep Student in a special education classroom for most of the school day, I must determine whether or not District personnel offered to include Student with regular education peers to the extent feasible. Oberti, above. The record shows preponderantly that the District offered such inclusion to the extent feasible. The District educators offered, as discussed above, inclusion in a life skills support class; indeed, they placed Student in such a class twice, and both times Student failed to achieve in that setting. (FF 14, 43.) In addition, District educators offered to include Student in a library activity and in lunch time with regular education students. (FF 36, 37.) Parent considered and rejected both of these options. Ibid. In addition, the District began bringing typical peers into

Student's music class in the multiple disabilities classroom, to provide opportunities for social interaction and behavior modeling. (FF 38.) Thus, I conclude that the District did what the IDEA demands, as interpreted in Oberti: include Student as much as possible with typical peers, consistent with Student's need for specially designed instruction.

The Third Circuit in Oberti recognized that there is a "tension" between the IDEA's preference for placement in the least restrictive environment and its mandate that schools provide a FAPE to every identified child. Oberti, 995 F.2d above at 1214, 1207. In this matter, at this time, and based upon this record, I conclude that the District's educators resolved that "tension" appropriately under the law.

#### ASSISTIVE TECHNOLOGY - FAILURE TO OFFER OR PROVIDE A FAPE

The IDEA requires that a state receiving federal education funding provide a "free appropriate public education" (FAPE) to disabled children. 20 U.S.C. §1412(a)(1), 20 U.S.C. §1401(9). School districts provide a FAPE by designing and administering a program of individualized instruction that is set forth in an Individualized Education Plan ("IEP"). 20 U.S.C. § 1414(d). The IEP must be "reasonably calculated" to enable the child to receive "meaningful educational benefits" in light of the student's "intellectual potential." Shore Reg'l High Sch. Bd. of Ed. v. P.S., 381 F.3d 194, 198 (3d Cir. 2004) (quoting Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 182-85 (3d Cir.1988)); Mary Courtney T. v. School District of Philadelphia, 575 F.3d 235, 240 (3<sup>rd</sup> Cir. 2009), see Souderton Area School Dist. v. J.H., Slip. Op. No. 09-1759, 2009 WL 3683786 (3d Cir. 2009).

"Meaningful benefit" means that an eligible child's program affords him or her the opportunity for "significant learning." Ridgewood Board of Education v. N.E., 172 F.3d 238,

247 (3d Cir. 1999). In order to provide FAPE, the child's IEP must specify educational instruction designed to meet his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. Board of Education v. Rowley, 458 U.S. 176, 181-82, 102 S.Ct. 3034, 1038, 73 L.Ed.2d 690 (1982); Oberti v. Board of Education, 995 F.2d 1204, 1213 (3d Cir. 1993). An eligible student is denied FAPE if his or her 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), cert. den. 117 S. Ct. 176 (1996); Polk v. Central Susquehanna Intermediate Unit 16, 853 F. 2d 171 (3<sup>rd</sup> Cir. 1988).

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

The law requires only that the plan and its execution were reasonably calculated to provide meaningful benefit. Carlisle Area School v. Scott P., 62 F.3d 520, (3d Cir. 1995), cert. den. 517 U.S. 1135, 116 S.Ct. 1419, 134 L.Ed.2d 544(1996)(appropriateness is to be judged prospectively, so that lack of progress does not in and of itself render an IEP inappropriate.) Its appropriateness must be determined as of the time it was made, and the reasonableness of the school district's offered program should be judged only on the basis of the evidence known to the school district at the time at which the offer was made. D.S. v. Bayonne Board of Education, 602 F.3d 553, 564-65 (3d Cir. 2010).

Parents argue that the District failed to provide a FAPE as defined above, because it failed to utilize appropriate assistive technology during the relevant period, thus impeding and delaying Student's achievement and learning. I conclude by a preponderance of the evidence that the District did provide appropriate assistive technology in light of what it knew at all relevant times, and that Student's very slow acquisition of skills was consistent with Student's abilities as known to the District during all relevant times. Therefore, I conclude that the District did not deny Student a FAPE.

During the relevant time period, the District did utilize assistive technology as part of its program of instruction with Student. Student was provided with picture boards, and the District offered to utilize a picture board that would be attached to Student's belt in order to provide symbolic communication options throughout the day and in multiple environments.<sup>5</sup> (FF 15, 23, 25), Student utilized a single choice voice output device called a "Big Mac." (FF 15, 25.) Student also was given access to a computer and learned to master an IEP goal to use touch screen or mouse to receive children's programming from the computer. (FF 24, 25, 28.)

The main issue regarding assistive technology was whether or not appropriate communication technology<sup>6</sup> was provided to Student. While a recorded voice output communication device was provided at least by November 2011, (FF 29), Parent argued that such a device should have been available throughout the relevant period, beginning February 2010. Parent asserted that Student had been communicating with a 32 picture device as early as Student's preschool years<sup>6</sup>, and that Student was capable of far more complex communications

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<sup>5</sup> This was not implemented because Parent did not follow through with implementation at home. (FF 23.)

<sup>6</sup> I found no corroboration for this claim, (NT 424), and I give it reduced weight because Parent did not demonstrate a sufficient understanding of Student's functioning or of assistive technology to confirm that any use of a 32 picture screen in a clinical setting was proof that Student could use it for functional communication.



at home than at school. (NT 876-877.) Thus, Parent sought to raise an inference that the District did not provide an opportunity for meaningful progress in communication because it did not provide assistive technology with a broad enough range of communicative choices.

The record contradicts these arguments. It shows that Student was unable to perform more than rudimentary communications - single word or single symbol communications - and often communicated with nothing but eye gaze. (FF 1, 8, 15, 18, 19, 24, 30, 46.) This does not deny Student's potential to communicate a greater range of needs or wants, or to utilize more complex "chaining" of words to form rudimentary sentences. (FF 30.) District documents recognize that Student had "communicative intent" and District IEPs offered goals for chaining two words together, goals that were not met in the school environment. (FF 39-41.) The evidence is not preponderant that Parent conveyed to the IEP team that Student's communications were more varied and complex at home; documents indicate that the team knew that Student used some oral one word utterances at home, but not that Student's expression was substantially more rich at home. Thus, the District's programming for Student was appropriate based upon what it knew at the time.

The record shows that Student made very slight and very slow progress in communication. (FF 7-9, 15-24, 27, 28, 30-33, 44-46.) Progress is to be measured by the student's potential and ability. Shore Reg'l High Sch. Bd. of Ed., above. In this case, the record is preponderant that the student was functioning cognitively in a range of profoundly intellectually disabled functioning. (FF 3, 9.) Student's progress in communication was not dissimilar to Student's slow progress in other areas of functioning, such a toileting, dressing, academics, motor skills and social interaction. (FF 7-9, 15-24, 27, 28, 30-33, 44-46.) Thus, I conclude that the Student's progress in school, including Student's slow and slight progress in

communication, was not de minimis; rather it was meaningful in light of Student's very limited abilities.

The record of recent increased progress in communication at home, (FF 46), does not prove that the District's programming was deficient, as Parents would have it. This seeming burst in progress could have been explained by other factors, including the course of the Student's cognitive development, and conditions at home that do not emulate those in the classroom. Thus, I conclude that the Parents have failed to produce a preponderance of evidence that the District denied a FAPE by failing to provide adequate opportunities for educational gains, or failed to offer appropriate assistive technology.

The Parents' communication and assistive technology expert witness reported a much more rich communicative ability at home than had been seen at school. The Student reportedly used two word chains and was able to address a broad range of subjects in communication. I give reduced weight to this report. The expert based her report entirely upon a history given by Parent, (NT 413-415, 423-424), review of selected documents provided by Parent's counsel, and an assumption that lack of progress in communication was due to lack of motivation. (P-5.) The expert's evaluation attributed substantially greater present ability to Student than a previous evaluation by the District's qualified evaluator, based on evaluation in the school setting and teacher interviews. I accord greater weight to the opinion of the District's evaluator, because it was based on data in the relevant setting, which is school. The expert's report on Student's communications at home, heavily dependent upon a setting and history provided by Parent, does not raise an inference that Student's skills at home have generalized to the school setting.

The expert's analysis, on the issue of whether or not FAPE was offered substantively, leaned heavily upon numerous questions left unanswered by reading the 2010 and 2011 IEPs.

This form of analysis, in the absence of an effort to discover what educational staff are doing to implement the IEP, is not helpful to the trier of fact, especially where the IEP has been implemented, and there is no concomitant analysis of the implementation.

One item of evidence from the expert's work with Student at home was Student's use of the programmable voice output device to form chains of messages forming apparent sentences. (FF 46.) This progress was not clearly reported in progress documentation at school; however, this suggests a capability in communication that exceeds the most recent reports of achievement at school, which indicated emerging ability to chain two concepts with much prompting in November 2010, and which indicated ability to use the communication device to chain multiple concepts together. (NT 431-433, 718.) These data are consistent with the evaluation report done by the District's evaluator in November 2011; the home evaluation was done several months after the District evaluation, and Student had had time to learn to use the expanded board sixteen picture communication device. (NT 700-707.)

Nevertheless, the expert's conclusion that the Student's previous lack of progress was due to limitations of the devices that the District had made available, is inadequately supported by the data available to the expert. (NT 423-431.) The expert did not have any communication with the Student's school personnel or District personnel, nor did the expert observe Student in the school setting. (NT 413-415, 423-424.) Therefore, I give this opinion reduced weight.

Parents argue that the voice output devices were not used consistently throughout the school day, and the evidence is preponderant that this is the case. (FF 47.) However, there was no evidence to show that this inconsistency was inappropriate. Student's day included social and communication opportunities, physical and occupational therapy, and explicit teaching of communication with a speech pathologist. The pathologist explained that it was the pathologist's

philosophy to train non-speaking students to use a variety of communication modalities, including voice output devices, so as not to become dependent of the voice output devices for every functional communication need. Consistent with this philosophy, it would have been inappropriate to teach Student to use the voice output devices throughout the day, and inconsistent provision of the device would not necessarily have been inappropriate. I must defer to this professional judgment of a qualified and experienced educator who was not only familiar with, but also responsible for, the educational program for this child.

## PROCEDURAL VIOLATIONS

Parent argues that the District committed procedural violations by not providing Parents with access to educational decision making and through IEPs that had materially inaccurate information in them. I conclude that, while there were somewhat glaring inaccuracies in the IEPs, especially as to the extent to which Student was not included in regular education, (FF 6, 10, 12, 26), these documentation deficiencies did not deprive Parents of access to or participation in the educational planning process.<sup>7</sup> The record is replete with evidence that, during the relevant period, Parents participated in IEP meetings or were invited to them, that staff attempted to communicate, meet and coordinate services with Parents, and that the District responded to Parents' desires, particularly for assistive technology evaluation and communication devices. (FF 6, 10, 12, 13, 23, 26, 29, 34, 35, 36, 37, 38, 42.) There is no evidence that any of the deficiencies in the IEP documents deprived Student of programming agreed upon at IEP

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<sup>7</sup> Parents cite an instance in which the IEP erroneously indicated that Student would be in regular education classes for part of the school day. Parent knew that this was not the case, and agreed to amend the IEP. (NT 90, 96.)

meetings. Thus, the evidence is not preponderant that these procedural deficiencies impeded parental participation, Student's receipt of a FAPE, or Student's receipt of educational benefit.

One of the procedural deficiencies Parents complain about was the apparent unilateral changing of the type of speech and language therapy to be provided under the November 2011 IEP, from all group therapy to a mix of group and individual therapy. (FF 39.) The District's speech and language therapist insisted that Parent had agreed to this change, which occurred without a NOREP being issued. Parent denied ever knowing about this. I accept Parent's testimony on this as I found Parent to be meticulously honest in two rounds of testimony, based upon the manner in which Parent answered questions, often conceding a point on cross examination, and Parent's demeanor. I found the District's speech and language therapist to be basically credible, but regarding this changing of the type of therapy, I found the therapist's testimony to be highly defensive and guarded. Since the witnesses' testimony directly clashes, I give greater weight to Parent's memory than to that of the speech and language therapist, though I do not find that the therapist intentionally misrepresented the therapist's recollection of events. On balance I find that this was a procedural violation.

I find no evidence in the record that the Parent's lack of meaningful participation in this decision either impeded participation in educational planning as a whole, impeded Student's access to a FAPE, or impeded educational benefit. As noted above, there is not preponderant evidence that this or any other procedural deficiency had those effects.<sup>8</sup> No doubt there was a misunderstanding here, but it does not rise to the level required for a finding of denial of a FAPE.

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<sup>8</sup> There was evidence that the group configuration in general is preferable to individual therapy, (NT 740-741); however, the witness making this statement was not in a position to directly criticize the use of some group therapy time for individual work, nor was that witness asked to do so.

I will, nevertheless, order the District to convene an IEP meeting, discuss the allocation of therapy hours with Parent, consider Parent's input, and issue an appropriate NOREP reflecting the actual allocation between group and individual speech and language therapy in the related services part of the IEP. I conclude that this correction to the IEP is required so that the nature of the services offered is clearly set forth after giving the Parent an opportunity to participate in that allocation of therapy hours.

I conclude that the District did not fail to place Student in the least restrictive appropriate placement, nor did it fail to consider the full continuum of alternatives, including the utilization of supportive aids and services. I further conclude that the District did not fail to offer and did provide appropriate assistive technology to Student. I find that there were procedural violations of the IDEA, but that these did not impede parental participation, Student's receipt of a FAPE, or Student's receipt of educational benefit. Nevertheless, I will order the District to convene an IEP meeting, discuss the allocation of therapy hours with Parent, consider Parent's input, and issue an appropriate NOREP reflecting the actual allocation between group and individual speech and language therapy in the related services part of the IEP. Any claims regarding issues that are not specifically addressed by this decision and order are denied and dismissed.

#### ORDER

1. The District did not fail to educate Student in the least restrictive environment to the maximum extent appropriate during the relevant time, February 14, 2010 to June 13, 2012.
2. The District, during the relevant period, did not deprive Student of a FAPE by failing to provide appropriate assistive technology.
3. The District, during the relevant period, violated the procedural requirements of the IDEA; however, these violations did not impede the Student's right to a FAPE,

significantly impede Parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to Student, or cause a deprivation of educational benefit.

4. The hearing officer will not order the District to place Student in a less restrictive environment, provide a FAPE, or provide any assistive technology.
5. The hearing officer will not order the District to provide compensatory education to Student for all or any part of the relevant period.
6. The District is ORDERED to convene an IEP meeting within the first ten school days of the 2012-2013 school year, discuss with Parent the recommended allocation of speech and language therapy hours between group and individual settings, explain the reasons for the recommendation, consider Parent's input and concerns, and, within ten days following the IEP meeting ordered herein, amend the prevailing IEP to reflect the IEP team's allocation of these hours.

*William F. Culleton, Jr. Esq.*

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

July 12, 2012