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

IN THE PENNSYLVANIA OFFICE FOR DISPUTE RESOLUTION

FINAL DECISION AND ORDER
ODR File No. 3158-1112KE

CLOSED HEARING

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

Hearing Date(s):
June 22; July 17, 24, and 27, 2012

Parties to the Hearing	Representative
Parents	Deborah G. DeLauro, Esquire Law Office of Deborah G. DeLauro P.O. Box 321 Haverford, PA 19041
The School District of Philadelphia 440 N. Broad St. Philadelphia, PA 19130	Heather L. Durrant Matejik, Esquire Levin Legal Group 1301 Masons Mill Business Park 1800 Byberry Road Huntingdon Valley, PA 19006

Record Closed: August 17, 2012

Date of Decision: August 31, 2012

Hearing Officer: Brian Jason Ford

[1] Other than this cover page, the child and parent(s)' names are not used to protect their privacy - even if the parent(s) requested an open hearing. "Parent" and "Student" is used instead. Other identifying information is omitted to the extent possible. Citation to the notes of testimony (transcript) are to "NT." Exhibits were marked variously but presented jointly. Each exhibit has its own exhibit number, and so citation in this decision is to exhibit number as "Ex #"

Introduction and Procedural History

The instant matter concerns the Student's educational rights under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*. and Section 504 of the Rehabilitation Act. The Parents, through their complaint, allege that the Student was denied a free appropriate public education (FAPE) from the start of the 2008-09 school year through the present (ongoing) and demand compensatory education to remedy the denial of FAPE.

Originally, the Parents also demanded a finding that, in order to receive FAPE, the Student must be placed in a private school at the District's expense.[2] Ultimately, the Parents abandoned that claim and instead argued that any compensatory education awarded may be used to offset the cost of private school tuition. The Parents seek an order that explicitly enables them to use compensatory education in that way.

The District argues that it has provided FAPE at all times. Alternatively, the District argues that if compensatory education is awarded, it may not be used to offset the cost of tuition at a private school. The District further argues that a portion of the Parents' claims are barred by the IDEA's statute of limitations.

Initially, the hearing was bifurcated to address the applicability of the statute of limitations before the denial of FAPE claim. As the hearing progressed, surprisingly, it became clear that it was more efficient to un-bifurcate this matter. Consequently, this decision begins with an analysis of the IDEA's statute of limitations and its applicability in this case. The alleged denial of FAPE is discussed immediately thereafter.

Issues

1. Does the IDEA's statute of limitations bar claims arising before May 15, 2010?
2. Was the Student denied a FAPE?
3. If compensatory education is awarded, may it be used to offset the cost of tuition reimbursement at a private school?

[2] This was a demand for prospective placement, not a demand for tuition reimbursement.

Findings of Fact[3]

1. The Student is a [pre-teenaged] seventh grade student who attends one of the District's several elementary schools.
2. The Student resides with the Parents and siblings within the District's geographical boundaries.
3. Historically, the Student has been diagnosed with Autism Spectrum Disorder (specifically Asperger's Syndrome), Attention Deficit Hyperactivity Disorder (ADHD), Pervasive Developmental Disorder, NOS and most recently Learning Disabilities.
4. The Student has been educated by the District at all times.
5. The Student attended a regular education classroom in [the Student's] neighborhood school in first and second grade.

Third Grade – 2008-09 School Year

6. The 2008-09 school year was the Student's third grade year.
7. At the end of second grade, the District recommended, and the Parents supported, transitioning the Student to an Autistic Support (AS) classroom in a different elementary school. (Ex 8 pg. 5).
8. The recommendation to move the student into an AS program was based on an Evaluation Report (ER). The ER reported that the Student was functioning at a 1.9 level in mathematics and a 1.7 level in reading. (Ex 46).
9. At the time of the transition, the Parents were primarily concerned about the Student's academic performance. The District had recommended the AS classroom because the Student was "achieving below grade level." (Ex 8 pg. 5). The Parents were also aware of the math and reading levels reported in the ER at this time. (NT at 495). Based on conversations with the Student's teachers and school administrators, the Parents were under the impression that the Student could transition back into regular education classes once [the Student's] academic performance improved.
10. The Student's IEP Team convened on September 4, 2008, the first day of the 2008-09 school year, to more formally recommend the AS classroom and to develop an IEP for the 2008-09 school year.[4] The Student's mother attended that meeting and received a Procedural Safeguards Notice at that time. (Ex 30; NT 49-50).
11. The September 2008 IEP offered AS programming at a supplemental level. Under that IEP, the Student received Literacy (properly thought of as Reading), Math and

[3] This hearing took place over four sessions. 1,356 pages of transcript were generated in over 35 hours of examination. Nearly 1,400 pages of documents were submitted as exhibits. This hearing officer read and considered every word on every page. Not all documents that were entered as exhibits are referenced in this decision, however. Further, notes from the Student's TSS were offered as evidence of the Student's lack of social progress in school. The TSS did not testify. The notes are hearsay, and were objected to as such. Hearsay is admissible in special education due process hearings, but cannot be used to form the basis of a decision. The TSS notes would not alter the outcome of this case, were not used to form the basis of this decision and are not referenced herein.

[4] Clearly, there should have been an IEP in place for the Student *before* the school year started.

Social Skills instruction in an AS classroom and attended science, social studies and preps in regular education classrooms, supported by a TSS throughout the day.

12. The September 2008 IEP includes no baseline data and a few negligible sentences regarding the Student's then-current educational levels. (Ex 30). The goals in the IEP are vague and include typos that confuse how progress should be monitored. (Ex 30). For example, one goal reads: "Given a level appropriate passage, [Student] will answer comprehension questions on 4 out of 5 consecutive trials with 80% accuracy. with 4 of 5 trials at 80% by 06/20/2009." Even assuming everything after the first period in the sentence should have been omitted, the IEP gives no indication as to what the Student's appropriate level is. More importantly, the IEP includes no specially designed instruction (SDI), related services or program modifications that would teach the student how to make whatever comparisons the goal calls for. The same is true for all goals in the IEP.
13. The September 2008 IEP included one social skills goal: "Given an appropriate time for playing, [Student] will will [sic] ask a peer to play and then play appropriately in the school yard for increasing amounts of time to 15 minutes on 4 of 5 trials. with [sic] 4 of 5 trials at 80% by 06/20/2009." (Ex 30 at 12). Although counseling is provided as a related service, the IEP includes no modifications or SDI to enable the Student to obtain this goal, and no baseline data is provided.
14. The September 2008 IEP provided individual Occupational Therapy (600 minutes per IEP term), large group Speech/Language Therapy (750 minutes per IEP term), and small group school based counseling (300 minutes per IEP term).
15. The Student's mother signed a Notice of Recommended Educational Placement (NOREP), indicating agreement with the IEP. (Ex 30 p. 20-22).
16. Shortly after the September 2008 IEP Team meeting, the Student's third grade AS teacher sent an email to the Parents. (Ex 34 p. 12). In that email, the teacher explained that she would "supplement" the Student's program and would use "remediation tools" to improve the Student's academic performance. (Ex 34 p. 12).
17. The Parents testified that they do not understand educational terms such as "intervention" and "remediation tools" but did not seek clarification from the Student's third grade teacher. (N.T. 516-518).
18. The Parents testified credibly that they did not understand the differences between an AS classroom and a regular education classroom. At the start of the Student's third grade year, the Parents were under the impression that the *only* reason the Student was placed in an AS classroom was to improve the Student's academic performance through more attention from [the Student's] teacher in a smaller sized class. (N.T. 453).
19. Parents noted in an email dated 08/28/08 that they wanted the Student in regular education for all classes but "reading and math". (Ex 34, P. 6).
20. During the Student's third grade year, the Student did not receive Literacy or Math instruction at the third grade level. Rather, as described by the Student's teacher,

through the use of an "intervention-based curriculum"[5] the Student was exposed to concepts that are taught to regular education third graders.[6] (NT at 135).

21. During this same period of time, the Parents testified that they explicitly asked whether the Student was being instructed at the third grade level and testified that they were told by the third grade teacher that the Student was being instructed at the third grade level
22. In testimony, the Student's third grade teacher denies making any such statement and, instead, testified that she told the Parents that the Student was being exposed to third grade concepts.
23. Reading and Math IEP goals, and reports of progress towards those goals, do not specify an instructional level. Rather, the goals discuss presentation of materials at the Student's level, whatever that level may be. (*See, e.g.* Ex 31 at 2).
24. Community outings were offered in the AS classroom in third grade. The Parents did not allow the Student to attend community outings, believing that the Student's time was better spent receiving academic instruction.
25. The third grade teacher monitored the Student's progress and reports of the student's progress were provided to the Parents on December 11, 2008; March 22, 2009; and June 18, 2009. (Ex 30, 31). The Student's mother also attended report card conferences. As a general matter, the progress reports and report cards indicated that the Student was making some progress in both academic and social skills goals. so much so that the Parents used the Student's report cards to motivate their other children. (N.T. 1269-1270).

Fourth Grade – 2009-10 School Year

26. The Student had the same teacher for third and fourth grade. The Student was educated pursuant to the September 2008 IEP at the start of the fourth grade (2009-10) school year.
27. After third grade ended but before fourth grade started, the Student's teacher sent an email to the Parents saying that the Student would be grouped with same aged peers in the AS classroom with "similar academic needs" and would continue to receive "intervention based instruction." (Ex 34 p 113).
28. The Student's IEP Team met on October 6, 2009 and revised the Student's IEP. (Ex 29). At this meeting, the IEP Team determined that the Student's behavior impeded [the Student's] learning or the learning of others, necessitating a functional behavioral assessment. The report of the Student's present levels of academic achievement and functional performance were also significantly revised. *Id* at 7.
29. Regarding Literacy, the October 2009 IEP states that the Student "has increase [sic] [the Student's] vocabulary development and comprehension skills" and that the Student **"is being instructed at the fourth grade level."** *Id* emphasis added.

[5] Although testimony on this point is somewhat confusing, I find that "intervention-based curriculum" is tantamount to a hodgepodge of methodologies and teaching practices (some of which are research-based), as opposed to a single, unified, research-based curriculum.

[6] For example, making inferences is part of the regular education third grade curriculum. Regular education third graders would receive a reading passage at the third grade reading level, and then would be asked to make inferences. In the AS classroom, the Student would be given a reading passage at [the Student's] own level and then asked to make inferences. (NT at 135).

Literacy is listed in the IEP under "Strengths," where the IEP says that the Student "has begun to enjoy reading" and "participates in discussions about stories during guided reading." *Id* at 11

30. Regarding Math, the October 2009 IEP states that the Student is "making progress in an intervention based math program" and that the Student **"is being instructed at the fourth grade level."** *Id* at 7 emphasis added. Math is listed in the IEP under "Strengths," where the IEP says that the Student "has developed a stronger foundation in basic math skills." *Id* at 11.
31. The Student's actual instructional levels in Literacy and Math are not reported in the Present Levels section of the October 2009 IEP. Instructional levels are, however, reported in the Goals. In October of 2009, the Student was on the 3.1 instructional level in Literacy (Ex 29 at 14) and the 3.2 instructional level in Math (Ex 29 at 18).
32. Goals in the October 2009 IEP are as problematic as the goals in the September 2008 IEP. For example: "Given both fiction and non-fiction texts on [the Student's] instructional level, [Student] will answer comprehension questions based on a text, with 8 out of 10 over 5 consecutive probes at 80% by 10/05/2010." Even knowing the Student's instructional level, the IEP gives no information about the Student's baseline and objective criteria for mastery of this goal is incomprehensible.[7]
33. The October 2009 IEP included no SDIs or related services to increase the Student's Literacy or Math abilities. (Ex 29 at 24).
34. In addition to academic goals, the October 2009 IEP included a behavioral goal: "Given opportunities for inclusion, [Student] will actively participate in the general education class with 9 out of 10 at 90% by 10/05/2010." (Ex 29 at 20).
35. The IEP also included two "Life Skills" goals. First: "Given the opportunity to participate in group discussion,, [Student] will use appropriate pragmatic behaviors when engaging in conversations with peers and adults in relation to curriculum based activities with 90% accuracy. with [sic] 4 of 5 trials at 90% by 10/05/2010." (Ex 29 at 21).
36. The second life skills goal reads: "Given feelings discontent [sic] with a peer, [Student] will verbalize feelings and attempt to results [sic] conflict with peer with 8 out of 10 at 80% by 10/05/2010." (Ex 29 at 23).
37. The October 2009 IEP included no SDIs or related services to increase [skills or] enable the Student to obtain the behavioral and life skills goals. (Ex 29 at 24).
38. During the IEP Team meeting in October of 2009, the Parents asked if the Student could be moved to all regular education classes, and clearly expressed that academic performance was their primary concern. (NT at 170). The IEP Team ultimately determined that the Student should remain in the AS classroom with inclusion in regular education with TSS support for certain subjects and preps. As in third grade, the Parents understood that the purpose of this placement was to improve the Student's academics to the point that the Student could be returned to regular education full time.

[7] Must the Student score 80% on eight probes five consecutive times? Must the Student score 80% on five consecutive probes? Or does each probe contain 10 questions - of which the Student must answer eight correctly - over five consecutive probes? Simply including numbers and percentages in the text of a goal does not make a goal measurable or objective.

39. At the IEP team meeting, the Parents signed an acknowledgment of receipt of procedural safeguards and approved the IEP. (Ex 29).
40. In November of 2009, the Student was evaluated to determine if [the Student] would be a good candidate for a research study at the Children's Hospital of Philadelphia (CHOP). The Parents were enthusiastic for the evaluation, as they believed that it would include "information on [the Student's] abilities and what kind of life [the Student] will have." (Ex 34 p. 140). The CHOP evaluation found that [the Student's] overall intellectual functioning was in the "extremely low" range and that academic measures were below age and grade-level. (Ex 41).
41. The evaluation recognized that testing was done in an environment that was new for the Student and that "children with autism spectrum disorders do not always perform to their highest abilities in new environments." (Ex 41) The report indicates that the Student might have performed better in a more familiar setting. (Ex 41).
42. The Student's fourth grade teacher reviewed the report and was "surprised at the results." (Ex 34 p. 143). In an email back to the CHOP evaluator, copying the Parents, the teacher said: "[Student] can perform. I agree that [the Student] is functioning below average, but not to the significant degree these results show." The email also notes that, according to the District's evaluations, the Student was on the 1.7 grade level in Math according to a WRAT 4 given in June of 2008 and that level increased to 2.8 in September of 2009. The same tests indicated that Reading also increased from 2.4 to 3.1. *Id*. The numbers reported in the email do not correspond with the numbers reported in the October 2009 IEP. The email as a whole leaves the impression that the Student is not performing to the level of [the Student's] non-disabled peers, but not to a significant degree.
43. The October 2009 IEP provided individual Occupational Therapy (600 minutes per IEP term), and large group Speech/Language Therapy (750 minutes per IEP term). The October 2009 IEP does not include small group school based counseling, which was provided in the prior IEP.
44. In December of 2009, Parents participated in a report card conference with the Student's teacher. (Ex 28) According to the progress monitoring, the Student was making "satisfactory" progress towards [the Student's] IEP goals except for math computation in which [the Student] was noted to "need improvement." (Ex 28). The progress monitoring reports were also shared with Parents on 03/24/10 and 06/15/10. (Ex 28).[8]

Fifth Grade – 2010-11 School Year

45. The Student remained in the same AS classroom with the same teacher for Literacy, Math and Social Skills during the 2010-2011 school year. (Ex 34 p. 172) The Student also participated in regular education for science and social studies. (N.T. 776-777)
46. The Student's IEP Team met on October 16, 2010 to revise the Student's IEP. The Student's mother participated in the meeting. Consistent with all past meetings, the

[8] The progress reports include both a narrative description of the Student's progress and a numeric percentage towards completion of the goal. The numeric value is only as probative as the objective criteria of the goal itself which, in this case, is low.

Parents' primary concern was the Student's academic progress. The Parent testified that, at all times, they explicitly asked if the Student was completing grade level work and were assured that [the Student] was. The Student's teacher flatly denies this, saying that the Parents were told that the Student was introduced to grade-level concepts, but was not performing at grade level.

47. The October 2010 IEP, which the Parents ultimately approved, called for the Student to remain in the AS classroom for fifth grade with an expectation that the Student would transition to "the Learning Support setting and general education class[es]" in the 2011-12 (sixth grade) school year. The IEP Team planned to reconvene in June of 2011 to plan for this transition.
48. Regarding Literacy, the October 2010 IEP states that the Student "has increase [sic] [the Student's] vocabulary development and comprehension skills" – this language is copied directly from the prior IEP, right down the typos – and that the Student **"is being instructed at the fifth grade level."** (Ex 25 p 12, emphasis added). Literacy is listed in the IEP under "Strengths," where the IEP says that the Student "has begun to enjoy reading" and "participates in discussions about stories during guided reading." The Literacy "Strengths" section is also directly copied from the prior IEP.
49. Regarding Math, the October 2009 IEP states that the Student is "making progress in an intervention based math program" – this language is copied directly from the prior IEP – and that the Student **"is being instructed at the fifth grade level."** *Id* at 12, emphasis added. Math is listed in the IEP under "Strengths," where the IEP says that the Student "has developed a stronger foundation in basic math skills." *Id* at 13. The Math "Strengths" section is also directly copied from the prior IEP.
50. As with the prior IEP, the Student's actual instructional levels are reported in the goals: 3.4 for literacy (and increase of .3 in one year) and 4.5 in math (an increase of 1.3 in one year). (Ex 25 at 22, 26).
51. The October 2010 IEP lists SDIs and modifications after each goal. For Literacy and Math goals, modifications and SDIs included picture cues, small group instruction, computer based reading support, testing in a separate room, small group testing, use of a typewriter or personal computer, a response scribe, word processor, graphic organizers, extended time and student-requested extended time.
52. Some of these accommodations are inconsistent with each other even within the same goal, and none shed light on what special education the District would provide to enable the Student to reach the IEP goals or, more importantly how the District intended to improve the Student's ability to read or do math.
53. There is evidence that the Student received Corrective Reading (a reading curriculum) during [the Student's] fifth grade year, despite the fact that this is not reflected in the Student's IEP.[9] (Ex 23). No evidence was presented concerning the Student's progress in the Corrective Reading program specifically.
54. The Student was reevaluated by the District and a Reevaluation Report (RR) was generated on November 16, 2010. The RR noted parental concerns with handwriting, reading and engagement with other children. (Ex 24 at 2).

[9] To the extent that Corrective Reading is a "brand name" reading program, the IEP is not flawed for failing to include the name of the program. However, whenever a student who is below grade level in reading receives a remedial reading program, that fact should be indicated somewhere in the IEP.

55. The 2010 RR included a Woodcock Reading Mastery Test. The Student's comprehension was scored at the 3.4 grade level and reading skills were scored at the 2.8 reading level, "yielding an overall reading score of a 3.1 grade level." These levels are *lower* than what was reported in the October 2010 IEP. Standards scores and normative percentiles are not reported.
56. Regarding Math, the 2010 RR included both a Key Math Assessment and a Wide Range Achievement Test. The Key Math test placed the Student at the 2.0 level and the WRAT placed the Student at the 4.5 grade level. The discrepancy between the tests is not explained, but the evaluator notes that the Student's score on the WRAT was more consistent with [the Student's] performance in class. The report is silent as to how the evaluator reached that particular conclusion. The 4.5 on the WRAT is consistent with the October 2010 IEP, but would indicate no progress between October and November. The 2.0 on the Key Math is not consistent with the October 2010 IEP.
57. The Parents contend that the Student was bullied during the 2010-11 (fifth grade) year, and that bullying caused the Student [redacted] in April of 2011. During the hearing, the District did not concede this point, highlighting the fact that most of the evidence of both the bullying and [redacted] is hearsay, which cannot form the basis of my decision. The District also argues that hearsay evidence, even if accepted, does not indicate that the Student was bullied in any significant way. As noted below, this position is not consistent with IEPs subsequent to [redacted]. In those IEPs, the District explicitly acknowledged the bullying, [redacted] and the connection between the two.
58. The District's arguments notwithstanding, I find that the Student was bullied during the 2010-11 school year and that the Student did [redacted].
59. [Redacted.]
60. [Redacted.]
61. The Parents met and corresponded with various teachers and administrators after the incident, but the Student was not reevaluated during the 2010-11 school year and [the Student's] IEP was not revised. The Student did, however, begin to receive more hours of support from a TSS.[10]

Sixth Grade – 2011-12

62. Based on the exhibits presented during the hearing, it is exceedingly difficult to track the development of the Student's IEP during the 2011-12 school year. It is clear that the Student's IEP team met several times during the 2011-12 school year and that the IEP was revised several times.[11] The record in this case makes it nearly impossible to tell exactly which revision of which IEP was in place at any given time during the 2011-12 school year. *See* Ex 2, 3, 4, 12, 15.

[10] The Student worked with a TSS at all times for a significant portion of [the Student's] day in school. The TSS was provided by and funded by an outside agency.
[11] Multiple IEPs, some with undated, hand-written revisions, were presented as single exhibit, and the same IEPs were presented in multiple exhibits and, occasionally, the dates of IEPs change within an IEP itself. *See, e.g.* Ex 2.

63. The October 2010 IEP indicated that the Student's IEP team would meet in June of 2011 to plan the Student's transition to a Learning Support (LS) classroom and, ultimately, to regular education. The contemplated meeting did not happen. Instead, the Student's IEP Team met on September 9, 2011, as the 2011-12 school year was starting.
64. During the meeting, the District proposed programming in an LS classroom. The Student's mother testified that this was the first time she learned that the Student would not be placed in a regular education classroom in the 2011-12 school year.
65. The Student's mother also testified that, during the September 2011 IEP Team meeting, the District explained the Student's grade levels in Literacy and Math for the first time.
66. During the meeting, it was agreed that the Student would receive Literacy, Math and Social Skills in the LS classroom and Science and Social Studies in regular education. (Ex. 22). This effectively swaps the AS placement in the prior school year with an LS placement.
67. The Student's sixth grade Leaning Support teacher was not the same person who taught the Student in the AS classroom.
68. The Student received a Psycho-Educational Reevaluation in either late September or early October of 2011. The records are too confused to determine the date of the evaluation.[12]
69. The resulting Reevaluation Report (2011 RR) was fundamentally flawed, containing numerous errors. Portions of the RR were copied and pasted from another student's RR – the other student's first name appears on portions of the RR. (Ex 50).
70. Flaws in the 2011 RR were obvious to the District's administrators, who called in the evaluator's supervisor to review and revise the report. (N.T. 1033-1037). The revised report – Ex 14 – relies on the same testing and information as the initial report (including a Woodcock Reading Mastery Test and a Key Math Assessment), but corrects typos, sections copied from another student's report, and information about the Student and [the Student's] family.
71. Both the initial 2011 RR and the revised 2011 RR recommend that the Student's primary disability category be changed from Autism to Specific Learning Disabilities, and that IEP goals should target academic areas.
72. The Parents disagreed with the 2011 RR and the District agreed to fund an Independent Educational Evaluation (IEE) of the Student.[13]
73. The Student's IEP was revised in November of 2011 to place the Student in Learning Support for all classes. (Ex. 15). The District completed a Functional Behavioral Assessment around this time.
74. Literacy goals in the November 2011 IEP note that the Student's instructional level is 4.1 based on the Woodcock Reading Mastery test. (Ex 15 at 53). The same IEP includes Math goals listing the Student's instructional level at 2.3 based on the Key Math Assessment.

[12] A version of the resulting Reevaluation Report is dated October 13, 2011. (Ex 50). It appears that a *later* version of the report is dated September 26, 2011.
[13] IEE funding was an issue at the start of this hearing. That issue was resolved by the parties.

75. All goals in the November 2011 IEP addressed Literacy and Math. None addressed social skills. Occupational Therapy was provided (600 minutes per IEP term), but counseling and Speech/Language Therapy were not offered.
76. An IEE was conducted in over three sessions on January 10, 2012; January 19, 2012; and February 1, 2012. The evaluator considered all prior evaluations completed by the District, reports and information from the Student's TSS provider agency, the CHOP evaluation and [redacted]. (Ex 8).
77. The IEE evaluator, a Ph.D. level, Pennsylvania Licensed Psychologist and Certified School Psychologist, also interviewed the Parents, TSS and wraparound providers, and observed the Student in school. The evaluator also conducted new testing, including a Wechsler Intelligence Scale for Children - Fourth Edition (WISC-IV); the Boston Naming Test; the California Verbal Learning Test - Children's Version; certain sub-tests of the the Wide Range Assessment of Memory and Learning, Second Edition (WRAML-2); a sub-test of the Differential Ability Scales, Second Edition (DAS-II); the Rey-Osterrieth Complex Figure Test; the Grooved Pegboard Test; subtests of the Delis-Kaplan Executive Functioning System (D-KEFS); the Wisconsin Card Sorting Test (WCST); and the Wechsler Individual Achievement Test - Third Edition (WIAT-III). (Ex 8).
78. In addition to the foregoing, the IEE evaluator also had the Student's mother complete a BASC-2, a SRS, a Vineland-II and a Child Behavior Checklist. A teacher input form, a BASC-2 and a SRS were also given to the Student's teacher but were not returned. (Ex 8).
79. The IEE tends to suggest that the Parents were aware of the Student's academic progress and were primarily concerned about the Student's social development and the effects of [the Student's] Autism diagnosis. (*See* Ex 8 at 19).
80. The IEE notes deficits in language, vocabulary, fine motor coordination, dexterity, and visual-motor integration. (Ex 8)
81. The Student's full scale IQ was scored at 60, but the evaluator concluded that score was brought down by the Student's frustration with and avoidance of the assessment. As a result, the student was not diagnosed with an Intellectual Disability. (Ex 8 at 20)
82. Tests of academic achievement revealed that the Student understood basic reading and math concepts but could not apply those concepts. (Ex 8 at 20).
83. The IEE evaluator felt that it was "<u>imperative that [the Student's] classification be amended so that [the Student] is accurately identified as a student with a primary disability of Autism.</u>" (Ex 8 at 20, underlining original).
84. The IEE includes a large number of specific, targeted program recommendations that address the Student's social and behavioral needs in an educational setting.
85. It is not clear exactly when the IEE report was completed, but the District received the report in March of 2012 and convened an IEP Team Meeting on March 28, 2012. (Ex 4).
86. The following language was added to March 2012 IEP (and all subsequent revisions): "[Student] was being bullied [redacted]." (Ex 4 at 7).
87. The March 2012 IEP does not change the Student's placement (Learning Support). Goals did not change, although some were eliminated. (Cf Ex 15, Ex 4). No goals were added to address the Student's social and behavioral needs, identified in the

IEE. Occupational Therapy, however, was reduced to 300 minutes per IEP cycle (an IEP cycle is a school year).

88. Another IEP Team Meeting convened on May 2, 2012 without the Parents. The District claims to have sent an invitation to the meeting to the Parents. (N.T. 1228-1230). The Parents deny this, and no evidence of an invitation was provided.
89. Without parental participation or input, a revised IEP was issued on May 14, 2012. (Ex 2). The May 2012 IEP includes much of the information from the IEE. Goals and SDI in the May 2012 IEP are significantly revised, provide special education and monitor progress in phonics, reading fluency and comprehension; writing; math; work completion (categorized as a behavioral goal); and interpersonal communications and social interactions (categorized as life skills goals). On the whole, the goals in the May 2012 IEP are measurable, objective and responsive to the IEE. The IEP does not, however, increase or add any therapies or specify what reading, math or social skills programs the Student will receive (either specifically or generally).
90. The Parents requested a due process hearing on May 15, 2012.

Legal Principles

The Burden of Proof

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). The party seeking relief must prove entitlement to their demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. *See N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), citing S*hore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this particular case, the party seeking relief must bear the burden of persuasion.

The IDEA's Statute of Limitations

In 2004, the IDEA was amended to include, *inter alia*, the following provision at 20 U.S.C. § 1415(f)(3)(C):

> A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing under this subchapter, in such time as the State law allows.

As noted by the Third Circuit Court of Appeals, the foregoing provision "broke new ground by providing for a two year statute of limitations where there previously had been none." *Steven I. v. Central Bucks School Dist*., 618 F.3d 411, 413 (3rd Cir. 2010). In *Steven I.*, the Third Circuit decided that the two-year statute of limitations precluded claims arising more than two years before the filing of a due process complaint: "Steven I.'s parents did not initiate a due process hearing until May 1, 2007. Thus, the two-year statute of limitations in IDEA 2004 applies to Steven I.'s claims and bars any causes of action that accrued prior to May 1, 2005." *Id* at 417.

Relying on *Steven I.*, the United States District Court for the Eastern District of Pennsylvania explicitly concluded that "[u]nder IDEA's amended statute of limitations, a court may consider alleged denials of a FAPE occurring for a two-year period prior to parents' request for a due process hearing." *L.G. v. Wissahickon School Dist.*, 2011 WL 13572, *7n5 (E.D. Pa. 2011).

Not every district court in Pennsylvania has explicitly reached the same conclusion, and some have indicated approval for an alternative calculation. *See I.H. ex rel. D.S. v. Cumberland Valley School Dist.*, --- F.Supp.2d ---, 2012 WL 400686, 4 (M.D.Pa., 2012). Even so, the Third Circuit's decision in *Steven I.* is consistent with the majority of cases in Pennsylvania. *See, e.g. School Dist. of Philadelphia v. Deborah A*., 2009 WL 778321,

*4 (E.D. Pa., 2009) (hearing officer properly precluded claims for compensatory education arising more than two years before parents requested a due process hearing); *Evan H., ex rel. Kosta H. v. Unionville-Chadds Ford School Dist*., 2008 WL 4791634 (E.D. Pa., 2008) (unpublished but cited as persuasive authority) (affirmation of an appeals panel determination that the IDEA's statute of limitations cuts off claims arising more than two years before a complaint is filed).

This Hearing Officer is persuaded by the logic of *Steven I.* and *L.G. v. Wissahickon*. The IDEA's statute of limitations precludes claims arising more than two years before a due process complaint is filed. However, application of the statute of limitations does not preclude parties from presenting evidence and testimony concerning events beyond the limitations period for the purposes of establishing foundation, background or context.

Exceptions to the IDEA's Statute of Limitations

There are two exceptions to the IDEA's statute of limitations. Those exceptions are codified at 20 U.S.C. § 1415(f)(3)(D):

> The timeline described in subparagraph (C) shall not apply to a parent if the parent was prevented from requesting the hearing due to—
>
> (i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or
>
> (ii) the local educational agency's withholding of information from the parent that was required under this subchapter to be provided to the parent.

If either or both exceptions apply, the statute of limitations does not apply. *See P.P. ex rel. Michael P. v. West Chester Area School Dist.*, 585 F.3d 727, 730 (3rd Cir., 2009). In this case, the Parents claim that the first exception – the specific misrepresentations exception – applies.

The Specific Misrepresentations

The term "specific misrepresentations" is not defined by the IDEA or its implementing regulations. In two unpublished decisions, the United States District Court for the Eastern District of Pennsylvania determined that the misrepresentations exception at 20 U.S.C. § 1415(f)(3)(D)(i) applies only to a school district's intentional actions. *See Evan H. v. Unionville–Chadds Ford Sch. Dist.*, 2008 WL 4791634 (E.D.Pa. Nov. 4, 2008) and *Sch. Dist. of Phila. v. Deborah A.*, 2009 WL 778321 (E.D.Pa. Mar. 24, 2009). This determination is consistent with unpublished decisions from other jurisdictions holding that a "misrepresentation refers to a 'misleading assertion with the intent to deceive.'" *A.B. v. Clarke County School District,* 2009 WL 902038 (M.D. Ga. Mar. 30, 2009).

At the same time, the Pennsylvania Supreme Court recognizes the concept of "negligent misrepresentation" as defined in the Restatement (Second) of Torts § 552. *See Bilt-Rite Contractors, Inc. v. Architectural Studio,* 581 Pa. 454, 482, 866 A.2d 270,

287 (2005). The applicable section of the Restatement, titled “Information Negligently Supplied for the Guidance of Others,” provides:

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Bilt-Rite at 459, n1. However, in the same case, the Pennsylvania Supreme Court also held

> Section 552 sets forth the parameters of a duty owed when one supplies information to others, for one's own pecuniary gain, where one intends or knows that the information will be used by others in the course of their own business activities. The tort is narrowly tailored, as it applies only to those businesses which provide services and/or information that they know will be relied upon by third parties in their business endeavors, and it includes a foreseeability requirement, thereby reasonably restricting the class of potential plaintiffs.

Id at 581 Pa. 454, 479, 866 A.2d 270, 285-286.

Although the element of pecuniary gain rarely, if ever, applies in IDEA proceedings, the analogy is clear. In an unpublished opinion, the United States District Court for the Western District of Pennsylvania adopted the negligent misrepresentation standard in an IDEA case. *See J.L. ex rel. J.L. v. Ambridge Area School Dist.,* 2009 WL 1119608, *12 (W.D.Pa.,2009)(abrogated on other grounds by *Steven I. v. Central Bucks Sch. Dist,* 618 F.3d 411). I note that *Steven I.* concerns the retroactive application of the IDEA’s statute of limitations and explicitly does not address the exceptions. *See Steven I*. at FN 5. As such, *Steven I.* is not a refutation of the analysis of the exceptions in *J.L.*

To be clear, *J.L.* adopts Pennsylvania’s common law standard of negligent misrepresentation, as articulated in *Bortz v. Noon*, 556 Pa. 489, 729 A.2d 555 (1999), as opposed to the standard in the Restatement. Regardless, *J.L.* adopts a four part test for negligent misrepresentation and distinguished negligent misrepresentation from intentional misrepresentation:

> “Negligent misrepresentation requires proof of: (1) a misrepresentation of a material fact; (2) made under circumstances in which the misrepresenter ought to have known its falsity; (3) with an intent to induce another to act on it; and; (4) which results in injury to a party acting in justifiable reliance on the misrepresentation.” ... Further, “[t]he elements of negligent misrepresentation differ from intentional misrepresentation in that the misrepresentation must concern a material fact and the speaker need not

> know his or her words are untrue, but must have failed to make a reasonable investigation of the truth of these words."

See J.L. at *12 *quoting Bortz* at 501, 729 A.2d 555.

In *J.L.,* the misrepresentation standard was met **even though the district did not actively conceal information from the parents.** Rather, the district reported misleading information from third parties to the parents without verifying the accuracy of that information. *Id* at *12. The parents also received misleading information directly from third parties. *Id*. Relying upon the misleading information, the parents reasonably concluded that the student was making meaningful progress at a time when a significant portion of the Student's needs were unmet. *Id.* It is important to note that in *J.L.*, the parents received a large amount of highly misleading information that the district made no effort to verify. Further, in relying on that information, the parents were prevented from requesting a due process hearing. *Id*.

It appears that a critical factor in the *J.L*. case was the District's failure to verify the misleading progress reports drafted by third parties. In many IDEA cases, there is a dispute as to whether a student made meaningful progress. Failure to make meaningful progress does not, by itself, trigger the exception. Similarly, if a school district accurately reports a student's progress and characterizes that progress as meaningful, the exception is not triggered even if the progress is later found to be not meaningful. The information shared with the parents must include an actual "misrepresentation of material fact." Otherwise, the exception would swallow the rule.

Negligent misrepresentation is the appropriate legal standard to apply to the analysis of the misrepresentation exception. It is increasingly clear that hearing officers have the authority to both conduct hearings and fashion relief that furthers the purposes of the IDEA. *See e.g. Ferren C. v. School Dist. of Philadelphia*, 612 F.3d 712, 720 (3d Cir., 2010)(hearing officers have broad equitable authority to fashion relief consistent with the IDEA); *D.Z. v. Bethlehem Area School Dist.*, 2 A.3d 712 (Pa. Cmwlth., 2010)(hearing officers have broad authority to control due process proceedings). Adopting the negligent misrepresentation standard is consistent with such authority because doing so supports the underlying purposes of IDEA due process hearings. That purpose, *inter alia*, is to assure that parents have a mechanism by which they can compel school districts to fulfill their affirmative duty to provide FAPE to IDEA-eligible children, and seek redress when FAPE is denied. Requiring proof of intent to deceive in the context of an administrative hearing is contrary to that purpose.

Absent binding authority from this jurisdiction to the contrary, I will apply the negligent misrepresentation standard to the exception at 20 U.S.C. § 1415(f)(3)(D)(i) to determine if a misrepresentation occurred. It is important to note, however, that the misrepresentation must concern "the problem forming the basis of the complaint" to trigger the exception. *Id*. The misrepresentation must also have prevented the parents from requesting a due process hearing to trigger the exception. *Id*.

The parents must satisfy all prongs of the exception by preponderant evidence. *See Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006) (the party seeking relief must bear the burden of persuasion and cannot prevail if the evidence rests in equipoise); *N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), citing S*hore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004)(The party seeking relief must prove entitlement to their demand by preponderant evidence).

Free Appropriate Public Education (FAPE)

As stated succinctly by former Hearing Officer Myers in *Student v. Chester County Community Charter School*, ODR No. 8960-0708KE (2009):

> Students with disabilities are entitled to FAPE under both federal and state law. 34 C.F.R. §§300.1-300.818; 22 Pa. Code §§14.101-14 FAPE does not require IEPs that provide the maximum possible benefit or that maximize a student's potential, but rather FAPE requires IEPs that are reasonably calculated to enable the child to achieve meaningful educational benefit. Meaningful educational benefit is more than a trivial or *de minimis* educational benefit. 20 U.S.C. §1412; *Board of Education v. Rowley*, 458 U.S. 176, 73 L.Ed.2d 690, 102 S.Ct. 3034 (1982); *Ridgewood Board of Education v. M.E. ex. rel. M.E.*, 172 F.3d 238 (3d Cir. 1999); *Stroudsburg Area School District v. Jared N*., 712 A.2d 807 (Pa. Cmwlth. 1998); *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3rd Cir. 1988) *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031 (3d Cir. 1993); *Daniel G. v. Delaware Valley School District*, 813 A.2d 36 (Pa. Cmwlth. 2002).

The essence of the standard is that IDEA-eligible students must receive specially designed instruction and related services, by and through an IEP that is reasonably calculated at the time it is issued to offer a meaningful educational benefit to the Student in the least restrictive environment.

Compensatory Education

Hearing Officer Skidmore has provided the best distillation of current compensatory education jurisprudence in Pennsylvania:

> It is well settled that compensatory education is an appropriate remedy where a [LEA] knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only a trivial educational benefit, and the [LEA] fails to remedy the problem. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996). Such an award compensates the child for the period of deprivation of special education services, excluding the time reasonably required for an [LEA] to correct the deficiency. *Id*. In addition to this "hour for hour" approach, some courts

> have endorsed an approach that awards the "amount of compensatory education reasonably calculated to bring [a student] to the position that [he or she] would have occupied but for the [LEA's] failure to provide a FAPE." *B.C. v. Penn Manor Sch. District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006)(awarding compensatory education in a case involving a gifted student); *see also Ferren C. v. Sch. District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010) (quoting *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005) (explaining that compensatory education "should aim to place disabled children in the same position that the would have occupied but for the school district's violations of the IDEA.")) Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

M.J. v. West Chester Area Sch. District, ODR No. 01634-1011AS (Skidmore, 2011).

Discussion

Applicability of the IDEA's Statute of Limitations in This Case

The most hotly contested evidence and testimony in this case concerns the IDEA's statute of limitations and the misrepresentation exception. The Complaint was filed on May 15, 2012. Unless the exception applies, claims arising before May 15, 2010 are time-barred. To determine if the exception applies, the four factors described above will be considered in order:

First, the District did make a misrepresentation of material fact. Indeed, the District made several misrepresentations of material fact. The Student's IEPs in fourth and fifth grade IEPs report that the Student was being instructed on the fourth and fifth grade levels, respectively. Actual grade levels are buried in the same documents while the false statement is placed front and center.[14] There is conflicting information about what the Student's third-through-fifth grade teacher told the Parents about the Student's grade level. The Parents say that they were told that the Student was being instructed at grade level in the third, fourth and fifth grade. The teacher says that the Student was being exposed to grade level concepts during those school years. For each of those years, I find that the Parents asked the teacher if the Student was at grade level and that the teacher replied that the Student was being exposed to grade level concepts. In context, the teacher's response is a misrepresentation of material fact. As a member of the IEP Team and as the person directly instructing the Student, the teacher knew that the Student's academic progress was of the utmost importance to the Parents. When confronted with a direct, explicit question about the Student's grade level, rather than telling the Parents what grade level the Student was actually performing on, the teacher said that the Student was exposed to grade level concepts. The Parents misunderstood the teacher and wrongly believed that exposure to grade level concepts is the same as performing at grade level, but that misunderstanding is ultimately not relevant for purposes of this part of the analysis. What matters is that the teacher gave a

[14] Such actions would also qualify as an intentional misrepresentation under the stricter standard.

misleading, unresponsive answer to the Parents' direct questions, knowing full well what information the Parents were seeking.

Second, the misrepresentations were made under circumstances in which the misrepresenter ought to have known its falsity. The District members of the Student's IEP team were fully aware of the Student's actual academic levels when those levels were misreported on the Student's IEPs in fourth and fifth grade. Similarly, the teacher knew that the Parents wanted to know what grade level the Student was being instructed at when she told the Parents that the Student was exposed to grade level concepts in third, fourth and fifth grade.

Third, the misrepresentations were made with an intent to induce another to act on it. Knowing the Parents concerns about the Student's academic performance and their desire to ultimately return the Student to regular education classes, the District misrepresented the Student's grade level, inflating the Student's purported academic performance. This, in turn, induced the Parents to accept the District's recommended placements and programs.

The fourth prong of the test as articulated in *J.L.* must be read in the context of special education litigation. That prong checks for injury to a party acting in justifiable reliance on the misrepresentation. The "injury" in the context of an exception to the IDEA's statute of limitations, is present if the misrepresentations prohibited the Parents from requesting a due process hearing.

In this case, I find that the misrepresentations did prevent the Parents from requesting a due process hearing. There is evidence that the Parents were actively involved in the Student's education and were concerned about [the Student's] academic progress. There is no evidence, however, that the Parents actually knew how the Student was performing academically. Reports of progress towards vague goals do not help anybody – let alone untrained parents – understand how students are actually performing. The Student's IEPs did contain actual grade levels, which were overshadowed by misrepresented grade levels. That information, presented with the teacher's obfuscating, mollifying remarks led the Parents to an inaccurate impression of the Student's progress.

After the Student was assigned to a new teacher in sixth grade, the Parents' actions evidence a change in their understanding of the Student's progress. For the first time, the Parents challenged the District's evaluations and pressed for changes in the Student's IEP. When those changes were not made, the Parents requested a hearing. As such, I find that the District's specific misrepresentations prevented the Parents from requesting a due process hearing and that the exception is triggered. The IDEA's statute of limitations does not apply in this case.

Denial of FAPE

The Student has been denied a FAPE since the start of [the Student's] third grade year.[15] In third and fourth grade, the Student's IEPs contained present educational levels that did not paint a sufficiently complete picture of the Student's needs; included vague goals with no baselines; addressed the Student's social and behavioral needs in a cursory, trivial way; and provided little to no specially designed instruction or program modifications.

The inappropriateness of the Student's fifth grade IEP is succinctly and correctly captured in the Parent's closing statement:

> [The Student's] IEP was insufficient in the following ways: 1) it was based on inaccurate and contradictory information about [the Student's] level of instruction as well as [the Student's] academic, socialization and behavioral progress; 2) the IEP indicated that [the Student] had significant communication needs and yet reduced speech/language therapy from 750 minutes per IEP term to 600 minutes per IEP term or only 17 minutes a week; 3) the IEP indicated that [the Student's] behavior is an impediment to [the Student's] learning and the learning of others, but again, did not include either a FBA or a BSP; 4) the Literacy goals were verbatim from 4th grade to 5th grade, progress was minimal, although the required mastery level increased to 90% in 5th grade from 80% in 4th grade; 5) the Math goals remained the same from 4th grade to 5th grade, and the overall computational progress decreased from 2.8 in 4th grade to 2.0 in 5th grade; 6) the Behavior goals also remained the same but, incredibly, the required level of mastery decreased from 90% in 4th grade to 80% in 5th; and 7) the speech goals and the required level for mastery (80%) were again, identical for 4th and 5th grades. Remarkably, there were no research based remedial programs in Reading, Math, Writing or Social Skills.

In sixth grade, even with information gathered from the District's RR and, ultimately, the Student's IEE, the IEPs and revised IEPs failed to include specially designed instruction to address the Student's deficits in Math, Reading or Social Skills. Again, "brand name" programs are not the hallmark of an appropriate IEP. Rather, an appropriate IEP must *clearly* spell out where the Student is, where the Student is going, and what the District

[15] Typically, school districts are given an opportunity to correct inappropriate IEPs before any award for a denial of FAPE can be issued. *See, e.g. I.H. ex rel. D.S. v. Cumberland Valley School Dist.,* --- F.Supp.2d ---, 2012 WL 400686, 4 (M.D.Pa., 2012). Under that standard, a portion of time would be removed from any violation as third grade started so that the District could correct any problems. In this case, the District has provided programming to the Student in first and second grade and the third grade program was designed around the District's own evaluations. The District also delayed putting an IEP in place before school started. Under these circumstances, and in light of the District's specific misrepresentations, the District is not entitled to any reduction.

is going to do to enable the Student to go from point A to point B. The first series of IEPs and revised IEPs in sixth grade fail in this regard.

These flaws were corrected to an extent in the IEP of May 14, 2012. For example, the IEP includes a Math goal and then lists "use of a research based instructional model that focuses on repeated skill practice until mastery is achieved using all four operational strategies (additional, subtraction, multiplication and division)." (Ex 2 at 27). Although this is an improvement, it is not clear on the face of the IEP how such a model would be appropriate for a student who grasps basic concepts (per the IEE) but has difficulty applying those concepts in the real world. Perhaps that question would have been raised and answered if the Parents were afforded an opportunity to participate in the May 2012 IEP Team meeting – but they were not. In light of solid evidence of invitations to other IEP Team meetings, the Parents actual participation in other IEP Team meetings, and the Parent's new-found displeasure with the District's programming, the absence of an invitation to the May 2010 IEP meeting and the Parents' absence from that meeting are both conspicuous. Parents have an unambiguous right to participate in the development of their children's IEP, and abrogation of that right is a denial of FAPE in and of itself. *See* 34 C.F.R. 300.513(a)(2)(ii); *Board of Education v. Rowley*, 458 U.S. 176 (1982); *D.B. & L.B. o/b/o H.B. v. Gloucester Tp. School Dist.*, 751 F. Supp. 2d 764 (D.N.J. 2010), *affirmed at* 2012 WL 2930226 (3d Cir. 2012).

Compensatory Education – Calculation

No evidence or testimony was presented as to how much compensatory education should be awarded for any alleged denial of FAPE. In cases where the record does not address how compensatory education should be calculated, Hearing Officers use the traditional "hour-for-hour" standard that flows from *M.C.*, *supra*. In this case, the District failed to offer IEPs that appropriately address the Student's needs in Reading, Math and Social Skills.[16] One would expect the Student to receive at least one hour per day of appropriate Reading services and one hour per day of appropriate Math services during the Student's third, fourth, fifth and sixth grade years. Arguably, Social Skills should be provided throughout the day every day. Minimally, one half of an hour per day of direct Social Skills instruction (either in a group or small group) should have been provided. Consequently, I will award two and one half (2.5) hours of compensatory education to the Student for each day that school was in session from the start of the 2008-09 school year through such time as the District offers an appropriate IEP.

I note again that an IEP cannot be appropriate unless it is drafted with meaningful parental participation. However, if the Parents intentionally delay the IEP development process, compensatory education shall stop accruing when the delay occurs.

[16] I use the term "Social Skills" to address the interpersonal and communications skills that are affected by the Student's Autism Spectrum Disorder. Appropriate services to address those deficiencies are handled by different departments using different modalities in various school districts. Whether the services are titled "social skills" or "speech and language" or anything else is irrelevant. What matters is that the Student's needs must be systematically met through [the Student's] IEP.

Compensatory Education – Uses

Hearing Officers generally determine how many hours of compensatory education are owed upon finding a denial of FAPE and then give parents broad discretion as to how those hours can be used. Common language, again typified by Hearing Officer Skidmore, is as follows:

> "Student's Parents may decide how the hours of compensatory education are spent. The compensatory education may take the form of any appropriate developmental remedial or enriching educational service, product or device that furthers the goals of the Student's current or future IEPs. The Compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided through the Student's IEP to assure meaningful educational progress."

M.J. v. West Chester Area Sch. District, ODR No. 01634-1011AS (Skidmore, 2011). The foregoing language makes a few things clear: 1) parents have unilateral discretion to select how compensatory education will be used; 2) compensatory education must be used for educational purposes; and 3) LEAs may not spend down compensatory education awards to provide what they would otherwise be obligated to provide in satisfying their FAPE obligations.

Many Hearing Officers put monetary restrictions on compensatory education. The above-quoted passage continues:

> "There are financial limitations the parents' discretion in selecting the compensatory education. The costs to the District of providing the awarded hours of compensatory education must not exceed the full costs of the services that were denied. Full costs are the hourly salaries and fringe benefits that would have been paid the District professionals who provided services to the Student during the period of the denial of FAPE."

Id.[17] I, however, do not typically include such a dollar-per-hour cap on compensatory education awards. Such caps, though common, assume that parents and LEAs can purchase services at the same price – an assumption that I consider fundamentally flawed. Without a cap, parents may purchase educational services that go above and beyond what the District must otherwise provide, no matter the dollar-per-hour cost of those services.[18]

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[17] *See also I.H. v. Cumberland Valley School District, ODR No. 01481-1011 KE and 01589-1011 KE (Hearing Officer Ford); P.V. v. School District of Philadelphia, ODR No. 01541-1011AS (Hearing Officer Ford); Student v. Plum Borough School District, ODR File No. 00628-09-10-AS (Hearing Officer McElligott); M.G. v. Downingtown Area School District, ODR File No. 00857-0910KE (Hearing Officer Skidmore).*

[18] This lack of a cap is, admittedly, problematic when parents wish to purchase products instead of or in addition to services.

In this case, the Parents intend to use compensatory education to offset the cost of tuition at a private placement. The District argues that compensatory education cannot be used for this purpose. More specifically, the District argues in its closing that "compensatory education and the public funding of private tuition (typically referred to as "tuition reimbursement") are two separate and distinct remedies." In support of their position that compensatory education and tuition reimbursement are not interchangeable, the District cites to *P.P. v. West Chester Area School District*, 585 F3d 727 (3rd Cir. 2009). In *P.P.*, the Third Circuit indeed held that "compensatory education" and "tuition reimbursement" are not interchangeable.

The *P.P.* case concerns a student who was unilaterally enrolled in a private school. *Id* at 739. P.P.'s parents then demanded tuition reimbursement based on, *inter alia,* the school districts alleged failure to offer FAPE while the Student was enrolled in the private school. *Id* at 739-740. The *P.P.* court held that the Student's enrollment in a private school terminated any demand for compensatory education because, in part, tuition reimbursement and compensatory education are separate remedies. In making this determination, the court quoted approvingly from a special education appeals panel decision:[19]

> "[T]uition reimbursement and compensatory education are two distinct remedies. They are not interchangeable. Tuition reimbursement is a remedy to parents who have unilaterally placed their child in a private school when a district offers their child an inappropriate educational placement and the proposed IEP was inappropriate under the IDEA thereby failing to give the child FAPE. In contrast, compensatory education is a retrospective and in kind remedy for failure to provide an appropriate education for a period of time."

P.P. ex rel. Michael P. v. West Chester Area School Dist. 585 F.3d 727, 739-740 (3rd. Cir. 2009)(quoting *In re The Educational Assignment of J.D.*, ODR No. 1120 at 14 (Pa. Spec. Educ. Appeals Panel 2001).[20]

The decision in *P.P.* is consistent with other courts that have considered the issue. In *Ms. M. ex rel. K.M. v. Portland School Committee*, 360 F.3d 267 (1st Cir. 2004) the First Circuit held that permitting compensatory education in the form of tuition reimbursement would enable families to circumvent statutory restrictions on compensatory education. Similarly, the threshold for a compensatory education award (i.e. a finding that FAPE was denied) is significantly different from and lower than the standard for tuition reimbursement that have been established by the United States Supreme Court in

[19] Pennsylvania has since moved to a one-tier hearing system. Appeals of hearing officer decisions are now taken directly to any court of competent jurisdiction.

[20] The District notes that I have previously considered and rejected the use of compensatory education as tuition reimbursement in *J.T. v. Perkiomen Valley Sch. District*, ODR No. 2036-1011KE.

Burlington School Committee v. Department of Education of Massachusetts, 471 U.S. 359 (1985) and *Florence County School District v. Carter*, 510 U.S. 7, 15 (1993).[21]

For their part, the Parents point to the well-established principle that Hearing Officers have broad authority to fashion equitable relief to remediate and compensate for a denial of FAPE. This principle is articulated in both *Burlington* and, more recently, affirmed in *Ferren C.* The Parents also cite to one Hearing Officer's decision that explicitly permitted parents to use compensatory education to include tuition reimbursement. *N.H. v. Central Bucks Sch. Dist.*, ODR No. 1442-1011KE, (Carroll, 2011). Unlike this case, the decision in *N.H.* concerns a student who was already attending a private placement. Further, the order for compensatory education as tuition reimbursement is only triggered if the parties cannot agree to programming. But, even more importantly, when the United States Court of Appeals for the Third Circuit and an administrative Hearing Officer adopt different standards – and especially when the Hearing Officer's standard is highly fact-specific – I must defer to the Third Circuit.

I find that, as a matter of law, compensatory education cannot be used to offset the cost of tuition reimbursement at a private school.

Conclusion

The Parents have proven by preponderant evidence the specific misrepresentations exception to the IDEA's statute of limitations applies in this case. The IDEA's statute of limitations, therefore, does not apply. The Parents have also proven by preponderant evidence that the Student was denied a FAPE in the 2008-09 (third grade), 2009-10 (fourth grade), 2010-11 (fifth grade), and 2011-12 (sixth grade) school years. To remedy that denial, two and one half (2.5) hours of compensatory education will be awarded for each day that school was in session during each of those school years. Compensatory education shall continue to accrue at the same rate until an appropriate IEP is offered to the Student. Parents may choose how compensatory education is used within parameters set in the following Order. No dollar-per-hour cap on compensatory education will be ordered, but the Parents may not use compensatory education to offset the cost of tuition reimbursement.

An Order consistent with the foregoing follows.

[21] The minutia of the so-called "*Burlington/Carter*" test need not be discussed here.

ORDER

And now, August 31, 2012, it is hereby order as follows:

1. The Student did not receive a free appropriate public education in the 2008-09, 2009-10, 2010-11 or 2011-12 school years in violation of the IDEA.

2. The Student is hereby awarded 2.5 hours of compensatory education for each day that school was in session during the 2008-09 school year; and

3. The Student is hereby awarded 2.5 hours of compensatory education for each day that school was in session during the 2009-10 school year; and

4. The Student is hereby awarded 2.5 hours of compensatory education for each day that school was in session during the 2010-11 school year; and

5. The Student is hereby awarded 2.5 hours of compensatory education for each day that school was in session during the 2011-12 school year; and

6. The Student is hereby awarded 2.5 hours of compensatory education for each day that school is or will be in session from the end of the 2011-12 school year until such time as an appropriate IEP is offered to the Student; and

7. The Parents may decide how the hours of compensatory education are spent. The compensatory education may take the form of any appropriate developmental remedial or enriching educational service, product or device that furthers the goals of the Student's current or future IEPs. The Compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided through the Student's IEP to assure meaningful educational progress; and

8. No dollar-per-hour cap on compensatory education is established and Parents may apply compensatory education regardless of any per-hour cost; and

9. Compensatory education shall not be used to offset the cost of tuition at any private placement.

It is **FURTHER ORDERED** that any claim not specifically addressed in this order is **DENIED** and **DISMISSED**.

/s/ Brian Jason Ford
HEARING OFFICER