DECISION

COVER SHEET

DUE PROCESS SPECIAL EDUCATION HEARING

FILE NUMBER:	3264/11-12AS
RESPONDENT/SCHOOL DISTRICT (LEA):	Midd-West School District
SCHOOL DISTRICT COUNSEL:	Sharon O'Donnell, Esquire
STUDENT:	M.S.
PETITIONER/PARENTS:	Parents
COUNSEL FOR STUDENT/PARENT	Phillip Drumheiser, Esquire
INITIATING PARTY:	Parents
DATE OF DUE PROCESS COMPLAINT:	June 12, 2012
DATE OF HEARING:	July 18 and 19, 2012
PLACE OF HEARING:	Midd-West High School
OPEN vs. CLOSED HEARING:	Closed
STUDENT PRESENT:	No
RECORD:	Verbatim-Court Reporter
DECISION TYPE:	Electronic
DUE DATE FOR DECISION:	August 26, 2012
HEARING OFFICER:	James Gerl, Certified Hearing Official

DECISION

DUE PROCESS HEARING

File No.: 3264/11-12

PRELIMINARY MATTERS

A prehearing conference by telephone conference call was convened herein on June 29, 2012. As a result of said conference, a prehearing conference Order was entered herein. Said Order is incorporated herein by reference.

At said prehearing conference, counsel for the parties informed the hearing officer that all issues contained in the due process complaint, except the issue of compensatory education if there had been a violation of IDEA, were resolved by the parties by mutual agreement at the resolution session herein.

No motions to extend the hearing officer's decision deadline were filed in this case. The deadline for the hearing officer's decision is August 26, 2012.

Prior to the hearing, counsel for the parties filed a joint prehearing memorandum. Such memorandum contained numerous stipulations of fact, and it defined the issue presented for purposes of this due process hearing. Said

memorandum also contained information concerning exhibits and witnesses. The parties' joint prehearing memorandum is incorporated by reference herein.

Subsequent to the hearing, both parties filed written briefs and proposed findings of fact. All proposed findings, conclusions and supporting arguments submitted by the parties have been considered. To the extent that the proposed findings, conclusions and arguments advanced by the parties are in accordance with the findings, conclusions and views stated herein, they have been accepted, and to the extent that they are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the material issues as presented. To the extent that the testimony of various witnesses is not in accord with the findings as stated herein, it is not credited.

Personally identifiable information, including the names of parties and similar information is provided on the cover sheet hereto which should be removed prior to distribution of this decision to the public. FERPA, 20 U.S.C. § 1232(g) and IDEA § 617(c).

ISSUE PRESENTED

The issue presented in this due process hearing, as identified by the parties in the prehearing conference and confirmed in their joint prehearing memorandum, is as follows:

1. Should Respondent be ordered to provide compensatory education to the student?

FINDINGS OF FACT

Based upon the parties' stipulations of fact as contained in their joint prehearing memorandum, the hearing officer makes the following findings of fact:

1. The student's date of birth is [redacted] (Stip-1). (References to stipulations of fact in the parties' joint prehearing memorandum are hereby referenced as "Stip-1," etc.).

2. The student resides with [the student's] mother and father. (Stip-2)

3. The student is presently enrolled in Respondent's school district. (Stip-3)

4. Due to academic and behavior concerns, the student's parents requested that [the student] be evaluated by the district to determine if [the student] was eligible for special education services. (Stip-4)

5. An initial evaluation report was completed by the school district on May 18, 2011, and it concluded that the student was eligible for special education services in the eligibility category of other health impairment. (Stip-5)

6. The school district issued an IEP dated June 8, 2011 and the parents approved the IEP by signing the Notice of Recommended Educational Placement which was also dated June 8, 2011. (Stip-6)

7. The Notice of Recommended Educational Placement dated June 8, 2011 changed the student's placement to a new elementary school that the school district stated would provide better access to behavior and math support services. (Stip-7)

8. A second IEP dated October 11, 2011 was issued by the school district and the parents approved it in the Notice of Recommended Educational Placement dated October 11, 2011. (Stip-8)

9. The district completed a functional behavioral assessment and drafted a positive behavior support plan dated December 15, 2011. (Stip-9)

10. The parents approved the positive behavior support plan by signing a Notice of Recommended Educational Placement dated December 22, 2011. (Stip-10)

11. The parents provided to the district a neuropsychological evaluation report dated January 5, 2012 which was completed by a clinical neuropsychologist. (Stip-11)

12. The parents requested a reevaluation for the student and the district issued a Permission to Evaluate form dated January 6, 2012, which the parents approved and signed on January 30, 2012. (Stip-12)

13. The parents requested an IEP meeting for the student in February 2012 and the district rejected their request and issued a Notice of Recommended Educational Placement dated March 1, 2012 which noted the school district's refusal to hold an IEP meeting. (Stip-13)

14. The school district's reevaluation report is dated March 23, 2012. (Stip-14)

15. A reevaluation meeting was held on March 28, 2012. (Stip-15)

16. The parents disagreed with the reevaluation report and requested an independent educational evaluation at public expense which is being disputed by the parties in a separate due process hearing proceeding. (Stip-16)

17. The parties agreed at the resolution meeting that the student will continue to be a student receiving learning support services in the regular education classroom for 93% of the school day for the 2012-2013 school year. (Stip-17)

18. The parties agreed at that the resolution meeting that the school district will conduct the SaS Toolkit process utilizing PaTTAN and the intermediate unit personnel during the first marking period of the 2012-2013 school year. (Stip-18)

Based upon the evidence in the record, the hearing officer makes the following findings of fact:

19. The October 11, 2011 IEP for the student provides that the student will spend 93% of [the student's] time in the regular education classroom. Said IEP also provides for specially designed instruction and goals to address the student's needs. Said IEP includes numerous modifications and accommodations to help support the student. Said IEP provides for emotional/social work support as a related service for 30 minutes every six day cycle. Said IEP also includes consultations between the regular education teacher and special education teachers, as well as support from emotional support staff. Said IEP specifies that Respondent's special education director will be the "single point of contact" person for the mother to contact when she has concerns regarding the student's IEP. (P-4; T of the student's mother) (References to exhibits shall hereafter be referred to as "P-1," etc. for the Petitioners' exhibits; "R-1," etc. for the Respondent's exhibits and "HO-1," etc. for the hearing officer exhibits; references to testimony at the hearing is hereafter designated as "T".)

20. The student's regular education teacher was primarily responsible for providing the specifically designed instruction pursuant to the student's IEP. (T of student's regular education teacher.)

21. The student was often disrespectful to [the student's] assigned aide during math class. The student resisted her efforts to assist [the student]. (T of

student's regular education teacher; T of student's special education learning support teacher)

22. On December 15, 2011, with the assistance of a behavior consultant from the intermediate unit, Respondent developed a functional behavioral assessment of the student. The FBA identified the functions of the student's inappropriate behaviors as avoiding, escaping or postponing assigned tasks and gaining adult attention in the form of redirection and prompting. (P-7; T of behavior consultant from intermediate unit)

23. On December 15, 2011, with the assistance of a behavior consultant from the intermediate unit, Respondent developed a positive behavior support plan to address the student's problem behaviors. The student's mother expressed concerns about the behavior plan, and the behavior consultant responded in writing with explanations of the plan and responses to each concern. (P-8; T of behavior consultant from intermediate unit; P-12; P-18; P-17)

24. Respondent's emotional support teacher was primarily responsible for implementing the student's positive behavior support plan. The student reported to the emotional support teacher for the first 15 minutes of the school day in order to gear up for the day and for the last 15 minutes of the school day in order to wind down and prepare for [the student's] homework assignments. During this time, [the

student] talked with the emotional support teacher about problems that [the student] might have been encountering. (T of emotional support teacher; P-4)

25. On December 14, 2011 and January 5, 2012, a neuropsychologist performed a neuropsychological assessment of the student. The report of said assessment concludes that the student has a nonverbal learning disability. Said report does not contain academic recommendations because no academic testing was conducted. The report recommends a follow-up intervention plan by a specific named school psychologist. In addition, said report contains other recommendations based upon the needs of students with nonverbal learning disabilities in general. (P-11)

26. The parent shared the neuropsychological evaluation at first with just the school psychologist and the special education director, but later provided it to the IEP team members. As a result, Respondent conducted a reevaluation of the student.(T of student's mother; P-18; P-20)

27. In a reevaluation report dated March 23, 2012, Respondent considered the neuropsychological evaluation report, but did not change the student's category of disability or adopt the diagnosis of nonverbal learning disability. In said reevaluation report, Respondent noted that the student's classroom teacher stated that the student was functioning as an average student with [the student's] fellow classmates in mathematics. The student's social worker reported that she had a positive working

relationship with the student. The social worker noted that the student was making progress and recommended that [the student] maintain at the current level of social work services. The reevaluation report notes that all of the student's teachers felt that the IEP and positive behavior support plan for the student were adequately meeting [the student's] needs academically, behaviorally and socially. (P-20)

28. Petitioner's expert school psychologist conducted a psychological evaluation of the student on May 19, 2012 and May 26, 2012. An initial draft report of the evaluation was prepared on June 20, 2012. Among the recommendations contained in the report is that the student's category of eligibility for special education be changed to specific learning disability as a result of the neuropsychologist's diagnosis of nonverbal learning disability. Petitioner's expert school psychologist changed his initial report to include the specific learning disability recommendations as a result of conversations with the parent in order to make the parent feel more included in the process. (P-31; T of Petitioner's school psychologist)

29. The student was an average student. [The student] was making academic progress pursuant to [the student's] educational plan as contained in [the student's] IEP, including progress in math. [The student's] final grades on [the student's] report card for the 2011-2012 school year were: C in reading; D in writing; C in mathematics; D in spelling; C in social studies; B in science and A's in art, physical education and

music (P-30; P-20; T of the student's general education teacher; T of the student's special education learning support teacher; R-4)

30. The student's behaviors at school fluctuated. With the exception of a flare-up around the Christmas holidays and one other flare-up, the student's behaviors were fairly well controlled pursuant to [the student's] positive behavior support plan until very late in the school year. (T of the student's regular education teacher)

31. The student's inappropriate behaviors increased significantly at the end of the school year. Many of these behaviors were of a [redacted] nature. [Redacted.] (R-3; P-23; T of student's mother; P-26 ; P-27; P-28; P-29)

32. On May 25, 2012, the student [redacted]. The student received a three-day out of school suspension [redacted]. (R-3; P-28, P29; T of student's mother)

33. As a result of the changes in the nature of the behaviors that the student was exhibiting at the end of the school year, Respondent's special education director and the behavior consultant from the intermediate unit were considering conducting another functional behavioral analysis to determine whether additional interventions would be necessary for the student. (T of behavior consultant from intermediate unit)

34. In October, 2011 the special education director for Respondent imposed a restriction upon the communications that the mother was allowed to make concerning the student's IEP. Said restriction prevented the student's mother from talking to any IEP team member other than the special education director concerning

the student's IEP. Respondent special education director did not discuss with the mother whether she had been abusing her right to participate or otherwise provide a warning to the mother prior to imposing the restriction. The restriction on communications by the mother was announced at an IEP team meeting. This was the first time that the parent learned that Respondent considered her communications with other IEP team members to be improper. The student's mother felt extremely frustrated as a result of the restrictions; she felt that she was not part of the team. (T of Respondent's special education director; P-4; T of student's mother)

35. The student's mother requested all educational records concerning the student prior to the hearing. Once she reviewed the e-mails that were provided, she found an email in which the special education director made a joke with another IEP team member [redacted]. In another e-mail from the special education director to the behavior consultant at the intermediate unit in the context of the parent having contacted the behavior consultant directly instead of going through the special education director, the special education director asked the behavior consultant "…shall I spank her for sending you this e-mail?" In another e-mail, Respondent's special education director referred to the student's mother as the student's "mouthpiece." (T of the student's mother)

36. Toward the end of the school year, the student's mother terminated the student's social work support services that [the student] was receiving from

Respondent's social worker. The mother terminated [the student's] social work services in large part because she thought that the social worker was trying to bait the student into using inappropriate internet websites. (T of student's mother)

37. For the last few days of the 2011-2012 school year, the student was placed on homebound instruction and received instruction from [the student's] regular education classroom teacher at the library because of anxiety issues the student was experiencing. (T of the student's mother; T of the student's regular education teacher)

38. The student had been receiving private counseling services since the second grade. The student's parents have not shared information with regard to the private counseling with school district staff. (T of student's mother)

39. The student's IEP was reasonably calculated to confer meaningful educational benefit. (Record evidence as a whole)

40. Respondent denied FAPE to the student by failing to provide meaningful participation to the student's mother in [the student's] educational process. (Record evidence as a whole)

41. Respondent appropriately addressed the student's behavioral needs until the end of the 2011-2012 school year when the student's behaviors began to impede [the student's] learning. (Record evidence as a whole)

CONCLUSIONS OF LAW

Based upon the arguments of the parties, and upon all of the evidence in the record, as well as legal research by the hearing officer, the hearing officer makes the following conclusions of law:

1. To determine whether a child with a disability has been provided FAPE, the two part Supreme Court test involves first whether or not the schools have substantially complied with the procedural safeguards in the Act and an analysis of whether the student's IEP is reasonably calculated to confer meaningful educational benefit. Bd. of Educ., etc. v. Rowley, 458 U.S. 178, 102 S. Ct. 3034, 553 IDELR 656 (1982); LE and ES ex rel. MS v. Ramsey Bd. of Educ., 433 F.3d 384, 44 IDELR 269 (3d Cir. 2006); Ridley School District v. MR and JR ex rel. ER, 680 F.3d 260, 58 IDELR 271 (3d Cir. March 3, 2012).

2. The law does not require the district to maximize the potential of a student with a disability or to provide the best education possible; rather, it requires that an IEP be reasonably calculated to provide the basic floor of educational opportunity. Bd. of Educ., etc. v. Rowley, 458 U.S. 178, 102 S. Ct. 3034, 553 IDELR 656 (1982); Ridley School District v. MR and JR ex rel. ER, 680 F.3d 260, 58 IDELR 271 (3d Cir. March 3, 2012).

3. IDEA does not concern itself with labels, but whether a student with a disability is receiving a free and appropriate public education; a disabled child's IEP must be tailored to the unique needs of that particular child. Heather S. v. State of Wisconsin, 125 F.3d 1045, 26 IDELR 870 (7th Cir. 1997); Fort Osage R-1 School District v. Sims ex rel. BS, 841 F.3d 996, 56 IDELR 282 (8th Cir. 2011). Regardless of the category of eligibility, each child with a disability is entitled to individually designed special education and related services. DB by LB v. Houston Independent School District, 48 IDELR 246 (D. Tex. 2007); Pohorecki v. Anthony Wayne Local Sch Dist 637 F.Supp.2d 547, 53 IDELR 22 (N.D. Ohio 2009). The child's identified needs, not the child's disability category, determines the services that must be provided to the child. Maine Sch Administrative Dist No 56 v. Ms W ex rel KS 47 IDELR 219 (D. Maine 2007); Letter to Anonymous, 48 IDELR 16 (OSEP 2006); see also, analysis of comments (pertaining to federal regulations), 71 Fed. Register 156 at p. 46586, 46588 (OSEP August 14, 2006); In re Student With a Disability, 52 IDELR 239 (SEA WV 2009); Letter to Audin, 58 IDELR 51 (OSERS March 7, 2011); Letter To Brumbaugh 108 LRP 33562 (OSEP 2008).

4. Under IDEA, a medical practitioner, or other expert may not simply prescribe special education or components of an IEP; rather, the IEP team must consider all relevant factors. Marshall Joint School District No. 2 v. CD by Brian and

Traci D., 616 F.3d 632, 54 IDELR 307 (7th Cir. 2010); District of Columbia Public Schools 111 L.R.P. 76506 (SEA D.C. 2011).

5. The student's behaviors toward the end of the school year were impeding [the student's] learning and that of others and, therefore, needed to be addressed by Respondent. IDEA §614(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i).

6. The IEP process is collaborative in nature. The intent of Congress in designing IDEA was that parents and school districts would work together to benefit children with disabilities. Schaffer v. Weast, 546 U.S. 49; 44 IDELR 150 (U.S. S. Ct. 2005); Ridley School District v. MR and JR ex rel. ER, 680 F.3d 260, 58 IDELR 271 (3d Cir. 2012); DS & AS ex rel DS v. Bayonne Bd of Educ 602 F.3d 553, 54 IDELR 141 (3d Cir. 2010).

7. A parent of a student with a disability has a right to actively and meaningfully participate in the IEP development process and in the education of their child. IDEA § 615(f)(3)(E)(ii)(II); 34 C.F.R. § 300.322; Pa. Code § 14.102(a)(2)(xxvii); See, Deal v. Hamilton County 392 F.3d 840, 42 IDELR 109 (6th Cir. 2004). A parent is guaranteed a large measure of participation throughout the process. Bd. of Educ., etc. v. Rowley, 458 U.S. 178, 102 S. Ct. 3034, 553 IDELR 656 (1982); Ridley School District v. MR and JR ex rel. ER, 680 F.3d 260, 58 IDELR 271 (3d Cir. 2012); DS & AS ex rel DS v. Bayonne Bd of Educ 602 F.3d 553, 54 IDELR 141 (3d Cir. 2010).

8. The IEP prepared for the student by Respondent is reasonably calculated to confer meaningful educational benefit.

9. Until the end of the school year, the IEP developed by Respondent for the student as supplemented by the positive behavior support plan was effectively addressing the student's behaviors. Later in the school year, the student's behaviors were impeding [the student's] learning.

10. Respondent denied FAPE to the student, and thus violated IDEA, by failing to allow meaningful participation in the student's education by the student's mother.

11. A special education due process hearing officer has broad equitable powers to award appropriate relief whether a local education agency such as the school district has violated IDEA. The School Committee Town of Burlington v. Department of Educ., 471 U.S. 358, 369, 105 S. Ct. 1996, 556 IDELR 389 (1985); Forest Grove Sch. Dist. v. T. A., 129 S. Ct. 2484, 52 IDELR 151, n. 11 (U.S. 2009); Reid ex rel. Reid v. District of Columbia, 401 F.3d 516, 43 IDELR 32 (D.C. Cir. 2005); Garcia v. Board of Education of Albuquerque Public Schools, 530 F.3d 1116, 49 IDELR 241 (10th Cir. 2008); In re Student with a Disability, 108 L.R.P. 25824 (SEA WV 2008); Dist of Columbia Public Schs 111 LRP 76506 (SEA DC 2011); In re Student with a Disability 111 LRP 40544 (SEA WV 2011).

12. All relief under IDEA is equitable in nature. Compensatory services or compensatory education should be flexible and designed to remedy harm caused by a violation of IDEA. Relief under IDEA should be tailored to the specific facts and circumstances of a particular case, the nature and severity of the violation and the nature and severity of the student's disability. Reid ex rel. Reid v. District of Columbia, 401 F.3d 516, 43 IDELR 32 (D.C. Cir. 2005).

13. Four hours of counseling or similar services as compensatory education and/or compensatory services is appropriate to remedy the harm caused by the denial of FAPE in this case.

DISCUSSION

1. Merits

Issue No. 1: Should Respondent be required to provide compensatory education to the student?

The sole remaining issue in this case involves whether the student should receive compensatory education. The other issues in the due process complaint involved whether the student should return to [the student's] regular education classroom and whether the Respondent should conduct an SaS toolkit for the student;

both issues were resolved at the resolution meeting prior to the hearing. Petitioner has withdrawn the other two issues.

Compensatory education is a form of relief. A parent/student is only entitled to compensatory education or other relief if there has been a denial of FAPE or other violation of IDEA.

In this case, Petitioner alleges a denial of FAPE. To determine whether a child with a disability has been provided FAPE, the two part Supreme Court test involves first whether or not the schools have substantially complied with the procedural safeguards in the Act and an analysis of whether the student's IEP is reasonably calculated to confer meaningful educational benefit. Bd. of Educ., etc. v. Rowley, 458 U.S. 178, 102 S. Ct. 3034, 553 IDELR 656 (1982); LE and ES ex rel. MS v. Ramsey Bd. of Educ., 433 F.3d 384, 44 IDELR 269 (3d Cir. 2006); Ridley School District v. MR and JR ex rel. ER, 680 F.3d 260, 58 IDELR 271 (3d Cir. 2012). The law does not require the district to maximize the potential of a student with a disability or to provide the best education possible; rather, it requires that an IEP be reasonably calculated to provide the basic floor of educational opportunity. Bd. of Educ., etc. v. Rowley, 458 U.S. 178, 102 S. Ct. 3034, 553 IDELR 656 (1982); Ridley School District v. MR and JR ex rel. ER, 680 F.3d 260, 58 IDELR 271 (3d Cir. 2012).

In the instant case, the student's mother contends that the student was struggling academically. The witnesses called by the school district, on the other hand, testified that the student was making academic progress and receiving passing grades in [the student's] regular education classroom, and that [the student] was an average student. To the extent that the testimony of the student's mother is not consistent with the testimony of Respondent's witnesses concerning this issue, the testimony of Respondent's witnesses is more credible and persuasive than the testimony of Petitioner's witnesses. In addition to the demeanor of the witnesses, the testimony of Respondent's witnesses is supported by the documentary evidence in the record, including the student's grades, as well as Respondent's thorough reevaluation report. It is concluded that the student's IEP was reasonably calculated to confer meaningful educational benefit and that the student was receiving meaningful educational benefit.

The student's parents also contend that the IEP is inappropriate because respondent failed to change the student's category of disability for eligibility to learning disability. In addition, the parents argue that Respondent erred by not adopting a diagnosis provided by a neuropsychologist, specifically, that the student had a non-verbal learning disability.

The parents' focus on the category of disability is misplaced. IDEA does not concern itself with labels, but whether a student with a disability is receiving a free and appropriate public education; a disabled child's IEP must be tailored to the unique needs of that particular child. Heather S. v. State of Wisconsin, 125 F.3d 1045, 26 IDELR 870 (7th Cir. 1997); Fort Osage R-1 School District v. Sims ex rel. BS, 841 F.3d 996, 56 IDELR 282 (8th Cir. 2011). Regardless of the category of eligibility, each child with a disability is entitled to individually designed special education and related services. DB by LB v. Houston Independent School District, 48 IDELR 246 (D. Tex. 2007); Pohorecki v. Anthony Wayne Local Sch Dist 637 F.Supp.2d 547, 53 IDELR 22 (N.D. Ohio 2009). The child's identified needs, not the child's disability category determines the services that must be provided to the child. Maine Sch Administrative Dist No 56 v. Ms W ex rel KS 47 IDELR 219 (D. Maine 2007); Letter to Anonymous, 48 IDELR 16 (OSEP 2006); See also, Analysis of Comments (pertaining to federal regulations), 71 Fed. Register 156 at p. 46586, 46588 (OSEP August 14, 2006); In re Student With a Disability, 52 IDELR 239 (SEA WV 2009); Letter to Audin, 58 IDELR 51 (OSERS March 7, 2011); Letter To Brumbaugh 108 LRP 33562 (OSEP 2008).

Accordingly, the parents' focus on the category of disability, and more particularly upon the nonverbal learning disability diagnosed by the neuropsychologist, is misplaced. All parties agree that the student is eligible for

special education and related services under IDEA. No further analysis of category of disability is necessary or relevant.

The parents' expert school psychologist testified that the category of disability should have been changed to learning disability in order to make the parent feel more included. Petitioner cites no authority in [the] post-hearing brief for the proposition that the school district must change the category of disability to make a parent feel more included. IDEA does not require such an action by a school district. Indeed, there is a danger if a school district were to pursue such an action that it might mislead a parent, particularly if a parent were unsophisticated, to believe that services are determined based upon eligibility category. Such stereotyping of children with disabilities is the opposite of the intended consequence when Congress passed IDEA. Students with disabilities are **individuals**.

In addition, the law does not require that a school district make changes to a student's IEP in order to reflect the diagnosis made by the neuropsychologist and endorsed by the parent's school psychologist, that the student had a nonverbal learning disability. Under IDEA, a medical practitioner, or other expert may not simply prescribe special education or components of an IEP; rather, the IEP team must consider all relevant factors. Marshall Joint School District No. 2 v. CD by Brian and Traci D., 616 F.3d 632, 54 IDELR 307 (7th Cir. August 2, 2010); District of

Columbia Public Schools 111 L.R.P. 76506 (SEA D.C. 2011). A school district is required to consider any evaluation or other input provided by a parent, and the record evidence in this case reveals that the school district did consider the opinion of the neuropsychologist that the student had a nonverbal disability, but rejected his conclusion. Accordingly, it is concluded that the school district duly considered the input from the parent, including the report of the neuropsychologist.

The testimony of Petitioner's expert school psychologist is accorded no weight. In addition to the factors discussed above, the testimony of said expert is impaired by the fact that he apparently views the role of special education as that of potential maximizing. Said expert also had a difficult time tying his conclusions to any academic effect upon the student and to the extent that he did draw such conclusions, they were not contained in his written draft report. More importantly, said expert school psychologist testified that the Respondent's functional behavioral analysis was deficient because it did not identify the function of the student's behaviors. Petitioner's post hearing brief includes an argument to this effect, claiming that the functional behavioral analysis is fatally flawed as a result. However, as Respondent's counsel pointed out in cross-examining the witness, said expert drew his conclusions concerning the functional behavioral analysis without ever looking at the report of the functional behavioral analysis. Instead, he relied solely upon a summary of the functional behavioral analysis contained in Respondent's reevaluation report. In fact,

the functional behavioral analysis prepared by Respondent does identify the functions of the student's behavior. The FBA identified the functions of the student's inappropriate behaviors as avoiding, escaping or postponing assigned tasks and gaining adult attention in the form of redirection and prompting. The testimony of Petitioner's expert school psychologist in this regard is highly problematic. That said witness would draw such a serious conclusion without even looking at the document he is criticizing seriously impairs the credibility and persuasiveness of his testimony.

Petitioner raises one additional argument. The due process complaint alleges that Respondent ridiculed the student's mother and limited her communication with IEP team members concerning the student's IEP. The IEP process is designed to be a collaborative process that encourages parents and school districts to work together for the benefit of a child with a disability. Schaffer v. Weast, 546 U.S. 49; 44 IDELR 150 (U.S. S. Ct. November 14, 2005); Ridley School District v. MR and JR ex rel. ER, 680 F.3d 260, 58 IDELR 271 (3d Cir. 2012). Where a school district significantly impedes the parent's opportunity to participate in the decision making process, it denies a free and appropriate public education to the student. IDEA § 615(f)(3)(E)(ii)(II); 34 C.F.R. § 300.513(a)(2)(ii); Pa. Code § 14.102(a)(2)(xxvii); Bd. of Educ., etc. v. Rowley, 458 U.S. 178, 102 S. Ct. 3034, 553 IDELR 656 (1982); Ridley

School District v. MR and JR ex rel. ER, 680 F.3d 260, 58 IDELR 271 (3d Cir. 2012); DS & AS ex rel DS v. Bayonne Bd of Educ 602 F.3d 553, 54 IDELR 141 (3d Cir. 2010); See, Deal v. Hamilton County 392 F.3d 840, 42 IDELR 109 (6th Cir. 2004).

In the instant case, it is clear that mom is a handful. She has engaged in a high volume of communication with the teachers and related service providers and other persons who worked with the student concerning [the student's] IEP and [the student's] education in general. Given the volume of communication coming from the student's mother, Respondent would have been well within its rights to place a reasonable limit on her communications with IEP team members. However, given the collaborative nature of the IEP process, it would seem reasonable to require Respondent to first at least confer with the student's mother, tell her that there is a problem and request that the number and volume of communications be limited. At a minimum, there should have been some kind of a warning. In this case, however, Respondent did not even consider conferring with the student's mother or otherwise warning her before imposing the limitation. Accordingly, the sanction was arbitrary and it did not include the mom in the process of helping to restrict the volume and number of communications. Instead, Respondent's special education director simply made the decision acting on his own, without communicating in any way with the student's mother first, that all communications by the mother concerning the student's IEP had to go through the special education director. This arbitrary

decision by Respondent was announced by the special education director at an IEP team meeting, and it was written into the student's IEP. The testimony of Respondent's special education director concedes that this severe restriction was made without any attempt to first sit down with the mother to address the volume and nature of her communications.

The special education director also ridiculed the student's mother in a number of emails to other IEP team members. One email contained [redacted]. Another called her the student's mouthpiece. Another email by the special education director criticized the mother for communicating directly with the behavior consultant at the intermediate unit rather than going through him and asked whether he should "spank" the mother. This sort of mean-spirited and unprofessional behavior stands the collaborative nature of IDEA on its head. Even though the special education director gave rebuttal testimony after the mother testified in this matter, the testimony of the mother concerning these ridiculing emails stands unrebutted. The mother's testimony concerning these ridiculing emails is credible and persuasive. There is no place in the system designed by IDEA for one IEP team member to ridicule a parent to other team members; the development of an education plan for a child with a disability is not intended to be a mean and nasty process. Respondent's ridicule of the student's mother is inexcusable.

When coupled with the insulting and ridiculing e-mails concerning the mother that were sent to IEP team members by the Respondent's special education director, the arbitrary limit on communications clearly had a chilling effect upon the mother's participation as a full and equal IEP team member. She testified that she was very frustrated by the limitation. She was certainly not made to feel that she was an equal team member.

It is true that the mother actively participated in IEP team meetings and even utilized the services of both an advocate and an attorney to assist her at such meetings. However, pursuant to the intent of Congress in adopting IDEA, the IEP team was designed to be an interdisciplinary group of diverse persons charged with developing a good IEP for a student with a disability after a rich discussion and dialog among persons with different perspectives. Congress certainly intended the parent to be a full partner in the IEP team process. Respondent's arbitrary communication limit and Respondent's ridiculing of the parent appear to have had a chilling effect upon the mother's participation as an IEP team member. The mother testified that she did not feel like she was a member of the team. In addition, it caused serious trust issues between the student's parents and the school district.

The issues involving trust surfaced dramatically near the end of the school year when the student's mother clearly overreacted to the actions of Respondent's social

worker who was providing the related service of counseling to the student. The mother's cancellation of social work services for the student as a result of a fear that the social worker was trying to trap the student into going to an inappropriate website on a computer might seem almost paranoid in isolation, but in view of the trust issues directly caused by the actions of Respondent's special education director, the mom's overreaction seems much less crazy and perhaps almost understandable. Cancellation of the social worker services by the parent was the direct result of the trust issues caused by Respondent which impaired the student's mother's meaningful participation in the student's educational process.

The student's behaviors toward the end of the school year were impeding [the student's] learning and therefore needed to be addressed. IDEA §614(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i). Up until that point, Respondent had made good efforts to deal with the student's problem behaviors. As a result of consulting with an intermediate unit consultant and developing a positive behavior support plan based upon a functional behavioral analysis, it appeared that the student's behaviors were mostly under control with the exception of some flare-ups during the course of the school year. However, at the end of the school year, the student had a large set of inappropriate behaviors. This was exactly the time when the student would have benefited most from counseling with the Respondent's social worker. The social worker had a good rapport with the student, and [the student] was making progress

working on social-emotional issues with her. The student was deprived of the services of the social worker, however, as a result of a trust issue caused by the Respondent's impairment of the parent's opportunity to meaningfully participate in the education process.

It should be noted that the impairment of the parent's right to participate in the student's educational process by Respondent was more than a procedural violation that would require more to be actionable. See, Ridley School District v. MR and JR ex rel. ER, 680 F.3d 260, 58 IDELR 271 (3d Cir. March 3, 2012). Rather, the arbitrary limit on communication coupled with the outright ridicule of the parent, amounted to a substantive violation of IDEA involving a denial of FAPE.

It is not clear from the record whether the student's [redacted] misbehavior at the end of the school year was the result of [the student's] disability. [The student's] teachers testified that these were "choice" behaviors, but as the behavior consultant from the intermediate unit testified credibly and persuasively, Respondent was considering conducting a functional behavioral analysis with respect to these new behaviors but had not yet had the opportunity to do so. Only after such an analysis, can the functions and causes of the behavior be properly determined.

Respondent's efforts to address the student's problem behaviors were very good prior to the end of the school year, and they should be commended. After the

services of the social worker were refused by the student's mother, however, the student's behaviors appear to have deteriorated considerably.

It is concluded that Respondent denied FAPE to the student by preventing [the student's] mother from having a meaningful opportunity to participate in [the student's] educational process. The period of denial of FAPE consists [of] only the last portion of the school year

2. Relief

A special education due process hearing officer has broad equitable powers to award appropriate remedies when a local education agency, such as a school district, violates IDEA. The School Committee Town of Burlington v. Department of Educ., 471 U.S. 358, 369, 105 S. Ct. 1996, 556 IDELR 389 (1985); Forest Grove Sch. Dist. v. T. A., 129 S. Ct. 2484, 52 IDELR 151, n. 11 (U.S. 2009); Reid ex rel. Reid v. District of Columbia, 401 F.3d 516, 43 IDELR 32 (D.C. Cir. 2005); See, Garcia v. Board of Education of Albuquerque Public Schools, 530 F.3d 1116, 49 IDELR 241 (10th Cir. 2008); In re Student with a Disability, 108 L.R.P. 25824 (SEA WV 2008); Dist of Columbia Public Schs 111 LRP 76506 (SEA DC 2011); In re Student with a Disability 111 LRP 40544 (SEA WV 2011).

All relief under IDEA is equitable in nature. Compensatory services or compensatory education for a violation of IDEA should be flexible and designed to

remedy the harm caused by the violation of the Act. Relief under IDEA should be tailored to the specific facts and circumstances of a particular case, considering the nature and severity of the violation, and the nature and severity of the student's disability. Reid ex rel. Reid v. District of Columbia, 401 F.3d 516, 43 IDELR 32 (D.C. Cir. 2005).

In the instant case, the deprivation of FAPE was relatively short and only involved the period of time near the end of the school year. The direct result of the denial of FAPE was that the student failed to receive counseling as a related service by the Respondent's social worker. The testimony of the student's mother at the hearing was that the student was to receive social work for 30 minutes every six days. It is not clear from the record exactly how many sessions of counseling services with the social worker were missed. It was during this period of time, however, that the student's behaviors were seriously impeding [the student's] learning and that of other students. Based upon the evidence in the record and the particular facts and circumstances of this case, it appears reasonable to award the student four hours of counseling or similar services with a social worker or other qualified provider as compensatory education and/or compensatory services to remedy the harm caused by the denial of FAPE by the Respondent herein. Accordingly, the order portion of the decision will so provide. Because compensatory education awards must be flexible, the parties will have the option of changing the compensatory education award if both parties so

agree. If the parties agree that services other than counseling or a different amount of counseling would be appropriate, they may do so. If the parties do not so agree, the relief will be as stated in the order portion of the decision.

In addition to the compensatory education, given the nature of the violation in this case, Respondent shall also be ordered to treat the student's mother as a full and important member of the student's IEP team. The special education director must cease and desist from ridiculing her. If the parents once again begin to abuse their right to participate, for example by making an excessive number of communications, Respondent must first meet with the parents and provide a proper warning prior to imposing any reasonable restrictions.

ORDER

Based upon the foregoing, it is HEREBY ORDERED as follows:

1. Unless the parties agree otherwise, Respondent is hereby ordered to provide the student with four hours of counseling or similar services by a social worker or other qualified provider as compensatory education and/or compensatory services. Said compensatory education and/or compensatory services shall be provided to the student within one year of the date of this decision; and

2. Respondent is hereby ordered to treat the student's mother as a full and important member of the student's IEP team. Respondent's special education director is ordered to cease and desist from ridiculing her. If the parents once again begin to abuse their right to participate, for example by making an excessive number of communications, Respondent is ordered to first meet with the parents and provide a proper warning prior to imposing any reasonable restrictions; and

3. All other relief requested by instant due process complaint is hereby denied.

ENTERED: August 25, 2012

James Gerl

James Gerl, Certified Hearing Official
Hearing Officer

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served the foregoing DECISION by emailing a true and correct copy thereof to the following:

Phillip Drumheiser, Esquire
[redacted]

and

Sharon O'Donnell, Esquire
[redacted]

On this 25th day of August, 2012

James Gerl

James Gerl, Certified Hearing Official
Hearing Officer

SCOTTI & GERL
216 S. Jefferson Street
Lewisburg, WV 24901