

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

PENNSYLVANIA

SPECIAL EDUCATION HEARING OFFICER

DECISION

DUE PROCESS HEARING

Name of Child: I.H.

ODR #3281/11-12-KE

Date of Birth:
[redacted]

Dates of Hearing¹:
September 14, 2012
October 11, 2012

OPEN HEARING

Parties to the Hearing:

Representative:

Parents

Joseph Montgomery, Esquire
Montgomery Law LLC
1500 Walnut Street Suite 700
Philadelphia, PA 19102

School District of Philadelphia
440 North Broad Street
Philadelphia, PA 19130

Judith Baskin, Esquire
School District of Philadelphia
440 North Broad Street
Philadelphia, PA 19130

Date Record Closed:

November 3, 2012

Date of Decision:

November 18, 2012

Hearing Officer:

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

¹ The parties convened briefly on August 7, 2012 but because they believed they could settle the matter a hearing session was not held.

Background

Student² is an elementary-school-age resident of the School District of Philadelphia [District] who is eligible for special education pursuant to the Individuals with Disabilities Education Act [IDEA]³ under the classifications of Autism and Intellectual Disability and consequently a protected handicapped individual under Section 504 of the Rehabilitation Act of 1973 [Section 504],⁴ as well as the federal and state regulations implementing those statutes.

The current matter addresses the Parents' belief that Student has been denied a free appropriate public education [FAPE] in the District and their request for relief in the form of compensatory education and prospective placement in an approved private school.

The Parents sought to pierce the IDEA's two-year statute of limitations because of alleged misrepresentations by the District. The hearing officer found that the Parents failed to establish the existence of an exception to the statute of limitations, and Findings of Fact and Discussion on this topic are included below. For purposes of potential recovery, the relevant period is from June 17, 2010⁵ to the present.

Issues

1. Did the District deny Student a free appropriate public education [FAPE] through procedural and or substantive violations?
2. Should the District be required to and/or did the District agree to fund an independent psychological evaluation, an independent speech/language evaluation, an independent occupational therapy evaluation and an independent functional behavioral analysis with a concomitant positive behavior support plan?⁶
3. If the District denied Student a free appropriate public education what remedy is appropriate?
 - a. Should Student be awarded compensatory education and if so in what form and in what amount?
 - b. Should Student be placed in an Approved Private School at District expense?

² This decision is written without further reference to the Student's name or gender, and as far as is possible, other singular characteristics have been removed to provide privacy.

³ 20 U.S.C. §§ 1400 *et seq.*

⁴ 29 U.S.C. § 794.

⁵ Student was eligible for Extended School Year [ESY] services in the summer of 2010 but the Parents chose not to send Student because the program was being delivered at a different school building than the one Student had been attending. Therefore, the effective scope of this hearing is September 2010 through the present. [NT 284-285]

⁶ This issue reemerges in the form stated because on October 14, 2012 District's counsel averred that she did not make clear on the record of September 14, 2012 that the District had offered to fund the above-named evaluations *only as part of settlement negotiations* and in fact had not agreed to fund them outside the context of an agreement.

Findings of Fact

Exception to Statute of Limitations

1. Student attended the same District elementary school from kindergarten [2007-2008 school year] through the first two months of 3rd grade [2010-2011]. After not attending for the rest of 3rd grade, Student began attending another school in the District for 4th grade [2011-2012]. The Parent⁷ was active in Student's education.⁸ [NT 61]
2. The IEP of May 15, 2009 to be implemented in first grade indicates that Student would receive "1:1 assistance". [NT 70-71; J-22]
3. The IEP sign-in sheet does not carry Father's signature. He testified that he was at the meeting but that he was told he did not have to sign in if his wife signed in. [NT 87; J-22]
4. The Parent testified that he interpreted "1:1 assistance" in the IEP to mean a one-on-one aide.⁹ [NT 92-93]
5. The Parent testified that he was told that Student would have a one-on-one aide. [NT 72]
6. The IEP of 2010 to be implemented in second grade also indicates that Student would receive 1:1 assistance. [NT 72-74; J-16]
7. The Parent testified that he was told that Student would have a one-on-one aide. [NT 73-74]
8. The IEP of 2011 to be implemented in third grade indicates that Student would receive 1:1 assistance. [NT 94; J-13]
9. The IEP sign-in sheet does not carry Father's signature and Father testified that he did not attend that IEP meeting. [NT 93-94]
10. The Parent testified that the District told him Student had a one-on-one aide that was with Student at all times. [NT 83]
11. During the time Student was in third grade Student was in a class with eight children, a teacher and a classroom assistant. The classroom assistant helps aid the teacher in

⁷ From this point on "Parent" is used throughout this decision unless there is a specific reference to Student's Mother because Father was the active participant in the first hearing session with the understanding that he was acting on behalf of both Parents. At the second hearing session Father left the building before the start of the hearing for reasons explained in the beginning of the transcript. Mother was present on speakerphone once the hearing session convened.

⁸ From the beginning of the current school year [2012-2013] to the present Student has not been attending school.

⁹ The Parent testified that he was only recently told that one-on-one assistance in the IEP does not indicate a one-on-one aide. [NT 93]

teaching the lessons and also helps the children attend to instruction. The classroom assistant helps with materials, prompting children, escorting them from the room if they have a problem, and helping with lunch and other duties such as bathroom duties. [NT 151]

12. The Parent testified that he continued to believe Student had a one-to-one aide until an incident arose in 4th grade toward the end of the 2011-2012 school year.¹⁰ [NT 76]
13. The Parent acknowledged that at IEP meetings or other occasions when he was at the school he never inquired about personally meeting with or the whereabouts of the one-on-one aide he believed Student had. [NT 115-116]
14. The special education liaison explained to the Parents at the June 11, 2012 IEP meeting that Student had 1:1 assistance not a one-on-one assistant, and that Student did not have a one-on-one personal aide. [NT 147-148]
15. In March 2011 the Parent sought legal counsel and signed authorization for a records release. He did not pursue a due process case at that point because the fees the attorney was seeking seemed to the Parent equivalent to what it would take for Student to attend private school.¹¹ [NT 369-370]

Transfer Between District Schools

16. Following an alleged incident with a teacher on October 25, 2010 the Parents removed Student from school and requested transfer on October 27, 2010. The matter was investigated, and although the District deemed the allegations to be unfounded Student was approved for transfer to another elementary school as of December 21, 2010. [NT 63-66, 436; J-5]
17. The Parent testified that he was not aware that the process of transferring Student would take more than a few days. [NT 116-121]
18. Although Student was expected to appear at the new school on January 4, 2011 following the winter vacation the Parents did not send Student to the new school, and kept Student out of school, until the next school year in September 2011, causing Student to miss half of the 3rd grade school year and accumulate 123 days of absence. Student attended the new school for the entire 2011-2012 school year, 4th grade. [NT 63, 300; J-3]
19. Over the summer of 2012, the District offered the parents two additional elementary schools, and although the Parents initially were considering one of the options, they rejected these offers because neither of these schools has video surveillance. [NT 379]

¹⁰ When the Parent came to pick Student up after school on an early dismissal day it took some time to locate Student. [NT 344-349]

¹¹ The Parent offered this testimony against the advice of his counsel. [NT 369-370]

20. As of the second hearing session on October 11th the District is still holding a spot for Student in an autistic support classroom at one of these two schools should the Parents send Student to school. [NT 443]
21. By District policy there are no video cameras in the District's classrooms. [NT 434]
22. The Parents indicated that they fear sending Student to a District school, although Student's father testified that he might be open to a school that has video surveillance cameras in the classroom and if Student has a personal aide. [NT 350, 361, 383-384]
23. The Parents have not returned Student to school for the current 2012-2013 school year, causing Student to miss over one third of the 5th grade year so far. [NT 220, 352]
24. The Parent testified that he would have sent Student back to school this year but he felt the District was trying to "trick" him into signing the IEP at the June 11, 2012 IEP meeting when he was in pain and medicated after surgery.¹² [NT 358-359]
25. On the fifth full day of school for the current [2012-2013] school year the principal of Student's assigned school contacted the Parents about returning Student to school. The Parent felt slighted because the classroom teacher did not call him. [NT 353, 355]
26. The Parent testified that he is trying to set up a home schooling program with a charter school. He is not willing to set up home schooling through the District. [NT 381-382]
27. The Mother expressed to the private psychologist evaluator that Student regresses after breaks in programming. The evaluator agrees that this is a concern for her as well. [NT 513-514]

Evaluation

28. Students with intellectual disabilities must be reevaluated every two years and parents may not deem the reevaluation for these students unnecessary.¹³ [NT 227-228; P-9]
29. Student's reevaluation was due to be completed prior to the summer of 2012. [NT 231]
30. The District offered a Permission To Re-Evaluate [PTRE] on May 14, 2012 in order to commence an evaluation by June 2012 within the biennial timeline¹⁴. The classroom teacher handed the PTRE to the Mother when she came to pick Student up from school which she did daily. The teacher reminded the Mother on several occasions that the PTRE needed to be signed and returned. [NT 234; J-29]

¹² The Parent had been working off a double-sided draft copy of the IEP. The school staff person wanted to exchange it at the end of the meeting for the single-sided draft copy of the IEP which would be the "official" copy. [NT 288-289]

¹³ Parents of children with disabilities other than an intellectual disability may waive the periodic reevaluation.

¹⁴ Prior to the 2010 re-evaluation Student was only classified as autistic; in 2010 Student was also classified as intellectually impaired.

31. The Parents rejected the PTRE on June 17, 2012 and filed for due process that day. [J-29]

Program/Placement

32. In the fall of 2009 prior to Student's entry into first grade the Parents met with a District staff member. The Parent testified that he did not remember Student's Mother expressing her concern about Student's socialization and her wanting Student to have contact with regular education students. [NT 102-103]
33. Evaluations noted the Parents' concerns about Student's increasing socialization skills. [NT 138-140; J-17, J-27]
34. Prior to the June 11, 2012 IEP meeting the previous IEPs indicated Student was placed in Full-Time Autistic Support. [J-13, J-16, J-22]
35. The Parent testified that he was unaware that under these IEPs Student could have opportunities during the school day to be with regular education peers in specials classes or lunch and believed Student would only be with other autistic students at all times. [NT 88-91]
36. The 4th grade special education classroom teacher testified that during the time she was in the classroom the children in her room ate lunch in their classroom, had their special subjects [music art and gym] only with one another, and had recess with one another unless another class happened to be in the recess yard. This program comports with what the Parent believed Student was and should be receiving. [NT 247-249]
37. At the June 11, 2012 IEP meeting the IEP team drafted an IEP to be implemented for fourth grade. Both Parents attended the meeting. The Father was not feeling well during that IEP meeting, as he recently underwent surgery. The classroom teacher testified that Father was offered the opportunity to reschedule the IEP meeting; the Parent testified that he did not remember that offer. [NT 97-99, 268, 352; J-9]
38. At the IEP meeting District staff discussed a change from "Full-Time Autistic Support" to "Supplemental Autistic Support".¹⁵ The teacher explained that the fundamental difference would be the opportunity for Student to socialize with nondisabled peers. The Parent testified that he thought this meant that Student would no longer be in an Autistic Support classroom. [NT 100-101, 270, 273-274]
39. The Parent testified that he did understand he was being told that at various times Student would have the opportunity to be with regular education peers. [NT 101]
40. The Parent testified that he had not been aware previously that Student "was mixing with other regular school students". [NT 102]

¹⁵ A NOREP was issued reflecting this change shortly after a previous NOREP without the change was issued. [J-7 and J-8]

41. The Parent testified that he does not agree that Student should be given opportunities to socialize with other children to improve [Student's] social skills. He would like Student to have "full time autistic support". [NT 143]
42. In her conversation with the private psychologist evaluator on August 2, 2012 the Mother expressed her desire that Student be taught how to socialize with persons other than Student's siblings. [NT 513; P-11]
43. The District has not implemented the change in the program since Student has not yet attended school for the 2012-2013 school year [5th grade]. [NT 270]
44. The Parents have not approved the June 11, 2012 IEP. Given that the June 11, 2012 IEP was not approved by the Parents, when Student returns to school the old IEP will be implemented until the Parents approve the new IEP. [NT 270-271, 382]
45. If the Parents approve Supplemental Autistic Support, Student will spend 1 to 1 ½ hours per day with nondisabled peers in the company of the autistic support classroom teacher or the classroom assistant. [NT 272-273]
46. All the children in the Autistic Support Classroom to which Student would be assigned for 5th grade are transitioned into the Supplemental Autistic Support program.¹⁶ [NT 274-275]
47. If Full Time Autistic Support is indicated on a NOREP and that proposed placement is intended to be an approved private school [APS] or an interim alternative educational setting [IAES] the NOREP would specify that an out-of-District placement is being proposed. [NT 411-412]

Offer of FAPE in the Period Relevant to the Scope of the Hearing

48. Student's teacher for the first half of the 4th grade [2011-2012] year went on leave for family reasons. The teacher assigned to the class from January 2012 onward is certified in special education and is in the second year of a program for Applied Behavior Analysis. [NT 220]
49. Student's 4th grade classroom had eight students¹⁷; after May there were seven students. In addition to the classroom teacher and the classroom assistant, there were between two and three Therapeutic Staff Support [TSS] workers assigned to other students through behavioral health agencies, and a one-to-one aide assigned to another student. [NT 221]
50. The private psychologist saw Student on August 2, 2012 and met with the Mother and Student for approximately 1 1/2 hours. She focused on Student for approximately 45

¹⁶ After reviewing many of the District's IEPs State monitors determined that the District was miscalculating the least restrictive environment formulas in the IEPs of low incidence disability children and the District began to correct this problem in about the 2009-2010 school year. [NT 427-428]

¹⁷ State regulations permit no more than eight children to be assigned to an autistic support classroom. [NT 426]

minutes. She did not observe Student displaying anxiety or acting out behaviors. She did not observe Student in a school setting or observe the District's proposed classroom(s) or speak with Student's 4th grade classroom teacher. [NT 504, 507-508, 521, 523, 526; P-11]

51. The private psychologist evaluator adopted in her report without challenge the District's prior evaluation findings regarding Student's severe cognitive, physical, and adaptive challenges. [NT 539; P-11]
52. The last time the private psychologist evaluator observed an autistic support class in the District was eight years ago. [NT 526]
53. The private psychologist evaluator recommended a program that is very structured and consistent and predictable with the use of a lot of visual supports such as charts, schedules, routines, work systems that would tell Student what's happening, explain what Student needs to do and when Student is finished how much work is left to do. [NT 503]
54. Student's IEP called for one-to-one assistance which would be provided either by the teacher or the classroom assistant, not a one-to-one assistant [aide]. If Student were to have a one-to-one person assigned specifically to Student the IEP would say "assistant" rather than "assistance". [NT 222-223, 225-226; J-13]
55. Throughout the day the teacher worked one-on-one with Student. [NT 226]
56. The private psychologist evaluator recommended that Student have one-on-one assistance. [NT 504]
57. The District psychologist working with the classroom in which Student had been placed noted that many of the classroom recommendations made by the private psychologist evaluator were things that were done in Student's classroom. [NT 544, 548; P-11]
58. The District psychologist working with the classroom in which Student had been placed testified to her observations that Student received one-to-one assistance in certain areas of the curriculum where Student needed it, for example Student received some discrete trial instruction in a one-to-one basis with [Student's] teacher and some academic interventions, the reading mastery and the STAR were also provided on a one-to-one basis with the teacher. [NT 550]
59. The District psychologist working with the classroom in which Student had been placed testified that Student was not in need of a one-to-one assistant at all times. [NT 550]
60. Applied behavior analysis is a scientifically research based, well-known practice for children with autism. It looks at the environment of the student and the causes and consequences of behaviors. Positive reinforcement is one of the principles of applied behavior. [NT 263]

61. In the 4th grade classroom the staff used a lot of positive reinforcement with Student, having Student work for a preferred reward. Such a reward motivates students to do more to obtain more rewards. [NT 263]
62. The direct instruction provided in the 4th grade classroom was based on applied behavior analysis. [NT 264]
63. Discrete trial training is called for in Student's IEPs. The District ensures that all its teachers and assistants are trained in discrete trial through personnel such as an autistic support coordinator who provides professional development in discrete trial training. The District also has a partnership with the University of Pennsylvania to work with the autistic support teachers to ensure professional development through trainings that are relevant to students with autism. Teachers and assistants are responsible for keeping the progress monitoring data on discrete trials. [NT 405-407; J-13, J-16, J-22]
64. In 4th grade Student was receiving research based programs in reading and in math, but is not making substantial gains. Student has problems focusing and tends to engage in scripting, repeating things heard on television or things said by peers. [NT 266-267]
65. In 4th grade Student was receiving individual direct instruction from the classroom teacher in reading for about 10 to 20 minutes daily and in math for about 10 to 15 minutes daily. [NT 277]
66. Student was not able to be instructed in a small group of three students and required individual instruction. [NT 281-282]
67. In 4th grade the speech/language pathologist came into the classroom once a week for 30 minutes for group instruction. [NT 278-279]
68. In 4th grade the autistic support teacher and classroom assistant implemented speech/language communication goals throughout the day. [NT 279]
69. In 4th grade the occupational therapist came into the classroom once every few weeks and worked with Student and consulted with the staff. [NT 280-281]
70. In 4th grade the autistic support teacher and classroom assistant implemented occupational therapy techniques and goals as appropriate. [NT 281]

Speech/Language

71. Student was evaluated privately by a speech/language pathologist who currently works with students from 14 to 21 years old specializing in life skills programming implementation, and goal setting. She holds bachelors and masters degrees in Speech, Language and Hearing. She has experience with disabled students preschool to eighth grade. She has worked in elementary, middle and high schools in New Jersey. She is certified in New Jersey and holds ASHA certification of clinical competence. [NT 158-159, 162-163]

72. The private speech/language evaluator spent about two and a half hours with Student at the Camden Public Library on July 27, 2012 and produced a written report. [NT 159-161; P-10]
73. The private evaluator did not feel it was necessary to speak with Student's District speech language therapist for purposes of completing her evaluation. [NT 203]
74. For purposes of the evaluation the private evaluator reviewed all documents made available to her and utilized formal instruments comparing Student to same-age neurotypical peers as well as informal testing/observation. [NT 160, 163-164, 214]
75. Regarding intelligibility, as an unfamiliar person, the private evaluator was able to understand the majority of Student's utterances. Student's intelligibility was not the same as that of a same-age neurotypical child but it is functional. [NT 185-186]
76. In 2007 Student could understand one and two step directions. [NT 184-185; J-26]
77. The 2012 IEP notes improved ability to understand one and two step directions. [NT 184; J-9]
78. Student demonstrates needs in the area of pragmatic language. Student's language consists of a considerable amount of scripting [perseverating on an idea not relevant to the conversation at hand], wherein Student may be very verbal but the communication is not effective. [NT 194-195]
79. It is very difficult for Student to have back and forth exchanges with a conversation partner. [NT 199]
80. Even given Student's well below average cognitive levels, progress in communication skills would still be expected with appropriate supports. [NT 215]
81. The material reviewed indicated to the private evaluator that Student was receiving 30 minutes of speech/language therapy weekly in a group of six or more. [NT 166-168]
82. Student's June 11, 2012 IEP calls for Student to receive approximately 18 minutes of speech/language therapy in a small group weekly. [NT 187-189, 205-206; J-9]
83. Because of student's attentional difficulties and the multiple communication skills that need to be addressed, the speech/language services offered to Student were insufficient. [NT 166, 188]

District's Responsibility to Fund Private Evaluations

84. Given that Student had not been in school for all but two months of the previous [3rd grade] school year, the IEP prepared in preparation for 4th grade emphasized that Student needed to be reevaluated upon reentry into school. [NT 240-241; J-13]

85. The autistic support classroom teacher conducted some educational testing in preparation for the Present Levels portion of the new IEP she was proposing but no evaluation was conducted by a psychologist. [NT 251-252]
86. The District stipulated on the record that Student should have been reevaluated upon return to school for 4th grade and was not, and it was on the basis of that lapse that the District agreed to fund independent evaluations. [NT 241]
87. As part of the settlement negotiations, the District offered to fund a number of private evaluations, including a psychoeducational evaluation, a speech/language evaluation, an occupational therapy evaluation, and a functional behavioral analysis with a concomitant positive behavior support plan. Additionally, the District offered to conduct an assistive technology evaluation itself. The transcript of September 14, 2012 records District counsel's repeated clear affirmation that the District had agreed to fund the above-named evaluations, with no stipulation that this was part of an overall resolution of the dispute. [NT 36-40, 44, 45, 49, 53, 55, 241, 375-376]

Discussion and Conclusions of Law

Burden of Proof:

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

Credibility:

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

The Parent testified to his understanding of Student's program. It appears that on some points he may have misunderstood what was being explained or did not recollect what was being explained. His staunch advocacy for his child was evident during the hearing. At several points during the September session I allowed Father to speak on the record in narrative form over the objection of District counsel because he displayed a strong need to be heard; although I view his statements as true indicators of his feelings and beliefs I did not rely on them to establish findings in the matter.

The individual who served as the special education liaison during the June 11, 2012 IEP meeting testified. Her testimony about the program she thought Student received was in direct contradiction to the testimony by the teacher actually delivering the program. When the two witnesses' testimony conflicted regarding what was actually delivered, the teacher's testimony was given more weight by far.

The teacher testified credibly about Student's program and Student's academic and communication needs.

The private speech/language evaluator testified credibly about Student's programming needs in the area of speech/language and her testimony was helpful in looking at the adequacy of the District's provision of speech/language services.

The acting deputy chief for the District's Office of Specialized Services was formerly the director of special education for Academic Division Nine in which both Student's schools are located. She testified candidly about the process of educating school personnel about correct terminology and her testimony provided an understanding of the reasons for some miscommunication in this case. She also clearly established that the District has a spot open for Student should the Parents allow Student to return to school.

The private psychologist evaluator largely testified about areas that came to be beyond the scope of the hearing. I found her recommendations for the classroom to be appropriate and useful guidance for planning Student's specially designed instruction. Her being in her fifth year of working for an Approved Private School must be taken into consideration when evaluating her recommendation for a private school Student. Additionally she has not seen an autistic support classroom in the District in the last eight years. As she did not provide solid evidence to back up that recommendation for a highly restrictive educational placement I could not give that recommendation substantial weight.

The District school psychologist is specially trained in the Autism Diagnostic Observation Schedule [ADOS] and specializes in autism in her work in the District.

Statute of Limitations

The IDEA requires parents to request a due process hearing within two years of the date the parents knew or should have known about the alleged action that forms the basis of the complaint. 20 U.S.C. 1415(f)(3)(C); 34 C.F.R. S300.511 (e). The same two year statute of limitations applies to alleged violations of Section 504 of the Rehabilitation Act. 20 U.S.C.

1415(b)(6)(B); 34 C. F. R. S 300.507 (a)(2). Pursuant to 20 U.S.C. 1415(f)(3)(D)(i – ii), 34 C.F.R 300.511(f)(1-2), the statute of limitations may not apply if the parent was prevented from requesting a hearing due to (i) specific misrepresentations by the LEA that it had resolved the problem forming the basis of the complaint, or (ii) the LEA’s withholding of information from the parent. In a very recent case of first impression, *D.K. v. Abington School District*, [696 F.3d 233 (3d Cir. 2012)], the U.S. Court of Appeals for the Third Circuit held that in order to be excused from the IDEA’s statute of limitations parents must show that the district intentionally misled or knowingly deceived them. Further, *D.K.* articulates a high threshold for interpreting ‘misrepresentation’ concluding that it is intent, deceit, or egregious misstatements that invoke the statute of limitations exception and that “a rule demanding at least a school’s knowledge that its representations ... are untrue or inconsistent ...” is required. Finally, *D.K.* also provides that even if parents can establish evidence of specific intentional misrepresentation or withholding of information, the exceptions still cannot be invoked unless the parents also show that the misrepresentations or withholding was the cause of their failure to request a hearing or file a complaint within the two-year timeframe.

In the instant matter the Parents seem to have misinterpreted what was written in various IEPs, despite one or both of them attending IEP meetings. The record is not clear as to exactly how the District explained 1:1 assistance, but it is doubtful that Father’s recollection that he was directly told the Student had a one-on-one personal aide is accurate. Additionally it is probative, given the Parents’ active involvement in Student’s education, and their picking Student up from school each day, that they did not ask to meet or to communicate with the one-on-one aide(s) they thought had been assigned.

Whether or not the Parents misunderstood or the District communicated unclearly, this did not prevent or cause the Parents not to file for a hearing. In fact, in March 2011 the Parents consulted an attorney and signed a records release. They knowingly chose not to pursue due process at that time because of the financial expense involved.

The Parents also allege that the District changed Student’s program without their knowledge or input. It is true that the District sought to change Student’s placement from Full Time Autistic Support to Supplemental Autistic Support for the 5th grade IEP proposed in June 2012. However, the classroom teacher testified that in 4th grade Student was getting exactly what the Parent said he wanted – full day with other autistic children with no socialization with regular education students. The District acknowledges that it cannot change the placement without the Parents’ permission such that when Student returns to school Student will have no classes with regular education peers.

Insofar as the District may have conveyed unclear information, or may not have understood the Parents’ confusion, about the 1:1 assistant or the proposed change from one level of autistic support to the other, there is no evidence that it did so intentionally, deceitfully or egregiously. A high level District administrator whose last position involved her being responsible for Student’s academic division where 1683 students across 39 schools had IEPs testified that a concern of hers has been inconsistent understanding among IEP teams as to the difference between full-time autistic support versus supplemental support. The administrator has taken on the task of educating staff about the distinction and has put out information to the special

education liaisons in monthly meetings to help them understand the distinction between Full Time, Supplemental and Self-Contained; this is an ongoing training issue. Similarly in IEP writing there is inconsistency which the administrator is trying to address. [NT 423-426, 431, 464-465]

The Parents have not met their burden of proof on this issue and therefore the scope of the hearing is limited to the two years preceding their filing a complaint, that is from June 17, 2010 through the present.

The scope of the hearing is further limited by two factors. First, although Student was eligible for and offered ESY services for the summer of 2010 the Parents chose not to accept the offer. Second, the Parents removed Student from the care of the District for periods of time during the course of the two-year period in question. Student was withheld from school from October 27, 2010 to the end of the school year in June 2011, and from the first day of school in September 2012 to the present. Although it is reasonable that the Parents kept Student out of school from October 27th to the end of December while waiting for a transfer, it is not reasonable that they continued to keep Student out of school for the remainder of that school year. Therefore, the scope of the hearing as it applies to any potential recovery is from the first day of school in September 2010 to December 21, 2010, and from the first day of school in September 2011 to the last day of school in June 2012, a period of approximately 13 ½ school months.

Due to the practical need to bring in witnesses as they were available led to my needing to defer a ruling on the statute of limitations and therefore for the sake of efficiency I allowed testimony to go back to 2007. Consequently a reader may note in the transcript that there is a considerable amount of testimony, particularly but not exclusively about behavior needs and assessment that is not addressed in this decision. Several witnesses were asked to address this issue and the private psychologist provided information in this area during the entire first part of her testimony. Material in the transcript not included in this decision was excluded largely because it was beyond the time scope of the hearing or determined by the hearing officer to be irrelevant to the issues that were within the scope.

Free Appropriate Public Education

Having been found eligible for special education, Student is entitled by federal law, the Individuals with Disabilities Education Act as Reauthorized by Congress December 2004, 20 U.S.C. Section 600 *et seq.* and Pennsylvania Special Education Regulations at 22 PA Code § 14 *et seq.* to receive a free appropriate public education (FAPE). FAPE is defined in part as: individualized to meet the educational or early intervention needs of the student; reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress; and provided in conformity with an Individualized Educational Program (IEP).

A student's special education program must be reasonably calculated to enable the child to receive meaningful educational benefit at the time that it was developed. (*Board of Education v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982); *Rose by Rose v. Chester County Intermediate Unit*, 24 IDELR 61 (E.D. PA. 1996)). In determining whether the District has offered an appropriate IEP, the proper standard is whether the proposed program is reasonably calculated to confer meaningful educational benefit. *Rowley*.

The instant matter covers the period from June 17, 2010 through the present given the application of the IDEA's statute of limitations discussed above. During that period, Student did not attend the offered ESY program, was physically in school from the first day of school in September 2010 through October 26, 2010 and did not return to school for 10 calendar months thereafter. Progress monitoring from September through October 2010 is an insufficient period of time to support Parents' allegations that Student did not make meaningful educational progress during that period.

Further, given Student's 10-calendar-month absence from District instruction from November 2010 through August 2011, any regression noted in September 2011 at the beginning of the 2011-2012 school year cannot be attributable to the District.

I have reviewed the progress reporting at J-6 as well as the meticulous and thorough charts the Parents' counsel provided in his written closing argument. After carefully considering this volume of material I conclude that, given Student's severe cognitive limitations and autistic spectrum disorder [Student] would be expected to make slow, incremental progress and that the 2011-2012 school year was largely spent in recouping any academic losses Student may have suffered as a result of non-attendance in school for the previous 10 calendar months. I find that the Parents did not meet their burden of proving that Student was denied the opportunity to make meaningful educational progress during the 13 ½ school-months time period delineated by the scope of the hearing and the District did not show that Student did make meaningful educational progress. This aspect of the evidence being in equipoise, the Parents did not meet their burden of proof in this area and under *Schaffer* cannot prevail on this issue.

Evaluations

The Pennsylvania Special Education statute provides that:

In addition to the requirements incorporated by reference in 34 CFR 300.301 (relating to initial evaluations), the initial evaluation shall be completed and a copy of the evaluation report presented to the parents no later than 60-calendar days after the agency receives written parental consent for evaluation, except that the calendar days from the day after the last day of the spring school term up to and including the day before the first day of the subsequent fall school term will not be counted. 22 Pa. Code § 14.123.

In some prior years the District has nevertheless performed evaluations/re-evaluations over the summer but fiscal restraints preclude that practice at this time. The District issued a Permission to Re-Evaluate [PTRE] on May 24, 2012 with the intent to complete an evaluation within the two year timeframe. The Parents did not sign the PTRE when it was issued, and up to the time of the hearing had still not signed it. Thus the Parents prevented the District from meeting its obligations to Student with regard to the biennial re-evaluation.

However, the District failed in a different respect. The IEP written at the end of the 2010-2011 school year anticipated Student's return to school in September 2011 after being kept home for all but the first two months of the previous year. The IEP contains repeated language that Student needed to be evaluated upon return to school. The evidence shows that Student was not re-

evaluated upon return to school, and that the only evaluation done was by the classroom teacher towards the end of the 2011-2012 school year to assess for Present Levels for the IEP. The District acknowledged this error, and agreed to fund several private evaluations and to conduct an assistive technology evaluation. Further the District was ordered to fund a psychiatric evaluation for Student.

At the time of the October 11, 2012 hearing date the District attempted to argue in off the record conversations and raises again in its written closing argument that its offer to fund evaluations was made only in the context of an anticipated settlement agreement which then was not achieved. However, the record of September 14, 2012 is replete with statements by District's counsel that it had agreed to fund the evaluations and at one point counsel stated that the reason was the failure to evaluate Student upon return to school early in the 2011-2012 school year. The District will be required to fulfill its offer/agreement which is deemed to be an appropriate remedy for its lapse.

The special education liaison testified that at the June 11, 2012 IEP meeting she explained to the Parents that the District does not currently offer "Full Time Autistic Support". [NT 146] The guidance counselor testified that she explained that "Full-Time Autistic Support" means a program that includes the students' having opportunities to be with regular education students and staff during period of the school day. [NT 146-147] The special education liaison explained that the terms "Full Time Autistic Support" and "Supplemental Autistic Support" indicated the exact same program. [NT 147] This explanation is in direct contrast to that offered in testimony by the 4th grade autistic support classroom teacher who reported that except for the happenstance presence of regular education children in the schoolyard when her students were at recess, her students received all their instruction in the Autistic Support Classroom other than traveling in a group to have specials in another location [gym, computer room, music room] and ate lunch together in the classroom as well.

Thus, the change from Full Time Autistic Support to Supplemental Autistic Support was not merely a change in nomenclature, but represented a proposed change in placement. There is no evidence that in 4th grade the District was giving the Student anything other than what the Father testified he wanted – the Student remained with other autistic students all day every day. The District explained to the Parents at the June 11, 2012 IEP meeting what Supplemental Autistic Support in 5th grade would entail, and if Student had returned to school for 5th grade and if the Parents had approved the IEP Student would have enjoyed a lesser level of restrictiveness.¹⁸ If Student had returned to school for 5th grade without an approved IEP Student's prior IEP would be implemented and Student would have been the only child in the class not permitted to socialize with regular education peers unless and until the Parents approved the change in placement or the District sought a hearing to have the proposed placement approved. The District did not change Student's placement without the Parents' knowledge/approval and the Parents were made aware of the proposed change.

Least Restrictive Environment: A plethora of case law supports IDEA's mandate that education must occur in the least restrictive environment appropriate for the individual child. The least restrictive environment (LRE) is defined in several ways – distance from a child's home, amount

¹⁸ The District's intent to have Student socialize with nondisabled peers is appropriate under the IDEA.

of contact with typical peers, and positioning of the proposed placement within a well-defined hierarchy of educational placements. The expectation of least restrictive environment is so rigorous that the courts have held, for example, that a school district is prohibited from placing a child with disabilities outside of a regular education classroom if educating the child in the regular classroom with supplementary aids and support services can be achieved satisfactorily. If the district fails to offer the student a program and placement which occurs in the least restrictive environment, it has failed to offer FAPE. The two concepts (LRE and FAPE) are inextricably intertwined. Children who are not provided with educational services in the LRE appropriate to their needs are not provided FAPE. Millersburg Area School District v. Lynda T., 707 A.2d 572 (1998).

One of the landmark Third Circuit cases on inclusion, Oberti v. Board of Education, 995 F.2d 1204 (3rd Cir. 1993) [19 IDELR 908] counsels that the failure to consider the full range of supplementary aids and services to enable a student to be educated in regular class to the maximum extent appropriate is sufficient to establish liability for violating the mainstreaming requirement of the IDEA. “If the school has given no serious consideration to including the child in a regular class with supplementary aids and services and modifying the regular curriculum to accommodate the child, then it has most likely violated the Act’s mainstreaming directive.”

Speech/Language

Student has speech/language needs that are significant and that impact Student’s profiting from the instruction offered. The teacher testified that Student engages in scripting when Student is supposed to be paying attention to reading and math, and Student cannot carry on a reciprocal conversation with peers in the classroom, thus impeding social progress. The private speech/language evaluator credibly opined that the amount of speech/language services offered to Student was insufficient. I agree that thirty minutes per week with a group of six or more children and eighteen minutes a week in a group of five or fewer children is not appropriate given Student’s classifications and described communication. I accept the guidance offered by the private speech/language evaluator as to the amount of individual speech/language therapy services Student requires and such will be ordered.

Remedies

The IDEA authorizes hearing officers and courts to award “such relief as the Court determines is appropriate” 20 U.S.C. § 1415(h)(2)(B), and compensatory education is an appropriate remedy when a school district has failed to provide a student with FAPE, *Lester H. v. Gilhool*, 916 F.2d 865, 871-73 (3d Cir. 1990) as the purpose of compensatory education is to replace those educational services lost because of the school district’s failure. [*Id.*] Compensatory education is an equitable remedy. [*Id.*] *B.C. v. Penn Manor Sch. Dist.*, 805 A.2d 642 (Pa. Commw. 2006) provides instruction for awarding compensatory education, counseling an award that would bring a student to the point where the student would be had FAPE been offered.

I find that tailoring compensatory education for the denial of FAPE in the area of speech/language fulfills the spirit of the *B.C.* holding. Further, the District’s offer to provide funding for private psychological, speech/language, occupational therapy and behavioral evaluations, and to conduct an assistive technology evaluation, certainly makes up for its failure

to follow its own plan to reevaluate Student comprehensively following Student's 10-month absence from programming.

Under the Supreme Court's interpretation of the IDEA in *Rowley*,² and in interpretations rendered in other relevant circuit court cases, a school district is not required to provide the best possible program to a student, or to maximize the student's potential. Rather, an IEP must provide a "basic floor of opportunity". There is no requirement to provide the "optimal level of services." *Mary Courtney T. v. School District of Philadelphia; Carlisle Area School District v. Scott P.*, 62 F.3d 520, 532 (3d Cir. 1995), cert. den. 517 U.S. 1135, 116 S.Ct. 1419, 134 L.Ed.2d 544 (1996). What the statute guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving parents.'" *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989). Citing *Carlisle*, Pennsylvania's federal court in the Eastern District noted, "Districts need not provide the optimal level of services, or even a level that would confer additional benefits, since the IEP required by the IDEA represents only a basic floor of opportunity." *S. v. Wissahickon Sch. Dist.*, 2008 WL 2876567, at *7 (E.D.Pa., July 24, 2008). The law requires only that the plan and its execution were reasonably calculated to provide meaningful benefit.

A District, however, can be ordered to correct deficiencies of its program. *In T.Y., K.Y. v. N.Y. City Board of Education*, 584 F.3d 412, 417 (2nd Cir 2009), the court affirmed the hearing officer's decision denying parents' claim for tuition reimbursement, although the hearing officer also concluded that the school district's program was partially deficient and ordered the district to provide additional services to correct the problem. The District in the instant matter is in fact being ordered to correct the deficiencies in its program in the area of individual speech/language services.

The Parents are seeking the remedy of a prospective program and placement in an Approved Private School [APS]. Neither they nor their private psychologist evaluator provided evidence that the District cannot prospectively provide an appropriate educational program and placement for their child or that their child requires the level of restrictiveness of an APS in order to obtain meaningful educational benefit. An appropriate special education program for Student is represented in the IEP of June 11, 2012, as amended in the area of speech language in the Order below. An appropriate special education placement for Student in the least restrictive environment is Supplemental Autistic Support in a public school.

Order

It is hereby ordered that:

1. Student received an insufficient amount of individual speech/language therapy to address Student's needs. Student therefore is entitled to compensatory education in the amount of 60 minutes per week of speech/language therapy with a certified speech/language therapist, and because of Student's attentional issues, this therapy should be delivered in 15 or 30 minute blocks, four or two times per week. The hours are awarded for the weeks Student was in attendance in the District's schools or waiting for transfer from the first day of school in September 2010 through December 21, 2010, and from the first day of school in September 2011 through the last day of school in mid-June 2012; partial weeks are to be counted as full weeks even if Student was absent because of illness; vacation weeks for winter and spring breaks are excluded from the calculation. The therapy may be delivered by a private speech/language therapist or within the District by a District speech/language therapist, but in either case must be in addition to and not in place of the individual speech language therapy that will be given according to an IEP.
2. Student's IEP must be revised to include at least 30 minutes per week of individual speech language therapy delivered by a certified speech/language therapist. These minutes are not to be used for small or large group therapy, nor for consultation with Student's teachers; group therapy minutes and consultation minutes should be in addition to the individual therapy minutes.
3. The District did agree to and therefore must fund an independent psychological evaluation, an independent speech/language evaluation, an independent occupational therapy evaluation and an independent functional behavioral analysis with a concomitant positive behavior support plan. This is an appropriate remedy for the District's failure to evaluate Student upon Student's return from a 10-calendar-month absence from school.
4. The Parents' request for prospective placement in an Approved Private School is denied.
5. The appropriate special education program in the least restrictive environment for Student is Supplemental Autistic Support in a public school.

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

November 18, 2012
Date

Linda M. Valentini, Psy.D., CHO

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