

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

Pennsylvania

## Special Education Hearing Officer

### DECISION

ODR No. 3483-1213 KE

Child's Name: B.Z.

Date of Birth: [redacted]

Dates of Hearing: 1/24/13, 1/31/13, 2/19/13

### CLOSED HEARING

Parties to the Hearing:

Parents

Parents

School District

Wilson

2601 Grandview Boulevard  
West Lawn, PA 19609-1324

Representative:

Parent Attorney

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School District Attorney

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Date Record Closed:

March 11, 2013

Date of Decision:

March 27, 2013

Hearing Officer:

Anne L. Carroll, Esq.

## **INTRODUCTION AND PROCEDURAL HISTORY**

Student is presently in the second year of school-age programming in the District, having previously received pre-school special education services from the local Intermediate Unit as an eligible young child with an autism spectrum disorder (ASD).

Despite Parents' concern about continuing with a verbal behavior (VB) program based on Student's slow progress in the local IU program, where instruction was also based on the VB model, they accepted the District's recommendation for Student's placement in its primary autistic support VB classroom. Because Parents perceived little progress during the first half of Student's kindergarten year, they contacted a consultant with expertise in programming for children with ASD to observe Student at home and at school in order to develop a home program to complement the school program. Still dissatisfied with Student's progress by the spring of 2012, Parents asked the consultant to develop an alternative to the VB program. After a second classroom observation in early April 2012, the consultant prepared a report proposing a functional curriculum for Student and a change from instruction by VB methods to another research-based, ABA inspired technique known as "pivotal response training."

The District does not believe that a change in methodology or curriculum is necessary for Student, who, it contends, has made and continues making meaningful progress.

For the reasons that follow, notably slow progress with limited generalization of skills during the 2011/2012 school year that should have alerted the District of the need to try a different instructional method and curriculum, and progress that has worsened during the current school year, the District will be ordered to alter its instruction of Student to determine whether a different kind of instruction and curriculum will result in meaningful progress. Parents will also be awarded compensatory education for the current school year, to continue until new instructional techniques are implemented.

## **ISSUES**

1. Has the School District appropriately:
  - a. Evaluated Student;
  - b. Developed appropriate IEPs reasonably calculated to yield meaningful educational progress;
  - c. Provided sufficient, appropriate special education services?
  
2. Is the verbal behavior instructional approach currently appropriate and effective for Student, or should the District be required to implement a different approach to instructing Student, specifically, pivotal response training paired with a functional curriculum?
  
3. Is Student entitled to an award of compensatory education for any period from the time of Student's enrollment in the School District at the beginning of the 2011/2012 school year, and if so, for what period, in what amount and in what form?

## **FINDINGS OF FACT**

### **Background**

1. Student, [an elementary school-aged] child, born [redacted] is a resident of the School District and is eligible for special education services. (Stipulation, N.T. pp. 15, 16)
  
2. Student has current diagnoses of autism and speech/language impairment in accordance with Federal and State Standards. 34 C.F.R. §300.8(a)(1), (c)(1), (11); 22 Pa. Code §14.102 (2)(ii); (Stipulation, N.T. p.15 )
  
3. Student is reported to be an energetic, engaging child with significant global delays, including limited cognitive ability, deficits in pre-academic, communication, motor and social skills, who seeks a high level of sensory input/physical stimulation obtained through gross motor movement and self stimulating behaviors. (N.T. pp. 50, 285, 286, 425; P-11)
  
4. From age 3 to 5, Student attended a pre-school autistic support program conducted by the local Intermediate Unit. Instruction in the IU classroom was based on applied behavior analysis principles, including errorless teaching with a 10-5-2 procedure that provides practice of a single skill over 10 trials, reduced to 5 and then to 2 as the skill is acquired, periodic reinforcement, mix of preferred/non-preferred activities, 80%/20% mix of easy to difficult tasks and most to least prompting. Sensory/motor activities were interspersed throughout the day and visual and auditory cues were provided. The District uses the same instructional principles in its primary autistic support program. (N.T. pp. 212, 213; S-1 pp. 3, 8)
  
5. Since Student remains largely non-verbal, an augmentative communication device is essential for Student to engage in functional communication, including expressing wants and needs. During most of the IU pre-school program, Student was using an I-Pad

loaded with Proloquo2GO software as an augmentative communication device. After a technology assessment, during the second half of 2010/2011 school year, and the IEP team's conclusion that Student needed a more advanced and versatile device, Student began using a Dynavox Maestro early in 2011, and has learned to use it effectively. Student continues to use the I-Pad when the Dynavox is unavailable. (N.T. pp. 32, 41, 72, 73, 286, 287, 425; P-2, P-4 p. 2)

6. The IU conducted a biennial re-evaluation of Student in the late fall/early winter of 2010, as Student was nearing the end of the pre-school program. The reevaluation report (RR) documented Student's significant impairments and needs in the areas of cognitive skills, communication, play and social skills, fine motor skills, adaptive skills, and sensory processing (S-1 pp. 7—15)
7. The RR described skills Student had acquired in various areas by the middle of the 2010/2011 school year, including mastery of 7 imitated gross motor movements: clap hands, arms up, stomp feet, arms out, slap table, tap tummy, touch cheeks. Student was also reported to follow a variety of 1 step directions and some 2 step directions in the classroom, as well as receptively identify a few items, but with a continuing need for repetition and practice. (S-1 p. 8)
8. Prior to meeting with the District to begin planning for Student's transition to kindergarten at the beginning of the 2011/2012 school year, Parents obtained an independent neuro-psychological evaluation of Student. Standardized assessments and rating scales administered to Parents and teachers confirmed deficits in cognitive, adaptive, communication, pre-academic and self-help skills (N.T. pp. 284, 285; P-3)
9. The District has not yet conducted its own comprehensive evaluation of Student. (N.T. pp. 44)

#### The School District's Primary Autistic Support Class/Verbal Behavior Program

10. The District implements the Verbal Behavior (VB) program in all autistic support classes in its neighborhood elementary schools, and serves as an independent model site for the statewide Autism Initiative. The District VB program is subject to periodic site reviews by board certified behavior analysts (BCBAs ) to assure fidelity in program delivery and that each child's program is appropriate. Through the Autism Initiative, the District also has immediate access to BCBAs and other consultants to assist the District in developing programs to maximize each student's motivators, to assist in creating individualized programs and Natural Environment Teaching (NET) and in developing generalization activities. (N.T. pp. 191—198, 397; S-27, S-28)
11. Natural environment teaching or training relies on determining the child's interests through observations in natural settings and using the items of interest to elicit responses leading to acquisition of skills, such as using high interest toys to teach identification of colors or shapes. (N.T. pp. 429, 430)

12. The VB approach is based upon the principles and instructional techniques of applied behavior analysis (ABA), with an emphasis on language acquisition/effective communication. The function and effect of communications are described by “verbal operants” (basic communicative forms) described as mands (requesting), tacts (labeling), intraverbal (initiating, responding to conversation), echoic (verbal repetition of sounds and words), imitation (of motor skills), and listener responding (following directions). (N.T. p. 190, 199—202, 203, 427; S-27 p. 9)
13. The availability of positive and negative reinforcements encourages students to learn and practice skills. Positive reinforcements add or give the child something to increase the likelihood of repeating the same behavior. Negative reinforcements remove something the child prefers to avoid, or allow the child to stop or escape from a non-preferred activity. Progress in skill acquisition depends heavily on identifying strong reinforcements for each child, which can vary day to day and often change over time. (N.T. pp. 209—211, 350, 352, 353, 428)
14. There is some question whether a child who uses a communication device is actually demonstrating the skill of tacting or labeling an object by finding it on the device, or is simply matching pictures. (N.T. pp. 200, 201, 388—390)
15. There is also some question whether selection of a picture on an augmentative communication device is truly an intraverbal response. (N.T. pp. 200, 201)

#### Overview of Student’s Program in Kindergarten (2011/2012) and 1<sup>st</sup> Grade (2012/2013)

16. When Student began kindergarten in the District, there were six (6) students in the classroom, and five (5) adults (teacher and 4 paraprofessionals). During the current school year, the autism support classroom to which Student is assigned includes eight (8) students and six (6) adults (teacher and 5 paraprofessionals). Six of the children in the classroom, including Student, are instructed using VB methods, specifically including discrete trial training. (N.T. pp. 189—191, 300, 309—311, 313)
17. In Student’s classroom, the school day includes group activities to promote social skills, play skills, attending to and participating in group instruction (circle time), generalizing skills to other settings, as well as 1:1 intensive teaching based on each child’s specific needs and goals. A variety of reinforcements are available, including equipment and activities to provide opportunities for sensory input. (N.T. pp. 207—209, 211, 426)
18. Student participates in the general education setting for “specials” (art, gym, music, library), as well as morning meeting in a regular education homeroom, recess and lunch, although not for the entire periods. Student’s time in the regular education setting has increased during the current school year as Student’s ability to attend to and participate in the regular education classes has improved and another regular education special class, math resource, was added. (N.T. pp. 209, 300—306, 370, 371)

19. Student's program focuses on receptive and expressive language/communication, self-care, social and play skills, based on Student's significant needs in those areas. Intensive teaching, or discrete trial training, sessions are based on Student's specific deficits in developmental areas, as determined by the VB-MAPP, an individualized assessment of developmental milestones based on the verbal operants and the skills in those areas expected of typically developing children at three age levels. VB-MAPP assessments identify skills that have been acquired and skills that need to be developed. At the time Student began kindergarten, Student's skills were at Level 1 in the VB-MAPP (0-18 months).<sup>1</sup> (N.T. pp. 189, 205, 206, 284, 287, 366, 367; S-21 p. 1)
20. Student's teacher has recently begun introducing some intraverbal skills by asking Student to fill in missing words from familiar children's songs using the communication device. (N.T. pp. 201, 202)
21. Because Student remains primarily non-verbal, echoic skills are not targeted during Student's intensive teaching sessions, but Student's vocalizations are always reinforced. (N.T. p. 202)
22. On average, Student receives 3 20 minute intensive teaching/discrete trial training sessions daily, as well as two manding sessions and one NET session daily, when Student works on generalizing skills. (N.T. pp. 314—316)

#### Parent Concerns/Student's IEPs and Progress

23. As Student began kindergarten, Parents were concerned about Student continuing with the Verbal Behavior (VB) program in the District, since Parents saw limited progress during the pre-school years. (N.T. pp. 53, 55—58)
24. Despite their concerns, Parents approved the initial IEP based primarily on the opportunities for inclusion with typical peers, which Parents hoped would increase Student's social skills and provide an opportunity for higher level learning. (N.T. pp. 57, 58, 81; P-5)
25. The IEP developed for Student at the beginning of kindergarten in August 2011 was largely based on the IU IEP that had been developed after the 2011 IU reevaluation. Information from the independent evaluations Parents provided was also taken into account, which called into question some of the goals in the prior IEP. The District, however, typically defers developing a new IEP for students transitioning into the VB program until its own staff has the opportunity to observe them and assess skills demonstrated in the new setting. (N.T. pp. 214, 215, 289—293; P-5)

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<sup>1</sup> Level 2 = 18—30 months; Level 3 = 30—48 months. A child who acquires all of the skills described at each level of the VB-MAPP is functioning at the level of a typically developing 4 year old. It is expected that all of the skills and developmental milestones represented by the scoring blocks on the VB-MAPP assessment will be acquired by children participating in a VB program. (N.T. pp. 366, 390; S-21 p. 1)

26. Parents noted some regression in skills during Student's early transition to the kindergarten program as Student became accustomed to the new program. Parents were aware that the first task was to "pair" Student effectively with the new teachers. "Pairing" is a process in which staff members who deliver instruction become motivating sources to the child. Parents were encouraged by emerging social skills, but were uncertain that inclusion with typical peers provided meaningful experiences for Student. (N.T. pp. 60—64, 205)
27. After conducting its first VB-MAPP assessment in September 2011, the District noted that the results were not consistent with the results of the final IU VB-MAPP assessment. A discrepancy of that kind is not uncommon for students transitioning from pre-school programming and could be attributed to a number of factors, including variations in the assessment materials and Student's difficulty in generalizing skills to different people and settings. (N.T. pp. 295, 366, 367, 382)
28. At an IEP meeting on November 15, 2011 various issues were discussed and Parent again expressed concern that the program in place was not appropriate for Student. Parents had received Student's first quarter progress report indicating that some of the IEP goals had not been addressed. The District concluded that the IEP goals needed to be revised to better reflect Student's skill levels observed in the classroom. The parties did not complete the IEP discussion at the November meeting. (N.T. pp. 68, 69, 216)
29. Parents received a copy of the District's proposed changes to the IEP approximately two weeks later and were surprised at the reduction in goals from the IEP in place at the beginning of the school year. Parents would have preferred adding short-term objectives rather than eliminating or reducing goals. (N.T. pp. 80—83, 87, 343; P-5 pp. 19—36, P-6 pp. 17—32, P-31 p. 49)
30. At the next IEP meeting on December 14, the District presented a draft IEP with updated levels of academic achievement and functional performance indicating low skill levels in manding (Student could spontaneously mand for 5 items when the items were present, generalize six mands to two people and settings), visual-perceptual skills/matching to sample (place items in a container and rings on a peg; match identical items) and motor imitation (2 gross motor actions, clapping hands and tapping the table). Student could not demonstrate tacking, or listener responding without a visual prompt. (S-8 p. 4)
31. The District provided more explanation of its proposal to remove goals for generating noun + verb combinations, following 2 step directions, removing and putting on shirt, socks and shoes. Other goals were modified to reflect present skill levels, a new goal for behavior and a goal for documenting development of a functional mand repertoire with the communication device were proposed. The District also proposed increasing criteria for mastery to assure that Student wasn't relying on rote memory but had truly acquired the skills described in the IEP goals. (N.T. pp. 223, 224; P-8, S-8, pp. 5, 16—18, 21, 23—25, 27, 29—31; S-20 pp. 1, 3, 4, 11, 16)

32. During and after the IEP team meeting, Parents expressed their preference to give Student the opportunity to meet expectations rather than reduce or remove them. (N.T. pp. 89, 90, 92, 219; P-8, S-8, pp. 5, 16—18, 21, 23—25, 27, 29—31; S-20 pp. 1, 3, 4, 11, 16)
33. The parties met again in mid-January 2012 to continue discussing Student's goals and finalize the IEP. Most of the revisions proposed in the December 2011 draft were incorporated into the final IEP. The goal for putting on socks and shoes was restored. (N.T. pp. 220—245; S-8 pp. 16—31, S-12 pp. 18—33)
34. Parents had developed a proposal to incorporate goals from a private speech/language evaluation and to restore the goals that had been removed from the District's proposed IEP to present at the next IEP meeting, in January 2012. As a result of the meeting, Parents felt that some of the goals the District had previously proposed removing remained in the IEP in substance, if not in the same form. (N.T. pp. 91, 93, 96; P-31 pp. 53—60, 63; P-5 pp. 17—30, S-12 pp. 18—33)
35. At the December 2011 and January 2012 IEP meetings, the District also proposed a plan to reduce negative behaviors in two areas, elopement from the work area during intensive teaching sessions and mouthing fingers or objects. With respect to elopement, the behavior plan focused on techniques to make the intensive teaching work area more motivating to reduce the desire for escape. (N.T. pp. 247—250; S-8 pp. 32—36, S-12 pp. 35—37)
36. To reduce elopement during 1:1 intensive teaching sessions in kindergarten, Student was often seated at a "station" where distractions were minimized, consisting of a desk against the wall, a desk in front, a barrier to one side with a desk for the teacher or paraprofessional delivering the instruction and an opening to the other side. (N.T. pp. 322—324, 433, 436)
37. Student's eloping and mouthing fingers/objects behaviors increased during the kindergarten school year in response to demands placed during intensive teaching sessions. Student also began to exhibit aggressive behaviors toward staff in response to demands and when overstimulated. Aggressive behaviors appear to have become less frequent during the current school year. (N.T. pp. 325, 326, 347, 386)
38. During the 2011/2012 school year, the District provided quarterly reports of Student's progress toward IEP goals using four descriptors: Goal Not Addressed; Adequate Progress; Some Progress, Good Progress; Mastered. Comments for each goal were also recorded quarterly (November, January, March and June). The comments provide some data that provides a more accurate picture of the Student's progress. The descriptive words, however, are not consistently quantified by corresponding to, *e.g.*, the number or percent of trials in which Student could perform a particular skill or intervals in which a behavior was observed. (N.T. pp. 255, 256, 387, 388; S-20)
39. By June 2012, the District reported that Student had mastered the following 8 of 20 goals in the areas of listener responding, motor imitation, self-care, visual



performance/matching to sample and manding by demonstrating the skill when tested on four consecutive daily cold probes:

- a. Imitating 10 different fine/gross movements (10 gross/3 fine motor actions);
  - b. Imitating 10 different actions with objects;
  - c. Sorting ten different colors and shapes (cylinder, square, circle, triangle; blue, red, green, orange, yellow purple);
  - d. Matching 25 non-identical pictures in a messy array of 10;
  - e. Matching 10 reinforcers and 10 common objects in pictures using the communication device;
  - f. Independently pull pants up and down (Mastered by January 2012);
  - g. Manding for 3 missing items needed to complete a task;
  - h. Manding for 20 new items. (S-20 pp. 3, 4, 5, 6, 17)<sup>2</sup>
40. In May 2012, the District proposed an IEP for the 2012/2013 school year with several goals in the areas of listener responding, motor imitation, self-care, visual performance/matching to sample and play that are either new or increased expectations. (S-17 pp. 12, 14—18)
41. With respect to manding, Student’s program is currently focusing on increasing spontaneous requests, expanding the number and type of requests, *e.g.*, actions as well as edibles, and generalizing the skill beyond the intensive teaching setting. (N.T. p. 278)
42. The District’s progress reports for the 2012/2013 school year have eliminated the descriptive words. For the first quarter of the current school year, comments for each goal are more specific in terms of how far Student has progressed toward reaching the annual goal or how frequently the skill or behavior was observed. (S-29)
43. Student’s progress report from the first quarter of the current school year discloses that with respect to the new goal of selecting 50 items in pictures from a field of 6 in 4 consecutive cold probes, Student can correctly select 45 items in pictures and 26 items on the Dynavox. Student has also been able to generalize by identifying 5 different objects and finding 2 items in a book. (S-29 p. 1)
44. During the 2011/2012 school year, Student demonstrated significant difficulty in responding to directions without visual models. By the end of the school year, Student could follow two directives to demonstrate a motor skill, consistently showing clapping, and mastered “touch your nose” by the end of the 4<sup>th</sup> quarter with intensive 10-5-2 instruction, repeating 10 consecutive trials without allowing the opportunity for a

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<sup>2</sup> The IEP includes 13 additional goals in the areas of language and OT/fine motor skills, including the area of oral/motor/echoic/vocalization skills. Parents, however, have asserted no specific claims relating to Speech/Language or OT services. Goals related to those areas, as well as goals related Student’s use of the augmentative communication device were not included for the purpose of assessing the appropriateness of Student’s program. *See* Stipulation, N.T. p.541 (No issue in dispute relating to the amount or level of speech/language services or speech/language goals); School District Closing Argument p. 13, Ftnt. 2; S-20, pp. 11—16)

- mistake and constant reinforcement for the correct response. (N.T. pp. 257, 258, 361; S-20 p. 8)
45. As of the January 2013 progress report, Student could respond to a verbal direction to perform 3 motor actions without a visual prompt. The goal for the current school year was increased from 5 to 7 motor actions. (S-20 p. 1, S-29 p. 2)
  46. With respect to the new goal of selecting 20 common objects, Student demonstrated the ability to correctly select 5 items and correctly identified 2 items during play or NET sessions. (S-29 p. 3)
  47. With repetition and review, Student has maintained the ability to imitate 10 gross motor actions and by January 2013, was able to imitate 5 fine motor actions with a visual model and the direction, "Do this." Student can also imitate 5 different motor actions requiring selection from an array with a visual model. (S-29 pp. 4, 5)
  48. In the area of visual performance/matching to sample, Student has demonstrated the ability to match 2 block designs that contain 6 or more pieces, and to match 14 letters, as well as an unspecified number of toy animals. (S-29, pp. 6, 7)
  49. Student can put on a sock with verbal prompts and assistance to start the task and a shoe with assistance to begin the task and gestural prompts to hold the tongue, and is able to unfasten a 1 inch button with verbal prompts and modeling. Because of the desire to reach a particular reinforcer, as of January 2013, Student was requiring more prompts to complete the arrival routine at the start of the school day. Pursuant to a new goal, Student has begun to participate in the departure routine, putting on a coat, putting books in the book bag and zipping it with assistance and verbal/gestural prompts. (S-29 pp. 8—10)
  50. With prompts and re-direction, Student is able to play appropriately with 7 different toys for an unspecified amount of and was observed to play with a color sort activity for two minutes in four consecutive daily observations. (S-29 p. 11)
  51. Student has increased the ability to play "pass the beanbag," remaining at a table with 4 students and 2 adults for 13 minutes with an average of 1 prompt every 76 seconds. Student requires more redirection to remain engaged in games that require standing and movement. (S-29 p. 12 )
  52. Student demonstrated the ability to engage in an independent activity for 3 minutes in 4 consecutive weekly observations with only a prompt to begin the task. A new annual goal for the current school year provides that Student will appropriately engage in an independent activity for 5 minutes. (S-29 p. 13)
  53. The VB-MAPP assessments completed by the District in April 2012, September 2012 and January 2013 disclose that Student reached most of the developmental milestones at Level 1 (0-18 months) by April 2012, as well as the visual-perceptual/matching to sample

milestone at Level 2 (18—30 months). Student reached no milestones at either Level 1 or Level 2 in the areas of tact and echoic. Student demonstrated a few Level 1 vocal skills but did not reach the 18 month level of development. Between April 2012 and January 2013, Student added only a few Level 2 skills in the areas of mand, listener response, play and imitation. (S-21 p. 1)

#### Parents' Consultant's Observations and Recommendations

54. Parents arranged for observations of Student in January 2012 at home and in the classroom in February 2012, by an independent behavior analyst with expertise in developing autistic support programs. Parents' initial purpose in consulting with the independent expert was to determine what they could do at home to better support Student's learning and increase progress. (N.T. pp. 107, 108, 173, 276, 420, 421, 424; P-11, P-43)
55. After a second classroom observation in April 2012, Parents asked the independent BCBA to propose an alternative to the VB program that the District could implement for Student, since Parents had become convinced that the VB program was ineffective. (N.T. pp. 108, 109, 443, 444; P-15)
56. At the end of the consultant's first observation, Student's classroom teacher shared her concerns about Student's slow progress. Although Parents' consultant considers VB an excellent program, generally, based on her observations, as well as the data she saw briefly, she does not believe VB is a good fit for Student due to cognitive deficits, ADHD behaviors, low adaptive skills and lack of functional spoken language. Her opinion was also based on Student's limited progress despite the number of years Student has been exposed to the VB approach. (N.T. pp. 437, 438, 441, 444, 445)
57. After observing Student at school and at home and discussing Parents' concerns, the consultant proposed replacing the VB program for Student with Pivotal Response Training (PRT). PRT is a research-supported program based on ABA principles, but centers on using the child's interests to improve responses, use of words and generalization of skills. PRT emphasizes NET and use of play as the primary means of acquiring pivotal skills, rather than discrete trial training to acquire separate, incremental skills in a "table-top" setting. (N.T. pp. 127, 447, 448, 450; P-41, P-42)
58. The consultant believes that Student's deficits, need for increasing and generalizing skills and eliminating unwanted behaviors, including "stimming" manifested by hand flapping and swinging beads or strings, requires a program based on identifying activities of sufficiently high interest that Student will be motivated to decrease problem behaviors and increase functional skills. The consultant considers a functional curriculum essential to improving Student's progress. (N.T. 446, 447, 454; P-15)
59. The consultant noted Student's lack of interest in table-top activities, manifested by elopement from intensive teaching sessions, as well as the time and effort expended between September 2011 through January 2013 to increase from 0 to 3 the number of

motor action directions of questionable intrinsic value, such as “touch your nose,” that Student can follow. (N.T. pp. 454, 455, 458, 459; P-24 p. 63, S-20 p.1)

60. With a functional curriculum, Student could be taught enduring and more valuable “pivotal skills” such as independent hand-washing, pouring a drink, counting with 1:1 correspondence, and putting on a shirt when cold. (N.T. pp. 454, 455, 486)
61. Parents are requesting that the District obtain training and implement PRT for Student to determine whether better progress is possible with a different methodology in light of Student’s low rate of progress with the VB program after several years of implementation in both the IU and District. Parents are concerned that given Student’s rate of progress with the VB program, Student would not acquire the skills expected of a 4 year old child until 5<sup>th</sup> grade. (N.T. pp. 109, 111—113, 119; P-14)

### **DISCUSSION AND CONCLUSIONS OF LAW**

The nature of the dispute in this case is reasonably straightforward. Parents contend that the District has inappropriately provided, and continues to provide, a “One size fits all” curriculum and methodology for Student despite an obvious lack of meaningful progress because verbal behavior is the only method the District uses, and is willing to consider, for providing special education services to children in the primary grades with an autism spectrum disorder. The District, however, contends that this case is nothing more than a methodology dispute, with Parents inappropriately and unreasonably trying to encroach on the District’s right to select a curriculum and type of instruction for Student receives.

The record in this case generally supports Parents’ underlying contention. The evidence established that although Student made progress, particularly in kindergarten, by the end of the 2011/2012 school year it should have been obvious to the District that a change was needed in order to assure Student a special education program reasonably calculated to provide the opportunity for meaningful progress going forward. As Parents’ expert witness pointed out, the VB program that drives both curriculum and instruction for virtually all children with ASD in the elementary school Student attends, as well as for most IDEA eligible students in at least the

primary grades in the District, is well-regarded and generally very effective, but not universally effective, and, therefore, appropriate for every child with ASD. (FF 56) Unfortunately, the nature and severity of Student's disability and the needs it creates make VB ineffective and inappropriate in this case, at least as the sole source of the curriculum and instruction provided to Student. (FF 58)

Parents' specific claims and the parties' arguments will be considered in more detail following an overview of the applicable legal standards.

#### FAPE/Meaningful Benefit

The IDEA statute provides that a school-age child with a disability is entitled to receive a free appropriate public education (FAPE) from his/her school district of residence. 20 U.S.C. §1400, *et seq.*; 34 C.F.R. §300.300; 22 Pa. Code §14. The required services must be provided in accordance with an appropriate IEP, *i.e.*, one that is "reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress." *Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982); *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d at 249. "Meaningful benefit" means that an eligible child's program affords him or her the opportunity for "significant learning." *Ridgewood Board of Education v. N.E.*, 172 F.3d 238 (3<sup>RD</sup> Cir. 1999). Consequently, in order to properly provide FAPE, the child's IEP must specify educational instruction designed to meet his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. *Rowley*; *Oberti v. Board of Education*, 995 F.2d 1204 (3<sup>rd</sup> Cir. 1993). An eligible student is denied FAPE if his program is not likely to produce progress, or if the program affords the child only a "trivial" or "*de minimis*" educational benefit. *M.C. v. Central Regional School*

*District*, 81 F.3d 389, 396 (3<sup>rd</sup> Cir. 1996); *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F. 2d 171 (3<sup>rd</sup> Cir. 1988).

#### Due Process Hearings/Burden of Proof

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

In *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005), the Supreme Court established the principle that in IDEA due process hearings, as in other civil cases, the party seeking relief bears the burden of persuasion. Consequently, because Parents have challenged the District's actions during the period in dispute, Parents must establish the violations they alleged.

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

This case presents a closer than usual approach to the "equipoise" that affects the outcome of the case, but on their fundamental claim, lack of meaningful progress, the evidence tipped the balance in favor of Parents.

#### Choice of Instructional Methods

As the District pointed out, school districts have significant discretion to choose the means and method of providing special education services. Even when services requested by parents might be equally appropriate, or better than a public agency's program, a school district is generally permitted to deny parents' preference and select its own program and services, as long as the school district's methods and curriculum appropriately meet the child's needs. *See, e.g., J.E. v. Boyertown ASD*, 2011 WL 476537 (E.D. Pa. 2011); *J.C. v. New Fairfield Bd. of Educ.* 2011 WL 1322563 at \*16 (D.Conn. 2011); *D.G. v. Cooperstown Cent. Sch. Dist.*, 746 F.Supp.2d 435 (N.D.N.Y. 2010); *Rosinsky v. Green Bay Area School Dist.*, 667 F.Supp.2d 964, 984 (E.D.Wis. 2009).

Moreover, as the court pointed out in *I.H. ex rel. D.S. v. Cumberland Valley School Dist.* 2012 WL 2979038 at \*11 (M.D.Pa. 2012),

...[O]ptimal services and entirely satisfactory results are not the measuring stick for a FAPE. *See Carlisle Area Sch. v. Scott P. by and through Bess P.*, 62 F.3d 520, 533–34 (3d Cir.1995) (“Districts need not provide the optimal level of services, or even a level that would confer additional benefits, since the IEP required by IDEA represents only a ‘basic floor of opportunity.’”). The standard is virtually minimal, indeed, “modest.” *See, e.g., A.B. v. Lawson*, 354 F.3d 315, 350 (4th Cir.2004) (“IDEA's FAPE standards are far more modest than to require that a child excel or thrive.”) (citing *Rowley*, 458 U.S. at 206–07).

As noted above, the minimal standard for denial of FAPE has been met in this case, but only with respect to the curriculum and services provided during this school year and in the near future.

#### Parties' Specific Claims/Arguments

##### Evaluation

Parents suggested that the District might have been better prepared to meet Student's needs from the beginning of kindergarten if it had conducted its own evaluation of Student prior

to the 2011/2012 school year. It was and remains unclear, however, how and why a full psycho-educational District evaluation before or during the 2011/2012 school year would have added important information. Student was evaluated twice near the end of the 2010/2011 school year, by the IU and an independent neuro-psychologist with similar results. (FF 6, 7, 8) Indeed, Student's Mother acknowledged during her testimony at the hearing that the 2011 evaluations were consistent with each other, with Student's functioning at the time they were conducted, and with Student's classroom functioning during the classroom observations conducted by the autism consultant they engaged to recommend first a home program, and later a different school program. Nothing in the evidence presented at the hearing suggests that at the time Student began the District's kindergarten program, the District lacked sufficient information about any aspect of Student's functioning that could have been obtained by more or different standardized assessments in the areas of cognition, achievement, language, social/emotional functioning, behavior or adaptive skills.

The testimony of Student's classroom teacher to the effect that the most important information about Student missing at the beginning of the 2011/2012 school year was how Student would react to the change of setting from the IU program to the District classroom was persuasive because it makes sense. The teacher testified that the District had as much information as it could obtain without actually knowing the child, noting that although standardized assessments provide an overview, a true understanding of the child could only develop with experience. (N.T. pp. 292, 293) The District's determination that recent IU and private evaluations provided an accurate general assessment of Student's significant needs, and that additional information of that nature was unnecessary was reasonable. No amount of pre-enrollment data could have accurately predicted how Student would react to unfamiliar staff and



a new peer group, and, therefore, provide the District with a better “blueprint” for developing appropriate goals or effective teaching strategies.

There is no doubt and no dispute that Student has very limited skills in all areas, with virtually no ability, at least none discernible to this point, to acquire new skills or generalize skills to different settings without intensive, explicit instruction and repetition. Parents, however, did not clearly articulate how and why the District’s decision not to conduct its own formal evaluation caused or contributed to a lack of progress at any time during the past two school years.

The true evaluation issue in this case is whether the District effectively used the information it gathered from its experience with Student in the classroom, and the VB-MAPP assessments it conducted, to appropriately inform instruction, particularly in choosing skills to target and instructional methods.

#### 2011/2012 School Year (Kindergarten)

Parents were understandably cautious about the likely effectiveness of a verbal behavior program since they believed Student showed little growth in the pre-school VB program, it was not unreasonable for the District to propose an IEP based on its own VB program and the most recent IU IEP. (FF 25) The District has a well-regarded VB program, as well as access to assistance from behavior analysts and other consultants through the statewide Autism Initiative. (FF 10) It was entirely reasonable for the District to take the position that it should have the opportunity to implement its own VB program.

Although Parents expressed concerns about the changes the District proposed to Student’s IEP after the first quarter of kindergarten, it was also not unreasonable for the District to make goal changes to reflect the skills Student was actually demonstrating. (FF 30, 31) In

the end, Parents acknowledged that the updated version of the IEP that resulted from the January 2012 IEP meeting did not include a significant reduction in goals. (FF 34)

Moreover, by the end of the school year, Student had reached the developmental milestones at Level 1 on the VB-MAPP, other than those that were affected by Student's use of an augmentative communication device and inability to speak and had mastered a number of IEP goals. (FF 17, 18, 39, 53)

Most tellingly, the consultant who observed the District's program at Parents' request did not express to either Parents or the District that the program Student was receiving was fundamentally flawed after the February 2012 observation. *See* P-11.

Student is severely affected by ASD and transitioned into a new program with new staff and a new peer group at the beginning of the 2011/2012 school year. It was not unreasonable for the District to have the entire school year to get to know Student and implement the program that has been successful with many other children with significant needs resulting from ASD.

In light of all the circumstances, the District did not deny Student a FAPE during the 2011/2012 school year. No compensatory education, therefore will be awarded for that period, including ESY. Parents presented no evidence that Student did not maintain skills during the summer s a result of inadequate or inappropriate ESY services.

#### 2012/2013 School Year

The circumstances changed, however, at the end of the 2011/2012 school year. By then, the District had an analysis from a recognized expert in the area of autism programming, explaining why VB was not likely to yield significant learning in the future, based on Student's unique characteristics and constellation of needs. (FF 57—60) Moreover, Parents' expert

witness testified that Student's teacher had expressed some concerns about Student's rate of progress, which the District did not refute. (FF 56)

The information available to the District from the consultant was confirmed by the District's VB-MAPP assessments in September 2012 and January 2013. Student gained very few skills from April 2012 through January 2013. (FF 53) In addition, the January progress reports indicate little progress on skills needed to advance to higher levels in the VB program. Although Student was making some progress, for the most part, the progress Student made via intensive teaching, in particular, was not meaningful in that Student was not gaining intrinsically useful skills, especially in light of the effort needed to gain and maintain those skills. *See* FF 43—47.

The District, however, did add some goals for developing functional skills, such as a goal for engaging in an independent activity and began introducing some skills of apparently higher interest to Student, such as identifying letters. (FF 48, 52) Considering Student's low level of skills in some areas, Student's ability to identify 14 letters is surprising and supportive of Parents' expert's opinion that identifying and working from high interest activities is reasonably likely to yield meaningful progress.

Parents requested compensatory education for the entire current school year, and presumably hour for hour. There is, however, no reasonable basis for such an award. Much of Student's school day is spent in activities as to which Parents did not pursue a claim, and/or as to which there is insufficient evidence to support an award of compensatory education.

Consequently, because many of the skills taught during approximately one hour daily that instruction is delivered are those that do not represent meaningful progress, Student will be awarded an hour of compensatory education daily for the current school year until such time as

the District offers a fully appropriate program with a curriculum and methodology reasonably likely to yield meaningful educational progress for Student.

#### Future Educational Program

Although Parents' expert witness was persuasive and her recommendations appear sound and sensible in light of the record since the recommendations were made at the end of the 2011/2012 school year, it is still the District's prerogative to select an appropriate educational program for Student. Nothing in the record suggests that the District is not entirely capable of doing so.

Consequently, although the District will be ordered to alter Student's program, it will not be ordered to provide PRT or any other program. There are at least two other programs that might be used to develop appropriate goals and an appropriate method of instruction for Student, and as noted above, the District has access to resources through the Autism Initiative. The District is free to use whatever resources it chooses, as long as it proposes an appropriate program.

### **ORDER**

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

1. Obtain consultation, as needed, through the Autism Initiative and/or other public or private sources, to fully consider whether/how research-based programs, other than verbal behavior, that are recognized as effective in addressing the core deficits of autism spectrum disorders, such as pivotal response training and/or other approaches/methods, *e.g.*, TEAACH or Lovaas, could be used to develop an appropriate program for Student that is reasonably calculated to yield meaningful educational progress;
2. Within 60 days of the date of this order, convene Student's IEP team to propose an appropriate special education program and related services for Student for the 2013/2014 school year and work cooperatively with the family to

assure that such a program can be implemented beginning with the first day of the 2013/2014 school year;

3. Provide Student with compensatory education equal to 1 hour for everyday that school was/will be in session from the beginning to the end of the 2012/2013 school year, or until such time as the parties agree upon a new IEP, whichever comes first. Parents may use the hours of compensatory education for services that address Student's identified need arising autism spectrum disorder, including consultation for a home program and summer programming to supplement or replace ESY services offered by the District.

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

Anne L. Carroll

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Anne L. Carroll, Esq.  
HEARING OFFICER

March 27, 2013