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PENNSYLVANIA

SPECIAL EDUCATION HEARING OFFICER

6205/05-06 LS

File Number

L.B.

Child's Name

Xx/xx/xx

Date of Birth

March 13, 14 and 23, 2006

Dates of Hearing

Closed

Type of Hearing

For the Student:

**For the Wyomissing Area School
District:**

Parent(s)

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Dates of Hearing:

March 13, 14 and 23, 2006

Receipt of Written Closing Statements:

April 17, 2006

Date Record Closed:

April 17, 2006

Date of Decision:

May 2, 2006

Hearing Officer:

Daniel J. Myers

BACKGROUND

Student (Student) is a [preteenaged] child with autism residing in the Wyomissing Area School District (School District.) His parents reject the School District's most recently proposed December 2005 individualized education program (IEP), and they contend that the School District has inappropriately implemented Student's IEPs for the last two school years.

ISSUES

Whether or not the School District's most recently proposed December 2005 IEP is appropriate?

Whether or not the School District has denied a free and appropriate public education (FAPE) to Student IEPs since September, 2004?

FINDINGS OF FACT

1. Student, whose date of birth is xx/xx/xx, is a [preteenaged] resident of the School District with moderate to severe autism. (Vol I, N.T. 54)¹ Student has also been diagnosed with mental retardation, although the record lacks precise assessments of Student's cognitive abilities. (Vol I, N.T. 54)
 - a. Expressively, Student will approach his teacher and classroom aides to make requests such as, "Mrs. F,² I want to spin," and "Spin me fast," or "Spin me slow". (Vol I, N.T. 295-296, 300) Student also requests items and objects from peers. (Vol I, N.T. 307)
 - b. In reading skills, Student has mastered 17 sounds and he can decode and encode some 2-3 letter words. (Vol I, N.T. 313, 316)
 - c. In math skills, Student counts to 14. (Vol I, N.T. 318)
 - d. Student's behaviors include verbal stimulation, chewing of objects, [and] excessively strong squeezes and hugs [redacted]. (Vol I, N.T. 310-312)
 - e. Student is not an incidental learner. He needs very organized, direct, repetitive instruction, with many trials, and sequential movement from easier to harder skills. (Vol I, N.T. 325; Vol II, N.T. 200-201)
2. After his diagnosis in 1999, Student began receiving Lovaas programming at home. (Vol III, N.T. 154-155)
3. In 2000, Student's parent switched to Verbal Behavior (VB) home programming. (Vol III, N.T. 157)

¹ References to "Vol I," Vol II" and "Vol III" are to the transcripts of the March 13, 14 and 23, 2006 hearing sessions, respectively. References to SD, P and HO are to School District, Parent and Hearing Officer exhibits, respectively.

² Hereinafter referred to as "Ms. F."

- a. VB programming relies upon a scientific, applied behavior analysis (ABA), approach to teaching that analyzes behavior for the purpose of developing a student's language skills.
 - b. VB programming uses the Assessment of Basic Language and Learning Skills (ABLBS) as its curriculum and progress monitoring instrument, charting a student's mastery of a variety of communication skills that progress sequentially from concrete skills to more abstract concepts. (Vol III, N.T. 162, 164) Examples of communications skills that are tracked via the ABLBS are: listening and repeating; labeling an item; describing a function; cooperation; requesting; answering "Wh" questions; and spontaneous vocalizations. (Vol II, N.T. 174-178)
 - c. Theoretically, all children would start with a blank ABLBS and eventually see their ABLBS charts completely filled. (Vol III, N.T. 164-165) Not every child with autism will progress to a fully-completed ABLBS. (Vol III, N.T. 336)
4. In September 2002, Student attended the School District's kindergarten. Ms. F was Student's one-on-one aide in kindergarten. (Vol I N.T. 52, 257; Vol III, N.T. 170) To assist Student's transition to kindergarten class, Ms. F first visited Student at home and observed his home program. (Vol I, N.T. 258)
 5. In January 2003 of Student's kindergarten year, Student began attending, at School District expense, the [Redacted] School (Private School) which is a private school that employs the VB method. (Vol I, N.T. 52-53, 129, 258; Vol III, N.T. 171) Ms. F initially traveled with Student to Private School to assist in his transition. (Vol I, N.T. 53, 259) Private School employed a Picture Exchange Communication System (PECS) as well as the Reading Mastery reading program. (Vol II, N.T. 162-163; Vol III, N.T. 184)
 6. Student remained at Private School for his 2003-2004, 1st grade school year. (Vol I, N.T. 52-53)
 7. Around this time (2003-2004), Student's parent acquired her certification as Board Certified Behavior Analyst (BCBA). (Vol III, N.T. 158) She began providing professional services to children with autism, and she played a significant role in the Commonwealth's statewide initiative called the VB Project, which is designed essentially to reproduce effective VB classrooms in public schools throughout the state. (Vol III; N.T. 173)
 8. In September 2004, Student returned to the School District for 2nd grade. (Vol I, N.T. 260)
 - a. At that time, the School District became part of the statewide VB Project initiative and established its own VB classroom. (Vol I, N.T. 55; Vol III, N.T. 114, 172) The classroom received monthly consultation services from three outside VB consultants, two of whom were BCBA's, and one of whom was a Board Certified Associate Behavior Analyst (BCABA). (Vol I, N.T. 326) Two of the VB consultants (a BCBA and a BCABA) were employed by the VB project, and one of the VB consultants (a BCBA) was employed by the local intermediate unit (IU). (Vol I, N.T. 64)

- b. Ms. F was the teacher of the School District's VB classroom. (Vol I, N.T. 259) Ms. F is a certified elementary and special Ed teacher with seven years experience in this School District teaching children with autism, and three years prior experience teaching children with emotional support needs. (Vol I, N.T. 254, 256)
 - c. Ms. F's VB classroom provides direct instruction in reading and math, using the techniques of errorless teaching, varied rates of reinforcement (VR), prompt fading, intensive teaching and transference of skills into the NET (natural environment teaching.) (Vol I, N.T. 13, 57, 59, 324; Vol III, N.T. 38)
 - d. Student's parent occasionally came into the classroom and not only observed her child, but also provided informal VB training to classroom personnel. (Vol III; N.T. 195) Both Ms. F and Student's parent considered this to be a mutually beneficial and mutually appreciated relationship. (Vol III, N.T. 44, 175)

- 9. Initially, because all students in the School District's VB classroom were new, the class routine consisted of substantial "pairing" activities during which few demands were made and the focus was to make the classroom a positive experience for the students. (Vol II, N.T. 161) Eventually, in November 2004, the parties developed an IEP for Student's 2004-2005 school year. (SD 1)
 - a. The IEP included goals in reading, listening comprehension, expressive and receptive skills, social skills, math readiness, self-help skills, and fine and gross motor skills. (SD 1)
 - b. Related services included occupational therapy (OT), physical therapy (PT), adapted physical education, speech and language therapy, music therapy, access to either a TSS worker or a one-to-one personal care assistant (PCA), and an assistive technology evaluation. (SD 1, p.19)

- 10. Consistent with the IEP, the School District requested from the IU an assistive technology evaluation for Student. (SD 2) The actual report was not issued until May 17, 2005. (SD 2; Vol I, N.T. 169-170; Vol III, N.T. 186) Apparently, although IEP team members originally thought that an evaluation and report could be completed quickly, the process involved cumbersome loan procedures for computer hardware and lengthy trials of various pieces of equipment. (Vol III, N.T. 91-94; P 27)

- 11. To provide the music therapy services required by Student's IEP, the School District contracted with a music therapist. (Vol I, N.T. 68; Vol III, N.T. 127-128) Initially, the music therapy was provided in a group setting with several students, but it was later provided to Student 1:1 because he was the only student in his classroom whose IEP required music therapy. (Vol III, N.T. 129-130)

- 12. Consistent with the IEP, the School District provided a 1:1 PCA. She happened to be (but was not required to be) a certified regular education teacher. Student was also accompanied by a wrap-around TSS who was not employed by the School District. (Vol I, N.T. 281; Vol III, N.T. 110, 112)

- 13. Student started at Lesson One in the Reading Mastery program, even though he had been receiving Reading Mastery instruction at Private School. This was in response to his

- parent's concern that Student's Private School teacher had not taught Student correctly in the lessons to which he had been exposed. (Vol II, N.T. 162-163; Vol. III, N.T. 258, 291)
14. The School District initially implemented the Distar Math program, but stopped at parent request and incorporated Student's math instruction into his VB sessions. (Vol II, N.T. 168) Because the IU consultant was concerned, however, that this type of math instruction was not necessarily sequential, and therefore might result in splinter math skills, the parties agreed to reimplement Distar Math in May 2005. (Vol II, N.T. 168)
 15. On May 12, 2005, Ms. K, M.S., BCABA, issued a privately-secured evaluation report to Student's parent recommending VB programming that purportedly would get Student through the stage at which he appeared to be "stuck." (P 6; Vol III, N.T. 189, 191-192, 248)
 - a. After attending a Vincent Carbone clinic in spring 2005, Student's parent became convinced that Student was "stuck" at the intermediate intraverbal stage of requesting and labeling. (Vol III, N.T. 165, 247, 256, 278-279, 335)
 - b. Student's parent was concerned that mistakes in Student's educational programming can lead to chronic behavioral problems that are difficult to modify. (Vol III, N.T. 161)
 - c. Student's parents privately secured an evaluation by Ms. K, purportedly one of the few VB experts in the world who knows how to program effectively for an intermediate learner with autism. (Vol III, N.T. 166, 327; P 6)
 - d. I find that Ms. K's report is entitled to no evidentiary weight for the purpose for which it was produced at hearing. (P 6)
 - i. The purpose for which the report was produced was to establish that Student is an intermediate learner who is stuck and who should have achieved, within three months, the seventeen ABLLS instructional objectives listed in the report.
 - ii. Ms. K's report appears to be quite valuable in explaining how the 17 objectives in the report can be taught.
 - iii. Ms. K's report, however, lacks any analysis or explanation as to why she believes this particular Student should achieve those 17 objectives within three months.
 - iv. Ms. K's 26 page report appears simply to be a set of excerpts from a handbook of teaching techniques, with Student's name inserted at various places. In only one location (page 20) is there any unique reference to Student, referring in parentheses to Student's response in an observation. Another location (page 23) suggesting specific teaching language, i.e., "let's play ([Student's] favorite game)" without identifying the game itself, reinforces my conviction that Ms. K's report is primarily a template into which Student's name is inserted in specific locations, rather than a report that uniquely analyzes Student's particular needs.
 16. On or about May 17, 2005, the School District issued its assistive technology evaluation. (SD 2) (SD 2; .Vol I, N.T. 169-170; Vol III, N.T. 186)

- a. The report was virtually useless. While asserting in its recommendations paragraph that assistive technology can be motivating to Student, can be an aid to his teacher, and can be of assistance in achieving his goals, it also states in the same paragraph, without supporting data, that Student must “improve[] significantly with his social interaction goals” before assistive technology will be of any benefit. (SD 2) The report appears to be more of a chronology of activities than any actual analysis of Student’s needs and the application of technology to those needs. I suspect that the ineffectiveness of the School District’s assistive technology report is actually the result of a lack of consensus between the parties regarding how technology might be used in Student’s programming.
 - i. While the parties appear to have agreed that Student would benefit from an augmentative expressive communication device, such as a MiniMerc, they disagreed over whether or not any such device should use a touch-screen or a mouse. (Vol III, N.T. 96)
 - ii. The parties also appear to have disagreed over whether or not Student might benefit from interaction with computer programs. Student’s Parent thinks that appropriate computer programs might expand Student’s horizons with language. (Vol III, N.T. 185) The School District and its assistive technology consultant appear to believe that Student will simply spend his time looking at a computer screen and reduce his human interaction. (Vol I, N.T. 71, 101; Vol II, N.T. 248; SD 2)
17. Between May and August 2005, the parties revised Student’s 2005-2006 IEP. (SD 4; Vol I, N.T. 76-77; Vol II, N.T. 207-208) The IEP that was eventually proposed by the School District on August 17, 2005 (SD 4) included the following:
- a. 1:1 intensive VB instruction for 120 minutes/day, plus NET teaching. (Vol I, N.T. 56, 244-253; Vol II, N.T. 162)
 - b. 5 hours/week related services, i.e., speech and language, OT, PT consultation, and adaptive physical education. (Vol I, N.T. 56) OT goals remained the same. (Vol II, N.T. 210-211)
 - c. New goals related to expressive language and spontaneous requests based upon the Ms. K report were added to previous goals. (Vol II, N.T. 211-212)
 - d. Cold probe data would be collected daily. Data would also be charted visually twice per quarter. (Vol II, N.T. 208)
 - e. A reading comprehension goal for 2-3 word sentences was added. No change in math goals. (Vol II, N.T. 209)
 - f. Toileting goals remained the same, but task analysis was added to break down the task into steps and record data on each step. (Vol II, N.T. 210)
 - g. A behavior plan was added. (Vol II, N.T. 211)
 - h. A lunch buddies program and a music class were added for more inclusion. (Vol II, N.T. 212-213)
18. On August 19, 2005, Student’s parent rejected the School District’s proposed IEP and requested mediation. (SD 4; Vol I, N.T. 59, 80) While Student’s parent was generally satisfied with the goals of the proposed IEP, she wanted the IEP to specify:
- a. Another assistive technology evaluation and services;

- b. A full speech and language evaluation;
 - c. Access to one to one PCA throughout the day, with minimum credentials and a plan to fade the TSS to be spelled out in the IEP;
 - d. 30 minutes per week music therapy;
 - e. Inclusion parameters; and
 - f. Training of all staff.
19. In the meantime, the School District agreed to pay for an independent assistive technology evaluation. (Vol I, N.T. 74; SD 3) The evaluator selected by Student's parent wanted to wait until Ms. F returned in November from her maternity leave, but Student's parent was anxious to get the evaluation completed immediately. (Vol III, N.T. 245)
20. Also in the meantime, the School District hired a substitute teacher for Ms. F in response to her maternity leave. (Vol I, N.T. 81) Just before the school year started, however, that substitute teacher resigned. The School District scrambled to hire another substitute teacher just days before the start of the 2005-2006 school year. (Vol III, N.T. 118-120) Ms. F contacted each parent before school started, prepared information on each child for the substitute teacher, and came to school on the first day to assist the substitute in getting settled. (Vol III, N.T. 120)
21. In September 2005, Student began his 3rd grade year in the School District's VB classroom with eight students, one teacher, four classroom aides, and at least two TSSs, including his own TSS. (Vol I, N.T. 142) Because Ms. F was on maternity leave, the statewide VB project did not reduce the frequency of its BCBA consultations as much as it otherwise would have. (Vol I, N.T. 144) Most of the first month was spent with positive pairing activities to enable the students to associate their new teacher with positive experiences. (Vol II, N.T. 173)
22. On September 7, 2005, the parties agreed to compromise their dispute regarding the August 2005 IEP, and Student's parents withdrew their rejection of the August 2005 IEP based upon the parties' compromise agreement. (Vol I, N.T. 80-82; Vol III, N.T. 269)
23. On or about September 22, 2005, Student's parent observed Student at school. (P 18; Vol III, 195) Student's parent, frustrated with the difficulty that she perceived in scheduling the observation, arrived at the appointed time to discover that Student was, inexplicably, going to OT rather than about to receive VB as arranged. Student's parent asked that the VB session occur, as arranged. (Vol III, N.T. 203) Student's parent observed numerous negative behaviors from Student. Student's parent also observed the teacher engage in a calendaring activity and permit use of a MagnaDoodle, both of which Ms. F had previously discontinued. After 30 minutes of silent observation, Student's parent provided advice to Student's teacher and PCA in specific techniques and charting procedures. (Vol III, N.T. 182, 200-201) School District officials considered the behaviors of Student's parent, particularly her request to observe VB rather than OT, to be disruptive. (Vol III, N.T. 195)

24. Sometime during the Fall 2005 semester, Student's parent discovered, and School District personnel were unaware, that the School District's PT contractor was providing PT services biweekly rather than weekly. (Vol III, N.T. 252)
25. On October 10, 2005, Mr. L, CCC-SLP, issued the independent evaluation report for which the School District had previously agreed to pay. (SD 6)
- a. This report is credible and thorough.
 - b. The report genuinely notes that Student's language and communication needs are "so well described... in his draft IEP of July 2005." (SD 6, p.6)
 - c. Based upon that IEP's descriptions, as well as a personal evaluation of Student, Mr. L concludes that assistive technology can be used to increase Student's independent or self-cued expressive language. (SD 6, p.7)
 - d. Mr. L's report analyzes Student's particular language skills and recommends specific software and hardware to develop his language knowledge and skills.
26. On November 14, 2005, Ms. F returned to the VB classroom and implemented the August 2005 IEP that Student's parents had originally rejected and then reluctantly accepted during mediation. (SD 4; Vol I, N.T. 65, 80, 123; Vol II, N.T. 215; Vol III, N.T. 308-311)
27. On December 22, 2005, the School District issued the proposed educational program and placement that is in dispute in this matter. (SD 8; Vol I, N.T. 83, 200-201) The proposed IEP:
- a. Eliminates two previous goals under which Student would independently ask "What" and "Where" for 10 novel situations throughout the day. (SD 4, p.10 #13,14; SD 8);
 - b. Includes a limitation upon parental observation prior to monthly meetings. Visits are limited to once per month, for up to one hour. No interaction, discussions or schedule changes with Student or teachers are permitted. (SD 8, p.21; Vol. I, N.T. 86; Vol. III, 118)
 - c. Changes the language relating to PCAs as follows:
 - i. The November 2004 IEP provides, "Access to a one to one TSS worker throughout the school day. If the TSS is not available then the district will provide a one to one personal care aide." (SD 1, p.19)
 - ii. The December 2005 proposed IEP provides, "Access to a personal care aide when one to one instruction is not provided." (SD 8, p.21)
 - d. Changes the cold probe data collection from daily to weekly for 6 of Student's 22 expressive language short term objectives. (SD 8, pp. 12-13, #1, 2, 5, 7, 9, 21) In earlier IEPs, all cold probe data collection was to be taken daily.
 - e. Replaces music therapy with music enrichment every two weeks by a music therapist or certified music teacher in a small group. (SD 8, p.21; SD 1, p.38)
 - f. Leaves blank the checkmark next to "Assistive Technology," indicating no need for assistive technology. (SD 8, p. 7; SD 1, p.5)
 - g. Provides 6 hours of initial ABA training to all staff working directly with Student, before working independently with Student if possible, but as soon as possible thereafter if not possible. (SD 8, p.23)

- h. Provides inclusion in music class for up to 15 minutes weekly, 10 minutes weekly in library, 30 minutes weekly in physical education and Art, and 75 minutes weekly in homeroom. (SD 8, p.22)
28. On or about January 5, 2006, Student's parent rejected the School District's proposed IEP and requested due process. (SD 9; SD 10; Vol I, N.T. 87-88)
 29. On January 12, 2006, I was assigned as hearing officer to this matter.
 30. Sometime in January 2006, the parties conducted a resolution meeting. No resolution was reached. (Vol II, N.T. 70)
 31. Also, sometime in January 2006, most of the other parents in Student's VB class came in to observe the classroom. Ms. F was not sure why this occurred, but a common theme among their questions concerned the training of new staff. (Vol III, N.T. 62)
 32. On January 31, 2006, Dr. K, an expert in curriculum for school age children with autism, observed Student in his classroom. (Vol. II, N.T. 14-16; P 21)
 - a. His observation was more abbreviated than usual, and was performed essentially as a favor to Student's parent. (P 21, p.1; Vol II, N.T. 108)
 - b. He concluded that Student should have advanced at a far greater rate in the Reading Mastery reading curriculum. (Vol II, N.T. 30-34; P 21) Student's rate of progress could indicate either that Reading Mastery is not the correct reading curriculum for Student, or that it is not being implemented properly. Dr. K did not know which was the case here. (Vol II, N.T. 130, 132)
 - c. He also testified that acceleration graphs are more effective progress monitoring tools than Ms. F's standard graphs. (Vol II, N.T. 53, 66-68)
 - d. He further testified that the standard ABA practice is to take daily data as opposed to weekly data. (Vol. II, N.T. 47)
 - e. Dr. K was a very credible witness, by which I mean that he was honest and he scrupulously qualified his opinion where appropriate.
 - i. I give his report little evidentiary weight however because, as described above, Dr. K did not know whether Student's rate of progress in Reading Mastery was due to improper implementation of that reading curriculum or to the fundamental inappropriateness of that curriculum to meet Student's needs. (Vol II, N.T. 130, 132) In my mind, this critical distinction must be resolved before Dr. K's report can serve the purpose for which it is offered.
 - ii. In addition, while Dr. K's opinion acknowledged that children learn at different rates, he failed to convince me that he understands Student's unique learning needs and he relied too heavily (in my mind) upon the assumption that the designers of the Reading Mastery program have determined the proper rate at which every child will progress. (Vol II, N.T. 126-128)

33. In March 2006, Student's parent observed Student's VB program prior to the parties' monthly parent/teacher meeting. Student engaged in 5 serious negative behaviors during a 15 minute period. (Vol III, 179)
- a. Believing that a recent student teacher's incorrect teaching techniques resulted in the Reading Mastery textbook triggering negative behaviors from Student, Student's parent asked Ms. F to remove a reading book from a table to determine whether that might be a negative trigger. (Vol III, 176-180) Although Ms. F disagreed with Student's parent, Ms. F removed book as requested by parent. (Vol III, 121) Later that afternoon, Ms. F placed the book back on the table to determine whether it was the book or other circumstances that had prompted Student's negative behaviors. (Vol III, 146)
 - b. Student's Parent observed Ms. F inadvertently reinforce a negative behavior by tickling Student at an incorrect moment. (Vol III, 179) Ms. F believes that the tickling was an appropriate reduction of potentially more serious negative behaviors. (Vol III, 140) Student's Parent admits that observer and teacher can interpret things differently. (Vol III, 180)
34. Typically, Ms. F plans Student's upcoming instruction over the weekend, and she meets daily with her staff. (Vol I, 249, 263-264)
- a. Ms. F provides primary instruction and then Student's PCA maintains or reviews the instruction. (Vol I, 304)
 - b. Student started at lesson 1 in Reading Mastery when he returned from Private School in September 2004, and now he's at lesson 69. (Vol II, 164, 197) Student's rate of learning in Reading Mastery was 2 days per lesson, or one-third the typical rate. (Vol II, 198)
 - c. Ms. F's trainings of her staff include interrater reliability training during which her staff watches a videotape of Student and tallies behaviors to ensure consistency among record-keepers. (Vol I, 103, 188)
 - d. From September 2004 through the 3rd quarter of 2005-2006, Student has gained 251 new target skills. (Vol I, 300)
 - e. Ms. F does not want to delegate data collection and graphing tasks to anyone else on her staff. (Vol II, 231)
 - f. From June 2005 to March 2006, Student progressed in Distar Math from lesson 9 to lesson 26. (Vol II, 170)
 - g. From September 2004 to March 2006, Student's writing skills progressed from inappropriately large letter sizes to near-mastery of regular sizing. (Vol II, 170-171)
 - h. Student can write some numbers and some letters, and he now asks to write his name. (Vol II, 171)
35. Parental Involvement.
- a. Typically, Ms. F sends cold probe data to Student's home weekly. (Vol II, 234) The parties also meet monthly, and those meetings are sometimes 1.5 hours long. (Vol II, 235) The School District has the capacity to videotape Student's classes. (Vol. I, 220; Vol II, 237) Student's parent historically offers programmatic

suggestions by email, or phone, or via the communication logbook, or at meetings. (Vol III, 125-126, 137)

- b. There is definite tension between Student's parent and his teacher, Ms. F. (Vol III, 123) Ms. F equates parental input with instructional decision-making. (Vol III, 32) This may have something to do with the expertise of Student's parent, and it probably has something to do with Ms. F's own, admitted, difficulty in setting boundaries with parents. (Vol III, 127)
- c. The School District contends that the presence of Student's parent in the classroom is disruptive and that one child perseverates on Student's parent. (Vol I, 90, 233; Vol II, 237) I reject this argument completely. VB consultants, related service providers, and numerous aides and TSSs are in that classroom every day. (Vol I, 234) I will not conclude that Student's parent, who is a VB consultant herself, should be excluded from the classroom because she, specifically, is a disruption.

36. PCAs. This issue actually mixes two distinct matters: the PCA and the TSS.

- a. The School District's proposed IEP does not require an assistant at any time that Student is in a one-to-one relationship with a teacher or related service professional. (SD 8, p.21; Vol I, 213; Vol II, 243-244) Theoretically, the PCA would be doing other things in classroom while Student is receiving such 1:1 instruction. (Vol I, 214-217)
- b. Student's Parent notes that Student has a complex, intense, hard to learn educational program that requires a dedicated, well-trained, consistent, all-day PCA to ensure proper instruction and data collection. (Vol III, 232)
- c. In addition, the School District considers Student's TSS to be an unnecessary data-taker who is often inconsistent in documenting behaviors. (Vol I, 95, 119) Ms. F has monthly meetings with TSSs to increase interrater reliability. (Vol III, 66, 217-218)
- d. Student's Parent believes that she would receive no accurate information about Student without an independent TSS in the classroom. (Vol III, 213) Student's Parent also raises a safety concern, noting that teachers sometimes are distracted and Student's TSS is dedicated to keeping safe. (Vol III, 229)

37. Data collection. This issue appears to mix three distinct matters: frequency of data collection; form of data collection; and frequency of data reports to parent.

- a. The School District supports its proposals to change data collection on 6 of 22 benchmarks by simply contending that "you don't take daily data." (Vol I, 94, 202) Student's parent is concerned that, absent daily data analysis, inadvertent teaching errors will create deep behavioral holes that are difficult to get out of. (Vol III, 196-197)
- b. Ms. F appears to consider parental requests for daily data to be a lack of trust in Ms. F's competence. (Vol II, 239, 250-251)
- c. Student's parent seeks daily data collection, using agreed upon data forms. (SD 9, p.4)

38. Music therapy. Music therapy incorporates non-music IEP goals, while music enrichment does not. (Vol. I, N.T. 159-160; Vol III, N.T. 234, 349)
- a. The School District does not believe that Student needs music therapy. (Vol I, N.T. 69, 160) Student's parent contends that Student has received music therapy for the last two years and has received great gains from music therapy. (Vol I, N.T. 166) Ironically, neither party's position is supported by data in the record.
 - b. At one time, both parties intended to use Student's contracted music therapist to transition student from music therapy to music inclusion. (Vol I, N.T. 163, 165; Vol III, 233-234, 299-303; SD 1, pp. 19-20)
39. Assistive Technology. The School District's December 2005 proposed IEP does not indicate that Student has a need for assistive technology. (SD 8) The School District apparently demands that, before it will concede that Student needs assistive technology, independent evaluator L. must observe Student in the classroom and demonstrate where human interaction should be reduced. (SD 10, p.2)
40. Training/Competency.
- a. Student's parent wants the School District to provide an independent BCBA, and/or Ms. K, to provide supervision and training to both home and school. (SD 9, p.7; Vol III, N.T. 243, 246, 337-339) Student's Parent adds the proviso, "as long as the person truly could accomplish and work collaboratively with me to accomplish the goals." (Vol III, 339)
 - b. Student's parent also contends that Student's OT lacks sufficient training, and that Student's Fall 2005 substitute teacher was inadequately trained. (SD 9, p.7; Vol III, N.T. 293)
41. Related services. This issue concerns two matters: the quantity and quality of related services.
- a. It is undisputed that the School District's contracted PT provider failed to provide all PT as required by the IEP. (Vol I, 115, 196, 206) Because Student's parent was the entity who discovered this deficit, she now wants documentation assuring that all related services are provided in accordance with the IEP. (Vol III, N.T. 250)
 - b. Student's parent testified that Student's OT attached a pencil to Student's wrist with a rubber band to improve his handwriting, which was not discussed with parent in advance, is not recommended by the IEP's Sensible Pencil program, and is not a data-based decision. (Vol III, N.T. 198-199) In addition, Student's OT records no behavioral data. (Vol III, N.T. 219)
 - c. Student's parent also wants standardized speech and language testing because the School District's proposed December 2005 IEP includes present educational levels for only 3 of 27 language goals. (Vol III, N.T. 90, 260-262) The School District argues that norm-referenced standardized speech and language testing is inappropriate in this case because Student is difficult to assess, with small, hard to measure gains. (Vol I, N.T. 121)

42. I conducted an evidentiary hearing in this matter over three days, March 13, 14 and 23, 2006. During those three days, I expected the parties to produce all evidence that they believed was necessary to support their positions.
- On March 14, I required the parties to spend 90 minutes discussion settlement of their dispute.
 - By the end of the 3rd hearing session on March 23, both parties vigorously contended that they still needed more time within which to present important evidence. The School District argued that my case management decisions prevented it from presenting a speech and language teacher who would have testified about the lack of utility of assistive technology and norm referenced standardized testing of Student. (SD 14; Vol II, N.T. 256-258; Vol III, N.T. 12-19) Student's counsel argued that she was prevented from presenting assistive technology and music therapy experts. (Vol II, 257-258)
 - Despite the parties' arguments, I consider three full days of hearing, even with 90 minutes of mandatory settlement discussion, to be sufficient time within which experienced counsel can present the evidence necessary to support their cases.
43. School District exhibits SD 1-11, 13, 14 were admitted without objection and SD 12 was admitted over objection. (N.T. Vol III, 357-359) Parent exhibits P 1, 2, 4, 7, 10, 14, 16-21, 23, 24, 26-28 were admitted into the record without objection. P 3, 8, 9, 12 and 22 were not offered. P 5 and p 11 were objected to and not admitted. P 6, 13, 15, 25 were admitted over objection. (Vol III, N.T. 353-357)

Exhibit	Not Offered	Admitted without objection	Admitted over objection	Not Admitted
SD 1-11			✓	
SD 12		✓		
SD 13			✓	
SD 14			✓	
P 1-2		✓		
P 3	✓			
P 4		✓		
P 5				✓
P 6			✓	
P 7		✓		
P 8-9	✓			
P 10		✓		
P 11				✓
P 12	✓			
P 13			✓	
P 14		✓		
P 15			✓	
P 16-21		✓		
P 22	✓			
P 23-24		✓		

Exhibit	Not Offered	Admitted without objection	Admitted over objection	Not Admitted
P 25			✓	
P 26-28		✓		

44. This decision is issued:

- a. 117 days after the due process hearing request; and
- b. 15 days after the record was closed in this case.

DISCUSSION

The burden of proof in an administrative due process hearing is upon the party seeking relief. Schaffer v. Weast, __ U.S. __, Dkt. No. 04-698 (Nov. 14, 2005) In this case, it is unclear which party has the ultimate burden of proof, because both parties desire changes to the last agreed-upon IEP. Nevertheless, the evidence does not appear to be in equipoise on any particular issue, and my conclusions described below are based upon preponderances of the evidence in the record.

An appropriate program is one that is provided at no cost to the parents, is individualized to meet Student's educational needs, is reasonably calculated to yield meaningful educational benefit, and conforms to applicable federal requirements. Rowley v. Hendrick Hudson Board of Education, 458 U.S. 176, 102 S. Ct. 3034 (1982) The appropriateness of the IEP is based on information known at the time it is drafted. Fuhrmann v. East Hanover Board of Education, 993 F.2d 1031 (3d Cir. 1993) While school districts are not required to provide the optimal level of services, a program that confers only trivial or minimal benefit is not appropriate. Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3d Cir. 1988), cert. denied, 488 U.S. 1030 (1989) The IEP must be likely to produce progress, not regression or trivial educational advancement. Board of Education v. Diamond, 808 F.2d 987 (3d Cir. 1986) In the end, however, School Districts are not required to maximize the potential of every student with a disability. Rowley, *supra*.

Communication issues between Student's teachers and parents cannot be resolved by simply barring the parents from the classroom. The School District's citation to an appeals panel decision that purportedly rejects a parental request for a minimum schedule of observations is inapposite because here it is the School District that seeks to establish in the IEP a maximum schedule of observations. The School District can address any perceived disruptions through such means as closed circuit TV and/or two-way mirrors and/or other creative means that other educational professionals undoubtedly have already devised. It is appropriate for the School District to expect Student's parent to adhere to district or building-wide rules, and to request that Student's parent not interfere with programming, but it is not appropriate for the School District to add restrictions in the IEP that prevent this Student's parent from seeing her own autistic child. I will require the School District to delete this provision from its proposed IEP.

I suspect that music therapy was originally included in Student's IEP with no real consideration of his actual need for this particular related service. School District personnel are clearly unconvinced of Student's need for music therapy, despite its recommendation in a 2002 private evaluation report and its inclusion in the November 2004 IEP. (Vol I, N.T. 158; SD 1) Ms. F and the music therapist did not collaborate, and the music therapist did not use errorless teaching techniques and record skills data. (Vol I, N.T. 68-69, 95-98, 161; Vol II, N.T. 246) Having once incorporated it into the IEP, however, School District personnel cannot now simply remove it either on the basis of their visceral beliefs that it is not needed or because they were dissatisfied with the quality of their contracted service provider. Some sort of mutually agreed upon resolution, or a music therapy evaluation, should be conducted to support its removal from the IEP. I will require the School District to reinsert music therapy into Student's IEP.

There appears to be no dispute that the School District's IU-provided assistive technology evaluation was inadequate. The School District agreed to pay for an independent assistive technology evaluation, and then unilaterally removed the checkmark from the IEP next to assistive technology needs and apparently is requiring that the independent evaluator come to the School District and convince its personnel that assistive technology is really required. I consider this to be inappropriately passive-aggressive behavior which, combined with the School District's failure, for the entire 2004-2005 school year, to provide an appropriate assistive technology report via the IU, warrants compensatory education services. I believe that an appropriately compensatory service, in response to the School District's failures in this area of assistive technology, is to order that the School District implement Mr. L's report in its entirety.

The School District complained that I did not give it sufficient time within which to present its speech and language expert to explain why it resists a standardized speech and language evaluation. I reject this argument and believe that the School District probably should have limited other less essential and time-consuming testimony. In any event, the record lacks sufficient explanation as to why a standardized speech and language evaluation would be inappropriate in this case. Even if it is of limited value, I do not understand why it should not be permitted at all. Accordingly, I will order that the School District conduct a standardized speech and language evaluation.

On the other hand, I do not consider the proposed IEP's provisions regarding inclusion, the PCA, and staff training to be inappropriate at all. No evidence in the record indicates that the School District's proposed inclusion activities are inappropriate. I am convinced that the School District will provide sufficient one-to-one assistance to enable Ms. F to assure implementation of Student's IEP goals. I believe that this PCA issue is actually a symptom of other frustrations felt by both sides, either with School District dissatisfaction with Student's wrap-around TSSs, or with the feeling of Student's parent that she needs independent eyes and ears in the classroom. (Vol I, 156-158; Vol III, N.T. 68) (Vol I, N.T. 91-92, 309) Finally, no evidence in the record indicates that the training provided to personnel working in this VB project classroom is anything less than satisfactory.

I also do not find either the proposed IEP's goals and objectives or its evaluation (i.e., data collection) schedule to be inappropriate. These appear to be reasonable on their face and akin to methodology decisions that are best left to the School District's professionals for

implementation. Further, I find no basis in the record for concluding that Student is an intermediate learner who is stuck in his programming and who cannot be “unstuck” without the assistance of a global expert. While these assertions may ultimately be true, the record lacks credible evidence supporting them, and this argument appears to be based upon an “optimal programming” standard rather than the “meaningful benefit” standard.

I reject apparent arguments of Student’s parents regarding the necessity of having related service providers document the provision of their services in greater detail. Although the School District scoffs in its written closing argument at the idea of time cards for related service providers, I suspect that their auditors might disagree, particularly since it was a parent, and not any School District personnel, who discovered the failure of contracted service providers to provide required services. Nevertheless, I believe that, for purposes of Student’s needs, the IEP’s progress monitoring provisions should constitute sufficient documentation of the provision of related services to Student.

Finally, Student’s parents want an independent BCBA to assist the School District in its inclusion decisions. (SD 9, p.8) Because I have already concluded that the proposed IEP’s inclusion provisions are appropriate, an independent BCBA is unnecessary. Frankly, however, such services might be useful in regularly mediating the inevitable future programming disputes that will arise between the parties. See, In Re R.C., Special Education Opinion No. 1417 (2003)

Student’s parent has a penchant for micromanagement, as demonstrated by her various suggestions regarding the Language for Learning program, the Reading Mastery and Distar math programs, and the instruction (or not) of prepositions. (Vol III, 69-77) (Vol I, N.T. 61, 196, 230) (Vol I, N.T. 197; Vol III, N.T. 46, 194) On the other hand, Ms. F is somewhat thin-skinned, and she has difficulty both in accepting negative feedback from Student’s parent, as well as in delegating tasks to her subordinates. An independent expert might be useful to both parties in these areas.

Further, the School District itself has demonstrated sufficient lack of creativity and passive aggressive behaviors, as described above, to warrant parental feelings of mistrust. (Vol. I, N.T. 80-82; Vol. III, N.T. 269-271) Finally, inevitable and unavoidable obstacles, such as Ms. F’s maternity leave, will always arise that require flexibility and cooperation between the parties. While the parties always have the option of having a hearing officer breeze into town for a few days to render some quick and dirty resolution to their dispute of the month, I am certain that both parties will find it to be an unsatisfactory dispute resolution mechanism. Thus, I suggest, but I expressly do not require, that the parties consider agreeing upon a mutually acceptable independent expert who might serve as their sounding board, understanding that Student’s parent will behave as “mom-only” and not as a visiting expert when she visits the classroom or sends notes to the teacher, and that School District personnel will address issues promptly, directly and not through any back-door behaviors or excessive procedural hoops.

ORDER

For the reasons described above, I ORDER that:

- The School District's December 2005 proposed IEP is not appropriate;
 - The provision on SD 8, pp.21-22 relating to parental observation must be deleted;
 - Music therapy must be re-inserted into the IEP, using the same language as found in Student's November 2004 IEP (SD 1, p. 38);
 - The Assistive Technology box on the IEP at SD 8, p. 7 must be checked;
 - The remainder of the School District's December 2005 proposed IEP shall stand.
- The School District shall conduct a standardized speech and language assessment;
- In the nature of compensatory education services, the School District shall implement fully the independent assistive technology report of Mr. L.

Daniel J. Myers

Hearing Officer

May 2, 2006

Re: Due Process Hearing
File Number 6205/05-06 LS