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PENNSYLVANIA
SPECIAL EDUCATION HEARING OFFICER

DECISION

DUE PROCESS HEARING

Name of Child: TD
ODR #7238/06-07 LS

Date of Birth: xx/xx/xx

Dates of Hearing:
February 16, 2007
February 26, 2007
March 6, 2007
March 9, 2007
May 7, 2007
May 8, 2007

CLOSED HEARING

Parties to the Hearing:
Ms.

Representative:
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Date Record Closed:

May 30, 2007

Date of Decision:

June 8, 2007

Hearing Officer:

Linda M. Valentini, Psy.D.

Background

Student is a xx-year-old eligible student enrolled in the School District of Philadelphia (hereinafter District). There is no dispute regarding his current special education program or placement. Student's mother, Ms. (hereinafter Parent), bringing this claim under the IDEIA and/or Section 504, asserts that the District failed to offer her son a free, appropriate public education (hereinafter FAPE) and that he is therefore entitled to compensatory education services. The time period under consideration was in dispute at the outset of the hearing. As the issue of the potential recovery period was complex, and the Parent asserted various exceptions to the IDEIA limitation on recovery, the parties were permitted to introduce evidence covering the entire time period the Parent was bringing into question.

Issues

1. Did the School District of Philadelphia deny Student a free, appropriate public education by failing to provide an appropriate evaluation?
2. Did the School District of Philadelphia deny Student a free, appropriate public education by failing to provide him with an appropriate placement?
3. Did the School District of Philadelphia deny Student a free, appropriate public education by failing to provide him with an appropriate program?
4. Did the School District of Philadelphia deny Student a free, appropriate public education by failing to provide him with appropriate related services?
5. Did the School District of Philadelphia deny Student a free, appropriate public education by failing to offer him an appropriate Extended School Year program?
6. If the School District of Philadelphia failed to provide Student with a free, appropriate public education is he entitled to compensatory education, for what time period, and in what amount?

Findings of Fact

1. On May 22, 2002 the Parent received a copy of the Procedural Safeguards Notice. (P-36¹)
2. In 4th grade, the 2004-2005 school year, Student was transferred to an emotional support classroom operated by [redacted], a mental health agency (hereinafter Agency). The District contracted with Agency to provide emotional support programs. The District's oversight of the Agency employees placed in the classrooms, as described by the regional special education case manager, consists of, "the dialogue between the program in the school, the school administrator, and the site directors of Agency to discuss any questions that could arise within programming". (NT 424)
3. The individual assigned as the "teacher" for that classroom during the entire time that Student attended graduated from college with a major in criminal justice and a minor in science. She held no teaching credentials. She held no regular education teaching credentials. She held no special education teaching credentials. No one from the District ever asked the individual if she was a certified teacher. (NT 795, 801)
4. Although Agency encouraged the "teacher" to apply for emergency teacher certification in October 2004, that certification was denied the individual². (NT 796-797)
5. Other than being stationed in the emotional support classroom Student attended, the "teacher" had no interaction between herself and the District. Her supervisor was an Agency employee. (NT 798)
6. Prior to becoming the "teacher" for Student's emotional support classroom the individual received two weeks of training from Agency on such things as classroom management and behavioral de-escalation techniques. (NT 801-803)
7. Part of one day of the two weeks was devoted to training on how to write an IEP. (NT 805-80)
8. The "teacher" received no training from Agency in working with children with autism. In preparation for a possible Therapeutic Staff Support (TSS) position she received one week of training in this regard from another agency. (NT 804)
9. The "teacher" received no training from Agency about how to determine if a child is eligible for ESY. (NT 806)

¹ With the exception of HO-1, all exhibits were marked Parent, although both Parties worked from the set and they were essentially Joint exhibits.

² She testified that she did not know it had been denied until after Student was no longer her student.

10. The Parent expressed her concerns to the District's regional special education case manager that the "teacher" did not know how to work with Student. (NT 395)
11. Another individual in the classroom was assigned as the mental health technician (MHT). It was his duty to deal directly with the students when they acted out. (NT 808)
12. A teaching assistant who worked with Student the year before provided some information about Student to the new "teacher" who received him into her classroom in September 2005. The "teacher" recalled that Student was described as "a nice kid...one of the better kids in the classroom in regards to behavior wise, and...aggressive behavior...he probably would take a little bit of time to warm up to me...pretty much that he was one of the kids that I probably wouldn't have to worry about that much in the classroom". (NT 812)
13. The "teacher" was informed by the same individual that some of the other students in the classroom were "fighters and cursers and had really strong, aggressive behaviors such as throwing chairs and things of that nature". The "teacher" confirmed that this information turned out to be correct. (NT 812)
14. One or more students had to be escorted from the classroom to a time-out room on a daily basis for behavior ranging from yelling out an answer, talking to a neighbor, or "things to the extreme of arguing in class". (NT 813-814)
15. The Parent sat in the classroom at times to observe him and sometimes helped out in the classroom to keep him closer to her and to assist him with his behaviors. (NT 481)
16. The Parent observed the classroom "in an uproar", loud, with children out of their seats, and the teacher screaming for them to sit or stop running. She observed a student kick out a window with his foot, and desks thrown in the classroom. (NT 483)
17. The Parent observed that "Student hollered too. He hollered with his hands over his ears...it was too much noise (for him)". (NT 483-484)
18. The BSC assigned from [redacted], Student's BHRS³ agency, visited Student in school approximately twenty times between December 17, 2004 and May 9, 2005. (P-80)
19. The BSC observed the "teacher" giving the students incorrect information and misspelling words on the board. (NT 715-716)

³ Behavioral Health Rehabilitative Services or "wraparound" services.

20. Student had difficulty writing and copying from the board. The BSC observed that the “teacher” would penalize Student for not finishing writing something from the board by taking recess away or delaying his lunch. (NT 719-722)
21. The BSC noted that the Mental Health Technician shouted at the children. When the BSC pointed out that this was not good for Student he tried to curb the yelling. (NT 720, 725)
22. Student’s “School Based Emotional Support Classroom Treatment Plan” noted his problem behaviors as “figgiting (sic)⁴” and “a long period of time to complete his assignment”. (P-50)
23. Desired behaviors were: “to follow direction”, “to stop from figgiting (sic)”, and “No outbursts”. (P-50)
24. The desired behaviors were to be taught by: “completen (sic) all assignment (sic), given verbal redirection, following direction”. (P-50)
25. Consequences for unacceptable behaviors were: “verbal redirection, prevellges (sic) remove (sic), suspention (sic), phone call home”. The “teacher” testified, “that’s not what should have been on Student’s...IEP...the suspensions, no”. (P-50)
26. The Consequences section was the same for all students in the classroom. (NT 819)
27. Asked where Student was academically in the classroom the “teacher” noted he was, “pretty much in the middle, because he was higher than most of the kids, but in certain things he was lower than some of the kids, but for the most part, concerns, he was – I wouldn’t even say in the middle. He was a little more than the middle. I would say roughly about 75 percent. He fell between zero and a hundred. He would have fell into the 75 percent category of being from a C average pretty much.” (NT 819)
28. Academic level was determined by tests given by the “teacher” who had some training on giving the tests during the initial training period at Agency and on at least one other occasion, before administering the Woodcock-Johnson. (NT 820-821)
29. Student received a good deal of his instruction on the computer. The BSC observed, that by the middle of the school year, “He wasn’t forced to do any writing. He wasn’t forced to do any class work. He wasn’t forced to socialize. He could just kind of be there (at the computer) without any incidents occurring. (NT 725-726)

⁴ The “teacher” did not write this plan. (NT 817)

30. The things that Student was doing on the computer were below his academic level, not a part of the lesson that everyone else received, and wasn't specific to his own demonstrated abilities according to his IEP. (NT 726)
31. Student received no OT services during the time he was in the Agency classroom. (NT 824-825)
32. Student received speech/language therapy (S/L) once a week until the therapist died sometime during the second semester, and then Student's S/L stopped. (NT 827-828)
33. The "teacher" prepared portions of Student's October 20, 2004 IEP. This IEP governed a small portion (December 13, 2004 to January 13, 2005) of the time period under consideration in this decision. Section III (Present Levels) contains multiple errors in elementary grammar and spelling. (P-44)
34. At the time of the writing of the October 2004 IEP Student was reported to be at the 3rd grade level for reading. His measurable annual goal is "Student will reach 4th grade level for english (sic)". (P-44)
35. Short-term objectives are "read on level (sic) books and be able to answer 6 out of 7 reading comprehension question (sic) correctly"; "learn how to use and identify a noun, verb, averb (sic) and adjective in a sentence 3 out of 5 times"; and " learn how to spell, define and use 28 out of 40 vocabulary words correctly each month". Methods of evaluation listed are, "homework", "class work", "test observation". (P-44)
36. At the time of the writing of the October 2004 IEP Student was reported to be at the higher 2nd/beginning 3rd grade level for math. His measurable annual goal is "Student will reach grade level for math". (P-44)
37. Short-term objectives are "continue to gain in long division and multiplication", divide two-digit divisor by a three-four digit dividend (sic for the entire phrase) 3 out of 5 time (sic)", "multiply 3-4 digits factors (sic) 3 out of 5 time (sic)", tell time by the hour, half-past, quarter-past, and quarter to hour 4 out of 5 time (sic). (P-44)
38. Methods of evaluation were "test observation", "grades", and "class work". (P-44)
39. Although an identified need is "to improve social skills", there are no goals and objectives to address this need in the October 2004 IEP.⁵ (P-44)

⁵ The S/L goals involve improving and increasing "recall of vocabulary to improve expression of ideas and age-appropriate communication skills in the classroom". Objectives are to fill in a semantically-appropriate word in a cloze sentence and to provide several semantically-similar words given a word in context". These goals address language but do not address socialization and social skills. (P-44)

40. An FBA included in the October 2004 IEP notes daily non-compliance 30% of the time at a mild to moderate level and daily tantrums 40% of the time at a mild to severe level. Factors suspected of affecting the behavior were described as ADHD-related. There was no consideration given to sensory integration, social deficits, or other autism features as being contributory. (P-44)
 41. The “teacher” who produced the FBA had no training in behavior analysis. She testified that, “All pretty much everything I did was based on some type of data”. (NT 881)
 42. In addition to the “teacher”, the Agency supervisor, and the Parent, the IEP team in October 2004 included the school counselor and the Special Education Liaison, both of whom were, presumably, District employees. (P-44)
 43. The IEP was revised on January 13, 2005. This IEP was in effect for a portion (January 14, 2005 through February 16, 2005) of the time covered by this decision. As was the case in the previous IEP, the “teacher” produced a description of the Present Levels that was rife with elementary spelling and grammar errors. (P-47)
 44. Under Literacy, the Present level is: “Student reads on grade level and spells above level”. The next sentence, under Need, is: “Student needs to reach grade level”. The annual goal is “will read on level books and answer on level comprehension question (sic) 2 out (sic) 5 questions correctly”. (P-47)
 45. Short term objectives for the Literacy goal were: “learn to identify adjective (sic) in a (sic) on level sentence 4 out (sic) 5 correctly”, “will write persuavie (sic) written (sic), and Student will learn to spell, define, and use the vocabulary words correctly 35 out (sic) 40 word (sic) each wk correctly”. (P-47)
 46. Under Math, the annual goal is to “gain in long division and multiplication. Student will divide two digit divisor by a three-digit dividend (sic entire phrase) 4 of 5 time (sic) correctly”, Student will “learn to subtract 3 digit numbers with regrouping 3 out of 5 time (sic) correctly”, and “will learn to add multiple digits with regrouping 3 out of 5 time (sic) correctly”. (P-47)
 47. Methods of evaluation are test observation, grades, class work. (P-47)
 48. The FBA in the January 2005 IEP is identical to that in the October 2004 IEP. (P-44, P-47)
 49. The January 2005 IEP does not have S/L goals or objectives. (P-47)
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50. The January 2005 IEP notes, in the ESY section: “Student does not suffer from recoupment or retention losses”. (P-47)
51. On February 16, 2005 the District convened a pre-hearing conference. The Parent had expressed her belief that Student would benefit from a class with high functioning autistic support students. (P-49)
52. The IEP team revised the IEP on February 16, 2005. The February 2005 IEP covers a portion (February 17, 2005 to May 9, 2005) of the time in the period under consideration in this decision. Many pages of this document are identical to pages in the January 2005 IEP document. The Present Level page is the same, as are the pages for Literacy goal/objectives. Math goal/objectives, Related Services and FBA. (P-44, P-49)
53. As did the October 2004 IEP, but not the January 2005 IEP, the February 2005 IEP carried S/L goals and objectives. These were significantly expanded from those presented in the October 2004 IEP and addressed social communication and social skills in various situations: polite, persuade, urgency, tact, topic maintenance, defense, vocal intensity. (P-49)
54. The February 2005 IEP also carries a goal and objectives for “Interpersonal Communication and Social Skills”, addressing Student’s needs in the areas of “initiating conversation, tolerating noise and initiating interaction with peers”. With a goal of “increasing (his) independence in responding to others while increasing his level of sophistication in expressing self to other (sic)” the objectives are: independently carry out familiar single directions in academic and non-academic instructional activities, participate as a member of the group with facial contact independently, and increasing the length of his verbal phrases to complete sentences independently. (P-49)
55. The ESY portion of the February 2005 IEP is identical to the ESY portion of the January 2005 IEP. (P-49)
56. The IEP team reconvened and revised the IEP on May 9, 2005. On this date the IEP team included both Parties’ very experienced special education attorneys. This IEP covers a portion (May 10, 2005 to the end of the academic year in June 2005) of the time covered by this decision. Most of the pages in the February 2005 IEP were repeated in the May 2005 IEP; these were the same pages also carried over from the earlier IEPs covering the period of time addressed in this decision. (P-57)
57. A major change discernable in the May 2005 IEP was the addition of a goal addressing increasing Student’s “ability to effectively communicat (sic) need for emotional regulation”. The objectives related to this goal are: verbally express emotional state and arousal level by using personal visual supports, when presented with a disregulating event will use organizing supports to help regulate

- his emotions, and when completing an extended task will request a break using a picture card. (P-57)
58. Another major change in the May 2005 IEP was the addition of OT services, 15 sessions for the year. (P-50)
59. Although in a January 2002 evaluation report the District psychologist recommended an Occupational Therapy (OT) screening to explore his “extreme sensory sensitivities”, described in testimony as “extreme sensitivity to noise” that generated negative behaviors in him, an OT screening was not done until November 2002. (NT 242-243; 247; P-31, P-41)
60. Although noting that assessing sensory integration issues was the reason for referral, the November 2002 OT screening report did not address sensory integration issues, instead describing focus, compliance, gross and fine motor control and self-care skills. No OT services were recommended. (NT 918-920; P-41).
61. An appropriate evaluation would have included a short sensory profile or a long sensory profile with information also being gathered from the school and home environments. (NT 928)
62. A sensory processing disorder is a disorder in the way an individual processes information coming in through the senses such that routine sounds, sights, touch and smells interfere with the person’s ability to participate in ordinary activities. (NT 893-894)
63. Individuals with sensory processing deficits can respond to the environment with avoidant, aggressive and/or controlling behaviors. They can be over-responsive to some things in the environment and hyper-responsive to other things in the environment. (NT 896-897, 905-906)
64. Records reviewed by an OT expert suggest that Student has high auditory sensitivity. (NT 909-910, 917, 933-934)
65. For Student, an environment with a lot of loud noises that he can’t control would be a difficult environment for learning. (NT 939-940)
66. The District performed an OT assessment in March 2005. The evaluator used observation and TSS reports as the basis for her findings but did not administer a short sensory profile or a long sensory profile to gather data to confirm her observations and on which to base interventions. (NT 936, 939)
67. Appropriate interventions for hypersensitivity to noise would be to adapt the environments based on looking at the triggers and the available mitigating options

- and to provide a systematic sensory diet in the school and home environments. (NT 912-915)
68. At some point during the 2004-2005 school year Student's S/L therapist died and services were interrupted for an unspecified period of time. (NT 1043)
 69. At the June 11, 2002 IEP meeting the District did not address ESY, other than to check that Terence was "not eligible (sic)". Student did not receive ESY during the summer of 2002. (NT 552; P-38)
 70. At an IEP meeting on September 27, 2002, although Terence had exhibited disruptive behaviors when he returned to school in September, the team did not address whether Terence might be eligible for ESY. Student did not receive ESY during the summer of 2003. (NT 559; P-39)
 71. At an IEP meeting held on September 29, 2003, the District informed Ms. that ESY "did not apply." No further explanation was provided. Student did not receive ESY during the summer of 2004. (NT 564; P-42)
 72. The October 2004 IEP notes, in the ESY section "Does not apply". The "teacher" who wrote the October 2004 IEP had no training on how to determine if a child was eligible for ESY. (NT 806, 837-839; P-44)
 73. The January 2005 IEP notes, in the ESY section: "Student does not suffer from recoupment or retention losses". The BSC who was present at the meeting does not recall any discussion of ESY at that meeting or in any other context at that time. (NT 736-737; P-47)
 74. The May 9, 2005 IEP, repeats the phrase from the ESY sections of the two previous IEPs: "Student does not suffer from recoupment or retention losses". ESY was not discussed. At this meeting the Parent was accompanied by a very experienced special education attorney. Student did not receive ESY during the summer of 2005. (NT 457; P-50)
 75. The District's regional coordinator testified that the District does not provide parents with notice regarding ESY. (NT 371)
 76. The District's procedural safeguards contain no information regarding ESY. (P-36)
 77. An IEP meeting was held on December 1, 2005. At that time it was determined that Student was entitled to ESY. (P-61)
 78. During the discussion of ESY at the December 1, 2005 IEP meeting, the teacher informed the Parent that in the ESY program Student would not necessarily be with all high functioning autistic children, that he might be with children who had multiple handicaps or were life skills. (NT 96)

79. The teacher was “frank” with the Parent, expressing her opinion that camp was a very good idea as Student had been to camp before. She opined to the Parent that although ESY was available, camp would be “a more appropriate experience” for him. (NT 96-98)
80. The teacher did not tell the Parent that Student’s individual goals and objectives would have been addressed at ESY if she sent “a packet” for him. (NT100)
81. The teacher did not know the children with whom Student would have been at ESY. (NT 98)
82. The teacher did not issue a NOREP regarding ESY for the Parent to accept or reject. (NT 102)
83. The teacher did not know that ESY could be based on considerations other than regression/recoupment. (NT 106)
84. The Parent chose to send Student to camp rather than to the ESY program. (NT 96)
85. The Parent was told that ESY was for lower functioning children. If the District had explained to the Parent what ESY entailed, the curriculum and activities, the Parent would have chosen ESY over summer camp which was not a good experience for Student.⁶ (NT 623)

Credibility of Witnesses

A Pennsylvania Special Education Hearing Officer is specifically charged with making credibility determinations regarding the witnesses’ testimony, as in the great majority of cases the hearing officer level is the only level at which direct testimony is taken.

This hearing officer based her findings primarily on the testimony of the Parent, the BSC, the Agency “teacher”, the current autistic support teacher and the Occupational Therapy expert presented by the Parent. The Parent testified credibly during this hearing. She did not exaggerate and did not display rancor toward the District. She clearly wanted an appropriate program for her child and was candid in acknowledging that Student’s current program and placement are appropriate for him and satisfactory to her. The Behavior Specialist Consultant (BSC) provided very credible testimony regarding the conditions in the Agency classroom. The “teacher” in the Agency classroom appeared voluntarily when subpoenaed. She no longer works for Agency and she is not a District employee. Although she was a gracious and cooperative young woman, her testimony served to highlight the fact that, lacking education or training, she was put into an

⁶ He went twice, with a TSS worker, to a regular summer camp. The other children made fun of him. (NT 623-625)

impossible situation when she was chosen for Student's classroom. She was unprepared to be an educator, she was unprepared to be a disciplinarian, and she certainly was unprepared to handle the particular procedures and paperwork required for special education students. Student's current teacher testified credibly and honestly and her testimony and demeanor suggested that she is a well-trained and gifted autistic support teacher. However, her testimony on the ESY matter indicates that she requires retraining on special education requirements in the area of ESY procedures and policies. The OT expert provided clear and convincing testimony regarding the District's failure to provide Student with an appropriate initial or follow-up occupational therapy evaluation, and helped establish the significant need the child had for a service which was denied him. This witness provided research-based information regarding the sensory integration aspects of autism, and was careful to delineate the boundaries of her role in the proceedings. Although highly educated and experienced in the field her testimony was clearly understandable by a layperson and she was low-keyed and refreshingly modest and balanced. It would be in Student's interest for the OT staff working with Student, and the classroom staff working with him, with permission of the Parent, to review the portion of the transcript containing her testimony. The testimony of the other witnesses who were presented was helpful as background, but was not central to this decision, and therefore their credibility will not be assessed.

Discussion and Conclusions of Law

In November 2005 the U.S. Supreme Court held that, in an administrative hearing, the burden of persuasion for cases brought under the IDEA is properly placed upon the party seeking relief. Schaffer v. Weast, 126 S. Ct. 528, 537 (2005). The Third Circuit addressed this matter as well more recently. L.E. v. Ramsey Board of Education, 435 F.3d. 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006). The party bearing the burden of persuasion must prove its case by a preponderance of the evidence. This burden remains on that party throughout the case. Jaffess v. Council Rock School District, 2006 WL 3097939 (E.D. Pa. October 26, 2006). However, application of the burden of proof does not enter into play unless the evidence is in equipoise, that is, unless the evidence is equally balanced so as to create a 50/50 ratio. In this matter that is not the case.

Scope of Potential Recovery Period

The Parent brought this hearing under Section 504 of the Rehabilitation Act of 1973 as well as under the IDEIA, and in closing arguments specifies, "only the FAPE claims pursuant to Section 504 are at issue here, however, not the discrimination claims which Student may have as a result of the deprivation of FAPE". To be eligible for services under Section 504, a student must have a physical or mental impairment that substantially limits one or more major life activities. 34 CFR § 104.3(j)(1). Student's autism has a substantial impact upon his ability to learn, which is a major life activity. 34 CFR §104.3(j) (2) (ii).

The Parent argues that any statutory limit on recovery that may apply in this matter under IDEIA does not apply to this matter under Section 504. This hearing officer must disagree. There is no substantive distinction between Section 504's prohibition against discrimination on the basis of handicap and a School District's affirmative duty under the Individuals with Disabilities Education Improvement Act (IDEIA) to assure that eligible students with disabilities receive a free and appropriate public education (FAPE). Ridgewood Board of Education v N.E., 172 F.3d 238 (3rd Cir. 1999). In fact, when a school district provides services under IDEIA to an eligible student, it fulfills its Section 504 obligation. 34 CFR §104.22(b)(2)

In this matter, all claims arise from the same facts alleged under the IDEIA claims, and they are subject to the same statute of limitations as applied to the IDEIA claims. (See M.D. V. Southington Bd. Of Educ., 119 F. Supp. 2d 115-116 (D. Conn., 2000), reversed in Part, affirmed in part, M.D. v. Southington Bd. Of Educ., 334 F.3d 217, 222 (2d Cir. 2003) "There is ample authority that where the parents did not show a distinct issue, such as accessibility, the disposition of the IDEA claim resolves the alternative 504 claim".⁷ (Special Educ. Opinion No. 1724 (2006). Further in Lower Merion School District v. Doe, 878 A.2d 925 (Pa.Cmnwlth.2005) the Commonwealth Court analyzed the applicability of IDEA standards to Section 504 requirements and explicitly determined that requirements under the IDEA apply with equal force to Section 504. The Parent's assertion that Section 504 confers a different potential recovery period must fail. The potential recovery period for compensatory education will be determined under the IDEIA.

At least as early as May 2002, pursuant to a prehearing conference the outcome of which was not a due process hearing, the Parent was issued the Procedural Safeguards Notice. At some time prior to April 5, 2005 the Parent retained a highly experienced special education attorney to represent her. By letter dated April 5, 2005 the Parent through her attorney challenged Student's program and placement and raised claims for compensatory education. At the time of the April 5, 2005 letter, the potential recovery period in Pennsylvania was defined by Montour, for practical purposes, one year prior to the filing of a complaint. Accordingly any potential recovery period for compensatory education awarded through litigation would have been from April 5, 2005 back to April 5, 2004.

In May 2005 the Parties through their respective counsel reached an agreement regarding program and placement. The Parent and her attorney, as members of the IEP team, decided along with the team that Student would remain in the Agency classroom until the end of the school year because a change to a new school that late in the school year would be detrimental to him. The Parent's and the District's attorneys also included in the agreement a proposed resolution of the compensatory education claim, involving providing Student with a computer. Although neither the Parent nor the District signed

⁷ See, e.g., Alexis v. Dallas Indep. Sch. Dist., 286 F. Supp. 2d 551 (N.D. Tex. 2004); Corey H. v. Cape Henlopen Sch. Dist., 286 F. Supp. 2d 380 (D. Del. 2003); Gregory R. v. Penn Delco Sch. Dist., 262 F. Supp. 2d 488 (E.D. Pa. 2003).

the Agreement, the negotiated program and placement were implemented. Neither the Parent nor the District appear to have pursued the compensatory education portion of the Agreement further, although by letter dated May 10, 1995 to the District's attorney the Parent's attorney noted that compensatory education still needed to be addressed.

On December 13, 2006 the Parent, through another highly experienced special education attorney, filed a claim for compensatory education due to denial of FAPE in past years. The recovery period for this claim, for practical purposes, is limited to two years back from the date of filing the complaint, barring the exceptions specified in the IDEIA. The Parent asserts that the Exceptions apply; the District asserts that the Exceptions do not apply.

The Parent argues that since the original complaint failed to produce an award of compensatory education that was executed either on paper (an Agreement signed by the Parties) or in fact (a computer delivered to Student), the clock for recovery should run backward from the date she filed the recent complaint (December 13, 2006), backward through the period covered in her original complaint (to April 5, 2004 under Montour), and further backward, bypassing the IDEIA limitation date of December 13, 2004 by virtue of the exceptions, to November⁸ of the 2001-2002 school year.

Through its changes in the reauthorized version of the IDEA, it was the intent of Congress to limit claims brought under the IDEA and to require parents to file claims in a timely manner. In Re: Educational Assignment of P. P., Spec. Educ. Op. 1757 (2006). This provision establishes that a 2-year window on the recovery of compensatory education applies absent evidence that either of the exceptions included in the statute applies. In Re: Educational Assignment of J. L., Spec. Educ. Op. 1763 (2006). The IDEIA provides that "the timeline ... shall not apply to a parent if the parent was prevented from requesting a hearing due to specific misrepresentation by the local educational agency that it had resolved the problem forming the basis of the complaint or the local educational agency's withholding of information from the parent that was required under this part to be provided to the parent. 20 U.S.C. § 1415 (f)(3)(D)(I); 34 C.F.R. § 300.511 (f).

The Parent claims that the exceptions to the timeline apply because the District withheld information about availability of autistic support classrooms from the Parent, and because the District's evaluation did not clearly inform the Parent of Student's classification. A clear reading of the documents and a close study of the testimony demonstrates no factual basis upon which to build a conclusion that the District had classrooms for "high functioning autistic" students Student's age at the time the Parent was questioning the disputed placement and also demonstrates that with the exception of the OT screening and OT evaluation the evaluations completed by the District were appropriate and accurate and provided the necessary information to program for Student. However, there are many indications in the record that the District withheld information from the Parent in regard to the nature of ESY and Student's potential eligibility for ESY, and therefore on the ESY issue the exceptions prevail and the timeline does not apply.

⁸ See Parent's Closing Argument, page 8.

As a framework for this decision, then, this hearing officer 1) agrees with the Parent that the compensatory education issue was never previously resolved; 2) finds that the Parent is responsible for the consequences of her choice not to pursue its resolution through her previous attorney or a new attorney for 20 months; 3) finds that the Exceptions allowed in the IDEIA do not apply as regards the issue of FAPE during the academic years; but 4) finds that the Exceptions allowed in the IDEIA do apply with regard to summer ESY.

Thus, the period under consideration for compensatory education for the regular academic years is from December 13, 2006 back to December 13, 2004. The Parent claims denial of FAPE through the 2004-2005 school year. The Parent, represented by experienced counsel in attendance, participated in an IEP meeting on May 9, 2005. Although a change in placement was agreed upon, the Parent, in the presence of her counsel, and the IEP team made the decision to allow Student to finish out the school year in his classroom for the good of the child. The Parent signed a NOREP on May 9, 2005 approving Student's remaining in his then-current placement through the end of the school year. Given these circumstances, the period under consideration for compensatory education for the academic years will be limited to the portion of the 2004-2005 academic year from December 13, 2004 through May 9, 2005,

However, with regard to ESY, the Parent clearly demonstrated that the District made misrepresentations and/or withheld information from her which was required to be disclosed regarding Student's entitlement to ESY. Thus the period under consideration for ESY will be the summers of 2002, 2003, 2004, 2005 and 2006.

FAPE – December 13, 2004 through May 9, 2005

Special education issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA"), which took effect on July 1, 2005, and amends the Individuals with Disabilities Education Act ("IDEA"). 20 U.S.C. § 1400 *et seq.* (as amended, 2004). Having been found eligible for special education, Student is entitled under the IDEIA and Pennsylvania Special Education Regulations at 22 PA Code § 14 *et seq.* to receive a free appropriate public education (FAPE). FAPE is defined in part as: individualized to meet the educational or early intervention needs of the student; reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress; provided in conformity with an Individualized Educational Program (IEP). The IDEIA requires that a child's IEP be provided in settings which are staffed with "appropriately and adequately prepared and trained...personnel [with] content knowledge and skills to serve children with disabilities". §612(a)(14)(A).

As per the IDEIA regulations, the IEP for each child with a disability must include a statement of the child's present levels of academic achievement and functional performance, a statement of measurable annual goals including academic and functional goals designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum and meet the child's other educational needs that result from the child's disability; a description of how the child's progress toward meeting the annual goals will be measured

and when periodic reports on the progress the child is making toward meeting the annual goals will be provided; a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child...and a statement of the program modifications or supports for school personnel that will be provided to enable the child to advance appropriately toward attaining the annual goals (and) to be involved and progress in the general curriculum...and to be educated and participate with other children with disabilities and nondisabled children; an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class... CFR §300.320(1-4)

A student's special education program must be reasonably calculated to enable the child to receive meaningful educational benefit at the time that it was developed. (Board of Education v. Rowley, 458 U.S. 176, 102 S. Ct. 3034 (1982); Rose by Rose v. Chester County Intermediate Unit, 24 IDELR 61 (E.D. PA. 1996)). The IEP must be likely to produce progress, not regression or trivial educational advancement [Board of Educ. v. Diamond, 808 F.2d 987 (3d Cir. 1986)]. Polk v. Central Susquehanna IU #16, 853 F.2d 171, 183 (3rd Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989), citing Board of Education v. Diamond, 808 F.2d 987 (3rd Cir. 1986) held that "Rowley makes it perfectly clear that the Act requires a plan of instruction under which educational *progress* is likely." (Emphasis in the original). The IEP must afford the child with special needs an education that would confer meaningful benefit. The court in Polk held that educational benefit "must be gauged in relation to the child's potential." This was reiterated in later decisions that held that meaningful educational benefit must relate to the child's potential. See T.R. v. Kingwood Township Board of Education, 205 F.3d 572 (3rd Cir. 2000); Ridgewood Bd. of Education v. N.E., 172 F.3d 238 (3rd Cir. 1999); S.H. v. Newark, 336 F.3d 260 (3rd Cir. 2003) (district must show that its proposed IEP will provide a child with meaningful educational benefit). The appropriateness of an IEP must be based upon information available at the time a district offers it; subsequently obtained information cannot be considered in judging whether an IEP is appropriate. Delaware County Intermediate Unit v. Martin K., 831 F. Supp. 1206 (E.D. Pa. 1993); Adams v. State of Oregon, 195 F.3d 1141 (9th Cir. 1999); Rose supra.

Districts need not provide the optimal level of service, maximize a child's opportunity, or even a level that would confer additional benefits, since the IEP as required by the IDEA represents only a basic floor of opportunity. Carlisle Area School District v. Scott P., 62 F. 3d at 533-534.; Hartmann v. Loudoun County Bd. of Educ., 118 F.3d 996, 1001 (4th Cir. 1998); Lachman, supra. In creating a legally appropriate IEP, a School District is not required to provide an optimal program, nor is it required to "close the gap," either between the child's performance and his untapped potential, or between his performance and that of non-disabled peers. In Re A.L., Spec. Educ. Opinion No. 1451 (2004) ; See In Re J.B., Spec. Educ. Opinion No. 1281 (2002)

What the statute guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving parents.'" Tucker v. Bayshore Union Free School District, 873 F.2d 563, 567 (2d Cir. 1989). Under the IDEA parents

do not have a right to compel a school district to provide a specific program or employ a specific methodology in educating a student. M.M. v. School Board of Miami - Dade County, Florida, 437 F.3d 1085 (11th Cir. 2006); Lachman v. Illinois Bd. of Educ., 852 F.2d 290, 297 (7th Cir. 1988) If personalized instruction is being provided with sufficient supportive services to permit the student to benefit from the instruction the child is receiving a “free appropriate public education as defined by the Act.” Polk, Rowley. The purpose of the IEP is not to provide the “best” education. The IEP simply must propose an appropriate education for the child. Fuhrman v. East Hanover Bd. of Educ., 993 F. 2d 1031 (3d Cir. 1993).

FAPE is written on paper and delivered by people. A child’s special education program is governed by the IEP, and hearing officers, appeals panels and courts look at the IEP to see if, “within its four corners” there is a plan “reasonably calculated to confer meaningful educational benefit”. Although little to no tolerance for imperfection in an IEP is sometimes demonstrated in hearing officer decisions and appeals panel opinions, this hearing officer adopts the practice of looking for a reasonable plan, based on defined needs and carrying sensible outcome measures. Generally this hearing officer, while looking carefully at what is written in an IEP also looks to the record as a whole to determine whether or not there is evidence that a child has actually received FAPE substantively and procedurally. In this case, it is clear that Student did not receive FAPE on paper and he did not receive FAPE in reality through the persons charged with delivering it.

Student’s IEPs in evidence for the period under consideration are among the worst this hearing officer has seen. The academic goals are meaningless, being the generic goal of every regular education student and a great many special education students. The objectives rarely match the goal in a way that makes sense. The objectives themselves demonstrate a lack of understanding of the subject matter to be taught. When non-academic goals and objectives are provided, with the exception of the S/L area, many are unclear and illogical in light of Student’s needs. Although there is an array of specially designed instruction checked off in the IEPs, this hearing officer has little confidence that they were implemented, which leads to the next major flaw in the District’s approach to providing FAPE to Student.

Unfortunately for this child, to balance out the abysmal IEPs, there was no mitigating factor in the person of a competent, skillful teacher and team delivering FAPE in fact. Although the classroom teacher, responding to a subpoena and appearing on her own time, was perfectly cooperative and gracious in assisting in the hearing process, she demonstrated that she was sorely equipped for the position of teacher in a special education emotional support classroom in a public school. Although Agency ran Student’s classroom, it lies squarely on the shoulders of the District that in the relevant professional discipline this young “teacher” was uneducated, untrained, uncertified, and lacking in the written literacy skills and understanding of at least one arithmetic process needed to provide instruction to any regular education student, much less a special education student, regardless of classification. Even if the IEPs were perfect, and they were certainly not, and even if the teacher were a gifted and intuitively talented “natural”

educator, and she was not, the fact that Student was not provided with a properly certified special education teacher during the period under consideration would alone be a denial of FAPE.

Putting aside the paper (IEPs) and the person (“teacher”) for a moment, the pupils in Student’s class also contributed to the inappropriateness of his placement. The students in the classroom were described by more than one witness as loud and cursing and aggressive. Some of the students recognized that Student was different, and they preyed upon his vulnerabilities for their own amusement. The personnel in this particular special education emotional support classroom, in addition to not being educators, were not capable of managing the students’ behaviors so as to create an atmosphere in which Student could feel safe and learn.

As the Parent correctly pointed out in her closing argument, this hearing is not about classification, and neither is it really about placement. Student is a complex child and this hearing is about his right to a free appropriate public education. It is not, in the end, about his diagnostic label or special education classification and it is not about the label of the classroom in which he is educated. Student could have received FAPE in a well-run emotional support classroom. With sufficient supports, Student could have received FAPE in a well-run regular education classroom. Student could have received FAPE in a well-run autistic support classroom. Student could have received FAPE in a well-run classroom in an approved private school. Where Student did not receive FAPE, either on paper or in reality, was in the emotional support classroom operated by Agency at the behest and invitation of the District.

This hearing officer has also reached the conclusion that Student was not provided with OT services during the entire period under consideration, and that he did not receive S/L services during an undetermined part of the period under consideration. However, as these services were to be provided during the school day and Student will be awarded compensatory education for his entire school day, a separate discussion does not need to be included here.

FAPE – Extended School Year

Extended school year services must be provided if a child’s IEP team determines, on an individual basis, that the services are necessary for the provision of FAPE to the child. 34 C.F.R. 300.309 (a)(2).

ESY services are special education and related services that -
are provided to a child with a disability -

- (i) Beyond the normal school year;
- (ii) In accordance with the child’s IEP
- (iii) At no cost to the parents; and

meet the standards of the SEA. 34 C.F.R. 300.309 (b).

A public agency may not limit extended school year services to particular categories of disability or unilaterally limit the type, amount, or duration of those services. 34 C.F.R.

300.309 (a)(3). A child with disabilities is entitled to ESY services if regression caused by interruption in educational programming and limited recoupment capacity, or other factors, makes it unlikely that the student will maintain skills and behavior relevant to established IEP goals and objectives. 22 Pa. Code 711.44 (1) (implementing 34 C.F.R. 300.309); *see also* 22 Pa. Code 14.132 (setting forth standards for determining whether a student is eligible for ESY services).⁶³ Regression does not necessarily have to be linked to academics, if the child's area of need is in another area such as emotional support. Prediction of regression in emotional development qualifies as a need for ESY. Bucks County Public Schools v. Commonwealth, (Pa. Commw.)(1987).

Regression is not the only factor which may entitle a child to ESY services. Regression only analyses violate IDEA. *Reusch v. Dr. Hiawatha Fountain*, 872 F. Supp. 1421, 1435 (D. Md. 1994). Severe disabilities such as autism/pervasive developmental disorder, serious emotional disturbance, severe mental retardation, degenerative impairments with mental involvement and severe multiple disabilities is an important consideration which, by itself, may entitle a child to ESY services. 22 Pa. Code 14.132 (2)(vii). The extent to which the student has mastered and consolidated an important skill or behavior at the point when educational programming would be interrupted must be considered. 22 Pa. Code 711.44 (4)(i); 22 Pa. Code 14.132 (2)(iv).

Consideration of the need for ESY services shall occur at every IEP team meeting. Pennsylvania requires that an LEA must hold a meeting for children in the target group⁶⁷ by February 28th of each school year. If child is eligible, ESY services must be recorded on the child's EP no later than March 31st. (BEC: Extended School Year Eligibility, Issued April 1, 2003; Expires June 30, 2008)

Notice of ESY designed to fully explain such services must be provided to parents of disabled children in a timely fashion before annual review meetings. The notice must not disguise or downplay the true nature of ESY or attempt to confuse parents between free extended school year services and tuition-charging summer enrichment programs. *Reusch v. Dr. Hiawatha Fountain*, 872 F. Supp. 1421, 1424, 1430 (D. Md. 1994).

The District's regional coordinator testified that the District does not provide parents with notice regarding ESY. The District's procedural safeguards contain no information

⁶³ "Regression" is a "lower level of functioning evidenced by a measurable decrease in the level of skills or behaviors which occur as the result of an interruption in educational programming." 22 Pa. Code 711.44 (1); 22 Pa. Code 14.132 (1)(i). "Recoupment" is "recovery of skills or behavioral patterns, or both, specified on an IEP to a level demonstrated prior to the interruption of educational programming." 22 Pa. Code 711.44 (1); 22 Pa. Code 14.132 (1)(ii); (BEC: Extended School Year Eligibility, Issued April 1, 2003; Expires June 30, 2008).

⁶⁷ The "target group" for ESY includes children with Autism/Pervasive Developmental Disorder, severe emotional disturbances, severe mental retardation, degenerative impairments with mental involvement, and severe multiple disabilities. IEP teams must consider ESY for all children with disabilities, however, not just those in the target group. (BEC: Extended School Year Eligibility, Issued April 1, 2003; Expires June 30, 2008). Whether Student was considered to have been autistic or emotionally disturbed, he was within the target group throughout the relevant time period.

regarding ESY. Because the Parent was entitled to such notice as a matter of law, and it is undisputed that she never received any such notice prior to any of the IEP meetings she had during the relevant time period, the District's denial of ESY to Student throughout the relevant time period creates liability for compensatory education for each of the years for which ESY is at issue in this case.

At all times under consideration, the District failed to provide a competent and timely assessment of Student's likelihood of regression over the summer in his primary areas of need, and although he was a member of Pennsylvania's "target group" the District failed to consider any of the other relevant factors in the ESY determination process.

Because the Parent was never provided with notice of Student's potential right to ESY, and because the District failed to assess Student's eligibility for ESY despite his complex disability and his being a member of the target group, Student was denied FAPE for the summers of 2002, 2003, 2004. The October 2004 IEP carried the notation that Student was not eligible for ESY, and this determination was presumably made for the summer of 2005. However, the Parent was represented by competent counsel at an IEP meeting held in May prior to the end of the school year, and at that meeting the ESY issue was not raised by the Parent or her attorney. Although a child's right to FAPE is not dependent on the vigilance of the child's parent, in this case for that particular ESY period the Parent had competent counsel; Student is therefore not entitled to compensatory education for the summer of 2005.

At the December 2005 IEP meeting the teacher provided the Parent with incomplete and incorrect information about ESY, and in fact shared her opinion that camp would be a better alternative for Student. The Parent testified that if she had been informed about what ESY was she would have chosen ESY for Student. Although this is a close call, this hearing officer has determined that Student was denied FAPE in an ESY program for the summer of 2006.

Compensatory Education

Compensatory education is a remedy designed to provide a student with the services he should have received pursuant to a free appropriate public education (FAPE). When a student has been denied the due process rights or an appropriate educational program that he should have received, compensatory education is an in-kind remedy. Lester H. v. Gilhool, 916 F. 2d 865 (3d Cir. 1990), cert. denied 499 U.S. 923, 111 S.Ct. 317 (1991) A child is entitled to compensatory education services if the child is exceptional and in need of services and/or accommodations and if through some action or inaction of the District the child was denied FAPE. With regard to the standard for determining whether and to what extent compensatory education should be awarded was summarized by the Third Circuit in M.C. v. Central Regional School District, 81 F. 3d 389, (3d Cir. 1996). As the Court in M.C. observed, when a school district fails to deliver that to which a student is entitled, an award of compensatory education is justified.

Student is entitled to compensatory education for the time period specified above. Although M.C. applies a reasonable rectification period for a district to realize a program

is ineffective and correct it, and compensatory education does not apply to this period, this hearing officer will not apply any grace period, for example a 60 day reduction, to the compensatory education award. The District had the entire beginning of the 2004-2005 school year, that is from the first day of school in September until December 12th, to remedy the situation and the record shows a pattern of inappropriateness during that entire school year. (See, for example, Sp. Educ. Opinion No. 1809 (2007)).

The Commonwealth Court of Pennsylvania in *B.C. v. Penn Manor School District*, No. 1150 C.D. 2005, 2006 Pa. Commw. LEXIS 445 (8/15/06), held that “where there is a finding that a student is denied a FAPE and the Panel determines that an award of compensatory education is appropriate, the student is entitled to an amount of compensatory education reasonably calculated to bring him to the position that he would have occupied but for the school district’s failure to provide a FAPE.” However, as articulated in Sp. Educ. Opinion No. 1763 (2006):

“The standard announced in *B.C.* requires a hearing officer or Appeals Panel to determine the level of achievement of a student with a disability *if that* student had received appropriate instruction. However, *B.C.* offers no guidance as to how a hearing officer or the Panel should go about making this determination. Rather, the court relied on the ‘special expertise of hearing officers and the Panel in such matters.’” As was the case with the Appeals Panel, this hearing officer, “knows of no validated method to predict, with a reasonable degree of accuracy, a student’s progress under a specific intervention other than prior progress under that specific intervention. . . appropriate instruction is not a unitary construct; there are often multiple types of instruction that might be appropriate, and these forms of instruction may be provided in varying combinations and degrees of intensity. . . students change in ways that cannot be known *a priori*; a student might form a learning set as a result of instruction and learn more rapidly, or might become bored or disinterested in the content of instruction and learn less rapidly. How changes in students affect their response to instruction cannot be known *a priori* but can be learned during the instructional process. Here, the Panel simply does not know what is needed to move Student to a level that cannot be determined”.

For many reasons, including Student’s age, his complex disability, and his intertwined learning and emotional challenges, it is beyond this hearing officer’s expertise to predict and project with certainty what would be needed to bring him to where he should have been but for the denial of FAPE. Furthermore, the level of achievement that Student would have attained had he received appropriate instruction is not addressed in testimony, exhibits or arguments. As did the appeals panel in Sp. Educ. Opinion No. 1763, this hearing officer finds the standard for awarding compensatory education set out by the Commonwealth Court in B.C. “is unworkable in this case”.

Therefore this hearing officer has determined that an hour-for-hour award that allows flexibility in the choice of services as Student grows and matures is the wisest choice. In Spec. Educ. Opinion No. 1102 (2001), the Panel held:

“Certain guidance may be inferred from applicable case law, however, as well as in common sense principles. First and foremost, compensatory education is a remedy which does not seek to give a student that to which he is already entitled. As an eligible student is entitled to FAPE, it follows that compensatory education may not simply further current and future educational goals which are (or should be) included in his present IEP. Instead, compensatory education serves to make up for a prior deprivation of service. In addition, it is the parent who has properly sought and obtained an award of compensatory education from a school district which had deprived a student of FAPE. Just as a parent may choose the site of a private school placement, which will be upheld where a school district has denied FAPE so long as the placement is ‘reasonable’, then logically a parental selection of compensatory education services should be honored so long as the selection is appropriate and reasonable under the circumstances.”

The Parent may decide how the compensatory education hours should be spent as long as they take the form of appropriate developmental, remedial or enriching instruction that furthers the goals of Student’s present or future IEPs. These hours must be in addition to his then current IEP and may not be used to supplant or substitute for such services. These services may occur after school hours, on weekends and during the summer months, when convenient for Student and his Parent.

The costs to the District of providing the awarded hours of compensatory education should not exceed the full cost of the services that were denied. Full costs are the salaries and fringe benefits that would have been paid to the actual professionals (special education teacher, trained teaching aide, occupational therapist, speech/language therapist [for the period of time the S/L service was not delivered]) who should have provided the District services and the actual costs for salaries, tuition and transportation for contracted services. This principle sets the maximum cost of all of the hours or days of the compensatory education awarded. The Parent may balance expensive and inexpensive instruction or services so long as the total cost and hours do not exceed the maximum amount. Finally, the Parent must not be required to make co-payments or use personal insurance to pay for these services.

The time for utilizing the compensatory education awarded may extend beyond age 21. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990); *R.S.*, Spec. Educ. Opinion No. 1755 (2006). This flexibility is necessary in this case, as Student will not graduate until the goals on his IEP are completed, and the compensatory education is not to be used to supplant goals and related services that are, or should be, in his current and future IEPs.

Order

It is hereby ordered that:

1. The School District of Philadelphia, for the period from December 13, 2004 through May 9, 2005, failed to provide Student with a free appropriate public education. As the denial of FAPE permeated Student's program, his placement and his related services, and FAPE was denied in all areas of his academic, emotional and social needs, he is entitled to a full day of compensatory education for every day school was in session during the period in question. A full day is to be calculated in hours from the opening bell in the morning to the closing bell in the afternoon, including the socialization periods of lunch and recess. No deductions are to be taken for days that Student was absent.
2. The School District of Philadelphia, for the summers of 2002, 2003, 2004 and 2006 failed to provide Student with a free appropriate public education through an ESY program. He is entitled to compensatory education hours equal to the total number of hours he would have spent in the District's ESY program each summer for the four summers he was denied FAPE.
3. The compensatory education is to be used as described above, for the time period specified above, within the financial parameters described above.

June 8, 2007

Date

Linda M. Valentini, Psy.D.

Linda M. Valentini, Psy.D.
Hearing Officer