

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

PENNSYLVANIA

SPECIAL EDUCATION HEARING OFFICER

DECISION

Child's Name: MI

Date of Birth: xx/xx/xx

Date(s) of Hearing November 1, 2007; November 21, 2007;
November 30, 2007; January 15, 2008; March 27, 2008

OPEN HEARING

ODR NO. 7931/2007-08 LS

Parents

Parents' Representative:

Lilian Akin, Esq.
3510 Gerber Avenue
Pittsburgh, PA 15212

School District:

District Representative:

No. Allegheny S.D.
200 Hillvue Lane
Pittsburgh, PA 15237

Student Brungo, Esq.
Maiello, Brungo & Maiello
1 Churchill Park, 3301 McCrady
Pittsburgh, PA 15235

Date Final Transcript Received: April 1, 2008

Date Record Closed: April 25, 2008

Date of Decision: May 13, 2008*

Hearing Officer: Margaret Drayden, Esq.

*Decision was delayed due to a medical emergency.

Précis

Student is a xx-year-old student residing in the No. Allegheny School District (District). Student has attended District schools since first grade and qualifies as a student in need of special education due to mental retardation, autism, and speech and language needs. Student was in a part-time life skills support (LSS) classroom in elementary school but upon transitioning to middle school the District designated the placement as full-time in its proposed IEP. Parents disagreed with that change and requested a due process hearing.

Stipulations

1. Student's date of birth is xx/xx/xx
2. Student has been a student in the District since 1st grade.
3. Student is currently a 7th grade student in the middle school.
4. The latest IEP, dated 6/2/06, indicates Student receives full-time LSS but Student is included in regular education for specials, lunch, and homeroom.
5. Student has been identified as a student in need of special education due to mental retardation, autism and his need for speech and language support.

Findings of Fact

1. Student was born with Downs Syndrome and was diagnosed with autism in August 1997 at age 4. (NT at 462-63; P-1, P-2.)¹
2. Student began an intensive Lovaas program (approximately 25 hours/week) shortly after the autism diagnosis. (NT at 463; P-2.)
3. On 8/15/00 the District's initial Evaluation Report (ER) issued and noted that Student had recently moved from [state redacted] where he attended a full-inclusion model for special education. Student was included with typical peers and would model peer behavior. (P-1.)
4. On 11/3/00 the District's Reevaluation Report (RR) issued wherein it was reported that Student was assigned to a life skills support (LSS) classroom and a first grade inclusion setting. It was reported that communications skills were significantly impaired and it was difficult to determine Student's level of receptive understanding.

¹Parents' exhibits are noted as "P-"; District exhibits are noted as "SD-"; Hearing Officer exhibits are referenced as "HO-"; Noted Transcript is referenced as "NT"; Findings of Fact are noted as "FF".

(P-2.)

5. On 12/13/02 the District's RR issued and one of Student's important strengths was listed as his ability to easily adapt to new situations and changes in his schedule. Further, Student demonstrated behaviors which were consistent with developmental milestones and social develop and which indicated progress was being made. Notably, he "demonstrated social referencing and attempts to use his peers as social models throughout the day." Social referencing was described as "reliance on another person's behavior to appraise a new or uncertain situation" and Student was observed showing interest in his peer's behavior to appraise new or uncertain situations as well as the peer's activities throughout the day. When in his inclusion class, Student frequently looked at what other students were working on with interest. Student was administered the Psychoeducational Profile Revised (PEP-R) on 10/2/02 and achieved an overall development score of 20-25 months, which showed an improvement on the 11/3/00 score of 18-22 months. (P-3.)
6. On 12/7/04 the District's RR issued. The report was comprised of existing evaluation data, parental input and evaluations, classroom observations, and the ABLLS (Assessment of Basic Language and Learning Skills) assessment. It was noted that Student's language skills increased both receptively and expressively when visual cues or gestures accompanied verbal information. Among IEP suggestions were: embedding academic goal practices across environments, adding vocabulary, additional use of peer buddies as supports for independence. (P-4.)
7. On 8/25/04, the District issued a NOREP providing for a part-time life skills support for 4th grade. (NT at 495-96; P-12.)
8. On 1/12/05, a District Assessment Report issued. Student was administered the Stanford-Binet IQ – 5th Ed. and obtained a full scale IQ (FSIQ) score of 40. (NT at 288; P-6.)
9. On 2/7/05, the District issued a NOREP again providing for part-time life skills support for 5th grade. (NT at 495-96; P-13.)
10. In April 2005, devise trials using a DynaVox device and the large and mini Mercury devises were tried, but ultimately a determination was made not to use any type of device and to continue with the PECS book. (NT at 578, 580-81.)
11. On 3/29/06, the District issued a NOREP and IEP providing for part-time life skills support at the elementary school setting. Under the heading, "Effect on Involvement and Progress in General Education Curriculum" it reported: "Due to [Student's] cognitive, language, and motor impairments, he experiences difficulty in the general education curriculum. When included in the general education curriculum, modifications should be made to ensure that the activities are functional, routine based, and tied to goals outlined in the IEP. [Student] is currently included in fifth grade for check-in, math, science, social studies, health, lunch/recess, integrated arts, PE, art, music, library and in the computer lab." (P-9.)
12. The 3/29/06 IEP provided for daily data collection in the special education room by the special education teacher and in regular education environments by the assistant. (Id.)
13. The 3/29/06 IEP, under the heading "Least Restrictive Environment", provided, inter alia, for 21-60% of student's educational day spent outside the regular education classroom, for Student's inclusion in Social Studies and Science; in Specials for 3

- hours/week; working on goals with younger peers for 30 min/week; and for working on goals with regular peers, computer lab, peer reading and play, and school jobs (under heading “Journal/Fine Motor daily, Math (1/2 hour) daily”). (Id.)
14. On 6/2/06, the District completed its proposed IEP for middle school. Data collection was described as being collected weekly and reported quarterly. No specific staff were assigned to do the data collection, and under the heading “Effect on Involvement and progress in General Education Curriculum” all reference to Student experiencing inclusion was eliminated. (P-10.)
 15. The 6/2/06 proposed IEP, under the heading “Least Restrictive Environment”, provided for full-time life skills support. The calculation of the percentage of student’s educational day spent outside the regular education classroom was left unchecked
 16. On 6/15/06 the IEP team met to discuss the IEP. (D-6.)
 17. On 8/25/06, the District offered a NOREP for 6th grade which recommended “life skills support” without designating either part- or full-time. However, the accompanying IEP, dated 6/2/06, listed the educational placement as “full-time life skills support.” (NT at 496-98; P-10, P-14.)
 18. On 8/31/06, Parents indicated their disapproval of the full-time life skills support placement NOREP by checking the box indicating their disapproval of the recommendation and writing “Agree to part-time life skills support at [middle school]. Do not agree to changes in proposed IEP.” (NT at 496-98; P-14.)
 19. The District implemented the program as proposed in the 6/2/06 IEP despite parental disapproval. The 6/2/06 proposed IEP is the IEP still currently used by the District. (NT at 500; P-10.)
 20. In September 2006, Parents received a call from the Special Education Supervisor’s secretary stating the District would be filing for a due process hearing. (NT at 498.)
 21. On 9/20/06, the Special Education Supervisor sent Parents correspondence stating the District was prepared to file for a due process hearing. However, the District never pursued a hearing. (NT at 598-99; P-22.)
 22. On 10/30/06, Parents sent correspondence to the Special Education Supervisor setting forth their concerns regarding Student’s program, including IEP noncompliance in regard to Student’s S/L requirements; lack of inclusion; and that the one-on-one support was neither consistent nor properly trained in Student’s communications system or IEP goals. (NT at 499-500; P-24.)
 23. The 12/7/06 RR determined that additional data was needed, recommended, inter alia, that the proposed Life Skills IEP be implemented, that “no changes [were] recommended for [Student’s] inclusion in general education at the present time, and called for an update of the ABLLS to compare with the 2004 ABLLS, to “add recommendations from the consultation to occur with Dr. L in January and February of 2007, include updates/recommendations from an Assistive Technology Specialist from AIU 3.” (P-7.)
 24. On 12/20/06, the District issued a Permission to Reevaluate and Parent signed the Consent. (D-2.)
 25. The 12/7/06 updated RR recommended “that the ABLLS be used as a common reference to identify skills to be targeted for change within the IEP.” (P-4; NT at 404.)

26. The 12/7/06 RR had updated information added, but Dr. L's report was not incorporated nor was it discussed with Parents, and the RR retained the same 12/7/06 date without any notation that it was a revised/updated RR. (NT at 506-07; P-7.)
27. The 12/7/06 updated RR found Student was a child with a disability in autism, mental retardation and speech or language impairment. (P-7.)
28. In February 2007, the AIU assistive technology consultant made a recommendation that there be an assessment of vocabulary to help build independence. (NT at 67-69.)
29. On 3/19/07, the District issued an Invitation to Participate in the IEP Team Meeting to discuss Extended School Year (ESY) 2007. (D-3.)
30. On 4/5/07, the District issued an Invitation to Participate in the IEP Team Meeting to discuss ESY 2007. (D-4.)
31. On 9/19/07, the District issued an Invitation to Participate in the IEP Team Meeting scheduled for 9/28/07. (D-5.)
32. On 9/28/07, the IEP team met. Meeting Notes indicate that Dr. L would provide consultation to the team and, in fact, led a discussion about Student's educational program. The District reported that "concerns were expressed around the issue of how to gain support from general education teachers if we decide to pursue inclusion in the academic areas of science or a foreign language. How do we explain the relevancy of that to teachers and it's (sic) relevancy to future outcomes?" (Id.)
33. Student has vocalizations, not verbalizations, whereby he makes basic gutturals to show pleasure. Student also indicates pleasure/happiness by flapping, smiling and making eye contact (if very happy). (NT at 467-68.)
34. Student uses PECS to request food, but does not convey concerns, pain, if he's cold, etc. (NT at 468.)
35. Student's understanding of receptive language is very primitive; he uses contextual visual cues, but without those he does not understand what someone is saying. (NT at 470.)
36. Student needs assistance in dressing. (NT at 558, 562.)
37. Student cannot draw letters or replicate shapes. (NT at 581.)
38. Student has difficulty with writing implements so uses a touch screen computer. (NT at 581.)
39. The Allegheny Intermediate Unit (AIU) educational consultant on inclusive practices worked as an assistive technology consultant (ATC) for 14 years and opined that when students are in need of assistive technology it should be used consistently by all who interact with student throughout student's day, both at school and home environments. (NT at 36, 37.)
40. The AIU consultant testified that alternate and alternative communication is the speech and language part of assistive technology that is typically used by individuals who are non-verbal, have unintelligible speech, speech delays or disorders – individuals who need to increase their ability to have expressive or verbal communication, and can range from "no" or "low" tech to "high" tech. It can include a Picture Exchange Communication System (PECS), a communication book, manual communication displays or boards to high-tech systems which are computer based that have synthesized speech. (NT at 38-39.)
41. Assistive technology and AAC are geared toward fostering independence. (NT at 42-43.)

42. The AIU consultant attended most of Student's IEP meetings as has conducted classroom observations since 1st grade. (NT at 44.)
43. Student has used a PECS system for communication since 1st grade. (NT at 45, 47.)
44. Student does not exhibit any behavior problems in the classroom. (NT at 45.)
45. Due to autism and Downs Syndrome, Student presents with difficulties in both receptive and expressive language. (NT at 46, 128.)
46. Student is non-verbal but has some vocalizations; receptive language is limited and Student has difficulty in making any generalizations but he expresses himself through his use of pictures and icons on a sentence strip, sign, gestures, or leading someone to what he wants. (NT at 46, 131-33, 142, 161.)
47. Student also communicates by grabbing someone and taking them to what it is he wants. This form of communication is not necessarily age appropriate, but it depends upon the location, the person, and the activity. (NT at 187, 193-94.)
48. Receptive language is one's understanding of the spoken language and one's ability to comprehend spoken language and make meaning and associations. (NT at 142.)
49. Receptive language difficulties and difficulties in generalizations go hand-in-hand. (NT at 162.)
50. The AIU consultant opined that students with limited receptive ability, with processing comprehension issues, benefit from visual supports to assist in making communications and associations with the concept being verbally expressed. Visuals are very important for any student who has deficits in receptive language. (NT at 142, 190.)
51. The AIU consultant has observed no vocalizations within the past few years. (NT at 131-32.)
52. Student is very quiet, he has and shows interests and preferences for certain activities, exhibits some stimulatory actions such as rocking or flipping something. (NT at 128-29.)
53. The AIU consultant opined that affect, emotions and understanding are difficult concepts for many children with autism and they are compounded due to Student's mental retardation. (NT at 177.)
54. The AIU consultant opined that consistency in communication is very important for Student (1) in terms of materials, strategies and approaches, and (2) by the individuals – across environments – interacting with him. (NT at 47.)
55. Student uses a "sentence strip" for communication. (NT at 47-48.)
56. Student also uses a visual schedule which increases his independence. (NT at 50-52.)
57. Both sentence strips and the communication book increase Student's independence. (NT at 52.)
58. A "flip ring" is not used by Student but by people interacting with Student and is used to "cue him in, especially with kids when they are going into the general education classroom". (NT at 52-53.)
59. The AIU consultant last worked with Student in May 2007. (NT at 53.)
60. The AIU consultant testified that she has seen much progress in Student's communication skills since first grade. Specifically, the consultant has seen improvement in Student's awareness of his environment, his ability to make connections with picture icons to represent items and activities, his ability to use the sentence strip, and his ability to navigate through a routine within the classroom. (NT

- at 54.)
61. The AIU consultant's assistive technology consultation reports were included in the District's Reevaluation Reports (RR) of 11/3/00 and 12/7/06. (NT at 55-56; P-2, P-7.)
 62. The AIU consultant testified that during his elementary school years, Student had Science and Social Studies and "specials" in inclusion settings. (NT at 59.)
 63. Student used a "communication book" – where he used pictures to support communication in a book format – starting in approximately the first grade. The book included sentence strips on the front of the book. (NT at 59-60, 65.)
 64. Student currently does not use the communication book independently but uses visual schedules with some independence. (NT at 60-61.)
 65. Not all of the AIU consultant's suggestions have been utilized by the District. One instance of a recommendation not acted upon is placing Student's visual schedules and/or mini-visual schedules in his communication book for more ready accessibility. Student understands the use of visual schedules and this "would move him through the activity from beginning to closure so that he would have some interaction, ability to communicate...It would add to independence in the fact that, I think, he would be able to internalize another routine. The hope was also by doing that that you were giving exposure to additional vocabulary." (NT at 62-63.)
 66. The AIU consultant opined that Student understands receptively when he is given a choice and hands an icon to the person with whom he is conversing. (NT at 65-66.)
 67. The AIU consultant initially recommended the communication book be revised early in the 2006-07 school year so that it would be more portable and would encourage more independence and increase Student's understanding of the set up of the book. Further the IEP team began to discuss the issue of vocabulary regarding Student's understanding and usage. (NT at 95-96.)
 68. The AIU consultant opined that the communications book needed to be reformatted and "cleaned up" to enable Student to become more independent. (NT at 157-58.)
 69. The AIU consultant saw no evidence of a vocabulary assessment conducted in the 2006-07 school year. (NT at 70-73.)
 70. The AIU consultant opined that an assessment was needed to understand what words Student actually understands. (NT at 159.)
 71. A "discrete trial" is "a teaching method where it is very structured, it is behaviorally based, and there is just a consistent manner in which the information is provided, the interaction with the student, and it is done over a period of time to collect data, to determine whether or not that there is an understanding on the student's part." (NT at 74, 159.)
 72. The AIU consultant testified that the discrete trials methodology provides data and is an appropriate method to determine Student's mastery of a subject. (NT at 75.)
 73. The District did not use discrete trials methodology during the 2006-07 school year (6th grade). (Id.)
 74. Discrete trials were used in 1st through 5th grades (elementary school). (NT at 466.)
 75. The AIU consultant saw no evidence that data in the area of communication was gathered during the 2006-07 school year; no data was shared with her as part of the IEP team. (NT at 79.)
 76. Communication is a large part of Student's educational day and programming. (NT at 80.)

77. The AIU consultant opined that, based on her knowledge of Student, there are communication goals that Student could appropriately work on in regular education classes. (NT at 82.)
78. The AIU consultant testified that a lack of consistency “in his communication in the vocabulary that is presented and the format and ...the interaction with him” would be detrimental to his educational progress. (NT at 83.)
79. The AIU consultant testified that “matching” skills should not be the focus of Student’s communication program, especially when he was in the general education classroom. The focus should be on functional, meaningful vocabulary and the use of the communication book and communication strategies. (NT at 86.)
80. Student made meaningful educational progress in elementary school (grades 1 through 5) as shown by Student’s improvement in his environmental awareness and learning routines by using the picture communication approach. The consultant testified that she observed him in regular education settings. (NT at 87, 162.)
81. In the elementary school setting, the vocabulary was aligned within the activity within the general education classes. (NT at 88.)
82. Student benefited from inclusion. (Id.)
83. Student has no history of being disruptive in the classroom or negative behaviors. (NT at 88, 133, 192.)
84. Vocabulary words were added to the communication book from 1st through 6th grades but she questioned whether it was merely “housing vocabulary and was not a functional book.” (NT at 101-02.)
85. Student needs consistent use of visual supports and she did not see consistent usage. (NT at 103-04.)
86. The AIU consultant saw a GoTalk machine being used with Student at the end of the 2006-07 school year. (NT at 109.)
87. The GoTalk is a low tech communication system with digitized speech which uses paper overlays with a grid of only 6 or 9 areas for pictures. (NT at 109-110, 170-72.)
88. The AIU consultant was unaware of any device trial recommending the GoTalk as appropriate for Student. (NT at 112-116.)
89. Lack of a device trial did not mean it was inappropriate to use the GoTalk and it could be appropriately used as a supplementary or an adjunct piece of Student’s communication program. (NT at 208-09.)
90. The AIU consultant opined that a GoTalk should not be used in lieu of the communication book. (NT at 173.)
91. The AIU consultant testified that the primary concern regarding Student is communication, not necessarily inclusion. (NT at 119.)
92. The AIU consultant did not see much difference in educational progress from the beginning of the 6th grade to the end of that school year. She did not see meaningful educational progress in 6th grade (NT at 120, 163-64.)
93. The AIU consultant opined that although Student has disabilities, one should not expect that progress would diminish as Student got older, although, generally speaking, any student with any disability can plateau. (NT at 164-65.)
94. ABLLS data is an assessment of Student’s communication and daily living, functional skills, and it can be used as a curriculum and to develop IEP goals. (Id.)
95. The AIU consultant expressed concern that the ABLLS data from 2004 and 2006

- showed decreased scores in the area of communication. These data were reviewed in a meeting by the District, Parent and the AIU consultant. (NT at 121, 190-93.)
96. The AIU consultant recommended in 2007, and continues to recommend, that Student have a vocabulary assessment to determine what would be meaningful communication programming for academic needs, daily living, and independence. (NT at 124.)
 97. The AIU consultant observed Student 8 times in the 2006-07 school year. These observations were each full-day observation consultations. (NT at 127.)
 98. The AIU consultant did not observe Student using his communication book on a consistent basis, which is important to enable Student to increase his vocabulary. (NT at 152-56.)
 99. The AIU consultant opined that Student learns through incidental learning. (NT at 135.)
 100. The AIU consultant explained incidental learning as “more or less through just being engaged in the activity that they are actually picking up the concepts.” (NT at 211-12.)
 101. Student is ambulatory. (NT at 141-42.)
 102. Student may not understand what someone says without visual aids, particularly if Student has not had sufficient opportunities to associate with word/words with the directive. Discrete trials would assist in understanding what the Student understands and what connections are being made. (NT at 143-44.)
 103. Student’s attendance in regular education classes, such as P.E. where he observes an activity creates opportunities to work on communication skills such as vocabulary and interaction. (NT at 188.)
 104. Student has experienced the most success in communication with the use of visual supports. (NT at 197-98.)
 105. When introducing new concepts and materials to Student, Student needs consistency and support with visuals. (NT at 214-15.)
 106. The AIU consultant has observed the middle school being inconsistent in the use of visuals. (NT at 215.)
 107. Parent’s expert (PE) is a full-time independent special education consultant. (NT at 222.)
 108. PE observed Student on 5/21/07; further, he reviewed educational records, reports by the AIU consultant, a report by an independent educational consultant (Dr. L), and he interviewed Parent. (NT at 236-38; P-8.)
 109. PE spoke with various District staff during his observation of Student, including the assistant principal. (NT at 246-47.)
 110. As part of the record review, PE noted that after the 12/7/06 RR, no IEP team meeting was held and there was no IEP generated. (NT at 248-49.)
 111. The last IEP was crafted on 8/23/06. (NT at 249.)
 112. Student was assessed using the ABLLS in December 2004 and again 25 months later in January 2007. There were 25 skill areas that Student improved in 13, decreased in 8 areas and had no change in 4 areas. (NT at 253.)
 113. The ABLLS scores were as follows:

<u>Skill Area</u>	<u>Score/Maximum Score Possible</u>	
	December 2004	January 2007
Cooperation & Reinforcer Effectiveness	23/30	26/30
Visual performance	38/76	33/76
Receptive Language	46/160	36/160
Imitation	10/46	7/46
Vocal Imitation	0/36	0/36
Requests	26/68	21/68
Labeling	14/122	10/122
Intraverbals	2/164	0/164
Spontaneous Vocalizations	1/28	1/28
Syntax and Grammar	0/44	0/44
Play and Leisure	13/28	17/28
Social Interaction	18/58	24/58
Group Instruction	7/38	9/38
Classroom Routines	10/24	11/24
Generalized Responding	3/12	4/12
Reading	4/46	0/46
Math	1/68	0/68
Writing	1/32	3/32
Spelling	2/16	2/16
Dressing	13/30	18/30
Eating	6/20	10/20
Grooming	0/14	1/14
Toileting	5/22	12/22
Gross Motor	16/28	19/28
Fine Motor	18/28	19/28 (P-7.)

114. PE testified that the ABLLS scores indicate that appropriate progress is not being made but, rather, the data “was extremely telling and disappointing.” (NT at 253, 256.)
115. Although the District has administered the ABLLS twice, PE testified that he typically saw it every 6 months to a year. (NT at 410.)
116. PE opined that communication is Student’s primary need and he is extremely concerned about the diminution in receptive language scores. (NT at 266.)
117. The ABLLS is a criterion referenced instrument based on material that has been observed and collected over time by school personnel. (NT at 271.)
118. Parents requested Dr. L’s services because of her background in including children with significant disabilities and she teaches at [redacted] University where one of her areas of expertise is reading programs for children with significant disabilities. (NT at 628.)
119. The District Supervisor of Special Education agreed to Dr. L’s observation and input. (NT at 505-06; P-7, P-8.)
120. PE opined that the 12/7/06 updated RR “is generally weak” in that it gave no guidance for the IEP team. (NT at 262-64.)
121. AIU consultant and Dr. L both recommended a functional vocabulary evaluation,

- which PE found appropriate and should have been part of the RR. (NT at 270.)
122. PE found the District's progress reports were not always responsive to the objective. Some data were on point, other data not exactly on point, and yet other time the information was "very much anecdotal and observational." (NT at 274-279.)
 123. PE opined that based on the progress reports showing lack of progress, the IEP team should have met by February and revised the IEP; however, there have been no revisions or adjustments. (NT at 274-79.)
 124. Progress reports should be entirely responsive to the objectives or the measurable annual goals. (NT at 280.)
 125. PE opined that after a semester of seeing progress was not approaching the accuracy the IEP team had projected in the annual goal, the IEP team should have met and revised the IEP. (Id.)
 126. PE opined that while consultants give their recommendations, Districts are not required to adopt them. (NT at 281-82.)
 127. PE testified he saw 3 different communication systems used and could not "discern an overarching philosophy" as opposed to what is typically experienced in autistic support classrooms. He observed paraeducators using the PECS system, occasionally the GoTalk, other times just speaking with Student, and when Student did not respond immediately there would be hand-over-hand or physical guidance. (NT at 284-85, 298, 432.)
 128. PE opined that verbal communication and hand-over-hand assistance should be paired with the visual methods Student uses. (NT at 415-16.)
 129. PE testified that in autistic support classes, whether private or public, one often sees "a use of a discrete trial training, the Lovaas Applied Behavior Analysis type of teacher, so that I am seeing communication lessons that are set up by staff, as well as speech and language for very specific skills, the PECS is being used with the device together to attempt to gain the appropriate response..." (NT at 288.)
 130. PE observed no behaviorally inappropriate conduct. (NT at 288.)
 131. PE opined that it "would be absolutely critical" for Student's family to use the same communication system at home as was used in school (NT at 289.)
 132. Alternative communication methods should be used consistently across all environments including home and school. (NT at 291.)
 133. PE observed Student carrying both the GoTalk and the communication book at the same time. The GoTalk was not used in P.E. although Student held it; it was used, however, in Tech. Ed. by Student and the paraeducator. (NT at 292.)
 134. PE observed life skills students in P.E. just doing untimed laps with the paraeducators without inclusion and there was no contact with non-identified peers. However, PE stated, "I want to... I have to be fair. I understand there are times general ed. needs to collect data, and I am going to make an assumption this was a bit of an off day." (NT at 293-95.)
 135. PE opined that while Student needs a one-on-one aide in an inclusive, regular education setting as set forth in Student's IEP, he believes it appropriate for the IEP to provide for a one-on-one aide all day, with the exception of the life skills classroom due to the "rich staff to student ratio". (NT at 296, 371.)
 136. In Student's 5th grade year, data collection was daily and tracked weekly, as is typical of an autistic support, ABA type of philosophy. In 6th grade, the District

- changed data gathering to weekly and reporting to quarterly. PE opined that for children with significant disabilities, “daily probes being taken selectively on the objectives in the IEP, and then ... looked at every week, perhaps biweekly, to see: do we have to make some adjustments and fine-tuning and tweaking in these particular areas?” (NT at 297.)
137. PE estimated that the hand-over-hand, oral approach, and physical prompting approach were utilized at least 50-60% of the day. (NT at 300.)
138. PE observed a general lack of response to paraeducators until prompted by the staff. (NT at 433.)
139. To determine the appropriateness of various communication methods it is necessary to have data collection and then analyze the data. PE opined that that is the point of progress monitoring/reporting as well -- it answers the question: how does this data change our approach?. (NT at 302.)
140. PE testified that he did not see consistency between paraeducators in their communications approach. (NT at 303-04.)
141. PE testified that he observed periods of time throughout the day where Student wasn’t doing anything, including one instance where “the staff was talking amongst themselves and students were just sitting there.” (NT at 310.)
142. PE observed that the Tech. Ed. class paraeducators used Fisher Price preschool-level plastic toys that looked like tools to teach item recognition. (NT at 310-11.)
143. PE testified regarding age inappropriate materials that “the research is clear that this kind of vicarious instruction, generally, has no payoff for students with disabilities in the long run.” (NT at 311.)
144. Materials which were age inappropriate were used in arithmetic, reading and writing; the materials were geared to children 5-7 years of age. (NT at 312.)
145. PE testified he observed nothing age appropriate for an adolescent in middle school. (NT at 312.)
146. Standard practice is to use age appropriate materials. (NT at 409.)
147. Student’s 5th grade IEP shows inclusion in Science and Social Studies; further, since Student has no behavior issues, Student could continue to be included in those subjects while working in a parallel curriculum and “those concepts could incorporate issues related to language arts and mathematics.” (NT at 330-32.)
148. Student could learn skill sets in an inclusionary general education setting among non-disabled peers and that teaching concepts should be age appropriate. For example, rather than teaching “big/little” by gluing and matching, Student could be asked to distinguish big/little tools, such as screws, nuts and bolts in the Tech. Ed. classroom. (NT at 435-36.)
149. PE observed only the speech and language therapist collecting data. “I was, again, really surprised that the student who has autism, with MR and speech and language, except for [the speech and language teacher], no one did a single probe the entire day on any objective. And he has pages and pages of objectives.” (NT at 339-40.)
150. The IEP is clearly a life skills program, which is satisfactory if it meets Student’s needs regardless of disability. (NT at 340.)
151. PE testified that the IEP does not set forth the appropriate “methodologies, techniques, programs to deliver” Student’s needs. (NT at 340-41.)
152. PE testified that Student’s progress was “incremental and not meaningful.” (NT

at 341.)

153. PE testified that he has concerns regarding the “SDI, the program modifications, the curriculum, the material, the strategies” and that Student “needs far more training in socialization with non-disabled peers.” (NT at 341-2.)
154. Teaching methods used with children with autism or communication needs besides discrete trials and ABA include TEACCH, which is a more “socially language based program”. (NT at 344.)
155. Both autism and MR impact Student’s education and Student’s IEP should include a teaching methodology for autism. (NT at 345.)
156. Student’s lack of initiating communication should not be a barrier to educational inclusion. (NT at 346-47.)
157. Student could certainly be included with non-disabled peers far more than he is currently; that Student will require paraeducators and require a parallel modified curriculum. (NT at 348.)
158. PE testified he is not advocating full-time inclusion but is advocating partial inclusion at a greater level than Student is currently experiencing. (NT at 349.)
159. PE opined that he saw no justification for reducing inclusion in middle school (NT at 347.)
160. PE’s professional opinion is that Student did not receive a FAPE during the 2006-07 school year because the materials were inappropriate, the techniques were not properly coordinated, inclusion was not nearly strong enough, and there is a lack of data to show Student’s current capabilities. Further, Student requires a program with a stronger autism emphasis and less life skills emphasis (NT at 354.)
161. PE’s 6/22/07 Independent Educational consultant Evaluation provided that it is PE’s “opinion to a reasonable degree of professional certainty that [Student] received an inappropriate educational experience during the 2006-2007 school year from the time he entered the [middle school] through the close of the school year. This inappropriate educational program and placement denied him FAPE in the LRE to the extent of an entire year on an hour for hour and day for day basis.” (P-28,,)
162. Student has an expired IEP, which is a procedural violation. (NT at 355.)
163. PE testified that Student appeared to have a cold the day he was observed, which could have adversely impacted or affected Student’s abilities that day but that did not appear to be the case. (NT at 357, 401-02.)
164. PE spoke with District staff and they answered his questions. (NT at 359-62.)
165. For Student to experience meaningful educational progress Student should: (1) have the materials used to deliver the curriculum to be high interest, low level and age appropriate; (2) include computer usage which should be incorporated for reinforcement of skills and communication; (3) have more opportunities to interact with non-disabled peers (increased inclusion); (4) have the life skills curriculum expanded and recognize that Student has an autism spectrum disorder so that the staff will all use the same methodology and use it consistently. (NT at 420-421.)
166. PE testified that life skills support classrooms are designed primarily for students with moderate levels of cognitive impairment who need independent living skills, who are most often verbal and can engage in receptive social interactions. An autism support classroom provides learning for students who do not learn incidentally, rather they must be taught everything in a structured, sequential fashion; students have

- communication needs which require constant data collection (which is not usually required in a life skills classroom). Further, autism is a neurological disorder whereas mental retardation is more of an organic and developmental disorder. (NT at 723-24.)
167. PE emphasized the need for regular and routine data collection for children with autism spectrum disorder “whether it is around communication or social skill development or academics or self-help skills” as it informs the District how to adjust/modify/revise the IEP and the instructional program. (NT at 440.)
 168. During Student’s early Lovaas training, Student mastered matching and then progressed to understanding a picture represents the object shown in the picture. Further, Student has never lost his ability to match. (NT at 475.)
 169. Parent attended regular unit meetings in elementary school. These meetings focused on upcoming lessons and Parent would help with adapting the work so there would be consistency. (NT at 477.)
 170. Unit meetings were removed from the 6/2/06 IEP. (NT at 479; P-9, P-10.)
 171. The level of team work in elementary school does not exist at the middle school where the focus is on life skills and prevocational rather than adapting the curriculum. (NT at 478.)
 172. Student enjoys gross motor activities including using the computer (via touch screen), swimming, going to arcades and amusement parks and go carts. (NT at 480.)
 173. Student was in inclusion classes throughout the day except for communication arts during 4th and 5th grades. (NT at 482.)
 174. The June 2006 middle school IEP changed from the elementary school focus of inclusion to adopting the IU curriculum with self-contained life skills support. (NT at 486-87.)
 175. The District’s decision to eliminate the one-on-one aide previously provided in Student’s IEPs, affected the daily data collection, as this had been part of the aide’s responsibilities. (NT at 489.)
 176. Parent testified that the District was non-responsive to wraparound services. Parent observed on 2 separate occasions in 2006 that the staff did not understand the PECS system (NT at 499-500.)
 177. The District did not respond to emails sent by 2 different wraparound Behavior Specialist Consultants (BSCs) who requested permission to visit and observe Student. The emails were directed to the Special Education Supervisor. One BSC also telephoned but received no response. (NT at 502-04.)
 178. Parent testified that at the end of the 2006-07 school year, one BSC was granted a singled, limited observation. (NT at 504-05.)
 179. Parent testified that in March 2007 an IEP meeting was held, but the focus was on ESY, not the 12/7/06 RR. (NT at 509.)
 180. Parent testified she observed the Unified Arts class and saw staff give Student push-button books with music when student was no longer attending to the project. Parent then provided the District with a tactile board so that Student could work on an IEP goal in lettering. (NT at 511.)
 181. Parent testified that due to educational concerns, Parents requested that Student not continue with 2 classes of Unified Arts but were informed that there were no other teachers for that period of the school day. Parents believe this is an example of scheduling for administrative convenience. However, the District offered to remove

- Student from the inclusion Unified Arts class and have Student attend a learning support class taught by the life skills teachers. This was unacceptable to parents. (NT at 513.)
182. Parent testified that they do not see the curriculum being adapted to Student's needs. (NT at 516.)
 183. Parent testified she visited for open house she did not see any adapted books. (NT at 585.)
 184. Parent testified that within the past 2 months the BSC observed Student in the Family Consumer Science class without visual adaptations – There was a lecture and Student just sat and the aide took notes. (NT at 517.)
 185. Dr. L witnessed Student in class where students were using computers but there wasn't a computer with a touch screen for Student to use. (NT at 517-18.)
 186. Parent expressed concern that new vocabulary isn't included in Student's PECS book but words are kept in various locations and Student does not have access to the vocabulary across environments. (NT at 521.)
 187. The communication book goes home daily; the GoTalk has gone home on a few occasions and Parent has programmed it for use for teaching at school by scanning a book which was sent home, including pictures and corresponding sounds, and programming Music. (NT at 525, 588-89.)
 188. Parents have the standard software necessary for adaptations: PowerPoint, scanners, and Boardmakers which is the software to do the icons. (NT at 618.)
 189. Parent has offered to help adapt the middle school curriculum on a daily basis as she did in elementary school. (NT at 619.)
 190. The middle school is located across the parking lot from the elementary school (NT at 619.)
 191. Parent believes the GoTalk would be appropriate if used for teaching but not for Student's primary communication. (NT at 527.)
 192. The GoTalk because it is a low-tech device and at the time Student was in device trials with high tech devices. (NT at 1033-34.)
 193. Student has 1 more year in middle school (NT at 619.)
 194. Parent testified that the middle school life skills program started last year and the District is using the AIU curriculum which is not geared toward children with autism. (NT at 532, 563-64.)
 195. Parent saw age inappropriate materials during the 2006-07 school year but has seen less of that during the 2007-08 school year. (NT at 533-34.)
 196. Parent has observed some regression in math and vocabulary skills. Parents are working on those areas at home. (NT at 539-40.)
 197. Parent testified that for communication at home they use the PECS book, a flip ring with receptive commands and some questions (such as "do you need to go to the bathroom?") that can be answered with a "yes" or "no", and specific smaller books which are used on specific outings, such as going to restaurants. (NT at 547-8.)
 198. Student most often initiates communication about food, but he has spontaneously flipped open his book and said, "I see [the aide]" and Student has started communicating his toileting needs this year. (NT at 555-57.)
 199. Student is not included in any of the 5 academic periods of the school day but is included for P.E., Tech. Ed, and regular Music. (NT at 563.)

200. Parent has requested to see the log book to determine whether or not the staff is currently gathering data daily but recording weekly, but that information has not been forthcoming. (NT at 597.)
201. Student sits with another life skills student and, on occasion, a learning support student, at lunch. Because Student is very routine based, Student will not initiate a change to a more integrated setting. (NT at 605-07.)
202. Student is adding only 10-14 vocabulary words a year in middle school compared with 3-4 words every 6 weeks in elementary school. (NT at 608-09.)
203. Learning to wait for a turn is neither an identified need nor an IEP goal for Student but he has a social goal for taking turns with games. (NT at 624, 629-30.)
204. No wraparound services are provided during school. (NT at 627.)
205. The inclusion facilitator (IF) has known Student since 1st grade and has been a member of Student's IEP teams. (NT at 645-46.)
206. IF characterized his position as helping IEP teams develop successful programs for students and developing programs that help students become more independent and successful adults. (NT at 644.)
207. IF was impressed that a District aide made sure there was time for Student to use the bathroom when dressing for P.E.. (NT at 659.)
208. IF was impressed that the District aide worked with Student on "follow-up self-care skills in terms of washing his hands and things like that." The IF was also impressed that Student learned how to use an exercise bike which is a skill Student can use later in life. (NT at 659-60.)
209. IF testified that there were challenges in helping "the general education Family Consumer Science teacher understand the need" to create a "more basic format," to use visuals, and the need for repetition – even if it was as simple as making toast. (NT at 663.)
210. IF testified that he was very impressed with the Tech Ed. teacher "in that he did outreach activities to the Parent in terms of inviting them to come in and see the program and asking them about goals." (ID.)
211. IF testified that he was impressed that there were communication supports for Student and "a lot of opportunities in terms of how it was designed for him to work on skills, work on machines, and try some things that I never seen him do before." (NT at 663-64.)
212. IF testified that he and the special education teacher met with Parent in June 2006 and he recalled "the whole issue of part-time versus full-time life skills support." He recalled the special ed. teacher being "very creative in terms of looking for different opportunities for [Student] to do inclusive activity. We were talking about the fact he would be included in what we call Unified Arts. At that time, Unified Arts refers to Art, Music, Physical Education, Family & Consumer Science, and Technical Education. And we talked about how [Student] would be included in all of those areas. And then I think [Parent] wanted to talk more about some of the other areas in terms of the Science and Social Studies, and I think that that is kind of where we hit a cross-road in terms of sorting those things out." (NT at 668.)
213. IF testified that in his professional opinion the goals delineated in the June 2006 IEP were properly calculated to address Student's needs. The goal of increased skills in areas of dressing, grooming and personal hygiene is appropriate for personal

- independence. The goal of increased functional literacy through developing a functional receptive and expressive vocabulary is appropriate because it lays the foundation for reading skills. IF opined all the goals were appropriate but expressed concern regarding the number of goals. (NT at 670, 678-80, 685-86; P-10.)
214. IF testified that during the 2007-08 school year there have been ongoing monthly meetings and, since January, meetings are approximately every 10 days. (NT at 670, 692.)
215. IF testified that Dr. L helped the IEP team to “tak[e] on the issue of communication, we had discussions about that, about doing an augmented communication device trial with [Student].” (NT at 672.)
216. IF testified that at various team meetings they have discussed inclusion and “how would we set that up in a way that it is appropriate and functional for [Student] in terms of hoping for ways to integrate goals from an IEP into those inclusionary opportunities....Plus we are continuing to work on gathering assessment data that will drive an IEP.” (NT at 673.)
217. IF testified that the District is now taking pictures of actual tools Student uses in Tech. Ed. and the District has purchased a reading curriculum and following the suggestions of the consultant, and doing things “in a more structured sequence.” (NT at 681.)
218. IF testified that he believes the SDI in the 6/06 IEP addresses Student’s autism. (NT at 687-89.)
219. IF testified that he believes Student has made meaningful educational progress. (NT at 691.)
220. IF testified there has been no updated IEP written since 6/2/06 or the 8/25/06 NOREP. (NT at 695.)
221. IF testified that although Student’s 5th grade IEP provided for inclusion in academic subjects the 6th grade IEP did not provide inclusion for any academic subjects. (NT at 699-700.)
222. IF testified the reason for greatly reduced inclusion opportunities in general education classes was “we were looking for more opportunities for [Student] to be part of the life skills classroom, to spend more time there, in order to focus on skill development because, again, the sense of history then, he wasn’t really acquiring skills to independence. So the idea of the life skills class was to give him more opportunities, more focus there.”(NT at 701.)
223. When asked if it was the District’s position that Student would not benefit at all from continued inclusion in academic subjects, IF responded, “we wanted to work as a team on developing a model where we would look at more aspects of the IEP and, at the middle school level, and sort out how we would work on those inclusionary settings, and we would continue to discuss that.” (NT at 702.)
224. When told that he had not answered the question, the question was restated and IF responded, “[i]t was the District’s position at that point that we were open to discussion of [Student] going into Social Studies and/or Science, and I know that [the special education teacher] worked on that in terms of looking for those opportunities. But, again, with a focus on relevance and function.” (NT at 702.)
225. When asked why would the District have to be open to discussions relative to inclusion when Student was already included in previous years, IF stated, “I think the

- focus...was developing a program that would look at both short term and long term, and what we were trying to move towards is a program, and opportunities for [Student] to develop skills where he would learn more mastery. We felt it was important for him to get more individualized instruction within that model and then work to generalize skills.” (NT at 703.)
226. IF testified that he did not recall seeing anything which said Student did not benefit from being in academic inclusion class settings. (NT at 704.)
227. IF testified that the IU curriculum is not specifically for students with autism. (NT at 704.)
228. IF testified that the District purchased a reading curriculum approximately September or October 2007 but did not know when it was implemented. (NT at 706.)
229. IF testified that while there were symbols being used to pair with other symbols in P.E., he has not observed any focus on increasing communication skills such as was done in Tech. Ed. regarding greetings. (NT at 709.)
230. When asked if classes other than Tech. Ed. set up greetings and took pictures to enable further communication, IF deemed the action in Tech. Ed. as a “pilot program” and that Student’s 6th grade year “was the first opportunity for [middle school] to experience students with [Student’s] level of need.” Parent’s counsel had to repeat the question several times before IF gave a direct answer: “No.” (NT at 709-713.)
231. IF testified that other than including Student in Music, there have been no additional increases in inclusion this school year. (NT at 715.)
232. IF characterized Student’s move from elementary to middle school as “a big transition [in] terms of moving to an environment where [Student] is going to be working with many different people, learning a new building, and what we were looking for as a receiving team is an opportunity to get to know him and then bring him in more step-by-step transitions.” (NT at 750.)
233. IF acknowledged that Student had transitioned from another school to District’s elementary classroom a few years previously without requiring Student to experience a “step-by-step transition” and that was because “there was more and more discrepancy in terms of where [Student’s] skill set was and where the curriculum was.” (NT at 750.)
234. IF characterized his interaction with Student as “sporadic.” (NT at 759-60.)
235. IF testified that he would consider the speed with which students move through the curriculum as a factor when looking at inclusion. (NT at 775.)
236. There is nothing in the IU curriculum which says the curriculum must be implemented in a self-contained classroom. (NT at 779.)
237. IF opined that a parallel curriculum would not be appropriate inclusion for Student. (NT at 778.)
238. When asked if Student’s IEP could be implemented in a regular education classroom, IF responded affirmatively. (NT at 779-80.)
239. IF testified that the District was preparing to include Student in a regular education Spanish class. (NT at 780.)
240. The Special Education teacher (SET) testified that she considers Student’s IEP to be a part-time life skills program although she probably thought Student had a full-time program when she crafted the IEP and wrote that Student’s placement was full-time. (NT at 787.)

241. SET testified that Student's inclusion in 6th grade included Unified Arts, P.E., homeroom, lunch, and DEAR (Drop Everything And Read – 15 minutes). Other classes were adapted classes not general education classes. (NT at 788, 847-856.)
242. When Student attends adapted classes, the teacher is a regular education teacher, the other students are all special education students – there are no regular education non-identified peers in attendance. (NT at 852-53.)
243. SET agreed that Student's 6th grade school day was between 70-80% in the special education setting. (NT at 852.)
244. Student quickly learned to navigate the middle school from the bus to his locker independently but there is an aide to ensure he gets safely into the building. (NT at 789-90.)
245. Student is currently in life skills support 4 periods out of 8; that the IEP team decided not to include Student in either Science or Social Studies; and that Student also receives S/L therapy twice a week. (NT at 791, 877.)
246. Student is very compliant and easy to work with. (NT at 792.)
247. Student went from dependent to independent in his lunch/eating skills: using a fork, opening containers, getting and putting things away, putting lids on and taking care of his trash. And he currently uses his PECS, flip book and mini-Merc at lunch to communicate with students. (NT at 794, 796, 837-38.)
248. Student has made great gains in toileting skills and has, on occasion, used his flip ring to say he needs to use the bathroom. (NT at 795-96, 814.)
249. Student is currently working on hand washing and drying, brushing his hair and making sure his clothing is straightened. (NT at 797-98.)
250. SET testified that she collected data on some aspect of Student's program every day of the week. (NT at 810.)
251. SET testified that Student either maintained or made progress on each of the 6th grade annual goals. (NT at 811-15.)
252. Student currently is sitting at lunch with a full table of typical non-identified peers and uses the sentence strip. (NT at 815.)
253. SET testified that Student has made progress with vocabulary. (NT at 816, P-17, P-20.)
254. SET opined that Student made meaningful educational progress on his IEP goals in 6th grade and is continuing to make progress on those same goals in 7th grade. (NT at 816-821.)
255. SET testified that when written tests are given in classes where Student is included, aides are instructed to remove Student from the classroom and work on another activity. (NT at 831.)
256. The IU curriculum is the only curriculum used in the life skills classroom. (NT at 838.)
257. SET testified that they are using discrete trials with Student, but they are not the typical discrete trials used with students with autism. (NT at 840.)
258. SET testified that in late 2007, the District purchased an early skill-builder reading program called "MOW" which Student uses 2-3 times/week. (NT at 841.)
259. SET testified that although the manufacturer of MOW recommends two 30-minute sessions per day, Student receives 2-3 sessions per week, approximately 20 minutes per session. This is due to "the time in the day and I am out of the classroom

- frequently.” (NT at 842.)
260. SET testified that they have taken some data while using the MOW curriculum but “the delivery of the program does get chopped up because I am not in the classroom.” (NT at 844.)
261. SET testified that there are age appropriate materials in the life skills support classroom but stated she does not think there are many sources for children with limited receptive and expressive language. (NT at 860-62.)
262. SET testified that in both 6th and 7th grades, Student was in life skills support class for 3 hours/day. (NT at 868-869.)
263. SET testified she is not sending home the Daily Reports this year on a daily basis because of using email. (NT at 872.)
264. Although the IEP calls for 4-8 new vocabulary words per regular education unit, SET is not doing this because of “not understanding exactly how we were supposed to do that, what words we were supposed to be including in his communication book...It wasn’t that I wasn’t sure how to do it. I, certainly, can produce those vocabulary words and work on his vocabulary words with him. It was not a clear understanding of how we were to determine what words were to be included.” (NT at 874-85, 926.)
265. SET testified that she believes some of the IEP goals could be addressed in an inclusionary setting but she is only 1 participant on the IEP team. (NT at 878-79.)
266. SET testified that adaptations to the regular education classes are made by the assistants with SET’s help. (NT at 888-89.)
267. SET testified that Parent or Student’s assistants make the PECS for the books read during the DEAR reading breaks. (NT at 890-91.)
268. SET testified DEAR is a time without conversation – everyone is doing silent reading. During this time, Student is using his PECS that referred to his book; he is not reading the words in the book, but using his pictures. (NT at 892-94.)
269. SET testified that there is no IEP goal that specifically addresses DEAR and silent reading. (NT at 894.)
270. SET testified that Student would work with her on Objective No. 2 of the IEP goal re functional literacy skills despite the requirement which states Student will sit with a peer to complete “I see....” and will turn pages in a variety of picture books. (NT at 894-95.)
271. The 6/2/06 IEP states a list of mastered goals will be kept and those goals will be probed within each quarter to advise on maintenance of skills. However, SET testified that she does not have this list. (NT at 901-02.)
272. The District does not have an adaptive keyboard for any computer; there are 2 touch screen computers: 1 in the life skills support classroom and 1 in the technology education classroom. When Student is in the computer lab, Student’s aide uses the mouse when Student points to the screen so that it appears that it responds to Student. (NT at 905-06.)
273. Student’s level of understanding is at the preschool level. (NT at 923-24.)
274. Books for Student are sent over from the elementary school library. (NT at 924.)
275. SET testified that Student is in an exploratory Spanish class and is the only identified student in the class. (NT at 925.)

276. Parent testified that Student has not had an increase in inclusion in 7th grade; and while Student is in Spanish, that class is during the Unified Arts period. (NT at 1037.)
277. The speech and language pathologist (SLP) testified that the flip chart Student uses is actually a small notebook which is color coded (red for Student; yellow for listener's responses) mentioned in the IEP and assists in reinforcing the reciprocal nature of a conversation. (NT at 955-59; P-10, P-16.)
278. SLP testified she has seen "a lot of progress in [Student's] interest in peers and awareness of peers....in looking at the specific short-term goals, he has made progress in each of them to some extent and others in a greater extent." SLP has seen increases in Student's vocabulary, "he is getting vocabulary from, different gym vocabulary, different Spanish vocabulary, and that is being incorporated into my classes, too. I bring that into my classes and hav[e] him expand on his sentences." (NT at 981-82.)
279. SLP testified that she believes Student has made meaningful progress in each of the S/L IEP goals. (NT at 948-83; P-16.)
280. No one person is responsible for the communication book, ensuring it is organized appropriately. (NT at 993-96.)
281. The GoTalk is used in S/L class and "it became the tool that was used when [Student] went to other classes along with the assistants" because it was easier to transport his communication book and because it developed a kind of prerequisite skill leading toward a device. (NT at 1001.)
282. Parent made boards for the GoTalk. (NT at 1000, 1003.)
283. Student works on vocabulary which is class specific. For example, Student could work on words in Art class, such as "clay" and these words are not placed in Student's communication book. (NT at 997-1112.)
284. Student receives S/L therapy twice weekly which is one-on-one; once weekly as a group (usually 1 peer and Student); and once weekly where SLP pushes into the classroom and also into Student's homeroom. (NT at 1026-27.)
285. On 2/11/07, Dr. L issued her report wherein she found the IEP short term objectives reporting methods and criteria to be "inconsistent" which made the "data questionable." She further reported that while "there is a plethora of performance levels available in the records used as a part of this review, the methods of reporting [Student's] performance makes using that data questionable." (P-8, P-15 through P-21.)
286. Dr. L observed that Student's "priority need is in the area of communication"; that adult support was adequate but it was unclear how these adults were implementing the IP goals and collecting data; that there was inconsistent usage of Student's communication book by his various adult support staff. (Id.)
287. Dr. L recommended in her report that there be a comprehensive evaluation to determine relevant skills and current performance levels of those skills; she found "[t]ypically a summary of progress on the past IEP goals is included, however the inconsistency measurement methods used for his IEP short term objectives makes the use of this data tenuous." Further, data collection should be "directly correlated with targeted outcomes." (Id.)
288. Dr. L reported that "data analysis cannot be stressed enough...[and] [v]alid, relevant instructional data needs to be collected daily and analyzed at least every 10

days for [Student] to inform future instruction....If data is not collected correctly and analyzed frequently there exists the danger of ineffective instruction being implemented for long periods of time.” (Id.)

289. The 6/2/06 proposed IEP lacks an “IEP Implementation Date” and an “Anticipated Duration of Services and Programs” date on the cover sheet. (P-10.)

290. The 6/2/06 proposed IEP – within the heading “Program Modifications and Specially Designed Instruction” lists projected beginning dates as 3/6/06 (this is 3 months prior to the date of the IEP) and anticipated duration dates as 3/5/07. (Id.)

Witness Credibility

1. Ms. A -AIU Educational Consultant (AIU Consultant) – Earned Bachelor’s degree in Communication Science in 1980 from University [redacted], a Master’s in Speech & Hearing from [redacted] University in 1982. She holds certifications in Instruction 2 and Special Education Supervision; a Certificate of Clinical Competence in speech and language given by the National American Speech & Hearing Association; and an Assistive Technology Certificate from the University of [redacted]. She worked for 9 years as a speech/language clinician at [redacted] and the past 14 years with the [redacted] Intermediate Unit as an Assistive Technology Consultant. Since May 2007, her current position has been the Educational Consultant in the Inclusive Practice’s Project. Her demeanor as a witness was very professional; she spoke knowledgeably and without hesitation. She was a very credible witness.
2. Mr. K - Parent’s Expert (PE) – Earned a BS in Biology (1969) and a MA in Education (1973) as well as a teacher’s certification (1971 from [redacted] University, and has post-Masters work and Special Education Certification and Supervisor of Spec. Education from [redacted] University in 1977. Certifications include: Supervisor of Special Education, teacher of the Mentally & Physically Disabled, Biology and General Science teacher. His work experience includes 4 years of classroom experience as a teacher; 27 years experience as a Director and Supervisor of Special Education for the [redacted] Clinic, [redacted] IU No. 13, and [redacted] School District; and 17 years experience as a PA Special Education Due Process Hearing Officer. Additionally, he lectures as adjunct faculty for various universities. PE presented himself very professionally, he was evenhanded in his testimony and presented himself as a highly qualified, experienced and credible professional. He was very forthright and his answers were stated without hesitation. He is very knowledgeable and was a very highly credible witness.
3. Mrs. - Parent - Has a BS and MBA in [areas redacted] and has undergraduate work in [redacted]. She worked at [redacted] for approximately 28 years as an [redacted] Manager and for [redacted] as the Director of [redacted] in the [redacted] Department and has expertise in [redacted]. She has attended various conferences on inclusion, attended the National Autism Conference at State College, attended a week-long conference in October 2007 at the Assistive Technology Conference in Minneapolis. Parent is well-spoken, presented herself as a highly competent professional with knowledge about her son’s needs and the manner in which computer technology and

communication play significant roles in her son's educational career. Parent was evenhanded in her comments – offering the fact that recently the District has improved in using more age-appropriate materials, etc. She was a very credible witness.

4. Mr. B - District's Inclusion Facilitator (IF) – Earned a Bachelor's degree in Health Education through S.U.N.Y. and a Master's in Special Education from U. of [redacted] (1977). He worked for 20 years at the [redacted] Institute which is an approved private school. During that time, he was a teacher, a hospital educator where he worked with young adults and teenagers with traumatic head injuries, Coordinator of Staff Development, and as a Consultant in a pilot position to create a model to bring students back from approved private placements. He has been employed by the District as an Inclusion Facilitator for 9 years. He is certified to teach Health & Education, and holds a Special Education Certification to work with students from severe to mild disabilities, K-12. This witness had difficulty answering questions directly; Parent's counsel had to repeat questions and said, "I don't think you answered my question." (NT at 702, 709-13.) District counsel also stated, "I don't know that you are understanding what I am asking" and had to restate his question to the witness. (NT at 775-76.) Although he is very experienced and gave lengthy answers, the testimony appeared to avoid giving substance – to talk around the question, as it were. This raised questions in this Hearing Officer's mind regarding the reliability of his testimony and whether the witness was intentionally avoiding questions or whether this is the witness's normal manner of speech. Due to this, this Hearing Officer was unable to find the testimony to be uniformly reliable and discounted portions of the testimony accordingly.
5. Ms. B - Special Education Teacher (SET) - Earned her degree in elementary and special education from [redacted] University in 1975. She was employed by the [redacted] Intermediate Unit before coming to the District 15 years ago. She has 32 years experience as a special education teacher. She presented herself in a professional manner. She spoke without hesitation and was evenhanded in her testimony. This Hearing Officer found her highly credible.
6. Ms. T - Speech & Language Pathologist (SLP) – Earned her Bachelor's in Speech and Language at the University of [redacted] and her Master's degree in Speech Pathology and Audiology from [redacted] University (1976). She is certified in Speech Pathology, Audiology and the Hearing Impaired. She has 25 years in practice and has been with the District for 10 years. She presented herself as a highly credible witness; her answers were thorough and without hesitation and she was evenhanded in her explanations.

Issues²

1. Is the District providing Student's educational program in the least restrictive environment appropriate for Student?
2. Is Student making meaningful educational progress?
3. Did the District commit procedural and substantive violations of the IDEIA from the beginning of the 2006-07 school year to date?
4. Did the District provide a free appropriate public education (FAPE) during the 2006-07 school year to date?
5. Has the District provide a FAPE during the 2007-08 school year thus far?

Discussion and Conclusions of Law

Jurisdiction

A due process hearing is a hearing authorized through special education laws of both federal and state legislation. The jurisdiction of such a hearing is highly circumscribed. A hearing officer cannot decide any issue – no matter how significant – which is outside those narrowly defined parameters. Thus, any concerns parents may have regarding education services which concern matters beyond those parameters are beyond the purview of this process and this Hearing Officer.

Witness Credibility

Within the context of the special education arena, however, "Hearing officers are empowered to judge the credibility of witnesses, weigh evidence and, accordingly, render a decision wherein the hearing officer has included 'findings of fact, discussion and conclusions of law. . . [and] the decision shall be based solely upon the substantial evidence presented at the hearing.'"³ Quite often, testimony – or documentary evidence – conflicts; this is to be expected for, had the parties been in full accord, there would have been no need for a hearing. Thus, as stated, part of the responsibility of the Hearing Officer is to assign weight to the testimony and documentary evidence of facts which

² Although the issues were stated in a different order during the hearing, there is no legal requirement that they be addressed in that same order in a Hearing Officer's Decision. The issues are hereby considered in the order which this Hearing Officers believes to be the more logical.

³ Spec. Educ. Op. No. 1528 (11/1/04), quoting 22 PA Code, Sec. 14.162(f). See also, Carlisle Area School District v. Scott P., 62 F.3d 520, 524 (3rd Cir. 1995), cert. denied, 517 U.S. 1135 (1996).

concern a child's special education experience.

Hearing Officers have the plenary responsibility to make “express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses” and “give some reason for discounting”⁴ or crediting evidence. Further, Hearing Officers’ decisions are to “specifically mak[e] credibility determinations among the various witnesses and contrary expert opinions”.⁵ The Third Circuit, in Shore Regional High School Bd. Of Educ. v. P.S., 381 F.3d 194 (3d Cir. 2004), held that “if a state administrative agency has heard live testimony and has found the testimony of one witness to be more worthy of belief than the contradictory testimony of another witness, that determination is due special weight. *Id.*,”⁶ Carlisle Area School v. Scott P., 62 F.3d 520, 527-29 (3d Cir. 1995). Specifically, this means that a District Court must accept the state agency’s credibility determinations ‘unless the non-testimonial, extrinsic evidence in the record would *justify* a contrary conclusion.’ Carlisle, 62 F.3d at 592 (emphasis added). In this context the word ‘justify’ demands essentially the same standard of review by a federal appellate court. See Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 574 (1985).”⁷ This court further held that “the task of evaluating [witnesses’] conflicting opinions lay in the first instance with the ALJ in whose presence they testified.”⁸

Similarly, credibility has been addressed in various jurisdictions. Looking to California, Stevens v. Parke Davis & Co., 9 Cal.3d 51, 67-68 (1973) held that a trier of fact may “accept part of the testimony of a witness and reject another part even though the latter contradicts the part accepted...[and also] reject part of the testimony of a witness, though not directly contradicted, and combine the accepted portions with bits of testimony or inferences from the testimony of other witnesses thus weaving a cloth of truth out of selected material.” Further, a fact finder may reject the testimony of even an expert witness, although not contradicted. Foreman & Clark Corp. v. Fallon, 3 Cal.3d 875, 890 (1971) And California courts have also found that “one credible witness may constitute substantial evidence”. Kearl v. Bd. Of Medical Quality Assurance, 189 Cal.App.3d 1040, 1052. (1986).

Burden of Proof

The burden of proof consists of both the burden of production and the burden of persuasion. Neither the IDEA nor the IDEIA⁹ addressed the subject of burden of proof and therefore the question of which party bore the burden was handled on a state-by-state basis with only a handful of states passing any laws or regulations on the matter. In Pennsylvania, the burden in an administrative hearing challenging an Individualized Education Program (“IEP”) generally fell to the LEA. Recently, however, the United

⁴ Blount v. Lancaster-Lebanon Intermediate Unit, 2003 LEXIS 21639 at *28 (2003).

⁵ *Id.* at *34.

⁶ Citing S.H. v. State-Operated School Dist. of City of Newark, 336 F.3d 260, 271 (3d Cir. 2003)

⁷ Shore Regional at 199.

⁸ *Id.* at 201.

⁹ The IDEIA is variously referred to in case law as the IDEIA or IDEA 2004. In either event, it is one and the same.

States Supreme Court addressed this issue in Schaffer v. Weast, 126 S. Ct. 528 (2005). In the concluding paragraph of the Opinion of the Court, Justice O'Connor held: "The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief."¹⁰ In Antoine M. v. Chester Upland School District, Civ. Action No 05-3384, (E.D.Pa. Mar. 14, 2006), the Court held that even where the challenge is not to the sufficiency or appropriateness of an IEP, but rather for the failure to find a child eligible for one, "the overarching logic of Schaffer – that, in the context of the IDEA, the party bringing the challenge bears the burden of proof...[and] [a] student's challenge to a district's determination that he or she is not eligible for an IEP should not be treated any differently than a challenge to the adequacy of an IEP." Thus, where a "case is brought solely under the IDEA and arises in a state lacking a statutory or regulatory provision purporting to define the burden of proof in administrative hearings assessing IEPs, Schaffer controls."¹¹

The burden of persuasion in an administrative proceeding lies with the party seeking relief.¹² This requires the Hearing Officer to make a determination of whether or not the evidence is "equipoise" rather than preponderant. Preponderance of the evidence is defined as evidence presented by one party that is of greater weight or more convincing than the evidence offered by the other party. In other words, where there is evidence which tips the scales, the party which presented that evidence prevails. However, where the Hearing Officer finds the evidence is equally balanced on an issue, the non-moving party prevails.

After a close examination and analysis of all of the evidence and the testimony, this Hearing Officer did not find "equipoise". Thus, the burden of persuasion was not at issue in this case.

Issue No. 1. Is the District providing Student's educational program in the least restrictive environment appropriate for Student?

The IDEIA provides that identified students are to be educated to the maximum extent appropriate with children who are not disabled. To that end, "special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aides and services cannot be achieved satisfactorily." 20 U.S.C. Sec. 1412(a)(5)(A); 34 C.F.R. Sec. 300.550.

Student has significant disabilities – he is nonverbal, has an IQ in the moderately mentally retarded range of 40, and has autism. The District offered inclusion in academic classes such as Social Studies and Science through 5th grade. The 3/29/06 NOREP and

¹⁰ 126 S.Ct. at 537.

¹¹ L.E. v Ramsey Bd. Of Educ., 435 F.3d 384, 391 (3d Cir. 2006).

¹² Greenwood v. Wissahickon Sch. Dist., Civ. Action No. 04-3880 (E.D. Pa. Feb. 3, 2006) ("Hence, because there is no Pennsylvania law imposing the burden on the district, Schaffer applies and the burden of persuasion at the administrative level in Pennsylvania is now on the party contesting the IEP".)

IEP provided for part-time life skills support with continued inclusion.¹³ However, just 2 months later, the District updated the IEP due to Student's move into 6th grade at the middle school and changed the program to full-time life skills support.¹⁴ An incomplete NOREP, dated 8/25/06, recommended LSS without designating whether the placement was full- or part-time.¹⁵ The inclusion facilitator explained the reason for reducing inclusion as offering "more opportunities for [Student] to be part of the life skills classroom, to spend more time there in order to focus on skill development."¹⁶ Parents disagreed with the District's decision and rejected the proposed NOREP and IEP. Parents' position is that Student benefits from inclusion and should continue in the LSS classroom on a part-time basis.

The Third Circuit addressed the issue of least restrictive environment in Oberti v. Board of Education of Clementon School District, 995 F.2d 1204 (3d. Cir. 1993).¹⁷ The court set forth what is now a famous two-part test to determine the appropriateness of a student's placement. First, the court determines whether education in the regular classroom with supplementary aids and services can be achieved satisfactorily.¹⁸ To accomplish this, Oberti set forth three factors: (1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom with supplementary aids and services; (2) a comparison of the educational benefits available in a regular class and the benefits provided in a special education class; and (3) the possible negative effects of inclusion on the other children in the class.¹⁹ If there is a determination that the child cannot be educated in the regular education classroom, the second part of the test is considered. At that point, the court must decide whether the district has mainstreamed the child to the maximum extent possible.²⁰

Part I of II-Part Test

Factor No. 1 – Reasonable efforts to accommodate in the regular education classroom with supplementary aids and services

Placement must be in the least restrictive environment where Student can receive a meaningful educational benefit.²¹ Oberti requires that before a placement other than the regular education class can be considered, "the school 'must consider the *whole range* of supplemental aids and services, including resource rooms and itinerant instruction,'

¹³ F/F Nos. 11, 12, 13.

¹⁴ F/F No. 15, 17, 240. The special education teacher thought at the time when she updated the IEP on 6/2/06 that Student would have a full-time LSS program but now considers it a part-time program even though the District has never changed the NOREP or the IEP to reflect this.

¹⁵ F/F No. 17.

¹⁶ F/F No. 222.

¹⁷ Oberti is particularly persuasive because Rafael Oberti, although xx years older than Student and having a history of behavior problems which Student does not experience, had, by virtue of Down's syndrome, severely impaired intellectual functioning and limited ability to communicate. Student also has a limited IQ and ability to communicate. *Id.* at 1207.

¹⁸ *Id.* at 1215.

¹⁹ *Id.* at 1220.

²⁰ Girty v. Sch. Dist. of Valley Grove, 163 F.Supp.2d 527, 533 (W.D.PA 2001)

²¹ See S.H. v. State-Operated Sch. Dist. of the City of Newark, 336 F.3d 260, 272 (3d Cir. 2003).

Greer, 950 F.2d at 696, speech and language therapy, special education training for the regular teacher, behavior modification programs, or *any other available aids or services* appropriate to the child’s particular disabilities. The school must also make efforts to modify the regular education program to accommodate a disabled child.” Oberti, 995 F.2d at 1216 (emphasis added). Absent this “serious consideration to including the child in a regular class with such supplementary aids and services and to modifying the regular curriculum to accommodate the child, *then it has most likely violated the Act’s mainstreaming directive*. ‘The Act does not permit states to make mere token gestures to accommodate handicapped students; its requirement for modifying and supplementing regular education is broad.’ *Daniel R.R.*, 874 F.2d at 1048; see also *Greer*, 950 F.2d at 696.” Oberti, 995 F.2d at 1216 (emphasis added.)

Until entering middle school, the District had offered Student a part-time LSS classroom with inclusion in at least 2 academic classes. There is no dispute that Student benefits from that part-time support. Nevertheless, there is no evidence in the record that there was any serious discussion of supplementary aids and services to enable Student to remain included in a regular classroom placement on a part-time basis. Rather, the record shows the opposite.

Testimony showed that the inclusion specialist and the life skills teacher met with Parent and discussed the proposed changes²² and Parent persisted in pursuing inclusion. It is clear that the District was unprepared for a student with Student’s significant needs, that there was a feeling the regular education teachers were not on board with inclusion,²³ and that Student’s educational needs would be provided in the LSS placement while they looked and “hop[ed] for ways to integrate goals from an IEP into those inclusionary opportunities...”²⁴ When pressed to explain why the District would have to have discussions relative to inclusion for Student, the inclusion facilitator testified the District believed it was “important for him to get more individualized instruction within that model and then work to generalize skills.”²⁵ Student was, in effect, being forced to earn a right to associate with typical peers in an academic inclusion setting. These conclusions were reached without the IEP Team’s consideration of a full range of supplementary aids and services which could enable Student to remain in the regular education kindergarten class for academics. There was no discussion of special teacher training, co-teaching, use of an itinerant teacher trained in aiding students with mental retardation, consultation for the regular teacher, or any other well-accepted inclusion techniques. See Girty, 163 F.Supp.2d at 536 (“simple techniques exist which could be used to facilitate Spike’s inclusion in regular education instruction...with a small amount of research into the methods that many school districts already use, a program beneficial to Spike could be developed.”); Blount, 2003 LEXIS 21639 at 27 (“A review of the record... does not show that the IU proposed any specific supplementary aids and

²² F/F No. 212, 221, 241 - 243. Inclusion was limited to Unified Arts, which – through a highly tortuous explanation, appeared to be most often adapted classes, in which the classroom students were all identified but taught by a regular education teacher.

²³ F/F No. 209.

²⁴ F/F No. 216, 222 - 224.

²⁵ F/F No. 225.

services,....The IU did not present any evidence as to what specific supplemental aids and services it considered. Its exhibits...make no reference either to those specific supplementary aids and services typically available to comparable children, or to any actually considered by the relevant decision-makers in the instant case.”) and Oberti, 995 F.2d at 1211 (“a number of commonly applied strategies...could be used, in combination, by the School district to integrate Rafael in a regular classroom, including: (1) modifying some of the curriculum to accommodate Rafael’s different level of ability; (2) modifying only Rafael’s program so that he would perform a similar activity or exercise to that performed by the whole class, but at a level appropriate to his ability; (3) ‘parallel instruction,’ i.e., having Rafael work separately within the classroom on an activity beneficial to him while the rest of the class worked on an activity that Rafael could not benefit from; and (4) removing Rafael from the classroom to receive some special instruction or services in a resource room, completely apart from the class. Dr. Brown explained that with proper training a regular teacher would be able to apply these techniques and that, in spite of Rafael’s severe intellectual disability a regular teacher with proper training would be able to communicate effectively with Rafael. Dr. Brown also testified that many of the special educational techniques applied in the segregated Winslow class could be provided for Rafael within a regular classroom....[Further] speech and language therapy Rafael needs could be most effectively provided within a regular classroom....language and speech therapy could easily be provided by a therapist inside the regular class during ongoing instruction if the therapist were able to collaborate ahead of time with the instructor regarding the upcoming lesson plans....Dr. McGregor...testified that, given the resources and expertise available to public schools ... the School District should be able to design an inclusive program for Rafael with assistance from professionals who have experience integrating children with disabilities in regular classes.”) Steps such as these are what Oberti referred to as “reasonable efforts to include [Student] in a regular classroom with supplementary aids and services”. Oberti, 995 F.2d at 1204.

The District offered no testimony to show there was any consideration of any combination of supplementary aids and services or that Student would be unable to receive a meaningful educational benefit with such aids and services. Instead, the opposite was the case – the special education teacher testified that her opinion is that some of the IEP goals could be addressed in an inclusionary setting.²⁶ The inclusion facilitator also acknowledged that Student’s IEP could be implemented in a regular education classroom but opined that a parallel curriculum would not be appropriate inclusion for Student and that he considers the speed with which students move through the classroom curriculum as a factor when looking at inclusion.²⁷

Certainly absent the legally mandated full range of supplementary aids and services, Student is unlikely to receive educational benefit from inclusion in academic classes such as Social Studies and Science. This Hearing Officer does not dispute that

²⁶ F/F No. 265. The teacher also noted, very tellingly, that she “is only one participant on the IEP team.” This certainly infers that the IEP team’s response is at variance with her position.

²⁷ F/F Nos. 235-238.

time spent in the life skills class is beneficial, or possibly, optimal in addressing many of Student's needs. Specifically, activities of daily living, such as toileting skills, are being mastered there, and this is not insignificant. However, evidence clearly shows that Student's primary need is communication and those skills are reinforced through interaction with typical peers. Thus, the time spent in a special education setting is necessary to provide the foundation and framework for Student but it is reinforced through the inclusionary setting. Further, the legal standard is not what is optimal. Rather, it is the least restrictive environment where student can obtain an adequate or "meaningful educational benefit in light of his individual needs and potential."²⁸ Thus, whether full-time life skills support would provide an optimal educational opportunity is not the question. Quite simply, there was no showing that with supplemental aids and services that Student would not obtain a meaningful educational benefit through inclusion.²⁹

This Hearing Officer finds the evidence not only preponderant but clear and convincing that the District failed to make reasonable efforts to accommodate Student in a part-time regular classroom setting with appropriate supplemental aids and services.

Factor No. 2 - A comparison of the educational benefits available in a regular class and the benefits provided in a special education class

This portion of the analysis requires (1) a heavy reliance on the "testimony of educational experts", and, (2) a requirement that the Hearing Officer "must pay special attention to those unique benefits the child may obtain from integration in a regular classroom which cannot be achieved in a segregated environment, i.e., the development of social and communication skills from interaction with nondisabled peers".³⁰ (emphasis added.) The second element was discussed at length by the Oberti court. It found a "fundamental value of the right to public education for children with disabilities is the right to associate with nondisabled peers....Thus, a determination that a child with disabilities might make greater academic progress in a segregated, special education class may not warrant excluding that child from a regular classroom environment. We emphasize that the Act does not require states to offer the same educational experience to a child with disabilities as is generally provided for nondisabled children. [cites omitted.] To the contrary, states must address the unique needs of a disabled child, recognizing that that child may benefit differently from education in the regular classroom than other students. See *Daniel R.R.*, 874. F.2d at 1047. In short, the fact that a child with disabilities will learn differently from his or her education within a regular classroom does not justify exclusion from that environment." Oberti at 1216-1217.

²⁸ T.R. v Kingwood Township Bd, of Educ., 205 F.3d 572, 578 (3rd Cir. 2000).

²⁹ The District's refusal to include Student in academic settings is further muddled by Student's current inclusion in a foreign language class. Why would inclusion in an academic setting where information is presented in English be without merit if the District finds Student should be included in an academic setting where the information is presented in Spanish?

³⁰ Oberti at 1216.

A. Testimony of Educational Experts

Parent's expert testified that he was not advocating for full-time inclusion but for partial inclusion at a greater level than Student is currently experiencing. He noted that Student exhibits no behavior problems that would preclude Student from being included in a general education setting with typical peers. His professional opinion was that Student could be included in classes such as language arts and mathematics classes while working on a parallel curriculum.³¹

The AIU consultant testified that inclusion provides opportunities for Student to work on communication skills such as vocabulary and have interaction with typical peers

The special education teacher also testified that some of Student's IEP goals could be addressed in an inclusionary setting; this was confirmed by the inclusion facilitator who testified that he did not recall seeing anything which stated Student did not benefit from being in academic inclusion class settings. He further opined that Student's IEP could be implemented in a regular education classroom.³²

B. Requirement that Hearing Officers "must pay special attention to those unique benefits the child may obtain from integration in a regular classroom which cannot be achieved in a segregated environment."

As previously noted, Student has autism and inclusion in regular education classes creates opportunities to observe and model appropriate behaviors with typical peers – and most importantly, develop communication skills.³³ While the District would have to modify the curriculum to meet Student's needs, this is "not a legitimate basis upon which to justify excluding a child' from the regular classroom unless the education of other students is significantly impaired."³⁴ Thus, the District's position, as enunciated through the inclusion facilitator, that the speed with which a student moves through a curriculum and/or that a parallel curriculum would not be appropriate inclusion³⁵ for Student reflects more of a "traditional...knee-jerk reaction" than the legal standard reflected in the IDEIA.³⁶

In comparing the benefits, this Hearing Officer must again turn to Oberti. "[A] determination that a child with disabilities might make greater academic progress in a segregated, special education class may not warrant excluding that child from a regular classroom environment."³⁷ Further, the Blount court found a Congressional preference for mainstreaming children "at the earliest possible time, rather than assigning a disabled

³¹ F/F Nos. 147, 148.

³² F/F Nos. 226, 238, 265.

³³ F/F No. 286 – where Dr. L describes in her report that this is Student's "priority need."

³⁴ Oberti at 1222.

³⁵ F/F Nos. 235, 237.

³⁶ Sp. Educ. Op. No. 1455 (Feb. 23, 2004.)

³⁷ Oberti at 1217.

child to special education with the hope that he will improve sufficiently to go into a mainstream educational setting.”³⁸

Factor No. 3 - The possible negative effects of inclusion on the other children in the class.

Oberti requires a consideration of any disruptive behaviors which could negatively impact upon the education of other classroom children.³⁹ However, Student is described as being compliant and easy to work with;⁴⁰ thus, there is no issue of negative effects upon other children.

Part II of II-Part Test

The second part of the test is a determination as to whether the school has mainstreamed the child to the maximum extent appropriate and the evidence, as discussed above, is clear that the District has failed to do so.

The foregoing analysis leads to the conclusion that the Parents met their burden of proving by a preponderance of the evidence that District did not consider including Student in regular education classes with supplementary aids and services and that Student can receive a free appropriate public education in a less restrictive setting than in a full-time LSS classroom. Instead, it “appears that the District was attempting to fit the Student into a program, placement and curriculum that already existed in the District, rather than tailoring a program and placement to the Student’s capabilities and limitations, as the law requires.”⁴¹

Issue No. 2. Is Student making meaningful educational progress?

Issue No. 3. Did the District commit procedural and substantive violations of the IDEIA from the beginning of the 2006-07 school year to date?

Issue No. 4. Did the District provide a free appropriate public education (FAPE) during the 2006-07 school year to date?

Issue No. 5. Has the District provide a FAPE during the 2007-08 school year thus far?

As these issues are closely intertwined, they will be considered together.⁴²

The courts have made clear that the standard for FAPE is whether or not the program and/or placement is reasonably calculated to provide a meaningful benefit that is neither trivial nor de minimis. This standard requires that it be reasonably calculated to offer educational benefit at the time it was offered, and it is required to be “appropriate” not the best program available.⁴³

³⁸ Blount, 2003 LEXIS 21639 at 41, fn. 5.

³⁹ Id. at 1217.

⁴⁰ F/F No. 246.

⁴¹ Spec. Educ. Op. No. 1858 (Jan. 11, 2008).

⁴² The discussion under Issue No. 1 is hereby incorporated by reference.

⁴³ See Bd. of Educ. v. Rowley, 458 U.S. 176 (1982), Polk v. Central Susquehanna I.U. 16, 853 F.2d 171 (3d Cir. 1988), Fuhrmann v. E. Hanover Bd. Of Educ., 993 F.2d 1031 (3d Cir. 1993), Oberti v. Bd. Of

There is no dispute that the last approved IEP and NOREP were offered on 3/29/06 while Student was still in the elementary setting. There is also no dispute that the IEP which has been implemented during the 2006-07 and 2007-08 school years was the proposed and rejected 6/2/06 IEP (proposed IEP);⁴⁴ thus, Student has attended middle school for almost two full years without an agreed upon IEP.

The proposed IEP copied the 3/29/06 IEP closely; the differences included eliminating the 1-on-1 aide who scribed the daily data collection and increasing the life skill support to full-time. The goals, short term objectives and SDI remained virtually the same.⁴⁵ The difficulty in ascertaining whether meaningful educational progress was made, despite what Dr. L referenced as “a plethora of performance levels available,” was the inconsistency in the methods of data collection used to report progress which made the data questionable.⁴⁶ Parents’ expert also made a similar observation – that the progress reports were not always responsive to the objective and that some data was on point, some not exactly on point, and other data was “very much anecdotal and observational.”⁴⁷

Communication is Student’s primary need. The speech and language pathologist testified that she had seen Student make meaningful progress on his S/L goals and that Student is getting vocabulary for difference classes. However, the special education teacher conceded that the proposed IEP calls for 4-8 new vocabulary words per regular education unit and that this is not being met because there is no understanding of how to determine which vocabulary words were to be included in Student’s communication book.⁴⁸ Instead, Student is adding only 10-14 vocabulary words a year.⁴⁹ The reason for this failure to implement this portion of the IEP is that Student’s teachers didn’t know which vocabulary words to include in Student’s communication book or how to arrive at a decision regarding the appropriateness of vocabulary. Adding to this confusion and compounding the situation is the teachers’ lack of direction and understanding almost 2 full years after Student started attending middle school. This confusion could be likened to the educational equivalent of “Who’s On First?” No one seems to know who’s responsible for coordinating Student’s communication needs.

Educ. of the Borough of Clementon, 995 F.2d 1204 (3d Cir. 1993).

⁴⁴ F/F No.289, 290. Further, the disputed 6/2/06 IEP contains projected beginning dates, listed in the Program Modifications and SDI section, as 3/6/06, which is 3 months prior to the date of the proposed IEP. The anticipated duration for this proposed IEP was one year and the ending date given is 3/5/07.

⁴⁵ This wholesale copying perpetuated the internal flaws of data collection noted by both Dr. L in her report and Parents’ expert in his testimony and report.

⁴⁶ F/F No. 285, 287.

⁴⁷ F/F 122. Thus, whether the District implemented the proposed but rejected IEP or the last agreed upon IEP, the SDI in each has the same flaws and therefore the same outcome. In a case with somewhat similar facts (the student was autistic and parent disapproved the NOREP), the Appeals Panel found that where the goals were vague, the short-term goals did not clarify the annual goals, and the specially designed instruction was not tailored to Student’s needs, that the District failed to offer an appropriate IEP reasonably calculated to provide FAPE. Spec. Educ. Op. No. 1813 (Apr. 23, 2007.)

⁴⁸ F/F 264, 278,279.

⁴⁹ F/F No. 202.

If the District had no intention of continuing to introduce this number of words per unit, as it had in previous years, it should not have committed itself to doing so. Certainly there was nothing to prevent the IEP team from readdressing this during one of the many team meetings. But the District cannot commit to a certain level of activity, fail to provide same, and then argue that it has provided an appropriate IEP and FAPE.

One of the main concerns regarding Student's communication needs is the need for consistency by the teachers and paraeducators. Testimony was conclusive that while Student is provided a PECS with a sentence strip and a GoTalk machine, other means of communication are interspersed throughout Student's day. Specifically, the AIU consultant observed inconsistency in the use of visuals, including his communication book, and that Student may not understand what is being said without visual aids. Parents' expert observed the same inconsistencies – paraeducators would use the PECS system, sometimes the GoTalk, and other times would just speak to Student and if he did not respond quickly would use hand-over-hand or physical guidance.

The AIU consultant noted that the ABLLS data, which is an assessment of Student's communication and daily living functional skills, showed decreased scores in the area of communication. And Parents' expert testified that in the 25 skill areas ABLLS assessed, Student improved in 13, decreased in 8, and had no change in 4 areas. The Parents' expert found the data "extremely telling and disappointing." Further, while a functional vocabulary evaluation has been recommended by both the AIU consultant and Dr. L, the District has not initiated such an evaluation.

While it is clear that the choice of communication devices and methodologies lies within the District's purview as long as it reasonably provides meaningful benefit in light of Student's abilities, it is clear from Dr. L's report (and Dr. L was hired by the District to provide her expertise to the District) and from the AIU consultant as well as Parent's expert, that Student did not receive that which is necessary in order for him to learn: a unified method of communication. It is not that the use of a GoTalk interfered with Student's learning but the disjointed approach utilized by the paraeducators in using various methods throughout Student's day created an educational puzzle for this Student with complex communication needs. The paraeducators should have been directed how to interact with Student from the beginning of the 6th grade. To have Student experience two years of uncoordinated, mismanaged communication methodologies is a haphazard approach and is unacceptable. Whatever methodology the District chooses to employ must be used by all adults at all times and in a unified manner.

Data collection must be addressed in a manner which assures regularity to enable the IEP team and teachers to know what Student is learning, how he is learning, and what changes, if any are necessary to ensure learning is meaningful. To date, there has been no vocabulary assessment to determine Student's functional vocabulary and there is a question as to whether the communication book is merely housing vocabulary and is not functional in terms of Student's communication needs.⁵⁰

⁵⁰ F/F No. 84.

Additionally, the District has not provided age appropriate materials, particularly in the 6th grade, and while there are more age appropriate materials being used in the 2007-08 school year, age inappropriate books and Thomas the Tank Engine computer programs have been observed this school year as well.⁵¹

The previously discussed refusal to provide academics was unwarranted – a child does not have to prove an entitlement to attend general education classes. The law clearly provides exactly the reverse: access to the general education is to be provided to all children without regard to disability unless the student cannot be provided a meaningful educational benefit – which is not to be judged through the prism of what non-identified peers could attain. This child had been successfully included in core academic subjects in 5th grade. Student did not change, his abilities did not change, and his disabilities did not change. The only thing that changed was Student crossed the parking lot to a different building and in so doing entered a different world with a different educational philosophy. Student did not change – the District changed. There was a paradigm shift in its approach to inclusion. Student seems required, by some unknown calculus, to parole himself to a less restrictive environment.

This is not to say that the District showed bad faith or acted egregiously. The record is clear that the inclusion facilitator, various teachers and Parents have met on a regular basis. But bad faith and egregious behavior are not required for finding a denial of FAPE just as regular IEP team meetings do not equate to providing Student with same.

On the other hand, Student has made some progress in some of his activities of daily living – most specifically, he is no longer diapered, and he has learned how use to an exercise bike. He is now eating lunch with typical peers and is now included in a Spanish class; but, without objective criteria and data, it is impossible to determine the level of educational progress.

The Third Circuit court held, in Ridgewood Bd. Of Education v. N.E., 172 F.3d 238, 250 (3d Cir. 1999) that “IDEA’s central goal is that disabled students receive an appropriate education, not merely an appropriate IEP.” Weighing all of the testimony and documentary evidence carefully, however, this Hearing Officer finds, on balance, that while Student did make some progress,⁵² the shortcomings in program and placement were such that, together with the procedural and substantive violations, there cannot be a finding of meaningful educational progress or that Student received an appropriate education. Therefore, there must be a finding that there was a denial of FAPE for the 2006-07 school year and 2007-08 school year to present.

Compensatory Education Awards

⁵¹ Thomas the Tank Engine is at preschool level.

⁵² In Board of Educ. v. Diamond, 808 F.2d 987 (3d Cir. 1986), the court “rejected the notion that the provision of any educational benefit satisfies IDEA holding that IDEA ‘clearly imposes a higher standard.’” Ridgewood, 172 F.3d at 247.

A student is entitled to compensatory education starting when the District knew or should have known that it had not provided FAPE. The period of compensatory education is equal to the period of deprivation, excluding the time reasonably required for the District to rectify the deprivation.⁵³

The law does not require a finding of bad faith or egregious circumstances in order to award compensatory education; neither does it depend upon the vigilance of the parents. M.C. v. Central Regional Sch. Dist., 81 F.2d 389 (3d Cir. 1996). Compensatory education is an appropriate remedy to cure the violation of statutory rights while the child is entitled to those rights. Big Beaver Falls Area Sch. Dist. V. Jackson, 615 A.2d 910 (1992); M.C. v. Central Regional Sch. Dist., *supra*. Courts have found that compensatory education is the appropriate remedy where there is a finding of denial of a FAPE, even where the student maintained good grades and made educational progress. Punxsutawney Area Sch. Dist. v. Kanouff, 719 A.2d 198 (1999). Obviously, then, a program which confers only trivial or minimal benefit is not appropriate. Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3d Cir. 1988).

Nature of Compensatory Education Award

Compensatory education “is an in-kind remedy designed to provide additional future educational services to compensate a student for denial of educational programming that he should have received.”⁵⁴ The following Appeal Panel decisions are particularly helpful in elucidating the nature of compensatory education awards and provide guidance for this decision.

First, Spec. Educ. Op. No. 1481, p. 13, explains:

The compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product or device that assists him in overcoming the effects of having been denied FAPE. To that end, the compensatory education shall be in addition to, and not supplant, educational services and/or products/devices that should appropriately be provided by the district through student’s IEP, to assure meaningful educational progress. These compensatory education services may occur after school hours, on weekends and/or during summer months when convenient for STUDENT and his parents. The hours and nature of compensatory education created by this paragraph may be implemented at any time from the present to student’s 21st birthday, as determined by the IEP team.

Second, Spec. Educ. Op. No. 1431 (2004), pages 10-13, clarifies the award should meet the present need of Student, rather than provide a simple replacement of services denied through lack of FAPE:

“Compensatory”, and court interpretations of it in education, continue to suggest

⁵³ M.C. v. Central Regional Sch. Dist. 81 F.3d 389 (3d Cir. 1996).

⁵⁴ Spec. Edu. Op. No. 1876. (Apr. 17, 2008.)

to this Panel, as they have in the past, a preferred remedy that replaces precisely what was denied. In a strict sense, compensating for educational deprivation entails, to the extent possible, providing those specific services that should have been a part of FAPE in the first place. Otherwise, the relationship between conduct resulting in denial of services and the remedy, likely necessary to prevent the latter from becoming punitive, can be tenuous.

Nevertheless, service-for-service remedial replacement may not always be “compensatory”, particularly where a student can no longer derive “meaningful educational benefit” from them. Failing to provide that benefit, and in turn an appropriate education, is what we believe compensatory education seeks to address, and not the simple absence of a particular service. Conversely, awarding the identical service later, from which obtaining such benefit has become impossible, is not compensatory and emphasizes the service rather than the benefit.

Consequently, we believe the equitable nature of this remedy permits, when previously denied services are no longer appropriate, discretionary substitution of others. In the first instance, the latter should be directed towards achieving what was or should have been the goals of the deprived services, but this too may fall victim to the deleterious effect time can have on appropriateness. Where that too is the case, then we see a substituted service in furtherance or enrichment of the student’s then current IEP documented educational goals generally as “compensatory”.

Decisions as to the form, location, scheduling, and costs, so long as they remain roughly equivalent to the public costs of these substituted services, can rest with no other than the parent. These controversies incept in district failure to provide “meaningful educational benefit”, and if they then influence substituted services to remedy that, the rule prohibiting their profit therefrom is besmirched. It is, in fairness, parents who expend the due process proof and remedy seeking effort, and who must likely deal with making the student available for compensatory services. We see no impropriety, therefore, in parental fashioning of the delivery vehicle for substituted services, if the services are developmental, remedial, or enriching instruction in furtherance of the then pending or a future IEP. See In Re the Educational Assignment of B.R., Special Education Opinion 1102 (2001). Obviously, then parents’ discretion is not complete, and a district is not faced with a fait accompli, as it may challenge parental selections in the proper forum. It was, then, completely acceptable for this District not to have a role in determining the nature of the compensatory education remedy.

...

It is insignificant that the goals and services student is recognized as needing are not documented in an IEP, since the focus of compensatory education is and should be that which was denied and not where its need is memorialized.

Further, in its Exceptions, the District seeks a limit on the rate for compensatory education services selected by parents. In fact, B. R. and too numerous to cite cases following it, in some instances, support limiting such costs to what the district would have incurred, since the services are in the nature of compensation rather than damages. We believe the line of demarcation for applying this limitation can only rest in the fact that this remedy is equitable, and facts such as parental inability to secure properly selected services at the district's rate or cost may justify not applying it. Nonetheless, on this record no factual basis is established for not applying the limitation....

Lastly, further discussion regarding the cost to the District for providing services and the Hearing Officer's authority to order specific services or programs is discussed in Spec. Educ. Op. No. 1122 (2001), p. 9:

.... Except in unusual circumstances, the cost to a 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 and paraprofessionals who should have provided the District services and costs for salaries, tuition and transportation, etc. for contracted services. This principle sets the maximum cost of all of the hours or days of compensatory education awarded. Parents may balance expensive and inexpensive instruction or services so that the average cost is below the maximum amount. Parents may also use fewer hours of expensive services as long as the maximum amount is not exceeded. Finally, parents may not be required to make co-payments or use personal insurance to pay for these services.

....

By way of dicta, we inform the District (and other interested parties) that this rationale does not preclude a Hearing Officer from ordering specific services or programs as compensatory education in some cases.

This Hearing Officer hereby adopts the rationale of these Appeal Panel decisions and awards compensatory education for the full 2006-07 school year and for the 2007-08 school year through today's date without the usual period for rectification less any holidays, vacation days, or days Student was absent from school for the following reasons:

(1) Student received an education in the District in a LRE for a period of not less than 2 years prior to attending middle school. Therefore, the District already knew or should have known it was not offering FAPE when it changed Student's placement from part-time to full-time LSS.⁵⁵ The period for rectification, in this instance, would

⁵⁵ While the Appeals Panel in Spec. Educ. Op. No. 1455 (Feb. 23, 2004) noted that inclusion claims are, for the most part, awarded only declaratory, and not compensatory education, relief, it is noted that Millersburg Area Sch. Dist. v. Lynda T., 27 IDELR 595 (Pa. Commw. Ct. 1998) upheld a compensatory education award by this same panel where the district's denial of FAPE was clear. This Appeals Panel found that

therefore serve to reward the District for an intentional denial of FAPE.

(2) The District failed to provide a unified communication system to ensure Student received meaningful educational benefit which detrimentally affected Student's whole educational day.

(3) The District's proposed IEP failed to provide short-term objectives reporting methods and criteria which would result in reliable data. Instead, the progress reports resulted in misleading information. These failures were pervasive and affected Student's whole educational day, thus denying Student FAPE.

ORDER

For the reasons hereinabove discussed, it is hereby ordered:

(1) That Student is awarded one full year of compensatory education for the 2006-07 school year, less any holidays, vacation days, or days Student was absent from school;

(2) That Student is awarded compensatory education for the 2007-08 school year to date, less any holidays, vacation days, or days Student was absent from school;

(3) That the IEP team meet within 20 school days and craft an appropriate IEP to meet all of Student's identified needs and that the team designate one person to be responsible for coordinating Student's communication needs, including vocabulary acquisition; and,

(4) That the District provide a communications assessment, including but not limited to a vocabulary assessment, and said assessment commence within 20 school days of receipt of this Order.

Margaret Drayden

Hearing Officer

May 13, 2008

where the district had evidenced "close to the stereotypical reaction that the IDEA's LRE preference is designed to counter" and had a "knee-jerk reaction" to inclusion of a 6th grade student with an IQ of 30, the district had to provide "inclusion in not only lunch, recess, PE, and homeroom but also music, art, and **at least one academic class with appropriate supplementary aids and services**, and (2) to monitor this experience...for fine-tuning in a subsequent IEP meeting." Spec. Educ. No. 1455 at 9, 10. (Emphasis added.)