

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.

HEARING OFFICER DECISION/ORDER:

**IN RE: AV, FILE 8096/07-08 LS
NORTH ALLEGHENY SCHOOL DISTRICT**

Type of Hearing: Closed

Dates of Hearing: 11/20/07; 12/19/07; 1/4/08; 1/11/08; 1/22/08; 1/28/08; 2/6/08; 2/11/08;
3/17/08; 3/19/08

I. PARTIES TO THE HEARING

PARENTS:

Mr. and Mrs.

DATE TRANSCRIPT RECEIVED:

3/23/08

PARENTS' REPRESENTATIVE:

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HEARING OFFICER:

Dorothy J. O'Shea, Ph.D.

Signature: Hearing Officer

DISTRICT CONTACT:

North Allegheny School District
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412-635-4109

DATE OF DECISION/ORDER:

DISTRICT'S REPRESENTATIVE:

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II. BACKGROUND INFORMATION

Student is an eligible student, enrolled in the North Allegheny School District (the “District”). In September of 2007, Mr. and Mrs. (“Student’s Parents”) made a due process hearing request, alleging eight claims: denial of Student’s free, appropriate public education (“FAPE”); compensatory education for time of FAPE denial; accrual date of Student’s claim for FAPE denial; exceptions to the *Individuals with Disabilities Education Improvement Act* (IDEIA) (referred to hereafter as “IDEA”); a Continuing Violations Doctrine; reimbursement for an Independent Educational Evaluation (“IEE”); discrimination; and Extended School Year (“ESY”) services (Narrative Transcript, pages 1-23: NT 1-23).

III. FINDINGS OF FACT

- (1) Student’s birth date is xx/xx/xx (Parent Exhibit 7, page 1: P7, page 1).
- (2) Student, an eligible student, is a District resident (Hearing Officer Exhibit 1, page 1: HO 1, page 1).
- (3) Student is in the 8th grade at [redacted] Middle School during the 2007-2008 school year (P13).

Facts Relating to Student’s Prior District Enrollment

- (4) On September 14, 1998, Student received an initial evaluation from the [former] School District, where he resided, when he was about to enter Kindergarten (P 37, pages 1-15).
- (5) Mrs. [redacted] completed a *Gilliam Autism Rating Scale*. Student’s overall autistic quotient standard score was 82 which, when compared to the average of 100, indicated that Student’s autistic behaviors were less severe than a typical child with autism (P2, page 2).
- (6) A 1998 *Vineland Adaptive Behavior Skills* checklist indicated that Student’s socialization skills were moderately low, low in daily living, and low in communication skills (P2, page 2).
- (7) Student’s September 14, 1998 Comprehensive Evaluation Report (CER) diagnosed Student with Pervasive Developmental Disorder and Landau Kleffner Syndrome (i.e., an epileptic syndrome of childhood, characterized by development of aphasia) (P37, page 1; P 59, page 1).
- (8) Student’s September 14, 1998 CER stated, “due to the nature of Student’s disability, his young age, and significant inattentiveness, a complete instructional assessment was not possible at this time...due to Student’s inability to maintain enough focus on each task, and due to his receptive and expressive language deficits...” (P37, pages 3, 5).
- (9) Student’s September 14, 1998 CER discussed Student’s problematic score on the *Peabody Picture Vocabulary Test*, due to his expressive communication delay. Student earned a standard score of < 40 (P37, page 6).
- (10) Student’s September 14, 1998 CER explained Student’s *Visual Motor Integration Test*. Student earned a standard score of < 55, corresponding to the 1%ile when compared to others his age (P37, page 6).
- (11) On May 31, 2001, the [former] School District provided Student’s reevaluation, noting Student’s first grade educational program: “Autistic Support; full-time special education in the regular classroom” (P37, page 8).
- (12) Student’s May 31, 2001 reevaluation reported, “his mother and school staff have noted relatively recent regression and self-injurious behaviors (biting, pinching). Medical history is significant for Autism, seizure disorder, and Landau-Kleffner Syndrome” (P 37, page 8).

Facts Relating to Student’s 2002-2003 School Year

- (13) Student transferred to the District at the beginning of his third grade, where he was placed in a Multi-Disabilities classroom at the District’s [redacted] Elementary School (P 46, page 1).
- (14) On September 4, 2002, the District issued an *Invitation to Participate in an IEP Meeting* form (School District 1: SD 1).
- (15) On September 4, 2002, the District issued a *Permission to Reevaluate* form (SD 3).

- (16) On September 6, 2002, the District provided to Student's Parents a *Notice of Recommended Educational Placement* (NOREP) in "full time support in multi-disabilities support class, speech and language support, occupational therapy support in school as close to his home school as possible" (SD 3; P 39, pages 1-2; P 51, pages 1-2).
- (17) On September 6, 2002, Student's mother approved the District's recommended placement (P39, page 2; P 51, pages 1-2).
- (18) Rather than continuing his autistic support that was available at [redacted]Elementary School, the District placed Student in [current elementary school] a neighboring elementary school in the Multi- Disabilities Class (P2, p.2).
- (19) On September 30, 2002, the District issued another *Invitation to Participate in an IEP Meeting* form (SD 4).
- (20) The District implemented the 10/23/01 IEP from the [former] School District (SD 5).
- (21) On October 16, 2002, after Student was placed in the Multi-Disabilities Class, the District completed its initial evaluation of Student (P2, page3; P36).
- (22) The District's Special Education Plan, 2004-2007, disseminated to the Pennsylvania Department of Education, Bureau of Special Education, describes the District's multi-disabilities support class stating that students, "require intensive interventions such as visual communication systems, highly individualized instruction and schedules, the most functional academics, basic daily living skills, and individualized behavior management" (P 41, page 8).
- (23) On October 16, 2002, the District provided a Reevaluation Report on Student (P36, pages 1-18).
- (24) The October 16, 2002 CER consisted of anecdotal information compiled from the Special Education Teacher, his Speech and Language Therapist, the Occupational Therapist, and an observation conducted by the inclusion facilitator, Mr. B. Relying on the five-year-old (1998) [former district] CER, the District school psychologist did not conduct any formal or informal assessments for the District's initial Evaluation Report (P2, page 3; P36).
- (25) The third grade Multi-Diagnostic Team (MDT) concluded that Student suffered from Landau-Kleffner Syndrome, Severe Pervasive Development Disorder, Epilepsy and Speech and Language Impairment. The Team continued Student's placement in the Multi-Disabilities Class combined with decreased Speech and Language support. Speech support was reduced from 90 minutes a week to 75 minutes a week (P2, page 3; P35 P14).
- (26) Student's October 16, 2002 Reevaluation Report stated, "the majority of Student's goals and objectives are addressed in a special education classroom that focuses on visual scheduling and the use of PECS to facilitate Student's communication" (P36, page 1).
- (27) Student's October 16, 2002 Reevaluation Report stated, "Student has intense communication needs" (P36, page 3).
- (28) Student's October 16, 2002 Reevaluation Report stated, "Without a visual schedule Student becomes apprehensive and upset. This leads to self-abusive behaviors. Student needs direct supervision at all times in order to ensure his safety" (P36, page 3).
- (29) Student's October 16, 2002 Reevaluation Report concluded, Student is a student with a "Pervasive Developmental disorder, Speech/Language Impairment" and is in need of specially designed instruction: "Multiple Disabilities Support/Speech/Language Support" (P36, page 7).
- (30) On October 21, 2002, Student's IEP Team revised Student's IEP (P35, pages 1-19).
- (31) On October 21, 2002, the School District developed Student's first IEP, which contained goals in functional reading skills, functional math skills, communication skills, computer skills, classroom routines, self-help skills, participation in an out-of-class regular education setting, adapted physical education and special education (P2, P35).
- (32) This 3RD grade IEP purportedly contained a Behavioral goal, limited specially design instruction, Occupational Therapy, and related service in Speech and Language Therapy (P35).
- (33) Student's October 21, 2002 IEP team participants were Student's mother, a music teacher, a regular education teacher, a special education teacher, an LEA, a BSC from [private agency], an occupational

- therapist, a speech and language therapist, an inclusion facilitator, a school psychologist, and a physical education teacher (P35, page 1).
- (34) On October 21, 2002, Student's mother signed receipt of a Procedural Safeguard Notice contained in Student's October 21, 2002 IEP (P35, page 1).
 - (35) Student's October 21, 2002 IEP named special considerations including, "Communication needs (uses a Picture Exchange Communication System to supplement a limited expressive vocabulary," and behaviors that impede his... learning or that of others") (P35, page 2).
 - (36) Student's October 21, 2002 IEP named his present levels of educational performance citing self-abusive behaviors, self-help, occupational therapy skills, and communication (P35, pages 2-3).
 - (37) Student's October 21, 2002 IEP considered the need for ESY, determining that Student is eligible for ESY, stating, "Student does qualify for ESY support in the summer of 2003" (P35, page 15).
 - (38) Student's October 21, 2002 IEP described Student's participation in state and local assessments, reporting, "educational progress will be tracked through the current IEP" (P35, page 16).
 - (39) Student's October 21, 2002 IEP named his educational placement (i.e., "Full-Time multiple disabilities support, speech/language support, OT Support") (P35, page 17).
 - (40) Student's October 21, 2002 IEP named his LRE calculating he receives 61% or more outside of the regular education classroom (P35, 17).
 - (41) Student's Parents noted that Student began to make progress in developing functional language, both receptively and expressively, as a result of the PECS employed and the behavioral centered approach used daily during his placement at the [first district] *Elementary School* with full-time multiple disabilities support, speech/language support, OT Support (P 46, page 1; P35).
 - (42) The District provided reports of progress on annual goals of Student's IEP in January, March, and June for the 2002-2003 school year and January, March, and June for the 2003-2004 school year (P 38, pages 1-33).
 - (43) In the spring of 2003, still in 3rd grade, the District administered the *Pennsylvania Alternative System of Assessment* (PASA) test to Student (P12).
 - (44) The PASA test results are in direct conflict with the MDT Team conclusions that Student was untestable (P12).
 - (45) In Spring 2003, Student's Parents received Student's scores on the PASA (P12, pages 1-5).
 - (46) Student's Spring 2003 PASA scores in Reading and Mathematics were at the "Proficient" level in these reading/mathematic-related items designed for students with the most significant cognitive abilities (P12, pages 2-3).
 - (47) On March 28, 2003, the District offered a NOREP for Student's Summer 2003 ESY program (P33, pages 1-3).
 - (48) On March 30, 2003, Mrs. agreed to ESY services for the summer of 2003 to be provided at [redacted] *Center for Autism* in [city redacted], Pennsylvania (P2, page 3).
 - (49) Student attended the ESY Program during the Summer 2003 (P33, pages 1-3).

Facts Relating to Student's 2003-2004 School Year

- (50) In August 2003, Student started in 4th grade year in the Multi-Disabilities Class at *Elementary* (P2).
- (51) On October 9, 2003, the District issued another *Invitation to Participate in an IEP Meeting* form (SD 7).
- (52) On October 21, 2003, Student's team met and his team indicated Student was to continue in the Multi-Disabilities Class. The 4th grade IEP contained goals and objectives similar to the 3rd grade IEP. The 4th grade IEP continued the behavior goal, occupational therapy, adapted physical education and speech and language therapy for 70 minutes (P2, page 3; P34).
- (53) On October 21, 2003, the District offered a NOREP to Student's Parents for the Multi-Disabilities Class at *Elementary*. Student spent his 4th grade year, during the 2003-2004 school year, in this program (P 33, page 4).
- (54) In June 2004, the District initiated Student's ESY program through [agency] and provided ESY goals (P 63).
- (55) In the summer of 2004, Student attended the [agency] therapeutic camp for ESY, with the program providing data on ESY progress over that summer (P 62, pages 1-4).

- (56) In 2004, Student underwent brain surgery to eliminate the capacity of his cortical tissue to generate seizure activity in the left and right hemispheres of his brain (P13, page 2).
- (57) Student's 2004 surgery caused some difficulties with Student's speech, and resulted in right vocal chord paralysis and fluid on the brain, such that Student began receiving intensive private speech therapy, occupational therapy, and vision therapy (P13, page 2).

Facts Relating to Student's 2004-2005 School Year

- (58) On August 27, 2004, several days prior to the beginning of Student's 5th grade year, the IEP Team met and placed a new cover sheet on Student's 4th grade IEP (P53, P55).
- (59). Without an evaluation, the District changed Student's placement from a Full-Time Multi-Disabilities Class to a Part-Time Life Skills Classroom at [another] *Elementary School* (P53, P55).
- (60) The District's Special Education Plan, 2004-2007, disseminated to the Pennsylvania Department of Education, Bureau of Special Education, describes a Life Skills Classroom stating, "the focus of the curriculum addresses functional academics, socialization/communications, daily living skills, behavior, vocational skills, community based skills and transition to adult life" (P 41, page 8).
- (61) On August 27, 2004, the District invited Student's Parents to an IEP meeting (P 55, pages 1-2).
- (62) On August 27, 2004, the District offered Student's Parents a NOREP to change Student's placement to a "Part time Life Skills support placement, paired with support services" (P 56, pages 1-2).
- (63) The Parent's signature date on the August 27, 2004 NOREP is June 27, 2004 (two months prior to when the District issued the NOREP) (P 56, page 2).
- (64) The District was aware of the Parent's opposition to Student's change in educational placement to a Life Skills support placement, yet still placed Student in the placement (P 58, pages 1-4).
- (65) The District provided a Fall 2004 Reevaluation Report on Student (P36, pages 12-18).
- (66) As a 5th grader, Student was reevaluated on October 14, 2004. (P36).
- (67) The Parents learned in the summer of 2004 that the District planned to close the Multi-Disabilities Class and change Student's placement from *Elementary* to a Life Skills Class at [another] *Elementary School*. Contrary to the regulations, Re-evaluation took place after Student was placed in a Life Skills class (P36 pages 12-16; 22 Pa. Code 141.131-141).
- (68) At the time of the October 19, 2004 Reevaluation, Student continued to receive 16 hours of in-home applied behavioral analysis services and once a week he attended the [agency] *Play Group* (P2, p.3).
- (69) The October 19, 2004, Reevaluation Report did not include any formal or informal assessments by the classroom teacher, speech and language clinician or the school psychologist (P36, pages 3-4; 22 Pa. Code 14.124).
- (70) The school psychologist did not participate as a member of the 2004 MDT Team or the 4th and 5th grade IEP Teams (P36, pages 3-4; 22 Pa. Code 14.124).
- (71) Student's October 2004 Reevaluation Report stated, "Student's transition to Marshall has shown no significant changes in his behavior" (P36, page 12).
- (72) Student's October 2004 Reevaluation Report described Student's educational levels of performance and educational needs related to reading, math, social and communication skills, computer skills, independence, Adapted Art and Adapted Physical Education, behavior, and speech and language (P36, pages 12-13).
- (73) Student's October 2004 Reevaluation Report concluded, "Student is properly placed in the Life Skills Classroom of the North Allegheny School District. The team also agrees that Student is in need of specially designed instruction in the areas of fine motor, communication (speech/language), all academic areas, and adapted physical education, art, and music" (P36, page 17).
- (74) On October 15, 2004, the District issued an *Invitation to Participate in the IEP Meeting*, form, signed by the Parent on October 19, 2004 (P 57, pages 1-2).
- (75) The IEP Team met on October 19, 2004, to develop Student's new 5th grade IEP. Student's special education teacher, a mandated member of the IEP, was absent. The 5th grade IEP was written for the Life Skills placement (P8; 22 Pa. Code 14.131).

- (76) Student's October 19, 2004 IEP team participants were Student's mother, a regular education teacher, an LEA, an occupational therapist, a speech and language therapist, and an inclusion facilitator (P8, page 1; P 52, page 1).
- (77) On October 19, 2004, Student's mother signed receipt of a Procedural Safeguard Notice contained in Student's October 19, 2004 IEP (P8, page 1; P 52, page 1).
- (78) Student's October 19, 2004 IEP named special considerations including, "Communication needs and behaviors that impede his... learning or that of others" (P8, page 2; P 52, page 2).
- (79) Student's October 19, 2004 IEP named sixteen annual goals related to reading, sorting, mathematics, typing, computers, receptive and expressive language, and self-injurious behavior and tantruming (sic), (P8, pages 9-21; P 52, pages 9-21).
- (80) Student's October 19, 2004 IEP named one annual goal related to Student's receptive and expressive communication needs (P8, page 20; P52, page 20).
- (81) Student's October 19, 2004 IEP named one annual goal related to Student's self-injurious behavior and tantruming (sic) (P8, page 21; P 52, page 21).
- (82) The IEP included one objective to address Student's self-injurious behavior (P8, page 21; P 52, page 21).
- (83) The one annual goal related to Student's self-injurious behavior provides: "Across school environments, Student will maintain his current level of self-injurious behavior and self injuries related to behavior tantruming." 8 (P8, page 2).
- (84) The single behavioral short-term objective repeats verbatim the annual goal. The behavioral goal was included in the Extended School Year (ESY) IEP (P5).
- (85) Student's October 19, 2004 IEP did not name any annual goals related to Student's Adapted Physical Education needs (P8, P 52).
- (86) Student's October 19, 2004 IEP considered the need for ESY, determining that Student is eligible for ESY, stating, "the team agrees to determine Goals, Location, Frequency, Projected Beginning date, and Duration at a meeting in February" (P8, page 26; P 52, page 26).
- (87) Student's October 19, 2004 IEP described Student's participation in state and local assessments, reporting he will participate in the Pennsylvania Alternative State Assessment ("PASA") and will take an alternate local assessment (P8, page 27; P 52, page 27).
- (88) Student's October 19, 2004 IEP named his educational placement (i.e., Full Time Life Skills Support) (P8, page 28; P 52, page 28).
- (89) Student's October 19, 2004 IEP named his LRE calculating he receives 61% or more outside of the regular education classroom "Speech: 70 min./week, O.T.: 60 min. week. Life Skills: 1445 minutes/week" (P8, page 27; P 52, page 27).
- (90) On October 19, 2004, the District provided Student's Parents a NOREP to change Student's educational placement to a full-time Life Skills program with speech/language support, occupational therapy support, adapted gym, adapted music, and adapted art (P 47, pages 1-2; P 53, pages 1-2).
- (91) On October 19, 2004, the Team changed Student's August 27, 2004, Life Skills Placement from Part-Time Life Skills to a Full-Time Life Skills placement with speech and language therapy two times a week for 80 minutes and included occupational therapy (P8, page.2).
- (92) Student's mother did not approve the October 19, 2004 NOREP for Student's placement to the District's Life Skills program (P 47, page 2; P 53, page 2).
- (93) The October 19, 2004 NOREP stated, "team discussed consult with Ms. A, technology specialist with the AIU. Her focus will be on assistive technology related to computer use" (P47, page 1; P 53, page 1).
- (94) The Parents only agreed to Student's participation in the Life Skills class in 4th and 5th grade with the caveat that Ms. A, the Allegheny Intermediate Unit Assistive Technology Specialist, provide Assistive Technology (P49, page1).
- (95) Ms. A did not, however, provide the services (SD 8; NT 1118-1121, 1123-11281134-1138).
- (96) The classroom teacher, Mr. O, failed to provide the Parents with mandated progress data for the first nine weeks (NT 656-657).

- (97) Mr. O could not explain why Student was moved from a part-time class to a full-time classroom (NT 670-674; P56).
- (98) Mr. O could not explain why the placement changed from a Multi-Disabilities class to the Life Skills class (NT 670-674; P56).
- (99) Mr. O could not explain why contrary to the NOREP, Student was not permitted to attend regular educational classes when he was a part-time student (NT 670-674; P56).
- (100) On December 28, 2004, Student received a private speech and language evaluation by the *Institute* (P 59, pages 1-9).
- (101) Student's December 28, 2004 Speech and Language Evaluation reported on Student's *Peabody Picture Vocabulary Test*, indicating an age equivalency of <1.9" (P 59, page 2).
- (102) In Spring 2005, Student's Parents received Student's scores on the PASA (P12, pages 4-5).
- (103) Student's 2005 PASA scores in Reading and Mathematics were at the "Novice" level in these reading/mathematic-related items designed for students with the most significant abilities (P12, pages 4-5).
- (104) On March 10, 2005 the District held an IEP meeting to discuss Student's ESY for the Summer of 2005 (P3, pages 3-18).
- (105) Student's March 10, 2005 IEP participants were Student's mother, Ms. C (the District's LEA) and Ms. C (Resource Coordinator) (P3, page 3).
- (106) Student's March 10, 2005 IEP stated, "Student does qualify for ESY services...will outline an ESY program by the end of March 2005" (P3, page 4).
- (107) Student's March 10, 2005 IEP contained three reading goals (pages 6-8), four math goals (pages 9-13), one behavior goal (page 14), one communication goal (page 15), and two copying goals (pages 16-18).
- (108) On March 10, 2005, the District offered to Student's Parents a NOREP proposing a Summer 2005 ESY program at *Elementary School* for Student (P3, page 1).
- (109) On March 10, 2005, Student's Parent did not approve the *Elementary School* ESY offer and requested a personal conference with the Supervisor of Special Education (P3, page 2).
- (110) Student attended [agency] as he had done for a number of previous summers (P2, pages 3-4).

Facts Relating to Student's-2005-2006 School Year

- (111) On October 17, 2005, Student, now in 6th grade, moved to *Middle School*, his third school in three years. When Student was promoted from 5th to 6th grade, he was placed in a full-time Autistic Support classroom, the fourth placement in three years (Full-Time MDC, Part-Time Life Skills, Full-Time Life Skills) (P6).
- (112) As with his other placements, Student's placement to full-time Autistic Support classroom was done without benefit of a reevaluation. 22 Pa. Code 14.123-124.
- (113) On October 17, 2005, the District prepared a Behavior Intervention Plan for Student, stating, "Student is a 6th grade student at Middle School in the Autistic Support Class" (P9, page 1).
- (114) Student's October 17, 2005 Behavior Intervention Plan reported that Student demonstrates significant impairments in cognitive, fine motor, and language skills (P9, page 1).
- (115) Student's October 17, 2005 Behavior Intervention Plan reported that Student displays a need for sensory integration to be incorporated into his school day...(both fine and gross motor sensory breaks) (P9, page 1).
- (116) Student's October 17, 2005 Behavior Intervention Plan reported that when Student becomes frustrated, he has demonstrated behaviors such as crying, hitting the desk with his fingers, hitting his chin with the palm of his hand, biting his shirt, and pinching others (P9, page 1).
- (117) On October 17, 2005, the District offered to Student's Parents a NOREP (P5, page 1).
- (118) The October 17, 2005 NOREP reported, Student was to participate in "Adapted Physical Education, general education with support from a one to one assistant for homeroom, music, and unified arts with a modified curriculum and adapted materials, and speech and language and occupational therapy as related services" (P5, page 1).
- (119) The October 17, 2005 NOREP stated, "Student demonstrates behaviors characteristic of Autism" (P5, page 1).

- (120) The October 17, 2005 NOREP named the educational placement recommended for Student, “Full time Autistic Support, Itinerant Speech and Language, Itinerant Occupational therapy” (P5, page 1).
- (121) Student’s placement to a full-time Autistic Support classroom was done without benefit of a reevaluation (22 Pa. Code 14.123-124).
- (122) The October 17, 2005, 6th grade IEP included goals in the area of reading, writing, mathematics, speech, adaptive physical education, occupational therapy and behavior. For the first time, a Behavior Intervention Plan (BIP) and a Crisis Management Plan were attached and made part of the IEP (P6, P7, P9).
- (123) A representation that the teacher conducted a Functional Behavioral Assessment (FBA) was included in the BIP (P6).
- (124) Although the BIP represents that the teacher conducted an FBA, the Autistic Support teacher acknowledged that she misrepresented that fact. The teacher testified that she neither conducted an FBA nor did she take appropriate baseline data (NT 791).
- (125) The District’s Special Education Plan, 2004-2007, disseminated to the Pennsylvania Department of Education, Bureau of Special Education, describes an Autistic Support classroom stating, “the focus of the curriculum is based on the “triad of impairments” that characterizes autism. This includes reciprocal social interactions, communication, and restricted and/or repetitive stereotypical patterns of behavior, interest and activities” (P 41, page 8).
- (126) On October 25, 2005, Student’s mother approved the District’s October 17, 2005 NOREP, “with accommodations” (P5, page 2).
- (127) The October 25, 2005 requested accommodations were a “one-to-one assistant at all times through all areas,” and “sensory diet and gross motor outlets, including a mini-trampoline and a body sock” (P5, page 3).
- (128) On October 25, 2005, Student’s IEP Team revised Student’s IEP (P6, pages 1-29).
- (129) Student’s October 25, 2005 IEP participants were Student’s mother, a regular education teacher, a special education teacher, an LEA, a community agency representative, a speech and language therapist, a BSC, a Master teacher/counselor (P6, page 1).
- (130) Student’s mother did not sign receipt of a Procedural Safeguard Notice contained within Student’s October 25, 2005 IEP (P6, page 1).
- (131) Student’s October 25, 2005 IEP named special considerations including, “Communication needs and behaviors that impede his... learning or that of others” (P6, page 3).
- (132) Student’s October 25, 2005 IEP named his present levels of academic achievement stating, “Student is able to attend to a familiar and/or a preferred activity for a period of 5 minutes...a majority of Student’s speech is unintelligible” (P6, pages 4-5).
- (133) Student’s October 25, 2005 IEP named his present levels of functional performance stating, “In the areas of social and communication skills across school environments, Student is able to independently respond to a greeting 50% of the time...Due to the clarity of Student’s speech, it is necessary for him to have a Picture Exchange Communication book with him throughout the school day.... during times of frustration, Student will cry, bite his shirt, knock on the desk with his fingers or hands, and hits (sic) his chin ” (P6, page 5).
- (134) Student’s October 25, 2005 IEP named how Student’s disability affects involvement and progress in the general education curriculum reporting, “...due to a diagnosis of Autism, Student demonstrates significant cognitive, communication, and fine motor impairments, as well as behaviors disruptive to his learning and the learning of others. Student requires significant curriculum modifications and accommodations, behavior intervention, and support from a one to one instructional assistant to participate successfully” (P6, page 6).
- (135) Student’s October 25, 2005 IEP named eight annual goals related to reading, English, and mathematics (P6, pages 9-16).
- (136) Student’s October 25, 2005 IEP named one annual goal related to Student’s Independence/behavior (P6, page 17).

- (137) Student's October 25, 2005 IEP named one annual goal related to Student's speech and language needs (P6, page 18).
- (138) Student's October 25, 2005 IEP named one annual goal related to Student's adapted physical education needs (P6, page 20).
- (139) Student's October 25, 2005 IEP considered the need for ESY Summer 2006, determining that Student is eligible for ESY (P6, page 26).
- (140) Student's October 25, 2005 IEP named his educational placement (i.e., Full time Autistic Support, Itinerant Speech and Language, Itinerant Occupational Therapy) (P6, page 27).
- (141) Student's October 25, 2005 IEP named his LRE calculating he receives 61% or more outside of the regular education classroom at *Middle School* for the 2005-2006 school year (P6, 27).
- (142) In the Summer of 2006, Student attended the *[agency] PA Autism and Developmental Disabilities 2006 Summer* program (P13, page 2).

Facts Relating to Student's 2006-2007 School Year

- (143) On October 17, 2006, the District offered to Student's Parents a NOREP (P5, page 4).
- (144) The October 17, 2006 NOREP reported, Student's mother "expressed concerns that Student is regressing" (P5, page 4).
- (145) The October 17, 2006 NOREP named the educational placement recommended for Student, "Life Skills Support at Middle School-Itinerant speech and language, itinerant occupational therapy" (P5, page 4).
- (146) On October 17, 2006, Student's mother did not approve the District's October 17, 2006 NOREP. The reason for disapproval: "regression of behaviors and skills due to change in placement" (P5, page 5).
- (147) On October 17, 2006, Mrs. requested a Pre-Hearing Conference (P5, page 5).
- (148) A pre-hearing conference was convened at which Dr. W Mr. and Mrs. , Mr. B, Ms. B, Ms. T and Ms. C were present (NT 1022-1023).
- (149) On October 17, 2006, Student's IEP Team revised Student's IEP (P7, pages 1-33).
- (150) Student's October 17, 2006 IEP participants did not sign the list (P7, page 2).
- (151) Student's mother never signed receipt of a Procedural Safeguard Notice contained within Student's October 17, 2006 IEP (P7, page 2).
- (152) Student's October 17, 2006 IEP named special considerations including, "Communication needs and behaviors that impede his... learning or that of others" (P7, page 3).
- (153) Student's October 17, 2006 IEP named his present levels of academic achievement stating, "Student is a seventh grade student attending Middle School receiving services in the Life Skills Support class" (P7, pages 4-5).
- (154) Student's October 17, 2006 IEP named his present levels of functional performance (P7, pages 6-7).
- (155) Student's October 17, 2006 IEP named how Student's disability affects involvement and progress in the general education curriculum reporting, "...due to a diagnosis of Autism, Student demonstrates significant cognitive, communication, and fine motor impairments, as well as behaviors disruptive to his learning and the learning of others. Student requires significant curriculum modifications and accommodations, behavior intervention, and support from a one to one instructional assistant to participate successfully" (P7, page 10).
- (156) Student's October 17, 2006 IEP named Student's participation in state and local assessments, stating he will participate in the Pennsylvania Alternative State Assessment ("PASA") and will take an alternate local assessment "due to cognitive, communication, and fine motor impairments related to his diagnosis of Autism" (P7, page 7).
- (157) Student's October 17, 2006 IEP named ten annual goals related to job performance and initiative skills, job opportunities, reading, functional literacy, writing, mathematics, home maintenance and safety, receptive and expressive language, copying, attention to computers, and pre-vocational tasks (P7, pages 9-16).
- (158) Student's October 17, 2006 IEP did not name any annual goals related to Student's Independence/behavior (P7).

- (159) Student's October 17, 2006 IEP did not name any annual goals related to Student's adapted Physical education needs (P7).
- (160) Student's October 17, 2006 IEP described Student's related services of Speech and Language and Occupational therapy (P7, pages 28-29).
- (161) Student's October 17, 2006 IEP named supports for school personnel provided (P7, page 29).
- (162) Student's October 17, 2006 IEP considered the need for ESY Summer 2007, determining that Student is eligible for ESY (P7, page 30).
- (163) Student's October 17, 2006 IEP named his educational placement (i.e., Full time Life Skills Support, Speech and Language, Occupational Therapy) (P7, page 32).
- (164) Student's October 17, 2006 IEP did not name and calculate his LRE for the 2006-2007 school year (P7).
- (165) On October 17, 2006, the District provided Student's Reevaluation Report (P13, pages 1-11).
- (166) Student's October 17, 2006 Reevaluation Report was revised November 10, 2006 (P13, page 1).
- (167) Student's October 17, 2006/ November 10, 2006 Reevaluation Report reported, while the District recommended that Student be placed in a Life Skills classroom, Student's mother expressed concerns about her son's multiple transitions to new classrooms and expectations, since these classroom changes have happened multiple times during Student's time in the District (P13, page 3).
- (168) Student's October 17, 2006/ November 10, 2006 Reevaluation Report found, Student's mother expressed concerns about Student moving from a classroom that is comprised of verbal children to where he is expected to participate and interact, to a classroom of mainly non-verbal children (P13, page 3).
- (169) Student's October 17, 2006/ November 10, 2006 Reevaluation Report found, Student is a student with autism and a speech or language impairment and "is appropriately placed in the Life Skills classroom of the District" (P13, page 7).
- (170) Student's October 17, 2006/ November 10, 2006 Reevaluation Report noted, Student "is in need of specially designed instruction in the areas of fine motor, communication (speech and language), all academic areas, adapted physical education, adapted music, and adapted unified arts"(P13, page 7)." (P13, page 7).
- (171) Student's October 17, 2006/ November 10, 2006 Reevaluation Report contained no signatures on the signature page (P13, page 9).
- (172) On October 17, 2006, the District provided a *Permission to Reevaluate* form to Student's Parents (P13, page 10).
- (173) Other than demographic information, there is no information provided to Student's Parents on the October 17, 2006 *Permission to Reevaluate* form (P13, pages 1-2).
- (174) On October 17, 2006, Student's mother signed her consent on the October 17, 2006 *Permission to Reevaluate* form (P13, pages 1-2).
- (175) In late Fall 2006, Student's mother wrote a letter to the District's School Board voicing her concerns about Student's placement in the District's Life Skills program and her opposition to it (P 46, pages 1-4).
- (176) The District received the Parent's Fall 2006 letter and was aware of the Parents' concerns (P 46, page 5; P 48).
- (177) Despite Student's mother's opposition to Student's Life Skills placement in seventh grade, the District continued Student's placement in the District's Life Skills program (NT 822-887; P 46, 1-5; P 47, page 2).
- (178) On March 27, 2007 the District provided a March 28, 2007 Reevaluation Report to Student's Parent (P14, pages 1-8).
- (179) Student's March 28,2007 Reevaluation Report stated, Student "demonstrates a significant need for specially designed instruction in all areas of the school day. He has intense communication, fine motor, and self-help needs, as well as cognitive impairments...He learns in a one to one or small group setting, which will occur in the Life Skills classroom (P14, page 7).

- (180) Student's mother signed that she agreed with Student's March 28, 2007 Reevaluation Report (P14, page 8).
- (181) The PASA was re-administered in the Spring of 2007, Student's reading and mathematics scores regressed to Novice levels (the second lowest score in both core content areas) P4, pages.4-5; P11,12).
- (182) The staff could not explain the regression from his Proficient 3rd grade levels (P4, pages 4-5; P11,12).
- (183) On March 22, 2007 the District took data on Student's daily behavior (P 40, pages 1-14).
- (184) On March 28, 2007, the District prepared a *Functional Behavioral Assessment* that stated, "Student is a seventh grade student at *Middle School* participating in the Life Skills Support program. He participates in an adapted music, unified arts, and physical education class, as well as a general education physical education class" (P10, pages 1-7).
- (185) On March 28, 2007, the District offered to Student's Parents a NOREP proposing a Summer of 2007 ESY program at Middle School for Student (P4, page 1).
- (186) The District's March 28, 2007 recommendation entailed a Life Skills ESY program for two weeks (P4, page 1).
- (187) On April 2, 2007, the District completed an Assistive Technology Request form, requesting an Assistive Technology consultation on Student from the Allegheny Intermediate Unit's consultant, Ms. A (P 65, pages 1-4).
- (188) On April 11, 2007, the Parent signed a NOREP, did not approve the recommendation, and indicated a request for Mediation (P 31).
- (189) On April 27, 2007, Student's Parents took pictures of Student's self-injurious behavior (P 64).
- (190) In April 2007, the District and Parents shared a number of e-mails concerning the Parents' concerns over Student's behavior and health needs (P 49, pages 1-3; P 50).
- (191) On July 31, 2007, Ms. A e-mailed Student's Assistive Technology Consultation to the District (P 67).
- (192) On May 1, 2007, Ms. A completed Student's Assistive Technology Consultation report, stating the reasons for the consultation was to "address Student's expressive communication skills" (P 66, pages 1- 3).

Facts Relating to Student's 2007-2008 School Year

- (193) In September 2007, Student's Parents received Student's scores on the PASA (P11, pages 1-3).
- (194) Student's 2007 PASA scores in Reading and Mathematics were at the "Novice" level in these reading/mathematic-related items designed for students with the most significant abilities (P11, pages 2-3).
- (195) On October 12, 2007, Mr. K observed Student in the District at the request of the Parent's counsel (P2, page 1).
- (196) Mr. K's October 12, 2007 report provided a review of Student's educational records provided by the Parent and her attorney from September 14, 1998 through September 2007 (P2, page 1-12).
- (197) Mr. K's October 12, 2007 report provided a review of Student's Behavioral Health Rehabilitation Service Plans, dated April 3, 2007 and August 9, 2007 (P2, pages 1-12).
- (198) Mr. K's October 12, 2007 report provided a review of the *District's Special Education Plan: 2004-2007 School Years* (P2, pages 1-12).
- (199) Mr. K's October 12, 2007 report provided a review of the *Allegheny Intermediate Unit Curriculum for Independent Living*, undated (P2, pages 1-12).
- (200) For the 2006-2007 school year, Student's 7th grade, he remained at *Middle School*; however, for the fifth time in four years, he moved to Mrs. B's Full-Time Life Skills classroom. (In 3rd grade Student was in the Multi-Disabilities Class for 45 days; in 5th grade he was placed into Part-Time Life Skills; he was then moved to Full-Time Life Skills; in 6th grade he was placed in a Full-Time Autistic Support) (P7).

- (201) The District Life Skills class focuses on functional academics, social/communication, daily living skills, behavior, vocational skills, community based-skills and transition skills for adult life (P41,page 8).
- (202) The District Multiple Disability program is available for students with the most significant cognitive, communication and behavioral needs. Students require intensive intervention such as visual communication systems, highly individualized instruction and schedules, the most functional skills, basic daily living skills, and individualized behavior management programs. Opportunities for inclusion of regular education environments are provided as determined with the IEP Team (P41, page.8).
- (203) The Life Skills Classes, Multiple Disability class and Autistic Support Class are not interchangeable programs and placement (P41).
- (204) On or about October 17, 2006, and again on November 10, 2006, the District convened a MDT to review Student's most recent evaluation (P13).
- (205) The October 17, 2006 reevaluation report concluded that the Team needed additional data in order to develop an appropriate program for Student (P13, page.4).
- (206) The District failed to: seek Parent consent prior to the Reevaluation; provide the Parents with procedural safeguards; and provide the reevaluation report to the Parent 10 days before the IEP meeting (22 Pa. Code 14.124 .131).
- (207) On October 17, 2006, the same day as the MDT/IEP meeting, the District issued a Permission to Reevaluate. The *Permission to Reevaluate* failed to include the mandated disclosure of the assessment tools, tests and procedures to be used in the reevaluation. Unaware of the test disclosure mandates, the Parent executed the blank permission to evaluate (P3, page10; 22 Pa. Code 141.123-124).
- (208) On November 10, 2007, the MDT Team provided the Parents with a second copy of Student's 2006 reevaluation report. However, the reevaluation report did not include any additional mandated assessments, data, or evaluations (P13, pages1-11; 22 Pa. Code §14.123-124; 34 CFR §300.303-304).
- (209) The reevaluation report mentions an October 2006 meeting to review Mrs. 's request that Student's time in 7th grade be split between Life Skills and an Autistic Support Class (P13).
- (210) The District never issued written notice denying Mrs. 's October 2006 request (NT 885-879; 22 Pa. Code §14.161-163; 34 CFR §300.503).
- (211) As part of the October and November 2006 reevaluation report, the Life Skills teacher, the classroom assistants and occupational therapists completed a *School Functional Assessment* (P13, page.2).
- (212) At the time the *School Functional Assessment* was completed, Student was a 14-year-old student in 7th grade (P13, p.1).
- (213) The *School Functional Assessment* is neither normed nor validated for children or are either age 14 or in 7th grade (NT 876-89).
- (214) The use of a test not normed for Student's age or grade level violated the IDEA assessment requirement, that tests be administered in accordance to the test-makers' directions and validated for the child's age. This violation renders the *School Function Assessment* data in the reevaluation report a nullity (34 CFR §300.304; 42 CFR §104.31).
- (215) Ms. B testified that although she was aware that the test results were not valid, she failed to tell the Parents and the other team members that the results misrepresented Student's functional skills and needs (NT 876-896).
- (216) Although the IEP is dated October 17, 2006, page 7 of the IEP represents that portions of standardized tests in the content area of the Speech and Language assessments were completed on October 30, 2006, approximately 17 days after the IEP was presented to the Parent (P7, pages 7-8).
- (217) The Speech and Language test data were not discussed in the October/November reevaluation report (P7,13). (The omission of the speech and language test data is a misrepresentation.)
- (218) The October 17, 2006, IEP Team recommended Full-Time Life Skills at *Middle School* with participation in general education, adapted physical education and a unified arts program. Despite the necessity for a one-on-one para-educator, no behavioral goals or objectives are noted in the IEP, without explanation the Behavioral Intervention Plan (BIP) was deleted, and unlike the 6th grade IEP, no goals are present for either segregated Physical Education or art class (P7).

- (219) On October 17, 2006, the Parent rejected the District's program and placement noting academic and behavioral regression. The Parent requested a Pre-Hearing Conference (P5, pages.5-6; 22 Pa. Code §14.161).
- (220) Aware of the parent's disapproval of the 7th grade IEP placement and in violation of the IDEA's "stay put" requirement, the District continued to implement the disapproved 7th grade IEP (P5, P7; 22 Pa. Code §14.161-163; 34 CFR §300.504).
- (221) The District refused to return Student to his pendant 6th grade, Autistic Support Placement (P5, P7; 22 Pa. Code §14.161-163; 34 CFR §300.504).
- (222) Mrs. B, the 7th grade teacher, implemented the disapproved IEP. (This teacher also failed to implement the 6th grade BIP program) (P7; SD15).
- (223) Mrs. B testified that she knew Student's mother disapproved of his placement in the IEP, but she continued to implement the disapproved IEP from October 2006 through the end of the 2007 school year because her administrators ordered her to implement it (NT 875-877).
- (224) On March 28, 2007, the District presented the family with a new reevaluation report, and a new *Behavior Management Plan/Functional Behavioral Assessment* (P10, P14).
- (225) The District never issued a *Notice of Intent to Reevaluate*, the Parent never consented to the March 2007 reevaluation report, nor did the District issue procedural safeguards (P14; 22 Pa. Code §14.161-163).
- (226) The District failed to provide the Parent with a copy of the March reevaluation report 10 days prior to ESY IEP meeting (22 Pa. Code §14.123-124).
- (227) The March 2007 reevaluation report provided, once again, that the IEP team determined that it needed additional assessment data (P13, page.4).
- (228) The District failed to issue yet another *Permission to Evaluate*, failed to issue Procedural Safeguards and failed to collect data or assess Student's unique needs (P14; 22 Pa. Code §14.123-124; et seq.).
- (229) Although Student's speech is unintelligible, the speech therapist reduced Student's speech class from 80 minutes of one-on-one speech, two times per week in the 6th grade, to one 45-minute session and one 40-minute group session in 7th grade (P7, p.24).
- (230) The Speech Therapist could not explain why a child with unintelligible speech needed a group session (P7, P17, P17a, P18, P18a).
- (231) Unlike the 6th grade IEP, the goals for adapted physical education were removed (P7).
- (232) When Student arrived at school on April 27, 2007, his arm was not red, swollen or tender to the touch (P30).
- (233) Although Ms. B observed Student on the bus, her failure to implement the agreed upon pendant BIP allowed Student to injure himself by biting his arm for 20 minutes while he was traveling on a bus on a class fieldtrip (NT1101-1106; P30, P64).
- (234) Upon arriving home from his fieldtrip, Student's parents took a photo of the multiple wounds on his red, swollen arm (NT 1101-1104; P64).
- (235) On April 27, 2007, using the communication book, Mrs. notified the teacher that Student suffered several severe wounds the size of a quarter from the 20-minute biting spree on the bus (P1104-1106; P30, P30a, P64).
- (236) The Life Skills teacher told the Parent that she did not implement the BIP on the fieldtrip, thereby enabling Student to bite himself without intervention for 20 minutes (P30a).
- (237) Student's 20-minute biting spree in 7th grade is evidence of regression as it is comparable to his 3rd grade levels of self-injurious behavior (P30a, P36; SD10, page 16).
- (238) Sometime in April 2007, Mrs. B, the Life Skills teacher, presented Mrs. with a *Permission to Evaluate* regarding Student's Assistive Technology needs (P30).
- (239) On or about May 11, 2007, Ms. A, the AT specialist from the Allegheny Intermediate Unit, conducted an in-class observation of Student regarding his Assistive Technology Needs (P65, P66).
- (240) Ms. A's consultation report notes that, during her observation of Student in the Life Skills and Occupation Therapy Class, neither the teacher, the para-educators, nor the occupational therapist

implemented Student's agreed upon PEC book or the visual schedules as called for in the pendant and proposed IEP (P66, p.2).

- (241) Contrary to the requirement that a reevaluation report be completed within 60 school days, as of April 2008, one complete calendar year later, the District has yet to complete Student's October 2006, November 2006 and March 2007 Reevaluation (P13, P14; 22 Pa. Code §14.123-124).
- (242) Student's 3rd, 4th, 5th, 6th and 7th grade IEPs did not have goals, objectives, or specially designed instruction to address his printing deficits, adaptive behavior deficits, behavioral self-help needs, or transition needs (P2, P12, P14, P36).
- (243) Although Student's inclusion facilitator observed Student in his classroom, the facilitator failed to collect any objective data about his academic or behavioral needs (P2).

Facts Relating To How IEPs Fail To Describe How Student's Disability Affects His Participation In The Regular Education Curriculum

- (244) The 3rd, 4th, 5th, 6th and 7th grade IEPs do not identify how Student's Epilepsy affects his involvement and progress in the general education curriculum (P7, P8, P13, P14, P36).
- (245) The 3rd, 4th, 5th, 6th, and 7th grade IEPs fails to describe how Student's Speech and Language Impairment affects his involvement and progress in the general education curriculum (P7,P8, P13,P14, P36).
- (246) Student was 14 years old in the 7th grade (2006-2007), the IEP included prevocational content goal areas. Neither the IEP nor the reevaluation report included present levels of performance or an assessment of how each disability affects his prevocational transition needs (NT 876-896).
- (247) Although the 7th grade IEP has several prevocational goals, the special education classroom teacher did not conduct an assessment of Student's transitional needs, interests, or preferences (NT 876-896; 34 CFR 300.29).

Facts Relating To How The District Failed To Provide Mandated IEP Data And Include Mandated MDT Team Members

- (248) The District's psychologist did not attend the 4th, 5th, 6th and 7th grade IEPs (P6, P7, P8, P13, P14, P36; 22 Pa. Code 14.132, et seq.).
- (249) The 5th grade teacher failed to attend the 2004-2005 (5th grade)IEP Team meeting (P5, P8).
- (250) The 7th grade IEP Team failed to include a mandated delegate of the District authorized to commit District resources (P7, P55).
- (251) The 7th grade ESY IEP Team failed to include a person knowledgeable about Student's disability or on LEA (P7, P14, P26).
- (252) On March 27, 2007, without mandated neither notice to or consent from Student's parents, and the District conducted a Multi-Disciplinary Evaluation (MDI) of Student's educational needs (P14; 34 CFR §300.320-324).
- (253) Neither the October/November 2006 reevaluation report nor the March 2007 reevaluation report included a variety of educational assessments in the core content areas of speech and language, functional academics, transition, behavior, adaptive behavior, social skills, or emotional development. (P13, P14; 34 CFR §300.320-324).
- (254) The 3rd, 4th, 5th, 6th and 7th grade special education classroom teachers, Mrs. E, Mr. O, Ms. S, and Mrs. B each failed to perform a curriculum-based assessment in the core content areas of reading, writing, mathematics, and spelling (P2, P3, P6, P7, P8, P9, P13, P14, P36).

Facts Relating To How The District Failed To Provide Mandated Progress Reports

- (255) The family did not receive the mandated progress reports on the annual goals in the area of Speech and Language for either the 2005-2006 or 2006-2007 school years (Pp16, P17, P17a,P18, P18a).
- (256) The 3rd, 4th, 5th, 6th and 7th grade IEPs failed to include appropriate expected levels of achievement (P2, P6, P7, P8, P13, P14, P34, P35, P36, P37).
- (257) The 4th, 5th, 6th and 7th grade IEPs lacked objective methods of evaluation and progress monitoring (P2, P6, P7, P8, P13, P14, P34, P35, P36, P37).
- (258) The District's speech therapist testified that Student made progress was nullified when she admitted that she confused Student's 6th and 7th grade progress reports with other students (P17, P17a,P18, P18a).

(259) Although the speech and language teacher, Mrs. T, testified that Student made progress in 6th grade, on cross-examination she testified that she implemented the 5th grade IEP (NT 905-906, 965-995; P17, P17a, P18, P18a).

(260) The District's formal report card does not provide mandated progress data or grades in Occupational Therapy or Adaptive Physical Education (SD13, SD 14).

Facts Relating To How The District Failed To Evaluate All Areas Of Unique Needs

(261) The 2002, 2004, 2006 and 2007 reevaluation reports establish that Student's receptive and expressive language are extremely deficient and below basic for a 16-year-old child (P2, P12, P13, P14, P37, P59).

(262) Assessment data known to the District in the area of speech, from the [previous school district's] September 14, 1998, Evaluation and the assessment data from the December 2004, evaluation completed by *Institute* evaluation conclusively established that (<0.1%ile) Student received no meaningful benefit (P 37, P59).

(263) Subjective progress reports were the sole criteria utilized to advance Student from one grade level to the next. These subjective opinions were not linked to any standardized testing, curriculum-based assessments or baseline data (P6, P7, P8, P13, P14).

(264) The 2006 and 2007 reevaluation reports failed to report, assess or collect objective measures of progress in the academic subjects of science, social studies, English, mathematics, history, all of which were included in the regular education curriculum (P13, P14, P17, P17a, P18, P18a; 34 CFR §300.320-324).

(265) Despite the complete absence of objective, normative or criterion-referenced test scores and with knowledge of Student's stagnant <0.1% ranking in speech, the 2002, 2004, 2006 and 2007 reevaluation reports represent that Student is making progress. (P13, P14, P59).

(266) The IEP/MDT Team determined in October/November of 2006 and again in March 2007 that the team needed additional data (P13, P14).

(267) At no time did the District conduct, assess or collect the mandated additional data. Moreover, the staff failed to explain why they either refused to or failed to collect the data (P13, P14).

(268) Ms. A completed the AT assessment in May of 2007, and provided a copy of the AT evaluation to the District in July of 2007, and again in January of 2008 (P65, P66).

(269) Although the District received the AT assessment, the District failed to convene either an IEP or MDT meeting or share the evaluation with the Parents (P65, P66).

(270) Neither the IEP Team nor the MDT Team reviewed the 3rd, 5th, or 7th grade PASA scores (P12, P13; 34 CFR §300.303, §300.324).

(271) Student's 2002, 2004, 2006, and 2007 RRs failed to provide any objective data regarding regression or recoupment of Student's functional academic, behavioral, social, adaptive behaviors, transitional, prevocational or emotional skills. District staff omitted Student's declining PASA reading and math scores from the RRs (P2, P13, P14; 34 CFR §300.106; 22 Pa. Code 14.123-124; 132).

(272) Although the District initiated three reevaluations in 7th grade, one with and two without consent, the District failed to complete either evaluation (34 CFR §300.303).

(273) The 3rd, 4th, 5th, 6th and 7th grade IEPs did not contain mandated data from assessments from a variety of sources with objective benchmarks to determine Student's instructional level or unique needs (P6, P7, P8, P9, P11, P12, P13).

(274) Although the District knew Student is a student with Landau-Kleffner Syndrome, a form of epilepsy, they failed to assess how his condition affected his learning (34 CFR §300.301-304).

(275) Falling asleep and bladder accidents are manifestations of epilepsy (P30).

(276) Although he was diagnosed with epilepsy, the teacher was not aware that a manifestation of epilepsy was falling asleep and losing bladder control during a seizure (P30a).

(277) The 3rd, 4th, 5th, 6th and 7th grade IEPs do not address how Student's Health Impairment of Epilepsy affects his participation in regular and special education (P6, P7, P8, P13, P14).

Facts Relating To How The District Failed To Implement The IEP

- (278) The 7th grade speech and language IEP required Student to use his PEC book as a primary method of communication (P8).
- (279) Mrs. A, the Allegheny Intermediate Unit Assistive Technology Specialist, and Mr. testified that the Life Skills teacher and the occupational therapist failed to follow the IEP or use Student's PEC Book or visual schedules (P64, P65, P66).
- (280) Although an active member of the IEP team, the Speech Therapist, Ms. T, claims she was not aware that Student's mother disapproved of the proposed 7th grade program and placement. Therefore, she implemented the disapproved IEP (P4,5, P18, P18a).
- (281) The 7th grade teacher, Mrs. B, did not implement the mandated "stay put" IEP or BIP (P6, P7, P9, P10; 22 Pa. Code §14.161-163).
- (282) From 6th grade to 7th grade, after one year of life skills, Student's rate of biting himself, hitting himself and hitting others increased showing regression to his 2nd and 3rd grade levels (P7, P8,P16,P30,P30a,P36; SD10, SD15).
- (283) Although the 7th grade IEP included a BIP, during a classroom observation Mr. observed Student hit, bite, and ingest glue. He observed that the staff failed to intervene. (NT 1088-1091).
- (284) Although required of all 7th grade students as either special education or as part of the regular curriculum, Student did not take social studies, history or science in 6th or 7th grade (P6, P7).
- (285) Student's 7th grade (2006-2007) IEP included adapted physical education as a core class; however, unlike his 6th grade, the 7th grade IEP did not include goals or objectives for adapted physical education, music or regular physical education. (P6, P7; SD12, SD 15).
- (286) The District failed to provide the Parent adapted physical education progress reports. P6, P7, P13, P14; SD15).
- (287) Student's IEP team never received progress reports for adapted physical education, occupational therapy, or regular academics (34 CFR §300.324).
- (288) Although the RR identified Student as a student with Autism, Mrs. B misrepresented to the regular education staff that Student was a student with an IQ of 40-50 placing him in the Mental Retardation range (NT 1146-1152; P68).
- (289) After five years of one-on-one instruction, Student's speech is still not intelligible and his standard score on the *Peabody Picture Vocabulary* test is <0.1%ile (P6, P7, P13, P14, P36, P37, P50).
- (290) Mrs. S, the 6th grade teacher, did not provide Mrs. B, with a list of commonly missed vocabulary words or other functional academics (NT 1234-1235; P30, P30a).
- (291) Although Ms. T testified that Student made progress, she also testified that she unilaterally deleted two objectives from the 7th grade IEP because he was not learning. Contrary to the regulation, the District failed to provide the parents with a new IEP and procedural safeguards (NT 966-976).
- (292) At the March 2007 ESY meeting, the speech teacher listed two goals for Student's ESY IEP, the classroom teacher gave the parents a laundry list of eight ESY content areas (P26).
- (293) The March 2007 ESY IEP, like the 5th grade ESY IEP, did not include present levels of performances, objectives, goals, Specially Designed Instruction (SDI), a BIP, or a description of the related services (P3, P26)
- (294) Mrs. B's 7th grade communication log was the only anecdotal measure provided to Mrs. regarding Student's behavior in 7th grade (P30, P30a).
- (295) Although the pendant IEP included a BIP, the communication log reflects, although Student bit himself, bit others, fell asleep, had bladder accidents, played with shoelaces, and pulled down his pants, the staff never implemented the BIP (P30).
- (296) The nurse records reflect that Student was treated on multiple occasions for injuries resulting from his self-injurious behavior (P30, P52). Taken together, these records prove Student did not make any progress.
- (297) Compared to 6th grade, Student's rate of self-injurious behavior in the 7th grade increased and his academic behavior regressed (P46).
- (298) From 2002-2007, the District decided Student's ESY placement prior to developing each ESY IEP P3,P26,P27,P34,P35,P49).

- (299) The District advised Mrs. that, in 7th grade, Student would be in a Life Skills class five days per week. Mrs. was not told that the Life Skills teacher, simultaneously instead of working with Student, was teaching a class of learning support students (NT 813, 815-818, P2).
- (300) Mrs. complained to Dr. W, the Special Education Director, and Dr. K, the building principal, about Student's regression and his need for Assistive Technology supports (P49).
- (301) Mrs. requested that a private behavioral consultant, Ms. K, join the IEP team to support for the staff in implementing the BMP (P48, P49).
- (302) In response to Parent concerns about Student's regression, the District had weekly meetings in the fall of 2006 with Ms. K, the private behavioral consultant (P48, P58).
- (303) After Mrs. complained to the Board about Student's regression, Dr. W unilaterally cancelled the weekly behavior meetings (P46).
- (304) While the rate and intensity of Student's self-injurious behavior was increasing, Dr. W excluded Ms. K, who was also a school psychologist, from the weekly meetings (P21, P22, P23, P24, P25, P28, P30, P30a, P50, P64).
- (305) The District failed to replace her with its own school psychologist to observe, assess or participate in Student's meetings (P21, P22, P23, P24, P25, P28, P30, P30a, P50, P64).
- (306) It was after Ms. K was expelled from the weekly meeting that Student engaged in the 20 minute self injurious biting behavior (P30, P66).
- (307) From 2nd to 7th grade, Student failed to make meaningful educational progress in the areas of reading, speech, mathematics, language, adaptive behavior, numerical operations, spelling, written expression, listening comprehension, oral expression, phonological processing or behavior (P2).
- (308) Goals and objectives "to improve or increase" functional academics, speech, behavior management, computer skills, keyboarding and prevocational skills are vague and otherwise not measurable (P2, P6, 7, 8, 9, 17, 18, 18a).

Facts Relating to the Parents' Due Process Hearing Request

- (309) On September 20, 2007, Student's Parents filed a Due Process Hearing Request (HO 6, page 2).
- (310) In September 2007, after the Office for Dispute Resolution assigned the Hearing Officer, she scheduled the initial session for October 23, 2007 (HO 1).
- (311) On October 16, 2007 the District requested a hearing continuance, due to a health matter involving one of the Attorneys (HO 2).
- (312) On October 18, 2007, the Hearing Officer held a three-way telephone conference in which she granted the District's request for continuance to the agreed-upon dates of November 20, 2007 and November 29, 2007 (HO 2).
- (313) On November 16, 2007, Charles W. Jelley, Esquire, representing Student's Parents, sent via certified mail, November 16, 2007 Motions to the Hearing Officer and to the District's Attorney, Michael Brungo, Esquire (HO 3, HO4, HO5, HO6, HO7).
- (314) On November 16, 2007, the Parents' Attorney filed a November 16, 2007 Motion to Declare the District's Witnesses Hostile (HO 4).
- (315) On November 16, 2007, the Parents' Attorney filed a November 16, 2007 Motion to Present Evidence, Records and Conduct Which Exceeds Two Years from the Date of Filing the Due Process Complaint (HO 5).
- (316) On November 16, 2007, the Parents' Attorney filed a Motion to Present Relevant Evidence Regarding a Multi-Year Claim for Compensatory Education (HO. 6).
- (317) On November 16, 2007, the Parents' Attorney filed a Motion to Sequester Witnesses (HO7).
- (318) On November 16, 2007, the Parents' Attorney filed a November 16, 2007 Motion for Default Judgment (NT 23).
- (319) On November 20, 2007, Student's due process hearing initiated (NT 1-88).
- (320) On November 20, 2007, the parties agreed to the hearing issues on the record (NT 16-20).
- (321) On November 20, 2007, the Hearing Officer entered into the record the Parents' November 16, 2007 Motions (HO 3, HO 4, HO 5, HO 6, HO 7; NT 23-24).

- (322) On November 20, 2007, the Parents withdrew the November 16, 2007 Motion for Default Judgment (NT 23).
- (323) On November 20, 2007, the Parents and District agreed that the November 16, 2007 Motion to Declare the District's Witnesses Hostile is a matter of right with the District agreeing to allow the Parent's Attorney to call District witnesses as of cross-examination in the Parents' case in chief, and the District reserving the right to call Parent witnesses in the District's case in chief (as hostile) (HO 4; NT 23-24).
- (324) On November 20, 2007, the Hearing Officer ordered the District to respond to each of the entered Parents' Motions on or before December 3, 2007 (HO 5, HO 6, HO 7; NT 21-25).
- (325) On November 20, 2007, Independent Education Consultant Mr. K presented his curriculum vitae and testified on behalf of the Parents (P1, pages 1-4; NT26-83).
- (326) On November 20, 2007, after the Parents' initial presentation of evidence, the Hearing Officer cancelled the next hearing session, and directed the District to respond to the Parents' Motions (NT 84-87).
- (327) On November 20, 2007, the District agreed to send on or before December 3, 2007, an electronic version and a hard copy of the District's Responses (NT 85-86).
- (328) On November 20, 2007, the Hearing Officer stated that she would respond in writing on or before December 10, 2007 to the Parents' November 16, 2007 Motions and the District's Responses (NT 85-86).
- (329) On December 3, 2007, the District responded to the Parents' Motion to Present Relevant Evidence Regarding a Multi-Year Claim for Compensatory Education (District's December 3, 2007 Response to Motion, pages 1-4).
- (330) On December 3, 2007, the District responded to the Parents' Motion to Present Evidence, Records, and Conduct Which Exceeds Two Years From the Date of Filing the Due Process Complaint (District's December 3, 2007 Response to Motion, pages 1-4).
- (331) On December 3, 2007, the District responded to the Parents' November 16, 2007 Motion to Sequester Witnesses (District's December 3, 2007 Response to Motion, pages 1-4).
- (332) On December 9, 2007, the Hearing Officer granted the Parents' Motion to admit relevant evidence regarding Student's multi-year claim for compensatory education (HO12, pages 1-10).
- (333) On December 9, 2007, the Hearing Officer granted the Parents' Motion to present evidence beyond the two-year period from the date of filing Student's Special Education Due Process Hearing complaint (HO12, pages 1-10).
- (334) On December 9, 2007, the Hearing Officer held in abeyance the Parents' request that the Hearing Officer award Student more than two (2) years of compensatory education at the present time (HO13, pages 1-8).
- (335) On December 9, 2007, the Hearing Officer denied the Parents' November 16, 2007 Motion to Sequester Witnesses (HO14, pages 1-7).
- (336) On December 19, 2007, the District's Dr. W testified on behalf of the District. (NT 96-221).
- (337) On December 19, 2007, Ms. K testified on behalf of the Parents (NT 221-270).
- (338) On January 4, 2008, Independent Education Consultant Mr. K again testified on behalf of the Parent (NT 274-368).
- (339) On January 4, 2008, Student's mother provided her testimony concerning Student's IEPs and District programming (NT 369-403).
- (340) On January 11, 2008, the District's Mr. B testified (NT 415-512).
- (341) On January 11, 2008, at the parties' request, the Hearing Officer granted continuances to January 22, 2008, January 28, 2008, February 7, 2008, and February 11, 2008 (HO 15, pages 1-6).
- (342) On January 22, 2008, the District's Mr. B again testified (NT 519-594).
- (343) On January 22, 2008, the District's Mr. O testified (NT594-682).
- (344) On January 22, 2008, the District's Ms. U testified (NT 682-709).
- (345) On January 22, 2008, at the request of the District, the Hearing Officer cancelled the February 7, 2008 session and changed it to February 6, 2008 (HO 16, pages 1-3).
- (346) On January 28, 2008, the District's Ms. G a/k/a Ms. S provided testimony (NT 716-810).

- (347) On January 28, 2008, the Parents made a Motion concerning the admissibility of the January 25, 2008 IEP and its link to a District witness's prior testimony and District Exhibit 12 (HO 17, page 1; NT 807-808).
- (348) On January 28, 2008, the District's Ms. B provided testimony (NT 810-897).
- (349) On February 4, 2008, at the request of the Parents, the Hearing Officer issued a subpoena to Ms. A (P 60, pages 1-2).
- (350) On February 6, 2008, the District's Ms. T provided testimony (NT 904-996).
- (351) On February 6, 2008, at the parties' request, the Hearing Officer granted a continuance due to both sides' opportunity to present rebuttal witnesses and to make a determination on the January 28, 2008 Motion (HO 17, pages 1-17).
- (352) On February 11, 2008, the District's Dr. W testified and provided her curriculum vitae (SD 16; NT1002-1080).
- (353) On February 11, 2008, Student's step father, testified concerning school observations and field trip he and Student undertook on the District's *Bring a Parent to School Day* (NT 1080-1106).
- (354) On February 11, 2008, Ms. A testified that she did not provide individualized assistive technology consultation or services to Student (SD 8; NT 1118-1121, 1123-11281134-1138).
- (355) On March 10, 2008, the Hearing Officer canceled the March 7, 2008 session due to the District attorney's illness. The Hearing Officer granted a continuance to the mutually agreed upon dates of March 17, 2008 and March 19, 2008 (HO 18, pages 1-10).
- (356) On March 17, 2008, the Parties stipulated to the "Joint Stipulation Regarding Staff Salaries" (HO 19, pages 1-2).
- (357) On March 17, 2008, the Parties stipulated that if the Hearing Officer awards compensatory education, the cost of Student's teachers staff salaries must be increased by 30% to cover staff benefits (P66).
- (358) On March 17, 2008, the District's Ms. B again provided testimony (NT 1146-1236).
- (359) On March 19, 2008, the Hearing Officer did not permit the "ex pert witness" testimony of the Parent's rebuttal witness (NT 1244-1276).
- (360) District calendars introduced into evidence were for the 2006-2007school year, the 2006-2007school year, and the 2005-2006 school year (P 42).
- (361) The Collective Bargaining Agreement between the District and teachers was from July 1, 2005 through June 30, 2010 (P43).
- (362) On March 19, 2008, Student's hearing adjourned (NT 1285).

IV. ISSUES

- Did the District provide Student with a FAPE in the form of an appropriate IEP for his sixth grade (i.e., 2005/2006 school year), his seventh grade (i.e., 2006/2007 school year), and his eighth grade (2007/2008 school year up to October 9, 2007)?
- Is Student entitled to compensatory education for time of denial of FAPE, which may include a period of time prior to 2005/2006 and through October 9, 2007?
- What is the accrual date of Student's claim for denial of FAPE?
- Do any of the exceptions in the IDEA apply, including, a) specific misrepresentation, and b) failure to provide mandated information?
- Does a Continuing Violation Doctrine apply?
- Is Student eligible for IDEA reimbursement for an IEE?
- Did the District discriminate against Student by denying him a FAPE?
- Did the District provide Student an appropriate ESY during the summer of 2006 and the summer of 2007, and with the possible inclusion of ESY in prior years?

V. DISCUSSION AND CONCLUSIONS OF LAW

Burden of Proof

Student's Parents raised their due process claims on or about September 20, 2007 (HO 4, pages 1-2). Student's parents hold the burden of persuasion in their due process claims.

The United States Supreme Court held that the burden of proof in an administrative hearing challenging an IEP is upon the party seeking relief. See *Schaffer v. Weast*, 126 S.Ct. 528 (2005). Determining, "this case concerns only the burden of persuasion," the *Weast* Court ruled that the parents, as the party seeking relief, have the burden of persuasion. The *Weast* Court's ruling did not, however, change the long-established practice of placing the burden of persuasion on a district to prove its affirmative defense that it provided a child an appropriate education or complied with the IDEA's procedural safeguards.

Although the *Weast* Court assigned the burden of proof to the party who initiates the hearing, the Court also held, "[t]he ordinary default rule, of course, admits of exceptions. See, *McCormick on Evidence* §337, at 412-415. For example, the burden of persuasion as to certain elements of a plaintiff's claim may be shifted to a defendant, when such elements can fairly be characterized as affirmative defenses or exemptions." *Weast*, at 535. See also, *FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948).

The Federal Rule of Civil Procedure 8 (F.R.C.P. 8), Pennsylvania Rule of Civil Procedure 1030 (Pa.R.C.P. 1030), and Title 1 of the *Administrative Practices Act*, mandate that a defendant plead and prove all affirmative defenses. F.R.C.P. 8 provides that any "matter constituting an avoidance or affirmative defense" must be affirmatively asserted in the responsive pleading. Otherwise, it is waived.

By way of dicta, in Student's hearing, the District holds the burden of proof as to all affirmative defenses. Such affirmative defenses must be pled and proven, as they cannot be raised by a simple denial in the response. See, *Toledo-Lucas County Port Authority v. Axa Marine & Aviation Ins. (UK) Ltd.*, 220 F.Supp.2d 868 (D.C. Ohio 2002). In *Director Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 272, 114 S.Ct. 2251, 129 L.Ed.2d 221 (1994), the Court relied on *Powers v. Russell*, 30 Mass. 69 (1833), and held that the only time the burden of proof – as opposed to the burden to produce evidence - shifts is in the case of *affirmative defenses*." *Id.*, at 77. (Emphasis supplied.) (See, *Weast*, at 534).

The IDEA directs an affirmative, beneficiary-specific obligation on providers of public education to ensure a free, appropriate public education (FAPE) to an eligible child that confers significant learning in the least restrictive environment (LRE). Local educational agencies (LEAs) must offer and provide each eligible child an Individualized Education Program (IEP) suitable to the child's unique needs. 20U.S.C. §§1400(d)(1), 1412(a)(4), 1414(d). LEAs must ensure both substantive and procedural requirements to provide FAPE. 20U.S.C. §1401(7)(8).

Both the IDEA and *Rowley* stress that the LEA must demonstrate compliance with the IDEA's procedural and substantive requirements, and that, as a result of its compliance, the child made meaningful educational progress. *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 203-204 (1982); *Moore v. Kulicke & Soffa Industries, Inc.*, 318 F.3d 561, 566 (3rd Cir. 2003).

The District must plead and prove all affirmative defenses. The IDEA's prior written notice and the response to the complaint mandates, coupled with the five-day rule, specify the requirements for the contents of the District's defense(s). 34 C.F.R. §300.503; §300.507; §300.512. These requirements, individually and collectively, are analogous to F.R.C.P. 8, Title 1, and Pa.R.C.P. 1030. Fundamental fairness and due process require the District to set forth the affirmative reasons that either negate the claims against it or prove its allegations to avoid liability.

IDEA and Section 504 claims are similar causes of actions. The IDEA imposes an affirmative duty on states that accept certain federal funds to provide a FAPE for all students with disabilities. 20 U.S.C. § 1411 (2005); *Lawrence Tp. Bd. of Educ. v. New Jersey*, 417 F.3d 368, 370 (3^d Cir. 2005) (citing 20 U.S.C. § 1412(a)(1)). Section 504 prohibits discrimination against disability in federally funded programs. 29 U.S.C. § 794(a) (2002). "[T]he regulations implementing § 504 adopt the IDEA language, requiring that schools which receive or benefit from federal financial assistance 'shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction.'" *W.B. v. Matula*, 67 F.3d 484, 492-493 (3^d Cir. 1995)(citing 34 C.F.R. § 104.33(a)).

Once pled in the affirmative, the District carries the burden of proof regarding all of the facts that support its claims, that the goals are measurable and that the child has progressed in the LRE. *Timothy H. v. Cedar Rapids Cmty. Sch. Dist.*, 178 F.3d 968, 971 (8th Cir. 1999) (to avoid liability for a denial of a FAPE claim under Section 504, the District also must assert and prove the affirmative defense that a requested accommodation would constitute an undue burden in providing FAPE). The intent of the statutory and regulatory schemes mandates that the District, as the recipient of federal funds, be held accountable for a child's learning through measurable annual goals. §300.320(a)(2)-(a)(3).

In Student's hearing, the prior written notice requirement and the obligation to respond to the Parents' due process complaint are based on the rationales that the District is familiar with the full range of educational facilities in its jurisdiction and is informed by its experiences with other, similarly-disabled children causing it to believe that the IEPs in question are appropriate. By way of dicta, the District, in the instant action, holds the burden of proof as to all facts that it provided affirmative defense.

Witness Credibility

A hearing officer holds the responsibility to "*specifically mak[e] credibility determinations among the various witnesses and contrary expert opinions.*" *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at 34 (2003). This Hearing Officer holds the authority in Student's due process hearing to assess the credibility of witnesses and to weigh evidence. *Carlisle Area School District v. Scott P.*, 62 F.3d 520,524 (3rd Cir. 1995), cert. denied, 517

U.S. 1135 (1996). The Hearing Officer determined the following assessments of witness credibility:

Mr. B, the District's Inclusion Specialist, testified that the District's redistricting efforts justified changes to Student's educational placement (NT 472-475). Redistricting needs, as promulgated by Mr. B's testimony, lessened his credibility and was diminished by his apparent position that District redistricting efforts condoned changes to Student's educational placement (NT 584-587). The District changed Student's Placement/Level of Intervention five times in five years without the benefit of evaluations or assessments (e.g., placements in Multiple Disabilities, Part-Time Life Skills, Full-Time Life Skills, Full-Time Autistic Support, Full-Time Life Skills Support classes) (P2). Mr. B's testimony contributed to this Hearing Officer's understanding that each time the District changed Student's educational placement, it did so to suit administrative convenience, in violation of federal law. 34 CFR §300.324, et seq.

Mr. O was Student's *5th Grade Life Skills Teacher* when Student attended the District's *Elementary School* during the 2004-2005 school year (NT 594-596). Mr. O's testimony was diminished by his admission that for the first nine weeks of Student's 5th grade in a Life Skills class, Mr. O implemented Student's 4th grade IEP, developed for Student's Multiple Disabilities class and geared toward a different District curriculum (SD 10, SD41; NT 632-633). Mr. O justified administrative convenience by testifying that Student's August 27, 2004 NOREP stated that the reason Student's program was changed was for "redistricting" reasons. Mr. O testified that Student was removed from the full time Multiple Disabilities program to a part time Life Skills program. He also testified that Student went from a part time Life Skills placement to a full time Life skills placement (NT 636-638). At the end of 4th grade, the District closed Student's Multi-Disability class. Two days before the start of 5th grade, the District held an IEP conference, changed the cover sheet on the 4th grade IEP, and issued a NOREP changing Student's placement from Full-Time Multiple Disabilities to a Part-Time Life Skills Class (P54, P56). Forty days later, the District issued a new 5th grade IEP changing his placement from Part-Time to Full-Time Life Skills (P54-P56). Mr. O could not justify the more restrictive Full-Time placement. He could not explain why the placement became more restrictive, and why for the first nine weeks he never gave the Parents the mandated progress reports (NT 650-651). He failed to explain why, contrary to Student's NOREP, Student was not permitted in regular education classes (NNT 646-650). Mr. O's testimony was not credible in explaining that while Student was in the Life Skills Class 1,775 minutes a week, Mr. O only worked with Student 375 minutes a week (NT 674-676).

Ms. S, Student's 8th Grade Teacher during the 2007-2008 school year, previously taught Student as a 6th grader in the same Autistic Support Classroom. Ms. S's testimony was diminished by her lack of convincing data to substantiate that Student made progress during his 6th grade year, yet had a need for and continued in the same IEP goals during his 8th grade year (NT 782-809).

Testimony offered by *Ms. T, Student's Speech and Language Clinician*, led this Hearing Officer to believe that the District misrepresented data to the Parents, in violation of 20 U.S.C. 1415(f) (3) (D). Ms. T testified on Student's progress reports that purportedly showed Student's speech-language progress during Student's

6th grade (2005-2006), his 7th grade (2006-2007 school year), and his 8th grade (2007-2008 school year) (NT 905-906). After seven months in 7th grade, and lacking any objective testing, Ms. T unilaterally concluded that, contrary to her direct testimony, Student was not benefiting from his speech services. To correct this “lack of progress,” Ms. T, without the benefit of an IEP meeting, deleted two short-term objectives from Student’s IEP (NT 989). Ms. T admitted she had implemented the wrong IEP the previous school year. She, further, did not convene Student’s IEP Team meeting to review her independent decision and issue a revised IEP (P18a). As such, Ms. T failed in her affirmative duty to seek IEP team consensus. Under cross examination, Ms. T admitted that progress speech and language reports submitted as evidence in direct examination did not match actual progress reporting presented in Student’s IEP goals. Ms. T altered Student’s progress reports over the period she served as Student’s clinician (P6, P7, P16, P17; NT 965-995). Rather than correct the problem through the IEP process, she unilaterally terminated a significant segment of Student’s IEP speech and language services while his speech continued to remain unintelligible (NT 989; P7, P17, P17a, P18, P18a). Ms. T’s actions substantiated specific and deliberate IEP misrepresentations to Student’s Parents. She flagrantly misrepresented data to Student’s Parents, in violation of 20 U.S.C. § 1415(f)(3)(D).

Ms. B, Student’s 7th Grade Life Skills Teacher (2006-2007 school year) and his *8th Grade Life Skills Teacher* at the beginning of the 2007-2008 school year, admitted under oath that she implemented a contested IEP in her Life Skills Support classroom knowingly when Student’s Parents did not agree to the placement and to which his Parents had voiced strong opposition. Ms. B’s rationale was that she received a directive to do so from her administrators (NT 876-896). Ms. B also misrepresented Student’s potential to the regular education staff by advising them that Student’s full-scale intelligence was between 40-50, thereby placing Student in the range of children with mental retardation. Ms. B testified that Student displayed a strong need for behavior support, but such support did not extend to him during transportation on a field trip with peers. The failure to include the behavioral intervention plan for the bus ride caused Student to injure himself while the staff did not respond for 20 minutes (P30, P64). The failure to implement the behavior plan throughout the school day, on the bus and on the field trip, deprived Student of meaningful educational benefit (P2, P30). Ms. B’s actions substantiated specific and deliberate IEP misrepresentations to Student’s Parents, who were informed that Student’s behavior progressed.

The testimony by *Ms. U, Speech and Language Clinician*, during Student’s 5th grade (2004-2005 school year), was credible. Her testimony, however, was diminished by acknowledgement that although she administered Student’s *Peabody Picture Vocabulary Test* and reviewed Student’s scores from the *Children’s Institute* evaluation for 2004, she never measured how many communication icons Student used consistently, despite her knowledge of Student’s severe language needs and necessity of his *Picture Exchange System* (PEC) for communication (NT 701-708).

Dr. W, the District’s Assistant Superintendent of Special Education and Pupil Services, (NT 96-221; 1002-80) presented as an experienced professional. Her testimony diminished, however, by Dr. W’s admitted lack of

knowledge of and interactions with Student until Student's Parents began voicing concerns to District Board of Directors concerning Student's educational needs and placement considerations (P46; NT1013-1016, 1075-1076).

Student's Mother, testified regarding attempts she made to support her son's evaluation, placement, and programming. Mrs. provided credible testimony concerning the decision to express her concerns to the District's Board and to initiate a due process hearing because of the family's concerns with Student's educational changes, self-injurious behaviors, lack of meaningful progress, and educational regressions (P46, NT 369-402).

Student's Stepfather, provided credible testimony concerning his school observations and reflections on District responses to Student's self-abusive behaviors (NT 1081-1106). Mr. was so concerned about Student's self-abusive behaviors and lack of intervention responses by District personnel that he documented by taking photos of Student's arm biting episode after observing Student at school (NT P64; NT 1083-1089).

Ms. K, Certified School Psychologist, [agency] Autism and Developmental Disability's Program, provided subpoenaed testimony on behalf of the Parents (NT 221-270). As Student's behavioral specialist consultant through [agency], Ms. K provided credible testimony concerning her work with Student's classroom teachers in the District (NT 223-229). She testified concerning Student's increasing behavioral difficulties in the classroom, noting bites and scabs on Student, as well as charting Student's behavior at school and in the community (NT 229-247).

Ms. A received a subpoena on behalf of the Parents (NT 1107-1140). Ms. A, an *Allegheny Intermediate Unit* employee, provided assistive technology consultation to the District in May 2007. She offered credible testimony, admitting that she did not provide individualized assistive technology consultation or assistive technology support to Student prior to the District's Spring 2007 request (SD 8; NT 1118-1121, 1123-1128, 1134-1138). Although the team requested more data in October of 2006 and again in March of 2007, the District never completed the evaluation (P13, P14). A classroom teacher in 2007 did recognize that the District never completed the previously promised *2004 Assistive Technology Consultation Evaluation* and sought Ms. A's help (P30, P65, P66). Although Ms. A provided her report to the District in July 2007, neither Student's Parents, nor his IEP team received Ms. A's data (P65, P66). Ms. A's testimony corroborated the Parents' claim that by the District's failure to provide mandated information within the mandated time frames, the District infringed on the Parents' due process rights. 34 CFR §300.303-304. Ms. A's report, also, corroborated Mr. 's October 2006 observation wherein each found that District staff did not implement the PEC book or the mandated visual schedules as noted in Student's IEP (P 65, P66). The failure to implement the IEP, including the use of the PEC communication book and visual schedules, denied Student educational opportunity (P2). Ms. A's report also confirmed Mr. K's independent observation that Student's Assistive Technology and communication needs remained unmet resulting in a decline of Student's educational progress (P2).

Mr. K, Independent Educational Consultant, testified on behalf of the Parents. He presented as a qualified, experienced, and credible professional (NT 274-363). Mr. K observed Student in classrooms taught by District personnel, communicated with Student's family, examined Student's educational reports and IEPs, and provided an in-depth summary of Student's educational strengths and needs through a reflective, consultant report. Mr. K provided credible testimony concerning the extent and nature of Student's educational programming. Mr. K reviewed Student's records in a comprehensive manner, contributed to the knowledge base about Student's strengths and needs, and noted the lack of appropriate composition of Student's IEP teams. For example, Mr. K noted that the District's psychologist did not attend the 4th, 5th, 6th and 7th grade IEP meetings (P34, P35, P36; 22 Pa. Code 14.123-124, et seq.). He noted that the 5th grade teacher failed to attend the 2004-2005 IEP Team meeting (P5, P8). He found that the 7th grade IEP Team failed to include a delegate of the District authorized to commit District resources (P7; SD 54). The 7th grade ESY IEP Team failed to include a person knowledgeable about Student's disability or an LEA (P7, P 14, P 26). Mr. K's IEE provided essential information about Student's educational profile and needs which were not contained in the District's evaluations or IEPs (P 2, P 13, P 14).

Ms. M (NT 1244-1276), *Autism Consultant*, was asked to present as a witness on behalf of the Parents. Ms. M did not qualify as an expert witness in the education and behavioral needs of children with autism (P72). She did not get approval to render an opinion about behavioral programs for Student (NT 1274-1275).

I.) DID THE DISTRICT PROVIDE STUDENT WITH A FAPE IN THE FORM OF AN APPROPRIATE IEP FOR HIS 6TH GRADE, THAT IS, THE 2005/2006 SCHOOL YEAR; HIS 7TH GRADE, THE 2006/2007 SCHOOL YEAR; AND HIS 8TH GRADE, THE 2007/2008 SCHOOL YEAR UP TO OCTOBER 9, 2007?

ANSWER: The Parents established through testimonial and documentary evidence that Student was denied a FAPE in the form of an appropriate IEP for his 6th grade, (2005/2006 school year), his 7th grade, (2006/2007 school year), and his 8th grade, (2007/2008 school year up to October 9, 2007).

Federal mandates of the IDEA direct that an eligible student must be assured a FAPE. Part B of the IDEA requires that States provide a FAPE to eligible students from age three to twenty-one. 20 U.S.C. § 1412; 34 C.F. R., Part 300. FAPE means special education and related services that meet state standards, provided in conformity with an IEP, at public expense, under public supervision and direction, without charge, and include an appropriate preschool, elementary, or secondary school education. 20 U.S.C. § 1401(8).

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies impeded the child's right to a FAPE; significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE; or caused a deprivation of educational benefit. See, §615(f)(3)(E). The IDEA's substantive component requires that the eligible child be provided with a FAPE that, "consists of educational instruction specifically designed

to meet the unique needs of the child, supported by such services as are necessary to permit the child 'to benefit' from the instruction." 20 U.S.C. § 1412(1).

The IDEA provides parents with specific procedural rights to enforce the substantive rights of their children. *Irene B. v. Phila. Academy Charter*, 2003 WL 24052009 (E.D. Pa. Jan. 29, 2003); *Pettigrew v. Middletown Area School District*, 2006 WL 4032181 (M.D. Pa. Sept. 26, 2006). Parents may examine all relevant records concerning evaluation and placement of their children, 20 U.S.C. § 1415(b)(1)(A); must receive prior written notice when a school proposes or refuses to alter a placement, 20 U.S.C. § 1415(b)(1)(C); may contest in an impartial due process hearing decisions regarding the education of their disabled child, 20 U.S.C. § 1415(b)(1)(E); and may obtain judicial review of an administrative decision. 20 U.S.C. §1415(e)(2).

The following are relevant based on the factual evidence of record:

A. *There Was Evidence of Multiple District Errors.* District's errors included: predetermining Student's placement without the benefit of an evaluation; failing to implement the pendant IEP; failing to implement the speech and language portion of the IEP; failing to collect, review and revise data about Student's levels of regression and recoupment for ESY; failing to provide mandated information; failing to convene a team of knowledgeable professionals; failing to provide progress reports; and actively interfering with assistance from knowledgeable professionals. These actions, inactions, and intentional failures interfered with the Parents' participation in the development of Student's IEPs to the degree that each IEP is a nullity. Additionally, the District failed to implement substantial or significant provisions of Student's IEPs, as opposed to a mere de minimis failure, such that he was denied a meaningful educational benefit. See *Melissa v. Sch. Dist. of Pittsburgh*, 183 Fed. Appx. 184, 187 (3d Cir. 2006)(citing *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000); *T.R. ex rel. N.R. v. Kingwood Twp. Bd. of Educ.*, 205 F.3d 572, 577 (3d Cir. 2000).

B. *The District Denied Parental Rights and Significantly Impeded Student's Parents.* The IDEA does not permit the District to decide a placement first. Placement must be based on Student's unique needs and abilities. The District's attempt to predetermine placement and structure Student's program to fit that placement, denied Student a FAPE. As evidenced by Student's academic records, his assessments and evaluations, and testimony by Parent and District witnesses, the District's denial of rights caused Student to receive inappropriate programming in a regular school setting, without success or meaningful progress. Further, evidence of record and testimony by Parent and District witnesses indicated that the District specifically misrepresented academic, behavioral, and speech and language progress. Such reporting to the Parents was intentional and flagrant, in violation of 20 U.S.C. § 1415(f)(3)(D). The District significantly impeded Student's Parents in the decision making process so as to alert them to Student's lack of meaningful educational progress and an appropriate program based on Student's needs. 34C.F.R. §300.320(3). The District specifically and flagrantly changed Student's placement, ignoring mandated procedures in the required prior, written notice. 20 U.S.C. § 1415(b)(1)(C). The evidence of record

substantiates the Parents' claim that Student's IEPs were written before placement changes, that his Parents were not given notice when changes were made, and that the District significantly impeded the Parents in examining evaluation and placement records. The District made numerous errors that resulted in Student's loss of meaningful educational progress. Each time Student moved, contrary to regulations, the District would make the placement, hold an IEP conference, and then issue the NOREP.

District convenience cannot justify an inappropriate placement to an eligible student. See *Ridgewood*, stating that the "IDEA requires that disabled students be educated in the least restrictive *appropriate* environment." *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 249 (3d Cir. 1999) (emphasis in original). The District's redistricting needs cannot condone Student's inappropriate placement in a setting that Student's Parents outwardly rejected. The District's failure to comply with IDEA requirements directly led to Student's denial of FAPE, loss of educational opportunity, and harm to Student, who was subjected to inappropriate educational placement as a result of the District's failure to implement his IEPs based on his needs.

C. The District Failed To Conduct Appropriate Evaluations, Assessments And Progress Monitoring. The IDEA's substantive component requires that eligible children be provided with a FAPE, one which "consists of educational instruction specifically designed to meet the unique needs of the child, supported by such services as are necessary to permit the child 'to benefit' from the instruction." 20 U.S.C. § 1412(1). The U.S. Supreme Court held that the FAPE requirement is met by providing personalized instruction and support services to permit the child to benefit educationally from the instruction, providing the procedures set forth in the Act are followed. See *Rowley*, at 458 U.S. 176 (1982). The Rowley standard is only met when a child's needs are met and the program provides him or her with more than a 'trivial or de minimis' educational benefit. *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3d Cir. 1988).

The District was negligent in assessing all of Student's needs by way of his evaluation reports (ERs) and through his IEPs. The failure of the District to assess all areas of Student's unique needs in the ER and reevaluation reports (RRs) is the result of either not having a team member knowledgeable in assessing a child with epilepsy, Pervasive Developmental Disability (PDD), severe behaviors, and speech and language impairments, or over-reliance upon a single medical diagnosis. Either of these omissions violated Student's right to a FAPE.

Relying solely on teacher observation/grades, subjective progress reports, a single medical diagnosis of epilepsy and a wrong IQ score, the District failed to create a program for Student's academic, behavioral, emotional, functional, speech/ language, and social needs. 34 CFR 300.303-304. Neither the evaluations nor the composition of Student Team was appropriate (P2) and the evaluations were inappropriate and insufficient, both in scope and in depth, to have fully investigated Student's exceptionalities. 22 Pa. Code §14.125. Appropriate tests and evaluation tools must be administered so that the evaluation results accurately reflect the child's needs. 22 Pa. Code §14.123-124. The ER performed by the District in 2002 was devoid of any objective test scores or Curriculum Based Assessment data in all areas of suspected disability (34 CFR

§300.304). These omissions violated both procedural and substantive rights that individually and collectively resulted in a denial of FAPE (P13, P14). Contrary to the regulation, the District's 2002, 2004, 2006, and 2007 reevaluation reports did not use a variety of assessment tools at assessing Student in each of the areas of his suspected disabilities or educational needs (P13, P14, P36; P34; CFR §300.303-304).

D. The District Did Not Provide Appropriate Evaluations. Although the District's initial evaluation of Student reflects that he was not able to be tested, the [previous school district's] kindergarten ER Team was able to administer a *Peabody Picture Vocabulary Test*, a *Visual Motor Test*, a *Gilliam Autism Rating Scale*, and his Therapeutic staff team was able to administer a *Brigance Achievement* test (P2). Based upon the above, the [previous school district's] team did determine his initial deficits in social, adaptive, behavioral, academic and speech and language achievement (P36, P37).

The District's 2002, 2004, 2006 and 2007 evaluations, on the other hand, failed to assess Student's full academic potential or achievement in all areas of unique need; failed to include a variety of assessment tools, like Curriculum Based Assessment measures, normative measures, checklists or criterion referenced assessments, 34 CFR §300.303-304; failed to assess how Student's Epilepsy or his Speech and Language disability affects his participation in the regular education curriculum, 34 CFR §300.303-304; failed to use technically sound instruments that assess the adverse effects of Student's adaptive behavior deficits upon his educational needs (i.e., neither an AAMD scale of adaptive behavior nor an Autism checklist was completed), 34 CFR §300.303-304; failed to use tests and other evaluation materials tailored to assess specific areas of educational need and not merely those designed to provide a single intelligence measure, 34 CFR §300.303; 304(d); failed to collect and report on Student's behavioral, organizational, academic and attention weaknesses as noted in the [previous school district's] ER, (P#37); and failed to conduct a functional behavioral assessment of the behaviors that interfere with Student's behavioral needs and/or the behaviors that interfere with Student's learning, 34 CFR §300.303-304, *et seq.* These procedural and substantive omissions denied Student of any chance to receive a FAPE and directly interfered with his Parents' participation in the development of his IEPs (P 2, P6, P7, P8, P13, P14; 34 CFR §300.303-304).

E. The District Misrepresented Data Concerning Student's Speech And Language Needs. The District's failure to inform Student's Parents of the instructional implications of Student's declining educational performance and his unintelligible speech obstructed the Parents' participation in the development of the evaluations and IEPs. His speech and language scores declined, and the District failed to program appropriately his speech and language needs. While his speech became more unintelligible, the District continued to misrepresent to the Parents through his report cards, progress reports and IEPs that Student was making progress (P16, P17, P18, P18a).

In 1998, at the age of 7, with 90 minutes of speech services per week, Student had a *Peabody Picture Vocabulary Test* score of <0.1%ile. In 2004, with 85 minutes of individual and group speech services, he obtained the exact same score (P50). Neither the Speech clinicians nor, for that matter, the evaluation team,

reviewed or discussed with Student's parents, that his 1998 <0.1%ile *Peabody Picture Vocabulary Test* scores were identical to his 2004 scores evidencing a complete lack of progress (P12, P17, P36, P 37, P59). Although the clinicians testified they were aware of his static below basic scores, the 7th grade clinician decreased his one-on-one services to 45 minutes of individual session and one 40-minute group session (P7). District staff was in unanimous agreement that Student's speech is unintelligible, however, the staff reported to the Parents that he was making progress (P7, P17, P17a, P18, P18a).

This misrepresentation demonstrates where the failure to provide mandated information is tantamount to a concession of a denial of a FAPE. The failure to provide accurate progress reports, supportive data, appropriate IEPs, and evaluations created a knowledge vacuum such that the Parents were unable to learn of Student's failure to make meaningful educational progress.

F. The District Failed To Oversee, Develop, and/or Implement Relevant Sections of Student's IEPs Related To Student's Behavioral Needs. The District did not evaluate and monitor Student's behavior, even though he consistently demonstrated self-abusive behaviors that District personnel knew about, but the District did not intervene appropriately. Student's behavioral needs were treated inappropriately, especially his biting and chewing responses. The District witnesses failed to explain why Student's discrepant behavior and adaptive behaviors were not assessed nor addressed (P2, P6, P7, P8, P9, P13, P14). Although Student's Parents reported to the District that Student was self-injurious, a *Functional Behavioral Assessment* was not done nor was there consideration given to the addition of a school psychologist to the IEP team. Student's IEPs did not develop specially designed instruction to address his severe self-abusive needs (P2, P6, P7, P8, P9, P13, P14). The District's own MDT form called for a psychologist to be a mandated member of the Team, but the staff ignored this mandated requirement (P36, P37). The failure to include a psychologist caused the District to ignore the need to assess Student's behavior prior to or subsequent to changing his placements or implementing the District's purported behavioral intervention plan (34 CFR §300.324).

G. The District Failed To Oversee, Develop, and/or Implement Relevant Sections of Student's IEPs in Academic and Functional Areas. Student's present levels were not measurable (P17,18). For example, the Present Level of Educational Performance ("PLEP") did not reference any objective behavioral, functional reading, math, writing, speech, prevocational, or organizational measure although each is a recognized need (P13, P14). The PLEPs did not state the degree of Student's academic deficits (P13, P14, P17, P18). Student's IEPs did not provide a clear, precise, and accurate understanding of Student's level of functioning within the District's curriculum (P2, P5, P6, P7, P8, P9). The lack of measurable short-term instructional objectives precluded both Student's Parents and the Team from assessing or monitoring Student's progress (P18, P18a). The annual goal and short-term objectives fell far short of the requirements of 34 CFR §300.320, et seq.

Student's functional academic skills declined. For example, Student's reading and math skills were once rated Proficient, but fell to a Novice level based on the *Pennsylvania System of Alternative Assessment* (PASA) (P12, P13). This single objective measure is overwhelming evidence that after five years of instruction in the District, Student did not make academic progress, and in fact, he regressed (P2). Student displayed stagnant standard scores, obvious deficits, and increased levels of self-injurious behaviors (P2). Testimony of Mrs. B, Mr. O, Ms. T and Mrs. S clearly established that many, if not all, of Student's unique needs were never addressed (P 3, P6, P7, P12, P13, P14).

H. The District Failed To Implement Substantial Provisions of Student's IEP, Such That He Was Denied A Meaningful Educational Benefit. Student's IEPs did not specify behavioral and communication goals to address directly and explicitly Student's needs for special education and related services. Academic goals did not reflect Student's present levels of academic achievement and functional performance. 34 C.F.R. § 300.320 (1). His IEPs did not include adequate statements of measurable annual goals. 34C.F.R. § 300.320 (2). His IEPs did not adequately describe Student's progress toward meeting the annual goals and when periodic reports on the progress Student is making will be provided. 34C.F.R. § 300.320 (3). His IEPs did not adequately describe statements of the special education and related services and supplementary aids and services, and statements of program modifications or supports for school personnel. 34C.F.R. § 300.320 (4). His IEPs did not offer an appropriate explanation concerning Student's participation with nondisabled children in the regular class. 34C.F.R. § 300.320 (5). They did not address Student's appropriate accommodations to measure Student's academic, achievement, behavioral, communication, functional, and social performances. 34 C.F.R. § 300.320 (6). The IEPs did not specify the projected dates for the beginning of Student's services and modifications, including the anticipated frequency, location, and duration of those services and modifications. 34 C.F.R. § 300.320 (7). His IEPs did not focus directly on Student's needs, addressing Student's identified needs for Behavioral Support or Speech and Language Therapy as defined by the federal regulations. 34 C.F.R. § 300.34 (c) (6) (9). Student's IEPs did not meet procedural and substantive requirements and did not provide meaningful educational benefit to Student (P2, P5, P6, P7, P8, P9).

The District's substantive and procedural failures concealed the ongoing denial of FAPE. The intrinsic and extrinsic testimonial and documentary evidence as described above demonstrates that Student's evaluation reports, reevaluation reports, and IEPs are procedurally and substantially flawed. The evidence compels a finding that Student has not made any meaningful progress.

II.) IS STUDENT ENTITLED TO COMPENSATORY EDUCATION FOR TIME OF DENIAL OF FAPE, WHICH MAY INCLUDE A PERIOD OF TIME PRIOR TO 2005/2006 AND THROUGH OCTOBER 9, 2007?

ANSWER: As discussed below, because there was a showing by Student's Parents that the exceptions to the IDEA apply and that the District discriminated against Student, Student's Parents are entitled to seek recovery of compensatory education beyond a two-year limitation.

The following are relevant based on the factual evidence of record:

A. Because He Has Been Denied A FAPE, Student Is Entitled To Compensatory Education.

20 U.S.C. § 1415(i)(C)(iii). Compensatory education for a period equal to the period of deprivation, excluding the time reasonably required to rectify the problem, is appropriate where a school district knows or should know a child is not receiving more than a de minimis educational benefit and fails to correct the situation. *M.C. on Behalf of J.C. v. Central Reg'l Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. 1996).

B. The IDEA Provides That The Trigger Point For Filing An Action Is When Either Party Either Knows Or Should Have Known Of The Need For Redress. The Trigger Point For The Calculating The Remedy Of Compensatory Education Is, However, Different. In *M.C. v. Central Regional Sch. Dist.*, the Court held that the trigger point for calculating a compensatory education award accrues when the District, not the parents, knew or should have known that the student is not receiving an appropriate education. Therefore, this Hearing Officer holds that the time for calculating the award of compensatory education can begin prior to the date the parent either knew or should have known. The Act places an affirmative duty on the District to review, revise and develop an IEP each school year. The evidence is preponderant that the District failed to review, revise and develop an appropriate IEP based on sound progress monitoring. The District either knew or should have known of the denial of a FAPE as early as the 2002-2003 school year but failed to develop an appropriate IEP.

In applying the holding of the Third Circuit in the *M.C. Court*, the start date for compensatory education begins when the District either knew or should have known that Student was entitled to services, excluding the time reasonably required for the District to rectify the problem. *Id.*, at 395. Therefore, applying the "M.C. knew or should have known" standard, the trigger point for any calculation of compensatory education accrued when Student began his classes in the third grade at the District.

C. Appropriate Relief Must Be Reasonably Calculated To Provide Student With The Lost "Educational Benefits" He Would Have Otherwise Received Had The District Provided Him With A FAPE. The threshold question is how to compensate Student for the services he should have received. Compensatory education is one of the child's remedies available for the District's failure to provide otherwise available services. See, *In Re: Educational Assignment of M.S.*, No. 1104. (SEA PA 2001). The ultimate award must be reasonably calculated to provide Student with the lost "educational benefits" he would have otherwise received had the District provided him with a FAPE. *Reid ex rel. Reid v. Dist. of*

Columbia, 401 F.3d (D.C. 2005). In *Reid*, the court described “compensatory education as part of the Court’s resources in crafting appropriate relief.” *Reid*, at 523, quoting *Parents of Student W. v. Puyallup Sch. Dist., No.3*, 31 F.3d 1489, 1497 (9th Cir. 1994).

D. Student Was Denied A FAPE For Each Full School Day During The Period Of Time From The Start Of The 2002 School Year Through October 9, 2007. The IDEA imposes neither an equitable nor a legal limitations period with regard to compensatory education awards. *A. A. v. Coatesville Area Sch. Dist.* (42 IDELR 260 04-4184).

On March 17, 2008, the Parties stipulated to the “Joint Stipulation Regarding Staff Salaries” (HO 19, pages 1-2). On March 17, 2008, the Parties stipulated that if the Hearing Officer awards compensatory education, the cost of Student’s teachers staff salaries must be increased by 30% to cover staff benefits (P66). Student’s remedy covers five years of compensatory education and five summers of ESY services. The failure to provide an appropriate educational program for Student pervaded his entire school day and throughout his entire school year. (Student’s award for compensatory education, however, is calculated and based on the joint stipulation) (HO1, pages 1-2; P66).

III.) WHAT IS THE ACCRUAL DATE OF STUDENT’S CLAIM FOR DENIAL OF FAPE?

ANSWER: Student’s claim for compensatory education did not accrue until Spring 2007 when the Parents discovered for the first time from the IEE that Student was not making meaningful educational progress in his current program (HO 6, pages 1-2).

In the amendments that went into effect on July 1, 2005, Congress amended the IDEA to establish a two-year limitations period and to trigger it on “the date the parent or agency knew or should have known about the alleged [FAPE denial].” 20 U.S.C.A. § 1415(f)(3)(C) (2005); *see also id.* §1415(b)(6)(B).

The following are relevant based on the factual evidence of record:

A. Student’s Parents Were Unaware Of Student’s Lack Of Progress Until The Spring 2007.

Student first attended the *Elementary School*, and was subsequently transferred to the District’s Life Skills program. He was then transferred into an Autistic Support class at *Middle School* and then moved to the Life Skills class at *Middle School*. In the spring of 2007, the Parents obtained Mr. K’s IEE. After receiving the IEE they discovered, for the first time, contrary to the District’s claims, the extent of Student’s academic difficulties, deficiencies and needs (P2). In addressing when did Student’s claim accrue, absent overriding considerations, a federal claim accrues on the date the parents discovered or should have discovered the injury. *See, Cada v. Baxter Health Care Corporation*, 920 F.2d. 446, 450 (7th Cir. 1991).

B. The United States Senate Committee on Health, Education, Labor and Pensions addressed timelines for requesting a hearing under the IDEA at Section 615(f) (3) (D). This report titled, *Senate 1248 Committee Report Language on the IDEA*, stated, “...where the conduct or services at issue are ongoing to

the previous two years, the claim for compensatory education services may be made on the basis of the most recent conduct or services and the conduct or services that were more than two years old at the time of due process or the private placement” (emphasis added). Senate Report (1248) 108-185, at page 41 (2003).

The District argued that because much of the Parents’ protected activity took place outside the limitations period, their claim is time barred. This argument is unpersuasive. When determining whether a claim is timely, the focus is on when the alleged injuries occurred or when the plaintiff should have first been aware of these injuries. As a federal cause of action, the District’s inappropriate conduct and activities took place prior to and within the statute of limitations period, thus Student’s Parents’ claims are timely. *See, for example, Porter v. Intermediate Unit*, No. 06-1145, 2007 WL 2597911 (W.D. Pa. Sept. 5, 2007).

C. In the instant matter, Student is entitled to compensatory education for a period of time longer than the presumptive limit of two years, due to the confluence of several improper actions by the District, each of which separately, (and compounded in the aggregate), had the effect of lulling Student’s Parents into asserting claims on Student’s behalf. *See Chase Manhattan Mortgage Corp. v. Caraway* (2003-NMCA-020, 2002) in which the court determined that one party engaged in conduct which *lulled the other into refraining from timely filing a cause of action*. In the instant case, the District failed to adequately notify Student’s Parents of proposed changes in Student’s educational program and placement and parental rights under the IDEA despite the District’s knowledge that it must do so. First, the District changed Student’s program without offering his Parents prior written notice when it proposed or refused to alter his placement, 20 U.S.C. § 1415(b)(1)(C). The District’s approach to notification of IEP meetings, IEP content, and composition of required IEP team members was haphazard, cursory, and oftentimes non-existent. In the absence of knowledge of their rights, Student’s Parents were unable to assert those rights on Student’s behalf. Second, through speech and language progress reporting forms (P 17A, P17, P18, P18A), lack of appropriate behavioral progress reporting (P2), and inattention to Student’s need for assistive technology consultations (P49, P65, P66, P67), the District misrepresented data, disseminating to Student’s Parents information that was demonstrably incorrect: that his speech and language needs were progressing, despite his unintelligible speech ...that his behavioral progress was appropriate, despite his continued self-abusive behaviors...that his assistive technology needs were considered, despite Ms. A’s testimony that she never provided individualized assistive technology consultation services... and that Student made meaningful progress through his IEPs, despite his obvious digressions. These actions by the District either indicate an intent to deceive, or a fundamental confusion on the part of District staff concerning the provision of appropriate services to Student based upon his specific needs and meaningful educational progress that *must be reported in good faith*. Student required academic, behavioral, functional, speech and language, social, adapted physical education, and assistive technology services tailored to his specific needs, but which were not provided. This failure is largely, if not entirely, attributable to the District’s persistent failure to evaluate

Student's unique needs and progress. By proffering a plausible-sounding but disputed explanation for its refusal to place Student in his LRE with appropriate services, (e.g., "redistricting"), informing the Parents that Student made progress, and changing Student's program at whim, the District avoided its responsibility to Student under the IDEA, and it lulled Student's Parents into inactivity over their concerns about Student's progress and program.

With respect to knowledge, actual or constructive, of the facts, even if the District did not actually know of its duty to place Student after offering an IEP (i.e., proposing the IEP first and then placing Student) or did not know of its duty to notify of proposed changes, or of Student's needs, once it was on notice of Student's needs, such knowledge must be imputed to it: the District has an affirmative duty to be aware of the IDEA requirements and to possess sufficient knowledge of devising an educational plan, appropriate progress reporting, while implementing an appropriate educational program for Student in his LRE.

Student's Parents lacked knowledge of the real facts of Student's progress, his learning strengths and needs, and his appropriate placement. They suffered in absence of effective notification of parental rights, including the right to be notified of evaluations and IEP meetings, the right to challenge the District's decision through due process, the right to have Student evaluated in all areas of his disability (including his assistive technology, speech-language and behavioral needs), the right to have input into Student's IEPs prior to placement decisions, and the right to have appropriate IEPs implemented in Student's LRE See, 20 U.S.C. § 1412(1). Also see, 20 U.S.C. § 1415(b); §615(f)(3)(E).

Student's Parents lacked the opportunity to learn the truth about Student's educational needs. It was reasonable for the Parents to rely on the plausible assertions of District professionals, who were in a much better position than Student's Parents to know the law, the educational opportunities available in the District, and appropriate services needed by Student. As a result, Student's Parents were lulled into not asserting claims on behalf of Student, a situation that did not change, until the Spring of 2007 when his Parents learned for the first time that Student was not making more than de minimis progress.

IV.) DO ANY OF THE EXCEPTIONS IN THE IDEA APPLY, INCLUDING, A) SPECIFIC MISREPRESENTATION, AND B) FAILURE TO PROVIDE MANDATED INFORMATION?

ANSWER: The exceptions in the IDEA apply to Student's case, including, a) specific misrepresentation, and b) failure to provide mandated information.

The IDEA 2004 contains an explicit timeline for filing a due process hearing. A parent or LEA must request a hearing within two years of the date the parent or LEA either knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing under this part, in such time as the State Law allows. 20 U.S.C. 1415(f) (1) (A) – (D). This timeline does not apply, however, if a parent was prevented from requesting a hearing due to

“specific misrepresentations by the LEA that it had resolved the problem forming the basis of the complaint; or the LEA’s withholding of information from the parent that was required under this part to be provided to the parent.” 20 U.S.C. 1415(f) (3) (D).

While there is little case law interpreting this statutory limitation, the Regulations from Secretary of the Department of Education (hereinafter, "Regulations") explain this provision. 71 F.R. § 46540-01 (August 14, 2006). With respect to the two-year time period, the Regulations provide that it is "clear that a due process complaint must allege a violation that occurred not more than two years before the date the parent or public agency knew, or should have known, about the alleged action that forms the basis of the due process complaint." 71 F.R. § 46540-01 at 46697 (August 14, 2006). The Regulations further provide that "hearing officers will have to make determinations, on a case by case basis, of factors affecting whether the parent 'knew or should have known' about the action that is the basis of the complaint." 71 F.R. § 46540-01 at 46706 (August 14, 2006). Thus, the IDEA statute of limitations is triggered when the parent knew or should have known about the action that forms the basis of the complaint.

Section 1415(f)(3)(D) enumerates two exceptions to the statute of limitations, providing in relevant part that the statute of limitations: shall not apply to a parent if the parent was prevented from requesting the hearing due to (i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or (ii) the local educational agency's withholding of information from the parent that was required under this subchapter to be provided to the parent. 20 U.S.C. § 1415(f)(3)(D) (2005).

The Regulations further provide that the drafters declined to specifically define "misrepresentations" as used in the Act, explaining that "[w]e do not believe that it is appropriate to define or clarify the meaning of "misrepresentations," as requested by the commenters. Such matters are within the purview of the hearing officer." 71 F.R. § 46540-01 at 46706 (August 14, 2006). Further, "[i]f the complaining party believes that the timeline in [20 U.S.C. 1415(f)(3)(C)] should not apply, the complaining party would need to ask the hearing officer to determine whether an untimely due process complaint can proceed to hearing based on misrepresentations by [the district]. The hearing officer would then determine whether the party's allegation constitutes an exception to the applicable timeline." 71 F.R. § 46540-01 at 46706 (August 14, 2006).

Accordingly, the application of the exceptions in Student’s case is a three-pronged analysis: first, did either of the listed instances occur; second, what is the meaning of “misrepresentations” in the instant matter, and third, did those occurrences prevent Student’s Parents from filing for due process?

The following are relevant based on the factual evidence of record:

A. In The Instant Matter, The District Withheld From Student’s Parents Prior Written Notice When The District Proposed Or Refused To Alter Student’s Educational Placement. 20 U.S.C. § 1415(b)(1)(C). The District changed Student’s educational placement multiple times, at District convenience and without notice. The Parents provided evidence that Student’s inappropriate behaviors increased, speech and language skills deteriorated, and achievement in the form of his educational progress, such as his PASA

scores diminished. The District failed to hold mandated IEP meetings with required IEP content and participants for Student that resulted in a denial of FAPE.

The IDEA statute of limitations exceptions apply to Student and his Parents. The District failed to provide Student's Parents appropriate mandated information, so as to alert them to Student's lack of meaningful educational progress. This ongoing failure to provide mandated information created a vacuum such that the Parents were unable to learn of or discover Student's failure to make meaningful educational progress (HO 6, pages 1- 3).

B. The District Specifically, Intentionally, And Flagrantly Misrepresented Data To The Parents. § 615 (f)(3)(E) (I) (II) (III). Misrepresented data to the Parents occurred in the form of speech and language progress reports that altered IEP goals and misrepresented Student's progress in a key area of Student's needs as an eligible student -his receptive and expressive communication. The District also misrepresented to the Parents Student's behavioral progress, when, in fact, his behavior did not progress and in fact, deteriorated such that his self-abusive behaviors persisted/increased. The District misrepresented Student's IQ score and adaptive behavioral needs without evaluating him. The District misrepresented Student's achievement gains, as reflected through his state assessment scores.

C. District Actions Impeded The Parents From Filing For Due Process. The District's own actions prevented or hindered Student's Parents from asserting Student's claims in a timely manner. District actions that had the effect of lulling his Parents into failing to file a timely claim on behalf of Student, were specifically in contravention of the clear requirements of the IDEA (i.e., prior written notice when it proposed or refused to alter a placement, notification of parental rights, and evaluation of Student as a student with disabilities in all areas of his suspected disability). 20 U.S.C. 1414.

V.) DOES THE CONTINUING VIOLATION DOCTRINE APPLY?

ANSWER: The common law doctrine of "continuing violation" is no longer applicable to Student's IDEA claims because the exceptions to the statute of limitations set forth in the IDEA and its Regulations are the exclusive exceptions to the statute of limitations. (*J.L., et al. v. Ambridge Area School District*, 2008 U.S. Dist Lexis 13451 (W.D. Pa,2008) IDEA Regulations explain that "the Act provides explicit exceptions to the timeline for requesting a due process hearing. [20 U.S.C. § 1415(f)(3)(D)] incorporates these provisions. These exceptions do not include when a violation is continuing or where a parent is requesting compensatory services for a violation that occurred not more than three years from the date that the due process complaint was filed." 71 F.R. § 46540-01 at 46697 (August 14, 2006). The drafters further explained that "[i]t is not necessary to clarify that common-law directives regarding statutes of limitations should not override the Act or State regulatory timelines, as the commenters recommended, because the Act and these regulations prescribe specific limitation periods which supersede common law directives in this regard." 71 F.R. § 46540-01 at 46697 (August 14, 2006).

Importantly, in the Parents complaint, in addition to violations under the IDEA, Student's Parents alleged denial of FAPE, pursuant to violations of section 504 of the Rehabilitation Act ("§ 504") 29 U.S.C. §§ 701, *et. seq.* (1998), as amended and 29 U.S.C. 704 (1998) and 29 U.S.C. § 794(a) (2002); and the Americans with Disabilities Act ("ADA") 42 U.S.C. §§ 12101, *et seq.*, (1990).

Because his Parents raised a claim of discrimination and were able to show that Student suffered discrimination, the *Continuing Violation Doctrine is applicable to Student's section 504 and ADA claims*. The Parents claimed that Pennsylvania law for discrimination tolls the running of a statute of limitations until the Parents actually discover the harm caused by an earlier inflicted injury. The Pennsylvania minority tolling statute applies to Student's claims of discrimination under section 504 and the ADA. The statute of limitations is tolled for a minor's claim of discrimination. 42 Pa. C.S.a. § 5544 (b).

The following are relevant based on the factual evidence of record:

A. The Continuing Violation Doctrine permits Student to pursue his claim, as the injury became apparent only in light of later developments. The District's failure to ensure that Student received an appropriate education, in his LRE setting from 2002 through October of 2007 is an ongoing continuing practice, and gives rise to the Continuing Violation Doctrine under section 504 and the ADA. The failure to provide mandated data, such as required quarterly progress reports, notices of intent to evaluate, procedural safeguards, additional data requested by the MDT and IEP teams, coupled with the failure to implement his 6th and 7th grade IEPs in his LRE that would provide Student an equal opportunity to participate, corroborate the fact that the District failed to provide the Parents with mandated data necessary for the Parents to participate in the IEP process thereby tolling the applicable filing deadline for Student's claims of discrimination under section 504 and the ADA. Importantly, *District actions prevented the Parents* from timely filing.

B. The Parents raised a discrimination claim on Student's behalf and met criteria for a claim under Section 504 and the ADA.

Student's Parents explicitly raised a discrimination claim in their request for the due process. In Student's case, through a highly factual inquiry, this Hearing Officer has determined that District prevented Student's Parents from filing a due process complaint, based on their federal claims, due to lulling the Parents into inactivity. Student's Parents have provided highly factual and credible evidence that they did not know of any violations that formed the basis of their complaint under federal discrimination laws until the Spring 2007.

VI. DID THE DISTRICT DISCRIMINATE AGAINST STUDENT BY DENYING HIM FAPE?

ANSWER: Student's Parents initially raised their discrimination issues in a multi-year claim (HO 5, HO 6, HO HO9, HO10, HO12, HO13) and were able to show that the District discriminated against Student by denying him a FAPE.

Students with disabilities are protected from discrimination on the basis of their disabilities by section 504 of the Rehabilitation Act of 1973, 20 U.S.C. §794 (“Section 504”), and its implementing regulations, 34 C.F.R., Part 104. Section 504 prohibits discrimination by setting forth the following: “No otherwise qualified handicapped individual in the United States...shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination in any program or activity receiving federal financial assistance.” *Rehabilitation Act of 1973, Section 504*, 29 U.S.C. § 794(a).

Section 12132 of the ADA provides that “[s]ubject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132 (1990). *See also Jeremy H., 95 F.3d at 279* (“[the ADA] ... extends the nondiscrimination rule of *section 504* of the Rehabilitation Act to services provided by any 'public entity' (without regard to whether the entity is a recipient of federal funds)").

The following are relevant based on the factual evidence of record:

A. As An Eligible Student Under Chapter 14 In Pennsylvania, Student May Use The Procedures For Requesting Assistance Under 22 Pa. Code § 15.8(A) (Relating To Procedural Safeguards) To Raise Claims Regarding Denial Of Access, Equal Treatment, Or Discrimination Based On Handicap. Because he is raising a claim of discrimination, Student is a protected handicapped student. 22 Pa. Code § 15.2 (relating to definitions). Student must be afforded an equal opportunity to participate in his school programs and extracurricular activities to the maximum extent appropriate. Student needs reasonable accommodation in his regular education class. 45 C.F.R § § 104.34, 104.37. Student’s parents have standing to set forth claims under both section 504 and the ADA. Student’s Parents initiated administrative remedies as required under federal law prior to bringing such discrimination claims against the District. The Parents raised claims under section 504 and the ADA. The Parents have established discrimination under section 504 and have established bad faith or gross misjudgment on the District’s part, as required under the ADA.

B. The Parents established that the multi-year denial of FAPE is discrimination within the meaning of Section 504 and the American with Disabilities Act. Section 504 applies to prevent students with disabilities from being denied a free appropriate public education by a school district. *See Ridgewood, 172 F.3d at 253* (quoting *W.B., 67 F.3d at 492-493*) (“We have held that there are few differences, if any, between IDEA's affirmative duty and § 504's negative prohibition and have noted that the regulations implementing § 504 require that school districts 'provide a free appropriate education to each qualified handicapped person in [its] jurisdiction.'”).

The Third Circuit Court of Appeals has said in several cases that there are few differences, if any, between the IDEA's affirmative duty to educate an eligible student with a disability and the Rehabilitation Act's

prohibition in Section 504 of discrimination against a handicapped individual. *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238, 253 (3d Cir.M.1999); *W.B. v. Matula*, 67 F.3d 484, 492 (3d Cir.M.1995). In *Ridgewood*, the Third Circuit held that "the failure to provide a free appropriate public education violates IDEA and therefore could violate Section 504." *Ridgewood*, 172 F.3d at 253. The holding in *Ridgewood* has been interpreted to stand for the proposition that the failure to provide FAPE is not per se discrimination under section 504, and that to prevail, Parents must still establish "all of the elements of a prima facie case under [section 504]." *Indiana Area School District v. H.H.*, 428 F.Supp.2d 361, 364 (W.D. Pa. 2006).

In *Tereance D. by Wanda D. v. School Dist. of Philadelphia*, (07-4166, February 13, 2008), the U.S. District Court, Eastern District of Pennsylvania, determined that a parent did not need to prove intentional discrimination to prevail on her Section 504 and ADA claims against a Pennsylvania district. The court concluded that the district's alleged failure to provide the student FAPE, if true, would make the district liable for discrimination. The court acknowledged that the parent did not allege intentional discrimination by the district, but explained that such a showing was not necessary under *W.B. v. Matula*, 23 IDELR 411 (3d Cir. 1995), *abrogated on other grounds by A.W. v. Jersey City Pub. Schs.*, 47 IDELR 282 (3d Cir. 2007).

C. Student's Parents Need Not Prove That The Discrimination Requires The Element Of Intent. See, *Ridgewood*, 172 F.3d at 253. In the instant matter, this Hearing Officer, however, finds a denial of a FAPE and applies those same facts in finding a claim for discrimination. See also *K.S. v. Fremont Unified School District*, 47 IDELR 222 (N.D. Ca. 2007). The instant facts rise to the level of discrimination. Under a civil rights statute such as Section 504, a plaintiff must prove: (1) that the actions in question were taken by the actor on the basis of disability (or other classification in the civil rights statute), (2) that the alleged discrimination was pervasive and regular, and (3) that the actions were objectively seen as discrimination, (*i.e.*, that the actions would have had an exclusionary effect on a reasonable person with ordinary sensibilities in the same position). *Kumin v. Sears Roebuck & Co.*, 175 F.3d 289, 293 (3rd Cir. 1999); *Andrews v. City of Philadelphia*, 895 F.2d. 1469, 1482 (3rd Cir. 1990).

Student's Parents have set forth sufficient facts to establish that Student:

(1) is disabled as defined by the Act; (2) is otherwise qualified to participate in school activities; (3) the school or the board of education receives federal financial assistance; (4) was excluded from participation in, denied the benefits of, or subject to discrimination at the school; and (5) the school or the board of education knew or should be reasonably expected to know of his disability. *H.H.*, 428 F. Supp.2d at 363 (citing *W.B.*, 67 F.3d at 492).

The record evidences that Student's Parents specifically articulated and demonstrated instances where Student was excluded from participation in, denied the benefits of, and was subjected to discrimination from the District's failure to provide FAPE for the 2002/2003 school year through the October 2007 school year. While the Parents are not required to establish intentional discrimination, the Parents' complaint sets forth

sufficient facts to establish a prima facie case of discrimination under *section 504* and the ADA. Student was excluded from participation in school in his LRE during Mr. O's class. Mr. O's was a more restrictive Full-Time placement, without the benefit of mandated progress reports (NT 650-651). Contrary to Student's NOREP, Student was not permitted in regular education classes and never received reasonable accommodations in regular education classes (NNT 646-650). While Student was in the Life Skills Class 1,775 minutes a week, Mr. O only worked with Student 375 minutes a week (NT 674-676).

During Student's participation in Mr. O, Ms. S, and Ms. B's classes, Student 's disabilities were inadequately accommodated so as to hamper his equal opportunity to participate due to inappropriate behavioral support and lack of meaningful, equal opportunities in academics and speech and language services. The failure to implement the behavior plan throughout the school day, on the bus and on the field trip, also deprived Student of meaningful, equal educational benefit in Student's related services (P2, P30). Ms. B's actions substantiated specific and deliberate IEP misrepresentations to Student's Parents, who were informed that Student's achievement and behavior progressed. Ms. T altered Student's speech and language progress reports over the period she served as Student's clinician, also substantiating specific and deliberate IEP misrepresentations (P6, P7, P16, P17; NT 965-995). Rather than correct the problem through the IEP process, Ms. T denied Student's equal opportunity benefits to participate by unilaterally terminating a significant segment of Student's IEP speech and language services while his speech continued to remain unintelligible (NT 989; P7, P17,P17a,P18,P18a).

Student was denied participation in school services due to a lack of the implementation of appropriate IEPs. His educational programs throughout the years were not reasonably calculated to provide him with meaningful benefit and he did not progress through his educational programs (P6, P7, P8, P34, P52). The evidence also proves that the progress reports and school records misrepresented Student' present levels, progress and unique needs (P15, P16, P17, P17A, P18, P18A, P19). The facts establish that the information concealed and obfuscated the inconsistent facts such that reasonable parents like the [redacted]s, would likely be confused or misled by the recently discovered lack of child-centered data.

Student's Parents have sufficiently shown facts that the District excluded Student from participation in school and denied him the benefits of a FAPE. By not being provided appropriate academics, speech and language services, and/or behavioral support that contributed to Student's meaningful progress, the District subjected Student to discrimination at school. The Parents have made a prima facie case of the elements required for a cause of action under Section 504. Student was impermissibly discriminated against, in contravention of Section 504 and Chapter 15 of the Pennsylvania School Code. The District's continuing failure to meet Student's needs in each school year from his sixth grade (i.e., 2005/2006 school year), his seventh grade (i.e., 2006/2007 school year), and his eighth grade (2007/2008 school year up to October 9, 2007) constituted multiple acts of discrimination, and a continuing violation of Student's rights under Section 504 and Chapter 15 of the Pennsylvania School Code. The District's discrimination against Student is part of

an ongoing pattern of discriminatory conduct initiated in 2002 that only became apparent to Student's Parents in Spring 2007 when his Parents discovered for the first time that Student was not making meaningful educational progress in his current program (HO 6, page 3).

D. The Parents Have Shown Denial of FAPE Under a Repeated Conduct Analysis.

Regarding the Parents' ADA claim, the Parents have established *bad faith or gross misjudgment* by the District as required to demonstrate a violation of the ADA. The District acted with bad faith and exercised gross misjudgment with respect to Student's educational needs sufficient to make a finding of discrimination under the ADA. Based on bad faith or gross misjudgment, Student's teachers and therapists implemented inappropriate IEPs in an educational setting that was not his LRE. Student suffered, his behavior declined, his speech and language needs deteriorated, and Student's achievement diminished. District actions constituted a series of discriminatory acts such that Student's Parents were unaware of the need to assert their rights prior to the Spring of 2007, due to the District's misrepresentation of facts, and procedural violations of written prior notice, with instances of the discriminatory practice occurring as a part of a continuing pattern of discrimination. (See *Bullington v. United Air Lines*, 186 F.3d 1301, 1310 (10th Cir. 1999). Because Student's claims involve a federal right, federal law controls issues of accrual. (See *Industrial Constructors Corp. V. United States Bureau of Reclamation*, 15F.3d 963, 1994. *C10.41406 Versus Lam.com* 29-30 (10th Cir. 1994).

E. The Morgan Analysis Is Relevant. The Continuing Violation Doctrine is applicable to 504/ADA claims (See *Bullington*, 186 F.3d 1301), and applies when *repeated conduct* is involved. See *Hammond v. Dist. of Columbia*, 35 IDELR 121 (D.C. 2001). Under a "*Morgan*" analysis, the Continuing Violation Doctrine will not operate to extend the filing period for discrete acts of discrimination. See *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101. Under *Morgan*, however, the filing period is still subject to the equitable doctrines of waiver, estoppel, equitable tolling and laches. *Id.* That is, claims concerning implementation of Student's IEP, which involve many minor daily events too small in themselves to be actionable, and involve multiple failures to provide agreed-upon services but may not relate to specific dates of agreement, and relate to unanticipated conditions in the school and classroom, involve *repeated conduct* which cannot be said to occur on a single day, but which combine to constitute a single course of discriminatory conduct. For these IEP implementations and failures to implement Section 504 and ADA claims, the *Continuing Violation Doctrine as set out in Morgan*, applies in Student's case because the District misconduct constituted repeated conduct in serial acts. The Third Circuit has instructed that courts should consider the following factors in weighing the application of the Continuing Violation Doctrine:

(1) subject matter -- whether the violations constitute the same type of discrimination; (2) frequency -- whether the acts are recurring or more in the nature of isolated incidents; and (3) degree of permanence -- whether the acts hold a degree of permanence which should trigger the plaintiff's awareness of and duty to assert his/her rights and whether the consequences of the act would continue even in the absence of a continuing intent to discriminate. *Id.* (citing *Brenner*, 927 F.2d at 755 n. 9). "A continuing violation is

occasioned by continual unlawful acts, not continual ill effects from an original violation." *Ocean Acres Ltd. v. Dare County Bd. of Health*, 707 F.2d 103, 106 (4th Cir. 1983).

This Hearing Officer finds that District's serial actions concerning changes in Student's educational assessments, educational program and placement without parental notice were considered abuses of process, in violation of statutory rights, and not in the nature of an isolated incident. Student's IEPs were not calculated to provide educational benefit to Student in his LRE. Student was denied a FAPE, with resulting loss of equal access and equal opportunity to participate over time. See, *Pittman v. Continental Airlines*, 35 F.Supp. 2d at 441. The District's violations do not consist simply of isolated or sporadic acts of discrimination. See, *Rush v. Scott Specialty Gases*, 113 F.3d at 481.

The Rehabilitation Act adopts the scheme of "remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964," 42 U.S.C. § 2000d *et seq.*, to remedy alleged violations of Section 504 by recipients of federal funding. 29 U.S.C. § 794a(a)(2). Title VI provides for federal funding to be terminated if an entity receiving assistance fails to comply with its requirements. 42 U.S.C. § 2000d-1. Title VI does not, however, contain an express private right of action. Rather, the Supreme Court has found an *implied* right of action under the statute and Congress has acknowledged this right in amendments to the statute, "leaving it 'beyond dispute that private individuals may sue to enforce' Title VI." *Barnes v. Gorman*, 536 U.S. 181, 185 (2002) (quoting *Studentander v. Sandoval*, 532 U.S. 275, 280 (2001)). "Thus Congress, in essence, provided a private right of action under Section 504 by incorporating Title VI's 'remedies, procedures, and rights' into the statute." *Three Rivers Ctr. for Indep. Living v. Hous. Auth. of Pittsburgh*, 382 F.3d 412, 425-26 (3d Cir. 2004).

The remedies for violation of Section 504 "are coextensive with the remedies available in a private cause of action brought under Title VI of the Civil Rights Act of 1964." *Gorman*, 536 U.S. at 185. These remedies include compensatory damages, injunctive relief, and other forms of relief traditionally available in suits for breach of contract. *See id.* at 187.

VII.) IS STUDENT ELIGIBLE FOR IDEA REIMBURSEMENT FOR AN INDEPENDENT EDUCATIONAL EVALUATION?

ANSWER: Student's Parents are entitled to the IEE performed by Mr. K at the District's expense.

In the instant matter, the Parents, through counsel, hired Mr. K to observe Student's interactions in the District placement; review Student's evaluations, IEPs, and records; and give an opinion based upon those interactions and review. The District did not agree to fund Mr. K's IEE.

The following are relevant based on the factual evidence of record:

A. Mr. K's IEE is viable under the IDEA. The District argued that the Report of Mr. K dated October 12, 2007 is not an independent educational evaluation as contemplated under IDEA for a number of reasons. First, Section 300.15 of the Regulations defines evaluation as "procedures used in accordance with Sec. Sec. (sic) 300.304 through 300.311 to determine whether a child has a disability and the nature and extent

of the special education and related services that the child needs." Section 300.304 sets forth the Evaluation procedures and requires various methods of assessment to determine whether the child is a child with a disability, and to determine the content of the child's IEP.

A review of Mr. K's report finds that he did use information "provided by the parent, that may assist in determining—

(i) whether the child is a child with a disability under 300.8; and (ii) the content of the child's IEP, including information related to enabling the child to be involved in and progress in the general education curriculum." See, §300.304(b) (1).

B. The District did not define its agency criteria for an IEE, and has an affirmative obligation to do so. The statutory requirement is such that the District must "consider" the IEE when making decisions related to the provision of Student's FAPE; however, the District does not have to accept the findings or act on the recommendations. 34 C.F.R. §300.503(c)(c). What does obligate the District, however, is §300.502(b)(2), the statutory requirement stating,

"If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either—

- (i) file a due process complaint to request a hearing to show that the evaluation is appropriate; or
- (ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria."

In the instant matter, the District did not provide any evidence that the District filed a due process complaint concerning Mr. K's IEE. Also, during the course of Student's due process hearing file by the Parents, the District failed to provide any data related to its agency criteria and an IEE. The District failed to defend its evaluation at the due process hearing. *Warren G.*, 190 F.3d at 87. The evidence is beyond a preponderance that the District failed to show that it had tested Student in areas of suspected disabilities. The IEE uncovered disabilities that the evaluation hadn't even considered (P2). For example, Mr. K pointed out that Student's behavioral needs were never assessed, his speech needs were untested, and his assistive technology needs were untested and otherwise ignored. In *Glendora Unified Sch. Dist.*, 49 IDELR 172 (SEA CA 2007) the hearing officer found that the failure alone amounted to a denial of FAPE in the LRE. In Student's case, the District in 2004 stated that Student needed an AT evaluation, it was three years later, after Mr. K observed Student that an AT evaluation was completed and then hidden from the team and the Parents (P65, P66).

Mr. K offered expert testimony based upon his prior experiences and training in special education. Mr. K's IEE contributed to the IEP team's knowledge of Student, Student's strengths and needs, and Student's placement considerations.

VIII). DID THE DISTRICT PROVIDE STUDENT AN APPROPRIATE EXTENDED SCHOOL YEAR DURING THE SUMMER OF 2006 AND THE SUMMER OF 2007, AND WITH THE POSSIBLE INCLUSION OF EXTENDED SCHOOL YEAR IN PRIOR YEARS?

ANSWER: The District did not provide Student an appropriate ESY during the years from the 2003/2004 school year through the summer of 2007.

The following are relevant based on the factual evidence of record:

A. *The District Did Not Collect Formal Regression/Recoupment Data As Called For Under Federal And State Law.* Extended school year services ("ESY") are special education and related services operated by the District beyond the normal school year if necessary to provide a student with a FAPE. See 34 C.F.R. § 300.309(a)(2). Whether a child qualifies for ESY must be raised at every IEP team meeting. See 22 Pa. 14.132. Pennsylvania law, at 14.132(2), requires the IEP team to consider whether, when formal education is interrupted, "the student reverts to a lower level of functioning" ("regression"), "whether the student has the capacity to recover the skills or behavior patterns in which regression occurred" ("recoupment"), and "[w]hether the student's difficulties with regression and recoupment make it unlikely that the student will maintain the skills and behaviors relevant to IEP goals and objectives." 22 Pa. 14.132(2)(i)-(iii). The District's failure to collect formal regression/recoupment data during weekends and vacations "resulted in the inability of the IEP team to consider" these factors.

B. *Student's ESY IEPs Were Insufficient.* Student's 7th grade ESY IEP failed to provide goals, objectives or Specially Designed Instruction (P7, P26). The 5th grade ESY IEP, like the 7th grade IEP, failed to include present levels of education, objectives, goals, a behavior management plan, AT services, specially designed instruction or occupational therapy (P3). At no time did the staff provide the parents with data about Student's level of regression (P5).

District personnel testified that, contrary to the regulation, Student's 2005 ESY IEP team failed to include the following mandated team members: speech education teacher, regular education teacher or an occupational and speech therapist (NT 642-643). There was testimony by personnel that the ESY IEP failed to include present levels, or description of the related services. Personnel could not explain why the mandated information about Student's assistive technology needs or his behavioral needs was completely omitted from the IEP (NT 642-646).

The District did not provide mandated information on Student's IEPs in the March 2005 ESY IEP including the signature of a regular education teacher, occupational therapist and speech language clinician. This IEP did not address special consideration factors, had no present education levels, no statement how the student's disability affects him; and whether the IEP has determined that ESY is necessary. There were no listings of specially designed instruction, or of related services, frequency, location or anticipated duration of related services. The speech and language and transportation services, as well as program modifications were absent (NT 642-648).

Contrary to the applicable regulations, all of Student's ESY IEPs, from the 2003/2004 school year through the 2006-2007 ESY program, lacked levels of regression and accordingly were not reported to his Parents. 22 Pa. Code §141.132. The teachers also testified that they did not review the data from Student's privately funded ESY placements. Accordingly, the ESY IEPs failed to meet his needs.

CONCLUSIONS OF LAW

- The District failed to appropriately evaluate Student's unique needs. (34 CFR 300.303(4)(c)).
- The District failed to provide Student with a free and appropriate public education in the 3rd - 2002-2003, 4th - 2003-2004, 5th - 2004-2005, 6th - 2005-2006, 7th - 2006-2007 grade school years as well as through and including August, September and October of 2007.
- Although the parents disapproved the proposed 7th grade life skills program and placement, the District failed to return Student to his 6th grade Autistic Support class. (34 CFR 300.507, et seq.)
- The District failed to provide the parent-mandated information regarding Student's 6th grade speech and language program. (34 CFR 300.320-324).
- The 6th grade speech and language therapist failed to implement the agreed upon 6th grade speech and language goals and objectives. (34 CFR 300.320-324).
- The failure to implement the agreed upon 6th grade speech and language goals denied Student a FAPE contrary to the regulations. (34 CFR §300.101).
- In 3rd, 4th, 5th, 6th, and 7th grade the District changed Student's program and placement and then developed an IEP for the new placement. (34 CFR §300.320-324).
- The failure to develop an IEP prior to placement violates the IDEA. (34 CFR §300.33).
- The District failed to provide Student an appropriate extended school year program in 5th, 6th, and 7th grade. (22 Pa. Code §14(132); 34 CFR §300.304).
- Contrary to the regulations, Student's IEP and MDT teams failed to include a school psychologist, a mandated member of an IEP team. (22 Pa. Code §14.124; 34 CFR §300.303).
- The RRs failed to include mandated information from a variety of sources regarding assessment of Student's unique need and progress. (22 Pa. Code §14.123-124; 34 CFR §300.301-306).
- The goals and objectives in Student's IEPs are vague and immeasurable. (34 CFR §300.320-324; 14 Pa. Code §14.131-132).
- The present levels set forth in Student's 3rd, 4th, 5th, 6th and 7th grade IEPs do not relate to or support the proposed goals or objectives in each. (22 Pa. Code §14.131-132).
- The failure to conduct a proper and appropriate evaluation of Student's unique needs denied the team and Student essential information so as to enable him to receive meaningful educational progress. (22 Pa. Code §14.131-132; 34 CFR §300.320-324).
- Contrary to the applicable regulations, the District failed to provide the family with progress reports for the first quarter of the 3rd, 4th, 5th, 6th, and 7th grade school years. (22 Pa. Code §14.131-133).
- The following procedural violations interfered with and prevented meaningful Parent participation in the development of Student's programs: failing to provide progress reports, failing to complete the RR within 60 days, failing to provide the Parents with a copy of the AT report, failing to implement the IEPs, and failing to implement the BIP section of the IEPs. (34 CFR §300.513(2)(i); 22 Pa. Code §14.123-124).

- Contrary to the regulations, the District predetermined Student's placement, without benefit of an evaluation, in 2002-2003, 2003-2004, 2004-2005, 2006-2007, and 2007-2008. 34 CFR §300.320; §300.114-117; 22 Pa. Code §14.123-124.
- The failure to provide a FAPE under the IDEA is discrimination within the meaning of Section 504. (42 CFR §104.31).
- The failure to appropriately evaluate Student is discrimination within the meaning of Section 504. (42 CFR §104.35(a)-(d)).
- The failure to appropriately reevaluate Student is discrimination within the meaning of Section 504. (42 CFR §104.35(d)).
- The failure to implement Student's IEPs is discrimination within the meaning of Section 504. (42 CFR §104.33(a)-(c)).
- The failure to conduct a preplacement evaluation prior to changing Student's educational placement is discrimination within the meaning of Section 504. (42 CFR §104.35(a)).
- The District discriminated against Student when it failed to use testing and other evaluation materials that were validated for the specific purposes of assessing his educational, emotional, social and behavioral needs. (42 CFR §104.35(b)(1)-(3)).
- The failure to implement Student's pendant IEP after the family initiated a due process hearing is discrimination within the meaning of Section 504. (42 CFR §104.36).

The evidence of record proves that the evaluations and the IEPs were procedurally and substantially flawed and are meaningless. District failures deprived and interfered with the Parents' substantive and procedural rights and Student's right to a FAPE. Student has not made any meaningful progress in the form of significant learning. The IDEA exceptions to filing a due process claim apply in Student's hearing. The District's failures, including omissions and acts of concealment denying FAPE, also tolled the applicable filing deadline in the Parents' section 504 and ADA claims.

**HEARING OFFICER ORDER:
SPECIAL EDUCATION HEARING FOR STUDENT , FILE 8096/07-08 LS
NORTH ALLEGHENY SCHOOL DISTRICT**

1. AND NOW, this 2nd day of April, 2008, having found that the District failed to provide Student with a Free Appropriate Public Education from 2002 through October 9, 2008, I find by the preponderance of the evidence that the Parents have meet their burden of proof under either exception to the IDEA filing deadline. 20 U.S.C. 1415(f) (3) (D).

2. I, also, find that the under the instant facts, pursuant to section 504 and the ADA, the Parents have established a continuing violation which also tolls that applicable filing dead line *29 U.S.C. § 794(a) (2002); 42 U.S.C. §§ 12101, et seq., (1990); 42 Pa. C.S.a. § 5544 (b)*.

3. To remedy the multi-year denial of FAPE I hereby order the following.

I hereby **ORDER** the following compensatory education as appropriate relief:

a. 990 hours for 3rd grade;

b. 990 hours for 4th grade;

c. 990 hours for 5th grade;

d. 990 hours for 6th grade;

e. 990 hours for 7th grade; and,

f. 6 hours per day beginning August 28, 2007 up to and including October 9, 2007 of Student 8th grade year.

4. I further **ORDER** that the Parents shall have complete and absolute control as to the use of the compensatory hours provided that the hours are expended on developmental, corrective, remedial education, special education or related services that meet Student 's then unique needs.

5. The District is **ORDERED** to convert the above hours into the {stipulated} fund based on calculation of staff salaries including benefits, costs for transportation, tuition and all other associated or related service costs that the District would have expended in each of the above years so as to enable Student to receive appropriate relief within the meaning of the IDEA, Section 504 of the Rehabilitation Act, and the Americans with Disabilities Act (HO 19, pages 1-2; P66).

6. I **FURTHER** find that the District failed to provide Student with a comprehensive individual education evaluation. I find that the parents' Independent Education Evaluation offered new and important information about Student 's unique needs. I hereby **ORDER** the District to reimburse the Parents for their out-of-pocket costs in securing Mr. K's independent evaluation.

7. I find that the District failed to provide Student with appropriate extended school year services for the 2003-2004, 2004-2005, 2005-2006 and the 2006-2007 extended school year programs.

8. I find that failure to provide Student appropriate ESY services is a violation of the IDEA and section 504/ADA. To correct these violations, I hereby **ORDER** the District to provide Student with compensatory education equal to 6 hours per day for 6-week program providing services for 5 hours per day for each of the above ESY periods. The total awarded extended school year compensatory education services is 600 hours (HO 19, pages 1-2; P66).

9. I also find the multi-year denial of FAPE is discrimination within the meaning of Section 504 and the American with Disabilities Act. As the above relief is comprehensive, I do not award any further equitable relief.

Date: _____

Dorothy J. O'Shea, Ph.D.
Hearing Officer