

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

Pennsylvania Special Education Hearing Officer

DECISION

Child's Name: CI

Date of Birth: xx/xx/xx

Dates of Hearing:

January 25, 2008, January 29, 2008, February 12, 2008, February 13, 2008, April 8, 2008, April 9, 2008, April 14, 2008

CLOSED HEARING

ODR #8189/07-08 AS

Parties to the Hearing:

Ms.

Council Rock School District
The Chancellor Center
30 North Chancellor Street
Newtown, PA 18940

Representative:

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Date Record Closed:

April 28, 2008

Date of Decision:

May 13, 2008

Hearing Officer:

William F. Culleton, Jr., Esquire

INTRODUCTION AND PROCEDURAL HISTORY

Student is a preteen age eligible resident of the Council Rock School District (District). Student is identified with autism and is placed in the autistic support class at the District's Elementary School (School). The Student is diagnosed also with low to moderate mental retardation. (NT 32-35; S-1, 14.) Student has an extensive home program and receives special education services at school.

The Parent requests an order that the District's program and placement is inadequate and directing the District to place the Student in a full time residential setting. The Parent asserts that the Student is not able to generalize what Student learns in school to the home setting, and therefore Student needs a full time residential setting in order to generalize Student learning to all aspects of Student life. The District asserts that its program and placement are adequate and that the Student has in fact generalized Student learning to the home setting. The District also asserts that any reduction in the Student's learning at home is due to factors within the home that are not within the control of the District.

The Parent filed for due process in October 2007. A resolution session was convened on November 29, 2007, and no agreement was reached. (NT 29-30.) The hearing was held in seven¹ sessions from January 25, 2008 to April 14, 2008. The record closed upon receipt of written summations² with legal argument on the governing standard on April 28, 2008.

¹ One session was terminated after less than one hour because the Parent's witness, a District employee, became ill and was unable to attend on the day of the hearing. (NT 748.)

² These are marked and forwarded with the record as HO-1 ("Parents' Closing Argument") and HO-2 ("Closing Argument and Memorandum of Law of the Council Rock School District").

ISSUES

1. Does the Student need full time residential placement in order to receive an opportunity for reasonable educational benefit?
2. Should the hearing officer order the District to place the Student in a full time residential placement?
3. From March 13, 2007 until January 25, 2008³, did the District offer an appropriate program and placement?
4. From March 13, 2007 until January 25, 2008, did the District appropriately implement the offered program?
5. Should the hearing officer award compensatory education for the period of time from March 13, 2007 to January 25, 2008?

FINDINGS OF FACT

ACHIEVEMENT IN PREVIOUS SETTINGS

1. Prior to moving to the District in 2006, the Student was identified with autism in the [redacted] Public School District in [city redacted], [state redacted]. (NT 33-34; S-1.)
2. In [city redacted], the Student was placed in a small, self-contained class in a school specializing in education for children diagnosed with autism. The school utilized an Applied Verbal Behavior approach to instruction. The Student had speech and language therapy, occupational therapy and a behavior plan. The Student had home based program utilizing Verbal Behavior techniques. (NT 34-39; S-1, S-2.)
3. In July 2004, the Student's cognitive testing was considered invalid; Student's functional assessment was in the low range of functioning and the moderate deficit range in daily living skills. Both receptive and expressive language were below expectations for Student's age. Overall and academic achievement were very low compared to the Student's peers. The Student was rated as severely autistic. (S-1, 2.)

³ This time frame was specified by counsel for the Parent and there was no objection. Therefore the hearing officer adopted it. (NT 16-18, 28-29, S-30.)

4. While in the [redacted] School District, the Student exhibited distractibility, a lack of expressive language skills, and disruptive behaviors. Student needed one-to-one instruction with full prompting for most activities. Student exhibited disruptive behaviors, including running away, getting out of Student's seat and vocalizations. Student was noted to exhibit negative self talk. (NT 36, 38-44; S-2.)
5. While in the [redacted] School District, the Student was able to respond to questions, directions and cues. Student's instruction centered upon attention to task, verbal requests, labeling, simple "wh" questions, imitating utterances, following simple instructions and responding to greetings and to Student's own name. (S-2.)
6. At home in [city], the Student did not perform life skills including toileting, brushing teeth, and bathing. The Student did not exhibit social skills. The Parent complained that the school was using too much prompting, and that the Student was not manding with words or using spontaneous speech. (NT 139-140; S-2.)
7. In June 2005, the Parent expressed a concern to staff at [city] that the Student might need to be placed in a residential setting if Student's life skills did not improve. Parent was trying to motivate the staff there to increase the effort and to pressure the Student to learn at a faster rate. (NT141; S-3.)
8. The Student attained very few of Student's IEP goals at [city]. (NT 159-160.)

ACHIEVEMENT IN THE DISTRICT

9. The Parent is under extreme personal stress due to the fact that they are raising the Student alone, and has to be the Student's sole support as well. The Parent has not been able to make enough time available for the Student's unusually demanding home educational and parenting needs and the Parent's professional responsibilities. (NT 46-49, 51-53, 55-56, 121-124, 130-132, 138, 149-159, 214-224; S-2, S-3 p. 4, S-15 p. 1, S-25, S-31 p. 1, 4, 11, 12, 38, 40, 47, S-37e p. 22, 34, 99.)

10. The Parent was rarely present at either the school or the educational sessions at home, and did not scrutinize carefully the volume of written data that had been sent home routinely during two years of services from the District. (NT 385-393.)
11. The Student moved to the District in January 2006. (NT 37; S-9.)
12. The District placed the Student in its autistic support class in the Elementary School, with inclusion for lunch, recess, and some assemblies. The District implemented the pending IEP from [city] while it conducted an evaluation and a behavior analysis. (NT 142, 367-368; S-7 to S-10.)
13. The District offered an IEP in March 2006 and an IEP in March 2007. The March 2007 IEP set goals and objectives for mastery of higher or different skills than those established in the March 2006 IEP. (NT 281, 330-342, 369-371; S-10, S-30.)
14. Each IEP was based upon the skills identified and assessed in the ABLLS system, and teaching was based upon a system that was data driven. The March 2007 IEP contained some goals that were not based upon ABLLS. (NT 486-487, 1011-1012; S-32, S-36, S-37, S-38, S-39, S-48, S-51, S-52, S-53, S-56 to S-66.)
15. The District provided speech and language therapy, occupational and physical therapy, a positive behavior support plan, and services in the home of eleven hours per week. (NT 260-262; S-10.)
16. The home services were data driven and aimed at generalization of skills from the classroom setting to the home setting. (NT 417-422, 450-452, 572-574, 576, 630-637, 652-665.)
17. The District provided reverse inclusion as part of its programming, and the Student made significant progress in requesting, behavior and social skills in the reverse inclusion periods. (NT 311-312, 1198-1202.)
18. Programming was delivered by qualified professionals trained in research based methods. Staffing included a teacher and classroom aide for five students. (NT 357-361, 539-541, 596-599, 845-849,

933-936, 1001-1006, 1013-1014, 1097, 1150-1154, 1236-1248, 1253-1253.)

19. By March 2007, the Student had acquired a greater number of skills as measured by the ABLLS Skills Tracking System, as reflected by behavioral observations, and as reflected in the Present Levels of Functional Performance sections of the March 2006 and March 2007 IEPs for the Student. However, progress was incremental and slow. Slow progress is also caused by the Student's need for a period of time before Student is comfortable with new classes and surroundings from year to year. (NT 323, 441, 470-471, 493-494, 602-603, 612-613; S-10, S-30 p. 4 to 7 and 25 to 27, S-31 p. 7, S-38B, S-41, S-42.)
20. By March 2007, the Student had not attained the goals of Student March 2006 IEP. However, Student still made substantial progress in Student's education. (NT 481, 1016-1017.)
21. The Student has not met the Parent's hope that Student would be more manageable at home. This is the basis for the Parent's conclusion that the District has failed to provide meaningful educational benefit. (NT 175-176, 187-192, 220-222, 958.)

Attending, Reinforcement and Classroom Cooperation

22. The Student made substantial progress in attending during small group sessions and individual sessions during the 2006-2007 school year, including the ESY session in the summer of 2007. However, Student did not meet Student's IEP objectives. (NT 399-401, 558.)
23. By the end of the 2006-2007 school year, the Student was able to participate in the beginning and end of day classroom routines with reduced prompting, but had not met Student's IEP objectives. Nevertheless, Student made significant progress in this skill by January 2008, due to the substantial fading of prompts along the prompting hierarchy. (NT 416-417, 560-561, 604-608, 690, 1094-1097, 1263-1264; S-30, S-32, S-54, S-46.)

24. By January 2008, the Student was participating more spontaneously and independently and following directions better in morning class meetings. (NT 612-613.)
25. By January 2008, the Student had learned to work for non-edible reinforcers, look to Student's instructors for feedback, and work for praise and approval, a substantial advance. (NT 1029-1032; S-67 p. 30.)

Problematic Behaviors

26. In March 2007, the Student still exhibited problematic behaviors in school, including grabbing, tantrums, perseverating on food, self-stimulation, making noises, hair pulling and hitting herself on the head and chest. (NT 323-322; S-30.)
27. By January 2008, problematic behaviors had decreased substantially in school. (NT 494-495, 565-567, 646-649, 706-707, 1255-1263.)
28. At home, problematic behaviors decreased in the areas of tantrums, self injury, and aggressive behavior toward others, but not in the area of perseverating. (NT 76-82, 100-103, 1042, 1211.)
29. Some of the Student's behavior may have been a reaction to side effects of medications, to which the Student is prone. (NT 79-80, 103, 300-302, 315-316, 410-412; S-38E p. 4.)

Self Care

30. The Student had learned to drink from a straw and a cup, eat finger foods and utilize a spoon or fork. By March 2007 Student had learned to take Student's food to the table and clear Student's area of the table. Student could not cut with a knife. (NT 105; S-30 p. 6.)
31. By January 2008, the Student had not yet learned to cut Student's food with a knife. Student had not attained Student's IEP objectives. (NT 561; S-54 p. 10.)

32. The Student's toileting skills increased from March 2006 to March 2007 in that Student began to ask to go to the bathroom and was able to use a bathroom that was out of the classroom. (NT 394, 426-429.)
33. At school, the Student was able to use the toilet and inconsistently request to use it when needed; at home Student inconsistently asked to use the bathroom and had occasional accidents. Student was able to wipe self and wash Student's hands with prompting in school; at home Student could do these things but Student's Parent observed that Student was inconsistent and did not wash thoroughly. Student had not attained Student's IEP goals. (NT 69-70, 105-106, 214562-563; S-30 p. 6.)
34. By January 2008 the Student was able to follow a picture schedule with bathroom times in the schedule. Student inconsistently requested bathroom breaks spontaneously, and went to the bathroom outside the classroom by []self. This was a significant improvement. (NT 697-701; S-54 p. 11.)
35. In dressing, by March 2007, the Student could put on and remove pants, shirts, socks, shoes and coat; unzip zippers and zip up the zipper on Student's back pack. The Parent admitted that this was observed in the home. The Student had attained one IEP objective. (NT 109-111, 561; S-30 p. 6, S-54.)
36. By January 2008, the Student had made substantial progress, and was able to zip up Student's coat and fasten snaps on non-clothing items. (S-54 p. 10, S-67 p. 32.)
37. In March 2007, the Student was able to wash and dry Student's hands and blow Student's nose. (S-30 p. 6.)
38. By January 2008, the Student was able to perform the same level of skills. (S-54 p. 10.)
39. By the end of school year 2006-2007, the Student was able to navigate to another classroom with minimal prompting, a substantial improvement. (NT 405-406.)

Receptive Language

40. In March 2007, the Student was able to touch body parts and clothing; and select pictures by actions and by functions. (NT 271-274; qS-30 p. 4, 7.)
41. By January 2008, the Student was able to identify 30 items, touch two body parts and identify one person by going to that person. This represented mastery of one IEP objective, and progress on two others. In addition, the Student began working on fluency in discrimination, and responding to hand signals. (NT 678-685, 1034-1035; S-54 p. 2, S-67 p. 30.)
42. In November 2007, the Student had made inconsistent progress on Student's receptive language goals. (NT 543-544; S-42.)

Labeling

43. In March 2007, the Student was able to label ten or more reinforcers and label items when told their function. (S-30 p. 5.)
44. By January 2008, the Student was making slow progress in labeling various categories of objects and persons; Student had not mastered any of Student's objectives. (NT 555-556; S-54 p. 5.)

Intraverbals

45. In March 2007, the Student was able to identify animal sounds , various items by function, and answer some questions with personal information. (S-30 p. 5.)
46. By January 2008, the Student was able to master targets in filling in functions and had made progress in answering "wh" questions. This is one part of one objective of Student's IEP. (NT 556-557; S-54 p. 6.)

Expressive Language

47. By March 2007, the Student was able to spontaneously imitate various phrases, say words and say phrases. The Parent admitted that this was observed in the home. (NT 111-112; S-30 p. 5.)
48. By January 2008 the Student was able to spontaneously imitate various consonant and combined letter sounds, and spontaneously make requests on a daily basis. (S-54 p. 4, 5.)
49. The Student has not attained Student's spontaneous vocalizations goal. (NT 557; S-30, S-54.)

Requesting

50. By March 2007, the Student was able to request specific items and activities with reinforcer present and request an item not present when prompted; and spontaneously request without reinforcer. (S-30 p. 5.)
51. By January 2008, the Student was able to make both prompted and spontaneous requests, sometimes using three word phrases. Student had attained one objective on the IEP and had made progress in two others. Student had not attained the goal; however, Student had made significant progress, and had generalized the skills to another teacher. (NT 551, 554-555, 557, 689-690, 694-697; S-54 p. 5.)

Visual Skills

52. By January 2008, the Student had attained one objective in visual skills. Student made substantial progress on two others. Student has advanced to working on fluent matching and sequencing, and has had some success. (NT 690-692, 1033-1035; S-67 p. 30.)

Social, Play and Leisure Skills

53. In March 2007, the Student had the skill of allowing other children to touch toys, and was able to engage in appropriate behavior with peers, and listen to peers. (NT 398-399; S-30 p. 5.)

54. By the end of the 2006-2007 school year, the Student's social skills had improved substantially, but Student had not attained Student's IEP objectives. (NT 412-413, 557-558.)
55. By January 2008, the Student was able to initiate appropriate play with typical children, play games appropriately and follow instructions of other children in play. This was substantial progress. (NT 610-611, 621, 690; S-54 p. 7.)
56. After March 2007, Student had made significant progress in sports games under the instruction of the physical therapist provided by the District. (NT 533-537.)
57. By January 2008, the Student had not met Student's social interactions goals, but had met two objectives. (NT 558-559; S-30, S-54.)

Physical Movement and Imitation

58. By January 2008, the Student reached two of Student's objectives in physical imitating. (NT 545-549; S-30.)
59. In gross motor skills, by January 2008, the Student had attained one IEP objective. Student had increased the number of movements Student could imitate, responded to different types of instruction, and was able to imitate kinetic movements. (NT 563, 1035-1037; S-67 p. 30.)
60. In fine motor skills, by January 2008, the Student had attained three IEP objectives. (NT 563-564.)

Academic Skills

61. In March 2007, the Student had difficulty holding a pencil or crayon, and Student's skills were at the pre-writing level. Student was able to make a mark on paper, and to trace with physical prompts. (NT 319-320; S-30, S-38H p. 21-32.)

62. By January 2008, the Student could draw vertical and horizontal lines, trace straight and curved lines with hand over hand assistance and sometimes with minimal prompts, trace the letters of Student's name with light physical prompts, and do coloring with verbal prompts. The Parent observed some of this in the home. (NT 104, 106, 403; S-42 p. 9.)
63. In March 2007, the Student was able to match individual letters to letters on a word card. (S-30 p. 5.)
64. By January 2008, the Student had not made progress in this area, but had some sight word reading skills. (NT 403-404; S-54 p. 12.)
65. In March 2007, the Student was able to count by rote and count objects with prompting. (S-30 p. 5.)
66. By January 2008, the Student could rote count to twenty, but was matching names to only one numeral. (NT 403; S-54 p. 12.)

Generalization and Retention of Skills

67. The Student does not lose learned skills at night or over the weekend. (NT 705-706.)
68. By March 2007, data showed that the Student had generalized some of Student's classroom – acquired skills to the home setting. (NT 450-451, 491-492.)
69. In January 2008, the Student was able to generalize across stimuli, instructors, and environments within the School. Student could use Student's skills in groups and had generalized Student's language skills. (NT 712-713; S-30 p. 5.)
70. Home program data from the District and the home program teacher indicate that the Student was able to replicate skills from the classroom to the home in the areas of behavior, receptive language, intraverbals, imitating phrases and songs, matching, play skills, dressing, cleaning up after Student's snack, and making one word requests, toileting skills, holding a pencil, drawing lines, letter

identification, but not sorting, counting and (NT 739-797, 815-817, 824-825-832, 849, 865-870, 874-884, 889-898, 906-910.)

71. The Student generalized Student learning in the school and in the home setting. (NT 1251-1252.)

Services Provided in the Home

72. The District provides nine hours per week of therapist services after school, and each day provides about two hours. The local community mental health center provides an additional twelve and one half hours of personal care assistance to the Student, being home to get the Student off the bus in the afternoon, and being present after the school therapist leaves in the evening, spending several hours per day either with the Student or cooking and doing the Student's laundry. (NT 150-158, 163-165.)

73. The State provides Therapeutic Support Staff for several hours on the weekend. (NT 166.)

74. The state has offered to make available an additional eight and one half hours per week of habilitative services and twelve hours per year of respite care; however, there are staffing difficulties that may affect the total hours ultimately provided.. (NT 158-159.)

75. The March 2007 IEP set goals reasonably calculated to increase the Student's skills significantly in the 2007-2008 school year. (S-10, S-30.)

76. The March 2007 IEP reduced the Student's speech and language services by 15 minutes per week and reduced the Student's home program hours by two hours per week; however, this was balanced by an increase of five hours per week in the school day. (NT 93-95; S-22.)

DISCUSSION AND CONCLUSIONS OF LAW

BURDEN OF PROOF

The burden of proof is composed of two considerations: the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact.⁴ The United States Supreme Court has addressed this issue in the case of an administrative hearing challenging a special education IEP. Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005). There, the Court held that the IDEA does not alter the traditional rule that allocates the burden of persuasion to the party that requests relief from the tribunal. The Court noted that the burden of persuasion determines the outcome only where the evidence is closely balanced, which the Court termed “equipoise” – that is, where neither party has introduced a preponderance of evidence⁵ to support its contentions. In such unusual circumstances, the burden of persuasion provides the rule for decision, and the party with the burden of persuasion will lose. On the other hand, whenever the evidence is clearly preponderant in favor of one party, that party will prevail.

FREE APPROPRIATE PUBLIC EDUCATION

The District was and is obligated to provide the Student with a free and appropriate public education (“FAPE”), in accordance with an Individualized Education Plan (IEP) reasonably calculated to enable the child to receive meaningful educational benefit. Bd. of Educ. v. Rowley, 458 U.S. 176, 206 (1982); Ridgewood Board of Educ. v. N.E., 172 F.3d 238, 247 (3d Cir. (1999)). Under the IDEA, an IEP must include goals, “including academic and functional goals designed to ... meet each of the child’s other educational needs that result from the child’s disability” 34 C.F.R. § 200.320(a). See, M.C. v. Central Regional School District, 81 F. 3d 389, 393-394 (3rd Cir. 1996). These needs include behavioral, social and emotional skills. Ibid.

⁴ The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact (which in this matter is the hearing officer).

⁵ A “preponderance” of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. Dispute Resolution Manual §810 (please note that the Manual was promulgated before the Supreme Court ruled in Schaffer v. Weast, at a time when the Local Educational Agency had the burden of persuasion in Pennsylvania and elsewhere in the federal Third Judicial Circuit. Thus, the first sentence of section 810, indicating that the LEA has the burden in most cases, is outdated and was effectively overturned by Schaffer).

In determining the appropriateness of an IEP, the legal standard is whether or not the IEP was “reasonably calculated” to provide meaningful educational benefit. Board of Education v. Rowley, 458 U.S. 176, 207, 102 S.Ct. 3034, 73 L.Ed. 2d 690 (1982); Ridgewood Board of Educ. v. N.E., 172 F.3d 238, 247 (3d Cir. (1999)). In making this determination, the IEP is to be judged as of the time it was written, not in hindsight. Roland M. v. Concord School Committee, 910 F.2d 983, 992 (1st Cir. 1990); cert. den., 499 U.S. 912, 111 S.Ct. 1122, 133 L.Ed.2d 230 (1991); Fuhrman v. East Hanover Board of Educ., 993 F.2d 1031, 1040 (3d Cir. 1993).

Compensatory education is an appropriate remedy where a district has failed to provide a student with FAPE under the IDEA. M.C. v. Central Regional School District, 81 F.3d 389 (3rd Cir. 1996); Lester H. v. Gilhool, 916 F.2d 865 (3rd Cir. 1990), cert. denied, 488 U.S. 923 (1991). Where an IEP confers only trivial or de minimis educational benefit, the student has been denied FAPE and is entitled to compensatory education. M.C., *supra*. The period of compensatory education is equal to the period of deprivation, and accrues when the District knows, or has reason to know, that the student is not receiving an appropriate education. Ridgewood Board of Education v. N.E., 172 F.3d 238 (3rd Cir. 1999).

LEGAL BASIS FOR PRIVATE PLACEMENT

The IDEA embodies a strong policy preference for inclusive placement of children with disabilities. The statute explicitly requires the states to educate such children “with children who are not disabled” - and this must be done “to the maximum extent appropriate” 20 U.S.C. §1412(a)(5)(A); Oberti v. Board of Educ., 995 F.2d 1204, 1218 (3rd Cir. 1993); In re Educational Assignment of A.M., Spec. Educ. Op. 1248 at 3 (May 24, 2002). The intent of Congress was to “ensure, to the maximum extent possible, that children with disabilities are educated with children who are not disabled.” Jonathan G. v. Lower Merion School District, 955 Fed. Supp. 413 (E.D. Pa. 1997). Each disabled child must be placed in the least restrictive environment that will provide Student with meaningful educational benefit. T.R. v. Kingwood Twp. Board of Education, 205 F.3d 572 (3d Cir. 2000). Districts may not “remov[e]” children to “special classes [or] separate schooling” unless:

the nature or severity of the disability of a child is such that education in regular classes with the use of

supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. §1412(a)(5)(A).

To determine whether or not a local education agency has complied with the inclusion mandate in the IDEA, the Court in Oberti, 995 F.2d at 1215, set forth a two step analysis. First, a court must determine whether or not education in the regular classroom “can be achieved satisfactorily.” Ibid. Second, if separate education is deemed necessary, the court should determine whether or not the educational agency has “made efforts to include the child in school programs with nondisabled children whenever possible.” Ibid.

Residential placement is considered restrictive and it is to be provided only when “necessary to provide special education and related services” 34 C.F.R. §300.104. In determining necessity for residential placement, courts have applied the first step of the Oberti test, inquiring whether or not, in light of the Rowley standard of some meaningful educational benefit, such placement is necessary. D.B. v. Ocean Township Board of Education, 985 F.Supp. 457, 491 (D.N.J. 1997), aff’d mem. 159 F.3d 1350 (3d Cir. 1998). In D.B., the District Court for the District of New Jersey considered nine factors in concluding that residential placement was not necessary under the above rule: 1) the steps the local educational agency had taken to include the student; 2) the comparative benefits of day and residential placement; 3) the effect on typical children; 4) whether or not the student’s behavior interfered with own or peers education in the classroom; 5) prior professional recommendations for residential placement; 6) unrealized potential that could be fulfilled only in a residential placement; 7) past experience suggesting need for residential care; 8) whether the parent’s request for residential placement was primarily to address educational needs.

In addressing these factors, courts have split on the significance of a failure to generalize classroom learning to the home setting. In Devine v. Indian River County School Board, 249 F.3d 1289 (11th Cir. 2001), cert. denied 537 U.S. 815, 123 S.Ct. 82 (2002), the court held, in line with other authority in the 11th circuit, that failure to generalize did not render a non-residential placement inappropriate under the IDEA. However, in Thompson R2-J School District v. Luke P., 2007 WL 1879981 at (D.Colo. 2007), the district court held, in light of the facts of the case, that classroom learning not generalized to the home was de minimis educational benefit. Id. at *25.

The Parent relies upon Thompson, above, to argue that the Student's slow and imperfect generalization to the home setting rendered the Student's educational progress at school de minimis. HO-1 at 5. However, in Thompson, the court noted that lack of generalization does not always mean de minimis benefit; thus, the case is limited to its facts. Moreover, the interference with living at home was extreme and the lack of generalization in Thompson was complete. The court found :

[The student's] dysfunctional eating and sleeping habits, which affect behavior and long-term functioning, clearly impact ability to get any benefit from what Student learns at school.

Id. at *24. There was evidence of substantial behavioral interference with classroom learning. The parent and school had worked collaboratively and made a substantial effort to create consistent methodology across home and school settings, and this effort had failed. There was substantial regression in academic achievement. There was no strategy to address either generalization or regression. There was expert opinion supporting a residential placement.

The matter at hand is distinguishable, as set forth below. Moreover, the record in this case is preponderant that residential placement is not appropriate for this Student.

THE DISTRICT'S PROGRAM AND PLACEMENT WERE AND ARE APPROPRIATE

The preponderance of the evidence proves that, at all relevant times, the District provided the Student with an appropriate placement and program that, based upon the information they had at the time, (FF 1-8, 14), were reasonably calculated to provide meaningful educational benefit to the Student. The District placed the Student in its established autistic support classroom, which is staffed by well trained and credentialed educational professionals. (FF 12-18.) There were five students and two full time staff in that classroom. (FF 12.) The placement employed research based and data driven methodologies emphasizing techniques drawn from the literature on "Verbal Behavior" and "Applied Behavior Analysis." (FF 16-18.) The Student's IEP was comprehensive, addressing all of Student's educational needs, including academics, language, attention, self care, behavior, social skills and leisure skills. (FF 12, 14.) It included a behavior support plan to

deal with the Student's extreme autistic behaviors, and called for related services including speech and language, occupational and physical therapy and a home services plan to provide for both continuity and generalization of learned skills to the home. (FF 13-16.) The hearing officer finds that this program and placement was appropriate under the IDEA.

THE STUDENT MADE MEANINGFUL PROGRESS FROM MARCH 2007 TO JANUARY 2008

The preponderance of the evidence of record shows that the Student did receive meaningful educational benefit from the program and placement that the District provided. School District witnesses unanimously testified to this effect, and the hearing officer found these witnesses to be credible and well qualified to provide such opinions.

The Student made meaningful progress in most areas of educational need. (FF 19, 20, 22-66.) In the underlying area of amenability to and cooperation with educational services, the Student made gains in attending and in the less concrete forms of reinforcement Student needed. (FF 22-25.) In language, the Student advanced in Student's receptive language skills, requesting behavior, and expressive language, including articulation and use of words. (FF 40-51.) Student advanced in gross and fine motor skills, reduction of problematic behaviors, self care, academics and in Student's social and leisure skills. (FF 26-39, 52-66.) Thus, the record is preponderant that the Student made progress, and thus received meaningful educational benefit.

The Parent consistently described Student in terms that suggested an intractable inability to learn. Parent indicated that the concerns being addressed 2005 are the same as those being addressed today. (FF 7, 21.) Parent suggested that the child cannot retain skills overnight. (NT 53-54.) However, District personnel had a different view, because they saw and measured progress. (FF 16, 18.) The hearing officer gives greater weight to the testimony of the District's professional personnel. The Parent in fact bolstered their testimony because it relies upon their data keeping within the ABLLS system, and the Parent endorsed that system specifically because it allows systematic data collection and reporting. (NT 54.) Given the greater learning and experience of the District's professionals, and the fact that their estimation of progress is based upon data, their testimony must be given greater weight than the impressions of the Parent, which the hearing officer finds is not supported by the data. (FF 10, 16, 18.)

This conclusion is buttressed by the hearing officer's observation that the Parent repeatedly reached conclusions that depicted the Student in a light more negative than is supported by the record. For example, the Parent stated that no typical children will play with the Student because of Student's lack of social skills. (NT 64.) While this may be the Parent's experience at home, it is not true in general, since the School has numerous records of social interaction with typical children through its reverse inclusion programming. (FF 17, 53-57.) Similarly, the Parent asserted that the Student's speech skills had regressed since entering the District (NT 60); however, the District's records contradict that assertion, (FF 47, 48).

Slow Progress

In determining whether or not progress was meaningful, the hearing officer is guided by the principle that meaningful benefit is to be gauged in relationship to the student's intellectual potential. In re Educational Assignment of M.P., Spec. Educ. Op. 1812 at 7 n. 51 (April 12, 2007). The Student's progress is and has been throughout Student's life, very slow. (FF 3, 6, 8, 19.) The Parent makes much of the Student's failure to meet many if not the majority of Student's IEP objectives and goals by January 2008. The hearing officer, cognizant of the importance of the IEP and its function as a standard of expected achievement in a given year, nevertheless gives less weight to these facts for several reasons.

First, the provision of FAPE is judged in light of the student's ability to learn, and in this matter, the record proves preponderantly that the Student's cognitive limitations, combined with Student's severe autistic behaviors, create a profound limitation on Student's ability to learn. This results in a very slow learning curve.

Second, the period for which relief is sought here is less than a full school year – it ends in January 2008. Thus, the failure to attain many objectives and goals does not measure a full year's attainment. This is compounded by the fact that the Student loses time in the beginning of the year due to transitional needs that require additional generalization of previously acquired skills.

Third, some leeway must be afforded to the IEP team to set goals that, in hindsight, probably were not well calibrated to the potential of this Student. The Student had made considerable progress in the previous year; thus, it would be reasonable for the team to set higher goals. Moreover, the Parent was unrealistic in the expectations for Student's achievement, and the hearing officer can infer from record as a whole that Parent likely pressed

the team to set higher goals than were indicated, given the Student's serious learning deficits. In the law, it is not the attainment of IEP goals that governs the appropriateness of an IEP; it is the reasonableness of the IEP at the time of its creation. The hearing officer gives some deference to the judgment of the IEP team, whose members he finds to be eminently qualified.

Fourth, there is an abundance of evidence that the District has devoted substantial resources, well qualified staff, and sound research based and data driven programming to this Student. (FF 14-18.) The Student's slow learning is not due to a failure to provide adequate resources, or to provide them with state of the art expertise. The Parent was unable to provide any expert evidence to the contrary.⁶ Thus, the Student's lack of attainment is not due to any failure on the part of the District.

Generalization

The Parent's chief criticism of the District's efforts was that they did not result in the Student being able to generalize what Student learned to the home setting. Parent cited various examples of skills that were reported to be mastered at school, but that the Parent did not see in the home setting. However, the District proved preponderantly that the Student did in fact generalize Student's skills across various settings, and across various providers. (FF 67-71.) Specifically, the evidence proves that the Student did generalize skills to the home setting. (FF 68, 70, 71.) The record shows that the Parent was not a reliable source of information on this point. Parent was rarely present at either the school or the educational sessions at home, and Parent did not analyze with any care a great volume of written data that had been sent home routinely to the during two years of services from the District. (FF 10.)

⁶ The Parent did introduce three written reports; one was by a clinical psychologist and two were by psychiatrists. (S-14, S-15, S-25.) While these were admitted into evidence, the hearing officer ruled that the opinions contained therein would not be considered, because the writers did not testify and their opinions were not subject to cross examination. Thus, the opinions supporting the Parent will not be given weight. Nevertheless, it is clear that, even if these opinions were given weight, they would receive little weight, since the writers made no reference to either the District's programs or any specific residential programs, and they proceeded from a clinical, rather than a medical standpoint. (NT 984-985, 990-993.)

Unrealistic Expectations

The Parent demonstrated expectations for the Student's achievement that were not realistic in light of the Student's profound and complex disabilities. (NT 175-176, 186-187.) For example, the Parent expects the Student to be able to learn language before functional activities. (NT 197.) The Parent also expects the Student to learn many behaviors independently, without being prompt dependent. (NT 1207-1211.) The hearing officer finds that this understandable disappointment and frustration colored the Parent's estimation of the Student's attainment in the home and at school. (FF 9, 21.) This also rendered Parent's testimony less reliable as a result.

LACK OF CONTINUITY IN THE PLACEMENT

Under these circumstances, the Parent argues that the fault is in the placement. Parent argues that the Student's slow learning is due to a lack of continuity in Student's programming because it is community based, as opposed to a residential placement, where Parent posits there would be consistent staffing and less need for the Student to navigate among – and generalize skills within – different settings.

The hearing officer finds this argument unpersuasive. During the school year, the Student has only two settings: home and classroom. In the present placement, there is some variation and turnover of staff in both the home and the school, but there is no evidence that this can be avoided in a residential setting. The Parent posits that a residential school would provide continuity through holiday breaks and summers, but offers no evidence to prove that there is any actual setting that would eliminate variations due to these calendar periods, nor does Parent offer any evidence that such an increase in continuity would substantially increase the Student's long-term rate of learning. In fact, the District produced expert witnesses who advanced the opposite opinion – that such a setting would not provide any advantage educationally. (NT 1264-1269.)

AVAILABILITY OF SERVICES TO ASSIST THE PARENT IN CARING FOR THE STUDENT AFTER SCHOOL

The record shows that the District provided extensive services in the home, and that these were supplemented with many hours of direct care services from non-educational agencies. (FF 72-76.) The Parent's testimony is not reliable with regard to deficiencies in the District's services and in the level of the Student's performance at home, because cross examination revealed several inconsistencies in the testimony, and a tendency to exaggerate responses sometimes in a way that favored Parent's case. (NT 639-645.) These responses shifted as it became apparent what direction the questioning was taking, and in response to confrontation – or the prospect of confrontation - with inconsistencies. In addition, at the hearing, the Parent raised criticisms of the District's administration of the ABLLS assessment that Parent had not raised before when given an opportunity, and the criticism was contradicted directly by a qualified and credible District teacher. (NT 147-149, 150-156, 159-161, 177-18, 376-377, 383, 446.)

In cross examination, the Parent jostled with counsel for the District. In doing so, Parent misstated the facts concerning the amount of time taken away from work time because of gaps in service after school. After being confronted on cross examination with a discrepancy in the account, the Parent admitted that, with the longer school day, Parent had little time with the Student before a therapist arrives from the school to continue providing educational services. (FF 72.) In addition to the therapist, a personal care assistant from a mental health clinic attends the Student from the time Student comes home from school until Student goes to bed. (FF 72.)

The last test set forth in the D.B. case above weighs against the Parent here. It is plain that the services that the Parent desires to provide the child are not primarily educational – they are mainly custodial in nature. (NT 183-186.) Presently, the Student receives educational services from about nine o'clock until about 5:30 P.M., and personal care attendant services after that until bed time. The Parent pointed out repeatedly that the personal care services were unreliable due to staffing issues, and that the educational services did not cover holidays and summers. (NT 185-186.) Although the Parent couched the plea in the concept of "consistency," the desire is really to have the child attended for a greater number of hours than at present. (FF 9.) This expectation is unrealistic.

CONCLUSION

The hearing officer concludes that the District provided an appropriate program and placement to the Student, and that the Student benefitted from those services to a meaningful extent. It follows that it would not be appropriate to order the District to provide a residential school placement. It also follows that the Student is not entitled to compensatory education for the period at issue in this matter.

ORDER

1. The Student does not need full time residential placement in order to receive an opportunity for reasonable educational benefit.
2. The hearing officer will not order the District to place the Student in a full time residential placement.
3. From March 13, 2007 until January 25, 2008, the District offered an appropriate program and placement.
4. From March 13, 2007 until January 25, 2008, the District appropriately implemented the offered program.
5. The hearing officer will not award compensatory education for the period of time from March 13, 2007 to January 25, 2008.

William F. Culleton, Jr. Esq.

WILLIAM F. CULLETON, JR., ESQ.
HEARING OFFICER

May 13, 2008