

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

DUE PROCESS HEARING

Name of Child: AS
ODR # 8234/07-08

Date of Birth: xx/xx/xx

Dates of Hearing: February 13, 2008, February 20, 2008
April 28, 2008, May 7, 2008, May 8, 2008 ¹

CLOSED HEARING

Parties to the Hearing:
School District of Philadelphia
Third Floor
440 North Broad Street
Philadelphia, PA 19130

Representative:
Ken Cooper, Esquire

Mr. and Mrs.

Nancy Ryan, Esquire
238 West Miner Street
West Chester, PA 19382

Date Transcript Received:

June 2, 2008²

Date of Decision:

June 21, 2008

Hearing Officer:

Marcie Romberger, Esquire

¹ The record was held open until May 30, 2008 for the filing of closing statements. I received the District's closing on May 31, 2008 via U.S. Mail.

² I did not receive a hard copy of any transcript but one until June 2, 2008.

BACKGROUND

Student finished 8th grade in the School District at the end of the 2007-2008 school year. Student has been identified as a child with a disability under the IDEA category of Autism. Parents do not believe Student has received an appropriate education in the District since Student began in the District in the beginning of the 2005-2006 school year.

FINDINGS OF FACT

1. Student was placed in [private religiously-affiliated] Academy (hereinafter, "Academy") in nursery school. NT 333.
2. When Student was 6 years old, Student was diagnosed on the Autism Spectrum as well as with Attention Deficit Hyperactivity Disorder. P-2, 5; NT 328.
3. Student was evaluated by [redacted] Services on February 14, 2001. P-5. As a result of the evaluation, Student began receiving wraparound services with a TSS at school and at home. NT 334, 335.
4. Student had a TSS with Student at school during Student's entire tenure at Academy. NT 336.
5. Student also received occupational therapy during the 2002-2003 school year while attending Academy, but was discharged from therapy in 2003. P-6.
6. At the end of 4th grade, Academy told Student's parents it did not believe it could provide Student with the services Student needed. NT 340.
7. Academy agreed to educate Student for another year. NT 340. Academy provided Student with one-on-one instruction in academic areas. NT 339-340. Student did well academically, however, Student's socialization declined. NT 339. Student could not eat lunch in the lunchroom and had to eat in the classroom. NT 339.
8. After 5th grade, Student was withdrawn from Academy and enrolled in the School District (hereinafter, "District"). P-11; NT 340. On the enrollment form, Student's mother stated Student had Aspergers, was very anxious, impulsive, acted without thinking of consequences, had difficulty staying on task, sitting still, and understanding social cues. P-11.

9. On June 14, 2005, Student was evaluated by the District. P-11. Student's intelligence standard scores were as follows: Verbal IQ, 102; Performance IQ, 93; Full Scale IQ, 98. P-11. Student's achievement test scores showed Student having weaknesses in math reasoning and written expression. P-11.
10. A behavior rating scale was provided to Student's Parent who rated Student in the At-Risk range for conduct problems, anxiety, somatization, withdrawal, and attention issues. P-11. Parent rated Student in the Clinically Significant Range for hyperactivity, aggression, depression, atypicality, adaptability, and social skills. P-11.
11. A speech and language evaluation was also completed. Student was distractible, interrupted frequently, responded inappropriately, and had difficulty with topic maintenance and pragmatic language skills. P-11. Student was deemed eligible for special education services as a child with Autism and a secondary speech and language impairment. P-11.
12. It was recommended Student attend a different school than Student's neighborhood school to receive Autistic support in a resource setting. P-11; NT 346-347.
13. On June 15, 2005, a meeting was held to develop an Individualized Education Program (hereinafter, "IEP") for Student. P-12, 13. It was recommended Student receive services in the Autistic/Learning Support resource room. P-12.
14. The Present Education Levels in Student's June 15, 2005 IEP do not address Student's behavioral or social needs. P-12. The goals are not measurable nor do they address all of Student's needs. P-12.
15. On September 26, 2005, another IEP meeting was held to revise Student's IEP. P-13. This IEP provided Student with support in the part time Learning Support classroom as well as support in the Autistic Support resource room because Student needed more support than was originally provided to Student. P-13.
16. This IEP states Student needs one-to-one support in school to assure FAPE. P-13. It also states Student has communication needs and behaviors that impede Student's learning or that of others. P-13.
17. On January 24, 2006, another IEP was developed. P-14. This IEP states Student does not exhibit behaviors that impede Student's learning, nor is Student in need of 1:1 support in school. P-14. This is contrary to the comment in the IEP that Student "can function in a regular 6th grade classroom with TSS services. P-14.
18. The Present Education Levels in Student's January, 2006 IEP state Student's math skills rose from a 3.1 level on the WIAT to a 5th grade, 6 month level -- in just 6 months. P-11, 14. Student's needs were determined to be organization, dictionary

- skills, reading comprehension, solving math word problems, and fractions. P-14. There is no discussion of Student's written expression needs. P-14.
19. Student's January, 2006 IEP is flawed: no objective measures of evaluation; low expected levels of achievement; and immeasurable speech goals. P-14. All of Student's needs are not addressed. P-14.
 20. Another IEP meeting was held on May 24, 2006. P-15. This IEP concluded Student did not have communication needs or 1:1 support needs.³ P-15. In contrast, the IEP states Student is in need of improving peer interactions while decreasing inappropriate adult interactions and that Student is functioning "somewhat" in class with a TSS. P-14. Other needs listed were a need to listen and follow directions by an adult. P-15.
 21. Although Student was in need of improving peer interactions and social skills, no speech services were provided to Student nor are there specially designed instruction to teach social skills and peer interactions to Student. P-15.
 22. Student was exited from speech services without any data or exit evaluation showing Student no longer had a speech impairment or communication needs. P-15, 16.
 23. During the 2006-2007 school year, Student did not complete homework assignments and was in danger of failing science. P-22. No IEP meeting was convened to address these issues.
 24. As per a request from Student's parents, an occupational therapy evaluation was completed on March 8, 2007. P-24; S-2. It did not find Student in need of occupational therapy services. P-24. Although a speech/language evaluation also was to be completed, it was not. P-24.
 25. Another IEP meeting was held on June 13, 2007. P-25. This IEP meeting was untimely as Student's previous IEP was dated May 24, 2006. P-15. Student's parents did not approve the recommended IEP and placement. P-25.
 26. Student's June, 2007 IEP reverts back to Student needing 1:1 support and having communication needs. P-25. Student's math levels did not rise and may actually have decreased from the levels listed in the May, 2006 IEP. P-15, 25; NT 471. It is hard to determine if Student's reading levels have increased. P-15, 25.
 27. Student's June, 2007 IEP also fails to address all of Student's needs and does not provide appropriate objective measurements to determine progress or level of progress. P-25.

³ Although Student's IEP stated Student did not need 1:1 support, Student was being provided 1:1 support. P-15.

28. Student's report cards do not address progress toward IEP goals. P-27.
29. During the summer, 2007, Student began counseling with the [redacted] Center. The psychologist in charge of Student's counseling diagnosed Student with Oppositional Defiant Disorder in addition to Asperger's Disorder. P-3. It is unknown whether this information was shared with the District.
30. Another occupational therapy evaluation was conducted by the District on December 12, 2007 per the request of Student's parents. P-43; S-3. Student was found not to be in need of occupational therapy. P-43.
31. Also at that time, a speech and language evaluation was conducted by the District. P-43; S-1. The speech and language therapist only conducted one test and informally observed Student. NT 674, 675, 686. Student was determined not to be in need of speech/language services. P-43.
32. On March 5, 2008, Student's occupational therapy needs were evaluated privately. P-51. Student was not identified as needing occupational therapy for fine motor skills but was found to have areas of weakness in Student's sensory profile. P-51. The District had not evaluated Student's sensory needs. P-43.
33. Student was also privately evaluated for speech/language needs on April 14, 2008. P-52. The private speech/language evaluator determined Student had a moderate pragmatic language delay and provided goals and objectives which could be added to Student's IEP. P-52.
34. Although the speech and language therapist at the District disagreed with the conclusion of the private evaluator that Student needed speech and language services, she did state it was possible some of the private evaluator's results were accurate. NT 679-680. She also agreed a student can do well on the test she gave to Student and still have problems in natural pragmatic situations. NT 688.
35. Student's teachers are supposedly implementing the May, 2006 IEP. However, Student's May, 2006 IEP provided Student with 1:1 support which Student is not being provided at this time.
36. Student's 8th grade teacher testified Student hyper-focuses on certain subjects while speaking. NT 726-727.
37. Student has not been doing well on tests. NT 729. It does not appear tests or assignments are modified for Student. NT 729.
38. Student's 8th grade teacher assesses Student's writing based upon class projects but has never administered any tests to assess Student's writing. NT 767.

39. For approximately half the 2007-2008 school year, Student missed every Wednesday at school to attend counseling. NT 800, 802. Student's Parent acknowledged this impacted Student's schooling but felt it was necessary for Student. NT 802.
40. Student had problems with inattention in 6th, 7th, and 8th grade. P-1; NT 361-362. Student is not on task very much in academic classes. P-1.
41. Parent believes Student still has trouble with topic maintenance and inappropriate responses just like Student did prior to being exited from speech and language services. NT 378.
42. Parent does not believe Student can be out in public unsupervised. NT 380. Parent also does not believe Student has the capacity to empathize with other's feelings. NT 380.
43. Student missed 35 minutes of academic instruction per day because of Student's bus schedule. P-1.
44. Student has made no academic progress in any academic area as per standardized measures. P-1.

ISSUES

Did the District provide Student with appropriate IEPs from the 2005-2006 school year to the present or were they flawed as a result of a

- failure to develop measurable goals to address all of Student's needs;
- failure to provide Student with ESY;
- failure to provide IEP progress reports;
- failure to conduct a comprehensive speech language evaluation;
- failure to provide appropriate speech language services;
- cessation of speech language services without justification;
- failure to timely assess Student's occupational therapy needs;
- failure to provide appropriate specially designed instruction and related services;
- failure to provide an appropriate program to Student.

Is Student entitled to compensatory education from the 2005-2006 school year?

DISCUSSION AND CONCLUSION OF LAW

Burden of Proof

Following [Schaffer v. Weast, 126 S. Ct. 528, 537, 163 L. Ed. 2d 387 \(Nov. 14, 2005\)](#), and [L.E. v. Ramsey Bd. of Educ., 435 F.3d 384 \(3d Cir. 2006\)](#), the burden of persuasion in IDEA cases, as one element of the burden of proof, is now borne by the party bringing the challenge. As it was Student who filed this due process request, he has the burden of persuasion. Pursuant to [Schaffer](#), though, it only comes into play when neither party introduces preponderant evidence and, as a result, that evidence is fairly evenly balanced.

Individualized Education Program

The IEP is the cornerstone of the special education program of a student. The IEP must include comprehensive present educational levels; measurable annual goals which point toward the child's actual educational needs;⁴ benchmarks or short term objectives relating to the goals to address the child's disability and from which progress can be monitored;⁵ a statement of special education and related services and supplementary aids and services which meet the individual needs of the child as reflected in the CER and extend beyond mere classroom accommodations;⁶ and an explanation of the extent to which the child will be educated with non-disabled children. 34 C.F.R. § 300.320; [Polk v. Central Susquehanna Intermediate Unit, 853 F.2d 171 \(3d Cir. 1988\)](#).

To be appropriate, the IEP "must be reasonably calculated to enable the child to receive meaningful educational benefits in light of the student's intellectual potential." [Shore Regional High Sch. Bd. of Educ. v. P.S. ex rel. P.S., 381 F.3d 194, 198 \(3d Cir. 2004\)](#); [L.R. v. Manheim Twp. Sch. Dist., 2008 U.S. Dist. LEXIS 23966 \(E.D. PA 2008\)](#). The relevant inquiries are: "First, has the State complied with the procedures set forth in the Act? And second, is the [IEP] . . . reasonably calculated to enable the child to receive educational benefits?" [Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07, 102 S. Ct. 3034, 73 L. Ed. 2d 690 \(1982\)](#); [L.R. v. Manheim Twp. Sch. Dist., 2008 U.S. Dist. LEXIS 23966 \(E.D. PA 2008\)](#).

Regarding the first inquiry in determining FAPE, mere non compliance with IDEA procedures is not enough to find a lack of FAPE. "A child is denied a FAPE only when [a] procedural violation [of the IDEA] results in the loss of educational opportunity or seriously infringes the parents' opportunity to participate in the IEP formation process." [R.B. ex rel. F.B. v. Napa Valley Unified Sch. Dist., 496 F.3d 932, 940 \(9th Cir. 2007\)](#); [Deal v. Hamilton County Bd. of Educ., 392 F.3d 840, 860 \(6th Cir. 2004\)](#); [L.R. v. Manheim Twp. Sch. Dist., 2008 U.S. Dist. LEXIS 23966 \(E.D. PA 2008\)](#). When no substantive harm occurs, an "IDEA procedural error may be held harmless." [R.B., 496](#)

⁴ 34 C.F.R. §300.320. [Bernardsville Board of Education v. J.H., 42 F.3d 149 \(3rd Cir. 1994\)](#); [Battle v. Commonwealth 629 F.2d 269 \(3d Cir. 1980\)](#); [David P. v. Lower Merion S.D., 1998 U.S. Dis. LEXIS 15160 \(E.D. Pa. 1998\)](#).

⁵ [Kelsey B. v. Camp Hill School District, ___ F.Supp.2d ___ CV-01-1082 \(M.D.Pa. 2003\)](#).

⁶ 34 C.F.R. §300.320;

[F.3d at 938](#); see e.g., [Robert B. ex rel Bruce B. v. W. Chester Area Sch. Dist., 04-2069, 2005 U.S. Dist. LEXIS 21558, 2005 WL 2396968, at 9 \(E.D. Pa. Sept. 27, 2005\)](#) (denying relief because although "no regular education teacher was present at the IEP meeting," "the Court finds no evidence in the record that Robert has been denied any necessary service . . . as a result of the flaw"). [L.R. v. Manheim Twp. Sch. Dist., 2008 U.S. Dist. LEXIS 23966 \(E.D. PA 2008\)](#).

For the most part, the District did follow IEP procedures. It did not follow procedure, however, in a few instances which did prejudice Student. First, the District exited Student out of speech and language services in May, 2006 without data or an exit evaluation showing Student reached Student's IEP goals. A year later, Student was again identified as having communication needs, but not provide speech and language services. In addition, the District provided Student with a permission to evaluate for speech and language then failed to conduct an evaluation.

Also in June, 2007, an IEP meeting was held with no LEA or regular education teacher even though Student was in regular education most of the school day. NT 464, 465. Had Student's regular education teacher been present, accommodations and modifications to the regular education setting could have been discussed which would have provided Student with success.

Regarding the second inquiry in determining FAPE, an IEP must be sufficiently specific to address all of a child's identified needs. [Christen G. v. Lower Merion School District, 919 F.Supp. 793 \(E.D. Pa. 1996\)](#). An IEP which is inadequate in any material way is inappropriate as a matter of law. [Rose v. Chester County Intermediate Unit, 1996 WL 238699, aff'd 114 F.3d 1173 \(3d Cir. 1997\)](#). "[T]he measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date." [Fuhrmann ex. rel. Fuhrmann v. E. Hanover Bd. of Educ., 993 F.2d 1031, 1040 \(3d Cir. 1993\)](#) ("Neither the statute nor reason countenance 'Monday morning Quarterbacking' in evaluating the appropriateness of a child's placement."); [Carlisle Area Sch. v. Scott P., 62 F.3d 520, 534 \(3d Cir. 1995\)](#); [L.R. v. Manheim Twp. Sch. Dist., 2008 U.S. Dist. LEXIS 23966 \(E.D. PA 2008\)](#).

Student's June, 2005 IEP, with revisions in September, 2005, does not address Student's needs in the areas of social skills, communication, word fluency, vocabulary usage in writing, spelling, punctuation, using patterns to solve problems, using standard and non-standard units of measure, distractibility, and organization. P-11, 12, 13. Although a behavior management plan was attached, the evaluation method was not objective. P-12. Nor does it appear any data was collected to determine if Student was making progress on any of the IEP goals or behavior plan.

Student's January, 2006 IEP does not have objective measures of evaluation and the expected levels of achievement are low, 30%. P-14. The speech goals are not measurable. P-14. All of Student's needs are not addressed in this IEP. For example, there is no goal that discusses written expression or organization. Nor are there specially designed instruction in these areas or in the area of social skills. P-14.

Student's May, 2006 and June, 2007 IEPs are also inappropriate because they fail to address all of Student's needs. For example, there are no goals to address social skills, and written expression. In addition, Student was not provided speech and language services or goals and/or specially designed instruction regarding organization and homework completion. P-15, 25.

In addition, at no time did the District call an IEP meeting or request changes to the IEP when it was clear Student was having difficulty completing homework assignments.

I believe Student should have continued to receive speech and language services and that Student was inappropriately exited from that service. I do not believe however Student is in need of occupational therapy services. I also believe Student should have been receiving ESY. Student is on the Autistic Spectrum and has been shown not to have made progress since Student entered the District in any academic area. P-1. The District was clearly aware Student was not making progress in math and if nothing else, should have provided ESY to Student for math.

Therefore, as a result of both procedural and substantive errors, the IEPs provided to Student were not appropriate.

Compensatory Education

The Federal Courts have held the right to compensatory education accrues when the school knows or should know that its IEP is not providing an appropriate education. [M.C. v. Central Reg. Sch. Dist., 81 F.3d 389, 395 \(3d Cir. 1996\)](#). If a school district fails to correct the situation, "a disabled child is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem." [M.C., 81 F.3d at 397](#) (noting that "[t]he school district . . . may not be able to act immediately to correct and inappropriate IEP; it may require some time to respond to a complex problem"). [P. v. Wissahickon Sch. Dist., 2007 U.S. Dist. LEXIS 44945, \(E.D.Pa. 2007\)](#).

The District was aware of Student's needs before Student entered school in September, 2005. From the very beginning, the District did not provide appropriate IEPs to enable Student to make progress. Therefore, I will grant Student compensatory education from September, 2005 to the end of the 2007-2008. The amount provided to Student will be a full day of compensatory education for every day Student was in school. Student is also to receive 180 hours of compensatory education for the lack of ESY provided to him (15 hours per week for 6 weeks for Summer 2006 and Summer 2007).

ORDER

The District did not provide Student with appropriate IEPs from the 2005-2006 school year to the present. The IEPs were flawed for the following reasons:

- failed to develop measurable goals to address all of Student's needs;
- failed to provide Student with ESY;
- failed to provide IEP progress reports;
- failed to conduct a comprehensive speech language evaluation;
- failed to provide appropriate speech language services;
- stopped speech language services without justification;
- failed to provide appropriate specially designed instruction and related services;
- failed to provide an appropriate program to Student.

Student is entitled to compensatory education from September, 2005 to the end of the 2007-2008. The amount provided to Student will be a full day of compensatory education for every day Student was in school. Student is also to receive 180 hours of compensatory education for the lack of ESY provided to him (15 hours per week for 6 weeks for Summer 2006 and Summer 2007).

Marcie Romberger, Esquire