

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: Student
ODR #9745/08-09 LS

Date of Birth:
Xx/xx/xx

Dates of Hearing:
May 13, 2009
July 14/ 2009
July 15, 2009
August 5, 2009

CLOSED HEARING

Parties to the Hearing:

Parents

School District
Radnor Township
135 S. Wayne Avenue
Wayne, PA 1908-4117

Representative:

Parent Attorney
Catherine Merino Reisman, Esq.
Reisman Carolla LLP
20 East Redman Avenue
Haddonfield NJ 08033-2315

School District Attorney
Andria B. Saia, Esq
Levin Legal Group
1402 Mason Mills Business Park
1800 Byberry Road
Huntingdon Valley, PA 19006

Date Record Closed: September 1, 2009

Date of Decision: September 15, 2009

Hearing Officer: Deborah G. DeLauro, Esq.

Background

Student is a teen-aged eighth grade student who is a resident of the Radnor Township School District. Student is a child who qualifies for special education services under the category of mental retardation with a secondary category of speech and language impairment. Student attended [redacted] Elementary School, a District School, until the middle of the 2004-2005 school year. At Parents' request, when Student was in third grade, Student transferred to a private Diocesan school for students with learning and physical disabilities (Private School). The IEP team agreed and issued a NOREP supporting the change of placement. The District paid Student's tuition but as a private school, Private School developed its' own Individual Service Program and stated that it would not implement the District's IEP.

In addition to functional academics and a life skills program at Private School, Student received speech and language and occupational therapy services from the Montgomery County Intermediate Unit, and upon further request from Student's Parents, the District provided additional speech and language therapy three times a week and one-to-one academic tutoring twice a week after school. Student remained at Private School until the 2008-2009 school year. Student was re-evaluated by the District in the Summer of 2008 and an IEP team meeting was convened on August 28, 2008. The District proposed an IEP placing Student at [redacted] Middle School and, apart from a request of one-to-one services in language arts, math and speech,¹ the present levels of performance, the goals and the specially designed instruction were all agreed upon.

However, a factual dispute arose over whether the District agreed to provide the one-to-one services requested by the Parents at the IEP meeting. The Parents left the meeting believing that the District agreed to provide one-to-one instruction in math, language arts and speech. The District representatives apparently left the meeting with a less than clear understanding of what had been agreed to. After two months of attempting to arrange for services and adding 1:1 instruction and services where possible, the District issued a NOREP on November 3, 2009 along with a Settlement Agreement which included the one-to-one services in dispute. The Parents rejected the NOREP and an IEP team meeting was scheduled for November 7, 2009 in order to review a new draft of the IEP. The Parents continued to disagree because the services were not listed on the IEP. Following on the IEP meeting, the District issued a NOREP along with a Compensatory Education which included, *inter alia*, the additional services in dispute. Fearing that they would be waiving pendency rights for the services, Parents rejected the NOREP and Compensatory Education Agreement.

On February 23, 2009, the Parents filed a Due Process Complaint raising FAPE issues that dated back to the January 2005 through February 23, 2009. The Parents assert that the District denied Student FAPE by 1) failing to develop or implement an IEP from January 2005 through June 2008; 2) failing to develop an appropriate IEP which was to have been based on an agreement reached at the August 28, 2008 IEP meeting; 3) failing

¹ Parents requested one-to-one instruction in math, language arts and speech, five days a week for one hour a day.

to timely and comprehensively re-evaluate Student; 4) failing to have an appropriate IEP at the start of the 2008-2009 school year; 5) failing to offer an appropriate Extended School Year (hereinafter “ESY”) program at the February 20, 2009 IEP meeting; and 6) violating IDEA, §504 and the ADA when it offered related services in lieu of compensatory education for allegedly inappropriate services for the past two years.

After a preliminary ruling on the statute of limitations issue², this hearing officer dedicated the first hearing session to the knew or should have known date and the issue of exceptions to the two-year limitations period. Finding that the KOSHK date was May 15, 2005, this hearing officer ruled that Parents’ claims were barred from May 19, 2005 to May 19, 2007 and further finding that no exception(s) existed, the scope of the hearing was limited to the period from May 19, 2007 to February 23, 2009. [N.T. 194]

Issues

1. Whether the August 28, 2008 IEP was appropriate?
2. Whether the Student is entitled to compensatory education from May 19, 2007 to February 23, 2009?
3. Whether the Parents are entitled to tuition reimbursement for the 2009 ESY? ³
4. Whether the District is obligated to reimburse Parents for IEEs they obtained?⁴

Findings of Fact⁵

1. Student (hereinafter “Student”)⁶ is a teen-aged eighth grade student who resides in the Radnor Township School District (hereinafter “District”)
2. Student was diagnosed [with a disability] as an infant and qualifies for special education services as a student with mental retardation (hereinafter “MR”) pursuant to the Individuals with Disabilities Education Act (hereinafter “IDEA”). [SD-3; SD-9; N.T. pp. 20] ⁷

² See Hearing Officer’s Correspondence No. 2 Ruling on the Statute of Limitations issue, incorporated herein and attached hereto.

³ This issue was resolved by the Parties after the first hearing session. [N.T. 196-197]

⁴ This issue was withdrawn by Parent’s counsel at the last hearing session on August 5, 2009.

⁵ Although the scope of the hearing is from May 19, 2007 to February 23, 2009, background Findings of Fact are necessary as a context in this matter.

⁶ All future references to Student will be generic and gender neutral. These impersonal references to Student are not intended to be disrespectful but rather to respect Student’s privacy.

⁷ References to “SD” and “P” are to the School District, and Parent exhibits, respectively. References to “N.T.” are to the transcripts of the May 13, July 14 and 15 and August 5, 2009 hearing sessions conducted in this matter.

3. Student attended District schools from kindergarten through second grade. In January 2005, during Student's third grade year, Student transferred to Private School, a Diocesan school for students who have learning and physical disabilities. (SD-9; N.T. 490, 614)
4. Parents decided, without input from the IEP team, to enroll Student in Private School in January 2005. [N.T. 614, 664, 706]
5. Although Student was placed at Private School at Parents' request, the District issued and the Parents signed a NOREP agreeing to the placement. [P-1; SD-3; N.T. 86,-88, 90, 149, 490, 614]
6. The District did not evaluate Student before Student transferred or while Student attended school at Private School. [N.T. 50-51, 506, 615]
7. The District paid Student's tuition at Private School but as a private school, Private School developed its own Individual Service Plan (hereinafter "ISP")⁸ and stated that it would not implement the District's IEP. [SD-5; N.T.618, 666]
8. The principal of Private School, (hereinafter Ms. D.), stated that she explained to the Parents that since it is a Catholic Educational facility, it does not get all the services from the State that the public school gets so they work only on goals consistent with its program. [N.T. 618, 665-666]
9. Student's program at Private School consisted of: functional academics, vocational skills and life skills as well as speech language (twice a week) and occupational therapy (once a week). The Montgomery County IU provided the speech and language and occupational therapy services. [N.T. 663]
10. At Parents' request, the District augmented Student's program by providing additional speech and language services three times a week as well as one-to-one academic tutoring with a focus on reading twice a week after school. [N.T. 679, 683,]
11. During the time that Student was enrolled in Private School, Student's behaviors were addressed at every ISP meeting. [SD-5-8; N.T. 675-678]
12. Many of Student's inappropriate behaviors decreased during the time Student was attending Private School. [N.T. 566]
13. Each year, the Private School staff developed a new ISP that reflected Student's progress, scores on assessments and Student's program for the next year. [SD-5-8; P-14]

⁸ There is no functional difference between ISP and IEP. [N.T. 670-671] Since Private School is a private school, for a period of time, it was advised to refer to their IEPs as ISP because IEPs are public school documents. The forms otherwise are identical. [N.T. 670-671]

14. The IEP for 2007-2008, like the previous ISPs, was developed by the team, including parents, and includes:
- a. present education levels of performance, including recent assessments; [SD-8]
 - b. a separate behavior plan [SD-8; N.T. 675]
 - c. annual goals designed to enable Student to make progress; [SD-8; SD-24; N.T. 678]
 - d. a statement of expected levels of achievement and how and when progress shall be reported; [SD-8; N.T. 684]
 - e. a statement of program modifications, specially designed instruction, and related services; [SD-8]
 - 1) a specially designed instruction included the use of many research-based curriculums such as Edmark, PCI sight words, Touchmath and Touchmoney. [N.T. 691]
 - 2) related services included speech and occupational therapy provided by the MCIU through Private School as well as additional individual speech therapy 3 times a week and academic tutoring provided two times a week by the District. [SD-8; N.T. 114-116, 679]
15. Parents were active participants in the ISP team and their ideas were frequently incorporated into Student's goals. [P-14; N.T. 672, 751, 753]
16. Private School monitored Student's academic progress and assessed Student's progress yearly with classroom evaluation and with the Brigance. [P-2; the [N.T. 567, 571, 673, 678]
17. Sometimes Student did not cooperate when taking the Brigance; therefore, it was not always indicative of Student's actual ability that Student was able to demonstrate in the classroom. [N.T. 673, 733-734]
18. Student's progress was detailed and progress reports sent home in December, March and May each year while at Private School. [SD-24; N.T. 683, 749]
19. Student's progress was noted on reports by letter "M" for Mastered, "G" for Good, "S" for Satisfactory and "I" for Needs Improvement which referenced percentages of accuracy based on data collection using tracking sheets. [N.T. 684-685]
20. The system used by Private School in reporting progress was explained to the parents when they received their first progress reports from Private School. [N.T. 684-685]

21. Parents indicated that they thought Student's progress was good on most of the progress reports and they never returned any progress report with concerns about Student's progress. [SD-5-8; N.T.738]
22. Parent never indicated to Ms. D. or to Student's teacher, (hereinafter Ms. K.) that she thought that Student didn't make progress while Student was attending Private School. In fact, Ms. D. reported that in most conversations, Parent was "always positive" and "thought Student was doing well." [N.T. 668-669, 730, 739]
23. While at Private School, Student made progress in speech and language as indicated in reports by the speech and language therapist. [SD-24, N.T. 679, 683]
24. Student also made progress in reading, as evidenced by the Edmark report sent home to Student's parents. [N.T. 693-694, 737] Student progressed from lesson 50 to lesson 80 in the Edmark program. [N.T. 737]
25. At the end of the 2007-2008 school year, the Parents received binders of Student's language arts of math work which indicated Student's progress. [N.T. 737]
26. School psychologist, (hereinafter "Mr. D."), attended the 2005-2006, 2006-2007 and the 2007-2008 ISP meetings at Parent's request. [N.T. 49-50] Mr. D. stated that after each of the ISP meetings Student attended with Parent they would have a discussion about how she felt about the progress Student was making and whether she wanted to look at other programs. [N.T. 84-85] Mr. D stated that Parent wasn't interested in looking at other programs because she was happy with the placement at Private School and felt that Student was making, if not educational, behavioral progress; Student was no longer resistant to getting on the bus and Student had some friends. [N.T. 86-87]
27. The District did not issue a NOREP for the 2006-2007 and the 2007-2008 school years. [N.T. 49-50]
28. The District did not evaluate Student from January 2005 until August 2008. [N.T. 50-51, 615]
29. At the 2006-2007 ISP meeting, Mr. D stated that he was concerned about the minimal progress Student seemed to be making as indicated on the Brigance Diagnostic Inventory of Basic Skills (hereinafter "Brigance") but he stated that he always asked Parent if she wanted to look at other programs. [N.T. 85-87]
30. Student remained at Private School until the 2008-2009 school year. [N.T. 86-88, 90]

31. Parent never told Ms. D. or Ms. K. that Student was leaving Private School because she did not believe that Student had made progress there. [N.T. 669, 730, 739]
32. Student was evaluated by the District in the summer of 2008. [SD-9]
33. Given Student's measured Full Scale IQ (hereinafter "FSIQ") at 47-49, at all times relevant to this matter, Student has made progress in light of Student's potential and is performing consistent with that potential.[SD-8; N.T. 582, 687]
34. Student's FSIQ is consistent with previous findings⁹ falls within the moderately impaired or delayed range. [SD-9; N.T. 582, 687]
35. On the RR, Student's cognitive functioning was measured using the Stanford-Binet Intelligence Scales, Fifth Edition and yielded the following results:

Scale	Standard Score	Percentile Rank	Qualitative Description
Fluid Reasoning (both NV and V)	59	0.3	Mildly Impaired or Delayed
Knowledge (both NV and V)	60	0.4	Mildly Impaired or Delayed
Quantitative Reasoning (both NV and V)	61	1	Mildly Impaired or Delayed
Visual-Spatial Reasoning (both NV and V)	53	0.1	Moderately Impaired or Delayed
Working Memory (both NV and V)	57	0.2	Mildly Impaired or Delayed
Non-verbal IQ	43	<0.1	Moderately Impaired or Delayed
Verbal IQ	59	0.3	Mildly Impaired or Delayed
Full Scale IQ	49	<0.1	Moderately Impaired or Delayed

36. Student's basic academic skills were measured on the Wechsler Individual Achievement Test-II (hereinafter "WIAT-II")

Subtest	Standard Score	Percentile	Age & Grade Eqv
Word Reading	40	<0.1	6.0 (K.8)
Reading Comprehension	40	<0.1	6.0 (1.0)
Pseudo word Decoding	59	0.3	4.0 (Pre-K)
Numerical Operations	41	<0.1	6.4 (1.0)
Math Reasoning	40	<0.1	4.8(K.2)

⁹ Private evaluation conducted by Dr. B. in 2005. [SD-9]

Spelling	41	<0.1	5.8 (K.6)
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37. In addition to conducting a classroom observation of Student, Mr. D. administered the following additional assessments: the Naglieri Nonverbal Ability Test; the Beery-Buktenica Developmental Test of Visual-Motor Integration (VMI); the Developmental Reading Assessment (DRA) (conducted by Dr. M, K-12 Literary Coordinator); the Vineland-II Adaptive Behavior Scales; the Behavior Assessment Scale for Children-Second Edition (BASC-2); Speech and Language Evaluation, conducted by Ms. N, MS, DLP-CCC; a Physical Therapy Assessment conducted by Ms. G, PT and an Occupational Therapy evaluation conducted by Ms. L, MS, OTR/L. [SD-9]
38. Parents expressed their concerns regarding portions of the RR by letter. [SD-10; N.T. 496]
39. On August 28, 2008, an IEP team meeting was convened and the District proposed a program and placement for Student at the [redacted] Middle School. The August IEP was considered a ‘draft’ in order to provide input from all IEP team members.[SD-14; N.T. 374, 380, 383, 390, 400-401, 425, 438, 589]
40. At the August 28, 2008, IEP meeting Parent provided the IEP team with a list of services which she indicated were “non-negotiable.” [N.T. 439, 591]
41. The “non-negotiable” list included one-to-one instruction in reading, math and speech five days a week. [N.T. 439,592]
42. There have been no recommendations from experts, specialists, service providers or therapists, stating that Student needed that level of services. [N.T. 439-440, 591]
43. Parent admitted that there are no educational evaluations that state that Student learns better with one-to-one instruction; or that one-to-one instruction was required in order for Student to make progress. [N.T. 441, 550, 606]
44. The August 28, 2008 IEP includes Present Level of Educational Performance based on information derived from the RR. The IEP includes baseline information regarding the following areas of need: Reading Skills, Written Language, Math Reasoning, Math Calculation, Expressive Language, Receptive Language, Speech, Behavior, Social Emotional Functioning, Gross Motor Skills, Fine Motor Skills, and Organization. [SD-14; N.T.]
45. Parents never disagreed with or were precluded from discussing the present levels of educational performance delineated in the August 28th draft IEP. [N.T. 438, 640]

46. The August 28th IEP also includes Post School Goals/Transition goals which identify the activity, the location, the frequency, the projected beginning date, the Agency responsible, and the anticipated outcomes. [SD-14]
47. Also included in the August 28th IEP are goals which follow the areas of need identified in the RR. [SD-14; N.T. 640, 642]
48. Parents never disagreed with the content of or were precluded from discussing the identified goals in the August 28th IEP. [SD-16; N.T. 640]
49. Finally the August 28th draft IEP includes the following Modifications and Specially Designed Instruction (hereinafter “SDI”):
- 1) preferential seating near teacher
 - 2) supplement auditory information with visual aids
 - 3) allow for student to clarify directions before and throughout tasks
 - 4) provide “wait time” when asking questions in class to allow time to process thoughts and formulate a response
 - 5) conduct related learning with introduction of themes, background, resolutions
 - 6) introduce and review all vocabulary terms related to a topic before beginning a new topic
 - 7) model compound/complex sentences in a variety of sentence types and provide the visual cues whenever possible
 - 8) slow Student’s speaking rate and self- monitor placement and manner in production of target sounds during speech tasks
 - 9) read listener’s facial cues or verbally “check-in’ to determine comprehension on Student’s part
 - 10) role play with familiar peers, and/or therapist daily living activities such as job interview, phone conversation, peer/social outings, small talk, etc.
 - 11) use antonyms, synonyms, and similes to clarify and repair communication breakdowns
 - 12) incorporate interactive software to further develop and improve phonological awareness, articulation and overall intelligibility
 - 13) one-on-one instructional aide in academic classes and transition fading to independence
 - 14) science, all specials will be graded pass/fail
 - 15) alternate special or special support in lieu of social studies and foreign language
 - 16) keyboarding will not be covered in Tech Ed
 - 17) reminders to maintain personal space
 - 18) trial to determine if books on tape/or other assistive technology is appropriate [SD-14]
50. The August 28th draft IEP included the following related services:

- 1) adaptive physical education - 30 minutes once a week;
 - 2) occupational therapy – group 30 minutes/twice a week;
 - 3) speech and language therapy group - 42 minutes/week once a week
 - 4) speech and language therapy – individual 30 minutes twice a week
 - 5) physical therapy - 30 minutes, once a week [SD-14]
51. Apart from the non-negotiable list of one-to-one services, Parents never requested that anything in the IEP be changed except the implementation dates on the goals and the deletion of the SDI regarding Science. [SD-16; N.T. 444, 601-643]
52. There is nothing written on the August 28th IEP indicating that the District agreed to include the requested on-on-one services. [SD-14; N.T. 376, 439, 592]
53. The District implemented the August 28th IEP from the start of the 2008-2009 school year. [N.T.]
54. Student was receiving the following additional services and instruction during the 2008-2009 school year: 1:1 Reading: 5 days/week; 1:1 Math: 2 days/week; 1:1 Speech: 3 days/week. [SD-20; N.T.]
55. Student’s schedule during the 2008-2009 school year was as follows:¹⁰
- | | |
|-----------------|-----------------------------|
| 1 st | Reading (1:1) |
| 2 nd | Language Arts |
| 3 rd | Language Arts |
| 4 th | Math |
| 5 th | Lunch |
| 6 th | 1:1 Speech (MWF) |
| 6 th | 1:1 Math (TTH) |
| 7 th | Specials ¹¹ |
| 8 th | Community Based Instruction |
| 9 th | Community Based Instruction |
- [SD-20]
56. Student made measurable progress in every area of need identified on the IEP. [P-12; N.T. 411]

¹⁰ In addition to the services and instruction delineated in Student’s schedule, Student was also receiving the following related services pursuant to the August 28th IEP: speech/language therapy 3x week for 42 minutes; physical therapy 1x week for 30 minutes; occupational therapy 2x week for 30 minutes, and adaptive physical education 1x week for 30 minutes. [SD-14; SD-16]

¹¹ Specials included: FACS; Music; Art; and Tech Ed.[P-1, p.162]

57. Parent agreed that Student made progress in reading and math; in fact, she admitted that Student's progress in reading exceeded her expectations. [N.T. 545-546]
58. Student's teacher, Ms. S. implemented a behavior plan based on data which used a point system. A behavior check list was also sent home to Parents every day. [SD-19; N.T. 417-419]
59. On November 3rd Parents requested an "emergency" IEP meeting because they learned that the District had not agreed to provide all of the requested one-on-one services. [N.T. 516]
60. At the November 3rd IEP meeting, the Parents disapproved the NOREP offering the following additional services and instruction: 1:1 Reading: 5 days/week; 1:1 Math: 2 days/week; 1:1 Speech: 3 days/week. [SD-16; N.T. 404-405]
61. The District offered the one-to-one services requested by the Parents as part of a Settlement Agreement. [P-13; N.T. 518-519]
62. The Parents rejected the Settlement Agreement because they wanted the one-to-one services without a waiver of rights. [N.T. 551-560]
63. On November 7, 2008, the District offered the Parents a draft IEP with a NOREP and a Compensatory Education Agreement for the requested services for the duration of the 2008-2009 school year. [SD-17; N.T. 601]
64. Parents rejected the IEP and NOREP because of their concern that the 1:1 services had not been written into Student's IEP. [N.T. 401-402]
65. The November 11, 2008 NOREP proposed to provide the requested services in a Compensatory Education Agreement, explaining that "the Parents are requesting more related services be included in the IEP than the District thinks are required to provide Student with a FAPE. In an effort to reach an amicable agreement, the District is offering to provide the services via the enclosed compensatory education agreement." [SD-17; N.T. 601]
66. The Parents rejected the compensatory education agreement because they believed that contrary to the District's assurance that it did not contain a waiver of rights, by limiting the services to one year, the agreement constituted a waiver of pendency rights for those services. [SD-17; N.T. 631-634]
67. The Compensatory Education Agreement indicates in part that; "Resolution of outstanding services requested by parents for the 2008-2009 school year offered as compensation for programming during the 2006-2007 and the 2007-2008 school years, while enrolled in Private School school at parents request" and under "Other terms and conditions determined by the IEP team" it stated that:

“Parents do not waive their rights to seek additional redress.”[SD-17; N.T. 631-634]

Credibility of Witnesses

Hearing officers are empowered to judge the credibility of witnesses, weigh evidence and, accordingly, render a decision incorporating findings of fact, discussion and conclusions of law. The decision shall be based solely upon the substantial evidence presented at the hearing.¹² Quite often, testimony – or documentary evidence – conflicts; this is to be expected as, had the parties been in full accord, there would have been no need for a hearing. Thus, part of the responsibility of the Hearing Officer is to assign weight to the testimony and documentary evidence concerning a child’s special education experience. Hearing Officers have the plenary responsibility to make “express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses”. *Blount v. Lancaster-Lebanon Intermediate Unit, 2003 LEXIS 21639 at *28 (2003)*. This is a particularly important function, as in many cases the hearing officer level is the only forum in which the witnesses will be appearing in person.

The District psychologist, Mr. D, was involved with Student from the June 2004 IEP and NOREP which ultimately supported Student’s transition from a District program to Private School. Mr. D attended the ISP/IEP meetings with Parent; he re-evaluated Student in the Summer of 2008 and was part of the team at the August 28, 2008 IEP meeting. This Hearing Officer found Mr. D’s testimony to be sincere, forthright and highly credible. The only criticism this hearing officer has for Mr. D is that his efforts (along with other District personnel) to appease Parent’s wishes¹³ inadvertently contributed to the misunderstanding which arose from the August 28, 2008 IEP meeting.

On the other hand, the TSS working with Student during this period, Mr. G (hereinafter “Mr. G.”), lost some credibility with this hearing officer when he embellished his work experience and educational training. Although he was knowledgeable about managing behavior, his testimony regarding the strained relations with the District’s teachers and his perception of what occurred at the August 28th IEP meeting, lacked sufficient weight to counter other evidence in the record.

Student’s mother testified at length and although clearly concerned about her child, her testimony not only contradicted testimonial and documentary evidence presented, but also revealed that she could be very demanding and capable of manipulating the facts in order to serve her purpose or position. For example, in March 2008, when Dr. C conducted a re-evaluation to assess progress and update Student’s Treatment Plan, Parent indicated that Student had intense behavioral issues; however, when Parent completed the BASC for the District’s RR in August 2008, she indicated that Student had no clinically significant problematic behaviors. Similarly, while Student attended Private School from January 2005 through the 2007-2008 school year and when

¹² Spec. Educ. Op. No. 1528 (11/1/04), quoting 22 PA Code, Sec. 14.162(f). See also, *Carlisle Area School District v. Scott P.*, 62 F.3d 520, 524 (3rd Cir. 1995), cert. denied, 517 U.S. 1135 (1996).

¹³ Non-negotiable list of services.

Student re-enrolled in the District in time for the 2008-2009 school year, Parents were active participants in every ISP/IEP meeting and were continuously apprised of their son's program and Student's progress; yet Parent now claims that she was unaware of Student's minimal progress at Private School and that she was denied active participation at those very IEP/ISP meetings. Therefore, this hearing officer found Parent's testimony to carry less weight than other witnesses.

Dr. C, a pediatric neuro-psychologist¹⁴, conducted a Re-evaluation in order to assess progress in treatment, update the treatment plan, and make recommendations for future treatment. Although credible, his testimony added little weight to the primary issues involved in this case.

Ms. S (hereinafter "Ms. S") testified credibly although at times her testimony appeared somewhat glib.¹⁵ Nevertheless, this hearing officer found her explanation of what occurred with the TSS and his effect on Student's behavior to be believable and supported by documentary and testimonial evidence. Furthermore, her interactions with Student's mother as shown in the emails before, during and after the August 28th IEP meeting provided an honest explanation of why the District said that it was never agreed to put the one-to-one services in the IEP but yet, they were still trying to find providers to accommodate Parent's wishes even though they did not believe those extra services were necessary for Student to receive a FAPE.

Finally, this hearing officer found the testimony from Ms. D. and Ms. K from Private School to be highly credible especially when they testified about their program compared to the District's program and Student's documented progress at Private School. Furthermore, Ms. D's and Ms. K's provided credible testimony that the Parents were always very positive and never indicated that they were taking Student out of Private School because they believed that Student did not make progress.¹⁶

Legal Basis, Discussion and Conclusions

Burden of Proof

In November 2005 the U.S. Supreme Court held that, in an administrative hearing, the burden of persuasion for cases brought under the IDEA is properly placed upon the party seeking relief. Schaffer v. Weast, 126 S. Ct. 528, 537 (2005). The Third Circuit addressed this matter as well more recently. L.E. v. Ramsey Board of Education, 435 F.3d. 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006). The party bearing the burden of persuasion must prove its case by a preponderance of the evidence. This

¹⁴ Dr. C contracts with [redacted mental health agency] to conduct psychological evaluations in order to authorize wraparound services.

¹⁵ When asked on cross examination whether she was aware of any recommendations for five times a week math? She replied "Nope. None" [N.T. 440] Then when asked whether she had ever indicated to the [[mental health agency] behavior consultant or the TSS] that she was too busy to talk to them? Ms. S replied: "Nope."

¹⁶ Ms. D testified credibly that Parent told her that they were pleased with Student's socialization and Student's time at Private School. [N.T. 669]

burden remains on that party throughout the case. Jaffess v. Council Rock School District, 2006 WL 3097939 (E.D. Pa. October 26, 2006).

In this case, the Parents requested the hearing and therefore they bore the burden of proof. The burden of proof is in two parts: the burden of production (simply, which party presents its case first) and the burden of persuasion (which side has to convince the decision-maker(s) by a preponderance of the evidence that its position should be upheld).

However, application of the burden of proof does not enter into play unless the evidence is in equipoise, that is, unless the evidence is equally balanced so as to create a 50/50 ratio. In this matter the evidence was not in equipoise. As described in greater detail below, the Parents did not meet their burden of proof on either issue.

Whether the August 28, 2008 IEP was appropriate thereby providing Student with a free appropriate public education (hereinafter “FAPE”)?

Children with disabilities who require specially designed instruction are guaranteed a FAPE by federal and commonwealth statutes.

Special education issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 (“IDEIA”), which took effect on July 1, 2005, and amends the Individuals with Disabilities Education Act (“IDEA”). 20 U.S.C. § 1400 *et seq.* (as amended, 2004). Eligible students are entitled under the IDEIA and Pennsylvania Special Education Regulations at 22 PA Code § 14 *et seq.* to receive a FAPE.

A school district offers FAPE by providing personalized instruction and support services pursuant to an IEP that need not provide the maximum possible benefit, but that must be reasonably calculated to enable the child to achieve meaningful educational benefit. Meaningful educational benefit is more than a trivial or de minimis educational benefit. Whether an IEP is reasonably calculated to afford a child educational benefit can only be determined as of the time it is offered to the student and not at some later date. 20 U.S.C. §1412; *Board of Education v. Rowley*, 458 U.S. 176, 73 L.Ed.2d 690, 102 S.Ct. 3034 (1982); *Ridgewood Board of Education v. M.E. ex. rel. M.E.*, 172 F.3d 238 (3d Cir. 1999); *Stroudsburg Area School District v. Jared N.*, 712 A.2d 807 (Pa. Cmwlth. 1998); *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3rd Cir. 1988) *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031 (3d Cir. 1993); *Daniel G. v. Delaware Valley School District*, 813 A.2d 36 (Pa. Cmwlth. 2002)

The IEP must be likely to produce progress, not regression or trivial educational advancement *Board of Educ. v. Diamond*, 808 F.2d 987 (3d Cir. 1986)]. *Polk, supra*, citing *Board of Education v. Diamond*, 808 F.2d 987 (3rd Cir. 1986) held that “*Rowley* makes it perfectly clear that the Act requires a plan of instruction under which educational *progress* is likely.” (Emphasis in the original). The IEP must afford the child

with special needs an education that would confer meaningful benefit. Additionally, the court in *Polk* held that educational benefit “must be gauged in relation to the child’s potential.”

Districts need not provide the optimal level of service, or even a level that would confer additional benefits, since the IEP as required by the IDEA represents only a basic floor of opportunity. *Carlisle Area School District v. Scott P.*, 62 F. 3d at 533-534. What the statute guarantees is an “appropriate” education, “not one that provides everything that might be thought desirable by ‘loving parents.’” *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989). If personalized instruction is being provided with sufficient supportive services to permit the student to benefit from the instruction the child is receiving a “free appropriate public education as defined by the Act.” *Polk, Rowley*. The purpose of the IEP is not to provide the “best” education or maximize the potential of the child. The IEP simply must propose an appropriate education for the child. *Fuhrman, supra*.

Guidance for determining the factors comprising “meaningful benefit” is offered in *Cypres v. Fairbanks*, 118 F.3d 245, 253 (5th Cir. 1997) as follows:

1. The program must be individualized on the basis of the student’s assessment and performance;
2. The program must be administered in the least restrictive environment;
3. The services must be provided in a coordinated and collaborative manner by the key “stakeholders”; and
4. Positive academic and nonacademic benefits must be demonstrated.

In the case at bar, the documentary and testimonial evidence clearly shows that Student’s ISP/ISPs were based on accurate and up-to-date assessments, both at Private School and the District; they were coordinated and implemented in a effective and collaborative manner, and, most importantly, Student made academic and non-academic progress pursuant to Student’s potential. Moreover, a review of the academic assessments demonstrates that Student was performing consistent with Student’s ability. [SD-9; SD-11]

In fact, the evidence reveals that the IEP/ISPs provided more than a basic floor of opportunity, but they were calculated and conferred meaningful educational benefit.

Specifically, a review of Student’s IEP/ISPs reveals that they both included a statement of Student’s present levels of educational performance; a statement of measurable annual goals, including benchmarks or short-term objectives, related to meeting Student’s needs; a statement of the special education and related services and supplementary aids and services to be provided to Student...and a statement of the program modifications or supports for school personnel that will be provided for Student to advance appropriately toward attaining the annual goals (and) to be involved and progress in the general curriculum...and to be educated and participate with other children with disabilities and non-disabled children, to the extent possible; and an explanation of

the extent, if any, to which Student will not participate with non-disabled children in the regular class... CFR §300.347(a)(1) through (4)

An IEP must be crafted in such a manner that, provided it is implemented, there is a reasonable degree of likelihood that the student will make educational progress. Although implementation of an appropriate IEP does not guarantee that the student will make progress, in this instance the record is replete with evidence of Student's progress in all identified areas of need.

Furthermore, Student's IEP/ISPs were specific enough to address all of Student's identified needs, academic, functional and behavioral. 20 U.S.C. §1414(d)(1)(A)(i)(II), (IV); *Christen G. v. Lower Merion Sch. Dist.*, 919 F.Supp. 793 (E.D. Pa. 1996); 20 U.S.C. §1414(d)(3)(A)(iv). To that end, since Student's behavior frequently impeded Student's learning, the IEP/ISP teams must consider strategies to address that behavior. 20 U.S.C. §1414(d)(3)(B)(i).

It is true that the IDEIA requires a local educational agency to address every substantial educational need of the child with a disability, including behavior and social skills. If the IEP is inadequate in any material way, it is inappropriate as a matter of law. *Rose v. Chester Co. Intermed. Unit*, 196 WL 238699, 24 IDELR 61, *aff'd* 114 F.3d 1173 (3d Cir. 1997). This is reflected in the requirements for both evaluations and individual education plans.

The local educational agency must conduct a "full and individual initial evaluation" 20 U.S.C §1414(a)(1)(A). The child must be "assessed in all areas of suspected disability." 20 U.S.C. §1414(b)(3)(B). The regulations require that the evaluation procedures "assist in determining ... [t]Student content of the child's IEP. 34 C.F.R. §300.304(b)(1)

Additionally the IDEIA provides that all testing instruments must be valid and reliable for the purpose for which they are used, be administered by trained and knowledgeable personnel and be administered in accordance with the applicable instructions of the publisher. 20 U.S.C. §1414(b)(3)(A); 34 C.F.R. §300.304(c)(1).

In evaluating a child, a district may not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child; and The child is assessed in all areas of suspected disability;

Assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided.

Use of technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

Further, IDEA 2004 at Section 614(b)(3) imposes additional requirements that local educational agencies ensure that

Assessments and other evaluation materials used to assess a child:

- Are selected and administered so as not to be discriminatory on a racial or cultural basis;
- Are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally and functionally unless it is not feasible to so provide or administer;
- Are used for purposes for which the assessments or measures are valid and reliable;
- Are administered by trained and knowledgeable personnel; and
- Are administered in accordance with any instructions provided by the producer of such assessments;

Although a re-evaluation under 34 CFR 300.303 is not defined in the IDEA or in the 2006 implementing regulations, it is understood to be a comprehensive evaluation analogous to an initial evaluation under 34 C.F.R. 300.301, conducted for students who already have undergone evaluations and been found eligible for services. While a reevaluation must meet the same IDEA requirements as an initial evaluation, a student's reevaluation need not be identical to Student's initial evaluation in every respect. For example, because a re-evaluation must be individualized, it must take into account the student's then current needs. As a result, different procedures may need to be used.

A reevaluation under 34 C.F.R. 300.305(a)(2) of the IDEA a regulations should address the following five issues:

- 1) Whether the child continues to have a disability. 34 CFR 300.305(a)(2)(i).
- 2) The child's educational needs. 34 CFR 300.305(a)(2)(i)
- 3) Ascertainment of the child's present levels of academic performance, and related developmental needs. 34 CFR 300.305(a)(2)(ii)
- 4) Whether the child continues to need special education and related services. 34 CFR 300.305(a)(2)(iii)
- 5) Whether any additions or modifications to the special education and related services called for in the child's IEP are needed to enable Student or her to meet the measurable annual goals set out therein and to participate, as appropriate, in the general education curriculum. 34 CFR 300.305(a)(2)(iv)

With regard to reevaluation, the local educational agency must ensure that a reevaluation of each child with a disability is conducted "if it is determined that the educational or related services needs, including improved academic achievement and functional performance, of a child warrant, a reevaluation or if the child's parent or

teacher requests a reevaluation.” A reevaluation “may occur not more than once a year, unless the parent and public agency agree otherwise; and must occur at least once every 3 years, unless the parent and the public agency agree that a reevaluation is unnecessary.” 34 C.F.R. §300.303 However, with regard to students with disabilities who are identified as mentally retarded, those students must be reevaluated at least once every 2 years. 22 Pa. CODE §14.124.

Here, a review of the evidence in the record persuades this hearing officer that the District’s Re-Evaluation Report (hereinafter “RR”) was appropriate and met all of the delineated requirements in IDEIA. Specifically, the RR was comprehensive and evaluated Student in all areas of need; it not only ascertained Student’s present levels of educational performance, but also identified Student’s related academic and developmental needs. The RR did not use any single measure or assessment as the sole criterion for determining an appropriate educational program for the child; in fact, it used technically sound instruments which were valid for the purpose for which they were used, and were administered by Mr. S, who is highly trained with 36 years of experience who administered the tests in accordance with the applicable instructions.

A further review of the evidence reveals that the RR formed the basis of the August 28th IEP and its progeny.¹⁷ Those IEPs provided an appropriate program that met both substantive and procedural regulatory requirements and, as noted above, were designed to provide meaningful educational benefit. *Rowley, at U.S. 176, 206-07, 102 S.Ct. 3034 (1982)*

Therefore, since a preponderance of the evidence demonstrates that Student received a FAPE during the period of time from August 28, 2009 to February 23, 2009, this hearing officer finds the August 28, 2008 IEP to be appropriate.

Whether Student entitled to compensatory education for the time period between May 19, 2007 and February 23, 2009?

Compensatory education is a remedy designed to provide a student with the services Student should have received pursuant to a free appropriate public education (FAPE). When a student has been denied the due process rights or an appropriate educational program that Student should have received, compensatory education is an in-kind remedy. *Lester H. v. Gilhool, 916 F. 2d 865 (3d Cir. 1990), cert. denied 499 U.S. 923, 111 S.Ct. 317 (1991)* A child is entitled to compensatory education services if the child is exceptional and in need of services and/or accommodations and if through some action or inaction of the District the child was denied FAPE.

Like tuition reimbursement, compensatory education is an equitable remedy, designed to assure that an eligible student receives all of the special education services to

¹⁷ The November 7, 2008 IEP and the January, 2009 IEP.

which Student is entitled. It is not, however, appropriate to consider countervailing equities in determining whether compensatory education should be awarded, as in tuition reimbursement cases. *In re: The Educational Assignment of Nicholas T., Special Education Appeals Panel Opinion No. 1166 (August 17, 2001)*; *In re: The Educational Assignment of Laura C., Special Education Appeals Panel Opinion No. 1183 (October 19, 2001)*. Rather, once it is determined that a School District has failed to provide FAPE, compensatory education, measured as stated above, must be awarded. Id. Since it is the responsibility of school districts to offer FAPE to all eligible students at all times, the conduct of the parents in assuring that appropriate services are provided is irrelevant. Id.

In determining whether an award of compensatory education is warranted, the first step in the analysis is to assess the appropriateness of the program offered by the School District at the time it was offered or provided. *In re: The Educational Assignment of Karyn S., Special Education Appeals Panel Opinion No. 1124 (June 4, 2001)*. An award of compensatory education for lack of an appropriate program may be based upon implementation as well as the contents of the IEP. *Ridgewood*; *In re: The Educational Assignment of Zachary S., Special Education Appeals Panel Opinion No. 1000 (February 28, 2000)*.

Nevertheless, in the 2004 revisions to the IDEA, Congress affirmed its position that de minimis procedural violations do not constitute a deprivation of FAPE. Referencing 20 U.S.C. 1415(f)(3)(E) and (F), 1415(h)(4), 1415(o), it provides:

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies (1) impeded the child's right to a FAPE; (2) significantly impeded the parents' opportunity to participate in the decision making process...; or (3) caused a deprivation of educational benefits.

The circumstances in this case¹⁸ are such that the District did not conduct its' own re-evaluation¹⁹ while Student was attending Private School at Parent's request, but instead relied on Private School's evaluations and assessments, which the record reveals formed the basis of appropriate ISP/IEPs, and which met all the necessary components of law and were developed by a team including the Parents. Therefore, since Student received a FAPE and made meaningful educational progress, any procedural error which arguably may have occurred, was harmless.

Next, with regard to Parent's allegation that they were denied the opportunity to participate in the IEP/ISP meetings, the documentary and testimonial evidence shows otherwise. In fact, a review of the record reveals that the Parents were active participants in all of the ISP/IEP meeting at Private School; and they were provided with numerous

¹⁸ Parents' decision to place Student in Private School was unilateral which ordinarily would relieve the District of its duty to re-evaluate, but here, the District provided Parents with a NOREP and funded Student's placement at Private School, which would typically require the District to re-evaluate.

¹⁹ Required every two years for students with Mental Retardation.

opportunity to participate in the development of Student's IEP for the 2008-2009 school year. The only example that Parents raise is that the District ultimately did not include all of the non-negotiable 1:1 services that Parents wanted in Student's IEP.

However, a review of the evidence reveals that the District did provide all of the requested services with the exception of 1:1 math 5 days a week, and 1:1 speech 5 days a week. Instead, the District provided 1:1 math twice a week in addition to the math Student received in the classroom. Similarly, the District provided 1:1 speech three times a week on top of the speech provided in a group three times a week.

Therefore, this hearing officer finds that a preponderance of the evidence demonstrates that Parents' participation in the IEP process was not significantly impeded.

Accordingly, as there was no significant impediment to Parent's participation in the decision-making process, and any procedural error which may have occurred when Student was at Private School, was harmless, Parents have failed to meet their burden, Student was receiving a FAPE at all times, and there is no entitlement to compensatory education.

ORDER

It is hereby ordered that:

1. The August 28, 2008 IEP is appropriate, as it was based on an accurate and comprehensive evaluation and was reasonably calculated to provide Student with meaningful educational benefit.
2. The Student is not entitled to compensatory education for the period between May 19, 2007 and February 23, 2009 as Student was receiving a FAPE and suffered no educational harm as a result of procedural errors the District committed.

September 15, 2009
Date

Deborah G. DeLauro
Deborah G. DeLauro, Hearing Officer