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Pennsylvania

Special Education Hearing Officer

DECISION

Student's Name: B.S.

Date of Birth: [redacted]

ODR No. 15237-14-15-AS

CLOSED HEARING

Parties to the Hearing:

Representative:

Parent[s]

Elizabeth J. Kapo, Esquire
2123 Pinehurst Road
Bethlehem, PA 18018

Bethlehem Area School District
1516 Sycamore Street
Bethlehem, PA 18017

Kristine Roddick, Esquire
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One West Broad Street, Suite 700
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Dates of Hearing:

September 16, 2014, September 29,
2014, October 3, 2014, October 9,
2014, October 17, 2014, October 30,
2014

Record Closed:

November 24, 2014

Date of Decision:

December 9, 2014

Hearing Officer:

William F. Culleton, Jr., Esq., CHO

INTRODUCTION AND PROCEDURAL HISTORY

The Student named in the title page of this decision (Student) is an eligible resident of the school district named in the title page of this decision (District). (NT 14-15.) The District has identified Student with Autism, Intellectual Disability and Speech or Language Impairment. (NT 33; J 23.) Parents assert that the District has failed to offer or provide to the Student a free appropriate public education (FAPE), as required by the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA), and the Vocational Rehabilitation Act of 1973, 29 U. S. C. §794 et seq. Parents request compensatory education from the first day of school for kindergarten students in August 2012 through October 30, 2014.

The District asserts that it offered a FAPE during all relevant times and requests that the hearing officer so find.

The hearing was concluded in six sessions. The parties submitted written summations, and the record closed upon receipt of those summations. I conclude that the District has offered and provided a FAPE to Student.

ISSUES

1. During the period from the first day of school for kindergarten students in August 2012 through October 30, 2014, did the District fail to offer to, or provide Student with, a FAPE, in violation of the IDEA and section 504?
2. Should the hearing officer order the District to provide compensatory education to Student for all or any part of the period from the first day of school for kindergarten students in August 2012 through October 30, 2014?
3. Did the District offer to Parents an appropriate IEP for the 2014-2015 school year?
4. Should the hearing officer order the District to conduct a Functional Behavioral Assessment and an Assistive Technology Assessment, as well as to offer a new IEP, including a Positive Behavior Support Plan, for Student consistent with the findings and conclusions set forth in this decision?

FINDINGS OF FACT

1. Student has a medical history of seizures within the first two years of life. Student was diagnosed with pervasive developmental delays when Student was two years old. Student was delayed in the areas of communication, social and behavior skills, adaptive and safety skills, motor skills and cognitive skills. (J 1.)
2. Student received speech and language therapy and occupational therapy through the local behavioral health agency from age 2 years. Student received early intervention services through the local intermediate unit from March 2009 until Student entered kindergarten. Services included a verbal behavior classroom, speech and language therapy and occupational therapy. (J 1.)
3. The District identified Student as a child with the disabilities of Autism and Speech or Language Impairment, in a Re-evaluation Report in April 2011. The report recommended small group instruction in a highly structured environment with a low student to staff ratio; supports in the areas of cognitive, communication, social and emotional, physical and adaptive development; and speech and language supports. The report recommended consideration of occupational therapy. (J 1.)
4. Student was diagnosed with a physical disorder that affected Student's digestion, resulting in frequent experiences of constipation and a risk of impaction. This required medication, led to irritability in school, and was related to Student's delayed bathroom training and frequent urinary accidents, as well as occasional encopresis. (NT 773, 818; J 15, 23, 55, 72; P11 p. 1.)
5. The District offered initial provision of special education and related services for Student's kindergarten year, in Student's first year of eligibility, in the 2011-2012 school year. The District offered placement in full-time autistic support. Parents rejected this offer, indicating a preference for greater inclusion with typical children. Parents elected to retain Student in Early Intervention programming for an additional year. (J 3.)
6. Parents consistently opposed Student's placement in an autistic support program during Student's kindergarten and first grade years. (J 45, 64, 85.)
7. In preparation for Student's transition to kindergarten in the 2012-2013 school year, the District provided a Re-evaluation Report dated April 18, 2012. The report found Student eligible for specially designed instruction and related services. The report classified Student as a child with the disabilities of Autism and Speech or Language Impairment. The

report recommended an occupational therapy evaluation to determine continued eligibility. The report noted that Student could not be evaluated utilizing standardized assessments, due to Student's inadequate language skills at the time. (J 5.)

8. The April 2012 report listed as educational needs: school readiness skills, self-help skills, attention to task, following directions, social skills, safety awareness, functional communication and overall receptive and expressive language. The report noted the need for prompting with one step directions, and Student's inability to utilize an iPad application for communication utilizing icons. Student did not consistently utilize eye contact, and did not initiate interaction with peers. Student tested below the 1st percentile in language development. (J 5.)
9. In May 2012, the District offered a placement of itinerant learning support for Student's kindergarten year. (J 6.)
10. The IEP team offered an IEP dated May 16, 2012, which recognized that Student presented with communication needs, need for assistive technology and behaviors that impede learning. (J 6.)
11. The May 2012 IEP provided goals addressing receptive language, expressive language, social skills, self-help skills, pre-writing skills, academic readiness skills, appropriate classroom behavior, functional fine motor coordination and utilization of manipulatives. (J 6.)
12. The May 2012 IEP provided for specially designed instruction, including activity schedules, pictorial representations, differential reinforcement, chaining, interspersing all easy and difficult targets, use of manipulatives, modeling, ongoing data collection for functional behavior assessment, pairing with reinforcement, personal care assistance, positive behavioral support, prompting (faded systematically), behavior shaping, small group instruction and integrated related services. (J 6.)
13. The May 2012 IEP provided for 50 sessions of speech and language therapy, 30 minutes per session, on a push-in model. The IEP also provided occupational therapy, one time per week, 30 minutes per session, on a pull-out basis. (J 6.)
14. May 2012 IEP included a positive behavior support plan addressing Student's behavior of crying and vocalizing in order to escape from a task. The plan contained an informal "A-B-C" analysis of Student's behavior. (J 6.)

15. Parents accepted the placement and IEP by signing the Notice of Recommended Educational Placement (NOREP) on May 22, 2012. (J 6.)
16. In the summer of 2012, Parents' home behavioral program addressed Student's toilet training. Student progressed to 40 minute intervals dry before scheduled bathroom breaks. When Student began kindergarten, Student regressed. Student's bathroom needs became a significant impediment to other learning. (NT 794-797, 817-818.)
17. On September 13, 2012, Parent¹ attended an IEP team meeting for the purpose of adding baselines to goals and planning for Therapeutic Support attendant services in the school environment. (J 8.)
18. The September 2012 IEP revision noted that Student was using picture communication (PECS) for communication, with verbal and gestural prompting. Baseline data were added to goals where necessary. The revision provided that, if the assigned educational assistant should be absent, a designated person would be provided as a substitute. This substitute would engage in pairing activity so that Student would accept the substitute when necessary. (J 8.)
19. The September 2012 IEP revision added a goal for Student to follow a bathroom routine, consisting of 13 steps. The goal contained baselines. Specially designed instruction included use of a bathroom in the nurse's office as needed, with checking. (J 8.)
20. Student engaged in some behaviors impeding learning in the beginning of the kindergarten year; however, these were due primarily to the need to learn classroom skills and become used to the environment and its demands. While Student's sitting behavior improved, Student's avoidance behaviors increased later due to increasing demands put upon Student. The District had in place a behavioral support plan that was based upon the early intervention plan; this was sufficient to address Student's behaviors until November or December. The IEP team agreed to delay taking data formally until Student had time to acclimate to the school environment. (NT 545, 771-772, 774-775, 798-801, 829, 827; J 55.)
21. District personnel began taking data on Student's behavior informally, sometimes using an "A-B-C" analytical framework, in early October 2012. Teaching staff also took data on reinforcers. (NT 806; J 55.)

¹ Reference to Parent in the singular indicates Student's Mother, who conducted most of the communications and transactions with the District.

22. On November 14, 2012, Parent attended an IEP team meeting to discuss Student's progress and coordinate Therapeutic Support services in the school setting. Present levels were updated to note that Student had demonstrated negligible progress from the beginning of the year. This was due in large part to the goal of following a bathroom routine, which took up most of Student's school time, and kept Student away from the classroom. While the bathroom skills goal was maintained, the IEP team decided to reduce the frequency of scheduled bathroom breaks, and to utilize pull-ups, rather than ordinary underwear. Increased agitation and refusal behaviors were noted. Student continued using the PECS communication system. (J 9; P11.)
23. In Student's kindergarten and first grade years, District personnel provided Parents with detailed reports on a weekly basis, containing Student's performance data on IEP goals. Teachers and Parent exchange comments on communication forms on a daily basis. Parent sent numerous notes to Student's teachers and District personnel, with requests regarding educational programming. Parent requested additional reporting of data on preferred reinforcers, to be provided on forms created by Parent. (J 32, 35, 36, 37, 43, 55, 76, 87, 91-94.)
24. In Student's kindergarten and first grade years, District personnel kept daily task analysis data regarding Student's toileting schedule and bathroom skills goal, and daily data on Student's progress toward IEP goals and speech and language goals. (J 38, 53, 54, 82, 84, 86, 88, 91.)
25. District personnel provided quarterly progress reports on Student's IEP goals. (NT 707-708; J 39, 55, 56, 77.)
26. The November 2012 IEP notes Parent's request for a more detailed daily progress note, and team agreement on a new daily format. The District's behavior specialist suggested changes to verbal behavior training and addition of varied activities into the school day. (J 9.)
27. In January 2013, the District provided an adapted physical education report, recommending adapted physical education, one time per week for 30 minutes per session. (J 12.)
28. On February 20, 2013 Parent attended an IEP team meeting for the purpose of discussing Student's progress and parental concerns, making an ESY determination and adding adapted physical education. (J 13.)
29. The IEP team found Student eligible for ESY services. (J 13.)

30. At the February 2013 IEP team meeting, the team reviewed present levels on each of the existing goals. The team noted reduction in prompt levels for some functional skills. For many of the goals, there was no progress. There was negligible progress on academic goals, greeting peers, attention to task and following bathroom routine. Slight gains were noted in receptive and expressive language. (J 13.)
31. At the February 2013 IEP team meeting, Parent requested an evaluation for assistive technology. Parent also requested further revisions in daily data reporting to Parent. The listing of strengths in the IEP was amended to add strengths reported by Parent, including strengths observed at school. Parent was added as a support for school personnel. (J 13.)
32. The IEP was revised at the February 2013 IEP meeting to reformulate the goals for receptive language, requesting and behavior (a new goal was added for refraining from taking food belonging to others). New specially designed instructions and limitations were provided, including frequent breaks; adaptations for visual, auditory or physical needs; providing Student with a choice of reinforcers and activities; provision of specially designed pencils and grippers, as well as paper with bold boundaries for coloring and cutting; monthly rotation of materials and fidgets; daily written communication to include assignments, events and behavior; modified assessment formats; drill and practice of routines and basic concepts; visual supports for boundaries of personal space; extended response time and warnings for schedule changes. (J 13.)
33. The District decided to conduct a formal FBA after Parent asked for “any FBA’s” and District personnel determined that none had been conducted yet. At an IEP team meeting, behaviors of concern were identified for assessment. The team appropriately prioritized the behaviors to be addressed first. (NT 64-69, 306, 548-552, 565, 582, 586, 828-829, 974; P 13.)
34. On March 26, 2013, the District provided an occupational therapy evaluation of Student, conducted by the local intermediate unit. The evaluation recommended continued occupational therapy at 30 minutes per week, but changed goals to reflect Student’s lack of prerequisite skills for higher level fine motor activities. The evaluation recommended changing the goals to emphasize prerequisite skills through consultation, intervention and observation of Student in the classroom. Recommended goals included manipulating buttons and zippers, taken step by step; and tracing and copying lines and shapes. (J 17.)
35. Parent attended monthly IEP team meetings in April 2013. Present levels and parental input were updated. (J 19.)
36. On April 30, 2013, District personnel met and completed forms for an assistive technology evaluation (SETT). Parents were not invited to the meeting. Subsequently, Parents were

invited to a re-evaluation report review meeting to discuss assistive technology planning. Parents were able to participate in the assistive technology planning at this point. (NT 390-394, 1392; J 21, 24.)

37. District personnel performed a functional behavioral assessment in April 2013. The 1:1 paraprofessional collected the data while working with Student. (NT 549-551; J 18, 22.)
38. The District provided a Re-evaluation Report dated May 3, 2013. The report included a review of Student's educational records and medical and developmental history. It also included Student's present levels of performance on Student's IEP goals. The District's school psychologist attempted to perform both intellectual and achievement evaluation through standardized testing. Intellectual testing, corroborated through an adaptive behavior instrument, yielded scores consistently with the Moderately Impaired range of Intellectual Impairment. Achievement scores could not be obtained, due to Student's inability to follow the directions in the testing. The report concluded by classifying Student with Intellectual Impairment as a secondary classification, in addition to the primary classification of Autism and the secondary classification of Speech or Language Impairment. (J 23.)
39. At the meeting to review the report, the IEP team decided to have new data collected by a trained school counselor who would not be working with Student. This data was collected for nine days in the beginning of May. The subsequent FBA relying on this data was the basis for District interventions into Student's behavior. (NT 478, 551-557; J 25.)
40. The District provided an IEP dated May 28, 2013, which revised Student's goals and specially designed instruction for first grade. The revised IEP provided for a pre-school-year transition meeting, a meeting after 30 school days to set baselines on new goals, new academic goals, a revised self-help goal, a new behavior goal for transition times, a new safety awareness goal, and new gross motor goals. New specially designed instruction included the use of a communication book, PECS, slant board, a reading window, shortened assignments, morning and afternoon snacks, peer buddy, audiobooks and videos, extra set of textbooks, sensory and reading area, and replacement instruction for reading, mathematics and writing. The IEP increased speech and language services to three times per week. Placement remained in itinerant learning support. (J 28.)
41. The May 2013 IEP included a positive behavior support plan focusing on Student's behaviors of taking food and objects from peers, and elopement. (J 28.)
42. The May 2013 IEP provided a defined role for Parents' home health aide in the school setting; the aide was to be responsible for toileting only. (J 28; S 3.)

43. The speech therapist missed some sessions during the year; however, all were made up. (NT 1349-1351; J 88.)
44. Student demonstrated some learning progress during kindergarten year in the areas of classroom skills, social skills, language and motor skills. Student learned to hang up Student's coat and book bag with verbal rather than physical prompts; to follow one step directions; to return social greetings from peers independently and with prompts; to understand one-to-one correspondence for objects; to request items by selecting pictures with verbal and gestural prompts; to name items through pointing when asked; to identify a very few colors, shapes, numbers and letters upon request; to select vocabulary from a field of two; to zip a non-separated zipper; and to engage in adapted physical education activities with prompting and assistance. (NT 533, 683, 753-754, 1251; J 6, 8, 28, 39.)
45. On June 12, 2013, the District offered ESY services, including 25 hours of instruction with a special education at Student's neighborhood schools; 20 half-hour sessions of speech and language therapy; one week of day camp for socialization, participation of Parents' home health aide to continue toileting procedures, and planning meetings with Parent. (J 31.)
46. The ESY teacher worked on matching colors and shapes, identifying the letters of Student's name, hanging book bag properly on the hook, pointing to pictures of items in a reading book, play skills, gross motor skills, fine motor skills, and attention to task. (J 40.)
47. One August 22, 2013, Parents attended an IEP team meeting as planned, to discuss transition to first grade. (J 41.)
48. On September 27, 2013, Parent attended an IEP team meeting convened at Parent's request. The IEP team revised Student's IEP to add responsibilities for the Parents' home health aide in the educational environment; the aide would be responsible for Student's safety and eating. The aid would begin to use a task analysis and data collection sheet. Baselines were not added to goals because staff time had been devoted to Student's adjustment to full day school and caring. The team decided to begin one hour per day of 1:1 instruction for reading, writing and mathematics, including 20 minutes, four times per week, with a reading teacher. Speech and language was increased 23 sessions per week 30 minutes per session, all pull out. Occupational therapy was increased 22 sessions per week. Student's daily schedule was reduced to writing. (J 42, 46.)
49. On October 14, 2013, the District sent Parents a Notice of Recommended Educational Placement to change placement from itinerant to supplemental learning support, to provide a one to one personal care assistant, and to continue related services. (J 45.)

50. At an IEP meeting on November 12, 2013, the IEP was further revised. The team noted a positive response to 1:1 intensive teaching and review in a less stimulating environment. Placement was changed to supplemental learning support. Baselines were added to new goals. A goal for teaching boundaries was added. A goal for opening and closing the bathroom door was changed because mastered. The goal for buttons and zippers was replaced with a goal for utilizing Velcro fasteners. The home health aide was instructed to redirect Student back to the school work area when Student attempted to escape to the nurse. Visual scanning and reading goals were changed. A break card was instituted, along with a special seat and an easy bin. A new behavior was added to the positive behavioral support plan: mouthing non-edible things. The plan included a goal for sitting in class for more than thirty seconds. (NT 710; J 46.)
51. On February 20, 2014, Parent attended an IEP team meeting at which the IEP was revised. The IEP provided for ESY services; provided instructions for staff use of an iPad, including use as a reinforcer; provided detailed instructions for one to one instruction; provided for Parent's' speech and language specialist to model instructional strategies for district personnel in the classroom; provided for use of a new communication device; provided for modification of the bus route from home to the ESY location; and provided instructions for accommodating Student's opportunities for socialization in school. The social skills goal of independently returning greetings was ended, due to Student's mastery. (J 50.)
52. Parent disapproved the ESY services offered for the summer of 2014. (J 51.)
53. On April 8, 2014, Parent attended IEP meeting at which the IEP was revised after discussion of concerns. The IEP was revised to set forth a detailed plan for assistive technology assessment and determination of whether or not a new electronic communication device would be utilized in replacement of the PECS system in place for Student. Parent also raised concerns about teaching first-grade classes about autism, Student's eating schedule, Student's digestive problems and recent diagnosis, and Student's use of headphones without reinforcer. (J 57.)
54. In Spring, 2014, Parents filled out a request for assistive technology support form, providing detailed information relevant to Student's assistive technology needs. (J 59.)
55. In April 2014, District personnel filled out the detailed planning document for a meeting to discuss appropriate supplementary aids and services for Student. (J 61.)
56. Student's regular teachers missed a total of about 30 class sessions out of a schedule in excess of 300 sessions. Other teachers filled in on those occasions; in many cases, Student's 1:1 paraprofessional provided the lessons. The regular teachers would try to

conduct lessons at other times during class sessions after being absent. (NT 431-433, 705-706, 773-774, 1116, 1130; J 55.)

57. Student's reading teacher missed about 16 days of class with Student due to conflicting demands or personal absences, out of about 144 sessions required in the IEP. Student's other teacher and paraprofessional provided direct instruction time when the reading teacher was absent. (NT 428-429, 700-705, 1252; J 55.)
58. Student's speech/language therapist missed about 30 sessions that were not made up, including sessions missed for any reason. Student thus received about 78 of the approximately 108 sessions provided in the IEP. (NT 842; J 82.)
59. By NOREP dated April 24, 2014, District offered extended school year services with transportation. A specific schedule was offered, including 25 hours of 1:1 intensive academic and behavioral instruction; 14 hours of 1:1 speech; socialization; and two hours of integrated occupational therapy. Parents' home health aide was permitted to attend Student's classes for medical and safety purposes. A planning meeting was offered to coordinate home and school services. (J 58.)
60. Parents participated in an IEP meeting on or about May 28, 2014, at which the IEP was revised extensively. Student's placement remained at supplemental learning support. (J 64.)
61. The May 28, 2014 IEP revised present levels of performance to reflect progress in classroom participation skills including orientation to the classroom, following classroom routines; increased tolerance of peers during circle time; following one step directions; attention to tasks; attention to the teacher reading aloud; participation in classroom activities; hanging up belongings independently; expected behavior during transitions; and availability for one to one instruction. (J 64.)
62. Student demonstrated improved social skills, including positive social responsiveness to teachers and adult staff; positive social responses to peers; attainment of the skill of parallel play; and more consistent returning of greetings through eye contact. (J 64.)
63. Student's progress in pre-academic skills was inconsistent, and for most goals negligible progress was made. Student made some progress in speech and language therapy, in the areas of requesting wants and needs through utilization of picture exchange, and other receptive language skills, including sorting. Negligible progress was reported in tracing shapes. Some progress was reported in adapted physical education. (NT 871-872; J 64, 70; P 50.)

64. Student made significant progress in reading with the 1:1 reading teacher. (NT 1251, 1255-1256.)
65. The May 28, 2014 IEP provided for introduction of a new, electronic communication device. (J 64.)
66. The May 28, 2014 IEP revised Student's goals for classroom orientation; goals for academic skills including learning the alphabet; goals for requesting needed items from peers and staff; responding to "wh" questions; and keeping hands and feet together during transitions. (J 64.)
67. The May 28, 2014 IEP revised Student's specially designed instruction and modifications to address skills needed for assistive technology. (J 64.)
68. May 28, 2014 IEP reduced occupational therapy sessions to once per week. (J 64.)
69. July 2, 2014, Parents met with the IEP team to discuss their disagreement with the District's offered placement and IEP. Parents indicated acceptance of offered ESY services for the summer of 2014. (J 67.)
70. Student attended ESY programming in the summer of 2014. (J 69, 70, 78.)
71. Student made significant progress during ESY programming, which was on a 1:1 basis, in an intensive academic setting, and involved little or no transitions or distractions. Student improved the following skills: matching colors, matching picture to word, matching numbers and identifying Student's assigned locations in the classroom. Student also made progress and the skill of independently requesting a bathroom break. By October 1, 2014, Student had made further progress in these skills; in addition, Student had made progress in tracing letters, sorting, identifying categories and finding Student's classroom in the school building. (J 85.)
72. On July 23, 2014, Parent attended an IEP meeting to review progress in ESY. The team also planned for implementation of the new electronic communication device and team members were trained by a manufacturer's representative. The team planned additional bi-weekly meetings to coordinate and monitor implementation of the IEP. (J 85.)
73. On September 3, 2014, Parent attended an IEP meeting on September 3, 2014, at which the IEP was revised extensively. The IEP team added goals for utilization of the new communication device in order to request a break and properly transition back to

classroom. Specially designed instruction was revised to support use of the new device. In addition, specially designed instruction was revised to require reporting to parents daily on use of fidgets and reinforcers, to remove handwriting without tears programming, to utilize a visual silent timer, to utilize a visual task scheduler, and to provide for Student to utilize the bathroom in the nurse's office on an optional basis. (J 85.)

74. The September 2014 IEP revision increased occupational therapy to one 30 minute session in the therapy room and two 20 minute sessions in the classroom environment. (J 85.)
75. The September 2014 IEP found Student eligible for ESY services and provided for related services in the summer of 2015. Student's placement was not changed. (J 85.)
76. The September 2014 IEP removed all references to quiet hands and feet interventions. (J 85.)
77. The September 2014 IEP reflected an exact scheduling of meetings with the case manager every week. (J 85.)
78. On October 1, 2014, Parent attended an IEP team meeting in which the IEP was extensively revised. Present levels were updated. Baselines were added two goals and objectives. Supplementary aids and services, as well as other programming were modified. The change was made in the location of occupational therapy. Additional references to quiet hands and feet were removed from the positive behavior support plan. (J 85.)

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.² In Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence³ that the moving party is entitled to the relief requested in the Complaint Notice. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006)

This rule can decide the issue when neither side produces a preponderance of evidence – when the evidence on each side has equal weight, which the Supreme Court in Schaffer called “equipoise”. On the other hand, whenever the evidence is preponderant (i.e., there is weightier evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. See Schaffer, above.

In the present matter, based upon the above rules, the burden of persuasion rests upon the Parents, who initiated the due process proceeding. If the Parents fail to produce a preponderance of the evidence in support of Parents’ claims, or if the evidence is in “equipoise”, the Parents cannot prevail.

DUTY TO OFFER AND PROVIDE A FAPE

The IDEA requires that a state receiving federal education funding provide a “free appropriate public education” (FAPE) to disabled children. 20 U.S.C. §1412(a)(1), 20 U.S.C.

² 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).

³ A “preponderance” of evidence is a weight of evidence that is greater than the weight of evidence produced by the opposing party. See, Comm. v. Williams, 532 Pa. 265, 284-286 (1992). Weight is based upon the persuasiveness of the evidence, not simply quantity. Comm. v. Walsh, 2013 Pa. Commw. Unpub. LEXIS 164.

§1401(9). School districts provide a FAPE by designing and administering a program of individualized instruction that is set forth in an Individualized Education Plan (“IEP”). 20 U.S.C. § 1414(d). In order to provide FAPE, the child’s IEP must specify educational instruction designed to meet his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. Board of Education v. Rowley, 458 U.S. 176, 181-82, 102 S.Ct. 3034, 1038, 73 L.Ed.2d 690 (1982); Oberti v. Board of Education, 995 F.2d 1204, 1213 (3d Cir. 1993).

The IEP must be likely to enable the child to receive “meaningful educational benefits” in light of the student's “intellectual potential.” Shore Reg'l High Sch. Bd. of Ed. v. P.S., 381 F.3d 194, 198 (3d Cir. 2004) (quoting Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 182-85 (3d Cir.1988)); Mary Courtney T. v. School District of Philadelphia, 575 F.3d 235, 240 (3rd Cir. 2009), see Souderton Area School Dist. v. J.H., Slip. Op. No. 09-1759, 2009 WL 3683786 (3d Cir. 2009). “Meaningful educational benefit” means that an eligible child’s program affords him or her the opportunity for “significant learning.” Ridgewood Board of Education v. N.E., 172 F.3d 238, 247 (3d Cir. 1999). An eligible student is denied FAPE if his or her program is not likely to produce progress, or if the program affords the child only a “trivial” or “de minimis” educational benefit. M.C. v. Central Regional School District, 81 F.3d 389, 396 (3rd Cir. 1996), cert. den. 117 S. Ct. 176 (1996); Polk v. Central Susquehanna Intermediate Unit 16, 853 F. 2d 171 (3rd Cir. 1988). Moreover, “the provision of merely more than a trivial educational benefit” is insufficient. L.E. v. Ramsey Bd. of Educ., 435 F.3d 384, 390 (3d Cir.2006).

A school district is not necessarily required to provide the best possible program to a student, or to maximize the student’s potential. Rather, an IEP must provide a “basic floor of opportunity” – it is not required to provide the “optimal level of services.” Mary Courtney T. v.

School District of Philadelphia, 575 F.3d at 251; Carlisle Area School District v. Scott P., 62 F.3d 520, 532 (3d Cir. 1995). An IEP is not required to incorporate every program that parents desire for their child. Ridley Sch. Dist. v. M.R., 680 F.3d 260, 269 (3d Cir. 2012).

The law requires only that the IEP and its execution were reasonably calculated to provide meaningful benefit. Carlisle Area School v. Scott P., 62 F.3d 520 (3d Cir. 1995), cert. den. 517 U.S. 1135, 116 S.Ct. 1419, 134 L.Ed.2d 544(1996)(appropriateness is to be judged prospectively, so that lack of progress does not in and of itself render an IEP inappropriate.) The IEP's appropriateness must be determined as of the time it was made, and the reasonableness of the school district's offered program should be judged only on the basis of the evidence known to the school district at the time at which the offer was made. D.S. v. Bayonne Board of Education, 602 F.3d 553, 564-65 (3d Cir. 2010).⁴

PROVISION OF FAPE

I conclude that the District has provided an IEP and educational services that meet the above standard of providing Student with a reasonable opportunity for meaningful educational benefit in light of Student's intellectual potential in kindergarten and first grade. This conclusion

⁴ Section 504 and the ADA define FAPE differently, requiring that the education provided be designed to meet the individual needs of the child "as adequately as the needs of non-handicapped persons are met." 34 C.F.R. §104.33(b)(1). The same elements must be proved for claims pursuant to the ADA. 42 U.S.C. §12132; see, D.E. v. Cent. Dauphin Sch. Dist., 2013 U.S. Dist. Lexis 626 at 14 to 31 (M.D. Pa. 2013)(both section 504 and the ADA claims require proofs in addition to evidence that a district failed to provide a FAPE as defined in the IDEA). I conclude that if Parents can meet the Burlington-Carter three part test (including that the District failed to offer Student a FAPE under the IDEA), then an additional analysis will be required to determine whether or not section 504 and the ADA were violated, based upon the same facts adduced in support of the IDEA violation.

is based upon a review of the extensive record, determinations with regard to the credibility and reliability of witness testimony, and the weight that I accorded to the documentary and testimonial evidence.

Student's disabilities affected Student's intellectual potential and capacity to demonstrate educational progress in kindergarten and first grade. I conclude that, in this matter, Student's cognitive potential and disabling conditions – both cognitive and physical - must be considered in determining whether or not Student's modest educational progress was “meaningful” under the IDEA.

Student presented with severe developmental delays. Student had been retained for an extra year in early intervention, which provided verbal behavior training, speech and language therapy and occupational therapy, yet Student came to kindergarten with virtually no communication skills, very immature behaviors that interfered with functioning in the classroom environment, and virtually no interest in social interaction. Student also displayed delays in safety and adaptive skills, and motor skills. A District psychologist was able to test Student's cognitive ability; testing revealed that Student is a child with moderately severe Intellectual Disability.

Student's behaviors on the first day of kindergarten were those of a much younger child; Student demonstrated a variety of behaviors to escape from instruction. Student had no ability to speak, and it was not clear that Student had the ability to understand speech. Student typically played alone; Student had not reached the stage of parallel play with other children. Student needed to be taught the very beginnings of communication, acceptable behavior in the classroom environment, and the rudiments of social greetings and interactions.

Student also presented with a chronic physical condition that disturbed Student's digestion. Student suffered from constipation and the risk of impaction, and required medical treatment with

medicines for this condition. Student often came to school in discomfort because of this condition. Student did not eat regularly because of this condition, and often came to school without having eaten breakfast.

The evidence is preponderant that this physical condition substantially interfered with Student's availability for instruction. In addition, this condition interfered with Student's toilet training, and Student spent an inordinate amount of time engaging in toilet training and experiencing enuresis and the need to be cleaned and changed during the school day. This impediment to learning persisted in both kindergarten and first grade.

DISTRICT SERVICES PROVIDED

In Student's kindergarten and first grade years, the District conducted two complete educational re-evaluations and numerous IEP meetings with Parents. In the Spring of Student's kindergarten year, the District provided a formal Functional Behavioral Assessment. Also at that time, the District provided a detailed review of Student's assistive technology needs; throughout kindergarten and first grade, the District provided trials of several different communication methodologies for Student. Functional Behavioral Assessments and formal assistive technology assessments were conducted in first grade also. District personnel also assessed the supplemental aids and services through a formal process provided by the Pennsylvania Department of Education. I conclude that these evaluations and assessments, all conducted with parental input, identified Student's needs comprehensively.

The District addressed Student's unique educational needs through appropriate IEPs that were revised numerous times to provide individualized special education and related services. The IEPs provided extensive present levels of functional and academic performance. They included goals that comprehensively addressed Student's educational needs, addressing behavioral

regulation, social skills, communication skills (both receptive and expressive language), pre-academic skills in the areas of literacy, mathematics and writing, as well as training in gross motor and fine motor skills needed in the educational environment. They included numerous accommodations and specially designed instructional techniques. They included a variety of assistive technologies.

The IEPs provided related services including speech and language therapy, occupational therapy, transportation and paraprofessional assistance. During Student's kindergarten year, the IEP team added a provision for accommodated physical education, once per week. The District revised the original related services when data showed that Student's progress was negligible or too slow. Speech and language therapy gradually increased to three sessions per week. Occupational therapy was increased from one session to two sessions per week. These services were provided in a variety of settings, both by "push-in" services in the regular education classroom, and by "pull-out" services provided in other locations. Related services providers took data and reported that data to Parents.

The District also provided ESY services during the summers of 2013 and 2014. These services were individualized with parental input and included one-to-one instruction, speech and language therapy and occupational therapy. The District provided transportation.

STUDENT RECEIVED EDUCATIONAL BENEFIT

Student made virtually no progress in the first months of Student's kindergarten year. Nevertheless, by the end of that year, the evidence shows preponderantly that Student made slight but palpable progress.

By the end of Student's kindergarten year, Student had received instruction on a one to one basis, and the evidence shows preponderantly that such instruction was effective. Seeing this, the

IEP team revised Student's IEP to provide for one to one instruction for academics, and it changed the placement to supplemental learning support. In addition, the team increased Student's speech and language therapy sessions – also delivered one to one. I find that it was at this point that Student began to demonstrate academic progress.

As discussed above, the IDEA requires school districts to provide opportunities for "meaningful" benefit. Whether educational benefits are "meaningful" is determined in view of a child's cognitive abilities and potential. Given Student's low cognitive ability and disabilities creating substantial barriers to curricular access upon Student's enrollment in the District's kindergarten, I conclude that Student's demonstrated modest learning progress in kindergarten was "meaningful" under the IDEA, and that the record shows “meaningful” progress in first grade by a preponderance of the evidence.

PARENTS' CONCERNS

In the face of this record of provision of individualized and extensively revised services, Parents argue that the District failed to provide Student with meaningful educational benefit, because it failed to implement the prevailing IEPs as written. Parents argue that the District's implementation was deficient in numerous respects. They argue that the District employed a paraprofessional for both years who failed to provide appropriate instructional techniques, and who was rough with Student and even restrained Student illegally. They argue that the FBA was delayed inordinately, until spring of kindergarten year. They argue that the teachers, speech and language therapists and occupational therapists missed scheduled sessions. They argue that inadequate ESY services were provided. They argue that they were not properly included in the evaluation of assistive technology. I conclude that the evidence does not support all of these

concerns preponderantly, and that, even assuming their accuracy, the evidence does not show by a preponderance that the defects in implementation deprived Student of a FAPE.

Inappropriate Paraprofessional Services

Parents' principal argument is that the assigned paraprofessional failed to provide professionally competent services to Student for two years, and harmed Student by treating Student roughly and by physically restraining Student. Parents sought to prove these allegations through the testimony of several individuals whom they had employed privately to provide behavioral and therapeutic services to Student.

Parents employed a behavior specialist, who visited Student's school and observed Student's instruction weekly (twice a week in the first six weeks). I gave some weight to the specialist's observations that the paraprofessional was inconsistent in utilizing appropriate behavioral techniques during instruction. However, this witness could not specify the time period during which the paraprofessional had been inconsistent, nor could the witness provide any information or opinion as to the overall educational effect of any inconsistency. Thus, this testimony does not provide preponderant evidence of a denial of FAPE.

Parents also presented the testimony of a home health care worker who described several incidents of allegedly inappropriate touching, including restraining Student by holding Student across the chest; restraining by placing the paraprofessional's leg over the Student's legs and feet; barricading Student with chairs to prevent elopement from one to one instruction sessions; and a habit of touching Student on the shoulders, in a way that Student allegedly found to be

uncomfortable. These allegations for the most part were not corroborated⁵. More than one District witness credibly denied observing any inappropriate instructional actions by the paraprofessional.

On balance, I find that the home health worker's testimony was not credible as a whole. This is based in part upon a conflict in the record on a point that the witness raised in an attempt to provide corroboration for the witness' testimony. The witness claimed that District staff had criticized the paraprofessional in conversation with the aide, a suggestion that is somewhat counter-intuitive, as the aide was not a fellow employee and not a team member with those staff. The educator in question, whose testimony I find to be credible, flatly denied the allegation.

Nevertheless, it is admitted that the paraprofessional used a restraint of Student's legs in instructional sessions lasting no more than one hour, no more than four days per week, for no more than two months. This suggests a violation of the Pennsylvania regulation limiting physical restraint. 20 Pa. Code §14.133. I did not develop the record for purposes of making a determination about the legality of the paraprofessional's behavior, and I reach no conclusion as to its legality. I do conclude that it was inappropriate in the context of this matter, for this child.

Parents failed to show by a preponderance of the evidence that this behavior, or any of the allegedly inappropriate behavior of the paraprofessional, resulted in a denial of a FAPE to the Student. Witnesses – primarily the home health staff and Parent – testified that Student's demeanor was anxious, fearful and resistant to school during most of the two years in which the paraprofessional was assigned to Student; they testified that, after the paraprofessional was

⁵ Parents presented the testimony of the home health care worker's supervisor, and reports written about two incidents observed by the care worker and the supervisor. The supervisor testified that the reports are made within fourteen days of the observations; I conclude that they have less weight than a contemporaneous note of an event. Thus, the reports and the supervisor's testimony are uncorroborated hearsay and I do not find that they corroborate the worker's reports. Although the record supports that some holding of Student happened as referenced by the home health aide, the concerning details of the aide's description are not corroborated, and the incident does not prove that the restraint by the paraprofessional was inappropriate.

reassigned in May of first grade, Student's demeanor changed radically, Student no longer seemed anxious or fearful, and Student no longer attempted to elope when challenged to do school work. I find that this testimony is inconsistent with a record that indicates that Student's avoidance behaviors did not disappear when the paraprofessional was reassigned.

Even if I were to give this testimony weight, it would not prove that the paraprofessional was the cause of Student's many work-avoiding behaviors. The depicted change in Student's behaviors could have been attributable to several other factors. The paraprofessional left at the end of the first grade year, when work demands were being reduced. The replacement paraprofessional needed to reestablish that positively reinforcing association with herself called "pairing", so she reduced the work demands on Student during the first few weeks after beginning with Student in May. Student's digestive and bathroom difficulties had resolved somewhat. Student in May of first grade was receiving more one to one instruction in settings in separate from the regular education classroom, further reducing the challenge of school.

Thus, even if the paraprofessional's inappropriate behavior had a negative impact on Student's behavior, the evidence introduced by Parents does not demonstrate preponderantly that it was so pervasive as to prevent the Student from receiving meaningful educational benefit. On the contrary, the record as a whole shows that Student did receive such benefit, regardless of the effects of the paraprofessional's inappropriate behavior.

Delayed FBA

Parents argue that the District, acknowledging that the Student presented behaviors that impeded learning at the start of the school year, should have conducted an FBA immediately, and that this would have led to a behavior plan that would have helped Student to control Student's behaviors in kindergarten. While the FBA was delayed based on this record, there is no evidence

that this delay was the cause of Student's problematic behaviors or the cause of a denial of a FAPE. I conclude that Student's behaviors were due to the physical condition during most of kindergarten, as well as to the other impediments to learning with which Student entered kindergarten. Thus, the Parents failed to show that the delay was tantamount to a denial of FAPE.

Missed Instruction and Missed Related Services

Parents argue that the District failed to provide all of the services called for in the IEPs and their numerous revisions, when Student was available for education. They point to documents that show that classroom teachers missed classes in the general education room, the reading teacher missed classes, the kindergarten and first grade speech and language therapist missed sessions, and the occupational therapist missed sessions.

I conclude that the evidence does not show as great a deprivation of promised services as Parents claim. Documents indicated that some missed sessions were due to school-wide cancellations in winter or special activities that suspended regular classes. Classroom teachers pointed out that other teachers or the paraprofessional would pick up instruction where the teachers left off if the teachers were absent, and that often the teachers themselves were able to make up some of the one to one instruction during subsequent class hours. The reading teacher made up most of the absences, and the kindergarten speech and language teacher made up for her absences⁶. Overall, the Student received the vast majority of the services that the IEPs provided.

Moreover, I find no evidence that these missed services denied Student a FAPE. Due process is not charged with adjudicating IEP implementation as if it were a case of contract

⁶ The first grade speech and language therapist admitted missing about thirty sessions without making them up. Consequently, Student received only seventy percent of the sessions called for in the IEP. The District should make this up, but I will not order it to do so, because the record demonstrates preponderantly that these failures did not deprive Student of a FAPE.

performance. The IDEA requires the hearing officer to decide only the issue of denial of FAPE. Here, the record as a whole preponderantly demonstrates that the services actually provided to Student delivered meaningful educational benefit.⁷

ESY Services Not Long Enough

Parents argued that the Student's needs were so great that more than the usual ESY should have been provided, so that the gap between school days would not cause regression. Parents provided no evidence to support this assertion, and it must fail.

Parental Participation

Finally, the Parents argue that the District denied them participation in IEP planning for Student because it met and formulated a SETT analysis of Student's assistive technology needs in May of Student's kindergarten year, without including Parents. I find this suggestion to be without merit. While District personnel did discuss these issues without Parents due to an oversight, the District's Supervisor of special education called and apologized, and then made sure that the Parents had a chance to discuss the matter at the next meeting, which occurred within two to three weeks. The decision was to trial the AT device that the Parents wanted for Student. This record shows no deprivation of Parental participation.

CONCLUSION

⁷ As with the other allegations of inappropriate actions by the paraprofessional, I do not mean to condone the failure to provide instruction or to suggest that it should not be remedied. I only conclude that any such remedy for failure to comply with Department of education regulations or policies should be addressed to the Department; as long as FAPE was delivered, I must find for the District on the issues before me.

I conclude that the District provided this Student with a FAPE for kindergarten and first grade, and that the IEP offered for second grade was appropriate. Consequently, there is no basis to order the relief sought by Parents.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, the Parent's requests for relief are hereby **DENIED** and **DISMISSED**. It is **FURTHER ORDERED** that any claims that are encompassed in this captioned matter and not specifically addressed by this decision and order are denied and dismissed.

William F. Culleton, Jr. Esq.

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

December 9, 2014