

*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: J.E.

ODR #17039 / 15-16 AS

Date of Birth:  
[redacted]

Dates of Hearing:  
January 11, 2016  
March 11, 2016  
March 14, 2016

CLOSED HEARING

Parties to the Hearing:  
Parent[s]

Representative:  
Heather Hulse, Esquire  
McAndrews Law Offices  
30 Cassatt Avenue  
Berwyn, PA 19380

Pocono Mountain School District  
135 Pocono Mountain School Road  
Swiftwater, PA 18370

Glenna Hazeltine, Esquire  
King, Spry, Herman, Freund and Faul  
One West Broad Street Suite 700  
Bethlehem, PA 18018

Date Record Closed:

April 26, 2016

Date of Decision:

May 16, 2016

Hearing Officer:

Linda M. Valentini, Psy.D., CHO  
Certified Hearing Official

## Background

Student<sup>1</sup> is an early-teen-aged eligible student whose adoptive Parent (Parent) is a District (District) resident, and for whose educational programming the District was responsible until late May 2015 when Student was placed in a court-ordered residential treatment facility outside the District. Student had originally been found eligible for special education pursuant to the IDEA<sup>2</sup> under the classifications of emotional disturbance and speech/language impairment; an independent psychoeducational evaluator recently added the classifications of other health impairment (ADHD) and specific learning disabilities. In light of Student's disabilities, Student is also a qualified handicapped person / protected handicapped student under Section 504 of the Rehabilitation Act of 1973 (Section 504)<sup>3</sup>. The Parent requested this hearing under the IDEA and Section 504, alleging that the District denied Student a free appropriate public education (FAPE) by failing to address Student's academic, social, emotional and behavioral needs appropriately, and seeking compensatory education from the 2009-2010 school year until the time Student left the District. The District maintains that it provided Student with FAPE at all times relevant to this matter. In a prehearing ruling on the District's Motion to Limit Claims, the hearing officer found the relevant period for the hearing to be the 2013-2014 school year and the 2014-2015 school year up to the time Student left the District.

After carefully considering the testimony and credibility of each witness, the documents entered into evidence, and the parties' written closing arguments, for the reasons stated below I find for the Parent on some, but not all, aspects of her issues

## Issues

1. Did the District fail to appropriately evaluate Student in October 2012?<sup>4</sup>
2. Did the District deny Student a free, appropriate public education during the 2013-2014 and/or the 2014-2015 school year[s]?
3. If the District denied Student a free, appropriate public education, is Student entitled to compensatory education and if so in what form and what amount?

## Stipulations

1. The District's 2012 evaluation of Student was the District's evaluation. [NT 26]

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<sup>1</sup> This decision is written without further reference to the Student's name or gender, and as far as is possible, other singular characteristics have been removed to provide privacy.

<sup>2</sup> 20 U.S.C. §§ 1400-1482

<sup>3</sup> 29 U.S.C. § 794

<sup>4</sup> Although the relevant period for recovery in this matter begins in September 2013, the October 2012 evaluation was the basis for Student's IEPs during the relevant period.

2. The District asked the psychologist who had completed a publicly funded independent educational evaluation (IEE) to hold his report in which he had found the Student had autistic spectrum disorder until the speech and language pathologist completed her report, and then both reports were issued together. [NT 26-28]

## Findings of Fact

### The Student

1. Student was adopted by Student's [relative] (Parent) at [a young age]. Student had experienced abandonment by biological mother, and had suffered severe neglect. [NT 434]
2. At the time of the adoption Student's development was delayed in all areas. At [mid-prekindergarten age] Student was not able to speak, was not toilet-trained, did not know about bathing or tooth-brushing, did not know any colors, and had very poor motor skills. The Parent noted Student "had issues from A to Z" and described Student as being "afraid all the time". [NT 435-436]
3. Student did not receive early intervention services or attend preschool, so first exposure to a school setting was kindergarten. Student started attending District schools in the fall of second grade, the 2009-2010 school year, having moved to Pennsylvania from a neighboring state. [NT 435]
4. Student had originally been found eligible for special education under the classifications of emotional disturbance and speech/language impairment. In late 2015 an independent psychoeducational evaluator added the classification of other health impairment due to attention deficit/hyperactivity disorder as well as specific learning disabilities in mathematics and written expression. [S-22]
5. Additional conditions have been considered: autism spectrum disorder (ruled out by the independent psychoeducational evaluator following receipt of the independent speech/language evaluation); social pragmatic communication disorder; neurocognitive disorder with deficits in executive functioning; mood disorder not otherwise specified with depressive and anxious features; oppositional defiant disorder; intermittent explosive disorder; reactive attachment disorder; and, parent/child relational problem. [S-19, S-22]
6. During the 2012-2013 school year, the year prior to the relevant period, Student presented as active, happy, artistic, playful, endearing, and a joy to spend time with. At the same time Student was also described as immature, inattentive, restless, requiring repetition of rules, repetition of instruction, and supervision. Student was noted to dig in or shut down when not getting Student's own way, but "nothing extreme". [NT 677-678]
7. On November 19, 2013, Student was hospitalized at an inpatient facility for children and remained there for 10 days due to an incident in school of [behavior presenting a physical

danger to self and others]. Student was restrained and the District called the police. After discharge Student returned to school and the District provided paraprofessional assistance for a 30-day period. [NT 236-238, 258-259, 267-269; S-7]

8. On January 16, 2014 pursuant to a recommendation contained in the inpatient hospitalization unit's discharge summary (provided to the District on December 5, 2013) Student was placed in a school-based partial hospitalization program located in a District intermediate school. [NT 247-248; S-9]
9. After Student's health insurance had stopped supporting the partial hospitalization program, the District funded that placement through May 12, 2014. [NT 246-248]
10. On May 12, 2014 the IEP team reconvened and proposed an IEP to be implemented at the IU's Emotional Support Program (emotional support program). Under the May 12, 2014 IEP Student would receive full time emotional support programming in the IU placement along with speech/language support, individual counseling, group counseling, and specialized transportation to and from school. [NT 248, 615; S-11]
11. The IU's emotional support program offered a classroom of 12 students and 3 adults - the teacher, a mental health worker and a paraprofessional. Twelve to eighteen mental health workers are assigned to the overall emotional support program. [NT 328-329, 349, 470, 514-515, 541-544, 683-684, 708-712; S-19]
12. In addition to the embedded mental health milieu, the IU emotional support program offered direct counseling services. Student received 40 minutes of group counseling every day, and individual counseling for 15 minutes weekly or as needed. [NT 330, 352, 370, 469-472, 474-479, 481-484]
13. The IU's emotional support program addressed Student's behaviors with the school-wide positive behavior support plan, the TALII (Task, Area and Direction, Language, Interactions with Peers, and Interactions with Staff), a token economy, and a period of Friday afternoon free time based on TALII scores. Later a behavior support program/plan, TALUS, was added to the IEP and the IEP also included the use of TACT-II, a therapeutic passive restraint protocol, to be used if necessary. [NT 304-305, 350]
14. Although Student was prescribed medication, on some days Student didn't take it. [NT 354-355, 570- 571]
15. The behavioral incidents in which Student was involved at the IU emotional support program were typical of students at that program until behaviors escalated in April. Nevertheless in the 2014-2015 school year there were 26 disciplinary incidents including [physical aggression toward students and staff]. [NT 493; S-26]
16. On May 26, 2015 Student brought a [weapon] to school, reportedly because a student whom Student knew from the District and who allegedly had bullied Student was placed in Student's classroom. The entry of the new student had been addressed with Student in

group counseling, in individual counseling and in restorative practices. As a result of possession of the [weapon] at school and assault on a police officer Student was arrested at school for aggravated assault, simple assault, disorderly conduct, and possession of a weapon on school property. [NT 404-408]

17. Following the arrest Student was adjudicated and placed in a juvenile facility by the court. Student has since been moved to another court-ordered residential placement, a youth development center, because Student did not do well in the first setting. [NT 537]
18. The IEP team convened in June 2015 to revise the IEP and to conduct a manifestation determination, the outcome of which was a finding that Student's conduct on May 26<sup>th</sup> was a manifestation of Student's disability. The manifestation determination team recommended a psychiatric evaluation to consider a more restrictive placement. The psychiatric evaluation report was issued on June 27, 2015 with the recommendation for placement in a partial hospitalization program. [NT 431]
19. Student is welcome to return to the IU emotional support program upon release from the juvenile facility. [NT 517, 536]

#### Waiver of Full Evaluation / Subsequent Independent Evaluations

20. Student's last full evaluation by the District was completed on November 13, 2009 when Student was in 2<sup>nd</sup> grade and new to the District. Student was due for an IDEA-mandated three-year re-evaluation in November 2012 when Student was in the 5<sup>th</sup> grade. Student's emotional support teacher reviewed Student's progress and a District psychologist proposed a waiver to a full reevaluation (Waiver). The Parent signed the Waiver. Student's IEPs over the subsequent two-and-a-half years were based upon the 2012 reevaluation referenced in Stipulation #1 (reevaluation pursuant to Waiver). [NT 41-44; P-2]
21. The progress report for October 2011 through October 2012<sup>5</sup> that the emotional support teacher reviewed covered October of 4<sup>th</sup> grade through October of 5<sup>th</sup> grade, the year leading up to the District's October 2012 proposed Waiver of a full reevaluation. The progress report noted that Student's reading baseline was 42 words a minute at the second grade level. At the end of that IEP year Student had not met the reading fluency goal (94 words per minute at the fourth grade level) nor had Student met any of the incremental objectives under that goal.<sup>6</sup> The progress report on the first objective for each quarter

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<sup>5</sup> The relevant period begins in September 2013. The progress reporting for the 2011-2012 school year is provided only in order to demonstrate the data upon which the District decided to propose a waiver of a full triennial reevaluation and not for purposes of determining a denial of FAPE prior to September 2013. Information about progress during the 2011-2012 IEP period is important because the proposal to conduct an abbreviated reevaluation (Waiver) followed the District's review of progress monitoring. The abbreviated re-evaluation was the reevaluation upon which the Student's 2013-2014 and 2014-2015 IEPs were based.

<sup>6</sup> The emotional support teacher testified that the District's policy is to write annual IEP goals to indicate where a student should be at the end of the IEP year according to state standards at a student's chronological grade level as opposed to what would be expected advancement in one school year from a student's baseline. This approach is consistent with an OSERS November 15, 2015 Dear Colleague letter ("*We expect annual IEP goals to be aligned*

notes that “progress has been made toward the objective”, whereas the skills for the second and the third objectives were not assessed since they were contingent on attaining the first objective. [NT 46-56; P-15]

22. The same progress report addressed Student’s reading comprehension but did not provide a baseline. The goal (increase reading comprehension skills to grade level for fiction and non-fiction) was not met during the IEP year, nor were any of the objectives dealing with predictions, or characters/ set/plot/discussion. The progress report for each objective in each quarter notes “progress has been made toward the objective.” [NT 46-56; P-15]
23. The same progress report noted Student’s written expression baseline was 17 written words in three minutes. The goal (39 written words in three minutes) was not met during the IEP year, nor were any of the objectives – spelling, capital letters, punctuation, grammar, complete sentences – met. The progress report for each objective in each quarter notes “progress has been made toward the objective.” [NT 46-56; P-15]
24. The same progress report noted Student’s math computation baseline was 6 digits correct per minute on a second grade probe. The goal (29 correct digits per two minutes on third grade probes) was not met during the IEP year, nor was the first objective met in any of the four quarters; in each quarter “progress has been made toward the objective” was noted. The second objective was not introduced in any quarter. [NT 46-56; P-15]
25. The same progress report noted Student’s math reasoning baseline was 3 points correct per 6 minutes on a third grade probe. The goal (14 points in 8 minutes at grade three probes) was not met, and none of the objectives for addition, subtraction, multiplication, fractions, charts/tables or math vocabulary were met although the report noted “progress has been made toward the objective.” [NT 46-56; P-15]
26. From October 2011 to October 2012, Student had not met the reading fluency goal, the reading comprehension goal, the English/language arts writing goal, the math computation goal, or the math applications goal. [NT 55-55; P-15]
27. As of October 2012, the beginning of Student’s fifth grade school year, Student was functioning on a second grade level in reading fluency, reading comprehension,

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*with State academic standards for the grade in which a child is enrolled” and to the extent that a student is behind the state standard which the goal targets “The goals should be sufficiently ambitious to help close the gap”). While the OSERS guidance does acknowledge that for some students such an approach may not be appropriate, it limits this to “a very small number of children with the most significant cognitive disabilities.” However, when baselines are several years below chronological grade levels, expecting a child with learning deficits to make more than a year’s progress in one year may not be at all realistic given that a typical non-disabled student can be expected to make a year’s progress in one year. Much earlier OSERS guidance, Letter to Butler, 213 IDELR 118, 1988, counseled a more practical approach, noting that ‘annual’ means 12 months and that annual goals are statements that describe what a child with a disability can reasonably be expected to accomplish within a 12-month period in the child’s special education program. In the instant matter, however, the District is not being unfairly penalized for following OSERS guidance because although Student did not reach, and could hardly be expected to reach, any of the overly ambitious IEP goals, Student also did not master any of the reasonable short term objectives leading toward the goals. [P-15]*

English/language arts writing, math computation, and math applications. [NT 52; P-15]

28. The emotional support teacher agrees that Student was making minimal progress on IEP goals during the IEP year October 2011 to October 2012. [NT 69-70]
29. The progress report for October 2011 through October 2012 also noted Student's goal in speech/language was not met, and the goal and objectives in behavior were not met, although again the report notes "progress has been made toward the objective." [P-15]
30. In October 2012 Student was Below Basic in Study Island reading and math benchmarks. [P-2]
31. As reported in October 2012 on the Woodcock-Johnson Tests of Achievement 3<sup>rd</sup> Edition Student's standard scores were at or near 2 standard deviations from average. Student's standard scores were: 70 Broad Reading Composite at the 2<sup>nd</sup> percentile, 74 Broad Math Composite at the 4<sup>th</sup> percentile, and 68 Broad Written Language at the second percentile.<sup>7</sup> [P-2]
32. The teacher input for the abbreviated reevaluation was provided by the art teacher, and Student was observed in the regular education art class; however, art was one of Student's preferred subjects. Student was not observed in non-preferred special education academic classes where Student functioned below grade level.<sup>8</sup> [NT 56-58; P-2]
33. At the time the District issued the Agreement to Waive Re-Evaluation the emotional support teacher was aware that Student had not met IEP goals or objectives, was Below Basic on Reading and Math benchmarks, and earned Woodcock-Johnson Tests of Achievement scores that were significantly below average. [NT 62-63]
34. On October 26, 2012 the District provided an Agreement to Waive Reevaluation which included parent input, art teacher input and observation in art class, Study Island benchmarks, and Woodcock-Johnson scores. The Parent signed the Waiver. This document constituted the District's evaluation as noted in the first Stipulation above. [P-2]
35. The District did not conduct any assessments of executive functioning, although teacher input obtained on October 8, 2012 indicated Student needed frequent directions, was easily distracted with a short attention span, and displayed fluctuating levels of performance. As of December 2014/ January 2015 when they provided input for the IEE,

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<sup>7</sup> Briefly, standard scores are assigned on the bell-shaped curve, with 100 being exactly average. One standard deviation is 15 points. Percentile ranks show where a statistic about an individual [e.g. height, weight, academic test scores] would fall in rankings from highest (99<sup>th</sup> percentile) to lowest (less than 1<sup>st</sup> percentile) with the average being the 50<sup>th</sup> percentile.

<sup>8</sup> The emotional support teacher testified that the District's practice is to observe students outside the special education classroom and that therefore art was one of a limited number of choices. If this is indeed the District's practice, in Student's case the District's practice could have been satisfied by observing art but Student's better interests would have been served by adding observation[s] of Student being instructed in areas of difficulty.

Student's teachers in the IU emotional support program indicated continued executive functioning deficits. The IEE identified weaknesses in executive functioning that were necessary to understand Student's deficits and how they impacted success in school. [P-2; S-19]

36. Although Student was classified as having a speech/language impairment the District did not conduct any speech/language reassessments. [P-2]
37. Student was classified as having an emotional disturbance. Student's disciplinary file noted inappropriate behaviors during the 2011-2012 school year such as throwing [objects and physical aggression toward other students], yet the District did not reassess Student's emotional functioning, behavioral functioning, or social functioning, or reference Student's then-current psychiatric diagnoses and their potential impact on educational functioning. [S-26, P-2]
38. Despite Student's failure to meet the behavioral goal in the District's previous IEP, the October 26, 2012 IEP included the same Positive Behavior Support Plan (PBSP) as in the previous IEP. Student failed to meet the behavioral goal or any of the goal's objectives in the District's October 26, 2012 IEP over the 2012-2013 IEP year. [NT 104-106; S-1, P-15]
39. Based on its abbreviated evaluation as constituted above, the District determined that Student "continues to meet classification criteria as a student with an Emotional Disturbance and Speech and Language Impairment." [NT 62-63; P-2]
40. At an October 2014 IEP meeting the parties agreed to a District-funded independent psychoeducational evaluation (IEE) and an independent speech/language evaluation. The independent school psychologist evaluated Student in December 2014 and January 2015. The independent speech/language pathologist evaluated Student from mid-February through mid-March 2015 and the report was issued in May 2015. The independent psychoeducational evaluation report was not issued until May 28, 2015. As the independent school psychologist's testing indicated autism, the District requested that his report consider the speech evaluation before issuance. [S-16, S-19]
41. The IEE included the results of the Woodcock-Johnson III Tests of Achievement, which indicated that Student was functioning on a 2.6 grade level in Reading Fluency, a 3.5 grade level in Math Applied Problems, and a 2.6 grade level in Written Expression. From at least the beginning of the 2013-2014 school year until the date of the IEE testing, Student made no progress, and in fact had demonstrated regression, in all core academic areas. [S-19]

#### Individual Education Programs

42. Student's Individual Education Programs (IEPs) during the period in question were grounded in the information in the District's October 26, 2012 Agreement to Waive Re-evaluation (in accord with Stipulation #1, the "District's evaluation"). [S-1; S-5; S-6; S-



8; S-9; S-10; S-11; S-14; P-2]

43. Student's 2012-2013 IEP, created on October 26, 2012 which was the same day as the Parent signed the Waiver, was in force in September and October 2013,<sup>9</sup> the beginning of the relevant period until a new annual IEP was crafted on October 17, 2013 for the 2013-2014 school year. [NT 66; S-1, P-2]
44. The District's October 17, 2013 IEP included the same IEP goals as the previous October 26, 2012 IEP for reading comprehension, reading fluency, math computation, math applications, semantic knowledge, social language, peer interactions, and behavior. [NT 50-81; 212-213; S-1; S-5]
45. The District's October 17, 2013 IEP did not include any revisions to Student's specially designed instruction, related services, or educational programming. The District's October 17, 2013 PBSP is identical to the District's previous October 26, 2012 PBSP except that a new behavior of concern (leaving the classroom area), and the new accommodations of access to preferred activities/adult and keeping backpack in study carrel/access to study carrel were added. The District's daily point sheet used to record behavior progress was not specific to Student's behavioral needs but instead it was a classroom behavioral management point system utilized for all students in the emotional support classroom. [NT 214-217, 229-234; S-1; S-5, P-16]
46. Direct instruction in executive functioning skills was not offered in the October 17, 2013 IEP. [S-5]
47. Counseling services were not offered in the October 17, 2013 IEP. [NT 234-235; S-5]
48. During the 2013-2014 school year, the IEP team met six times: the annual meeting on 10/17/13; adding nursing services so Student could take medication in school on 11/14/13; reviewing the positive behavior support plan on 11/20/13, the day after Student was hospitalized as an inpatient; changing placement to school-based partial [as was recommended upon Student's discharge from inpatient hospitalization] on 1/16/14; reviewing a restraint on 3/26/14; and, changing placement to full-time emotional support at the IU facility on 5/12/14. [NT 235-236, 278; S-6]
49. The IEP was reviewed the day after Student's November 20, 2013 inpatient hospitalization without convening an IEP meeting, and the District did not meet to revise the IEP or PBSP or conduct any further evaluations of Student upon Student's return to school after the ten-day hospitalization. On the day following the hospitalization the IEP team concluded that the behavior plan that was in place reflected Student's needs. [NT 239-241, 278; S-5, S-8]

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<sup>9</sup> On 9/25/13 the IEP team met to discuss an incident on the school bus incident and review the PBSP. Changes made were a bus packet to occupy Student during the bus ride and incentives for appropriate behavior on the bus.

50. IEP progress monitoring from October 1, 2013 through January 16, 2014 indicated Student failed to make meaningful educational progress on IEP goals for math concepts and applications, math computation, written expression, reading fluency, reading comprehension, speech and language, peer interactions, and behavior. [P-15]
51. There was no IEP progress monitoring conducted from January 16, 2014 through May 12, 2014 while Student was in the partial hospitalization program. Progress monitoring from May 12, 2014 through the end of the 2013-2014 school year indicated “insufficient data/time to monitor.” [P-7]
52. During the 2013-2014 school year there were 7 disciplinary incidents, including [physical aggression toward other students and school equipment]. [S-26]
53. On October 2, 2014, the District offered a new annual IEP. The teacher who wrote this IEP could not recall if she reviewed Student’s progress monitoring from the previous school year. She testified that she approached developing this IEP as a fresh<sup>10</sup> project rather than reviewing the previous IEP to see where Student was and where Student needed to be. [NT 299-302]
54. Rather than conducting academic achievement testing, in early October 2014 the teacher writing the IEP for 7<sup>th</sup> grade used Student’s present academic levels gleaned from assessments conducted on May 19, 2014 at which time Student was functioning on a third grade level in Word Reading, Kindergarten level in Reading Comprehension, second grade level in Spelling, and end of first grade level in Numerical Operations. [NT 292-293; S-12]
55. Student’s baseline for reading comprehension in the District’s October 2, 2014 IEP noted that Student was at only a third grade level which was the same baseline for Student in the previous October 17, 2013 IEP. [NT 292-294; S-5, S-14]
56. Student’s baseline for reading fluency in the District’s October 2, 2014 IEP indicated regression from the previous baseline in the District’s October 17, 2013 IEP. [NT 294-295; S-5; S-14]
57. Although the teacher initially testified that a comparison of Student’s English/language arts goal indicated progress, she later clarified that these goals could not be compared because they were different goals. [NT 415-417]
58. In the IU emotional support program Student had received support from a reading specialist, but for reasons not clear this support was discontinued after a brief time because “[Student’s] levels progressed”. [NT 339-340]
59. In the District’s October 2, 2014 IEP Student’s math computation baseline increased

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<sup>10</sup> The Hearing Officer introduced the word “fresh” for want of a better word when trying to ascertain to what extent the teacher had used progress monitoring from prior years to establish goals and baselines. The teacher agreed with the characterization.

from end of second grade level to beginning of third grade level from the previous October 17, 2013 IEP. Student's math application baseline was at the third grade level in the District's October 17, 2013 IEP. The teacher who wrote the October 2, 2014 IEP was not aware if Student met that goal but the District's October 2, 2014 IEP did not include a math application goal. [NT 300; S-5; S-14]

60. Although the teacher testified initially that Student made progress on the math computation goal, she then agreed that the progress monitoring actually indicated regression over the 2014-2015 school year. [NT 414-415; S-23]
61. The last speech/language evaluation of Student prior to the independent speech/language evaluation was completed in November 2009 when Student was in early second grade. That speech/language evaluation informed the subsequent IEPs. The speech/language therapist who wrote Student's speech/language goals for October 2, 2014 testified that she started afresh.<sup>11</sup> However, she did not conduct a clinical observation of Student in the classroom. [NT 561, 595, 601; S-14]
62. Although the speech/language therapist agreed that Student had a deficit in receptive language and expressive language that impacted academic progress and social interactions and contributed to frustration in the classroom, she did not know if Student had a deficit in auditory memory or auditory perceptual skills. She testified that she never used a standardized test to assess Student's auditory memory or auditory processing, and could not make a determination whether Student had auditory memory or auditory processing deficits. [NT 593, 597-598]
63. In 7<sup>th</sup> grade the speech/language pathologist was working on a third grade level with Student. The speech/language goals were for Student to still be at a third grade level by October 2, 2015, when Student would be in eighth grade. Student did not meet the speech/language goals over the 2014-2015 school year [NT 602, 603-606]
64. The February/March 2015 independent speech/language evaluation that assessed all areas of Student's language indicated that Student demonstrated significant deficits in all areas assessed. Specifically, Student's "receptive and expressive language, auditory memory and auditory perceptual skills are well below normal limits for chronological age. It is likely that these deficits underlie [Student's] slower rate of academic progress and contribute to frustrations in the classroom. Furthermore, [Student's] social interactions are likely impacted by difficulties interpreting non-verbal cues, and generally 'reading' social situations. Overall these problems present serious challenges for Student both academically and socially." [S-16]
65. The teacher testified that the District's October 2, 2014 PBSP for 7<sup>th</sup> grade was based on an FBA completed as part of the District's November 13, 2009 re-evaluation when Student was in the second grade because they "were still seeing the same behaviors." [NT 318-319; S-14]

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<sup>11</sup> The word "afresh" was introduced by the District's counsel but the speech/language therapist agreed with the characterization.

66. Student's PBSPs include the same information with few meaningful revisions over the 2012-2013, 2013-2014, and 2014-2015 school years, with the October 2, 2014 PBSP including more negative consequences, including police involvement, with removal of teaching of appropriate behaviors. S-1; S-5; S-14.

### General Legal Principles

Burden of Proof: The burden of proof, generally, consists of two elements: the burden of production [which party presents its evidence first] and the burden of persuasion [which party's evidence outweighs the other party's evidence in the judgment of the fact finder, in this case the hearing officer]. The burden of persuasion lies with the party asking for the hearing. If the parties provide evidence that is equally balanced, or in "equipoise", then the party asking for the hearing cannot prevail, having failed to present weightier evidence than the other party. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006); *Ridley S.D. v. M.R.*, 680 F.3d 260 (3<sup>rd</sup> Cir. 2012). In this case therefore the Parent asked for the hearing and thus bore the burden of proof. As the evidence was not equally balanced the Schaffer analysis was not applied.

Credibility: During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. 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); *see also generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 \*11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). The testimony from the individuals responsible for the behavioral/therapeutic aspects of the IU emotional support program was particularly helpful.

### Legal Basis and Discussion of Issues

ISSUE: Did the District fail to appropriately evaluate Student in October 2012?

The answer to this question is YES, the District failed to properly evaluate Student in October 2012.

The IDEA requires initial evaluations to determine eligibility and identify educational needs as well as re-evaluations to determine continued eligibility and identify educational needs. Re-evaluations are subject to the same substantive and procedural requirements that the IDEA applies to evaluations. Substantively, then, an evaluation or re-evaluation must be sufficiently comprehensive to identify all the Student's special education and related services needs. Re-evaluations are required every three years, unless the agency and parents both agree that the re-

evaluation is unnecessary and the parent waives the three-year re-evaluation requirement 34 C.F.R. §300.301(c)(2)(ii); 34 C.F.R. §300.303; 34 C.F.R. §300.304(c)(6).

The District's school psychologist and the emotional support teacher believed that even though Student's last evaluation had been done in 2009 when Student was in second grade and attending school in the District for fewer than three months, the three-year re-evaluation of Student in 5<sup>th</sup> grade was not necessary because the District was not considering a change in identification, classification or placement. [NT 163, 680] However, identification, classification or placement are not the only reasons students are evaluated, as the IDEA requires re-evaluations to determine whether any programmatic changes are warranted based on a student's emerging needs. In Student's case, although the emotional support teacher reviewed progress monitoring reports that indicated Student was not making progress on IEP goals or objectives, she failed to recognize that this documented failure to make progress indicated that Student should be re-evaluated to determine appropriate educational programming.

ISSUE: Did the District deny Student a free, appropriate public education during the 2013-2014 and/or the 2014-2015 school year[s]?

The answer to this question is that the District did deny Student FAPE in the area of academics, executive functioning instruction and speech/language therapy, throughout the entire relevant period, but denied Student FAPE in the social/emotional and behavioral areas for only a portion of the relevant period.

Special education issues are governed by the IDEA. 'Special education' is defined as specially designed instruction...to meet the unique needs of a child with a disability. 'Specially designed instruction' means adapting, as appropriate to the needs of an eligible child ...the content, methodology, or delivery of instruction to meet the unique needs of the child that result from the child's disability and to ensure access of the child to the general curriculum so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children. C.F.R. §300.26

In *Board of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034, 3051 (1982), the U.S. Supreme Court articulated for the first time the IDEA standard for ascertaining the appropriateness of a district's efforts to educate a student. It found that whether a district has met its IDEA obligation to a student is based upon whether "the individualized educational program developed through the Act's procedures is reasonably calculated to enable the child to receive educational benefits." The appropriateness of a program is determined at the time it is written. *W.H. v. Schuylkill Valley School District*, 954 F. Supp. 2<sup>nd</sup> 315, 324 (E.D. Pa. 2013), citing *Susan N. v. Wilson Sch. Dist.*, 70 F.3d 751, 762 (3d Cir. 1995) Appropriateness is to be judged prospectively, so that lack of progress does not in and of itself render an IEP inappropriate. *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); *D.C. v. Mount Olive Twp. Bd. Of Educ.*, 2014 U.S. Dist. LEXIS 45788 (D.N.J. 2014). However, if and when changes in a child's needs, or indications that the child is not being successful, arise, then it is incumbent upon the IEP team to reconvene and revise the IEP.

Benefits to the child must be ‘meaningful’. Meaningful educational benefit must relate to the child’s potential. See *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572 (3<sup>rd</sup> Cir. 2000); *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3<sup>rd</sup> Cir. 1999); *S.H. v. Newark*, 336 F.3d 260 (3<sup>rd</sup> Cir. 2003) (district must show that its proposed IEP will provide a child with meaningful educational benefit). The description of annual goals should be specific enough to allow the district to determine whether the student made progress, and at the same time make clear what specific skills the child must learn in order to achieve those goals. *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3<sup>rd</sup> Cir. 2010); 64 Fed. Reg. 12,471 (1999). IEP teams must write goals in a way that allows for an objective measurement of the child’s progress toward achieving the annual goals. 71 Fed. Reg. 46,662 (2006). It is well-established that an eligible student is not entitled to the best possible program, to the type of program preferred by a parent, or to a guaranteed outcome in terms of a specific level of achievement. See, e.g., *J. L. v. North Penn School District*, 2011 WL 601621 (E.D. Pa. 2011) Thus, 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).

For purposes of this inquiry with respect to the relevant period I am considering the October 26, 2012 IEP that was in place during September and October of 2013, the October 17, 2013 IEP that was in place for the majority of the 2013-2014 school year, and the May 12, 2014 IEP that was implemented until Student left the District. Each of these IEP’s was governed by the District’s abbreviated re-evaluation in October 2012.

As I find that the District’s abbreviated re-evaluation was inappropriate, it follows that the ensuing IEPs were inappropriate. See *In RE: K.B.* Spec. Ed. Op. 1300, *In RE: M.H.* Spec. Ed. Op. 736. However, in addition and more importantly, the IEPs in and of themselves and on their face were not appropriate.

Progress monitoring is essential in crafting and revising a student’s IEP. While an IEP is not a performance contract, and some students do well under a ‘bad’ IEP and some students do poorly under a ‘good’ IEP, the IDEA demands that a student’s IEP be appropriately designed to address a student’s areas of need. Student’s IEPs were inappropriate and inadequate with respect to, for example, pinpointing current present levels, establishing clear baselines from those levels, establishing reasonable objectives [while following OSERS guidance on goals], revising and rethinking when Student demonstrated lack of progress, and/or providing supports to address behavioral and executive functioning needs. Although as the District points out Student’s IEP team reconvened repeatedly, changes were not made to Student’s basic plan of academic instruction. From annual IEP to annual IEP goals/objectives were not modified substantially in light of Student’s failure to make academic progress. Interim revisions addressed visiting the nurse and reviewing a restraint, altering the IEP minimally to adjust to two changes in placement, and reviewing but not changing the PBSP after a psychiatric inpatient hospitalization. In addition to failing to substantially revise academic planning, the IEP failed to address Student’s executive functioning and, until placement in the partial hospitalization program and the IU’s emotional support program, Student’s need for additional behavioral supports. I was particularly struck by the teacher’s deciding to do a “fresh” IEP using “present” levels that were four months old, and neglecting to review previous progress monitoring data, and equally as

mystified by her adopting an opposite tactic when she relied on the second grade FBA from November 13, 2009 to inform the May 12, 2014 PBSP for 7<sup>th</sup> grade. I likewise found that Student's speech/language services were inappropriate as they were not based in a current evaluation, the goals/objectives were not met, and progress monitoring was not used as the basis upon which to develop new goals/objectives.

Although the Student's written PBSPs and behavioral goals were not models of clarity and comprehensiveness, I do find that placement in the partial hospitalization program and especially placement in the IU emotional support program provided the requirements for FAPE in the social/emotional and behavioral areas. In fact, I was impressed with the social/emotional behavioral component of the IU's emotional support program and believe that it served Student well despite the unfortunate end, which I do not believe the program could have anticipated or avoided beyond what steps were taken to prepare Student for the entry of the other peer.

I do not find that the Parent carried her burden of proof as to her sweeping allegation in the closing statement that the District's denial of FAPE caused Student to regress "so significantly that [Student's] needs have warranted a highly restrictive placement through the juvenile justice system". I agree with the District that "it cannot be a school district's obligation or responsibility to obviate the serious issues with which children come to a district, including and especially the serious issues with which this Student came to this District." Student's early formative years were marked by significantly neglectful parenting and poor attachment. Although the Parent did an heroic job of helping Student make up for early deprivation, the insufficiency of good early caregiving and of strong positive early attachment in Student's infancy and toddlerhood is much more likely to have led to Student's poor impulse control, poor judgment, and poor coping skills exhibited in the May 26<sup>th</sup> incident and its aftermath than Student's low academic achievement.

Since the District denied Student a free, appropriate public education Student is entitled to compensatory education.

The answer to this question is Yes, and an appropriate amount of compensatory education services will be ordered.

Compensatory education is an appropriate remedy where an LEA knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only a trivial educational benefit, and the LEA fails to remedy the problem. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996); *Ridgewood Education v. N.E.*, 172 F.3d. 238, 250 (3d. Cir. 1999). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990). Courts in Pennsylvania have recognized two methods for calculating the amount of compensatory education that should be awarded to remedy substantive denials of FAPE. Under the first method ("hour for hour"), which has for years been the standard, students may potentially receive one hour of compensatory education for each hour that FAPE was denied. *M.C. v. Central Regional*. An alternate, more recent method ("same position"), aims to bring the student up to the level where the student would be but for the denial of FAPE. *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 523 (D.D.C. 2005); *B.C. v. Penn Manor Sch. District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006); *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 (M.D. Pa. 2014); *Ferren C. v. Sch. District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010) (quoting *Reid* that compensatory education "should aim to place disabled children in the same position that they would have occupied but for the school district's violations of the

IDEA.”). The “same position” method has been recently endorsed by the Third Circuit in *G.L. v. Ligonier Valley Sch. Dist. Authority*, 115 LRP 45166, (3d Cir Sept. 22, 2015) although the court also cites to *M.C.*

The “same position” method, while essentially ideal, has significant practical problems in that unless the parents produce a credible expert to testify about what is needed to bring the child up to the same position he or she would occupy but for the denial of FAPE the hearing officer is left with having to craft a remedy based on educated estimation. Although on several occasions this hearing officer has been able to do so with relative confidence, the instant matter does not present such an opportunity. Therefore the default “hour for hour” approach will be used.

I find that Student was denied FAPE in the three major academic areas of reading, mathematics and written expression. Student will be awarded three (3) hours for every school day the District was in session during school years 2013-2014 and 2014-2015 for the periods of time set forth in the Order. Student was also denied FAPE in the area of specific instruction to address executive functioning deficits. Accordingly, Student will be awarded an additional three (3) hours per week for every school week or part of a school week the District was in session during school years 2013-2014 and 2014-2015 for the periods of time set forth in the Order. I find that until Student entered the partial hospitalization program and later the IU emotional support program Student was denied FAPE insofar as appropriate behavior support/counseling services were not offered. Therefore Student will be awarded an additional five (5) hours per week for every school week or part of a school week the District was in session during school year 2013-2014 to January 16, 2014. Finally, I find that Student’s speech/language services were insufficient as therapy was not informed by a recent speech/language evaluation, classroom observation, or reference to prior progress monitoring. However, since Student did receive some speech/language services during the relevant period, I will credit the District for the hours during which the service was offered and order a modest amount of compensatory education, in the form of one-and-a-quarter (1.25) hours per week, for every school week or part of a school week the District was in session during school years 2013-2014 and 2014-2015 for the periods of time set forth in the Order.

The hours of compensatory education are subject to the following conditions and limitations. Student’s Parent may decide how the hours of compensatory education are spent. The compensatory education may only take the form of any appropriate developmental, remedial or enriching educational service, product or device that furthers Student’s academic skills and executive functioning, and any therapeutic intervention that is required to address emotional concomitants to poor academic achievement. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided through Student’s IEP to assure meaningful educational progress. Compensatory services may occur after school hours, on weekends, and/or during the summer months when convenient for Student and the Parent. The hours of compensatory education may be used at any time from the present until Student turns age twenty-one (21).

There are financial limits on the Parent’s discretion in selecting the compensatory education; the costs to the District of providing the awarded hours of compensatory education must not exceed the full cost of the services that were denied. Full costs are the hourly salaries and fringe



benefits that would have been paid to the District and/or IU professionals who did and would have provided academic services to Student during the period of the denial of FAPE.

Section 504: Finally, with respect to any Section 504 claims, the obligation to provide FAPE is substantively the same under Section 504 and under the IDEA. *Ridgewood, supra*, at 253; *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa.Comm. 2005). Because all of the Parent's claims have been addressed pursuant to the IDEA, there need be no further discussion of any claims under Section 504.

### Order

It is hereby ordered that:

1. The District failed to appropriately evaluate Student in October 2012.
2. The District denied Student a free, appropriate public education during the entire 2013-2014 and the 2014-2015 school years in the areas of reading, mathematics, written expression and executive functioning coaching/direct instruction. The District denied Student a free, appropriate public education in the area of speech/language services during the entire 2013-2014 and the 2014-2015 school years. The District denied Student a free, appropriate public education in the area of behavior support/counseling services from the beginning of the 2013-2014 school year until January 16, 2014.
3. As the District denied Student a free, appropriate public education in the areas of academics, executive functioning coaching/instruction, speech/language services and behavior support/counseling services Student is entitled to compensatory education to make up for the deprivation as follows:
  - a. Academics: Three (3) hours per day of compensatory education for each school day of the regular academic year from the first day the District was in session in the 2013-2014 school year to the last school day the District was in session in that school year, exclusive of the period Student was in the inpatient psychiatric hospital. Student is also entitled to three (3) hours per day of compensatory education for each school day of the regular academic year from the first day the District was in session in the 2014-2015 school year through May 26, 2015. Any days Student was absent from school shall be subtracted from the calculation, and the District's winter, spring and summer breaks shall be subtracted from the calculation.
  - b. Executive Functioning: Three (3) hours per week for every school week or part of a school week of the regular academic year the District was in session during the 2013-2014 and 2014-2015 school years through May 26, 2015, exclusive of the period Student was in the inpatient psychiatric hospital.
  - c. Speech/Language Services: One-and-a-quarter (1.25) hours per week for every school week or part of a school week of the regular academic year the District was in session during school year 2013-2014 and during the 2014-2015 school year through May 26, 2015, exclusive of the period Student was in the inpatient psychiatric hospital.

- d. Behavior Support/Counseling Services: Five (5) hours per week for every school week or part of a school week of the regular academic year the District was in session from the first week of the 2013-2014 school year through January 16, 2014 exclusive of the period Student was in the inpatient psychiatric hospital.
- e. The compensatory education is subject to the limits described in the body of the Decision above.

Any claims not specifically addressed by this decision and order are denied and dismissed.

May 16, 2016

Date

*Linda M. Valentini, Psy.D., CHO*

Linda M. Valentini, Psy.D., CHO  
Special Education Hearing Officer  
NAHO Certified Hearing Official