

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

Pennsylvania

## Special Education Hearing Officer

### DECISION

Child's Name: T.M.

Date of Birth: [redacted]

Dates of Hearing: 12/1/2015, 2/5/2016, 3/1/2016 and 3/4/2016

### CLOSED HEARING

ODR File No. 16811-15-16

#### Parties to the Hearing:

#### Representative:

##### Parents

Parent[s]

##### Parent Attorney

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Date Record Closed:

April 1, 2016

Date of Decision:

April 22, 2016

Hearing Officer:

Charles W. Jelley Esq. LL.M.

## Introduction and Procedural History

The Student<sup>1</sup> is an elementary-aged pupil who resides with [the Student's] Parents in the School District (District)<sup>2</sup>. The Parties agree the Student is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA). The Parties also agree the Student is a person with a disability within the meaning of Section 504 of the Rehabilitation Act and Title II of the Americans with Disability Act (ADA).<sup>3</sup> The Student's Parents filed a due process complaint against the District asserting a denial of a Free Appropriate Public Education (FAPE) under the IDEA, its implementing regulations, and claims of discrimination in violation of Section 504 and the ADA.

The case proceeded to a due process hearing convening over several sessions, at which the parties presented evidence in support of their respective positions. The Parents sought to establish the District failed to provide appropriate programming to address all of Student's unique needs. They now seek compensatory education for the 2014-2015 and the 2015-2016 school years. The District maintains that its special education program, as designed, offered and implemented was at all times appropriate for the Student in all respects.

On September 25, 2015, the District filed an Answer to the Complaint denying the Student's claim for compensatory education and discrimination.<sup>4</sup> For the reasons set forth below, I find in favor of the District on all Parents' claims.

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<sup>1</sup> In the interest of confidentiality and privacy, the Student's name and gender, and other potentially-identifiable information are not used in the body of this decision. Volume I of the transcript of these proceedings is numbered from pages 1–254. Volume II is not page numbered consecutively with Vol. I but instead starts again at page 1. To avoid confusion as to citations to the testimony, references to testimony are identified by the volume, in which the testimony appears as well as the page numbers. The following District Exhibits ## 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 17, 18, 19, 20, 22, 23, 24, 26, 27, 28, 30, and, 31 were admitted into the record. Parent Exhibits ##4, 6, 7, 8, 9, 10, 11, 12, and 13 were admitted.

<sup>2</sup> Except where the context indicates otherwise, the School District and the [local] Intermediate Unit will be referred to collectively as the "District."

<sup>3</sup> 20 U.S.C. §§ 1400-1482.

<sup>4</sup> The testimony of every witness and the content of each exhibit was reviewed and considered in issuing this decision, regardless of whether there is a citation to particular testimony of a witness to an exhibit or an email. The Parties' written closing arguments were likewise carefully considered.

## **ISSUES**

1. During the 2014-2015 school year, did the District provide the Student FAPE?
2. During the 2015-2016 school year, did the District provide the Student FAPE?
3. During the 2014-2015 school year, did the District discriminate against the Student in violation of Section 504 or Title II of the ADA?
4. During the 2015-2016 school year, did the District discriminate against the Student in violation of Section 504 or Title II of the ADA?

## **Findings of Fact**

### **Initial Evaluation**

1. In 2010, the District identified the Student as a person with autism, and an intellectual disability (S#2 p.26l; S#13 p.30). The Student is also diagnosed with a specific speech impairment of global apraxia. Apraxia affects the intelligibility of the Student's speech and all other areas of communication (S#13 p.2).

### **The 2014 IEP**

1. On May 22, 2014, the Parents and the District met to develop an Individual Education Program (IEP) for the remainder of the 3<sup>rd</sup> Grade and 4<sup>th</sup> Grade school year (S#10).
2. The IEP included detailed Present Levels of Academic Achievement and Functional Performance (PLAAFP), and, a review of the Student's progress from the previous school year (S#10, p.8).
3. The PLAAFP included baseline data for addition, writing numbers and counting, and place value of numbers (S#10, p.8).
4. The IEP described the Student's PLAAFP in reading as pre-primer and primer (S#10, p.8).
5. Using a five-minute partial interval occurrence-nonoccurrence recording protocol, the present levels reported the frequency of four target behaviors that impeded the Student's learning (S#10, p.12). The IEP notes aggression occurred during 0.4% of the intervals, throwing objects occurred during 0.2%

of the intervals, yelling occurred during 1.6% of the intervals, and teeth grinding occurred during 2.1% of the intervals (S#10, p.12). Noting partial success, the team added a new annual goal to develop coping skills (S#10, p.12).

6. The occupational therapist (OT) completed the School Function Assessment (SFA). The SFA measures the Student's strengths and limitations in performing school-related functional tasks (S#10, p.12). The results of the SFA notes the Student was able to participate in all tasks and activities (S#10, p.13).
7. The OT PLAAFP described how the Student benefited from structured sensory motor breaks throughout the school day coupled with environmental modifications (S#10, p.13).
8. The speech therapist's PLAAFP statement reported the Student was making progress in sounding words that end in long vowel sounds (S#10, p.15).
9. The IEP listed 10 academic, developmental and functional needs related to the Student's multiple disabilities (S#10, pp.15-16).
10. The IEP included a math goal, along with short-term instructional objectives, to identify coins by name and value (S#10, p.25). The goal statement noted the Student could label a penny (S#10, p.25).
11. The IEP included a second math goal, along with short-term instructional objectives, to complete 10 single-digit addition and subtraction problems. The Student's initial baseline was 0% (S#10, p.26).
12. The IEP included a reading goal, along with short-term instructional objectives, to develop listening comprehension (S#10, p.27). The goal statement provides when the Student is presented with a picture prompt the Student can answer "who" and "what" questions (S#10, p.27).
13. The IEP included a sight vocabulary goal along with short-term instructional objectives (S#10, p.29).
14. The IEP included a writing and a typing goal along with short-term instructional objectives. The Student's baseline was 0% (S#10, pp.30-31).
15. The IEP included a goal, along with short-term instructional objectives, to complete multi-step activities (S#10, p.30). The Student's baseline was 0% (S#10, p.32).
16. The IEP included a speech goal, along with short-term instructional objectives, to improve speech intelligibility and sound production (S#10, pp.32-33).
17. The IEP included baseline data, a goal, and short-term instructional objectives to develop coping strategies when the Student became upset or frustrated (S#10, p.35).

18. To improve the Student's intelligibility, the IEP included baseline data, a goal, along with short-term instructional objectives, to verbalize plural nouns (S#10, p.36). The IEP notes baseline data was to be determined sometime in the future (S#10, p.36).
19. The IEP included a math goal, along with short-term instructional objectives, to master counting by 2's to 20, by 5's and 10's to 100 (S#10, p.37). The IEP noted the Student could count by 10's to 90 (S#10, p.37).
20. The IEP listed 32 different types of Specially-Designed Instruction (SDI) (S#10, pp.38-42).
21. The Student receives 90 20-minute speech and language sessions a year, 60 30-minute speech and language sessions a year in the classroom, and 60 30-minute OT sessions a year (S#10, p.43).
22. The teacher receives support from a behavioral specialist two times per month for 30 minutes (S#10, p.43-44). Once a month, the speech therapist works with the teacher targeting speech-related SDIs (S#10, p.43-44). Once a month for 30 minutes, the OT works with the teacher on functional skill training (S#10, p.43-44). To address the Student's target behaviors, the teacher also receives additional support from a board certified behavioral analyst (BCBA) once a marking period (S#10, p.43-44).
23. The IEP noted the Student was eligible for extended school year (ESY) services (S#10, p.44).
24. The Student participates with [the Student's] peers in regular education physical education, art, library, recess and lunch (S#10, p.44). The Student also receives adapted physical education as an SDI (S#10, p.40).

### **The 2014 Progress Reports**

25. On June 18, 2014, the District provided the Parents with a quarterly progress report (S#12). The progress report summarized the Student's gains from June 2013 to June 2014. The Student mastered the math and reading goal (S#12, pp.4-5). In listening skills, the Student improved from a baseline of 0% to 75% (S#12, p.6). In answering questions about personal information, the Student mastered the goal (S#12, p.8). The report notes the Student's speech intelligibility improved (S#12, pp.12-13). In copying sentences onto a structured lined paper, the Student improved from a baseline of 0% to 53%.
26. In copying letters, the Student improved from a baseline score of 69% to 75% (S#12, p16-17).

27. The IEP stated the frequency of teeth grinding increased from 0.4% to 8.55% of the intervals (S#12, pp.5-6). Similarly, the frequency of loud vocalization increased from 0.1% to 3.5% of the intervals (S#12, pp.5-6).
28. In typing, the Student improved from a baseline of 0%, to 93% accuracy, when given two prompts, to complete a personal data form (S#12, pp.20-21).

## **The Re-evaluation Report**

29. On October 30, 2014, the District completed the re-evaluation report (RR) (S#13). The RR noted, in May 2010, the District was not able to obtain a valid measure of the Student's non-verbal ability (S#13, p.2).
30. The RR reported the scores from the Adaptive Behavior Assessment System second edition (ABAS-II), a measure of adaptive behavior. The Student earned a below average general adaptive composite (GAC) score of 64 (S#13, p.3). On the ABAS-II, the Student earned a GAC of 48, which represents a 16-point decrease in previous adaptive behavior scoring (S#13, p.3).
31. The RR included the results of two cognitive assessments, the Stanford-Binet Intelligence Scales fifth edition (SB5), and the Differential Ability Scale second edition (DAS-II) (S#13, p.3). On the SB5, the Student earned a non-verbal composite standard score (SS) of 62. On the DAS-II, the Student earned a special non-verbal composite SS of 67 (S#13, p.3). The scores on both measures placed the Student in the significantly below average range. The two cognitive assessments and the ABAS II scores indicate the Student has an intellectual disability (S#13, p.3).
32. To gauge the Student's response to sensory situations in the classroom, the OT administered the Student's sensory motor needs and skills assessment and the sensory profile school companion checklist (S#13, p.19). The sensory profile results indicate the Student needs a lot of sensory input to stay actively engaged on a task (S#13, p.21). To meet the Student's need for a variety of sensory activities, the OT recommended, and the IEP Team agreed to provide the Student with access to a rocking chair, a large therapy ball, a weighted lap vest with shoulder pads, and weighted stuffed animals (S#13, p.21).
33. On the Peabody picture vocabulary test-4, the Student earned a SS of 51 (S#13, p.25).
34. On the Goldman Fristoe test of articulation 2, the Student demonstrated errors in v/th sound in the medial position, l/y sound initial position and the f/th sound in the initial position (S#13, p.25).

35. To measure the Student's overall general ability, the District administered the Universal Non-verbal Intelligence (UNIT) test. On the UNIT, the Student earned a SS of 46 placing [the Student] in the significantly below average range (S#13, p.28). On the Reynolds Intellectual Assessment Scales (RAIS), a measure of nonverbal intelligence, the Student earned a SS of 65 (S#13, p.28).
36. On the Kauffman Test of Educational Achievement second Edition (KTEA-II), the Student earned a SS of 73 in letter word recognition, a SS of 63 in reading comprehension, a SS of 45 in math concepts and application and a math composite SS of 49 (S#13, p.30). All of the scores were in the below average range.
37. On the Wechsler Individual Achievement Test third edition (WIAT-III), the Student earned a below average SS of 45 in listening comprehension/oral discourse comprehension (S#13, p.30).

### **The Two ABA Observations and Reports**

38. On January 29, 2015, for one full six and a half hour (6.5) school day, the Parents' independent evaluator observed the Student (P#11, pp.12-35).
39. The evaluator administered the VB-MAPP milestones assessment (P#11, pp.12-35).
40. The results of the VB-MAPP indicate the Student skills are consistent with an eighteen (18) month old infant. The VB MAPP noted the Student's spontaneously imitating skills, spontaneously looking at peers skills and spontaneously imitating peers scores were low (P#11, p.1).
41. The independent evaluator concluded the Student presented with a major language delay, and would benefit from a systematic Applied Behavior Analysis (ABA) program (P#11, p.1).
42. The independent evaluator also administered the VB-MAPP barrier assessment which targets 24 different skill areas (P#11, pp.6-8).
43. Next, the independent evaluator administered the results of Roll Evaluation of Activities of Life (REAL), a standardized rating scale for individuals between 2 and 18 years old. REAL evaluates activities of daily living (ADL) like dressing, hygiene and grooming, feeding and toileting. REAL also assesses Instrumental Activities of Daily Living (IADL). The IADL skills set includes housework, managing money, shopping, meal preparation, personal safety, traveling, and, school-related skills (P#11, pp.9-11). On the REAL, the Student's raw scores and SS were in the 1st percentile (P#11, pp.11).

44. After analyzing the VB-MAPP and the REAL results, the independent evaluator generated two functional assessment hypotheses to describe why the Student engaged in the targeted behaviors (P#11, p.11).
45. The independent evaluator's report included a summary of data collected, along with 15 bar graph charts plotting the frequency of the Student's antecedents, topography, consequences, and response to demands data in a group and in a one-on-one instruction situation (P#11 pp.25-34).
46. The independent evaluator's report opined about a series of alleged deficiencies in the Student's PBSP. The independent evaluator noted alleged deficiencies in implementing the ABA program in data collection, prompting, and, manding<sup>5</sup> for breaks or preferred items. The independent evaluator opined "the plan was not written with the level of technological detail that is standard in the field making it difficult to measure procedural fidelity" (P#11, p.11).
47. The independent evaluator concluded the Student's PBSP lacked detailed written teaching procedures, lacked multiple control measures to address problem behaviors and suggested that "calming strategies" such as deep breathing exercises were not evidence-based practices in the field of ABA (P#11, pp.11-12).
48. The independent evaluator recommended the IEP team completely overhaul the IEP, rewrite many if not all of the goals, the SDIs and the District's ABA teaching practices (P#11, pp. 37-40).
49. The independent evaluator recommended the IEP team include 20 new goals into the Student's IEP (P#11, pp.41-61).
50. The independent evaluator recommended the Student receive 20 hours of direct, one-on-one ABA programming per week, provide by a Personal Care Assistant (PCA).
51. The independent evaluator called for the ABA program to emphasize manding, intra-verbal, motor imitation and echoic repertoires (P#11, p.61). The independent evaluator recommended 16 hours per month of consultation with a qualified BCBA. The independent evaluator recommended ABA/IEP team meetings every four weeks, monthly parent meetings, competency-based training for all PCA staff and two hours of ABA team meetings once a month (P#11, p.61).

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<sup>5</sup> A mand is one type of verbal behavior training.

[http://www.pattan.net/category/Educational%20Initiatives/Autism/page/Interactive\\_mand\\_training\\_manual.html](http://www.pattan.net/category/Educational%20Initiatives/Autism/page/Interactive_mand_training_manual.html) page 5

## **The Second Observation**

52. On January 13, 2016, the independent evaluator returned to the Student's classroom with a second data collector and conducted a second six and a half hour (6.5) daylong observation. The evaluator then prepared a second report about the observation. On February 25, 2016, the IEP team reviewed the second report (P#13).
53. The second report collected data about the Student's problem behaviors, consequences for problem behaviors, intensive teaching sessions, speech therapy, math, writing, art class and the Student's end of day activities (P#13, pp. 13-43).
54. Unlike the first report, the second report included a critique of the IEP goals and the Student's progress reports (P#13, pp.32-37). The evaluator did not challenge the District's statement of the Students' progress and in fact conceded the Student made "significant progress" in handwriting and typing (P#13, p. 33, p.36).
55. The Independent Evaluator also concluded the Student "made significant progress with typing rote information" and tacting (P#13 p.33).
56. The independent evaluator concluded the Student "made significant progress with the tacting objective" (P#13 p.36).
57. The independent evaluator concluded at other times the Student's "slow rate of acquisition", and the Student's "intelligibility" are an ongoing need (P#13 pp.32-37).
58. The independent evaluator concluded while the Student's current program is an ABA program it does not adequately address behavior in an analytic, effective, conceptually systematic, technological fashion and does not plan for or produce generalization (P#13 p.39).

## **The 2015-2016 IEP**

59. On March 30, 2015, the District developed the end of 4<sup>th</sup> Grade - 5<sup>th</sup> Grade IEP (S#17). The PLAAFP, in math, notes the Student made progress in counting by 2's to 16, by 5's to 35 and by 10's to 90 without a visual model (S#17, p. 8).
60. The PLAAFP, in reading, reports the Student knew all of the Dolch primer and first grade words. The Student also knew 157 sight words at the 2<sup>nd</sup> grade level (S#17, p.8). On the Brigance Comprehensive Inventory of Basic Skills II, the

- Student independently read the words listed in the pre-primer and primer levels with 100% accuracy. When presented words at the 1<sup>st</sup> grade level, the Student could read the presented words with 60% accuracy (S#17, p.8).
61. The PLAAFP noted minor increases in the frequency of teeth grinding, yelling, throwing, dropping and aggression (S#17, p.11).
  62. The PLAAFP included detailed statements about the Student's speech and language baseline for blends and speech intelligibility for familiar and unfamiliar listeners (S#17, p.14).
  63. The PLAAFP described the results of the Student's performance on the VB-MAPP and the REAL (S#17, p.14).
  64. The PLAAFP included a summary of the Student's PBSP (S#17, pp. 17-20).
  65. The IEP included measurable goals and short-term objectives, along with a PBSP, and 34 modifications and SDIs (S#17, pp.1-71).
  66. The IEP included 21 goals for the Student's ESY program, detailed related services and multiple teacher supports (S#17, pp.59-65).
  67. On April 30, 2015, the Parents disagreed with the SDIs, the goals and the objectives noting the District's unwillingness to follow all of the independent evaluator's recommendations (S#19, p. 3).
  68. Throughout the 2014-2015 school year, the Student's progress reports noted the Student made progress in identifying coins, basic math computation, answering "wh" questions, reading comprehension, sight word reading, writing legibly, typing personal information, following directions, using coping strategies, skip counting and speech articulation ( S#19 pp. 3-4; S#20; NT p.158).
  69. The Student did not make significant progress in one area – verbalizing plural nouns (S#19 p.4).
  70. Throughout the 2014-2015 school year, the Student interacted with regular education peers at lunch, recess, art, music and in gym (NT Vol II p.165).
  71. The Student participates in a daily social skills lesson (NT Vol II p.166).
  72. The Student benefits from the socialization with peers (NT Vol II pp.167-168).
  73. The March 2015 IEP includes 21 measurable goals including present levels and objective criteria to measure progress for each goal statement. The goals target the Student's unique needs in math like identifying coins, addition, subtraction, skip counting, reading sight words, handwriting, typing personal information, following directions, expressive vocabulary, articulation, verbal behavior goals, like labeling pictures/objects, manding items, manding activities and actions, identifying attributes, recognizing safety signs, behavior and hand washing (S#17 pp. 27-54).

74. The 2014-2015 and the 2015-2016 IEPs included measurable goals that are appropriate and relate to the Student's needs. The goals extend the Student's present levels and are connected to the Student's unique needs (S#17).
75. The 2015 IEP includes specially-designed instruction (S#17 p.63), describes the Student's modified curriculum in regular education environments (S#17 p.59), incorporates small group instruction (S#17 p.59), targets pre-teaching of essential skills calculated to support the Student's inclusion (S#17 p.60), uses individualized social stories (S#17 p.61), includes frequent review and repetition of skills (S#17 p.63) and they focus on the generalization of skills across staff and school environments (S#17 p.59).
76. The 2015 IEP included a series of personalized strategies and accommodations designed to reduce reliance on intrusive physical prompting (S#17 p.59), sensory breaks and strategies (S#17 p.60), instructional assistant training and support (S#17 p.60), chunking of similar tasks or skills (S#17 p.62), personalized fine motor strategies (S#17 p.61) and a goal for one-on-one social opportunities with peers (S#17 p.63).
77. The March 2015 IEP contained a detailed behavior plan with antecedent, replacement behavior and consequence strategies (S#17 pp. 17-20, 54-58).
78. The Student's behavior plan was regularly reviewed and updated by BCBA (NT Vol II p.104).
79. The March 2015 IEP provides for related services including speech goals for one-on-one services in the classroom setting and, OT (S#17 p.64).
80. The March 2015 IEP provides continuous ongoing support for personnel including consultation by a curriculum consultant weekly, bi-weekly support from a behavior specialist and regular consultation with both the OT and speech therapist (S#17 p.65).
81. The March 2015 IEP supports the Student's participation with general education peers in physical education, art, recess and lunch (S#17 p.69).
82. The March 2015 IEP calls for the Student to receive full-time autism support and speech and language support at a neighborhood school (S#18 p.2).
83. When the IEP team discussed the evaluator's 21 recommended goals, the consensus was to either adopt some or modify the evaluator's goal statements, while other goal statements were placed on hold subject to inclusion into the IEP based upon review of the Student's progress (NT Vol II p.186). The team rejected the evaluator's recommendation for 20 hours of one-on-one ABA supports with a PCA, the monthly team meetings and the 16 hours of BCBA consultation recommendations (NT Vol II p.186).

84. Following the March IEP meeting, the Parents approved the implementation of the IEP with the notation that they do not agree with the goals, objectives, and the SDIs (S#18 p.3).

### **The Third Progress Report**

85. By June 2015, the Student was able to identify a penny, a nickel, a dime and a quarter with 100% accuracy (S#20, p.2).
86. The progress report notes the Student is now able to add single-digit numbers with 61% accuracy (S#20, p. 5).
87. In reading, the Student's initial baseline score of 56% improved to 97%. The report states the Student learned 19 new 2<sup>nd</sup> grade words (S#20, p.7; NT pp.190-192).
88. The Student's letter printing skills improved (S#20, p.9).
89. The Student's typing skills improved (S#20, p.10).
90. The Student's functional communication skills improved (S#20, pp.21-22).
91. The progress report states that 53% of the time the Student is calm (S#20, p.30).
92. The Student made modest to steady gains in learning to hand wash and naming common items (S#20, p.34).
93. The psychologist testified the 2014-2015 and the 2015-2016 IEPs included SDIs to improve generalization (NT Vol IV p.588, S#10, p.38, S#2, p.2).
94. The psychologist testified that although the Student's SS were low when compared the Student's SS from the DAS and the Woodcock Johnston achievement testing the student made a full year of progress (NT Vol IV pp.582-592, S#13, pp.28-30). Although, the Student's testing identified the Student with an intellectual disability, the psychologist noted the Student's SS indicated "fantastic growth" (NT Vol IV pp.589-599).
95. When the psychologist compared the Student's test-taking skills from May 2010, in kindergarten to October 2014, in 4<sup>th</sup> Grade, the psychologist testified about significant improvements in the Student's ability to stay on task, actively engage in the testing and reported a noticeable reduction in the Student's off task behaviors during the testing (NT Vol IV p.533).

## **The Background Training and Experience of the IEP Team members**

96. The District BCBA holds an undergraduate degree in psychology, a master's degree in Applied Behavior Analysis, a doctorate in Educational Leadership and has a certificate in autism from Penn State (NT Vol III p.386-388). The BCBA has also worked in a school setting for 10 plus years Vol III p.386-388). Prior to working in a school setting, the BCBA worked and supervised an in-home ABA program (NT Vol III p.386-388).
97. The BCBA testified that the partial interval data collection strategy is an acceptable ABA data collection method (NT Vol III p.390)
98. The school psychologist has 10 years of school-based experience assessing students with a variety of disabilities in school settings (NT Vol VI pp. 532-533). The psychologist has assessed other students with autism, intellectual disabilities and apraxia (NT Vol IV p.533).
99. The former District Supervisor of Special Education and a member of the Student's IEP team has a bachelor's degree in Speech Therapy, a master's degree in Speech Therapy, a master's degree in Educational Administration, a master's degree in Pupil Personnel Services and a doctorate in Educational Leadership (NT Vol IV p.475).
100. The curriculum consultant is a member of the Student's IEP team, and has 12 years of experience working in the public school. The consultant holds a bachelor's degree in Education, a bachelor's certificate of Special Education, a master's degree in Education and a master's degree in Education with a technology certificate (NT Vol II pp.9-12).
101. The current supervisor of special education is a former teacher of autistic children, holds a bachelor's degree in Special Education from West Chester University, a master's degree in Early Childhood Education from Arcadia University and has a supervisory certificate in special education from Lehigh University (NT Vol II pp.198-199).

## **The Independent Evaluator's Background, Training and Credentials**

102. The independent evaluator holds a master's degree in Occupational Therapy and is a Board Certified Behavior Analyst (P#12).
103. The independent evaluator has never worked in a public school setting and has no teaching experience (NT Vol III p.299).

104. The independent evaluator did not attend a four-year college or university and does not hold an associate's degree (NT Vol III p.298).
105. The Independent Evaluator does not hold a regular or special education teaching certificate or a supervisory or pupil personnel certificate (NT Vol III p. 298-299).
106. The independent evaluator is not familiar with the District's reading or math curriculum (NT Vol III p.300-303).
107. The independent evaluator is not a licensed speech therapist and has no specific training related to apraxia (NT Vol III 299; P#11 p.38, P#13 pp. 34, 41).
108. The independent evaluator never worked in a public school setting and has no teaching experience (NT Vol III 299).
109. The independent evaluator does not hold a psychology degree and is not a school or a licensed psychologist (NT Vol III p.299).
110. Although the independent evaluator does not hold a speech therapist license, evaluator recommended specific materials to address the Student's apraxia (NT 299; P#11 p.38, P#13 pp. 34, 41).
111. Although the independent evaluator does not hold a teaching degree, the independent evaluator opined about the Student's math and, reading instruction, and, progress P#13 pp.32-33.

### **Applicable Legal Principles and Discussion**

#### **Burden of Proof**

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. The burden of persuasion lies with the party asking for the hearing. If the moving party provides evidence that is equally balanced, or in "equipoise," then the party asking for the hearing cannot prevail, having failed to present sufficient evidence. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Ridley S.D. v. M.R.*, 680 F.3d 260 (3<sup>d</sup> Cir. 2012). In this case, the Parents asked for the hearing and thus bore the burden of proof. All witnesses appeared to be testifying honestly and to the best of their recollections. There were no instances of conflicting testimony where a credibility determination was needed to establish a fact. Some witnesses were however more persuasive on some points than others.

## Credibility and Persuasiveness

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence, assessing the persuasiveness of the witnesses' testimony 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).<sup>6</sup>

Therefore, based upon my observation of the witnesses, and, after reviewing the record as a whole, I accord substantial weight to the District's two BCBA's, the Student's speech therapist, the school psychologist and the special education teacher about the Student's academic skills, challenging behaviors, language skills and progress as my findings of fact attest. The witnesses' demeanor and manner of answering questions about the Student gave every reason to find each credible, candid and sincere. All of the District's witnesses taught for many years and had successfully completed undergraduate and graduate level course work. Several of the District witnesses had taken advanced course work, or had previous professional experience with children with autism, apraxia and intellectual disabilities. All of the District staff demonstrated a working knowledge of the ABA principles and how to apply the principles for this particular Student.

For the following reasons, I accorded less weight to the independent evaluator's recommendations and testimony. The independent evaluator did not attend a four-year college, does not hold a teaching certificate, a psychology degree, or a speech therapist's certificate. While I recognize the independent evaluator has an occupational therapy degree and is a Board Certified Behavior Analyst, her recommendations about reading, math, speech and language were beyond her specialty areas. Overall, the recommendations supported an ABA clinical program rather than an ABA program in an integrated school setting.

The independent evaluator observed the Student on two occasions for some 16 hours whereas the District staff, for the most part, has been with the Student for two years. I find this constant contact coupled with the record evidence affected the persuasive weight that I accord to the witnesses' experiences with the Student.

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<sup>6</sup> *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)

Thus, all of the above findings are based upon a preponderance of the evidence. While some of the material evidence is circumstantial, I conclude therefore that I can derive inferences of fact from the teaching staff's day-to-day observations of the Student covering more than 1,440 hours of direct and indirect contact are more persuasive than the evaluator's 16-hour observation and two brief assessments.

The record is clear that the Parent's and the independent evaluator's credibility was fully tested by vigorous cross-examination. In drawing inferences, I remain mindful that the Parent's summary of events is given not only from the perspective of loving committed Parents who are vigilant advocates, but also from Parents who have a unique insight into their child's unique needs. On balance, I find that all of the witnesses' testimony represents their best recollection of events.

### **IDEA Free Appropriate Public Education**

The IDEA requires that a state receiving federal education funding provide FAPE to disabled children. 20 USC §1412(a)(1); 20 USC §1401(9). FAPE is "special education and related services" at public expense, that meet state standards 20 USC §1401(9).

School districts must provide FAPE by designing, implementing and administering a program of individualized instruction that is set forth in an IEP. 20 USC §1414(d). The IEP must be "reasonably calculated" to enable the child to receive "meaningful educational benefits" and "significant learning" 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).

"Meaningful 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). In order to provide FAPE, the child's IEP must specify and provide specially-designed instruction to meet the child's unique needs and must be accompanied by such supplemental or related services as are necessary to permit the child to benefit from the instruction. *Board of Education v. Rowley*, 458 U.S. 176, 181-182 (1982). 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 (3d Cir. 1996).

A school district is not required to provide the best possible program to a student or to maximize the student's potential. *Ridley Sch. Dist. v. MR*, 680 F.3d 260, 269 (3d Cir. 2012). An IEP is not required to incorporate every program, device, or

service that parents desire for their child. *Ibid.* Rather, an IEP must provide a “basic floor of opportunity” for the child. *Carlisle Area School District v. Scott P.*, 62 F.3d 520, 532 (3d Cir. 1995).

The appropriateness of the program is judged prospectively; therefore, the lack of progress does not in and of itself render an IEP inappropriate. Its appropriateness must be determined as of the time, at which it was made, and the reasonableness of the program should be judged only based on the data known or what should have been known to the school district at the time at which the FAPE offer was made. *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010); *D.C. v. Mount Olive Twp. Bd. Of Educ.*, 2014 U.S. Dist. LEXIS 45788 (D.N.J. 2014).

The IDEA requires each IEP to include a statement of the special education, related services, supplementary aids and services, along with a statement of the program modifications or supports for school personnel that will be provided to enable the child to advance appropriately toward attaining the annual goals. 34 CFR §300.320 (a)(4). The IEP must state the projected date for the beginning of the services and modifications described in 34 CFR §300.320 (a)(4), along with the anticipated frequency, location and duration of those services and modifications. 34 CFR §300.329(a)(7).

## **Elements of an IEP**

The IEP is the blueprint that describes the Student’s strengths, the parent’s concerns for advancing the education of their child, the results of the initial or most recent evaluation of the child and the academic, developmental and functional needs of the child. 34 CFR 300.324 (a)(1). Each IEP must contain "A statement of the child's present levels of academic achievement and functional performance. The IEP must include a statement of how the child's disability affects the child's involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children) 34 CFR §300.320(a)(1).

The IEP must contain individual measurable goal statements, in all areas of unique need, that address the student’s academic and functional skills. Measurable goals enable the child to make progress in the general education curriculum. The goals must also meet the child's other unique educational needs that result from the child's disability 34 CFR §300.320 (a)(2). Annual goals describe what a child can reasonably be expected to accomplish within a 12-month period. *Letter to Butler*, 213 IDELR 118 (OSERS 1988). 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). The description of annual goals should be specific enough to allow the

district to determine whether the student made meaningful progress and at the same time clearly describe 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 (3d Cir. 2010); 64 Fed. Reg. 12,471 (1999).

An IEP must include a statement of the special education services, specially designed instruction, related services, supplementary aids, and services, along with supports for school personnel that will be provided to enable the child to advance appropriately toward attaining the annual goals. 34 CFR §300.320 (a)(4). The IEP must state the projected date when services will begin along with the anticipated frequency, location and duration of the services. 34 CFR §300.329(a)(7); 34 CFR §300.320 (a)(4).

### **Progress Monitoring**

Each IEP must include a description of how the child's progress toward meeting the annual goals will be measured and when periodic progress reports will be provided to the parents 34 CFR §300.320 (a)(3). Progress monitoring is critical when determining whether the Student is receiving meaningful educational benefit 34 CFR §300.320 (a)(3). The IDEA directs IEP teams to review and revise the student's IEP whenever it believes that a change in the IEP may be necessary in order to ensure FAPE. *Notice of Interpretation*, Appendix A to 34 CFR Part 300, Question 20 (1999 regulations). When a student with a disability is participating in the general curriculum, good report card grades may suggest an inference that the student has received FAPE. *Rowley*, 458 U.S. 181-182.

### **Section 504's Nondiscrimination Standards**

Section 504 states, in relevant part, “[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 29 U.S.C. §794(a). The statute defines “program or activity” to include all of the operations of “local educational agency.” 29 U.S.C. §794(b)(2)(B). To prevail on a Section 504 discrimination claim, parents must show the Student has a disability, is otherwise qualified to participate in a school program and was denied the benefits of the program or otherwise subject to discrimination because of their disability. *G.C. v. Pa. Dep’t of Educ.*, 735 F.3d 229, 235 (3d Cir. 2013).

The IDEA on one hand governs the LEA's affirmative duty to provide a FAPE to disabled students, while Section 504 establishes a negative prohibition against depriving disabled students, based upon a disability a FAPE. *W.B. v. Matula*, 67 F.3d 484, 492-93 (3d Cir. 1995). The IDEA provides a remedy for "inappropriate educational placement decisions, regardless of discrimination", while Section 504 prohibits and provides a remedy for discrimination. *Hornstine v. Twp. of Moorestown*, 263 F. Supp. 2d 887, 901 (D.N.J. 2003) (although the student received FAPE, the district's policy denying her valedictorian status was nonetheless discriminatory under Section 504).

### **Section 504 Denial of a FAPE**

The Section 504's implementing regulations provide a detailed scheme for fashioning FAPE for students with a qualifying Section 504 disability. 34 C.F.R. §104.30-104.36. Similar to the IDEA requirements, Section 504 requires districts to conduct a comprehensive evaluation of the student needs, 34 CFR 104.33, provide FAPE, including regular and special education, in the least restrictive educational environment 34 CFR 104.34. When the parties disagree about the provision of FAPE, the District must provide procedural safeguards 34 CFR 104.36,<sup>7</sup>

The Section 504 regulations provide that the implementation of an IEP under the IDEA may also meet the substantive FAPE requirement of Section 504, but not necessarily all of Section 504 FAPE requirements of 34 CFR 104.33 (b)(1)(ii) and 34 CFR 104.33 (b)(2).

### **Title II of the ADA**

The Congressional findings contained in the ADA state that "discrimination against individuals with disabilities persists in such critical areas as . . . education. . ." 42 U.S.C. § 12101(a)(3). The ADA requires that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity". 42 U.S.C. § 12132.

To prove a Title II claim, a student must show (1) he or she is a qualified individual with a disability, (2) he or she was either excluded from participation in or denied the benefits of some public entity's services, programs, or activities or was

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<sup>7</sup> 34 CFR 104.34 (a), *Letter to Williams*, 21 IDELR 73 (OSEP 1994) (Section 504 requires districts to educate students with disabilities in the LRE); *In re: Student with a Disability*, 113 LRP 42334 (SEA NY 2013) (concluding that a violation of Section 504's LRE requirement at 34 CFR 104.34, requiring comparable services and activities, is not analogous to any IDEA regulations).

otherwise discriminated against and (3) such exclusion, denial of benefits, or discrimination was by reason of the plaintiff's disability.

The Title II regulations set forth the general prohibitions against discrimination that apply to schools as public entities. *See* 28 C.F.R. § 35.130(a). Schools may not, on the basis of disability, deny students with disabilities the opportunity to participate in or benefit from the aid, benefit, or service the entity provides. § 35.130(b)(1)(i). Nor may schools deny students with disabilities an equal opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others. § 35.130(b)(1)(ii). Schools must provide all services, programs, and activities in the most integrated setting appropriate to the needs of the individual with disabilities. §35.130(d). In addition, schools must make reasonable modifications to their policies, practices, or procedures when necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that doing so would fundamentally alter the nature of the service, program, or activity, or would result in undue financial or administrative burdens. § 35.130(b)(7); § 35.164.

"[C]omplying with the IDEA is sufficient to disprove educational discrimination" under the Section 504 and the ADA. *Taylor v. Altoona Area Sch. Dist.*, 737 F. Supp. 2d 474, 487 (W.D. Pa. 2010) (noting that if an IDEA claim fails, ADA and RA claims brought on the same core facts "must also fail"); *Miller v. Bd. of Educ.*, 565 F.3d 1232, 1246 (10th Cir. 2009). Conversely, the "[f]ailure to provide FAPE violates Part B of the IDEA and generally violates the ADA and RA because it deprives disabled students of a benefit that non-disabled students receive simply by attending school in the normal course—a free, appropriate public education." *CG*, 734 F.3d at 236. However, if the IDEA claim and the Section 504 or the ADA claims do not share a similar factual basis, they will be addressed separately. *GC* 734 F.3d at 235; *Taylor* 737 F. Supp. 2d at 487-88; *Hornstine v. Twp. of Moorestown*, 263 F. Supp. 2d 887, 901 (D.N.J. 2003).

In *CG v. Pennsylvania Dep't of Educ.*, 734 F.3d 229, 234 (3d Cir. 2013) the court held, "With limited exceptions, the same legal principles govern ADA and RA claims". Both require parents to (1) establish the person has disability as defined under the statutes, (2) the person is otherwise qualified to participate in the program, and (3) the qualified individual was precluded from participating in a program or receiving a service or benefit because of their disability. *CG*, 734 F.3d at 235. However, under the ADA, unlike Section 504, the student does not need to show the school receives federal funds. *Id.*

In *CG*, the court discussed the differences between “The statutes' respective causation elements...” see 42 U.S.C. § 12132 (“by reason of such disability”); 29 U.S.C. § 794(a) (“solely by reason of her or his disability”). The RA allows a plaintiff to recover if he or she were deprived of an opportunity to participate in a program solely on the basis of disability, while the ADA covers discrimination on the basis of disability, even if there is another cause as well”. *CG*, 734 F.3d at 236. However, Title II claims like Section 504 discrimination claims do not require intentional or overt discrimination. *CG*, 734 F.3d at 236, citing with approval *Helen L. v. DiDario*, 46 F.3d 325, 335 (3d Cir. 1995) ([W]e will not eviscerate the ADA by conditioning its protections upon a finding of intentional or overt ‘discrimination.’)

### **Compensatory Education**

It is well settled that compensatory education is an appropriate equitable remedy where a school district knows, or should have known, that a child's educational program is not appropriately addressing his or her disability, or that the child is receiving only trivial educational benefit and the district fails to remedy the problem. *M.C. v. Central Regional School District*, 81 F.3d 389 (3d Cir. 1996). Such an award compensates the child for the period of time of deprivation of a FAPE, excluding the time reasonably required for a school district to correct the deficiency. *Id.* In addition to this “hour for hour” approach, some courts have endorsed a scheme that awards the “amount of compensatory education reasonably calculated to bring him to the position that he would have occupied but for the school district’s failure to provide a FAPE. *Ferren C. v. School District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010) (quoting *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C.Cir.2005) (explaining that compensatory education “should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA”).

## **Analysis and Conclusions of Law**

### **The Parents’ request for a “Strict ABA”**

The Parents argue the Student is being denied the benefits of FAPE because the District is failing to provide a “strict ABA program”. The Parents believe that failure is causing the Student to become “prompt dependent”. They also believe the failure to follow a “strict ABA program” is interfering with improvements in the Student’s overall development. As examples of the lack of progress, the Parents point to the Student’s lack of progress in “speech intelligibility”, and the cyclic nature of the frequency of the Student’s challenging behaviors.

To support these contentions, they further argue even when the staff follow the agreed-upon ABA strategies they do not perform the ABA supports with “fidelity”. One example they point to is an alleged lack of “fidelity” in the collection of ABA data. The evaluator testified the failure to use the “gold standard” of measuring “the dimension of the Student’s behavior misrepresents the severity of the Student’s behavior” (NT Vol. III, pp.277-278). To correct these alleged deficiencies, Parents believe the current program should be scrapped, in favor of 20 new goals, crafted by the Parents’ evaluator. Parents now seek 20 hours a week of one-on-one ABA services provided by a PCA in a neighborhood school.

### **The District’s Response to the Parents’ Request**

Upon receipt of each of the independent evaluator’s two reports, the District convened an IEP meeting. At the meeting, the staff reviewed each report. In the first instance, the District incorporated several of the evaluator’s recommendations completely, or in part, as either a goal statement, or included the recommendation as an SDI. For example, from the first report, the District adopted the functional skill of hand washing. The District also modified the evaluator’s goal of manding 300 times per day to 100 times per day. The District however, takes exception to providing 20 hours of one-on-one services by a PCA. The District contends to do so would be a violation of the IDEA, Section 504 and the ADA’s LRE principles. I find the District gave proper weight to the Parental input and carefully weighed the evaluator’s recommendations in designing each IEP. Accordingly, I find the District did not violate the Parents’ substantive or procedural due process rights.

For the most part, the dispute clusters around a disagreement over the proper way to implement an ABA program, assignment of teaching staff and the management of an ABA classroom. Disputes over teaching methods favor districts unless the Parent can prove a denial of FAPE. In *Ridley*, the court recognized “. . . that there may be cases in which the specially designed instruction proposed by a school district is so at odds with current research that it constitutes a denial of a FAPE”. *Ridley*, 680 F.3d 277-278. However in this instance, the record is preponderant that this is not the case. The incremental, though modest gains over time favor the District’s discretion to manage a program that is producing progress.

### **The 2014-2015 IEP**

The IEP team included the Parent, the special education teacher, a regular education teacher, the curriculum consultant, the behavior consultant, the speech therapist and the OT. The IEP’s present levels included data from the initial ER, the previous FBA, OT data and data from the speech therapist’s assessments. The IEP

also included the results of diagnostic assessments in reading and math (S#10). The proposed goals were measurable and the frequency, duration and location of the SDIs were adequately detailed. The IEP included related services, appropriate supports for personnel, along with a detailed nine-page PBSP.

To ensure consistency and fidelity, across environments and staff, the PBSP included definitions describing the targeted behaviors and an objective measurement strategy. The PBSP included interventions like positive reinforcement, verbal behavior strategies, functional communication strategies and a sensory diet to avoid overload. The PBSP also included reactive strategies to foster coping skills, which if successful, would reduce either the frequency or the severity of the challenging behaviors. To ensure access to typical peers, the IEP provided the Student with regular contact with non-disabled peers and equal access to the regular education environment. The Parents did not challenge the benefits of an integrated education.

To address the Student's learning style, the speech therapist testified that repetition and continuous practice was an essential part of the Student's day-to-day program (S#10 p.42; S#17 pp. 63-64; NT 206-207). The Student receives speech instruction four out of five days per week (NT Vol II pp.218-219). Every day of the week, with either the teacher or the assistants, the Student received drill and practice to improve articulation skills using word rings and sentence strips (NT Vol II pp.218-219). The special education teacher and the speech therapist consulted on daily basis.

To address the Student's need to generalize communication skills beyond the classroom, the SDIs included several generalization interventions (S#10, p.38, S#17, p.59). The speech therapist also included the instructional assistants in speech therapy sessions. The inclusion of the teaching assistants, in each session, provided the speech therapist and the assistants with an opportunity to observe skill generalization and intelligibility across listeners. The Student's group speech sessions also provided for extra repetition and reinforcement of the Student's intelligibility goals across familiar and unfamiliar listeners (NT Vol II pp.205-206).

The BCBA regularly observed the Student, plotted the data and provided the teacher and the assistants with cues and directions to address the targeted behaviors. The behavioral data along with the classroom performance data was regularly shared with the Parents in the progress reports.

The OT supported the Student's needs to improve activities of daily living and develop sensory awareness. The IEP included a variety of sensory awareness strategies, all of which supported the Student's progress.

The 2014-2015 quarterly progress reports were provided on time, periodically reviewed and discussed with the Parents. The progress reports provided objective measures of the Student's performance over time. The progress report noted when the Student mastered the short-term instructional objectives and distinguished objectives that were "mastered and still maintained" from objectives not yet "mastered".

The progress reports objectively communicated the frequency of the challenging behaviors. At times, the Parents and the District worked corporately to understand how the Student's three intertwined disabilities affected the Student's potential, learning style, speech and behaviors. The progress reports illustrate the efforts made to provide the Student with equal access to equally effective aids, benefits and services in the LRE. The 2014-2015 progress report also provides another measure, corroborating the fact while the Student's standardized test scores are low, the Student did in fact make meaningful educational progress.

Accordingly, the hearing officer finds the record is preponderant that the District complied with the IDEA substantive and procedural standards including compliance with the IDEA's progress monitoring requirements. Therefore, this hearing officer finds the record is replete with evidence the Student received FAPE during the 2014-2015 school year. In the absence of an IDEA violation and with no record evidence of facts of discrimination "solely on" or "on the basis of a disability", the Parents' ADA and Section 504 FAPE claims and discrimination claims for the 2014-2015 school year are denied.

### **The October 2014 RR Results and the Independent Evaluator's March Report**

The October 2014 RR occurred on or at about the same time as the independent evaluator's initial ABA testing. The RR includes a variety of standardized assessment tools, parent input and an observation of the Student. At the initial testing session, the psychologist immediately noted improvements in the Student's attention and focus. These improvements directly contributed to the Student being able to complete the normed referenced standardized assessments. The SS on the UNIT and the RAIS along with the adaptive behavior scales confirmed an intellectual disability. The RR included speech data, behavioral data, an OT assessment, speech data and the results of classroom performance.

The RR included an objective measurement of the Student's strengths, academic weaknesses, behavioral challenges and educational needs. 34 CFR §300.301 through 34 CFR §300.311. Therefore, this hearing officer finds the record is preponderant the District's October RR evaluated the Student in all areas of unique need.

In October 2014, the independent evaluator administered two common ABA assessment tools. In January 2015, the evaluator during a six and a half (6.5) hour observation collected frequency data on 16 different behaviors. The evaluator's results confirmed much of what the District and the Parents already knew about how the Student learns and the Student's then current present levels. The evaluator's report reinforced the already existing beliefs about the function of the Student's challenging behaviors and the severity of the Student's speech deficits. The report also stressed the need to continue to provide goals targeting functional skill development and speech.

### **The March 2015 IEP**

On March 16, 2015, the District received the evaluator's report (S#17, p.14). After reviewing the report at the IEP meeting, the IEP team included goals and SDIs from the evaluator's report (S#17, p.14). The IEP notes as the Student makes progress, additional goal statements, from the evaluator's report would be considered for future instructional needs (S#17, p.14). The IEP included 21 measurable goal statements, descriptive present levels of performance, related services, a six-page positive support and 35 SDIs. Many of the goal statements included then current objective baseline data (S#17, pp.27-51). The IEP described the Student's academic, developmental and functional needs related to the Student's multiple disabilities (S#17, pp.16-17). The record is replete with evidence, at the time the IEP was drafted, it offered the Student FAPE in the LRE.

I do not provide significant weight to the evaluator's criticisms and critiques of the District's academic, speech or behavioral goals. The evaluator is not a certified teacher, a psychologist or speech therapist.

To the extent, the evaluator has a negative opinion of the implementation of the ABA program, an area of expertise; I find the testimony of the District staff to be more persuasive. Although the evaluator found fault with the District's data collection methods, the evaluator, in the first report, and later in the second report, did not disagree with the progress monitoring results. Curiously, the evaluator did not use the "gold standard" to gauge the "dimensions" of the challenging behavior. The evaluator's omission of such allegedly necessary data from the first and second report undercuts the evaluator's persuasiveness on the data collection criticism, the inferred lack of progress and the need for a "strict" 20-hour one-on-one ABA program.

In fact, the evaluator conceded the Student made “significant progress” (S#13, pp.13) also undercuts the evaluator’s testimony. Therefore, based on *Rowley* and *Ridley*, I find the record is preponderant that the student received FAPE in the LRE.

To the extent, any dispute remains about the student’s progress, the psychologist testified although the Student’s achievement testing yielded low SS, when the SS are compared to the previous SS data, the student made one full year of progress. The standardized achievement test results corroborate the ongoing data of incremental progress. Accordingly, this hearing officer finds the District’s progress monitoring documents evidence of the student’s continuous incremental advancement is tantamount to meaningful educational benefit and significant learning is consistent with the student’s ability and potential.

### **Conclusion**

While the progress was not satisfactory to the Parents or to the evaluator, this assessment does not appear to be justified based upon this record. The IDEA does not ask the public schools to guarantee the very best. *T.R.*, at 205 F.3d 577. Therefore, the hearing officer finds the District also provided the student with FAPE during the 2015-2016 school year. Accordingly, in the absence of a denial of a FAPE in the 2015-2016 school year, and, with no record evidence of facts of discrimination “solely on” or “on the basis of a disability” the Parents’ ADA and Section 504 FAPE claims for the 2014-2015 and the 2015-2016 school years are denied.

## ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The Parents' claim of a denial of FAPE and relief of compensatory education for the 2014-2015 school year is denied.
2. The Parents' claim of a denial of FAPE and relief of compensatory education for the 2015-2016 school year is denied.
3. The Parents' claims of discrimination or a denial of FAPE under the ADA or Section 504 for the 2014-2015 school year is denied.
4. The Parents' claims of discrimination or a denial of a FAPE under the ADA or Section 504 for the 2015-2016 school year is denied.
5. It is **FURTHER ORDERED** that any claims not specifically addressed by this Decision and Order are denied and dismissed.

Dated: April 22, 2016

Charles W. Jelley Esq. LL.M.  
Charles W. Jelley Esq. LL.M.  
HEARING OFFICER