

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: C.P.

Date of Birth: [redacted]

Dates of Hearing:

April 9, 2014

June 11, 2014

June 12, 2014

June 13, 2014

CLOSED HEARING

ODR File No. 14785-1314KE

Parties to the Hearing:

Parent[s]

Central Bucks School District
16 Welden Drive
Doylestown, PA 18901

Date Record Closed:
Date of Decision:

Hearing Officer:

Representative:

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July 21, 2014
August 6, 2014

Cathy A. Skidmore, M.Ed., J.D.

INTRODUCTION AND PROCEDURAL HISTORY

The Student (hereafter Student)¹ is beyond teen-aged and is a student in the Central Bucks School District (hereafter District) who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).² Student's Parents filed a due process complaint³ against the District asserting that it denied Student a free, appropriate public education (FAPE) under the IDEA, Section 504 of the Rehabilitation Act of 1973,⁴ and the Americans with Disabilities Act,⁵ as well as the federal and state regulations implementing those statutes.

The case proceeded to a due process hearing which convened over four sessions, at which the parties presented evidence in support of their respective positions. The Parent sought to establish that the District failed to provide Student with FAPE, particularly with respect to Student's transition and behavioral needs, beginning in June 2013 and throughout the 2013-14 school year; and, they also challenged the District's proposed placement for Student. The District maintained that its special education program, as offered and implemented, was appropriate for Student.

Following review and consideration of all of the testimony and documentary evidence,⁶ and for the reasons set forth below, I find in favor of the Parents on a portion of the claims, and in favor of the District on a portion of the claims.

ISSUES

1. Whether or not the District complied with the directives in a previous hearing officer decision dated December 8, 2013, specifically with respect to a functional behavior assessment or analysis;
2. Whether or not the District complied with the directives in a previous hearing officer decision dated December 8, 2013, specifically with respect to transitional/vocational services;

¹ Student is named on the cover page of the original, unredacted decision. In the interest of confidentiality and privacy, Student's name and gender, as well as other potentially identifying information, are not used in the body of this decision.

² 20 U.S.C. §§ 1401 *et seq.*

³ The original complaint filed by the Parents *pro se* (Joint Exhibit (J- 1) was subsequently amended by counsel (J- 65) with the agreement of the District. It should also be noted that Student's father was the active participant in this hearing, but references to "Parents" will refer to both of the parents where it appeared that one was acting on behalf of both.

⁴ 29 U.S.C. § 794.

⁵ 42 U.S.C. §§ 12101 *et seq.*

⁶ The testimony of every witness, and the content of each exhibit, was considered in issuing this decision, regardless of whether there is a citation to particular testimony of a witness or to an exhibit. The parties' written closings were also carefully considered.

3. If Student was denied appropriate functional behavioral assessment or analysis, and/or appropriate transitional/vocational services, is Student entitled to compensatory education and, if so, in what form and amount;⁷ and
4. Whether or not the District's proposed placement for Student is appropriate.

FINDINGS OF FACT

General

1. Student is a resident of the District and is eligible for special education services on the basis of an Autism Spectrum Disorder as well as a Speech/Language Impairment. (Stipulation, Notes of Testimony (N.T.) 37-38; Joint Exhibit⁸ (J-) 4 p. 3; J-41 pp. 1, 24)
2. Student at times will persevere on particular personal characteristics of people around Student, particularly when someone makes a change to his or her appearance. (N.T. 191-92, 443-44, 674-75, 725-26)
3. Student also exhibits difficulty with changes to routine, such as a variation of a bus route to a particular location or a substitute aide. (N.T. 192, 447-48, 480, 600, 704)
4. Student at times exhibits aggressive behavior toward others, often in conjunction with the perseverative behavior or to communicate frustration. (N.T. 192-93, 194-95, 452-53; J-12; J-18 pp. 6-10; J-43)
5. Student has occasionally engaged in aggressive behavior on the bus due to changes in the transportation routine such as a different route or driver, or unexpected noise. (N.T. 237-38, 240, 255-56, 299-300, 479-80, 487-89, 597-600, 703-04, 714-15, 751; J-35 pp. 10-11; J-41 p. 16; J-73)
6. Student does not exhibit problematic behavior at home or in the community on a frequent basis. (N.T. 443, 450, 452-53, 501-04, 578-80, 602-03)
7. Student has an interest in landscaping and horticulture, and enjoys activities related to those fields. Student also demonstrates a high aptitude for skills needed to perform activities in that area of interest. (N.T. 41, 414-16; J-4 pp. 4, 5, 10)

⁷ Following the conclusion of the hearing, the parties reached an agreement with respect to a portion of the compensatory education claim, which related to pendent services. See Parents' Closing at 4 n.1; District' Closing at 2 n.1; see also Notes of Testimony (N.T.) 404-07.

⁸ The parties submitted a single Joint Exhibit binder, which helped to ensure a concise hearing record. This hearing officer greatly appreciates counsel's cooperation in this regard, as well as throughout this hearing. And, although the exhibits themselves are marked with an "S" rather than a "J", the "J" designation is used in this decision because they were jointly offered and admitted.

8. The parties had a due process hearing on November 18, 2013, which resulted in a decision and order in December 2013.⁹

Program and Placement at Academy

9. Student began attending [redacted] Academy (hereafter Academy) in September of 2012. Student's program was full time autistic support. That classroom, with seven students, has a full-time special education teacher and an instructional assistant. It is a small classroom without dividers. Approximately 100 students were in the building where Student's classroom was located. (N.T. 41-42, 117, 218, 264, 436, 622-23, 625, 659, 733, 738-39, 753-54, 802; J-16 p. 5)
10. Student did engage in some social interaction with peers and staff at Academy, including greeting peers and asking a few specific questions. (N.T. 811-12)
11. There was a classroom reward system in Student's classroom, where the students could earn "Smart Bucks" by engaging in positive behavior. Smart Bucks could be used to purchase items of their choice in the school store. Student did not regularly earn Smart Bucks in the classroom. (N.T. 779-80, 783-84)
12. Student had a one-on-one personal care assistant (PCA) assigned to Student throughout the time Student attended Academy. The PCA provided academic and behavioral support to Student, and assisted with transitions as well as Student's focus and attention. Academically, the PCA provided direct instruction as well as reinforcement of concepts. With respect to behavior, the PCA implemented Student's behavior plan and took data on Student's behaviors. (N.T. 445, 623-24; J-18 p. 5)
13. The time for transportation between Student's home and Academy was approximately ten to fifteen minutes. (N.T. 473, 480-81)
14. Student has exhibited problematic behaviors, including aggression (attempts to punch, kick, or throw items), at Academy, beginning around February 2013. Student's demonstration of these behaviors did not significantly change between February 2013 and the end of the 2013-14 school year; rather, it has been fairly consistent. (N.T. 190-93, 217-18, 229-31, 272-76, 302-03, 441, 448-49, 651, 691-92, 757, 761-62, 774, 786, 1215; J-18 pp. 7-8)
15. Student's aggression has been toward others (staff or other students) or to property; Student often engaged in perseverative behavior prior to engaging in aggression, and staff viewed that perseverative behavior as a signal that aggression may follow. However, sometimes Student did not exhibit any such signs. At times, at the request of Student or staff, Student was escorted to a quiet area. The aggressive incidents were not infrequent, although staff never had to employ physical restraint with Student. (N.T. 629-31, 632, 634-46, 652-54, 658-59, 666-68, 671, 728-29, 731-32, 764-65, 792-94, 797-98; J-12; J-32; J-34)

⁹ *C.P. v. Central Bucks School District*, ODR Nos. 13978-1213AS and 14051-1213AS (Valentini, December 8, 2013).

16. Several of the aggressive incidents during the 2013-14 school year have been serious. In one such incident, Student picked up a heavy object and threw it toward a peer, narrowly missing that student's head; then, Student continued with a lengthy period of aggression toward staff and other peers. In another episode, Student kicked two holes in the wall of the sensory room. (N.T. 666-68, 728-29; J-18 p. 9; J-41 pp. 14-15; J-61)
17. In May 2013, and again in March 2014, Student's Parents elected to have Student attend Academy for half days only in order to provide respite to Student and staff. On a number of other occasions during the 2012-13 and 2013-14 school years, the Parents picked Student up at school early because of Student's behavior at the request of Academy staff, or at the request of Student or the Parents. (N.T. 454-55, 566-67, 603-04, 662-64, 695, 696-97, 721-22, 729, 795; J-12; J-18 pp. 8-9; J-30; J-34; J-42; J-43; J-56 p. 1; J-61; J-62 p. 2)
18. Student had a visual schedule at Academy, and staff informed Student of any changes to that schedule. Student was provided with frequent breaks throughout the school day in addition to the end of each class period. (N.. 627-28)
19. Student was provided with social skills instruction throughout the school day. Students also participated in vocational and independent living activities, such as cooking and community living. (N.T. 627, 752)
20. Student's behavior plan at Academy included teaching of replacement behaviors and earning rewards for exhibiting safe behavior. Staff monitored Student's behavior and intervened when necessary, and the behavior plan was implemented by the teacher, instructional assistant, and Student's PCA, as well as two behavior managers at Academy. Academy staff provided substantial behavioral support to Student which did not sufficiently address Student's challenging behaviors. (N.T. 627-28, 758-59, 780-81; J-18; J-35; J-41; J-67)
21. By May 2013, through and including the end of this due process hearing, the IEP team including Academy staff concluded that Academy was no longer appropriate for Student. The December 2013 hearing decision gave the District permission to "seek an appropriate placement" for Student (J-4 p. 12). (N.T. 190-91, 230-31, 296, 736-37, 1290-91, 1397-98, 1412; J-4; J-56)
22. Since the end of September 2013, Student had been spending a considerable amount of time outside of the classroom, alone with the PCA and away from peers, during the school day. By December 2013, the amount of that time exceeded half of the school day. Student also had asked to leave the classroom on a more frequent basis (almost daily), especially since the pendency hearing in April 2014. (N.T. 192, 653-55, 657-58, 765; J-4 p. 7; J-18 pp. 9-10; J-30; J-41 pp. 3, 14-15; J-56 p. 1; J-61)
23. Academy is not able to provide a secure program and placement for Student, and its staff is not able to manage Student's behaviors. (N.T. 674-79, 737-45, 963-72; J-56)

Re-Evaluation

24. Among other things, the December 2013 decision and order granted the District permission to conduct a multidisciplinary psychoeducational evaluation (including but not limited to a psychiatric evaluation, a functional behavioral assessment¹⁰ “to identify areas of strengths and deficits and construct an effective plan for positive behavior management,” (J-4 pp. 11-12) and vocational assessment) of Student. The District was to determine the appropriate instruments to be used to conduct the re-evaluation. (J-4)
25. The District conducted the ordered re-evaluation of Student and issued a Re-evaluation Report (RR) on February 28, 2014. (N.T. 208, 919-20, 924-25; J-41)
26. A complete psychiatric evaluation was not conducted because Student and Student’s Parents did not attend the scheduled appointment with the psychiatrist, and the Parents’ subsequent efforts to schedule an appointment were not successful. However, the psychiatrist did issue a psychiatric report based on a review of records, the psychiatrist’s previous evaluations of Student, and interviews with a District representative and Student’s then-current special education teacher. (N.T. 208-10, 493, 497-500, 1242-44, 1409-10; J-74)
27. The District school psychologist who conducted the re-evaluation sought information from the Parents by sending them several forms and rating scales. Parents did not provide input into that re-evaluation, or otherwise communicate with the school psychologist, because they did not know who from the District was requesting information from them.¹¹ (N.T. 547-48, 553, 925-32, 937)
28. The District school psychologist conducted an observation of Student at Academy in late January 2014 for the RR. Throughout that observation, Student was in the sensory room with Student’s PCA. (N.T. 955, 957, 986, 1002-03)
29. During the District school psychologist’s administration of cognitive and achievement measures, Student’s PCA was present. Student was provided a visual list of the activities that Student would be performing during those assessments, including a break for lunch. On a few occasions during that testing, Student began to engage in behaviors that were believed to be precursors to problematic behavior such as giggling and mumbling. The PCA prompted Student to engage in calming strategies, which Student did successfully to complete the testing without engaging in problematic or aggressive behavior. (N.T. 1005-08; J-41 pp. 11-12)
30. On cognitive assessment, Student’s performance was consistent with previous evaluations, achieving a Full Scale IQ score more than two standard deviations below

¹⁰ This paragraph of the decision used the term “functional behavioral analysis” (J-4 p. 11); the difference between the terms as related to this matter is discussed *infra*.

¹¹ The District, through the then-current special education supervisor assigned to Student, sent a letter to the Parents advising that the school psychologist would be sending information to, and requesting information from, the Parents. The school psychologist was not identified by name. (J-14)

- the mean and suggesting a deficit in intellectual functioning.¹² Student did demonstrate some scatter in strengths and weaknesses, with a noted relative strength in perceptual reasoning, consistent with previous assessments. (N.T. 978-79, 987-88; J-41 p. 12)
31. On achievement testing, Student again demonstrated a scatter of strengths and weaknesses. Student performed in the low average to average range on the Letter-Word Identification, Mathematics Calculation, and Spelling subtests, all relative strengths for Student. (N.T. 979-80, 989-91; J-41 pp. 13-14)
 32. The Behavior Assessment System for Children – Second Edition (BASC-2) was used to gather behavior information. Results of the teacher’s rating scales reflected scores in the clinically significant range for Withdrawal and in the at-risk range for Adaptability; no other scores were within those ranges. The school psychologist did not solicit a BASC-2 rating scale from Student. (N.T. 1017-18; J-41 pp. 14, 16-17)
 33. The Adaptive Behavior Assessment System – Second Edition was also used. Results of the teacher’s checklist reflected overall adaptive skills well below same-aged peers, with needs in communication, self-help, and social areas; Student’s school living and self-direction skills were in the average range. The school psychologist did not solicit input from Student for this measure. (N.T. 1017-18; J-41 pp. 18-19)
 34. A Speech/Language evaluation was conducted by a speech/language pathologist at Academy. Student continued to demonstrate weaknesses in receptive and expressive language. (J-41 pp. 17-18)
 35. The school psychologist utilized the Functional Independent Skill Handbook Assessment to evaluate independent living and vocational skills. However, the only information on this instrument was from Student’s teacher. (N.T. 1008-11, 1016; J-41 pp. 19-20)
 36. The RR included input from teachers and reported progress on IEP goals, with quite variable progress toward behavioral goals. (J-41 pp. 2-4, 7-9)
 37. A Functional Behavioral Assessment (FBA) was updated in February 2014 by Student’s special education teacher at Academy. This teacher had been a Board Certified Behavior Analyst (BCBA) for approximately six years before February 2014 and had done several FBAs and updates for Student. (N.T. 618, 626-27, 755; J-41 pp. 20-21)
 38. Identified antecedents for Student’s behavior generally were changes to the environment, including changes to Student’s routine or to the personal appearance of others in the environment. The behaviors of concern were identified as perseverative

¹² There was testimony by the father that Student, at some point in the past, scored within the average range of intellectual functioning. (N.T. 40) It is not clear when this testing may have occurred, but Hearing Officer Valentini noted in her December 2013 decision that Student’s nonverbal cognitive ability was in the average range. (See N.T. 1438-39; J-4 p. 3; *see also* J-71 pp. 2, 3)

comments; “precursor behavior” (J-41 p. 21) of verbal outbursts, giggling, and excessive laughter; and aggression toward a person or property. (N.T. 776; J-41 pp. 20-21)

39. The hypothesis formulated by the FBA was, “When changes occur in [Student’s] environment (see list of historical triggers above), [Student] is likely to display perseverative comments, precursor behavior, and/or aggression, in order to escape/avoid the undesired stimuli. [Student] will attempt to use problem behavior in order to return the environment to the way [Student] wants it to be/how [Student] perceives it should be (negative reinforcement).” (J-41 p. 21)
40. Student’s Positive Behavior Support Plan (PBSP) was summarized in the RR, identifying Prevention Strategies (visual schedule, preparation for changes, transition warnings, discrete instructions, prompting, periodic breaks, reminders to use calming strategies, and behavior blueprints for specific situations which specified reasons for not engaging in problematic behaviors, replacement behaviors, and consequences for following or not following the blueprint); Replacement Behaviors (teaching Student to request a break or to move to an alternate area; teaching Student calming strategies, and teaching Student to use the behavior blueprints); and Consequences for using appropriate and inappropriate behavior. The PBSP also included a crisis plan. (J-41 pp. 21-23)
41. The District school psychologist determined that the functions of Student’s problematic behavior at the time of the RR were escape and avoiding undesired stimuli. (N.T. 954)

Proposed IU Program

42. The local Intermediate Unit (IU) identified its full-time autistic support program at [redacted] (hereafter IU Program), in a neighboring school district, as one that could provide programming for Student. Student was accepted into the IU Program, which was able to begin implementing a program for Student as of the time of a February 2014 IEP meeting. (N.T. 179, 196-97, 198, 269, 1031-32, 1059-61, 1147)
43. At some point in the past, the IU Program was considered for Student, but it declined the referral as not appropriate. (N.T. 88, 214-15, 832, 838-39; J-51)
44. The IU Program is specifically designed for middle school and high school students with autistic spectrum disorders and behavioral difficulties. Most students have an intellectual disability. For students of Student’s age, the program focuses on vocational and transition activities, with opportunities for community-based instruction. (N.T. 183-84, 829-30, 868-70)
45. The time for transportation between Student’s home and the IU Program is approximately forty-five minutes to one hour. (N.T. 472-73, 1111-12, 1162-63)

46. Transportation would be provided to the IU Program by the District and, if Student needed an aide on the bus or van, the District would be responsible for providing that aide. (N.T. 1114, 1116, 1162-63, 1403-04; J-44; J-45)
47. An IU school psychologist who is also a BCBA considered Student for possible placement at the IU Program in January 2014. Following an observation of Student at Academy, an interview with staff at Academy, and a review of records, this school psychologist reported to the District that IU Program could provide an appropriate program and placement for Student. (N.T. 825-26, 833, 840-43, 853-54)
48. At the time of the due process hearing, the IU school psychologist/BCBA as well as its Supervisor of Special Education believed the IU Program could provide the appropriate level of behavioral and academic support to Student. District representatives, including the Supervisor of Special Education assigned to Student, also believed the IU Program was appropriate for Student. (N.T. 886-87, 888-91, 1047, 1049, 1140-41, 1294-96)
49. The IU Program full-time autistic support classroom is housed in a single-story building, and the classroom is located along a hallway with doors at either end that can be secured. All outside doors are locked and there is security at the main entrance. Staff meet students at or escort them to the bus, and students use a private entrance to and from the classroom. Students are never outside of the classroom unless accompanied by a staff member. Staff members also have walkie-talkies available that can be used if a student attempts to elope. (N.T. 1065-67, 1077, 1079-81, 1087-96, 1099, 1118, 1152, 1174-75)
50. The classrooms at the IU Program have five or six students, staffed by a teacher and an instructional assistant for each student. The instructional assistants are not permanently assigned to specific students, but for most children, they change from day to day or week to week in order to promote generalization. A few children have needs which require some limitation on frequency of those rotations and/or a delay in imposing any rotation of the individual providing that support. The classroom teacher has the discretion to determine the frequency in which the instructional assistants rotate. (N.T. 831, 883-85, 888, 1062-63, 1070, 1082-85, 1105, 1150, 1152-55, 1192-94)
51. The full-time autistic support classroom is large enough to accommodate individual work areas, which may be separated by movable dividers, within the room, in addition to a larger area for group activities. Student needs determine how the individual work spaces are set up. There is also a second classroom set up like an apartment where students can practice independent living and vocational skills. (N.T. 1075, 1077-78, 1085-87, 1128-30, 1150, 1173, 1188-91)
52. The IU Program is in a building with two quiet rooms that are padded on the walls and floor; the rooms are also climate-controlled and lit. Those rooms are used at a student's request, or by request of staff in the event of behavior that may be dangerous to a student or others. The rooms are located in close proximity to the

- classroom where Student would attend. Students typically do not spend more than a short time in the quiet room before returning to the classroom, and staff is generally successful in limiting its use in place of classroom activities. (N.T. 889-90, 1071-74, 1075-76, 1182-84)
53. The IU Program has a cafeteria and gymnasium in the building. There is also an open field next to the building that students sometimes use for outdoor activities. The students do move throughout the building during the school day. (N.T. 1097-1102, 1131, 1150-51)
54. The IU Program building has an outside area with plantings as well as grassy areas. Students tend to those areas through activities such as mulching, planting, trimming and pruning plants, and weeding. Student would be able to participate in those activities at IU Program. A job coach would also be assigned, and Student could perform similar activities at a nearby nature center to which van transportation, individual if necessary, is provided by the IU. (N.T. 1100-02, 1106-07, 1108-10, 1141-44, 1164-66, 1191-92)
55. The IU Program provides community-based instruction based on each child's needs. (N.T. 1159-62)
56. Staff at the IU Program include the school psychologist/BCBA and another doctoral level BCBA as well as speech, occupational, and physical therapists, in addition to another psychologist, counselors, and a social worker. (N.T. 1062-65)
57. The IU Program has a hierarchy for threat assessment and crisis situations. All staff are trained in the implementation of each child's behavior plan, as well as in Crisis Prevention Implementation and Applied Behavior Analysis. (N.T. 1065, 1083, 1096-97, 1102-04, 1153-54, 1175)
58. Students at the IU Program arrive at approximately 7:50 a.m. but each child has an individualized daily schedule. (N.T. 1118-20, 1150)
59. The IU Program is able to conduct both functional behavioral assessments and functional behavioral analyses by its BCBAs on staff. (N.T. 851-52, 859-63, 1070-71)
60. After a student is accepted into the IU Program, its team reviews relevant educational records, including IEPs and evaluation reports, to develop a plan to address that student's individual academic (including reading and mathematics) and other needs. Students participate in art, music, and gym, as well as activities for functional living and vocational skill development, including community-based instruction. (N.T. 1117-18, 1120-32, 1135, 1144, 1148, 1158-60)

Programming and Events After December 2013 Decision

61. The December 2013 decision and order granted the District permission to send out packets to prospective alternate placements without parental consent. The District

- subsequently sent a packet to a private school that did not accept Student, and to two other out-of-District programs that did not pursue possible placement for Student because the Parents did not communicate with them. The District also sent a packet to the county IU, and two behavior specialists with the IU observed Student at Academy. (N.T. 178-80, 187-88, 243, 1368, 1375, 1385-86, 1427-29; J-22; J-29)
62. The District attempted to schedule and convened a meeting of Student's Individualized Education Program (IEP) team in December 2013 to address the hearing officer's directive to meet and develop a plan for vocational training in Student's area of interest. Student's Parents would not attend because a certain District representative, who was the assigned supervisor of Student's special education program, would be present. The Parents had made the District aware in October 2013 that they would not communicate or work with this District representative. (N.T. 420-22; J-3; J-4; J-5; J-6; J-8; J-9)
63. Student's team did meet to revise Student's IEP in January 2014. A representative of Academy was present, but Student and Student's Parents did not attend this meeting. (N.T. 232-34, 646-47, 680-81, 686-88, 1226-27, 1229-30, 1232-35, 1240, 1245-46, 1268, 1376-78; J-11; J-15; J-18 pp. 1-2)
64. The team revised the IEP at that time to update behavioral information and the transition goals, and to add transition and related services. (J-18 pp. 9-11, 14, 24)
65. For the revision to Student's vocational programming to address horticulture and landscaping, the team decided to use a curriculum with a worksheet-based component (called "Veggie U") to be completed weekly at Academy. That curriculum was designed to run for five or six weeks, at which time the IEP team would consider additional assessments to determine further activities outdoors. (N.T. 680-81, 1246-48, 1253-54, 1259-63, 1314-15, 1330-31; J-18 pp. 11, 14)
66. The practical portion of Student's vocational programming curriculum, a "seed-to-preparation-to-eating-experience" (J-18 p. 11), was to be provided at the District's Educational Services Center because the Academy could not accommodate the type of equipment that would be needed. A job coach from the IU was to meet with Student three days per week, for approximately one hour excluding travel time, and Student was to engage in activities such as working with soil and growing vegetables in a specific area in that building. This program was to start indoors because of the winter weather, before moving to another location outdoors in the spring. (N.T. 232-37, 680-81, 688-89, 745, 1247, 1251-54, 1266-67, 1314-15; J-18 pp. 11, 14; J-26)
67. The time needed to travel the distance between the Academy and the Educational Services Center is approximately five minutes. This is a location where work-based learning activities are frequently conducted. (N.T. 237, 1249-50)
68. Student's father met with Academy representatives following the January 2014 IEP meeting and Student's programming was discussed. (N.T. 533-34; J-23; J-24)

69. The Parents did not approve the Notice of Recommended Educational Placement (NOREP) sent to them following the January 2014 IEP meeting, adding the notation, "I cannot approve what I don't know!" (J-11 p. 2). (N.T. 42-45, 114-16, 232-34; J-11; J-18; J-20; J-21)
70. Because the Parents did not request due process or mediation in rejecting the January 2014 NOREP, Student's vocational program was implemented. However, Student participated in that vocational program at the Educational Services Center for only one day before the Parents asked that it not be implemented, due in part to the need to transport Student to the Educational Services Center for those activities. Student did complete some portion of the academic aspect of the vocational program at Academy. (N.T. 233-34, 544-45, 689-90, 1256-57, 1268-70)
71. Student's IEP team met again in February 2014 to revise Student's IEP. The meeting was held at Academy, and a representative of the IU Program attended the meeting. Student's Parents did not attend the meeting, although Student's father was present at Academy but left without participating after learning that the District's then-supervisor of Student's special education program was also in attendance. Student attended this meeting for a time. (N.T. 140-41, 187-89, 260-61, 281, 533-34, 587-88, 709-10, 1043-44. 1146-47, 1270, 1275-78; J-29; J-35 pp. 1-2)
72. The District arranged for an alternate District representative to serve as the supervisor of Student's special education program, including attending Student's IEP meetings, as of February 2014. (N.T. 176-77, 220-21, 223, 259, 1209, 1355)
73. The IEP team members who attended the February 2014 meeting determined that the IU Program was the appropriate program to offer for Student at that time. Revisions were made to the IEP to update information on behavior and post-secondary transition goals. (N.T. 1278, 1280-81, 1283-84; J-35 pp. 1, 10-12; J-39)
74. The NOREP issued following the February 12, 2014 IEP meeting was also dated February 12, 2014. The NOREP, and letter accompanying the NOREP and IEP, provide for Full Time Autistic Support at IU Program. (J-36 p. 2; J-39 pp. 1, 3)
75. The Parents received the IEP and accompanying NOREP on or about February 18, 2014. These documents were sent both by email and first class mail. The Parents signed the NOREP on or about February 20, 2014, and returned it to the District by first class mail on or about February 22, 2014. Specifically, in Paragraph 8 of the NOREP, the Parents placed an X in the box next to "I do not approve this action/recommendation" and also handwrote (below the typed phrase "My reason for disapproval is:") "Current assessments inaccurate. Recommendation absurd." (J-36 p. 2). (N.T. 45-46, 49-50, 62, 94-96, 104-09; J-36 pp. 1-2; J-38)
76. The Parents also placed an X in the box next to the typed phrase "I request (Contact the Office for Dispute Resolutions [sic] at 800-360-7282 for information on Mediation and Due Process Hearing):" as well as the box below next to "Due Process Hearing" on the February 12, 2014 NOREP. The Parents then added a new box,

which they also marked with an X, and handwrote “Judicial Review.” (N.T. 49-51; J-36 pp. 2-3)

77. Student’s IEP team met again in March 2014, without the District representative whom Student’s father did not wish to be included, but the Parents did not attend. A representative of the IU Program attended the meeting (N.T. 203-04, 1043-44, 1138-39, 1300-02)
78. At that March 2014 meeting, the IEP team developed the annual IEP for Student. The District proposed ESY at the IU Program. District personnel believed such programming would help Student transition to the IU Program. (N.T. 1272-73; J-67)
79. The PBSP in the March 2014 IEP was revised to reflect modification to the crisis plan; no other changes were made to the behavior plan at that time. (N.T. 872-74, 1139; J-67 pp. 58-61)
80. The District issued a NOREP following the March 2014 for placement at the IU Program. The Parents did not approve the NOREP. (N.T. 1303; J-66)
81. Student has never attended the IU Program, and the Parents do not intend to permit Student to attend the IU Program. At the time of the due process hearing, the Parents had made arrangements to visit the IU Program but had not yet done so, although Student’s father had worked briefly at that location in a professional capacity several years earlier. The IU Program staff remained willing to have the Parents visit at any time. (N.T. 82-83, 145, 147-48, 240-41, 472-74, 575, 594-95, 1046-47, 1049-51, 1055-57, 1059, 1136, 1148, 1170; J-48)
82. Following an expedited hearing to determine Student’s pendent placement, Student returned to Academy for the remainder of the 2013-14 school year. (N.T. 694-95, 1256, 1287-88, 1297; J-54; Hearing Officer Exhibit (HO-) 1)
83. The District school psychologist observed Student again at Academy in early June 2014. Student was in the classroom during that observation with six other students, all doing independent work then sharing answers with the rest of the class. Student did participate with the rest of the class when called upon, but did not interact socially with peers. (N.T. 959-61, 986-87)

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

Generally speaking, the burden of proof consists of two elements: the burden of production and the burden of persuasion. At the outset, it is important to recognize that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62

(2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case rests with the Parents who requested this hearing.

Nevertheless, application of this principle determines which party prevails only in cases where the evidence is evenly balanced or in “equipoise.” The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position.

Hearing officers, as fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also 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). This hearing officer found each of the witnesses to be generally credible. While there were some inconsistencies among the accounts of some of the witnesses, likely due in part to their widely different perspectives on appropriate programming for Student, the testimony as a whole on matters important to deciding the issues in this case was largely uncontradictory. Furthermore, it must be noted that the Parents are clearly very strong supporters of and devoted, passionate advocates for Student, who are firmly convinced that Student can and should remain at Academy. Additionally, all of the District, Academy, and IU Program personnel who testified and appeared at the hearing presented as capable, dedicated professionals who care about Student and Student’s education. Despite the parties’ conflicting positions at the hearing, there can be no question that Student is surrounded by a team that is concerned with ensuring that Student is successful in the last year of IDEA eligibility, and acquires the skills necessary to be as independent as possible as an adult.

IDEA Principles

The IDEA and state and federal regulations obligate school districts to locate, identify, and evaluate children with disabilities who need special education and related services. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a); *see also* 22 Pa. Code §§ 14.121-14.125. Section 504 has a similar requirement. 34 C.F.R. § 104.32; *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 253 (3d Cir. 1999).

With respect to evaluating the child, the IDEA sets forth two purposes of the required special education evaluation: to determine whether or not a child is a child with a disability as defined in the law, and to “determine the educational needs of such child[.]” 20 U.S.C. §1414(a)(1)(C)(i). The law imposes certain specific requirements on local education agencies to ensure that sufficient and accurate information about the child is obtained:

(b) Conduct of evaluation. In conducting the evaluation, the public agency must—

(1) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining—

- (i) Whether the child is a child with a disability under § 300.8; and
- (ii) The content of the child’s IEP, including information related to enabling the child to be involved in and progress in the general education curriculum (or for a preschool child, to participate in appropriate activities);

(2) Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and

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

34 C.F.R. §§ 300.304(b). The evaluation must assess the child “in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status,

general intelligence, academic performance, communicative status, and motor abilities[.]” 34 C.F.R. § 304(c)(4); *see also* 20 U.S.C. § 1414(b)(3)(B). Additionally, the evaluation must be “sufficiently comprehensive to identify all of the child’s special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified,” and utilize “[a]ssessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child[.]” 34 C.F.R. §§ 304(c)(6) and (c)(7); *see also* 20 U.S.C. § 1414(b)(3).

The IDEA further requires the states to provide a “free appropriate public education” (FAPE) to all students who qualify for special education services. 20 U.S.C. §1412. In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that this requirement is met by providing personalized instruction and support services to permit the child to benefit educationally from the instruction, providing the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase “free appropriate public education” to require “significant learning” and “meaningful benefit” under the IDEA. *Ridgewood, supra*, 172 F.3d at 247. Local education agencies, including school districts, meet the obligation of providing FAPE to eligible students through development and implementation of an Individualized Education Program (IEP), which is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’ ” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). The IDEA further requires that eligible students be educated in the “least restrictive environment” which permits them to derive meaningful educational benefit. 20 U.S.C. § 1412(a)(5); *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572, 578 (3d Cir. 2000); *Oberti v. Board of Education of Clementon School District*, 995 F.2d 1204

(3d Cir. 1993). Local education agencies must, therefore, have available a continuum of alternative placements. 20 U.S.C. § 1412(a)(5); 34 C.F.R. §§ 300.114, 300.115.

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. Commw. 2005).

The Parents' Claims

The first issue is whether the District complied with the December 8, 2013 decision and order granting permission for a full re-evaluation, including conducting an FBA. The Parents first contend that the District failed to undertake a sufficiently detailed analysis of Student's behavior as specified,¹³ and thereby have an inadequate basis on which to make their placement recommendation. The District counters that, among other things, the order for the re-evaluation, including an assessment of Student's behavior, was at its request, so it was able to make all determinations on how to secure the necessary evaluations; and, that the Parents cannot now complain about the means by which it sought to obtain the information for that re-evaluation. (District's Closing at 2-5)

This hearing officer is not persuaded that the Parents are not able to challenge the RR or any portion of it merely because that evaluation, including the FBA, was conducted over parental objection and pursuant to a request by the District and a subsequent order of a hearing officer. The IDEA and its implementing regulations permit a parent to challenge an evaluation with which they disagree, and there is no limitation on the type of evaluation that may be contested, or any exception based on whether the parents consented to it. 20 U.S.C. § 1415; 34 C.F.R. §

¹³ There was some testimony about the differences between a "functional behavioral analysis" and a "functional behavioral assessment", with the Parents suggesting that the former was necessary. *See* J-4 p. 12; N.T. 378. Although the Parents appear to have backed away somewhat from this contention in their closing, it is addressed in this decision.

300.502; *see also Questions and Answers on Discipline Procedures*, 52 IDELR 231 (OSERS 2009)(explaining, *inter alia*, that parents may request an independent FBA at public expense). Here, rather than asking the District for an independent FBA, the Parents challenged the behavioral assessment it conducted as part of their own due process hearing request.

Substantively, the question is whether the functional behavioral assessment of Student conducted as part of the February 2014 RR was sufficiently comprehensive to permit the IEP team to develop a PBSP for Student. “Functional Behavioral Assessment (FBA) is a process for identifying problem behaviors and developing interventions to improve or eliminate those behaviors.”¹⁴ The FBA process is one of information-gathering in order to develop a hypothesis about the function(s) that the behavior is serving for the child, with identification of the environmental antecedents and consequences that are maintaining the behavior.¹⁵ The process of conducting an FBA involves collection of data from multiple sources and across various settings, using a variety of assessment methods.¹⁶ The District’s school psychologist elaborated on these concepts, explaining that an FBA involves gathering and analyzing data to identify target behaviors, antecedents and consequences, and setting events, through direct observation with data collection on the frequency, duration, intensity of behavior, and context of behaviors; then, analyzing all of that data to determine the function of behavior by developing a hypothesis. (N.T. 938-40) Thereafter, skill deficits can be identified, and a PBSP can be developed that includes appropriate interventions through prevention strategies, reduction of negative behavior,

¹⁴ Pennsylvania Department of Education, Bureau of Special Education, *Functional Behavioral Assessment (FBA) Process*, at 1 (2014), available at <http://www.pattan.net/category/Resources/PaTTAN%20Publications/Browse/Single/?id=4dc09560cd69f9ac7f140000>

¹⁵ *Id.*

¹⁶ *See Sattler, J. M., Foundations of Behavioral, Social, and Clinical Assessment of Children*, (6th ed. 2014) at 414.

increasing positive behavior through replacement behavior, and crisis intervention if needed.
(N.T. 940-43)

This hearing officer had some concerns with the FBA that was conducted in February 2014, as it appeared to consist of little more than an “update” by Student’s special education teacher who is also a BCBA, supplemented by historical information, an observation by the District school psychologist, reports of data collection and progress monitoring at Academy, and the teacher rating scale of the BASC-2.¹⁷ The variety of assessment methods used are not apparent in the record, nor is there indication of how the data collected in updating the FBA was carefully analyzed at that time to develop a hypothesis on the function of Student’s problematic behaviors. In essence, it appeared that the District relied heavily upon the experiences of Academy staff who were already familiar with Student’s behaviors as well as their functions, and deferred to a large extent to their behavioral input into the RR.

Nevertheless, the December 8, 2013 decision and order required assessment of Student’s social and emotional functioning, including an assessment of Student’s behavior, “to identify areas of strengths and deficits and construct an effective plan for positive behavior management,”¹⁸ (J-4 pp. 11-12), which is consistent with the discussion above on the FBA process. The evidence overwhelmingly demonstrates, and the personnel of both Academy and IU Program agreed (N.T. 776, 796-98), that the FBA appropriately identified the functions of Student’s problematic behaviors, and that further assessment such as a functional behavioral analysis was therefore not warranted. (N.T. 859-60, 950) The record also establishes that

¹⁷ The District school psychologist also explained the limited value of the BASC-2 for a student of Student’s age; and, it merits repeating that the District school psychologist sought information from the Parents without success.

¹⁸ It should be noted that issues surrounding the implementation of a hearing officer’s decision are within the purview of the Bureau of Special Education. See Basic Education Circular – Special Education Compliance, 22 Pa. Code §§ 14.102(a)(4) and 711.4 (revised October 11, 2011). The claim herein is that Student was denied FAPE as a result of the behavioral assessment, which is within the authority of a hearing officer.

Student's problematic behaviors did not change to any significant degree, but rather remained fairly consistent, between May 2013 and the time of the RR. This hearing officer is also persuaded that a functional behavioral analysis, more typically conducted in a clinical rather than an educational setting where the environment can be manipulated to trigger the challenging behaviors, was not an assessment that could have safely been conducted at Academy, even if indicated. (N.T. 748-49, 809-10, 950-51, 1335-36) Finally, for reasons set forth below in connection with the discussion of placement at the IU Program, the need for additional assessment of Student's behavior may be addressed upon Student's transfer to a new program. Thus, this hearing officer concludes that the Parents have not met their burden of proving deficiencies in the District's February 2014 FBA.

The next issue is whether the District provided appropriate transitional/vocational services and programming, as also required by the December 8, 2013 decision and order. This claim requires consideration of a variety of factors, including the relationship between the parties.¹⁹

The IEP team convened in early January 2014 to discuss and decide how Student would be provided with the ordered training in Student's identified area of interest: agriculture, horticulture, and/or landscaping. (J-4 pp. 10-11, 14) Dr. Valentini specifically directed the IEP team to include "both theoretical [classroom] and practical [work site] instruction" and concluded that Student had been entitled to appropriate vocational programming since June of 2013. (*Id.* at p. 14) This programming was to be developed and implemented immediately.

The IDEA requires that students who are transition-age must be provided with

¹⁹ The circumstances surrounding the distrust the Parents have for Student's former special education program supervisor are extremely unfortunate, and are apparently grounded in the disparate perceptions of the father and supervisor of a meeting in the fall of 2013. (N.T. 425-27, 434-45, 1362-65; J-16) While it might have occurred earlier than February 2014, the District's decision to replace that supervisor with another person for Student's programming was an appropriate response to this concern of the Parents.

appropriate measurable postsecondary goals, which are based upon age appropriate transition assessments related to training, education, employment, and independent living skills where appropriate, as well as the transition services and courses of study needed to assist the child in reaching those goals. 20 U.S.C. § 1414(d)(1)(A)(VIII). A transition plan is “a coordinated set of activities” that

(A) is designed to be within a results-oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child's movement from school to post-school activities, including post-secondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation;

(B) is based on the individual child's needs, taking into account the child's strengths, preferences, and interests; and

(C) includes instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation.

20 U.S.C. § 1401(34); *see also* 34 C.F.R. § 300.43. “The Third Circuit has not defined what amount of transition planning is required in an IEP to ensure FAPE. However, the Third Circuit affirmed one district court's conclusion that a bare transition plan in a child's IEP did not deny the student FAPE.” *K.C. ex rel. Her Parents v. Nazareth Area School District*, 806 F. Supp. 2d 806, 822 (E.D. Pa. 2011) (quoting *High v. Exeter Township School District*, 2010 U.S. Dist. LEXIS 7965, 2010 WL 363832, at *6 (E.D. Pa 2010)).

Unlike the IEP, a transition plan is not a strictly academic plan, but relates to several post-secondary skills, including independent living skills and employment. A district is not required to ensure a Student is successful in fulfilling all desired goals. The IDEA is meant to create opportunities for disabled children, not to guarantee a specific result.

Id. (other citations omitted).

The District clearly complied with the directive to convene an IEP meeting within 15 school days to discuss the transitional/vocational training, and it is indeed unfortunate that the Parents chose not to participate. While this hearing officer can certainly sympathize with the District's difficulty in making IEP team decisions without the Parents, and then be foreclosed by those same Parents from implementing what was discussed and decided upon, the inescapable fact remains that Student was provided with little exposure to vocational training since the January 2014 IEP meeting, thereby losing another half-year of programming out of what little precious time remains of Student's IDEA eligibility. This hearing officer also concludes that appropriate programming could have been accomplished through alternatives to the Educational Services Center, particularly when one considers this strong language in the December 13, 2013 decision:

Although Student's behavior in the school setting supports the District's concerns about appropriate functioning in other settings, *there is no evidence that Student's inappropriate behaviors have emerged in vocational settings.* ... The safety of Student and others must be the primary concern, but the default starting position of the IEP team must be that vocational training with the appropriate supports and services is a mandated and implemented part of Student's IEP. *The IEP team must be cautious about prejudging what Student's behavior will be in the work setting based on behavior in the school setting.*

(J-4 pp. 10-11) (emphasis added).

Here, the IEP team made a decision to provide the hands-on vocational training to Student in relative isolation, alone with a job coach and Student's PCA. While the chosen curriculum did appear to relate to agriculture/horticulture/landscaping, the program itself was vaguely described,²⁰ and the activities did not appear to resemble a work site or similar environment where Student could acquire skills and experiences to take into future employment.

²⁰ An internet search revealed that Veggie U is a nonprofit organization and, according to its website (<http://www.veggieu.org/>), "is dedicated to increasing children's awareness of healthy food options, and teaching them how real food reaches their plate." The program was designed for elementary school-aged children.

Moreover, Student had already demonstrated an aptitude for a variety of skills useful to the area of interest which could have been, and can easily be, built upon in order to continue to “create opportunities” for Student’s transition to adult life. *K.C., supra*. While the winter weather of the 2013-14 school year was certainly an important factor for the practical aspects of the vocational programming, the consideration given to how Student might be able to engage in work-site types of activities for the second half of that school year did not appear to be careful and thoughtful, but instead suggested an ambiguous approach to be largely determined at a later date. The IEP developed in March 2014 is also telling, as the only vocational activities in Student’s area of interest in that document were to water plants weekly (J-67), which is rather surprising since by then, spring was right around the corner.²¹ Taken as a whole, the record compels the conclusion that Student’s vocational programming needs were not thoroughly and adequately considered for immediate implementation.

This determination leads to the next issue, the Parents’ request for compensatory education. It is well settled that compensatory education is an appropriate remedy where a school district knows, or should know, that a child's educational program is not appropriate or that he or she 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 special education services, 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.” *B.C. v. Penn*

²¹ This hearing officer takes notice that at the time of the March 2014 IEP meeting, the Parents had already requested a due process hearing. However, at that time, the District had taken the position that Student’s operative placement was the IU Program. (N.T. 218)

Manor School District, 906 A.2d 642, 650-51 (Pa. Commw. 2006) (awarding compensatory education in a case involving a gifted student); *see also 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.”)) Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

The District argues that the Parents prevented the District from providing appropriate vocational programming. (District Closing at 14-16) However, the above discussion reflects the conclusion that the IEP team did not adequately consider, or program for, that need. Furthermore, “a child's entitlement to special education should not depend upon the vigilance of the parents[.]” *M.C., supra*, at 397.

The record reflects that Student would have received approximately three hours per week of practical, work-site based programming at the Educational Services Center following the January 2014 IEP revision, with an unknown amount of time spent on theoretical or classroom-based instruction. This hearing officer equitably estimates that the classroom-based portion of the chosen curriculum, including review and reinforcement, would have amounted to no more than approximately one half hour per day, which will be calculated at two hours per week. Although the above discussion reflects that this programming was not sufficiently appropriate for Student’s transitional/vocational needs, the time allotted to these activities appears to be an objective basis on which to calculate the award of compensatory education. Equitably, there shall not be compensatory education awarded for any school day that Student did not attend at least a portion of the day. Student shall, thus, be provided with one hour of compensatory

education for the denial of appropriate transitional/vocational programming for each day that school was in session and that Student attended at least a part of the school day during the 2013-14 school year. The summer of 2013 is excluded from this calculation because a previous hearing officer decision and order addressed the fully adjudicated issue of an appropriate Extended School Year (ESY) program in 2013.²²

The hours of compensatory education are subject to the following conditions and limitations. Student's Parents may decide how the hours of compensatory education are spent. The compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product or device that furthers Student's transitional/vocational goals and skills. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the District 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 Parents. The hours of compensatory education may be used at any time from the present until Student turns age twenty-four (24).

There are financial limits on the parents' 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 other professionals who did and would have provided transitional/vocational services to Student during the period of the denial of FAPE.

²² *C.P. v. Central Bucks School District*, ODR No. 13977-1213AS (Valentini, June 29, 2013). It should also be noted that the Parents' closing in this matter appears to seek compensatory education prior to June 2013, which was the beginning of the time period specified by the opening statement on the merits. (N.T. 381)

Placement for the 2014-15 School Year

The last issue is whether the District's proposed program and placement for Student at the IU Program is appropriate. The record as a whole provides more than ample support for concluding that the IU Program is appropriate to meet Student's educational, including transitional/vocational, needs. Specifically, Student would be provided full-time autistic support at the IU Program in a small, secure environment with one-on-one support. The classroom and program are sufficiently flexible to permit an appropriate work area for Student within the classroom, and two quiet rooms (similar to what Student has at Academy) are available when needed, with strategies for limiting the time Student spends in relative isolation in the quiet rooms. The building has a cafeteria, gymnasium, and areas outside for physical activities as well as agriculture/horticulture/landscaping, in addition to opportunities for work-based activities at a nearby nature center and other community-based learning. The IU Program has appropriate staff qualified to address Student's academic and behavioral needs who are trained in BCBA and crisis prevention.

If and when Student began at the IU Program, staff would review the existing behavior plan to determine how it needs to be revised and implemented. More intensive support is available at the IU Program than at Academy, which has been unsuccessful since at least the spring of 2013 in managing Student's behavior. Rather than have Student immediately begin the complete IU Program, staff would allow Student time to adjust by lowering demands, then slowly increasing demands until the full program is in place, at which time it would revisit Student's behavior plan. The IU Program school psychologist/BCBA would provide support to and train staff implementing the plan, and conduct observations to ensure it was implemented

appropriately. Staff would collect data on the behavior plan and revise as needed. (N.T. 865-68, 875-77, 879-82, 892-93, 1132-35, 1155-57, 1168-70)

The Parents have expressed several concerns with the IU Program. First, they are greatly concerned about the distance between Student's home and the IU Program location, requiring Student to spend more time on a school bus or van than at any time in the past. (N.T. 298-300, 472-73, 490-92; Parents' Closing at 13-14) However, there is no evidence in this record that Student cannot travel more than short distances, *e.g.*, in excess of 25 minutes at a time, beyond the Parents' concerns for the "potential for problems." (N.T. 473) The evidence is more than preponderant that the few instances of Student's demonstration of problematic behaviors during transportation were related to changes in routine, or to substitution of the individuals involved in the transportation, and not to the duration of a bus or van ride. Tellingly, this very argument was considered and rejected by Dr. Valentini in her December 2013 decision, wherein she stated that, "the Parents assert, but have produced no proof, that Student cannot safely travel on a school bus or van with an escort longer than a certain period of time." (J-4 p. 13) While the Parents' concerns may be understandable to some degree, the record in this matter similarly contains no such proof. Accordingly, the IU Program cannot be deemed inappropriate on this basis.

The Parents also suggested that the students who attend the IU Program are functioning at a lower level than is Student, and that there are students at that location who are involved in the juvenile justice system. (N.T. 473-74, 1186-87; Parents' Closing at 13) It must be noted that this belief on the abilities of the student population at the IU Program was based on Student's father's very limited experience there some five years ago. Furthermore, the spirit of the IDEA, and the concept of inclusive education, is to individualize instruction for each student based upon his or her unique needs, and not to make placement or other programming decisions solely on the

basis of ability or disability. The most significant factor to consider in evaluating the program is how the IU Program would meet *Student's* needs. Additionally, the evidence establishes that children who may be involved with juvenile justice are not in the same part of the building as *Student* would be at the IU Program. Notably, there is also evidence that there are students on the Academy premises who are in an alternative education program (N.T. 1216-17); this is not at all unusual for any educational facility, and there is no reason to believe that the IU Program would not take all appropriate steps to ensure the safety of all of its students.

Lastly, and most significantly, the Parents contend that Academy remains the appropriate program and placement for *Student*, and that it is less restrictive than the IU Program. (Parents' Closing at 8-14) The record, however, does not support these assertions. First, the evidence demonstrates that Academy and District representatives do not believe that Academy can appropriately program for *Student*, and particularly for *Student's* behaviors. (N.T. 694-95, 782, 784-84, 963-70, 972-74; J-50, J-56) Regardless of the perception that the Parents have of Academy's recommendations for *Student* (N.T. 564-69, 605-07), the evidence overwhelmingly supports this belief of Academy and District staff. And, again turning to the December 2013 decision and order, the basis for granting the District permission to explore alternative private school placements for *Student* was the evidence that Academy was not appropriate. (J-4 pp. 12-13) This position of Academy and District personnel has only been reinforced since the December 2013 decision and order, and it was made abundantly clear at this hearing that the Academy cannot simply make changes to its program and placement to make it appropriate for *Student*.

With respect to whether one program or the other is more or less restrictive, this is not a question of whether *Student* can be educated in the regular education classroom with

supplementary aids and services, or how much time Student will be included with typical peers, such that an *Oberti* analysis would be appropriate. The IDEA requires that Districts have available a continuum of services; and, both Academy and the IU Program are for full-time special education autistic support in an alternative school. This hearing officer cannot conclude that allowing Student to spend more than half of the school day isolated in a room with a PCA is less restrictive simply because of the physical proximity of Academy to Student's home school.

The Parents also expressed their sincere hope that Student could attend a vocational-technical school program. (N.T. 416, 449, 457, 470-72, 492, 565-68, 606-09) While a very understandable desire, the record does not support a conclusion that Student would be able to attend and be successful in such a program at the present time. Rather, in addition to providing the necessary practical and theoretical transitional/vocational programming, the focus must be on teaching Student how to develop skills to properly respond to circumstances that trigger Student's behaviors, and then generalize them to other environments. (N.T. 968-72, 981, 994, 707, 1298-99) It is entirely possible that, once Student acquires and uses those skills appropriately, Student will be able to attend a program such as a vocational-technical school; however, this hearing officer cannot conclude that Student is ready for that rather significant change in educational programming.

There is one aspect of the IU Program which requires direction to the IEP team, however: assisting Student with making the transition. There is no question based on this record that Student has significant difficulties with changes to routine, including personnel who work with Student. It is, therefore, rather surprising that the District did not appear to provide for a plan of carefully considered transition to the IU Program in February and March of this year. (*See, e.g.*, N.T. 994, 1273-74, 1333-34; J-44; J-45) While attending the IU Program for ESY services this

summer may have provided an appropriate opportunity for that transition this fall, the IEP team must now meet and develop a new plan to assist Student's gradual transition to the new program in a different location with entirely new personnel. The team must consider a limitation on the support staff who work as Student's instructional assistant(s), as well as how to otherwise help Student make a successful transition to this new program for Student's last year of IDEA eligibility.

The Parents must be invited to the IEP meeting to discuss and develop this plan of transition; however, if the Parents do not agree to participate after reasonable efforts to include them have been made, the District and IU Program staff may proceed with this IEP meeting without their participation, giving due consideration to any input they provide.

Section 504 Claims

The Parents' complaint also raised a claim under Section 504. Because the obligation of a local education agency to provide a "free appropriate public education" is substantively the same under Section 504 and under the IDEA, and further because all of the Parents' claims have been addressed pursuant to the IDEA, there need be no further discussion of their claims under Section 504.

CONCLUSION

Based on the foregoing findings of fact and for all of the above reasons, this hearing officer concludes that the behavioral assessment was appropriate, and that the IU Program is an appropriate placement. The transitional/vocational services were not appropriate, and Student is due compensatory education.

ORDER

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

1. The District's behavioral assessment of Student in February 2014 was appropriate for Student and did not deny Student FAPE.
2. The District's transitional/vocational services offered in January 2014 were not appropriate for Student and denied Student FAPE.
3. The District shall provide Student with one (1) hour of compensatory education, to address Student's transitional/vocational service needs, for every day Student attended school for at least part of the school day during the 2013-14 school year, subject to the conditions and limitations set forth above.
4. The District's proposed program and placement at the IU Program is appropriate.
5. On or before August 22, 2014, the District shall convene a meeting of Student's IEP team to develop a plan for Student's gradual transition to the IU Program, including a limitation on the support staff/instructional assistant(s) who work with Student. The District shall make reasonable efforts to schedule the meeting at a time and place convenient for the Parents. If the District is not able, after reasonable efforts, to obtain the participation of the Parents, this meeting may occur without the Parents' participation, giving due consideration to any input they otherwise provide.
6. Nothing in this Order precludes the parties from mutually agreeing to alter any of the directives regarding the IEP meeting and timelines, or the form of compensatory education, set forth in this decision and order.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are denied and dismissed.

Cathy A. Skidmore

Cathy A. Skidmore
HEARING OFFICER

Dated: August 6, 2014