

**STATE DEPARTMENT OF EDUCATION
STATE OF OKLAHOMA**

IN THE MATTER OF
[Student]
PROCESS HEARING

DPH No. 2042

DUE PROCESS HEARING DECISION

PETITIONERS:

REPRESENTATIVE:

RESPONDENT:

REPRESENTATIVE:

HEARING DATES: February 11-13, 2013
March 7, 2008

HEARING DECISION: April 30, 2013

HEARING OFFICER: ROBERT BOST Attorney
at Law

WITNESSES

(In order of testimony)

[Corresponding Names]

Director of Special Education
Principal 2
Custodian
Principal 3
Aide
Regular Education Teacher 2
Assistant Director of Special
Education (former)
Special Education Teacher 2
Regular Education Teacher 3
School Psychologist
Substitute Aide 1
Special Education Teacher 3
Substitute Aide 2
Substitute Teacher
Occupational Therapist
Physical Therapist
Speech Language Pathologist
Father
Special Education Teacher 1
Autism Specialist

EXHIBITS

District Exhibits:

RX 1 Attendance Records (2010-2011, 2011-2012, 2012-2013)
R 2 IEP (6/15/10)
R 3 IEP (10/7/10)
R 4 Written Notice to Parents and EXY IEP (10/7/10)
R 5 Notes as to parent contact re: attending ESY
R 6 Psycho-educational Report (October 2011)
R 7 IEP (10/6/11)
R 8 Parents Comments to MEEGS (11/5/11)
R 9 E-mails to/from Assistant Director of Special Education
RX 10 Assistant Director of Special Education's notes of meetings with parents and options presented (1/18/12)
RX 1 Written Notice to Parents (2/16/12)
RX 1 IEP, Notification of Meeting and Written Notice to Parents (3/2/12)
RX 1 Report of Achievement Testing (4/10/12)
RX 1 IES Review for Weeks 1-5 (4/26/12)
RX 1 ESY Documents, Notification of Meeting, Written Notice to Parents (4/26/12)
RX 1 Speech Therapy Notes and Report (2011-2012, 2012-2013)
RX 1 Physical Therapy and Occupational Notes (2011-2012, 2012-2013)
RX 1 Report (2/3/10, 10/3/10, 9/15/11, 10/27/11, 4/19/12) RX 19 Daily Calendar of Special Education Teacher 2 (2011/2012) RX 20 Parent Communication Log (2011/2012) RX 21 Daily Journal (11/9/11 to 1/19/12) RX 22 Notes of Regular Education Teacher 2

All District exhibits were admitted.

Parents Exhibits:

PX 5 Sensory Processing Definition PX
6 ESY Document (3/29/07) PX 7 IEP
Review (3/29/07) PX 8 ESY/IEP Review
(2/18/09)
PX 9 IEP Review (2/3/10) **(Not admitted** included within PX

PX 10 End of Year Sheet (2010)
PX 11 E-mail (5/26/10)
PX 12 Record of Parent Contact (2010)
PX 13 IEP Review (2/3/10)
PX 14 OT/PT Report (10/3/10)
PX 15 IEP Review/ESY (2/3/10 to 2/13/11)
PX 16 Annual IEP (2/3/10)
PX 17 ESY Skills Sheet (7/19/10)
PX 18 ESY/IEP (10/7/10) **(Not admitted,** included within

PX 19 Annual IEP (10/7/10)
PX 20 Closed IEP (10/6/11)
PX 21 E-mails RE: Placement of Student (2/14/11)
PX 22 Speech Progress Summary
PX 23 Speech Evaluation (10/24/11)
PX 24 E-mails/Assistant Director of Special Education
(11/10/11)
PX 25 Student's Schedule (11/20/11)
PX 26 E-mails/ Assistant Director of Special Education
(10/4/11)
PX 27 Comment Form (11/5/11)
PX 28 Background History (10/21/11)
PX 29 ESY Documentation (undated)
PX 30 Annual IEP (10/6/11)
PX 31 MEEGS (10/27/11)
PX 32 Psycho-Educational Report (2011)
PX 33 Sensory Profile Report (10/27/11)
PX 34 Speech Evaluation (10/24/11)
PX 35 Re-Evaluation Checklist (9/08/11)
PX 36 IEP (2/16/11) **(Not admitted,** included within PX
20)
PX 37 Review of Existing Data (8/25/11)
PX38 Progress Report (9/19/11)
PX39 Revised BIP (10/2/11)
PX40 Record of Access (9/1/05 TO 1/12/11)
PX41 34 Pages of Data Sheets (2012)
PX42 Achievement Test (4/10/12)
PX43 Daily Documentation (2012-2013)
PX44 Speech Progress Notes (2012)
PX45 Speech Progress Summary (4/11/12)
PX46 Speech Progress Report (1/6/12)
PX47 Project Peak Evaluation (11/2/12)
PX48 Speech Therapy Notes (2012)
PX49 School E-mails **(Not Admitted)**
PX50 Incident Details (2012)
PX51 E-mail from Special Education Teacher 3 (8/30/12)

included within PX 44)

PX53 E-mail RE: Needed Supplies (3/5/12)
 PX54 Record of Access (10/25/12)
 PX55 Schools ESY Policy
 PX56 ESY Document (4/26/12)
 PX57 ESY Progress Notes (4/26/12)
 PX58 Written Notice to Parents (2/16/12)
 PX59 IEP (3/2/12)
PX60 Review from IES IES (4/20/12) **(Not admitted,**
 included within PX 56 or PX 62)
 PX61 Written Notice (4/21/12)
 PX62 Photographs of Student Working (4/26/12)
 PX63 Bus Incident Report (4/4/12)
 PX64 Daily Documentation Sheets (10/25/12)
 PX65 Power School Incident Reports (9/12/12)
PX66 IEP (2/16/12) **(Not admitted,** draft of IEP)

 PX68 Incident Report (8/22/12)
PX69 Due Process/Requested Information **(Not admitted)**

At the Pre-hearing Conference it was determined that PX 29 and PX 63 were unsigned/unauthenticated documents. They, however, were included as admitted in the Pre-hearing Order. (Neither was referred to at the hearing.) Other than as noted, the Parents exhibits were admitted.

Hearing Officer Exhibits:

HX 1 Special Education Training Record
 HX 2 Recommendations from Special Education Teacher 1
 to Assistant Director of Special Education HX
 3 Scatterplot Data Sheet
 HX 4 Timeline and Summary of School Personnel HX 5
 Photos of Student with Special Education Teacher
 2 and Custodian HX 6 Photo Book provided by
 Special Education Teacher

and Photo
 from Special Education Teacher 1

**LIST OF SCHOOLS
and
ABBREVIATIONS**

School 1
School 2
School 3

Individuals with Disabilities Education Act
Free Appropriate Public Education
Extended School Year
Least Restrictive Environment
Occupational Therapy/Therapist
Physical Therapy/Therapist

IDEA
FAPE
ESY
LRE
OT
PT

DPH 2042

BACKGROUND

The Student is a 10-year-old male. He is autistic. He is currently in the third grade, though he attends school at a fourth and fifth grade school. In the last three years, the Student has been in three separate schools.

PRELIMINARY MATTERS

On October 5, 2012, the Parents filed a Due Process Complaint Notice. The notice sets out numerous allegations. The allegations cover a variety of matters. Some are clearly IDEA matters. Some are not. Only the IDEA issues are discussed herein.

A pre-hearing conference was held on January 28, 2013. The issues presented by the complaint were discussed as well as the proposed exhibits of both the Parents and the District.

The District objected to several of the Parents exhibits. The majority of the objections had to do with the fact that the exhibits were incomplete and/or included in other exhibits. This was resolved by going through the exhibits and eliminating what were essentially duplicates. Two exhibits were objected to as unsigned/unauthenticated. These two exhibits were (through oversight perhaps) included on the admitted list. They, however, were not referred to during the hearing. Finally, two exhibits were objected to as irrelevant because they related to resolution matters, which occurred after the filing of the complaint. I agreed. Except as noted, the exhibits of both the Parents and the District were admitted. See Pre-hearing Order, Attachment A.

The hearing was held on February 11-13, 2013, and on March 7, 2013.

At the conclusion of the hearing the District moved that certain allegations included in the complaint be dismissed. I asked the District to put its motion in writing and submit it to me by March 14, 2013. The Parents were given (with an extension) until

open the question of the significance of cancelling the 2012 ESY Decision on District's motion to Dismiss, Attachment B.

ISSUES

At the pre-hearing conference on January 28, 2013, it was determined that the issues were:

1. Was the Student's IEP followed?
2. Did the Student have or need a behavior plan?
3. Was the Student's placement appropriate?
4. Were ESY services required/provided?
5. Were parental rights violated?
6. Is compensatory education an appropriate remedy for violations of one or more of the above issues and, if so, how much?

FINDINGS OF FACT

1. The Student is eligible for special education and related services. PX 31.
2. The Student is categorized as autistic. PX 31.
3. The Student at time kicks, bites, pinches, and pokes at other students and staff. TR 871-872.
4. The Student's behaviors impede his ability to learn. TR 870.
5. The Student's IEP for the 2010-2011 school year was signed on October 7, 2010. It provided for 3.25 hours in the special education setting and 3.75 hours in the regular education setting with the proviso that "classroom participation time will be adjusted to fit (the Student's) needs..." The IEP also provided for OT, PT and Speech. RX 3, PX 20.
6. The Student's IEP for the 2010-2011 school year states: "Behaviors are addressed under the speech and language goals." RX 3, PX 20.
7. The Student's 2011 ESY IEP provides "2.0 hours six weeks during June and July". It is unclear what this meant. RX 4.
8. The Student attended part of the first day of 2011 ESY. TR 1006-1011.
9. The Student's IEP for the 2011-2012 school year was signed

special education setting and 2.0 hours daily in the regular education setting with the proviso that "classroom participation time will be adjusted to fit (the Student's)

RX 7, PX 30.

10. The Student's IEP for the 2011-2012 school year states: "OT/PT will provide direct/consultation services to address sensory/behavior issues...". RX 7, PX 30.
11. The Student's Behavior Intervention Plan was signed on October 6, 2011 and is marked "revised". PX 39, RX 7.
12. On March 2, 2012, a new IEP was signed. It provides for 5.0 hours daily in the special education setting and 2.0 hours daily in the regular education setting. It does not include the proviso included in the previous two IEPs but does add behavior management to the services to be provided by the special education teacher and states: "Behaviors are addressed under the speech and language goals through OT/PT. The IEP also provided for OT, PT, and Speech. RX 12, PX 59.
13. The Student's 2012 ESY provides "6 hours/4 times per week". RX 15.
14. The academic portion of the Student's 2012 ESY was cancelled.
15. The Parents met with the District on or about June 9, 2012 and discussed the Student's placement for the following year. TR 730.
16. The Student did attend classes in the regular education setting when he was present and his behavior allowed. TR 481-484, 486-487, 495-498.
17. The Student's IEPs do not require a specific curriculum. RX 3, 7, 12; PX 20, 30, 59. TR 500-501.
18. During the 2011-2012 school year, the Student missed approximately 55 full days and 3 partial days. He was also late 18 times. This includes the time he was out of school but not reflected on his attendance record. RX 1.
19. During the 2012-2013 school year, the Student missed 28 full days and 7 partial days. He was also late 18 times. RX 1.
20. The Student's absences have been detrimental to his progress. TR 45, 180, 382.
21. The Student's test score do not show regression. They, however, show only modest improvement. RX 13.
22. Other findings will be included below as necessary.

**CONCLUSIONS OF LAW
and
RATIONALE**

The burden of proof, in an action brought under the IDEA, rests with the party seeking relief or the party who files for due

(2005). In this case, the burden of proof rests on the Parents.

Appropriateness of IEP

While not an issue, I did review the various IEPs involved in this case. An IEP must contain "a statement of measurable annual goals, including academic and functional goals designed to ... enable the child to be involved in and make progress in the general education curriculum; and meet the child's other educational needs which result in the child's disability". 20 USC § 1414(d) (1) (A) (i) (I) and (II). In addition, the IEP must contain a statement of special education and related services which will be provided to the student and when the services are to be provided. *Id.* at (IV).

The Student's IEPs appear to meet these requirements. RX 3, 7, 12 and PX 30, 20, 59. While the Parents are concerned with the Student's progress, the concern relates to the implementation of the IEPs and not to the appropriateness of the IEPs. The Parents were quite clear in the remedy section of their Amended Due Process Complaint Notice that what they wanted was the Student's IEP followed. See Attachment C. Finally, the Student is receiving special education and related services according to the testimony of his various teachers, the Occupational Therapist, the Physical Therapist and the Speech/Language Pathologist. There may be a question as to the degree of services but not as to the services to be provided.

Implementation of IEP

School districts determine the appropriate methodology to be used to implement a student's IEP. Parents, "no matter how well motivated—do not have a right under IDEA to compel the school district to provide a specific program or employ a specific methodology for the education of their disabled child." *Logue By and Through Logue v. Shawnee Mission Pub. Sch. Unified Sch. Dist.* No. 512,959 F. Supp. 1338, 1351 (D. Kan. 1997), *aff'd*, *of Educ.*, 136 F.3d 495, 506 (6th Cir. 1998)

In addition, where a district makes a good-faith effort to assist a student to achieve the student's goals, the student's "failure to achieve his goals does not equate to a failure by the (District] to implement the IEP." *J.K. v.*

Fayette County Bd. of Educ., 45 1DELR 35,5,2006 WL 224053 *6
(E.D. Ky. Jan. 30,2006).

There was evidence about what was and was not used to provide educational services to the Student; but there was very little showing that he was not receiving exactly what was called for in his IEPs. At various times the Parents either suggested or agreed that more emphasis should be placed on behavior than education. RX 7, PX 30. TR 855.

There is absolutely no evidence that the Student was not getting the related services (OT, PT, Speech) called for in his IEP. This was dealt with in my Decision on the District's Motion to Dismiss and does not need to be discussed here. See Attachment C.

Almost everyone agreed that structure and routine was what the Student needed. The Autism Expert testified that it was predictability more than a particular routine that was important. TR 940. However, the Student was often absent or came to school late thus breaking his school routine. RX 1. The father testified that the Student often had trouble sleeping and that he thought it would be better to bring him in rested than on time. TR 742. While this may be true, it certainly had an impact on the Student's routine and the ability of the District to develop a structured program.

Three IEPs are involved in the time period covered by this case. They show (2010-2011) that the Student was to receive 3.25 hours daily of instruction from the special education teacher and 3.75 hours daily in the regular education setting. See RX 3, PX 20. This was changed to 5 hours of instruction from the special education teacher for 2011-2012 with a comment that this might have to be adjusted based on behavior. He was also to receive 2 hours in the regular education setting. See RX 7, PX 30. The 5 hours of instruction from the special education teacher and 2 hours in the regular education setting was carried over into 2012-2013. RX 12 and PX 59.

The Student did participate with his peer as provided for in the IEPs. His length of participation was sometime cut short by his behavior. There was testimony from the Assistant Director of Special Services (former) that she did not believe the Student was receiving 3.75 hours in the regular education setting. She, however, could not articulate any specifics. In addition, the Student's IEP for the 2011-2012 school year specifically states

in regular education will be adjusted to fit his needs. If the Student arrived late to school or was unable to function in the regular education classroom, then he may not have spent the specified amount of time in the regular education classroom. This does not equate to a failure to follow the IEP.

As indicated above, the Parents for a variety of reasons kept the Student out of school or brought him late. The Student's attendance records during the 2011-2012 school year show that he was absent 28 full days and 3 partial days. (In fact, another 20 school days probably need to be added to his absences here, which are not reflected on his attendance records.) In addition, he was tardy 18 times. RX 1. During the 2012-2013 school year, the Student was absent from school 28 full days and 7 partial days. In addition, he was tardy 18 times. RX 1. This cannot help but have had a negative impact on the Student's education, both academically and behaviorally, as was testified to by numerous witnesses. TR. 45; 180; 382; 609-610; 648; 867. It cannot be held against the District.

I see nothing in the Student's IEPs that was not being followed or at least there was no evidence showing that the IEPs were not being followed. From the testimony of all of his teachers, I believe they all tried and did their best. They probably did not live up to Special Education Teacher 1, but even she had difficulties with him in Spring 2012. In addition, there is no evidence and I got no feeling that the District didn't care. The evidence indicates to me that it was trying to figure out how to deal with the Student.

The Parents did not submit any evidence showing that Student's IEPs were not being followed. The most they established was that not all of his teachers used colored folders. None of the Student's IEPs designate a particular curriculum that must be used with Student.

The Student's IEPs provided that his time in regular education classes would be adjusted to fit his needs. The Student was not always present for a full day such that District was not able to provide all of the time specified for regular education. Additionally, the Student's behavior was such that he sometime was not able to stay in the regular education class. Accordingly,

The standardized testing results show that the Student made some progress over the course of the 2+ years covered by this case. More regular attendance would probably have improved his progress. RX 13.

Accordingly, the Parents failed to establish by a preponderance of credible evidence that Student's IEPs were not followed.

Behavior Plan

An IEP team is required to consider the use of positive behavioral interventions and supports, along with other strategies, designed to address a student's behavior, which impedes his own learning or the learning of others. 34 CFR 300.324(a)(2)(i). This clearly fits this case.

Behavior was a constant problem as testified to by all his special education teachers. He also demonstrated some of the same behaviors at home. See Father's testimony, TR 754. He even had problems with Special Education Teacher 1, who was continually held out as the person who was best able to deal with the Student. TR 897.

The Student had a behavior plan, which covers the relevant periods of this case. PX 39. In addition, behavior intervention is addressed to some extent in all of the Student's IEPs. RX 3, 7, 12 and PX 30, 20, 59. As a result, there is no doubt that the Student's IEP team considered the use of positive behavioral interventions and supports, along with other strategies, designed to address the Student's behavior.

The only testimony concerning behavior intervention plans was that of the Autism Specialist. TR 948. In her opinion, the Student's behavior plans were negative. TR 949. According to her they need to be positive in nature. TR 949. She, however, did not elaborate on how you control undesirable behaviors in a positive manner.

I have reviewed the relevant portion of all of the Student's IEPs along with his behavior plan. I fail to see the negativism the Autism Specialist was referring to in her testimony.

The Parents were part of the IEP team that prepared the behavior plan and, by their signature on the respective IEPs, agreed with

section of the IEPs that there was any disagreement with the plans or the procedures used. The IEP for 2011-2012 does include the comment that the Mother "wants the behaviors (pinching, etc.) to stop." Clearly one or both of the Parents were aware of the efforts being used by the District to deal with the Student's behavior.

Except for the Autism Specialists, there was no testimony showing that the District's methods of dealing with the Student's behavior were inappropriate. (One instance of a 45 minute time out will be dealt with later.) Accordingly, the Parents failed to establish by a preponderance of credible evidence that Student did not have a BIP.

Least Restrictive Environment (Placement)

The law requires that an education be provided to a disabled child in the least restrictive environment with the child participating to the maximum extent possible in the same activities as non-disabled children. 20 USC § 1412 (a) (5) (A). The least restrictive environment mandate requires that schools ensure that children with disabilities are, to the maximum extent appropriate, educated with children who are non-disabled and that special classes, separate schooling, or other removals from the regular educational environment only occur if the nature of the disability is such that education in regular classes with the use of supplementary aids cannot be achieved satisfactorily. 34 CFR § 300.114(a).

The Tenth Circuit in *LB v. NEBO School District*, 379 F.3d 966,976 (10th Cir. 2004) adopted a test to determine the least restrictive environment for a student which requires the court: (1) to determine whether education in a regular classroom with the use of supplemental aids and services, can be achieved satisfactorily; and (2) if not, to determine if the school district has mainstreamed the child to the maximum extent appropriate. *Id.*, relying on *Daniel R.R. v. Ed. of Educ.*

determining whether the first prong of the *Daniel R.R.* test has been met, the courts consider the following: (1) the steps the school district has taken to accommodate the child in the regular classroom, including the consideration of a continuum of placement and support services; (2) a comparison of the academic benefits the child will receive in the regular classroom with those the child would receive in the special

the child *s overall educational experience in regular education, including non-academic benefits; and (4) the effect on the regular classroom of the disabled child's presence in that classroom. *Id.*

In determining the educational placement of a student with a disability, the placement decision is to be made by the Student's IEP team. 34 CFR § 300.116(a)(1). When determining LRE, the IEP team must give consideration to any potential harmful effect on the student or on the quality of services that the student needs. 34 CFR § 300.116(d).

Under his current IEP, the Student spends 5 hours daily in a special education setting and 2 hours daily in a regular education setting. RX 12 and PX 59. The Student has a one-to-one aide (since November 2012, 2 aides have been available to assist him), who is with him at all times in both the regular education classroom and the special education classroom. The Parents agreed to this IEP. In addition, the testimony of Special Education Teacher 3, as well as Regular Education Teacher 3 supports this decision.

A review of the two previous IEPs and the testimony of both his special education teachers and his regular education teachers also supports the decision made by the IEP team in both IEPs. While this is an after the fact determination, it certainly give credence to the IEP team's decision to place the Student for part of the day in the special education classroom and part of the day in the regular education classroom. RX 3, 7, 12 and

It was never really clear what the Parents concerns were about his placement. The most that can be drawn from their testimony is that they didn't believe anyone was teaching their son like Special Education Teacher 1 did and that they would prefer more involvement with regular students.

His Mother did testify that she would like her son to attend his "home school because when he was at School 1 he got invitations to birthday parties, and those are the kids in the neighborhood." TR 982.

The District has clearly attempted to accommodate the Student in the regular education classroom. The Student's schedule has always included some portion of his day in the regular education classroom. Despite the supports, which were in place, the

class and needed the small setting

and individualized instruction of a special education classroom.

The Student's IEP's provided that his time in regular education would be flexible depending on his needs and abilities. The Student's placement in part-time regular education and part-time special education was an appropriate placement, which provided Student with his education in the least restrictive environment possible.

There is simply no evidence, other than the desire of the Parents that the Student be with his peers more, that the Student's placement is not appropriate. Accordingly, the Parents failed to establish by a preponderance of credible evidence that Student's placement was not appropriate.

ESY

The Fourth Circuit Court of Appeals discussed the issue of ESY services in *MM v. School District of Greenville County*, 303 F.3d 523 (4th Cir. 2002). The court held that ESY services are required

meaningful progress. Because all students whether disabled or not may experience some regression during lengthy breaks from school, the mere fact of likely regression is not a sufficient basis to establish eligibility for ESY services and/or a denial of FAPE. *MM* at 537-538; *see also, JH v. Henrico County School Board*, 326 F.3d 560, 566 (4th Cir. 2003).

Two ESY periods are covered by this case. The first is the 2011 ESY. RX 4. The second is the 2012 ESY. RX 15. The facts relating to each are totally different. The one thing that is the same is that the Student's IEP team in both instances determined that ESY was necessary.

During the Summer of 2011, the District made ESY services available for Student. The Student did not attend because when his mother took him the first day it was disorganized. TR 1006-1010. There was no evidence showing that the Parents did any follow-up with the District on this. They just kept him at home. While the child did not receive what he was supposed to receive under the 2011 ESY, it was the Parents' fault. Yes things should have been ready to go on the first day. I, however, suspect that the first day of school is often in some form of disarray, while the students, as well as the teachers, get services even

if Parents did not take advantage of the services. The Student did receive the related services called for in the 2011 ESY IEP.

Clearly the Student did not receive the educational hours provided for in his 2012 ESY IEP. The teacher, who was going to provide the services, left the District. The District was unable to find a replacement at the last minute. This was unfortunate and presents a problem.

According to the Director of Special Services the 6 hours set out in the IEP was to provide regression prevention as well as education to help the Student catch up. This may be true but doesn't excuse the fact that no academic services were provided.

The 2012 ESY, according to Special Education Teacher 1, was designed to get the Student back to where she thought he should be and not just to maintain skills. TR 898. The thing about this is that, if you follow the logic, all the Student needed to be caught up for the beginning of the 2012-2013 school years was 144 hours.

Except for ESY 2012, the Parents failed to establish by a preponderance of credible evidence that ESY services were not provided.

Parental Rights

The issue on parental was dealt with in the District's Motion to Dismiss. I did leave open the question of the significance of cancelling the academic portion of the 2012 ESY without the Parents' input on the parental rights issue. See Decision on District's motion to Dismiss, Attachment B.

With the exception of the decision not to provide academic instruction to the Student during the 2012 ESY, the parents participated in the development of all of the Student's IEPs. Although not part of the decision to cancel the 2012 ESY, the Parents were almost immediately involved by the District in deciding proper placement for the following school year. See TR 728. While the failure to involve the Parents in the decision to cancel the academic portion of the 2012 ESY is inexcusable, under the facts of this case, it is nothing more than a procedural violation.

The law states that a procedural violation must

participate in the decision-making process «..» See 34 CFR 300.513(2). Again the testimony is clear that the Parents knew of and attended all meetings relating to the Student's education, with the exception of the decision to cancel the academic portion of the 2012 ESY. The question therefore is the significance of cancelling the academic portion of 2012 ESY without the Parents' input. This one event did not, in my opinion, "(s)ignificantly impede the parent's opportunity to participate in the decision-making process.-." Even if they had been involved, it would have made no difference; the academic portion would still have been cancelled as the District had no teacher to provide the service and it was too late to realistically find a replacement.

The Parents were, almost immediately, involved by the District in deciding placement for the following year. TR 730. The Student was provided the related services called for in the ESY IEP. Accordingly, the Parents failed to establish by a preponderance of credible evidence that Parental Rights were violated.

FAPE

Under the IDEA, FAPE is defined as "special education and related services that ..." are "provided at public expense ...; meet the standards of the state educational agency; ... include an appropriate preschool, elementary, or secondary school education .,;" and "are provided in conformity with an individualized education program ...". 20 USC § 1401(9). FAPE consists of "educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction." *Board of Educ. of Hendrick Hudson Central School Dist. v. Rowley (Rowley)*, 458 U.S. 76, 102 S.Ct. 3034, 3042, 73 L.Ed.2d 690 (1982).

Reviewing the Student's IEPs shows that a lot of time went into their preparation. The Parents were definitely involved. There is nothing to indicate that they were not designed to meet the unique needs of the Student. To the contrary, the needs of the Student are addressed throughout.

"[Any] deficiency in the IEP process must result in prejudice to the student or his parents before a court may find that the

District No. 512, 153 F. 3d 727, 1998 WL 406787 (unpublished) (10th Cir. 1998) (citing *O'Toole v. Olathe District Schools Unified School District No. 233*, 144 F.3d 692 (10th. Cir. 1998)). Technical deviations are insufficient. Thus, if a student is receiving personalized instruction with sufficient supportive services to allow the student to benefit from the instruction, then a student is receiving FAPE. *Rowley* at 3042 and 3049.

In this case, the District did fail to provide the educational opportunity set out in the Student's 2012 ESY IEP. This could not help but have had a negative impact on the Student. Accordingly, he was denied FAPE for this period. Other than in this instance, the Parents failed to establish by a preponderance of credible evidence that the Student was not receiving FAPE.

Other Concerns

There were numerous concerns presented by the Parents that don't really fall within any of the issues but which do merit mention.

The Parents spent considerable time eliciting testimony about whether certain employees had particular training such as MANDT or CPR. They also questioned whether certain teachers utilized the same curriculum as Special Education Teacher 1. However, the Parents presented no evidence that any of Student's IEPs required particular training for employees or required the District to utilize a particular curriculum. The determination as to what curriculum to use is solely the District's determination.

The Parents testified that they were concerned for their son's safety. They referred to an incident where the Student ate toilet paper and an incident where he drank from the urinal. Both incidents are regrettable. It was not clear when these events actually occurred though they were used to justify keeping the Student out of school for several months during the 2011-2012 school year.

The Parents were also concerned about some pictures that Special Education Teacher 2 sent to them. They show the Custodian and Special Education Teacher 2 holding the Student wrapped in a blanket. HO 5. The Father thought the child looked frightened; the Mother thought the child should be learning. I believe the Special Education Teacher 2, who testified she sent the picture

show that the Student was having a good day- TR 336.

Finally, the Parents were concerned about a 45 minute time out. There is no question that it shouldn't have occurred. Its significance, however, is minimal.

Compensatory Education

Compensatory education is not a remedy expressly identified in the IDEA, nevertheless, courts and hearing officers are empowered to "grant such relief as (they) determine is appropriate." 20 U.S.C. §1415(i)(2)(C)(iii); 34 CFR § 300.516(c)(3). See also, *Burlington Sch. Comm. v. Massachusetts Dept. of Educ.*, 471 U.S. 359, 369, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985). As such, it is an equitable remedy that is available to help compensate a student that has been denied FAPE. *Garcia v. Board of Educ. of Albuquerque Public Schools*, 520 F.3d 1116, 1129-1130 (10th Cir. 2008).

The amount of compensatory education to be provided is determined on a case-by-case basis. *Reid*, 401 F.3d 516 (D.C.

a contractual one. *Id.*

In determining the amount of compensatory education, some courts have used a day for day approach. *Manchester Sch. Dist. v. Christopher B.*, 19 IDELR 389 (D.N.H. 1992); and *Marple Newton Area Sch. Dist.*, 33 IDELR 115 (SEA PA 2000). But see *Friendship Edison Pub. Charter Sch. Collegiate Campus v. Nesbitt*, 49 IDELR 159 (D.D.C. 2008). Other courts have held that a student with disabilities is entitled to only so much compensatory education as is required to provide him with an appropriate education. *Parents of Student W. v. Puyallup Sch. Dist.*, 21 IDELR 723 (9th Cir. 1994).

A hearing office must also consider compensatory education in terms of the equities involved. *Parents of Student W v. Puyallup Sch. Dist.*, 31 F.3d 1489, 1497 (9th Cir. 1994).

All things considered, except as relates to ESY for 2012, the Parents are not entitled to compensatory education in this case because they have failed to establish that Student was denied

respects. In addition, the Student had an opportunity to attend ESY in the summer of 2011 and choose not to attend.

Even being overly generous, the Student couldn't have missed more than 144 hours of academics for the Summer ESY of 2012. The testimony was that this was both to prevent regression and to try to catch the Student up.

The Parents didn't quantify anything. The only real testimony as to quantity came from Special Education Teacher 1, who testified that 6 hours per day for 4 days a week over the 6 week 2012 ESY session would catch the Student up to where she thought he ought to be. TR 898. The Autism Specialist talked about intensive training but applied it only to skills lost. TR 947-962. The bottom line is the Parents failed to establish by a preponderance of credible evidence that Student is entitled to compensatory education services, except as noted.

The Parents might want to consider a private placement, probably at their expense, or apply for a Lindsey Nicole Henry Scholarship.

DECISION

The Hearing Officer finds that:

1. The Student's IEP is an individual education program designed to meet the needs of the Student. (This is true as to all of them.)
2. The Student's IEP is being followed to the extent it is within the control of the District. (This is true as to all of them.)
3. The Student has a behavior plan.
4. The Student is in the least restrictive environment considering his abilities.
5. Parental Rights were not violated.
6. The Student has been denied FAPE because of the District's failure to provide academic services for the 2012 ESY.
7. The Student is entitled to 144 hours of compensatory

CONCLUDING STATEMENT

Unless appealed, this decision is binding upon both parties. Either party may appeal this decision by filing a written request with the Special Education Section, State Department of Education, 2500 North Lincoln Boulevard, Oklahoma City, Oklahoma, 73105, within 30 days of the receipt of this decision.

ROBERT K. BOST
Hearing Officer