

PENNSYLVANIA
SPECIAL EDUCATION HEARING OFFICER

Student: [REDACTED]
Date of Birth: [REDACTED]
Hearing Dates: September 8, 2010; September 22, 2010; October 12, 2010;
November 3, 2010; November 4, 2010 &
February 14, 2011.
ODR File Nos.: 01083/09-10 AS
01367-1011AS
(Consolidated Decision)

OPEN HEARING

School District: Lower Merion School District

Parties:

Representatives:

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Date Record Closed: February 20, 2011
Date Closings Submitted: March 15, 2011
Decision Date: March 25, 2011
Hearing Officer: Gloria M. Satriale, Esquire

INTRODUCTION AND PROCEDURAL HISTORY

This case concerns the provision of a Free Appropriate Public Education (hereinafter "FAPE") for ██████████ (hereinafter referred to as "Student"), a 17 year old Student, who resides with his mother, ██████████ (hereinafter referred to as the "Parent") in the Lower Merion School District (hereinafter referred to as "District") and who has been identified as an eligible Student with specific learning disabilities.

The Parent filed a due process complaint notice on May 13, 2010 (the "Complaint"). The District challenged the sufficiency of the Complaint in a May 28, 2010 filing. On June 8, 2010, the Complaint was determined to be insufficient and the Parent was directed to file an amended complaint by June 19, 2010. The Parent was given an extension of time to file the amended complaint to June 26, 2010. The Parent filed her amended due process complaint (the "Amended Complaint") on June 26, 2010. The District filed a second due process Complaint on July 16, 2010 seeking to defend the District's Reevaluation Report of October 27, 2008 and to oppose the Parent's request for an Independent Education Evaluation to be performed at Public expense. A sufficiency challenge to the District's complaint was filed on July 28, 2010, which was denied. These two Complaints were consolidated, by consent, and the issues contained in each were heard during the course of these sessions and are decided in this Opinion.

Following oral argument and for the reasons stated on the Record, the Parent's Race Discrimination claim was dismissed and pursuant to the Motion to Limit Claims filed by the District, the Parents claims were limited to those arising on or after June 26, 2008.

Following the initial session, the parties conducted a second resolution meeting on October 19, 2010; the Family and the District were unable to come to an agreement.

A Due Process hearing ensued over six (6) sessions on September 8, 2010, September 22, 2010, October 12, 2010, November 3, 2010, November 4, 2010 and February 14, 2010.

Exhibits were submitted and accepted on behalf of the Parent as follows:

P-15, P-42, P-63, P-67, P-73, P-81, P-87, P-97, P-100, P-101, P-104, P-105, P-107, P-111, P-112, P-112A, P-113, P-114. P-15, P-42, P-63, P-67, P-73, P-81, P-87, P-97, P-100, P-101, P-104, P-105, P-107, P-111, P-112, P-112A, P-113, P-114.

Exhibits were submitted and accepted on behalf of the District as follows:

S-7, S-8, S-12, S-15, S-47, S-49, S-52, S-72, S-73, S-74, S-75, S-80, S-81, S-84, S-90, S-96, S-97, S-104, S-105, S-106, S-107, S-110, S-114, S-115, S-116, S-117, S-120, S-121, S-122, S-124, S-125, S-128, S-129, S-130, S-131, S-135, S-137, S-140, S-141, S-142, S-145, S-146, S-147, S-151, S-153, S-154, S-156.

The Parents contend that the District failed to properly identify the Students disabilities and needs and asserted the right to an Independent Educational Evaluation (IEE), which was denied by the District. The parents further asserted that, since the District failed to properly identify the Student, he was deprived of a FAPE, thereby entitling him to compensatory education. Additional violations of the provision of a FAPE were asserted for failure to provide proper supports and Extended School Year Services (ESY) as well as asserting violations of Section 504 and of the Student's right to be educated in the Least Restrictive Environment (LRE) appropriate.

The District wholly denies these allegations and asserts provision of a FAPE in the least restrictive environment possible and that the Student's failure to thrive, if any, is as a result of the Student's lack of effort and Student's failure to fully avail himself of District supports, attend class, attend to instruction and complete class and homework.

Although this case involves a complex fact pattern involving multiple assessments and interpretations of a variety of instruments and disputes within the record regarding disclosure by and to the Parent; and recognition by the District of symptomology of this Students performance, the core question is basic: has a causal connection been established between the obvious avoidance behaviors of this student and learning difficulties which were ignored or ineffectively addressed by the District. The answer is undeniably no. The District responded appropriately and often to the typography of this student's learning style and behavior issues. Accordingly, this student has not been denied a FAPE. The profile that the District failed to recognize is that the specific learning and behavior challenges of this student required continued structured maintenance in order to preserve the gains achieved during the school year and should have been afforded ESY services.

For the reasons that follow, Parents' claim for an Independent Educational Evaluation at Public Expense is GRANTED. The request for Compensatory Education is for the period of the 2008/2009 and 2009/2010 school years is DENIED. Compensatory

Education in the form more specifically enumerated in the attached Order for ESY for 2008, 2009 and 2010 is GRANTED.

ISSUES

The issues presented at the hearing were as follows:

1. Did the District fail to provide Student with FAPE in the District's provision of special education and related services in reading, writing, math, assistive technology and transition services in a manner that was reasonably calculated to provide him meaningful progress for the period from June 26, 2008 through June 28, 2010 including the applicable periods of potential ESY services?
2. If the District did not provide FAPE (including ESY services) to GJ from June 26, 2008 through June 28, 2010, what compensatory education should be awarded?
3. Did the District provide FAPE in the Least Restrictive Environment (LRE) appropriate?
4. Is the Parent entitled to reimbursement for an independent educational evaluation (an "IEE") obtained by the Parent?¹

FINDINGS OF FACT

1. The Student is an eligible Student identified with specific learning disabilities born on July 20, 1993 and lives with his mother who resides within the District. (NT 26-30; 327).
2. The District is a recipient of Federal Funds. (NT 26)
3. During the 2008/2009 school years, the Student was in 10th grade.
4. During the 2009/2010 school years, the Student was in the 11th grade. (NT 1447-14-48)

¹ Although violations of Section 504 were alleged in the complaint and addressed by the Parties as an issue for determination, Section 504 violations need not be addressed since a determination of FAPE has been made. *West Chester Area Sch. Dist. v. Bruce*, 194 F. Supp. 2d 417, 422 n.5 (E.D. Pa. 2002).

5. The current school year, 2010/2011 is not in issue.
6. The Parent has consistently been involved in the IEP process and, in fact, has often been represented during these meetings by an advocate. (NT 3; SD 73).
7. Although the Parent requested ESY services, the District determined the Student ineligible for ESY services.
8. Documentary and testamentary evidence presented by both the Parent and the District demonstrated inconsistent performance of the Student as well as demonstrable regressions when supports were reduced or removed throughout the 2008/2009 and 2009/2010 school years.
9. Documentary and testamentary evidence presented by both the Parent and the District supported that the Student, with the exception of a few classes, did not like school, had numerous unexcused absences from school and class, frequently fell asleep during classroom instruction; often arrived late to class and failed to complete class work or homework. (NT 946-976; 1126-1130; S-10)
10. During the Student's 10th grade school year, notwithstanding the existence and implementation of a Behavior Management Plan (herein after referred to as "BMP") targeting the Student's inconsistent attendance and attending challenges, the Student failed to decrease these behaviors. (S 73; 75 NT 725-726; 1148-1150; 1168-1170).
11. The Independent Evaluator is qualified as independent evaluator and certified school psychologist pursuant to her CV. (P-111, N.T. at 533).
12. The School psychologist is a qualified professional to administer the instruments utilized during the District's Reevaluation. (SD-135)
13. One purpose of the reevaluation was to gain information on possible contributing factors to Student's inconsistent performance in school and his tardiness to class, falling asleep in class, lack of test preparation, and incomplete homework; therefore, the proposed reevaluation included social-emotional assessments. (N.T. at 364-365).
14. One of the instruments utilized during the District's Reevaluation was the BASC-2 that is comprised of a Student, parent and teacher interview forms which are then

“rated” to determine, collectively, “scales” indicating the Students social and emotional functioning. (NT 353-354,356-358; 372-375).

15. The Parent portion of the assessment was not administered. (NT 353-354).
16. The School Psychologist did not conduct observations of the Student as part of his reevaluation process. (NT 388).
17. The SRA Corrective Reading program is a “multisensory structured program that has a phonetic component as well as a comprehension component,” was introduced to the District by a Chester County Intermediate Unit expert involved in the Governor’s Schools of Excellence and reviewed by a team of District professionals. (N.T. at 821, 831-832).
18. The Parent’s expert testified that the SRA Corrective Reading program is an appropriate phonics program for Student (N.T. at 674, 684-685).
19. Student had the SRA Corrective Reading program for decoding and comprehension from eighth grade through eleventh grade. (N.T. at 688, 1280-1284).
20. Student was working on Level C in decoding in the SRA Corrective program when he entered 9th grade; during 9th grade he finished all 125 decoding C lessons and passed the posttest. (N.T. at 1283-1284).
21. Student’s final grades in 9th grade included A’s in Reading I and Physical Education, C’s in English I, Information Technology, and ISL, and D’s in African/Asian Studies, Intro to Algebra, Active Biology, and Basic Foods and Nutrition. (HO-5).
22. Student’s 3/24/2008 IEP had annual goals in the areas of reading comprehension and essay writing. (S-73, pp. 12-13).
23. Having completed the decoding portion of the SRA Corrective Reading Program, Student worked on Comprehension Book B1; Student passed all of the B1 posttests. (N.T. at 1283-1284, 1303).

24. In 9th grade (2007-2008 school year), Student's grades declined in the 3rd quarter as he was less engaged and not completing homework indicating a need for ESY Services. (N.T. at 720-721).
25. The 3/24/2008 IEP had a "yes" checked for whether Student showed behaviors that impeded his own or others' learning. (S-73; N.T. at 1225).
26. The IEP Team developed a behavior plan to help Student receive extra help and Student's ISL teacher followed Student's Behavior Management Program, which targeted his inconsistent homework completion and late arrivals to class. This behavior plan was in effect through the first marking period of 10th grade. (S-75, N.T. at 725, 1148-1150, 1168-1170).
27. The 3/24/2008 IEP and Behavior Management Plan were in effect through 11/2008, (from the spring of 9th grade through the fall of 10th grade). (N.T. at 1148).
28. The IEP team was concerned that Student's may need specially designed instruction to address emotional issues and recommended a reevaluation. (N.T. at 725-726).
29. The Student expressed an interest in film and the team supported his enrollment in a film class at school; Student failed the class because of his cuts and had to withdraw. (P-67; N.T. at 718-719).
30. The 3/24/2008 IEP and Behavior Management Plan were in effect through 11/2008, (from the spring of 9th grade through the fall of 10th grade). (N.T. at 1148).
31. Student's 3/24/2008 IEP had post-school outcomes including Student's attending college, working competitively after high school/college, and learning independent living skills. (S-73, pp. 10-11).

32. Student's 3/24/2008 IEP had specially designed instruction including, but not limited to: (1) preferential seating, (2) graphic organizers for writing, (3) teaching self-advocacy, (4) option for extended time for tests and an alternate location, (5) having text read aloud and directions summarized to ensure understanding, (6) study skills instruction, (7) extra math practice and access to a calculator, (8) reinforcement of self-editing, (8) help with time-management, breaking down long-term projects, preparing for tests, using his assignment book, and keeping his binders and book bag organized. (S-73, pp. 14-15).
33. The 3/24/2008 IEP included a 45-minute ISL three days out of a four day cycle where Students were provided with direct instruction in their goal areas. (S-96, N.T. at 1158-1159).
34. In addition to the ISL, Student's 10th grade classes included a Learning Support English class, a Learning Support History class, a Learning Support reading class, a college prep Algebra I class, a health class and physical education class. (N.T. at 1179).
35. Student also had a regular education co-taught Active Chemistry class, with daily labs, less note-taking, and more physical activities and assignments. (N.T. at 1179-1180).
36. In the high school, science classes that are "Active" are regular education classes that teach the same content as regular classes but use a different approach. (N.T. at 944-945, 1179-1180).
37. Student also had an Academic Recovery period in 10th grade.¹ (N.T. at 1352).

¹ Academic Recovery is a mandatory 30-minute period at the end of the day on three days out of the four-day cycle. Students sign up to meet with one particular teacher for review, depending on the Students' individual needs that day. Students are required to go; teachers take roll and write up Students who do not attend. (N.T. at 1111-1113, 1352, 1389-1390).

38. Student's 10th grade ISL teacher and case manager worked collaboratively all year with Student and communicated with his teachers in person and through phone calls and e-mail regarding Student's progress. (S-72; N.T. at 1168, 1183-1184).
39. The 10th grade ISL teacher followed the 3/24/2008 IEP by providing direct instruction in the goal areas as well as in organization and study skills, and implementing the specially designed instruction. (S-73, N.T. at 1167).
40. There were between six and eight Students in Student's ISL, along with the ISL teacher and a teacher's aide. (N.T. at 1159).
41. In the 10th grade ISL, Student worked primarily on reading, comprehension, and writing activities. (N.T. at 1160).
42. Student's WISC-IV Global Ability Index was 93 (32ndile) and the school psychologist classified Student as having average intelligence. (S-81, N.T. at 288, 389).
43. The testing environment was consistent throughout the testing sessions. (N.T. at 379-382).
44. Student was eligible to continue to receive special education services with a primary disability category of specific learning disability and no secondary disability category. (S-81, p. 9).
45. There was a meeting to review the Reevaluation Report and an IEP meeting on 11/25/2008, where the school psychologist read the Reevaluation Report to the parent. (N.T. at 351-352).
46. The Reevaluation Report notes that (1) the goals and SDI in Student's 3/24/2008 IEP are still appropriate, (2) transition goals for Student to select a field of study and

appropriate post-secondary institutions are needed, (3) additional goals to increase Student's tolerance for frustration and his academic motivation are needed. (S-81, p. 10).

47. The Parent signed the Reevaluation Report and marked her agreement. The Parent did not express any disagreement with the report at the meeting or ask for any information to be added to the report. (S-81, p. 11; N.T. 345-347).

48. Student expressed an interest in carpentry so his assistant principal² connected Student with a project manager so that Student could observe real-life job-related activities. (S-140, p. 101; N.T. at 955-956, 962).

49. Student initially wanted to attend the vocational technology school but changed his mind and decided that he wanted to attend college. (N.T. at 962-963).

50. Student took the PSAT test during his 10th grade year. (S-90; N.T. at 963-964).

51. At the 11/25/2008 IEP meeting, based on the case manager's data collection, the team agreed that the Behavior Management Plan had not been successful and would be removed and that a behavior goal would be used instead. (SD-96; N.T. at 725, 1168-1169, 1195, 1207-1208).

52. At the 11/25/2008 IEP meeting, the case manager reported that Student did not qualify for ESY at that time based on the data. (N.T. at 1183).

53. The 10th grade ISL teacher addressed time management skills with Student by helping him (1) record and track assignments using different methods including an assignment book, a little notebook, and folders, (2) prioritize and estimate how long assignments would take, and (3) plan his daily schedule for the school day and after

² Student refers to Mr. Kilpatrick, who is currently LMHS's 12th grade assistant principal. (N.T. at 955-956).

school to incorporate preferred activities and assignments, addressed organizational skills, provided one to one instruction in content areas, self management, executive functioning, self advocacy and monitored and modified strategies when necessary. (N.T. at 1028, 1160-1165, 1170, 1188-1190, 1180-1181, 1187-1191, 1253-1254).

54. In 10th grade, the Student was encouraged to attend the after school homework assistance sessions on Wednesdays in the Help Center because the math specialist was available for one hour of help. The Student did not avail himself of these resources or opportunities (N.T. at 1249-1250, 1351).

55. To help the Student access the material, assistive technology was used.

56. The Student made progress in his 10th grade IEP reading goals. (S-97, pp. 19-20).

57. The Student made progress in his 10th grade IEP writing goals. (S-97, pp. 21-22).

58. The Student achieved independent mastery of his 10th grade IEP math goals. (S-97, pp. 23-24).

59. The Student's performance on his perseverance goals in the areas of arriving to class on time, persisting on difficult or non-interesting tasks, and completing and turning in homework was inconsistent. (S-97, pp. 25-26).

60. There was an IEP meeting on 6/4/2009 to discuss Student's 11th grade schedule for the 2009-2010 school year. (S-96, p. 7; N.T. at 1182).

61. The 6/4/2009 IEP Team agreed and the Student requested a move from a Learning Support Western Civilization course to a supported section of College Preparatory U.S. History (S-96, p. 7; S-141; N.T. at 964, 1182, 942-943, 1348-1351).

62. The Parent agreed to move Student to a College Preparatory U.S. History class. (S-141; N.T. at 1350-1351).
63. The Student's 10th grade final grades were A's in Active Chemistry, Academic Literacy 2, and Physical Education, a B in English 2, C's in Western Civilization, Math Problem Solving, Health, and ISL, an F in Algebra I, and a pass in Algebra Lab. (HO-5).
64. Although the IEP team identified inconsistencies and regressions throughout the 10th grade year, no offer of services to maintain grades over the summer were made other than attendance at a regular session of summer school.
65. The Student's 11th grade classes included Reading III, a special education reading class, English III, a special education English class; both classes were part of the learning support program and taught by special education teachers. (HO-5; N.T. at 808, 1026-1027).
66. The Student's 11th grade 2009-2010 classes included Algebra I and Algebra lab for one 55-minute class during a 4-day cycle; the lab is a math supplement class that is part of the general education program and includes remediation as well as instruction of skills Students need for the Algebra course. (HO-5; N.T. at 809-810, 1026).
67. The Student had modified homework assignments in his 11th grade history class when necessary. (N.T. at 1409).
68. The 11th grade ISL provided individualized instruction, direct instruction, and one-on-one assistance to Students depending upon their needs. (N.T. at 1018).
69. The 11th grade ISL teacher communicated with Student's other teachers via e-mails, phone calls, and in-person contact to learn what Student's assignments were and to

find out if Student needed help in a particular class; the ISL teacher sent e-mails to the teachers every two weeks for progress updates. (S-117, N.T. at 1026-1027, 1039-1040).

70. During ISL, the first five minutes were used to prioritize what the Student would complete during that period; typically, Student would complete a test, study for a test, complete a missing homework assignment, or participate in class work prompts for progress monitoring. (N.T. at 1035-1036).

71. The Student received a laptop from the District in 11th grade. (N.T. at 1027).

72. The 11/20/2009 IEP, which covered the last three marking quarters of 11th grade, included, amongst other items, the following specially designed instruction: prompts to record homework assignments, encouragement to complete assignments on a daily basis, reinforcement on how to self-edit written work, checks throughout the writing process, notification to the ISL teacher if the Student was late four or more times during a week, organizational help (book bag and binders), option to have test materials and directions read aloud and summarized to ensure understanding, extended time on tests/quizzes, encouragement to ask for help when needed, graphic organizers for writing, and preferential seating. (S-97; N.T. at 1020-1021).

73. The the Student met his writing goal in the 2nd quarter but not the 3rd quarter of 11th grade. (P-97, pp. 2-4.)

74. The trend line for the Student's reading progress in 11th grade goes down. (P-97; N.T. at 1084).

75. The trend line for the Student's perseverance in 11th grade goes down. (P-97; N.T. at 1084-1085).

76. The Student was given a detention on 11/23/2009 for unexcused latenesses. (S-106; N.T. at 1125-1126).
77. The Student was given an in-school suspension on 12/21/2009 for cutting class. (S-107; N.T. at 1126).
78. On 3/15/2010, the Student's reading teacher/case manager called the Parent because of concerns about the Student's progress and lack of homework completion. (S-117, p. 5; N.T. at 1384).
79. The Student's 11th grade final grades were an A in Physical Education, B's in Reading III, ISL, and Ceramics, C's in English III and Geology, D's in Algebra I and US History, and P's in Algebra Lab and PASS. (S-137).
80. Assistive Technology for the Student's reading, math, and writing needs were discussed and appropriate forms were completed for the Student to begin accessing assistive technology. (S-153; S-154; N.T. at 1369-1371, 1398-1400).
81. The Student's counsel contacted Ms. Tawanna Jones, Parent's expert witness, for a private educational evaluation ("PEE") for The Student in June 2010; the report was completed on 9/16/2010 (P-111; P-113; N.T. at 599).
82. The Parent's expert conducted an observation of the Student. (N.T. at 609).
83. Both the Independent Evaluator and School Psychologist reported similarly regarding the Student's behavior during testing: lethargy, lack of attention/motivation.
84. The District paid for the Student to be tutored in the summer of 2010 at Huntington Learning Center. (P-112a; N.T. at 713, 745).

85. Notwithstanding the IEP Team's recognition the Student's difficulties in maintaining skills, downward trends and regressions, comprehensive ESY services were denied.
86. LMSD authorized 50 hours of tutoring through the beginning of school; the tutoring started in mid-August 2010, "30-some hours" were completed by the beginning of school, and LMSD has not extended the timeline for Huntington Learning Center to do the remaining 20 hours. (N.T. at 745-746).
87. Each of the IEP's relevant to the applicable time periods contained objective and measurable short and long term goals individualized to the Student's ability and potential. Modifications were data driven and implemented by regular progress monitoring.
88. The Student testified that he has received specially designed instruction to support academic instruction as well as to support his admitted intermittent lack of interest in school. (N.T. at 923-991).

DISCUSSION AND CONCLUSION OF LAW

The Right to a Free and Appropriate Public Education and Burden of Proof

The Individuals with Disabilities Education Act ("IDEA") requires that a state receiving federal education funding provide a "Free Appropriate Public Education" ("FAPE") to disabled children. 20 U.S.C. § 1412(a)(1). In Pennsylvania, the Commonwealth has delegated the responsibility for the provision of a FAPE to its local school districts.

A parent who believes that a school has failed to provide a FAPE may request a hearing, commonly known as a due process hearing, to seek relief from the school district for its failure to provide a FAPE. 34 C.F.R. § 300.507. In Pennsylvania, the hearing is conducted by a Hearing Officer. *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 527 (3d Cir.1995).

As the moving party, the Student bears the burden of proof in this proceeding. The United States Supreme Court has held that the burden of proof in an administrative hearing challenging a special education provision of a FAPE is upon the party seeking relief, whether that party is the disabled child or the school district. Schaffer v. Weast U.S., 126 S.Ct. 528, 163 L. Ed. 2d 387 (2005). In Re J.L. and the Ambridge Area School District, Special Education Opinion No. 1763 (2006). Because the Student's parents seek relief in this administrative hearing, they bear the burden of proof in this matter, i.e., they must ensure that the evidence in the record proves each of the elements of their case. The United States Supreme Court has also indicated that, if the evidence produced by the parties is completely balanced, or in equipoise, then the party seeking relief (i.e., Student's parents) must lose because the party seeking relief bears the burden of persuasion. Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528 (2005); L.E. v Ramsey Board of Education, 435 F. 2d 384 (3d Cir.2006). Of course, where the evidence is not in equipoise, one party has produced more persuasive evidence than the other party.

School districts provide a FAPE by designing and administering a program of individualized instruction that is set forth in an Individualized Education Plan ("IEP"). 20 U.S.C. § 1414(d). The IEP "must be 'reasonably calculated' to enable the child to receive 'meaningful educational benefits' in light of the Student's 'intellectual potential.'" Shore Reg'l High Sch. Bd. of Ed. v. P.S., 381 F.3d 194, 198 (3d Cir.2004) (quoting Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 182-85 (3d Cir.1988)). In assessing whether an individualized program of instruction is "reasonably calculated" to enable the Student to receive meaningful benefit, the progress noted must be more than a trivial or *de minimis*. Board of Education v. Rowley, 458 U. S. 176, 73 L.ed.2d.690, 102 S.Ct.3034 (182); Ridgewood Board of Education v. M.E. ex.rel. M.E., 172 F.3d 238 (3d Cir.1999).

An IEP is a detailed written statement for a child with a disability that includes a statement of the child's present levels, measurable annual goals, a description of how the child's progress towards meeting the goals will be documented, a statement of special education and related services and supplementary aids and services to be provided to the child, an explanation of the extent, if any, that the child will not participate with non-disabled children in regular education classes, testing accommodations, beginning and end dates for services, and transition

goals and services. 20 U.S.C. § 1414(d)(1)(A)(i). The IEP Team must consider the concerns of the parent in developing the IEP. 34 C.F.R. § 300.324. In the instant matter, the IEP team met on a regular basis assessing present progress and making data driven modifications to address changes in the student's behavior, performance and expressed interests (S-144, NT 1037-1038, 1098-1099, 1362-1363). Some of these meetings were in response to Parent requests, but the District also often initiated exchanges of information and requests for meetings as concerns arose. The Parent was continually involved in the process and, in fact, was often represented by an advocate (NT 1378-1379). On one such occasion, the District initiated a meeting in order to address an escalation in tardiness, absenteeism, inattentiveness and falling asleep in class. In response, the team designed a "Behavior Management Program" (hereinafter referred to as "BMP") (S-73; S-75; S-81; NT 725, 1148-1150,1168-1170;1225;15; 364-365;725-726). Although in successive IEP'S, the BMP was removed, individual goals specifically targeting behaviors, and specially designed instruction engineered to aid the implementation of those goals were added. Successive witnesses corroborated each other in their testimony regarding their efforts to ensure the success of this Student. The testimony revealed to this Hearing Officer that the efforts by administrators and teachers alike went well beyond mere compliance with IEP goals, but exhibited a sincere and genuine interest in this young man and his continued progress. No matter the numerous modifications and supports put into place, in both the tenth and eleventh years, the Student only completed, on average, 66% of his work and was late to class, on average 50% of the time. The inconsistencies in his academic and behavioral performance (rates of attendance and work completion rose as high as 90%) clearly indicate performance/motivation deficits not skill deficits. (NT 1043-1044; 1125-1126; 1234-1235; 1160-1162; 1170, 1187-1190; 1025; S 97; S 104; S 107; S 120; S 121). It is important to note the results of the evaluations placing the student within low average to average intelligence and the fact that progress monitoring and grades demonstrate progress. Perhaps not as much progress as one would expect or one would like to see, however, it is not a FAPE does not require one years' progress in one year. *Derek B. v. Donegal SD., No. 06-5134, 2007 U>S> Dist. LEXIS 2983 at*34 (E.D. Pa. Jan, 12, 2007)*. Under the circumstances of the Student's excessive absenteeism, tardiness and inability to attend class and complete his class work and home work, it is no wonder that the Independent Evaluator found " breaks and chunks of learning or information missing from his repertoire of knowledge" (NT 632).

The Parents specific denials of a FAPE in the lack of appropriate designation of specific learning disabilities, or response by the District to support them in providing appropriate specially designed instruction, assistive technology, peer integration or utilization of specific methodologies is wholly unsupported by the evidence. In fact, the evidence is replete with examples of the District continually doing whatever it could to motivate and support this student.

Is the Parent Entitled to an IEE at District Expense

Under both Section 504 and IDEA, the School District is required to fully evaluate any 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." where the child is suspected to be in need of special education 34 CFR Sec. 300.532 . Should the Parent's disagree with an evaluation, they have the right to request an independent educational evaluation at public expense. 34 C.F.R. 300.503. The District is obligated to grant that request or, in refusing must file it's own due process request. Id. IDEA and its regulations require that the people who review the assessment information and complete the report must be qualified professionals who, with the parent, determine the educational needs of the child. 34 C.F.R. § 300.306. The evidence clearly demonstrated that the professionals the District utilized in conducting the were properly credentialed and experienced.

The District asserts that "*the Parent is not entitled to an IEE as the evidence demonstrates that Student and the Parent actually agreed with the evaluation obtained by the District. The applicable IDEA regulations state: "A parent has the right to an independent education evaluation at public expense **if the parent disagrees** with the evaluation obtained by the public agency...." 34 C.F.R. § 300.502(b) (emphasis added). Here, the District conducted an evaluation to which the parent expressly agreed, thus they are not entitled to reimbursement".*

While it is true that pursuant to 34 CFR §300.502(b)(i), a parent is entitled to reimbursement of an IEE at public expense if they disagree with the District evaluation report and the District evaluation report is in some way inappropriate. *Holmes v. Millcreek Tp. School Dist., 205 F.3d 583 (3rd Circ. 2000)*. There are also decisions supporting the reimbursement of an IEE on equitable grounds even if there was not a previous District

evaluation conducted with which the parent disagreed. The regulation is broadly applied to permit reimbursement not only when the parents expressly disagree with the evaluation but also when "the parents[] fail[] to express disagreement with the District's evaluations prior to obtaining their own" evaluation because unless the regulation is so applied "the regulation [would be] pointless because the object of parents' obtaining their own evaluation is to determine whether grounds exist to challenge the District's. Warren G. ex rel. Tom G. v. Cumberland County Sch. Dist., 190 F.3d 80, 87 (3d Cir. 1999). Consequently, reimbursement may be warranted where a parent does not take an express position with respect to the district's evaluation or otherwise "fails to express disagreement." Lauren W v. Radnor School District 480 F.3d 259 (3rd Cir 2007), PA Spec. Educ. Op. No. 899 (1999); PA Spec. Educ. Op. No. 1111 (2001); PA Spec. Educ. Op. No. 1140(2001); PA Spec. Educ. Op. No. 1573 (2005); PA Spec. Educ. Op. No. 1733 (2006).

More importantly, the starting point for the determination of the appropriateness of an offer of a FAPE is the evaluations from which the needs of a Student are identified. In order for an evaluation to be determined to be appropriate, it must meet the requirements of 34 CFR § 300.532. More specifically, the Evaluation Report (ER) should: 1) utilize a variety of assessment tools and strategies to gather relevant functional and developmental information about the Student, including information provided by the parents; 2) assess the Student in all areas related to the suspected disability; 3) be sufficiently comprehensive to identify all of the Student's special education and related services needs; and 4) utilize technically sound instruments to assess the relative contribution of cognitive, behavioral, physical and developmental factors. See In Re the Educational Assignment of L.-M. B., Special Educ. Op. No. 1795 (2007). The Districts evaluation fails the third requirement in the lack of its sufficient comprehensiveness. Notwithstanding the administration of a variety of instruments, two key components were lacking. Key components that, under the circumstances of the facts of this particular case were critical not to ignore: observation of the Student and proper input from the parent. The District admitted that observations of the Student were not incorporated into the findings of the reevaluation. Many of the needs requiring support were needs that could only be determined through observation and not through scores derived from standardized instruments. The record is replete with evidence regarding behaviors impeding learning. Further, regarding the standardized

instruments, the District admits that, in one instance wherein the protocol requires administration of a portion of the tool to the parent, the administration of that tool was not done. The District seeks to minimize the importance of the requirement and is dismissive of its error. On the one hand the District seeks to support its utilization of technically sound instruments in defense of its evaluation and on the other argue that the instruments need not be administered as designed. Additionally, the law is clear that where a District benefits from the information garnered in an IEE, reimbursement is appropriate (citations omitted). In defense of its provision of a FAPE to this Student, the District is proud of their incorporation of “many of the suggestions” of the independent evaluator (P 113; S 104). Reimbursement of the IEE is appropriate and is so Ordered.

Is the Student Entitled to ESY Services

ESY is a component of FAPE and must be considered by the IEP Team. 34 C.F.R. §300.106. The IEP Team must consider:

(i) Whether the student reverts to a lower level of functioning as evidenced by a measurable decrease in skills or behaviors which occurs as a result of an interruption in educational programming (Regression).

(ii) Whether the student has the capacity to recover the skills or behavior patterns in which regression occurred to a level demonstrated prior to the interruption of educational programming (Recoupment).

(iii) Whether the student’s difficulties with regression and recoupment make it unlikely that the student will maintain the skills and behaviors relevant to IEP goals and objectives.

(iv) The extent to which the student has mastered and consolidated an important skill or behavior at the point when educational programming would be interrupted.

(v) The extent to which a skill or behavior is particularly crucial for the student to meet the IEP goals of self-sufficiency and independence from caretakers.

(vi) The extent to which successive interruptions in educational programming result in a student’s withdrawal from the learning process.

(vii) Whether the student's disability is severe, such as autism/pervasive developmental disorder, serious emotional disturbance, severe mental retardation, degenerative impairments with mental involvement and severe multiple disabilities.

22 Pa. Code §14.132(a)(2).

The IEP Team considered ESY at the 3/24/2008 IEP meeting and determined that the Student was not eligible for ESY for summer 2008. (S-73, p. 16). The Team also considered ESY at a 6/4/2009 IEP meeting and determined that the Student was ineligible for summer 2009. (S-97, p. 30). The IEP Team noted regressions and downward trends, behavior patterns interrupting educational programming and noted that the Student was in danger of failing Algebra for the year, discussed the possibility of the Student retaking the class over the summer, and also offered for the student to take the Summer Math Academy – none of which were specifically designed to include programming necessary to preserve mastered skills. (S-97, p. 7). An offer of readily available “summer school” does not meet legal standards of services necessary to halt regression. Most dispositive of the need for ESY services is the Districts assertions of responsiveness to downward trends and acknowledgments that this Student required constant support (which the District maintains that they provided and I agree they did) to maintain gains achieved through the Districts provision of a FAPE. ESY is a necessary component of a FAPE to which this Student was entitled as evidenced by the Districts own presentation of testamentary and documentary evidence. The District did not provide this particular component of a FAPE.

Compensatory Education as a Remedy

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 the Student is receiving only trivial educational benefit, and the district fails to remedy the problem. The period of compensatory education granted should be equal to the period of deprivation, excluding the period of time reasonably required for the district to act accordingly.

Ridgewood Board of Education v. M.E. ex.rel. M.E., 172 F.3d 238 (3d Cir.1999); M.C. v. Central Regional School District, 81 F. 3d 389 (3rd Cir. 1996).

If personalized instruction is being provided with sufficient supportive services to permit the Student to benefit from the instruction the child is receiving a “Free Appropriate Public Education as defined by the Act.” Polk, Rowley. As discussed above, the Student

demonstrated a declines in skilland difficulties in maintaining gains achieved. Since the District failed to provide ESY services to ensure the gains achieved were maintained as ***supportive services to permit the Student to benefit from the instruction the child is receiving a “Free Appropriate Public Education as defined by the Act.”*** (emphasis added) *Id.* the Student was denied a FAPE and is entitled to compensatory education.

CREDIBILTLY OF WITNESSES

Hearing Officers are empowered to judge the credibility of witnesses, weigh evidence and, accordingly, render a decision incorporating findings of fact, discussion and conclusions of law. The decision should be based solely upon the substantial evidence presented at the hearing. Spec. Educ. Op. No. 1528 (11/1/04), quoting 22 PA Code, Sec. 14.162(f). See also, *Carlisle Area School District v. Scott P.*, 62 F.3d 520, 524 (3rd Cir. 1995), *cert. denied*, 517 U.S. 1135 (1996). Quite often, testimony or documentary evidence conflicts; which is to be expected as, had the parties been in full accord, there would have been no need for a hearing. Thus, part of the responsibility of the Hearing Officer is to assign weight to the testimony and documentary evidence concerning a Student’s special education experience. In this particular instance, the evidence, testamentary and documentary, was not as disparate as one finds in many cases as it was merely differing in philosophy or approach.

Hearing Officers have the plenary responsibility to make “express qualitative determinations regarding the relative credibility and persuasiveness of the witness”. *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIZ 21639 at *28 (2003). This is a particularly important function, as in many cases the Hearing Officer level is the only forum in which the witness will be appearing in person. Fourteen witnesses provided detailed information regarding numerous supports implemented to assist the Student with his ability to receive and benefit from instruction. All witnesses from both the District and Parent testified credibly. Of particular note is the testimony from the Student himself who testified with honesty and sincerity regarding his educational experiences and perceptions of not only his own performance, but that of the District in the District’s efforts to meet his needs.

CONCLUSION

For all of the foregoing reasons, the Student has been denied a FAPE in the Districts failure to properly identify the Student as one in need of ESY services. Accordingly, as outlined below the Student is entitled to compensatory education sufficient to remediate the deprivation of free access to a public education for the entire period applicable. Additionally, as the IEE secured by the Parent provided valuable information and insight to the Student's needs which the District utilized and agreed with, the Parent is entitled to reimbursement for the expenses she incurred in securing and sharing the evaluation.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, the School District is hereby ordered to take the following actions:

1. Issue reimbursement for the Independent Educational Evaluation secured by the parent within 30 days of provision, by the Parent, of documentation of the Invoice evidencing payment for the evaluation.
2. Provide the Student with compensatory education for the entire period of deprivation in the form of full days for each applicable day of the ESY school calendar for ESY conducted in 2008 and 2009. The value of those services shall be measured by the cost to the District in providing such services and may be utilized by the Student to acquire tutoring in any academic domains, therapy/instruction in executive function or organizational skills, college preparation or assistance/instruction regarding other vocational/technical training as well as any related services incident thereto which may be indicated by the IEE.

Dated: March 25, 2010

Gloria M. Satriale

Gloria M. Satriale, Esq.,
Special Education Hearing Officer