

PENNSYLVANIA
SPECIAL EDUCATION HEARING OFFICER

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

5769/05-06 KE and 5861/05-06 KE

File Numbers

V.D.

Child's Name

Xx/xx/xx

Date of Birth

1/04/06, 1/06/06

Dates of Hearing

Open

Type of Hearing

For the Student:

Parent(s)

For the Pittston Area School District:

Margaret Boyt
Director of Special Education
Pittston Area School District
5 Stout Street
Pittston, PA 18640-3391

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Dates of Hearing:	January 4 and 6, 2006
Date of Receipt of Transcript:	January 11, 2006
Date of Decision:	January 26, 2006
Hearing Officer:	Daniel J. Myers

BACKGROUND

Student (Student) is a/an xx year old resident of the Pittston Area School District (School District) with a specific learning disability in written expression and attention deficit hyperactivity disorder (ADHD). His parents contend that he has been denied a free and appropriate public education (FAPE) since his most recent re-enrollment into the School District in January 2005. The School District contends that Student is not even a special education student any longer. The parties also want me to determine what is the appropriate program and placement for Student for the 2005-2006 school year. For the reasons described below, I find that the Student is entitled to 32 hours of compensatory education and that I will not disturb the program and placement decision of the June 2005 facilitated IEP in this case.

ISSUES

1. Whether or not Student is entitled to compensatory education for any period since January 2005 due to a denial of a FAPE.
2. What is the appropriate program and placement for Student for the 2005-2006 school year?

FINDINGS OF FACT

1. Student is a/an xx year old, 10th grade resident of the School District with a specific learning disability in written expression and ADHD. (N.T. 264) ¹
2. In August 2003, Student resided in a different school district, i.e., the [Redacted] School District. (N.T. 68; SD 1; SD 2)
3. On August 27, 2003, Hearing Officer David Lee determined that Student was making meaningful progress in the general curriculum of the [Redacted] School District without a differentiated curriculum or instruction and, therefore, Student was not in need of special education. (SD 1)
4. On September 26, 2003, a Special Education Appeals Panel affirmed Hearing Officer Lee's decision, noting Student's successful academic and behavioral performance in school, based upon the preponderant proof of grades, but teachers' anecdotal reports, specialists' observations, and test scores. In Re the Educational Assignment of V.D., Special Education Opinion No. 1413 (2003) (SD 1)
5. Student's family moved into the School District around December 2003 or January 2004. (SD 2) Student's parents told School District officials that Student had received special education services at his previous school, and that they were in the process of obtaining

¹ References to SD, P and HO are to School District, Parent and Hearing Officer exhibits, respectively. References to N.T. are to the transcripts of the January 4 and 6, 2006 hearing sessions.

- an evaluation report from Dr. K, but they did not explicitly inform School District officials of either the Hearing Officer's or the Appeals Panel's decisions. (N.T. 68, 117, 377)
6. On or about January 14, 2004, the School District and Student's parents agreed to an IEP that placed Student into designated special education classes for all of his academic subjects. Because Dr. K's evaluation report was pending, the IEP was labeled "work in progress" with the intention that it would be revisited after Dr. K issued her evaluation report. Student was in 8th grade at this time. (SD 3; SD 4; SD 6; SD 7; N.T. 69, 73-74, 177, 179, 186)
 7. On or about January 27, 2004 Dr. K issued her evaluation report. Ordinarily, the School District issues its own evaluation report after receiving independent evaluation reports. In this case, however, the School District did not do so. (P 1; SD 8; N.T. 73, 186-187, 391, 393)
 8. In February 2004, the School District obtained an occupational therapy (OT) evaluation that simply listed OT-related observations, but that did not include specific recommendations regarding whether Student should, or should not, receive OT. (SD 9; P 21)
 9. On or about March 5, 2004, the School District obtained an assistive technology evaluation report recommending that Student was not in need of assistive technology services. (SD 11; P 2)
 10. In May 2004, Student was involved in [an accident and was injured]. While recuperating, he received home-bound instruction for an unspecified amount of time. (N.T. 74, 119-120; P 3)
 11. On or about May 12, 2004, Student's IEP team met to develop his 9th grade IEP. (SD 14; 74)
 12. In August 2004, Student's application to the [Redacted] School was rejected, apparently because Student's academic and psychological needs were beyond the scope of its programs (N.T. 74-75; SD 15; P 17)
 13. Also in August 2004, Student's parents withdrew Student from the School District and enrolled him into the [Redacted] Charter School, which is a cyber-charter school. The former principal of the Cyber-Charter School testified that she was aware of the 2003 hearing officer and appeals panel decisions involving the [Redacted] School District. (N.T. 19, 22, 26, 50, 75-76)
 14. On or about September 15, 2004, Student's parents and the Cyber-Charter School developed an IEP based upon Dr. K's January 2004 evaluation report. (P 18; P 19; N.T. 22, 60) That IEP provided for, among other things:

- a. A Balometrics program, which is not a computer program, but rather is a sensorimotor integration program for children with attention and academic difficulties, using audio cassettes or CDs, a balance board, and bean bags; (N.T. 24-25, 56)
 - b. A scheduling system; (N.T. 25)
 - c. Learning support services. (N.T. 28)
 - d. The “Dragon Naturally Speaking” speech-to-text computer program that allows Student to utilize his good verbal skills to compensate for his weaker written skills; (N.T. 28)
 - e. “Inspiration” and “DraftBuilder” graphic organizing computer programs; (N.T. 29)
 - f. “Text to Speech” and “MyAxis” writing-related computer programs. (N.T. 29)
 - g. “BrainBuilder” and “Test & Improve Your Memory” computer programs, which assist Student in following directions; (N.T. 30) and
 - h. A James Stanfield video series to improve social skills. (N.T. 32)
15. On or about November 2004, Student’s parents requested that the Cyber-Charter School obtain a neuropsychological evaluation to determine whether or not Student suffered from traumatic brain injury following his May 2004 [redacted] accident. (N.T. 77; SD 24; P 16)
16. Rather than obtain the evaluation requested by Student’s parent, the Cyber-Charter School obtained a psychoeducational evaluation from an Intermediate Unit psychologist.
- a. The evaluation report chronicled the unusually numerous evaluations sought by, and disabilities alleged by, Student’s parents.
 - b. The evaluation report concluded that there were strong indications that Student’s mother suffers from Munchausen by Proxy.
 - c. The evaluation report concluded that it was unable to determine whether or not Student had any specific learning disabilities, but it was able to conclude that Student had “suspected Personality Disorder (NOS).”
 - d. Apparently, one of the results of the evaluation report was a referral and subsequent investigation by the county Children and Youth Services agency. (SD 16; P 25; P 30; N.T. 77-78, 118)
17. On or about December 24, 2004, the Cyber-Charter School and Student’s parents met to revise Student’s IEP. The Cyber-Charter School issued a Notice of Recommended Educational Placement (NOREP) proposing to provide itinerant “learning support in the area of written expression and ... emotional support services for his ADHD.” Student’s parent testified at the hearing that she approved the content of the proposed IEP, but she disapproved the proposed location of the services because she had decided, by that time, to re-enroll Student into the School District. (P 20; P 31; N.T. 128, 293-294, 296)
18. Around January 2005, Student began receiving wraparound services from a local mental health agency, apparently in connection with the personality disorder and Munchausen by Proxy diagnoses. The wraparound services received by Student included a behavior plan,

the services of a mobile behavior therapist, and a psychiatric evaluation (P 13; N.T. 80, 121-122, 129, 132, 402)

19. On or about January 3, 2005, Student was re-enrolled into the School District. The School District implemented the last IEP that it had developed in May 2004. The School District's special education director apparently determined that Student should be placed in special education classes. Teachers testified that these classes were "watered down" versions of their regular education counterparts. (N.T. 87, 135-138, 147, 163, 267; P 5)
20. On or about February 26, 2005, Student's parent requested an IEP team meeting. In response, the School District offered IEP meeting dates in May and June. (N.T. 88, 210; P 27)
21. On or about March 16, 2005, the School District requested permission to conduct a complete psychoeducational assessment, including cognitive and achievement assessments, for the purpose of updating his levels of functioning to determine future programming. (SD 17; 89; P 6)
22. On or about March 22, 2005, Student's Parent refused to grant the requested permission to evaluate.
 - a. Student's parent believed that the School District had sufficient evaluative information.
 - b. Student's parent did not request either mediation or due process.
 - c. Student's parent expected that, in response to her refusal to grant permission for the testing, the School District would simply develop an evaluation report based upon existing data.
 - d. Student's parent reminded the School District that she had requested an IEP meeting on February 26, 2005.
(N.T. 89, 124; SD 17)
23. On March 24, 2005, Student, his mother, her advocate, the School District's special education director and the guidance department supervisor met to select Student's courses for Student's upcoming 10th, 11th and 12th grade high school years. Even at that class selection meeting, the School District deferred any IEP discussion request until June. In fact, the School District's memo memorializing that meeting explicitly notes that the meeting was for the purpose of selecting a curriculum, and that it was not an IEP meeting. (N.T. 211; SD 18)
24. On April 21, 2005, Student's parent requested the evaluation report that she believed was supposed to have been issued following her denial of permission to conduct further testing. (SD 19; P 7)
25. On or about June 3, 2005, the School District and Student's parent engaged in a facilitated IEP team meeting with a neutral facilitator provided by the Office for Dispute Resolution. (P 8; P 9A; SD 20; SD 21; N.T. 96, 270)

- a. By this time, it was clear to the School District that Student's needs had not been met during the previous semester. Academically, Student was far ahead of his peers, his teachers uniformly considered Student to be bright, and they had to give Student extra materials to keep him busy. (N.T. 149, 164-166, 194, 232-233, 246-248, 262; SD 32)
 - b. Student's Science teacher testified that he wished he had requested an IEP revision sooner than June 3, 2005, and he was unaware that Student's parent had requested an IEP meeting back in February 2005. (N.T. 152)
 - c. Although Student exhibited some organizational problems, they did not appear to his teachers to be different from the regular organizational problems of regular education 10th grade students. (N.T. 150)
26. On July 1, 2005, the County Children and Youth Services closed its investigation of Student's family, finding no current evidence of child abuse or neglect issues that would warrant further involvement with the family. (P 30; N.T. 132, 219-220)
27. On or about July 2, 2005, the School District sent to Student's parent a revised IEP based upon June 3 meeting. The revised IEP was not accompanied by a NOREP. (N.T. 98; P 9C)
28. On July 13, 2005, the School District requested permission to conduct a multidisciplinary evaluation, including an individual psychological evaluation, an academic assessment, a review of records, observations, and input from parent and staff. (SD 22)
29. On or about July 16, 2005, Student's Parent refused to grant the requested evaluation permission. The reasons for such refusal were: 1) the School District's request indicated that it was in response to a parental request, and Student's parent had not requested new assessments; and 2) Student's parent was still expecting an evaluation report based upon all evaluative data that already existed. (SD 22; SD 24; P 11; N.T. 98-99, 276, 345-346)
30. On July 26, 2005, the Pennsylvania Department of Education's Bureau of Special Education (BSE) issued a Complaint Investigation Report (CIR).
- a. Student's parent had complained that the School District had failed to provide an evaluation report in response to her request, and had failed to provide progress monitoring reports pursuant to Student's IEP.
 - b. The School District's Special Education Director had informed the BSE investigator that Student has had an IEP since the appeals panel's 2003 opinion. (N.T. 333)
 - c. When the BSE Investigator asked whether Student was listed on a state database as a special education student, the School District answered in the negative, apparently because the School District does not identify as a special education student any child who is enrolled in all regular education classes. (N.T. 334)
 - d. The CIR concluded that the School District was in compliance in both cases and that, as determined by a September 2003 Special Education Appeals Panel decision, Student was not eligible for special education. (SD 23)

31. On or about August 8, 2005, Student's Parent requested a neuropsychological evaluation for suspected Traumatic Brain Injury. (P 12) The School District's Special Education Director did not respond to this request because she could not find documentation of any injury that Student suffered at school, she had no medical documentation of any [related] injury, and the School District wanted permission to conduct an educational evaluation, not a neuropsychological evaluation. (N.T. 278-280)
32. On August 15, 2005, Student's parent filed with the Office for Dispute Resolution a request for due process hearing. (SD 25; N.T. 280)
33. On or about August 22 and August 31, 2005, the School District reiterated its request for permission to evaluate Student. (N.T. 102; SD 22; SD 26; P 26)
34. When the 2005-2006 school year began, Student was placed in all regular education classes, and he received no specially designed instruction or program modifications. (N.T. 164, 282) Student's English teacher was aware during the first week of the school year that Student had an IEP, but she did not see an IEP until November 2005. (N.T. 251-252, 257)
35. On September 2, 2005, I conducted a telephone conference call with Student's parent and the School District's lawyer in response to the request of Student's parent for an emergency order requiring the School District to implement "pendency" or the "stay put" IEP. (N.T. 284-285; HO 1)
 - a. Student's parent alleged that Student had begun the 2005-2006 school year in regular education because the School District refuses to implement a valid January 2005 IEP that had been developed while Student was still attending the Cyber-Charter School.
 - b. The School District's counsel could not confirm or deny that a valid January 2005 IEP exists.
 - c. I noted that, generally, a unilateral change of placement by the School District into regular education over a parent's objection and in contravention of a valid IEP is fundamentally unjust.
 - d. I further noted that, where school had already begun, and where the School District's counsel could not confirm or deny material facts, and where I must make a prompt decision, then I would assume that the facts alleged by Student's parent were true.
 - e. I therefore ordered the School District to implement the alleged January 2005 IEP that was developed at the [Redacted] Charter School and that allegedly was in the possession of the School District.
36. Just before the October 2005 hearing, Student's parent retained an attorney and settlement discussions began. Student's parent agreed to grant permission to evaluate Student in exchange for the School District's agreement to develop some goals and instruction. (N.T. 103, 286, 355; SD 31; P 14; P 26)

37. On or about November 8, 2005, School District personnel and Student's lawyer, parent and advocates met to develop some goals and instruction. The School District offered to provide additional writing support services from Student's English teacher, but not goals addressing organizational and attention deficits, or transition services were developed. (N.T. 20, 43, 46-47, 75, 103, 175; P 9B; P 15)
38. On December 8, 2005, the School District issued its re-evaluation report. (SD 30; P 22;P 23; N.T. 108)
- a. The re-evaluation report was based primarily upon Student's current performance in his classes, noting that Student is proficient in reading and writing, and he has good communication skills, he works independently, he is punctual and his work is complete, he exhibits self-control, and he has good peer relationships. (N.T. 361, 365)
 - b. WISC-IV results indicate high average cognitive abilities, high average verbal comprehension, superior perceptual reasoning, and average working memory and processing speed. (N.T. 369)
 - c. WIAT results indicate high average performance in reading, average in written language, and superior in listening comprehension. (N.T. 372) Some discrepancies between ability and achievement were observed in spelling, written expression and written language, but results were still in the average range. (N.T. 372)
 - d. The re-evaluation report concluded that Student is a child with a disability, i.e., a specific learning disability in spelling and written expression, but he does not need specially designed instruction. The report's evaluator further concludes that Student's ADHD does not appear to have a negative educational impact upon Student. (N.T. 373-374, 385, 415)
39. Based upon this re-evaluation report, the School District believes that Student is not eligible for special education services. The School District has never issued a NOREP recommending Student's exit from special education. (N.T. 131)
40. Student's parent wants an independent educational evaluation. Student's parent disagrees with the conclusion in the School District's re-evaluation report that Student does not need any specially designed instruction. (N.T. 109)
- a. Student's parent complains that the re-evaluation report erroneously indicates that the IEP team reviewed existing evaluation data on August 31, 2005. The School District's evaluator testified that this is the date that all existing evaluation data in the School District's files were forwarded to Student's parent, and therefore, while no IEP team actually met to review data, all members of the IEP team had the data for review. (N.T. 108, 110, 356, 407-408)
 - b. The re-evaluation report did not mention the December 2004 IU evaluation report conclusions regarding a personality disorder and Munchausen by Proxy because that report appeared simply to be a chronological survey of past data, and did not appear to contain any new evaluative data. In addition, the School District's re-evaluation report preferred to focus on present functioning, and the December

2004 IU evaluation report conclusions were not useful for that purpose. (N.T. 110, 358, 380, 394-397)

- c. The re-evaluation report did not reach any conclusions regarding the fact that, since Student's re-enrollment in the School District in January 2005, had apparently been given three IEPs. (N.T. 380)
- d. Evaluator did not base conclusion on the fact that Student had 3 IEPs in SD already. (380)

41. Sometime in December 2005 Student's parent fired her attorney. I conducted a due process hearing in this matter on January 4 and 6, 2006. Parent Exhibits 1 through 31 were admitted without objection. (N.T. 420) School District Exhibits 1 through 33 were admitted without objection. (N.T. 421)

DISCUSSION

A child with a disability is defined in federal regulations as a child with one of several specific conditions and "who, by reason thereof, needs special education and related services." 34 CFR §300.7(a); In re the Educational Assignment of V.D., Special Education Opinion No. 1413 (2003) A School District must give sufficient, definitive, specific written notice, with appropriate specific procedural safeguards, of its intention to remove itself from its special education obligations to Student. 34 C.F.R. §§ 300.533(d)(1)(ii), 300.534(c)(1)

In 2003, this particular Student was determined by Hearing Officer Lee, to have not met the second prong of this definition, and that determination was affirmed on appeal. (SD 1) In that earlier case, Student's parents and former school district were never able to agree upon any IEP proposed by the school district. When, however, the school district decided that Student no longer needed special education, it issued a NOREP proposing Student's exit from special education. In re the Educational Assignment of V.D., Special Education Opinion No. 1413 (2003) The Appeals Panel suggested that if the parties in that case had ever agreed upon an IEP, even if the school district's agreement had been motivated simply by a desire to acquiesce, appease or compromise with Student's parent, then that school district would have been bound to provide the services required in the agreed upon IEP pending resolution of the NOREP proposing Student's exit from special education. Id.

Ironically, in this case, the current School District does have an agreed upon IEP and it has never issued a NOREP proposing Student's exit from special education services. Yet, this School District seeks to use the earlier Hearing Officer Decision and appeal as bases for avoiding any obligation for special education services. I conclude that this School District has never given sufficient, definitive, specific written notice, with appropriate specific procedural safeguards, of its intention to remove itself from its special education obligations to Student.

I conclude that this School District voluntarily agreed to give Student an IEP when Student re-enrolled into the School District in January 2005, and it renewed that agreement in June 2005 through the facilitated IEP. (SD 6; SD 7; SD 21) I conclude that, if the School District wants Student exited from special education services, the School District must issue

a NOREP to that effect. I will not permit the School District to avoid that procedural requirement by asking me to confirm the School District's December 2005 re-evaluation report's conclusion that Student is not in need of special education services.

The following four examples of the School District's attempts to avoid its obligations, and its apparent indifference to the rights that attach to Student as a result of its agreement to give Student an IEP, are disturbing to me. First, testimony regarding Student's January 2005 placement upon his re-enrollment in the School District gave me the impression that the School District had (at least at that time) only two positions on the "special education spectrum" – either a watered down curriculum for children with IEPs, or regular education for children without IEPs. (N.T. 147-163)

Second, the School District simply refused to honor the request of Student's parent for an IEP meeting at any time during the Spring 2005 semester, and it even went so far as to memorialize in writing that a course selection meeting with the guidance office was not the IEP meeting that Student's parent had been insistently requesting. (N.T. 88, 210-211; SD 18; P 27) Even worse, that course selection meeting later was used to support the School District's position that Student was not eligible for any special education services. (Apparently, when a special education student in this School District is enrolled in the least restrictive environment possible, i.e., all regular education classes, that student is no longer reported to the State as a special education student. (N.T. 277, 334; SD 23))

Third, rather than request a due process hearing to override the first refusal of Student's parent to grant permission for the particular evaluations desired by the School District, the School District simply repeated its requests for permission to evaluate, and found a reason to consider Student "thought-to-be-eligible" rather than an actual special education student. (N.T. 272, 323, 336) The School District should have followed appropriate procedures for overriding a parental refusal to consent to evaluation. 34 CFR § 300.505; In re the Educational Assignment of A.D., Special Education Opinion No. 1663 (2005)

Fourth, when the School District could not find a copy of a Cyber-Charter school IEP that matched precisely with the IEP described in my September 2005 stay-put order, it did not seek reconsideration of my order, but simply ignored it and implemented no IEP – neither the Cyber-Charter school IEP that it had in its possession nor any of its own IEPs. (N.T. 285, 299-300, 306, 317-319, 352; SD 24)

Without question, it is difficult for reasonable people to communicate with Student's parent. References in the 2003 appeals panel opinion to her perseverating perceptions and overly technical assertions accurately describe my observations as well. (SD 1) Student's parent communicates voluminous information in a confused and disorganized fashion, with no apparent sense of prioritization. (N.T. 173, 217, 311, 341, 406, 410) During her concluding argument, after two days of hearing, Student's parent added to her request for relief an IEE and an independent assistive technology evaluation. (N.T. 422) Student's special education file is the third largest file in the School District. (N.T. 338) The fact that my September 2005 stay put order erroneously identified the Cyber-Charter School IEP is

directly related to the difficulty that I had in understanding exactly what it was that Student's parent wanted from me – and it is typical of her communication patterns. (HO 2)

Regardless how difficult it is to communicate with Student's parent, and regardless how unreasonable Student's parent may be in her communications, Student is entitled, by virtue of having been awarded an IEP by this School District, to enjoy the procedural protections of the IDEIA and Chapter 14. Notice and due process procedures exist for exiting children from special education services, and Student is entitled to have those procedures enacted by this School District. Because this School District unilaterally determined exit Student from his special education status without following applicable exit procedures, Student was denied a free and appropriate public education. Accordingly, I will award compensatory education to Student.

Frankly, I am at a loss as to how to calculate the appropriate compensatory education award in this case, where the FAPE denial is procedural rather substantive, and where the most appropriate substantive special education services for this Student may, in fact, be no special education services (if all procedural requirements are ever satisfied.) Because the equities require some sort of award, however, I calculate that Student is entitled to one hour per week, or 36 total hours, of compensatory education since his re-enrollment into the School District in early January 2004. Because the School District is entitled to a reasonable period within which to rectify its FAPE denial, which I calculate in this case to be one month, I will reduce the 36 hour award by 4, for a total of 32 hours of compensatory education.

I will not grant the request of Student's parent for an IEE or an independent assistive technology evaluation. These last minute requests for relief were not clearly made with sufficient notice for complete response by the School District and for appropriate consideration by me.

I will not determine that Student is not in need of special education services. The School District can issue follow applicable notice procedures by issuing a NOREP with appropriate description of its desired result.

Regarding the question of what is the appropriate program and placement for Student for the 2005-2006 school year, I will not disturb the program and placement determined at the June 2005 facilitated IEP team meeting. Special education procedures allow any party who is dissatisfied with that June 2005 IEP to request a change in the IEP and to seek mediation and/or due process to resolve any conflict.

ORDER

For the reasons described above, I hereby ORDER that:

- Student is entitled to 32 hours of compensatory education services;
- I will not disturb the program and placement determined at the June 2005 facilitated IEP team meeting.
- The requests of Student's parent for an IEE and for an independent assistive technology evaluation are denied.

Daniel J. Myers

Hearing Officer

January 26, 2006

Re: Due Process Hearing
File Numbers 5769/05-06 KE and 5861/05-06 KE
Student

[Redacted] School District