

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

PENNSYLVANIA

SPECIAL EDUCATION HEARING OFFICER

DECISION

DUE PROCESS HEARING

Name of Child: M.M.
ODR #01394/10-11 JS

Date of Birth:
[redacted]

Dates of Hearing:
September 21, 2010
October 4, 2010
November 1, 2010

CLOSED HEARING

Parties to the Hearing:
Parent[s]

Rose Tree Media School District
308 N. Olive Street
Media, Pennsylvania 19063

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:
Catherine Reisman, Esquire
19 Chestnut Street
Haddonfield, New Jersey 08033

David Painter, Esquire
PO Box 5069
Doylestown, Pennsylvania 18901

November 23, 2010

December 5, 2010

Linda M. Valentini, Psy.D., CHO
Certified Hearing Official

Background

Student¹ was enrolled in the Rose Tree Media School District (hereinafter District) from kindergarten through the sixth grade. The Parents requested this hearing alleging the District failed to offer Student a free appropriate public education (FAPE) through a failure to timely evaluate and identify Student as an eligible student or as a protected handicapped student. The District maintains that Student was identified as a protected handicapped student in a timely manner, is not an eligible student and was not denied FAPE.

Because the Parents asked for public funding of an Independent Educational Evaluation the District also filed a hearing request, but withdrew it with the parties' mutual agreement that the present hearing would address both matters.

For the reasons presented below I find for the Parents on the first issue and award compensatory education. As discussed below on the second issue I also find for the Parents and award public funding for the independent educational evaluation.

Issues

1. Did the School District deny Student a free appropriate public education (FAPE) from October 2008 to the end of the 2009-2010 school year? If the District denied Student FAPE, is Student entitled to compensatory education and if so, in what form and in what amount?
2. Was the evaluation of Student completed by the District in spring 2010 appropriate? If the District's evaluation was not appropriate, must the District pay for the independent educational evaluation performed by a private psychologist?

Joint Stipulations by Counsel²

1. Student, date of birth [redacted] lives with Student's Parents within the boundaries of the School District.
2. The District is a recipient of Federal funds and subject to the IDEA and Section 504 of the Rehabilitation Act and Pennsylvania and Federal regulations implementing these laws.
3. On April 19, 2010 the District issued the evaluation report marked as Exhibit S-19. The ER concludes that Student is not eligible for special education but is a protected handicapped student under Section 504 and Chapter 15.

¹ The decision is written without further reference to the Student's name or gender to provide privacy.

² Exhibit S-52

4. By correspondence dated April 22, 2010 Parents requested an independent educational evaluation.
5. The District filed a complaint for due process rather than fund the IEE requested by the Parents. On July 22, 2010 the District withdrew its complaint docketed at 01026-0910 with the understanding that (A) the Parents had preserved their disagreement with the April 19, 2010 evaluation; (B) the District fulfilled its obligation under IDEA and Chapter 14 to file for a due process hearing for denying the Parents' request for a publicly funded IEE, and (C) the parties understood and intended that the IEE dispute would be addressed in any subsequent proceeding filed by Parents. The parties understand that the Hearing Officer will decide the issue of the appropriateness of the April 19, 2010 ER in the context of this proceeding.
6. Parents provided the IEE by Dr. P, Exhibit S-33, to the District on July 21, 2010. Parents seek reimbursement for this IEE in connection with this proceeding.
7. The parties stipulate that Dr. P, whose resume is included in the exhibits, is an expert in neuropsychology.
8. By e-mail correspondence from counsel dated September 13, 2010, the Parents withdrew their tuition reimbursement claim for the 2010-2011 school year.
9. Although the pre-marked documentary exhibits in this matter were designated as School District exhibits, counsel for the District and the Parents collaborated on the selection of documents in preparation for the hearing such that the documentary exhibits can be regarded as jointly determined exhibits.

Findings of Fact

Background

1. In spring of fourth grade Student reported to the guidance counselor about being teased in school. Student and the counselor worked together periodically to examine ways to address the problem. The guidance counselor had no records of her contacts with Student. [NT 106-107, 116-119; S-4³]
2. The guidance counselor knew that the principal of the Elementary School had spoken with other students regarding their treatment of Student in school. [NT 110]

³ The parties through counsel collaborated in selecting exhibits for the hearing; although exhibits are marked as "S" and referenced as "S" in the record they are Joint exhibits.

3. In April of fourth grade the Parents⁴ emailed the guidance counselor to let her know that they had taken Student to a child psychologist because Student was upset about school, and to ask the counselor for information on local resources to assist Student with self-esteem and peer interactions. No response was forthcoming from the guidance counselor until June 18th. [NT 32-33; S-43 p20]
4. The counselor's response was that she and Student had met a few times in the spring to work out some situations with peers, that the principal had also assisted in speaking with the peers, and that she, the principal and the teacher were working on the roster for the following year "to make sure [Student] has some peers in [Student's] class that [Student] connects with". [S-43 p 20]
5. The school counselor acknowledged that at times Student had legitimate grievances related to how other students treated Student. She also observed that Student sometimes interpreted what other students were doing differently than typical peers might. [NT 119-120]

Evaluation in Fifth Grade: September-October

6. During the summer following fourth grade the Parents requested an evaluation because Student was "hyper", was having a rough time with peers, was isolated on the playground and was crying many nights about school. The District commenced the requested evaluation in September of fifth grade. [NT 32; S-4]
7. Student had been enrolled in the District from kindergarten through sixth grade. From the beginning Student displayed overactive behaviors. In kindergarten Student needed a "smiley (face) chart" to address behaviors. In first grade, if Student had a calm day, the reward would be to go visit the librarian who had been Student's kindergarten teacher. These behaviors continued in subsequent grades. [NT 31; S-33]
8. As part of the evaluation Parents completed a Parent/Guardian questionnaire. Parents indicated that Student was seeing a psychiatrist every other week for social problems and that Student had had trials of Strattera and Ritalin⁵ but with little positive effect. [S-1 p 2, 4]
9. Observed by a guidance counselor for purposes of the evaluation in the homeroom after an outdoors science class Student appeared attentive to instructions but was playing with scissors and a pencil and chewing on a piece of plastic. Student asked a question about the homework but was reminded that Student was in another math class and urged to think before calling out. [NT 115; S-4]

⁴ "Parents" is used here although mother conducted the email correspondence acting for herself and her husband. Both parents were present and testified at the hearing.

⁵ Medications commonly prescribed to address symptoms of ADHD. Student most recently has been prescribed Adderall. [S-33]

10. For purposes of the evaluation, the fifth grade teacher noted that although Student was proficient or advanced in most subjects, in Language Arts Student was only approaching the standard. At times Student had difficulty focusing on reading. However, as assessed during the evaluation Student's Full Scale IQ on the Wechsler Intelligence Scale for Children – Fourth Edition [WISC-IV] was 103, within the average range. [S-4]
11. Although three of the Index Scores on the WISC-IV were within the average range [Verbal Comprehension 108, 70th percentile; Perceptual Reasoning 106, 66th percentile; Working Memory 102, 55th percentile], Student's Processing Speed Index, which assesses skills in mental processing speed, attention and eye-hand coordination was in the low average range, only at the 16th percentile. [S-4]
12. For purposes of the evaluation academic achievement was assessed with the Woodcock Johnson Tests of Achievement – 3rd Revision [WJ-III]. On all subtests addressing reading, math and writing Student scored in the average to high average range, between the 87th percentile and the 35th percentile. Student's single low average score, in the 13th percentile, was on a task of math fluency requiring simple rapid addition, subtraction and multiplication calculations. This score, while still in the broadly average range is notable in comparison with Student's other scores because success requires focus, attention, concentration and perseverance on a relatively easy task. [S-4]
13. The fifth grade teacher noted that Student's problem areas were organization, impulsivity, interrupting others and immature responses. Self-monitoring with post-it notes was a strategy to help Student decrease impulsive outbursts; working with the school counselor to develop more grade-appropriate responses was also occurring. [S-4]
14. The District psychologist testified that she did not consider Other Health Impaired for ADHD type issues because of classroom observations of Student, but there is no documentation in the ER related to any in-classroom observations that she personally conducted or that anyone else conducted other than a brief homeroom period. The Instructional Support teacher observed Student during recess and in the lunch room. The guidance counselor observed Student during a science lesson conducted outdoors, and briefly in homeroom. [NT 278, 293; S-4]
15. Although the District psychologist knew that Student was taking medications that are prescribed to address ADHD she testified that "it wasn't clear that that was agreed on as a diagnosis" and did not pursue clarification beyond saying that she requested but did not receive the diagnosis from the psychiatrist. She did not recall what steps if any she took to clarify her questions. [NT 274-275, 288, 290; S-4]
16. The District psychologist testified that she "thought it was difficult to conclude that [Student] had ADHD because there are many other clinically significant issues at home, particularly anxiety, depression, atypicality, withdrawal and

- developmental social disorders”. [NT 282]
17. When conducting a Re-evaluation a year and a half later, the Middle School psychologist noted a history of ADHD and reported that the medications Student had been prescribed [at the time of the initial evaluation] were used “to treat this symptomology”. [S-58]
 18. Student has a rough time with children Student’s age; peers think Student is annoying. Student is “hyper”, does not take cues from others, and speaks at a loud volume without realizing it. Student can converse well with adults, more easily than with kids. [NT 31, 35]
 19. Student consistently demonstrated behavior that was annoying to peers. [NT 347, 354, 364-365, 371, 376, 403-404, 513-517, 617-618; S-1, S-13, S-19]
 20. An observation was done by an Instructional Support teacher for purposes of the evaluation on September 29th. In the play yard Student interfered with a cooperative ball-catch game and annoyed the 20 other students involved in the game by throwing and catching a hula hoop and running in front of the game until one of them told Student to “Move!” [S-4]
 21. The observing teacher noted that in the lunch room, following recess, Student watched another student eat and then began stuffing 4 or 5 grapes at a time into [Student’s] mouth with both hands; after seeming to become annoyed with the conversation at the table Student moved to another table, speaking briefly to peers and then finishing lunch. [S-4]
 22. In an observation by a school counselor in September Student went over to tell the science teacher it was 3:00 [the time class should be over] even though the teacher was finishing up something with other students. [S-4]
 23. The Parents were given the Gilliam Asperger’s Disorder Scale (GADS) to complete. Based on the Parents’ responses, Student scored an Asperger’s Disorder Quotient of 82 which is considered within the range of High/Probable of meeting criteria for the disorder. The fifth grade teacher was also asked to complete the GADS, and the Asperger’s Disorder Quotient was a 68 which is within the Low/Not Probable range. [S-4]
 24. The District psychologist concluded that “There is not enough evidence at this time to diagnose [Student] with Asperger’s Disorder. The District psychologist did not discuss in the report why the available information was not sufficient and what criteria were missing, or how and whether she would attempt to acquire additional needed information. [S-4]
 25. Student is a child considered by adults to be oversensitive. [NT 120, 134, 668; S-4, S-19]

26. Student's BASC-2 Self- Report yielded At Risk scores on Social Stress and Anxiety. Student's endorsements as "Almost Always" included: I get nervous, people tell me I am too noisy. "Often" responses included: I am afraid I might do something bad, I am afraid of a lot of things, I forget things, I feel depressed, I am lonely, I am left out of things, I am bothered by teasing, and I am good at schoolwork. [S-4]
27. Student was given the Revised Children's Manifest Anxiety Scale (RCMAS) and was "unusually honest" in completing the questionnaire. Student's Total Anxiety Score was equivalent to the 94th percentile indicating that Student was "experiencing a significant amount of anxiety". On the Physiological Anxiety Scale Student scored in the 75th percentile, and on the Worry/Oversensitivity Scale Student scored at the 96th percentile. [S-4]
28. The District psychologist testified "because of the anxiety [she] decided [she] needed to look at Emotional Disturbance". In her ER she quoted the IDEIA definition for Emotional Disturbance which included one or more, over a long period of time of the following: "an inability to build or maintain satisfactory interpersonal relationships with peers and teachers, inappropriate types of behavior or feelings under normal circumstances, a general pervasive mood of anxiety or unhappiness or depression". [S-4]
29. Although the District psychologist concluded that Student "is experiencing significant symptoms of anxiety as well as difficulties with attention and impulsivity" she concluded that the symptoms were not impacting learning at school to a significant degree and that "social difficulties at school are being managed through regular meetings with the counselor including problem solving of social skills issues, observations and frequent checking in with [Student]". She encouraged the family to "consider ongoing psychotherapy for [Student]". She did not classify Student as having Emotional Disturbance because she did not see Student's academics being affected. She testified that she thought the anxiety had to be "disabling" for an Emotional Disturbance classification. [NT 273, 276, 285-286; S-4 p 13]
30. On the Behavioral Assessment System for Children -2 [BASC-2) the fifth grade teacher's ratings yielded At-Risk scores for the areas of Hyperactivity, Anxiety, Depression, Internalizing Problems, Atypicality, Withdrawal and the overall Behavioral Symptoms Index. Student was also, according to the teacher's ratings, At-Risk in Adaptability, Developmental Social Disorders and Resiliency. [S-4]
31. Problematic items endorsed by Student's teacher on the BASC-2 as being seen "Often" were: has trouble staying seated, bothers other children, cannot wait to take a turn, has a short attention span, is easily distracted, plays alone, is nervous, complains about being teased, and is overly active. [S-4]
32. The Parents' BASC-2 responses reflected Clinically Significant scores in the areas of Hyperactivity, Anxiety, Depression, Internalizing Problems, Atypicality,

- Withdrawal and the overall Behavioral Symptoms Index, and an At-Risk score in the area of Attention Problems. Student was also, according to the Parents, showing Clinically Significant problems in the area of Developmental Social Disorders and At-Risk functioning in the areas of Executive Functioning, Emotional Self-Control and Negative Emotionality. [S-4]
33. Problematic items endorsed by the Parents on the BASC-2 at a high level were: hyperactivity, anxiety, depression, atypicality, withdrawal, and developmental social disorder with concerns at a lesser degree in executive functioning, emotional self-control and negative emotionality. [S-4]
 34. The Parents and the fifth grade teacher completed the Connors' Rating Scales. The teacher's ratings placed Student in the Mildly Atypical range on Hyperactivity, ADHD, Restless-Impulsive, and Hyperactive-Impulsive symptoms, in the Moderately Atypical range on Anxious-Shy, and in the Markedly Atypical range on Social Problems. [S-4]
 35. The Parents' Connors' ratings placed Student in the Mildly Atypical range on Cognitive Problems/Inattention, Anxious-Shy, and Inattentive and in the Markedly Atypical range on Hyperactivity, Social Problems, ADHD, Restless-Impulsive and Hyperactive-Impulsive. [S-4]
 36. Despite the presence of a variety of sources of support for two disabling conditions – ADHD and “significant” anxiety⁶, the District psychologist did not find that Student had a disability. She did think that Student needed psychotherapy however, and recommended that the Parents procure it privately for Student. [S-4]
 37. As she did not find that Student had a disability, the District psychologist did not find that Student was a protected handicapped student under Section 504 and did not recommend a Section 504 Service Plan, although she noted with approval the “management of anxiety” through regular meetings with the counselor including problem solving of social skills issues, observations and frequent checking in with [Student]”. [S-4]
 38. Despite the presence of a variety of sources of support for three of the possible eligibility categories under IDEIA - Autism (social skills deficits including plays alone, interrupts others, misses social cues and bothers other children), Other Health Impairment (ADHD), and/or Emotional Disturbance (inability to maintain satisfactory interpersonal relationships with peers, inappropriate types of feelings under normal circumstances, anxiety), the District psychologist focused only on academics and concluded that Student did not have an IDEIA disability classification and that Student was ineligible for special education. [NT 285; S-4]
 39. The guidance counselor who had been working periodically with Student from the

⁶ Along with “not enough” evidence at the time to support a diagnosis on the autism spectrum.

previous year did not attend the MDT meeting following the evaluation. The District's psychologist told the Parents that Student was not eligible for special education because Student did not meet the criteria for a student with an emotional disturbance. She did not discuss Other Health Impairment (ADHD) or Autistic Spectrum Disorder (Asperger's). As she had not found a disability, she did not discuss possible status as an eligible handicapped student or discuss a 504 Service Plan. [NT 36-37, 276-277; S-4]

40. Although she testified when asked that she did consider whether Student was a protected handicapped student, the District psychologist did not document that consideration anywhere in the ER and did not discuss it with the Parents. She recalled that the Parents were provided with "the special education paperwork" but not "anything specific about the 504". [NT 276-278]

Remainder of Fifth Grade:

41. On January 20 the Parents wrote to the guidance counselor and asked about the status of promised "regular" meetings with Student related to social skills given that the District psychologist had found that these were in place to address Student's anxiety and social skills. The following day the counselor responded that she was sorry for the delay and that she and the fifth grade teacher had chosen Fridays for Student's meetings with her. She did not indicate that she had been having any of what the District psychologist called "regular" meetings with Student between October 22, the date of the ER, and January 21,. [NT 122-123; S-43 page 22]
42. Student is very literal. On one occasion during the fifth grade school year when the gym teacher told Student to "get out" of the gym Student packed up and left the gym, and then got into trouble for disrespecting the teacher. The Parents needed to interpret Student to the gym teacher who then apologized to Student. [NT 38-39]
43. Toward the end of the fifth grade year Student's teacher reported to the Parents that he "had to take several items away from [Student] as they were causing both [Student] and others to be distracted." The teacher reported to the Parents that Student had difficulty getting along with peers. [NT 305-306; S-51 page 72]
44. In fifth grade the principal called some students to his office and, when asked if they knew why they were there, they guessed that it was because of the bullying of Student that went on in [a music] class. [NT 40-41]
45. In testimony the fifth grade teacher confirmed that Student demonstrated social and emotional challenges during that year. [NT 538-539]
46. During fifth grade, Student continued to have difficulty working appropriately in a group setting. [NT 513]
47. The fifth grade teacher had to intervene a little more than half the time during the school year to ensure appropriate group interactions when Student was involved. [NT 517]

48. Student's classmates complained about behaviors that were related to Student's impulsivity. [NT 514-515]
49. The fifth grade teacher testified that he did not have a sense that he was successful in addressing Student's behavior in group settings. [NT 518]
50. The fifth grade report card related to the general education curriculum at Student's elementary school included an evaluation of the children's "Learning Qualities", and children were assessed on such things as organization of time, tasks and materials; completes class work on time; completes homework on time; demonstrates independence; works cooperatively, shares and receives information and ideas; demonstrates respect for self and others, accepts responsibility for own actions; listens without interrupting, and exercises self-control. Student was given N (Needs Improvement) once or more in each of these enumerated categories, despite acceptable grades in academics. [NT 271, 528-529, 545; S-31 page 4]

Sixth Grade:

51. Student was one of only two students for whom the Elementary School guidance counselor wanted to ensure that accurate information was transferred to the Middle School. The District actively implemented a transition process for Student from Elementary School to Middle School. [NT 135, 140-144, 206-208]
52. By mid-September the Explorer Team⁷ of the sixth grade was already discussing Student, the topic being an untoward reaction to having to fill out an 'unprepared' slip, a fairly routine requirement for the class. [NT 339-340]
53. In October Student was referred to the Child Study Team as Student demonstrated the need for additional support. Teacher(s) noted concerns similar to those in the previous year, including impulsivity (calling out, attention seeking, lacking coping strategies) and social/emotional concerns (not reading social cues, reactions outweigh situations, outbursts of tears, paper crumpling and throwing, stomping, eating paper/used tissues, trouble relating to peers). [NT 145; S-6 at 6]
54. As had been the case the previous year, Middle School staff indicated that Student had difficulty working with peers, chose to work alone, and was inflexible. In addition, when interacting with school staff, Student needed immediate attention, engaged in persistent attention seeking behaviors, and interrupted adult conversations. [S-6 at 6]
55. On November 10th the Child Study Team referred Student to the Academic Intervention process. The "Initial Meeting Form" noted problems with "focus, outbursts, calling out, reaction to redirection, and working well with others." [NT 152-152, 603; S-7 at 1]
56. District staff recorded no quantitative data regarding the effectiveness of pre-referral interventions. [NT 151-152, 600-602; S-6 at 9]

⁷ The Middle School students were divided into Teams and each Team had its own set of teachers. This is not to be confused with a MultiDisciplinary team or an IEP team.

57. In mid-November, the Parents were made aware of a “Think Sheet” form that was being used by the teachers on Student’s Team to address Student’s behavior. Think sheets were a regular education intervention and could be used with any student. The teachers used a nonverbal signal to give Student the choice to refocus on what the class was doing or take a break in the team center. [NT 47-48, 607-608; S-1 page 59]
58. On November 13th, one of Student’s teachers wrote to Parents that Student’s behavior in front of the class when requesting frequent restroom breaks was inappropriate, “[Student] chooses to do this with the entire class watching, which worries me, knowing that [Student] has had some bullying issues already this year.” [S-51 at 62]
59. At the December meeting, the Middle School psychologist suggested that the family pursue outside services for Student in the form of social skills groups. [NT 53-54, 605-606; S-7 at 2]
60. Beginning in December, the District began using “Tracking Sheets” with Student; however Student routinely entered all or part of the data on the Tracking Sheets. Various Tracking Sheet problems were noted on one or more occasions including but not limited to: teachers did not review the data Student entered, teachers did not initial the data, Student calculated the percentages and not always correctly, data was entered for a class to which the Tracking Sheet was not carried, when calculating the percentage Student ignored negative input from the teacher because Student did not agree with it, Student re-scored the teacher’s ratings because in Student’s opinion the teacher was wrong, Student miscounted negative marks, Student ignored negative data and left it out of calculations when Student perceived self not to be at fault, and Student frankly ignored negative data when calculating. [NT 353-355, 630; S-29]
61. The Middle School psychologist nevertheless described the Tracking Sheets as “a big part of our plan” that offered the Parents documentation of how Student was doing in school. [NT623]
62. Although the sixth grade science teacher, who met daily with other teaching team members, concluded that Student showed improvements on behaviors that were the focus of the Academic Intervention Team, the District had no baselines for any of the behaviors being tracked on the tracking sheets. [NT 331, 338-339, 373, 389-390, 397-398, 620-621]
63. The District did not begin tracking the number of “reminders” that Student needed until April 13th. [S-29 at 37]
64. On October 27th the Explorer Team met with the Parents who reported Student was crying at bedtime and complaining about problems at lunch. [NT 341-342]
65. Student began eating in the classroom with a few peers rather than the cafeteria at the end of October or beginning of November. At times peers asked teachers to intervene because of Student’s controlling behavior. In January, Student began eating instead with the guidance counselor because the teachers’ contract

- specified that they have a lunch break away from students. [NT 161, 164, 343-348; S-8]
66. By January 13th Student was eating lunch out of the cafeteria five days a week. [NT 168]
 67. As of March the Middle School psychologist who served on the Academic Intervention Team began eating lunch with Student once a week. [NT 574-575]
 68. As of April after a meeting with the Parents the Middle School psychologist also had Student check-in once a week to see if there were any concerns and to problem-solve concerns. [NT 574-575]
 69. After a February incident, Student ate lunch in a room adjacent to a District administrator every day. [NT 241-242, 309-310]
 70. In Middle School, as in Elementary School, Student continued to have difficulty with appropriate social interaction. [NT 38-39]
 71. As did the fifth grade classroom teacher, the sixth grade science teacher throughout the year (with some mid-year improvement and later regression) observed and had to intervene in problems Student had when working in a small group. Student wanted to control the group and the other students became frustrated with this. [NT 371-374]
 72. In February, Parents expressed concern to the academic support teacher and the guidance counselor that some students were posting insults about Student on Facebook. [S-43 at 8]
 73. On February 24th Parents expressed a concern to District personnel related to bullying Student had experienced in the locker room on that date. [NT 69, 181-182; S-43 at 28-29]
 74. Using the “SLMS Bully Prevention Student Reporting Form” another student reported that Student was bullied. The District investigated the incident by interviewing the participants and other students corroborated Student’s assertion about being bullied. The accused student admitted that he pushed Student into the locker. [NT 181-184, 186-187; S-40, S-41]
 75. One sixth grade classmate whose sibling was a sitter for Student’s family, submitted a bullying referral form concerning Student, stood up for Student on the Facebook postings, and, alerted staff to a concern about what might happen at a Paint Ball birthday party to which Student had been invited. [NT 227-228; S-41, S-50, S-51]
 76. During sixth grade from November 17th to May 20th the District investigated five separate incidents involving a variety of interactions between Student and peers at school: Student yelling and attacking a child; Student telling others to “Shut up;” Student and/or others throwing Student’s shoes in the locker room; another student putting his hand around Student’s throat and pushing Student against the locker; a peer teasing Student for wearing “[redacted]”; Student being pushed or

accidentally bumped into a wall when students were crowded together; Student pushing ahead and butting in line resulting in other students pushing Student back to the end of the line; and Student being spit upon, or, getting splashed with drinking water. [NT 58-60, 69-70, 178-185, 238-253, 257-260, 262-263, 265-266; S-19,S-40, S-43, S-50]

Re-Evaluation in Sixth Grade: April

77. In February Student had a consult at a local hospital for children, and the physician who also sought input from the District wrote that Student “meets criteria for ADHD, combined subtypes.”⁸ [Student] is exceptionally bright and as a result may be compensating for the inattentive ADHD symptoms. At this time these symptoms are impacting mostly on [Student’s] social relationships and causing [Student] significant distress.” [NT 177; S-9, S-43]
78. The hospital’s physician also concluded that Student “meets criteria for Overanxious Disorder. [Student] worries excessively about things and can’t always control the worries. The anxiety appears to have been more evident in the past and now it may be more covert.” [S-9]
79. The hospital’s physician concluded that Student was experiencing “significant social difficulties” that “may be due in part to the ADHD as well as to difficulties picking up and interpreting social cues.” She also found that the social difficulties were aggravated by harassment [Student] was experiencing in school. [S-9]
80. In March the Parents had Student evaluated privately by a certified school psychologist. The examiner noted Student’s need for multiple breaks and reminders to stay on task, and that work style and inattention interfered with performance. [S-18]
81. The evaluator noted the Behavior Assessment System for Children (BASC) self-report indicated that Student was aware of experiencing anxiety and attention issues. Student told the evaluator that peers found Student ‘annoying or weird’. She noted that neurological dysfunctions “make large quantities of work seem difficult as well as cause difficulty with social interactions and interpretations of those actions”. The report was shared with the District as soon as it became available. [S-18]
82. Student began private therapy after the hospital evaluation; therapy consisted of behavioral treatment for ADHD and cognitive behavioral treatment for anxiety. [NT 667, 679-680]
83. Student was clearly distressed in treatment about teasing/bullying, real or perceived, and the therapist noted that Student sometimes felt persecuted even when others’ actions were within the realm of normal childhood behavior. [NT 668-669]

⁸ The Diagnostic and Statistical Manual of the American Psychiatric Association- Fourth Edition (DSM-IV) codes ADHD Combined Type as having elements of both hyperactivity and attention deficits, as opposed to one or the other symptom predominating.

84. Parents met with District personnel on March 1st to discuss their concerns about the locker room incident. At this time they provided the hospital evaluation to the District. [NT 577, 579]
85. The need for an evaluation through the District was discussed at the March 1st meeting. [NT 71-73, 577-579]
86. Parents asked the District to provide Student with a 504 Plan pending completion of further evaluations. [NT 318, 329-330]
87. The principal directed the Middle School psychologist to issue a Permission to Evaluate for 504 eligibility after reviewing the hospital psychiatric. On March 3rd the District issued a permission to evaluate to determine whether Student was a protected handicapped student under Section 504 and PA Chapter 15. [NT 579, 610; S-10, S-11, S-15]
88. Upon further reflection and considering the volume of information that had to be taken into account given private psychiatric and psychometric evaluations, the District decided to issue a Permission to Evaluate for IDEIA eligibility. This decision was discussed among the Middle School psychologist, the director of special education and District's legal counsel. [NT 579-580, 610-612, 616; S-14]
89. On April 9th the Parents met with the District to discuss a revised permission to evaluate for special education eligibility. They signed another permission to evaluate, with the understanding that the District would complete the Evaluation Report by April 19th the completion target date of the original permission to evaluate for 504. [NT 73, S-4 at 3, S-43 at 40]
90. At the April 9th meeting, the Parents were told that the counselor was forming a social skills group, and that it would begin on April 16th. The social skills group was part of the general education program at the Middle School, and was not specially designed instruction in social skills. Any student could elect to attend groups and the groups were generic with typical themes⁹ such as social skills, study skills, identifying support systems, and grief. [NT 191-192, 647-650; S-43 at 40]
91. The District has no data related to Student's progress in any areas of need, including baselines, specific goals, or progress reporting from the social skills group in which Student participated since mid-April of sixth grade. [NT 393-394, 402, 492]
92. The District began its re-evaluation in April. Student's teachers reported that Student had difficulty socially in class, and that the social difficulties often resulted in negative reactions from peers. The District's Middle School psychologist testified that there was nothing in the teachers' input forms that he did not already know about Student. [NT 613-614; S-13]

⁹ To implement the social skills group, the guidance counselor used the curriculum in Chapter 12 of a book called "Support Groups for Children."

93. On the teacher input form the Spanish teacher wrote that Student was “extremely annoying in every way to other students. [Student] makes []self an easy target”. The same teacher wrote, “In general, students become angered with [Student’s] antics”. Further, in response to the question ‘What behavior issues if any interfered with learning of the student or of others in the class?’ the teacher wrote, “[Student] is extremely defensive and bossy”. [NT 617; S-13]
94. The Middle School psychologist thought that the behaviors noted by the Spanish teacher could have been related to Student’s anxiety. The Middle School psychologist told Student’s therapist that he had observed that when Student became anxious Student became more controlling and that hurt relationships with peers. [NT 618, 671-672]
95. Student’s teachers noted social concerns with Student throughout the sixth grade year, with some improvement. However the math teacher in March noted that Student’s “attention-getting” behaviors were interfering with Student’s learning or that of others, and the science teacher noted interference from “preoccupation” and “perseveration” on something. [NT 620-623]
96. The Middle School psychologist who performed the District re-evaluation and has administered at least 500-800 evaluations testified that he had to prompt Student “perhaps more” than children [Student’s] age and that [Student] was slightly more fidgety in terms of working one-on-one. [NT 586-587]
97. When the Middle School psychologist observed Student in class the teacher noted that Student did a “particularly good job of working independently” on that day and that in contrast to that day Student “often requires a great deal of direct feedback from her”. Nevertheless the Middle School psychologist did note that during the class Student called out “Please be quiet!” to the rest of the class, tended to use the loudest voice during a small group activity, and did appear to become somewhat frustrated when the teacher did not always check Student’s group’s response first. [S-58]
98. During testing the Middle School psychologist noted that despite being “exceptionally motivated and highly persistent throughout” the evaluation Student was “exceptionally enthusiastic” when doing well with a task which was usually the case but also became “more disappointed/frustrated than expected” when not meeting with success. Student was “rather fidgety”, “easily distracted”, and “needed a great deal of prompting to stay on task”. After one hour and fifteen minutes Student “appeared to become somewhat mentally fatigued” so the assessment had to be completed in a second session. [S-58]
99. On the Connors 3 Self-Rating Scale Student scored at the Very Elevated level on Inattention, Hyperactivity/Impulsivity, ADHD Hyperactive/Impulsive Type, Aggression and Oppositional Defiant dimensions. [S-58]
100. On the Connors 3 Parent Rating Scale Student was Very Elevated for Inattention, ADHD Predominantly Inattentive Type, Hyperactivity/.Impulsivity, ADHD Hyperactive/Impulsive Type, Learning Problems, Executive Functioning

- and Peer Relations. [S-58]
101. On the BASC 2 Parent Report Student scored in the Clinically Significant range on Hyperactivity, Anxiety, Depression, Somatization, Atypicality, Withdrawal, Attention Problems and Activities of Daily Living. [S-58]
102. On the BASC 2 Teacher Report form the science teacher and the advanced math teacher both endorsed items contributing to a Clinically Significant score on Atypicality and Withdrawal and At-Risk scores for Hyperactivity, Somatization, Attention Problems, and Adaptability. [S-58]
103. On the 16 dimensions covered by the BASC-2 (which combine in groups to form composites) the two teachers' endorsements resulted in *exactly* the same results dimension by dimension. On the 139 individual items, each of which can be rated as Never, Sometimes, Often or Always, the two teachers posted different ratings on *only three* items, #27 [has headaches], #29 [gets upset when plans are changed], # 43 [tries to bring out the best in people], and both teachers skipped #50 [has trouble getting information when needed].¹⁰ [S-58]
104. The Re-evaluation Report was issued on April 19th. The evaluator had made two administration errors affecting the scoring which he caught after the RR was issued so a new RR was prepared and given to the Parents. The errors negligibly affected the outcome of the assessments. [NT 682-586; S-19, S-24]
105. Although Student earned only a Basic score on Writing in the 5th grade PSSA testing in comparison to Proficient Reading and Advanced Math, for purposes of the evaluation, in assessing Student's written expression skills the Middle School psychologist used the very outdated Wechsler Individual Achievement Test (WIAT), which has been re-normed twice since its original release.¹¹ The District had no other recent standardized assessment of written expression in its files to provide information on this academic area. [NT 594-597; S-58]
106. The re-evaluation report did not include teachers' written comments that Student's behaviors and social skills deficits interfered with Student's learning and that of others. The report did not reflect the extent to which the teachers observed that Student's behavior annoyed peers and in fact made Student a "target". [S-58]

¹⁰ This concordance is remarkable if not astonishing. The fact that the identifying information at the top of the questionnaires seems to have been filled out by the same person is not necessarily remarkable as the psychologist could have filled this portion in before giving the teachers the forms. The science teacher's testimony suggested that she thought she was the one teacher who had been picked to fill out the form. (NT 379)

¹¹ The WIAT II and the WIAT III. When a standardized test is re-normed it is more difficult to obtain a certain score since the test gets somewhat harder as the population gets somewhat smarter. The problem then becomes that if an earlier version is used to look at academic proficiency, the test-taker may score better than he/she actually is functioning compared to the rest of the current population of test takers. If an evaluator were using the "Discrepancy Model" to see if achievement matches cognitive ability, and a comparison were made between the old WIAT and the relatively new WISC-IV, an actual discrepancy could be masked.

107. Student was reporting nearly daily teasing/bullying to the Middle School psychologist and that likewise was not reflected in the RR [NT 642]
108. The Middle School psychologist acknowledged that Student's anxiety "played a role in" the behaviors that led to bullying by classmates. [NT 618]
109. The Middle School psychologist made no mention in his evaluation report of any attempt during the evaluation, in the interest of exploring all possible exceptionalities, to discern whether or not Student was on the autistic spectrum (specifically Asperger's Disorder) despite the previous District evaluator's disparate results when assessing the possibility and her noting in her report that, "[t]here is not enough evidence at this time to diagnose [Student] with Asperger's Disorder". [S-4, S-58]
110. The RR concluded that Student was not eligible for special education but is a "protected handicapped student" under Section 504 and Chapter 15. [S-52]
111. The Middle School psychologist who evaluated Student believes that Student has needs in the area of social skills training and support, but does not believe that social skills instruction is specially designed instruction. [NT 632-633, 659]
112. In June Parents enrolled Student in private social skills training. The provider identified needs in the areas of reciprocal conversations, conversing without interrupting, recognition of the intent of others' comments and actions, ability to read social cues, increasing self-esteem, decreasing anxiety, and expressing appropriate emotional responses. [NT 314; S-48]
113. The Middle School psychologist testified that if social skills training and support did constitute specially designed instruction then he would change his opinion and find that Student would be eligible for special education under the IDEA. [NT 632-633]
114. On April 27th at the MDT meeting the District provided Parents with a Section 504 Service Agreement, but the team did not discuss the Service Agreement. The Parents believed that the interventions contained in the Service Agreement were already in place and were not working. [NT 75-76, 320, 331, 646, 661; S-32]
115. The Middle School psychologist testified that some elements of the Service Plan were good teaching practices for teachers of sixth grade students and many if not all of them were already in place during sixth grade for Student and the students in general. [NT 651-656]
116. In spring of sixth grade Student began to avoid school because of concerns about interactions with peers. Student returned to school after an incident only after meeting with his treating psychologist and addressing anxiety about the

situation at school. [NT 673-674]

Independent Educational Evaluation

117. On April 22nd the Parents requested an independent educational evaluation [IEE] specifically a full neuropsychological evaluation.¹² [NT 75; S-20]
118. The Independent Evaluator opined that the District's Re-evaluation incorrectly concluded that Student was not eligible under IDEA and Chapter 14 and Student was entitled to special education. [NT 446]
119. The Independent Evaluator found, based on her evaluation, District's Re-evaluation, input from District staff, the hospital psychiatric report and input from Student's therapist that Student was IDEIA-eligible for classification as a student with Other Health Impairment in accord with state and federal regulations. [NT 446, 486]

Discussion and Conclusions of Law

During this hearing both parties presented testimony and documents regarding bullying and/or teasing; there is no bright line between the two because what may be interpreted as "teasing" by one child might be perceived as "bullying" by another child who is sensitive and anxious or who misinterprets social cues. The District cautions this hearing officer to appreciate the limits to a school's ability to exercise total control over teasing/bullying, while the Parents would have this hearing officer appreciate the extent to which teasing/bullying adversely affected Student.

However, for purposes of this decision and the relief sought, it is not necessary for this hearing officer to reach the question of whether Student was bullied/teased, how frequently and with what intensity and with what effect Student was bullied/teased, or whether or not the District fulfilled its obligation to protect Student from bullying/teasing. The intersection between the issues that this hearing officer must address and bullying/teasing lies solely in the determination of whether the *behaviors* Student presented that may have made Student a "target" and/or the *emotional* and *social* difficulties Student had that may have led to misinterpretation of or over-reaction to normal childhood/preadolescent interactions constituted a disability or not, and then whether by virtue of that disability Student required a 504 Service Plan or specially designed instruction.

During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make "express, qualitative determinations

¹² The District denied the request and filed for a hearing. See Stipulations.

regarding the relative credibility and persuasiveness of the witnesses”. Blount v. Lancaster-Lebanon Intermediate Unit, 2003 LEXIS 21639 at *28 (2003). In this matter I have given considerable weight to the Parents’ testimony; it was clear that they diligently sought help from the District, shared all relevant information in their possession and were open to acknowledging that their child demonstrated behavioral, social and emotional problems. The same weight could not be given to the District’s most relevant witnesses. The first evaluating psychologist’s reasoning as put forth in testimony and in the ER was not sound and in fact resulted in an incorrect conclusion from the outset that affected all the District’s subsequent dealings with Student. Unfortunately the Middle School psychologist’s testimony and report could not be credited with much weight either, Although he did find Student was disabled, given the more than ample information to suggest that regular education initiatives were not working, he nevertheless withheld a finding that Student required specially designed instruction. Overall during their testimony the District’s witnesses seemed focused on defending the conclusions of the first evaluation completed in fifth grade in October rather than acknowledging the existence of an alternate point of view. In one instance discussed below it is suspected that District personnel compromised assessment data taken for the April sixth grade re-evaluation by copying one another’s responses.

Our United States Supreme Court has held that in an administrative hearing brought under the IDEIA the burden of persuasion, which is one element of the burden of proof, is properly placed upon the party seeking relief. Schaffer v. Weast, 126 S. Ct. 528, 537 (2005). The party bearing the burden of persuasion must prove its case by a preponderance of the evidence¹³. Jaffess v. Council Rock School District, 2006 WL 3097939 (E.D. Pa. October 26, 2006). Therefore in order for this hearing officer to award the relief sought, Student’s parents must present a preponderance of convincing evidence to support their position on the issue of denial of FAPE and the District must bear the burden of persuasion on the issue of the appropriateness of its 2010 evaluation. However, the burden of persuasion under Schaffer only comes into play when neither party introduces a preponderance of the evidence. In that event, evidence is evenly balanced, or in "equipoise" as the Court put it, as the party having the burden of persuasion failed to tip the evidence scale in its favor and thus cannot prevail. In this matter an analysis under Schaffer is not applicable as the Parents have clearly met their burden of proof, having produced preponderant evidence discussed below that the District denied Student a free appropriate public education from October of fifth grade to the end of the sixth grade school year. The District failed to meet its burden of producing a preponderance of evidence that its re-evaluation completed in April of sixth grade was appropriate, and therefore the Parents prevailed on the second issue as well.

Eligibility

Special education issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA) which took effect on July 1, 2005. 20 U.S.C. § 1400

¹³ A “preponderance” of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. Dispute Resolution Manual §810.

et seq. The IDEA sets forth the responsibilities (commonly referenced as “child find” responsibilities) borne by school districts for identifying which children residing in its boundaries are in need of special education and related services such that “[all] children with disabilities residing in the State...regardless of the severity of their disabilities...are identified, located and evaluated...” 20 U.S.C. §1412(a)(3). Parents do not have a duty to identify, locate, or evaluate their child pursuant to IDEA. This obligation falls squarely upon the district. Hicks, ex rel. Hicks v. Purchase Line School Dist. 251 F.Supp.2d 1250, 1253 (W.D.Pa., 2003), citing, M.C. v. Central Reg'l Sch. Dist., 81 F.3d 389, 397 (3d Cir.1996).

In its April of sixth grade re-evaluation the District determined that Student has a disability. However, the initial evaluation conducted eighteen months prior in September/October of fifth grade, found that Student did not have a disability. The first inquiry in this hearing then is twofold: “When should the District reasonably have suspected that Student had a disability?” and “Did the Student then require a 504 Service Plan or an Individualized Education Plan?”

Parents’ counsel posed the question, “What did the District know and when did it know it?” District’s counsel reminds this hearing officer that the Third Circuit set forth a clear rule that courts and hearing officers cannot engage in “Monday Morning Quarterbacking” whereby armchair “quarterbacks” take what is known after the outcome of the game to criticize the play-calling that occurred during the game the preceding day.” Fuhrman v. E. Hanover Bd. of Educ., 993 F.3d 1031 (3d Cir. 1993). Clearly it is necessary to look at exactly what the District knew in October of Student’s fifth grade when it completed its evaluation.

In October of fifth grade the District knew from its five years of experience that Student had displayed overactive behaviors in kindergarten and needed a “smiley (face) chart” to address behaviors and that in first grade, “a calm day” earned Student a special reward. [FF 1] In October of fifth grade the District knew from the Parents that Student had seen a child psychologist, that Student was seeing a psychiatrist every other week for social problems and that Student had had trials of Strattera and Ritalin, medications prescribed for Attention Deficit Hyperactivity Disorder. [FF 3, FF 8] In October of fifth grade the District knew from the guidance counselor that even when Student appeared attentive, Student played with items and chewed on non-edibles and forgot for a moment which math class Student attended. [FF 9] In October of fifth grade the District knew from the fifth grade teacher that Student had difficulty focusing on reading, and although of average intelligence was not doing as well in language arts as in other subjects. [FF 10, FF 11] In October of fifth grade the District knew from the fifth grade teacher that Student had difficulty in the areas of organization, impulsivity, interrupting others and immature responses. [FF 13] In October of fifth grade the District knew from its own psychologist’s testing that Student’s skills in mental processing speed, focus, attention, concentration and perseverance fell below skills in other areas assessed. [FF 11, FF 12] In October of fifth grade the District knew from multiple sources including the instructional support teacher that Student consistently demonstrated behaviors that were annoying to peers. [FF 19, FF 20, FF 21] In October of fifth grade the District knew from the

guidance counselor that Student interrupted and was bossy with teachers. [FF 22] In October of fifth grade the District knew that on a structured instrument assessing Asperger's Disorder the Parents were reporting symptoms of significant social skills deficits. [FF 23] In October of fifth grade the District knew from multiple sources that adults considered Student to be oversensitive. [FF 25] In October of fifth grade the District knew from the Student's responses to a structured instrument that Student was nervous, was considered by others to be too noisy, was afraid of doing something bad, was afraid of a lot of things, forgot things, felt depressed, was lonely, was left out of things, and was bothered by teasing. [FF 26] In October of fifth grade the District knew from the fifth grade teacher that Student often had trouble staying seated, bothered other children, could not wait to take a turn, had a short attention span, was easily distracted, played alone, was nervous, complained about being teased, and was overly active. [FF 31] In October of fifth grade the District knew from its psychologist that results of a structured scale assessing anxiety showed that Student was suffering from a significant amount of anxiety and was worried and oversensitive. [FF 27] In October of fifth grade the District knew that Student's fifth grade teacher endorsed items on a rating scale that yielded a finding of "markedly atypical" on Social Problems. [FF 34] In October of fifth grade the District knew that its psychologist thought Student should have regular meetings with the guidance counselor to manage anxiety and social issues [FF 37], and in October of fifth grade the District knew that its psychologist thought Student should receive psychotherapy and recommended that the Parents procure it. [FF 36]

Notwithstanding all these things that the District knew in October of fifth grade, the District's multidisciplinary team adopted its psychologist's opinion that Student did not have a disability. The District psychologist's reasons for not finding that Student had a disability were put forth in the Evaluation Report and in her testimony.

The District psychologist did not find that Student qualified for a diagnosis of Attention Deficit Hyperactivity Disorder or a classification of Other Health Impaired. She testified that she made this determination partially based on classroom observations of Student, but neither she nor the two individuals who conducted observations for purposes of the evaluation observed Student in a classroom, other than a brief homeroom period. She also testified that she knew that Student had taken medications that are prescribed to address ADHD, but that "it wasn't clear that that was agreed on as a diagnosis" and did not recall what steps if any she took to clarify her questions. Finally she testified that she "thought it was difficult to conclude that [Student] had ADHD" because there were many other clinically significant issues at home, particularly anxiety, depression, atypicality, withdrawal and developmental social disorders".

Turning to social disorders we see that the District psychologist also rejected a finding that Student had Asperger's Disorder, a social atypicality that is an autism spectrum disorder. She knew that Student did not take cues from others, could converse well with adults but not with peers, consistently demonstrated behavior that was annoying to peers, and was inappropriately bossy with teachers and peers. Although she had results from the Parents' GADS ratings that placed Student in the "High/Probable" range for meeting criteria/guidelines for the disorder, she gave more weight to the ratings of the teacher, and concluded that "There is not enough evidence at this time to diagnose [Student] with

Asperger's Disorder". There was no discussion in the ER about why the available information was not sufficient, what information was missing, or how and whether she would attempt to acquire additional essential information to rule in or rule out this viable diagnosis/classification.

Finally, despite her assertion that Student had many other clinically significant issues particularly anxiety, depression, and withdrawal the District psychologist did not find that Student had an Emotional Disturbance. In the ER she quoted the IDEIA definition of Emotional Disturbance which included one or more, over a long period of time of these characteristics: "an inability to build or maintain satisfactory interpersonal relationships with peers and teachers, inappropriate types of behavior or feelings under normal circumstances, and a general pervasive mood of anxiety or unhappiness or depression". Although the District psychologist found that Student was "experiencing significant symptoms of anxiety as well as difficulties with attention and impulsivity" she concluded that the symptoms were not impacting learning at school to a significant degree. She testified that she thought the anxiety had to be "disabling" for an Emotional Disturbance classification.

The United States Supreme Court held that merely passing from grade to grade and achieving passing grades is not dispositive that a student has received a FAPE. Board of Educ. v. Rowley, 458 U. S. 176, 203, n.25 (1982). 34 C.F.R. §300.101(c)(1) provides: "Each State must ensure that FAPE is available to any individual child with a disability who needs special education and related services, even though the child has not failed or been retained in a course or grade, and is advancing from grade to grade."

In October of fifth grade the District failed to recognize the waving red flags and declined to find that Student had a disability. Based on the evidence in the record, this hearing officer finds that as of October of fifth grade Student should have been considered disabled in the areas of ADHD and Anxiety Disorder.¹⁴

The next inquiry revolves around whether teaching social skills and emotional regulation is within the realm of responsibility of a school district when because of a child's disability that child does not pick up appropriate behaviors in the normal course of living in an intact family¹⁵ and associating with classmates in a well-run regular education setting. Evidence that the courts hold that schools are responsible for teaching social skills and emotional regulation abounds in case law. Going back to the seminal Oberti ruling, we learn that in our Third Circuit the court considered "[L]earning to associate, communicate and cooperate with nondisabled persons is essential to the personal independence of children with disabilities. The Act's mainstreaming directive stems from Congress's concern that the states, through public education, work to develop such independence for disabled children." Oberti v. Board of Education of Clementon Sch. Dist., 995 F.2d 1204, 19 IDELR 908 (3d Cir. 1993). Three years later the Third Circuit

¹⁴ Although as Student's experiences in sixth grade later unfolded, Student appears quite similar to other students in this hearing officer's experience who have been diagnosed with Asperger's Disorder.

¹⁵ If children without disabilities are subjected to unstable and chaotic home or school environments they may fail to acquire these skills.

articulated its position that education is more than academics and involves emotional and social progress in its holding that an IEP is appropriate if it offers meaningful progress in *all relevant domains under the IDEA* (emphasis added). M.C. v. Central Regional S. D., 81 F.3d 389 (3rd Cir. 1996), cert. den. 117 S. Ct. 176 (1996). The Third Circuit continued to offer guidance on this matter when in Girty v. School Dist. of Valley Grove, 163 F. Supp. 2d 527, (W.D.Pa. 2001), aff'd 60 Fed. Appx. 889, 175 Ed. Law Rep. 408 (3d Cir. 2002) the court, citing Oberti, noted that development of social skills must be considered as one educational benefit when comparing regular education and non-inclusive settings when determining least restrictive environment. Just a few months ago, again turning to its finding in M.C. when deciding Breanne C. v. Southern York County School District, 2010 WL 3191851, M.D. Pa, Aug 11, 2010 our Third Circuit noted that when an eligible child receives an IEP, that IEP must be reasonably calculated to afford the child the opportunity to receive a “meaningful educational benefit” [Shore Reg'l High Sch. Bd. of Educ. v. P.S., 381 F.3d 194, 198 (3d Cir.2004) ; Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 247 (3d Cir.1999)] and that an IEP confers a meaningful educational benefit when it is more than a trivial attempt at meeting the educational needs of the student, and it is designed to offer the child the opportunity to make progress in all relevant domains under the IDEA, including behavioral, social and emotional.

Further support for the finding that school districts are mandated to attend to behavioral, social and emotional education is found in Pennsylvania statutes. The Pennsylvania Department of Education [PDE], headed by the Secretary of Education, is charged by the General Assembly with developing rules and regulations to carry out its legislative enactments as set forth in the Pennsylvania School Code. Act of July 23, 1969, P.L. 181, § 1, 71 Pa. Stat. Ann. §§ 1037, 1038; Act of June 16, 1994, P.L. 319, No. 49, § 9, 64 Pa. Stat. Ann. § 468. The PDE explains that public education “prepares students for adult life by attending to their intellectual and developmental needs and challenging them to achieve at their highest level possible. In conjunction with families and other community institutions, public education prepares students to become self-directed, life-long learners and responsible, involved citizens.” 22 Pa Code § 4.11(b). Thus, public education in Pennsylvania is intended to provide opportunities for students to: (1) Acquire knowledge and skills. (2) Develop integrity. (3) Process information. (4) Think critically. (5) Work independently. (6) Collaborate with others. [and] (7) Adapt to change. 22 Pa Code § 4.11(c). Finally, attention is invited to 22 Pa Code 4.21(b) related to “Elementary Education: primary and intermediate levels” – which mandates that “curriculum and instruction in the primary program shall focus on introducing young children to formal education, developing an awareness of the self in relation to others and the environment, and developing skills of communication, thinking and learning”.

If schools must address behavioral, social and emotional domains in public education when educating disabled students, then a student with a disability in these domains who has not benefitted from regular education programming to address these domains necessarily requires specially designed instruction in these areas. Clearly Student did not profit from regular education initiatives in this regard. Student received occasional and then more frequent meetings with the guidance counselors starting in spring of fourth grade and continuing through sixth grade, was involved in a regular education “social

skills” group [although the groups did not really seem to address Student’s core issues], was given regular education tools such as “smiley face” charts and Think Sheets and Tracking Sheets, eventually had regular weekly meetings with the Middle School psychologist and received reminders, preferential seating and other good teaching practices. Meanwhile the Parents were procuring psychiatric services and psychotherapy for Student, all with minimal effect on Student’s behavioral, social and emotional functioning.

Returning to “what the District knew and when did it know it”, this hearing officer acknowledges that many of these ineffective regular education interventions did not begin until after the October fifth grade evaluation such that the District did not necessarily know in October that they would prove ineffective. However, given this hearing officer’s finding that Student should have been considered to have a disability as of October and the District’s consequent failure to even reach the question of whether Student required specially designed instruction this hearing officer holds that the District owes Student compensatory education.

The IDEA authorizes hearing officers and courts to award “such relief as the Court determines is appropriate” 20 U.S.C. § 1415(h)(2)(B), and compensatory education is an appropriate remedy only when a school district has failed to provide a student with FAPE. Lester H. v. Gilhool, 916 F.2d 865, 871-73 (3d Cir. 1990) as the purpose of compensatory education is to replace those educational services lost because of the school district’s failure. [*Id.*] Accordingly this hearing officer has determined that Student is entitled to one (1) hour of compensatory education for each day Student was in attendance in school from the date of the issuance of the October 2008 ER to the end of the 2009-2010 school year.

The hours of compensatory education may be used for any appropriate developmental, remedial, or enriching instruction or service that the parents choose as long as the instruction or service contributes toward addressing Student’s behavioral, social and emotional needs. The total cost of the award must not exceed the salaries and fringe benefits of an emotional support teacher for one period each day and a psychologist or guidance counselor providing specific social skills training twice weekly.

Independent Educational Evaluation

The Parents contend that the District’s 2010 evaluation was not appropriate. The IDEIA provides, at Section 614(b)(2) that in conducting the evaluation the local educational agency shall:

*Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining--
Whether the child is a child with a disability; and
The content of the child’s individualized education program...*

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

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

Further, the IDEIA at Section 614(b)(3) imposes additional requirements that local educational agencies ensure that

Assessments and other evaluation materials used to assess a child under this section--

Are selected and administered so as not to be discriminatory on a racial or cultural basis;-

Are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally and functionally unless it is not feasible to so provide or administer;

Are used for purposes for which the assessments or measures are valid and reliable;

Are administered by trained and knowledgeable personnel; and

Are administered in accordance with any instructions provided by the producer of such assessments;

The child is assessed in all areas of suspected disability;

Assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided.

In the instant matter, the district has the burden of proving that its evaluation was appropriate. The IDEIA at Section 615(b)(6) provides for the opportunity for any party to present a complaint - with respect to any matter relating to the identification, evaluation, or educational placement of the child, and for that complaint to be resolved at a due process hearing. An appropriate remedy for a district's failure to provide an appropriate evaluation for a student is the awarding of an independent educational evaluation at the district's expense. This right is explained in the implementing regulations of IDEIA:

A parent has the right to an independent evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency... If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either file a due process complaint notice to request a hearing to show that its evaluation is appropriate or ensure that an independent

evaluation is provided at public expense. If the public agency files a due process complaint notice to request a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent evaluation, but not at public expense. 34 CFR §300.502(b)(1)(2)(3).

This hearing officer has several areas of concern regarding the District's April re-evaluation when Student was in sixth grade. First, the written report fails to convey the gravity of information the Middle School psychologist had available from personal interaction with Student and from written teacher comments. For example, although the report acknowledges that Student has social problems it does not note that at least one teacher described Student as "extremely annoying in every way to other students" such that "[Student] makes []self an easy target". Neither does the RR acknowledge that this teacher was of the opinion that Student's "extremely defensive and bossy" attitude, which the Middle School psychologist thought could have been related to Student's anxiety, interfered with Student's learning and/or of others in the class. The RR did not acknowledge that another teacher found Student's "attention-getting" behaviors were interfering with Student's learning or that of others, and that yet a third teacher noted interference in learning from "preoccupation" and "perseveration". It appeared through these omissions that the author of the report was attempting to minimize Student's needs to support his conclusion (and the District's position) that Student was not eligible under the IDEIA.

A second area of concern about the District's April re-evaluation is that the examiner found it necessary to assess Student's writing, yet used a very outdated version of a testing instrument to conduct this assessment. The IDEIA requires an evaluator to use technically sound instruments which are used for purposes for which the assessments or measures are valid and reliable. The original version of a test that has been revised and re-normed twice already cannot any longer be considered reliable and this is not moot even if the Student ultimately experiences no difficulty in the area assessed.

The third area is of concern because it tarnishes the credibility of both the Middle School psychologist and the two teachers who completed the BASC 2. It is implausible that independent endorsements of 135 items at four possible degrees of seriousness (requiring matches in 540 out of 552 possibilities), and the omission of the exact same one item out of 139 items happened by chance. This hearing officer cannot help but conclude that either the teachers filled out the forms together or that one person filled out the forms for both. It is rather alarming that the evaluator, whose role it was to analyze the data gleaned from the assessments, did not notice this rather jarring coincidence.

The fourth area of concern is that despite the fact that the October fifth grade evaluation had left the question of an Asperger's diagnosis open, the Middle School psychologist did not conduct any further exploration of this possibility, in violation of IDEIA's mandate that a student be assessed in all areas of suspected exceptionality.

Overall, this hearing officer was left with the strong impression that the April re-evaluation done in sixth grade was prepared for the same purpose that the District alleges the IEE was prepared – for purposes of litigation. Aside from its conclusions, I find the District’s re-evaluation inappropriate on its face and not meeting the requirements of the IDEIA, and therefore find that the Parents are entitled to reimbursement for an independent educational evaluation. Unlike the second District evaluator, and very unlike the first District evaluator, the independent evaluator conducted a thorough and appropriate inquiry, collecting various types of data and then integrating her data into cogent explanations of why or why not she found Student meeting criteria for the IDEIA eligibility categories in question in addition to providing valuable information about Student’s strengths and needs.

Order

It is hereby ordered that:

1. The School District denied Student a free appropriate public education (FAPE) from October 2008 to the end of the 2009-2010 school year. As the District denied Student FAPE, Student is entitled to compensatory education in the amount of one hour per day for every day that Student was in attendance at school during that period, in accord with the parameters set forth above.
2. As the evaluation of Student completed by the District in spring 2010 was not appropriate, the District must reimburse the Parents for the independent educational evaluation performed by the private psychologist.

Any claims not specifically addressed by this decision and order are denied and dismissed.

December 5, 2010

Date

Linda M. Valentini, Psy.D., CHO

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PA Special Education Hearing Officer
NAHO Certified Hearing Official