

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: LR
ODR #1938/10-11-KE

Date of Birth:
[redacted]

Dates of Hearing:
August 15, 2011
November 1, 2011

CLOSED HEARING

Parties to the Hearing:

Representative:

Michael Gehring, Esquire
McAndrews Law Offices
30 Cassatt Avenue
Berwyn, PA 19312

Downingtown Area School District
540 Trestle Place
Downingtown, PA 19335

Jennifer Donaldson, Esquire
Sweet, Stevens, Katz and Williams
331 Butler Avenue PO Box 5069
New Britain, PA 18901

Date Record Closed:

December 2, 2011

Date of Decision:

December 7, 2011

Hearing Officer:

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

Background

Student¹ is a teen-aged eligible child who was identified with Other Health Impairment during the relevant period addressed in this decision. Student's Parents requested this hearing, asserting that the District failed to offer Student a free, appropriate public education [FAPE] because of deficiencies in the Individualized Education Programs [IEPs] and/or their implementation. The District maintains that it offered Student FAPE.

For the reasons presented below I find for the Parents with modifications.

Issue

Did the Downingtown Area School District deny the Student a free appropriate public education (FAPE) for the 2009-2010 school year² and for the 2010-2011 school year through December 15, 2010³ by 1) failing to provide individualized instruction in the areas of math, organization skills, and focus; 2) failing to address Student's emotional needs by failing to provide a positive behavior support plan or employing other means; 3) failing to implement the portion of the IEP concerning facilitating positive peer relationships; and 4) failing to provide progress reports to the Parents.

Findings of Fact

1. Student is a teen-aged aged eligible child who moved from another state and enrolled in the District for 5th grade in the fall of 2004. [NT 35]
2. In October 2008 Student was identified as eligible for special education under the classification of Other Health Impairment (Attention Deficit Hyperactivity Disorder - ADHD). During the relevant period, the 2009-2010 school year and the first half of the 2010-2011 school year, Student remained eligible for special education.⁴ [NT 26, 45, 79; S-4]
3. Student's cognitive testing revealed a Verbal Comprehension Index of 132 [Very Superior], a Perceptual Reasoning Index of 115 [High Average], a Working

¹ This decision is written without further reference to the Student's name or gender, and other singular characteristics have been removed to provide privacy.

² Although the relevant period actually starts on June 14, 2009, as there was no evident need for Extended School Year [ESY] services following the 2008-2009 school year, the effective start of the period under consideration is the beginning of the 2009-2010 school year.

³ Prior to presenting their case in chief the Parents were given the opportunity to present evidence to support their assertion that they should be permitted to pierce the IDEA's two-year statute of limitations because of the existence of either or both the exceptions. They failed to meet their burden of proof in this regard and the ruling was made on the record. [NT 34-73]

⁴ In July 2009 prior to beginning 9th grade Student incurred legal involvement for a nonviolent crime. [NT 108-109; P-39]

- Memory Index of 110 [High Average], and a Processing Speed Index of 85 [Low Average]. [S-4, P-19]
4. During the evaluation process, the Parents reported their concerns including Student's difficulty adjusting to changes in routine and task demands, choice of friends, social withdrawal, anger management difficulties and lack of self-esteem. The Parents shared that Student had been suffering from depression and was seeing a psychologist for therapy and a psychiatrist for medication. (NT 181, 183, 187-190; P-19)
 5. The ER indicated that "[o]verall, [Student] has difficulty with attending to and organizing information that is consistent with individuals with ADHD and consistent with deficits in executive functioning." The ER did not find Student to be eligible under a secondary disability category of Serious Emotional Disturbance; however, the ER noted that "[t]here is an emotional component to [Student's] lack of performance that should be monitored." [S-8]
 6. The Evaluation Report [ER] recommendations to the IEP team focused on math and organization needs and did not address behavioral or emotional issues. [S-4]
 7. The first IEP was created on November 7, 2008 ["2008 IEP"] and covered the first portion of the relevant period from the beginning of school in fall 2009 until November 6, 2009. The 2008 IEP noted problems with organization, work completion, time management, and behavior. [P-19]
 8. The 2008 IEP indicated "No" as the answer to the question: "Does the student exhibit behaviors that impede his/her learning or that of others?" [P-19]
 9. Under the Social/Emotional Present Levels section the 2008 IEP quotes the ER: "It is difficult to determine if [Student's] specific difficulty regulating [Student's] behavior leading to disciplinary referrals during Middle School is the result of ADHD. A lack of problem solving ability is considered to contribute to [Student's] behavior. In addition, mental health professionals treating [Student] may want to consider underlying depressive symptoms that contribute to [Student's] attitude toward peers and toward school". [P-19]
 10. The 2008 IEP carried only two goals, both addressing organization (organizing notebooks and notes and using an agenda book to plan out assignment completion). There were no goals addressing relative difficulty in math or social/emotional/behavioral needs. [P-19]
 11. The 2008 IEP carried Specially Designed Instruction addressing organizational strategies and time/pacing accommodations related to Student's ADHD as well as a structured approach to math instruction. Access to the guidance counselor upon request was offered as an SDI, but not as a regularly scheduled supportive service. [P-19]

12. One of the parental concerns noted in the evaluation was that Student had difficulty “maintaining positive social circles”. Specifically Student’s mother testified that Student “was hanging out with children that were not of a positive nature.” Asked to explain the mother noted, “In what they wore, their music, also their intellect. [Student] was not hanging out with children that were of [Student’s] caliber.” [NT 80-82; S-4, P-19]
13. The Parents wanted the District to provide Student with “some positive role model, some positive group, something to allow [Student] to see how smart [Student] actually is and that hanging out with these negative groups would be -- to show Student how positive groups can be much better.” [NT 82]
14. In response to the Parents’ concerns the 2008 IEP team added the following SDI: “Include [Student] in any social groupings that might form to help [Student] foster positive friendships”; this SDI was repeated in the 2009 IEP. [NT 81, 97; P-19, P-27]
15. In spring 2009 the District implemented this particular SDI by suggesting [a District program] for students referred by their teachers because they display leadership skills. The program includes a weekend trip, monthly breakfasts and various after-school activities geared toward team building, leadership and skill building. [NT 83, 245-246, 457]
16. Student participated in the weekend trip in spring 2009; however, Student refused to participate in any further [program] activities, despite being encouraged to participate by various District staff throughout the 2009-2010 school year and the fall of the 2010-2011 school year. [NT 174-175, 323-324, 465]
17. Student was informed of all District clubs and activities through the Student Handbook, morning announcements, and advertisements in the school building. The learning support teacher showed Student where information about available activities could be accessed. The guidance counselor also spoke with Student about getting involved in activities at school and administered an interest inventory. [NT 325-326, 560, 582]
18. Discussions were held about Student participating in [elective], but Student refused to join this activity despite [being eligible]. [NT 97-102, 326]
19. Student’s final grades for the 2008-2009 school year included one A, five Bs and three Cs. [S-8]
20. At the beginning of the 2009-2010 school year Student was still associating with the “non-positive” students, was agitated and withdrawn at home, and not performing well at school. The Parents communicated their concerns to the school in an email on October 7, 2009. [NT 82-85]
21. At the beginning of the 2009-2010 school year Student began receiving private psychological counseling and psychotropic medication management because of

- issues with depression and behaviors including not coming home on the bus as expected and not following house rules. [NT 85-87]
22. Although she believed that the student assistance specialist and the learning support teacher [aka study skills teacher]⁵ were aware that Student was receiving private treatment and the reasons why, the only District individual whom the mother identified with certainly as having this information was the school psychologist who had evaluated Student a year earlier. [NT 87-88]
 23. Student approached the 2009-2010 school year “with gusto” but as school started became more frustrated, more aloof, either did not complete or did not turn in homework, skipped classes and was late. [NT 89]
 24. From the beginning of the 2009-2010 school year, Student was receiving study skills instruction three times per cycle, this support having been increased from twice per cycle. [NT 90]
 25. The study skills class consisted largely of assignment completion rather than instruction. Student received no scientifically-based, peer-reviewed instruction in executive functioning skills (organization and planning) or math. [NT 514-518]
 26. However, in study skills class Student did receive some help with organization [e.g. help keeping folders and notebooks, using an agenda book to write down homework assignments] and with catching up on work. [NT 90]
 27. Student’s mother testified that this was working “a little bit” but then admitted that it was helping the same as it had the previous year which was definitely an improvement over how Student functioned before student had an IEP. [NT 91]
 28. An annual IEP meeting was held on November 6, 2009. Grades for the first marking period for the 2009-2010 school year were included in the IEP [“2009 IEP”]. Student received a C in English, a D in Western Civilization, a B in Geometry, a D in Biology, a D in Spanish II and an A in Fitness. Insofar as math was addressed in the study skills class, Student clearly profited, as Geometry was the highest grade. [P-27]
 29. The 2009 IEP dropped the organizational goal related to notebooks, kept the organizational goal related to the agenda book and added a goal for Student to communicate Student’s needs to the teachers by making appointments or conferencing with them when needing assistance. [P-27]
 30. The 2009 IEP kept all previous SDI including the one addressing “social groups”, and added two relating to note-taking and one regarding extra textbooks for home

⁵ As of December 1, 2009 the learning support teacher started maternity leave and a new learning support teacher took over for the remainder of the 2009-2010 school year. The original teacher returned for the 2010-2011 school year. [NT 459-460, 466-467]

- use. Again access to the guidance counselor upon request was included, but guidance was not offered as a regularly scheduled supportive service although the IEP identified Student's experiencing emotional and behavioral issues. [NT 611; P-27]
31. There continued to be parental concerns about Student's associating with a different peer group. However, although Student [qualified for participation] Student did not want to [join a certain elective], a school activity which would have been available to Student and involved [being integrated into two extracurricular activities with a group of peers]. [NT 97-98]
 32. On December 11, 2009 Student was admitted to an inpatient psychiatric facility because of threatening self-harm, threatening to hurt the Parents and depression. Student remained in the inpatient program for a week. [NT 102-103, 181; P-33]
 33. Following inpatient psychiatric hospitalization, Student was placed in a psychiatric partial hospitalization (day hospital) program for about two weeks, most of which was during the District's winter break. [NT 103-104]
 34. The District was aware of Student's hospitalizations and the reasons via conversations with Student's mother and a request for coordinating educational services from the inpatient unit. [NT 104-105, 181, 193-196, 263-268, 308, 383, 443-444; S-12, P-33]
 35. Student missed approximately 8 or 9 days of school because of the hospitalizations. Upon Student's return to school, even though the District had knowledge of Student's poor grades that were markedly different from the previous year despite receiving additional study skills assistance, knowledge of the inpatient psychiatric hospitalization, knowledge of the subsequent stay at the partial psychiatric program, knowledge of the involvement of a private psychotherapist and a psychiatrist, and knowledge of its own recommendation in November 2009 that Student attend an intensive outpatient program [IOP] (see below), the District did not seek to reevaluate Student for emotional disturbance or to assess for other needs, convene another IEP meeting, or ask the Parents to share evaluation reports from the psychiatric hospitals. The District did not propose a reevaluation until December 2010, eleven months later. [NT 103, 309-311, 365-366, 378, 384, 390]
 36. At the 2009 IEP meeting the IEP team discussed providing more intensive supports given the Parents' continuing concerns about behaviors at home. The team decided Student would be a good candidate for an intensive outpatient program [IOP] conducted in the school by a private agency. Following Student's return from partial psychiatric hospitalization Student participated in this program through the end of the school year. [NT 93]

37. The IOP consisted of three sessions of group therapy in a small group weekly. The program was covered by the Parents' medical insurance, but required a \$30 co-pay per session. The Parents and the District agreed that the District would pay two of the co-pays per week and the Parents would pay one co-pay per week. [NT 93-95]
38. In February 2010 the Parent asked the student assistance specialist about therapeutic wilderness and outward bound-type programs to address behavioral issues. The student assistance specialist was concerned about whether such a program would contain an "educational component," because she wanted Student "to earn [Student's] credits this year so [Student] is on track to graduate." The student assistance specialist suggested that the Parents obtain counseling and therapeutic support but the District did not propose to reevaluate Student at this time. [NT 105-106; 396-397, 402; P-36]
39. Despite the student assistance specialist's concern and the Parents' ongoing concerns, the District did not reconvene the IEP team until March 10, 2010. Student's emotional issues were not discussed, and Student was not offered any individualized instruction in any area, despite the District's knowledge that Student was failing at least three classes. Rather, the March 10th IEP ["March 2010 IEP"] simply added two extra study skills classes to the schedule, and provided that Student could attend academic detention, a "program that was set up for kids that were not completing their homework" twice per week. [NT 108, 272-273, 552; S-15]
40. In an email dated March 18, 2010 the student assistance specialist told Student's mother that she felt that Student was "slowly giving up on school" and suggested that the Parents involve Student's probation officer as "probation is a heavy hand". [NT 107-108, 404-406; P-38]
41. The IEP team met again on April 19, 2010 to consider Student's failing grades. Rather than offer additional instruction the District made academic detention mandatory to spend time working on homework completion. [NT 108, 280; S-15]
42. On April 22, 2010 the learning support teacher noted that Student was failing most classes, although Student had increased time in study skills class, and was serving academic detention twice weekly. The learning support teacher stated that Student was often "tuned out during class time" and "require[d] re-teaching of concepts before... making up a missed test" and opined that the "extra hours we are adding to help [Student] catch up are a band-aid." The District did not propose a reevaluation or offer specialized instruction other than adding extra hours of the same service that was ineffective. [NT 110-113, 412; P-41]
43. On April 22, 2010 the guidance counselor noted "at this point Student should go to tutoring because [Student] is failing and needs help". There is no evidence that

- the District offered tutoring free of charge or specially designed instruction to Student in the subjects that were being failed. [P-43]
44. On April 24, 2010 the student assistance specialist noted in an e-mail that Student “really needs support for math”. She also noted that Student “does not want to be viewed as an intelligent and capable student”. Finally she noted “our goal is all B’s for the 4th marking period.” [NT 113-114; P-43]
 45. On May 4, 2010 the assistant principal acknowledged that despite being in learning support Student was failing everything, and suggested that part of the reason may be the Student was late to class, or missing classes, partially because of seeking out help from the student assistance specialist and the guidance counselor. Rather than propose an evaluation to determine why Student was failing despite learning support and/or the emotional aspects that were leading to Student’s frequent need to seek support outside class, he suggested that in the following school year study skills class be increased to six times per cycle. [P-44]
 46. As of May 5, 2010 according to a letter from the guidance counselor to the Parents, Student was failing four classes [English, geometry, biology, and Spanish II]. [NT 120; P-45).
 47. On May 7, 2010 the learning support teacher e-mailed the Parent, noting that when Student came to study skills that week Student was finishing up tests for geometry and working on biology and was engaged in catching up on academic work. She noted that 45 minutes four times a cycle was not enough to keep Student caught up and that Student was making an effort in biology and math but often had homework every night and “staying on top of it was quite a bit for [Student]”. [NT 122; P-46]
 48. When the Parents met with a school administrator in the context of discussing an emotional support class for behavior and academics the administrator told them that there was no program in the District that would fit Student, but that there were other school districts that had programs that would fit student. [NT 124-125, 127, 346-348]
 49. A May 25, 2010 IEP revision increased study skills periods to six times per cycle through the end of the school year. A revised IEP dated June 21, 2010 specified that the retroactive change was so Student could complete assignments. [P-50, P-51]
 50. A year-end report the Parents received after school had closed indicated that Student was not handing in homework and grades were an average 53% in homework representing little if any progress in IEP goals over the course of the school year. [NT 128; P 52]

51. Although in the 2009-2010 school year there were two annual IEPs in place and several revisions of the second annual IEP, and there had been an increase in hours in study skills and an addition of academic detention, Student's academic performance was poorer than the previous school year. IEP goal progress reports showed little to no progress, and final grades included an F in biology and a D in geometry, and Spanish II was dropped because there was "no hope of passing" that subject for the year. [NT 616; P-51, P-52, P-63]
52. At the beginning of the 2010-2011 school year the special education teacher and the student assistance specialist knew through contacts with the Parents that Student was depressed and having issues at home. [NT 132-135]
53. Responding to a concern about Student's failing math, the learning support teacher communicated to the math teacher that Student's "disability stems from emotional issues" but she did not propose a reevaluation for emotional issues. [NT 532-533; P-55]
54. On November 1, 2010 the biology teacher communicated to the learning support teacher that Student had a 62% in biology [which Student was retaking due to having failed it the previous school year], was missing work and wanted to sleep in class at times. [P-60]
55. The annual IEP meeting was convened on November 3, 2010. The IEP [November 2010 IEP] continues to indicate that Student did not have behaviors that impede Student's learning. The IEP notes that in addition to the poor biology grade, Student had a 67% in algebra II and was missing a third of the assignments. [P-63]
56. The November 2010 IEP contains two goals, one related to turning in work in a timely manner and the other related to self-advocacy. Neither the goals nor the SDI addressed emotional concerns that could have contributed toward Student's struggles in school. The IEP continued to carry the SDI related to positive social groups. [P-63]
57. Student was receiving Family Based mental/behavioral health services and the Family Based therapists attended the November 2010 IEP meeting. The District did not propose a reevaluation in light of year-long continuing academic struggles and the ongoing presence of mental health issues. [NT 137-139; P-63]
58. IEP progress reports of November 8, 2010 showed regression and such was acknowledged by the learning support teacher. In an email the learning support teacher expressed her concern that Student was "really falling apart". However, the IEP team was not reconvened and no reevaluation was proposed. [NT 140-141, 149, 537-541; P-65, P-67]

59. On November 11, 2010 the learning support teacher emailed the Parent saying “I am very worried that things are going downhill very quickly”. However, the IEP team was not reconvened and no reevaluation was proposed. [NT 143; P-71]
60. In early November 2010 after the principal called and notified the Parents that Student had left school and was found drinking with peers Student was sent to Rehab after School. On November 12, 2010 Student received a Notice of Behavior Intervention for [redacted], a behavior that had “happened multiple times”. A discipline summary and individual behavior reports indicate disciplinary issues in November and December 2010, such as cutting classes, sleeping in class, and leaving school grounds. [NT 141-142, 144-146; P-66; P-73; P-74, P-76]
61. On November 19, 2010 the learning support teacher expressed in an email that she was “very worried” about Student. No re-evaluation was proposed. [P-76]
62. The Parents requested an IEP meeting, and on November 24 and 29, 2010 the learning support teacher notified the special education supervisor and the guidance counselor respectively that there would be an IEP meeting for Student and that the District was planning on doing a behavior plan and offering a psychiatric evaluation. [NT 149-152, 154, 549-550; P-79, P-81; P-92]
63. The IEP meeting was held on December 2, 2010 [December 2010 IEP]. The IEP addressed only a single behavioral issue: not remaining on task and [redacted], and included a behavior plan that addressed only that issue. [NT 291; S-21, P-87]
64. The school-based members of the December 2010 IEP team did not discuss alternative placements or interventions with the Parents or offer any specially designed instruction in any subject. [NT 153]
65. Despite the learning support teacher’s previous indications that the District would be offering a psychiatric evaluation, no psychiatric evaluation was offered at the December 2010 IEP meeting, rather the Parents asked that Student be further evaluated, but no psychiatric evaluation was ever offered or conducted. The Referral Form for evaluation noted that the request was from the Parents, and although FBA [Functional Behavior Assessment] was checked Psychiatric evaluation was not checked. [NT 150-155, 556-557, 638-639; P-87, P-92, P-93]
66. On December 7, 2010 the District notified the Parents that a Multi-Disciplinary Evaluation was warranted to obtain current social/emotional and behavioral data. [NT 155; P-93]
67. The Permission to Evaluate was issued on December 7, 2010 but the Parents did not sign it until February 1, 2011 because they had already placed Student in an inpatient rehabilitation facility in another state as of December 16, 2010. [NT 156-158; P-94]

68. Student's grades up to the time Student left the state included 35.88% in English, 60.95% in history, 41.76% in algebra II, 60% in math plus, and 38.36% in biology. (N.T. 160-161; S-31, P-97; P-99; P-103; P-104; P-106]

Discussion and Conclusions of Law

Burden of Proof

In November 2005, the U.S. Supreme Court held the sister burden of proof element to the burden of production, the burden of persuasion, to be on the party seeking relief. However, this outcome-determining rule applies only when the evidence is evenly balanced in "equipoise," as otherwise one party's evidence would be preponderant. *Schaffer v. Weast*, 126 S. Ct. 528, 537 (2005). The Third Circuit addressed this matter as well more recently. *L.E. v. Ramsey Board of Education*, 435 F.3d 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006). Thus, the party bearing the burden of persuasion must prove its case by a preponderance of the evidence, a burden remaining with it throughout the case. *Jaffess v. Council Rock School District*, 2006 WL 3097939 (E.D. Pa. October 26, 2006). Here, the Parents requested this hearing and were therefore, assigned the burden of persuasion pursuant to *Schaffer* and also bore the burden of production. The evidence was not in equipoise, as the Parent's evidence was preponderant, and therefore the *Schaffer* test on burden of proof did not apply.

Special Education Mandate and Standards

Special education issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA" or "IDEA 2004" or "IDEA"), which took effect on July 1, 2005, and amends the Individuals with Disabilities Education Act ("IDEA"). 20 U.S.C. § 1400 *et seq.* (as amended, 2004). "Special education" is defined as specially designed instruction...to meet the unique needs of a child with a disability. 'Specially designed instruction' means adapting, as appropriate to the needs of an eligible child ...the content, methodology, or delivery of instruction to meet the unique needs of the child that result from the child's disability and to ensure access of the child to the general curriculum so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children. C.F.R. §300.26

In *Board of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034, 3051 (1982), the U.S. Supreme Court articulated for the first time the IDEA standard for ascertaining the appropriateness of a district's efforts to educate a student. It found that whether a district has met its IDEA obligation to a student is based upon whether "the individualized educational program developed through the Act's procedures is reasonably calculated to enable the child to receive educational benefits."

Thus, benefits to the child must be 'meaningful'. Meaningful educational benefit must relate to the child's potential. See *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572 (3rd Cir. 2000); *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3rd Cir.

1999); *S.H. v. Newark*, 336 F.3d 260 (3rd Cir. 2003) (district must show that its proposed IEP will provide a child with meaningful educational benefit). Furthermore, an IEP must be specific enough to address all a child's identified needs, academic, functional and behavioral. 20 U.S.C. §1414(d)(1)(A)(i)(II), (IV); *Christen G. v. Lower Merion Sch. Dist.*, 919 F.Supp. 793 (E.D. Pa. 1996); 20 U.S.C. §1414(d)(3)(A)(iv).

The Third Circuit 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). Recently, 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.

Re-evaluations

The local educational agency must ensure that a reevaluation of each child with a disability is conducted "if it is determined that the educational or related services needs, including improved academic achievement and functional performance, of a child warrant, a reevaluation or if the child's parent or teacher requests a reevaluation." 34 C.F.R. §300.303

Although a re-evaluation under 34 CFR 300.303 is not defined in the IDEA or in the 2006 implementing regulations, it is understood to be a comprehensive evaluation analogous to an initial evaluation under 34 C.F.R. 300.301, conducted for students who already have undergone evaluations and been found eligible for services.

A reevaluation under 34 C.F.R. 300.305(a)(2) of the IDEA a regulations should address the following five issues:

- 1) Whether the child continues to have a disability. 34 CFR 300.305(a)(2)(i).
- 2) The child's educational needs. 34 CFR 300.305(a)(2)(i)
- 3) Ascertainment of the child's present levels of academic performance, and related developmental needs. 34 CFR 300.305(a)(2)(ii)
- 4) Whether the child continues to need special education and related services. 34 CFR 300.305(a)(2)(iii)
- 5) Whether any additions or modifications to the special education and related services called for in the child's IEP are needed to enable him or her to meet the measurable annual goals set out therein and to participate, as appropriate, in the general education curriculum. 34 CFR 300.305(a)(2)(iv)

Discussion

This is a case that, sadly, ended up in litigation even though there was evident, sincere and frequent communication and cooperation among the Parents and those closely involved with Student (primarily the student assistance specialist, one of the learning support teachers, and the guidance counselor, collectively “District staff”). While the District staff most closely involved offered personal support and a kind ear to the Parents and to the Student, they did not utilize the tools the IDEA provides to ensure that Student received FAPE, namely a reevaluation to explore other unidentified needs underlying academic struggles and a subsequent detailed IEP addressing all relevant needs.

Two major factors played into this situation. First, during the relevant period, although they were well aware of Student’s emotional and behavioral issues that manifested primarily at home, the District staff operated as though Student shed these issues like a backpack and left them at the schoolhouse door. In testimony witnesses returned again and again to the mantra that “we were not seeing these issues in school”. Second, the District staff seemed to explain Student’s significant decline in grades from an A, five Bs and three Cs at the end of the 2008-2009 school year to one A, one B, one C, and three Ds at the first marking period in fall 2009 as solely a failure in motivation and organization. Rather than connecting the dots and looking at Student as a whole, the District staff seemed to view home behaviors and plunging grades as disconnected. The District staff virtually ignored what was written in black and white in its ER and in the initial IEP: *“It is difficult to determine if [Student’s] specific difficulty regulating [Student’s] behavior leading to disciplinary referrals during Middle School is the result of ADHD. A lack of problem solving ability is considered to contribute to [Student’s] behavior. In addition, mental health professionals treating [Student] may want to consider underlying depressive symptoms that contribute to [Student’s] attitude toward peers and toward school”*. Unfortunately the failure to connect the dots between behavior problems at home and declining school performance led to the District providing more and more study skills sessions that devolved into work completion periods, in effect doing more of what wasn’t working, rather than taking a step back and closely reevaluating Student’s situation. It was particularly striking, and an illustration of the failure to connect the dots as well as an undermining of their credibility, that in their testimony the student assistance specialist and the guidance counselor noted respectively that at the end of the 2009-2010 school year this bright student with four study skills periods a week made meaningful academic progress by passing the majority of the classes and “ended the year pretty well” and “really pulled through at the end.” [NT 321-322, 616-617, 620]

In their closing argument, the Parents capture precisely the problem: *“... the District, despite its actual knowledge of [Student’s] emotional and behavioral issues, failed at many obvious points to reevaluate [Student] regarding such issues, resulting in a clear failure to effectively address such issues in [the] IEPs. See G. “J.” D. v. Wissahickon School Dist., 2011 WL 2411098, at *11 (E.D. Pa. June 14, 2011) (failure to properly reevaluate eligible student resulted in behavioral issues being insufficiently addressed,*

leading to denial of FAPE). Cf. L.G./West Chester Area School Dist., ODR No. 1582/10-11-AS (Aug. 6, 2011) (district violated child find obligation where it failed to find student was eligible under Emotional Disturbance) category where, inter alia, district knew student had been hospitalized for mental issues, was seeing school counselor for emotional issues, and was cutting class)."

Compensatory Education

Student was denied FAPE. In-kind compensatory education is a remedy for a span of FAPE denial by district action or inaction, less a reasonable period when it could have been rectified, its form and timing to be a matter of parental discretion as long as costs are commensurate with what was denied and it does not replace programming to which a student is otherwise entitled under an IEP.

Parents may select the form of the compensatory education so long as it addresses any appropriate developmental, remedial, or enriching instruction that furthers the goals of the student's present or future IEPs. However, there are financial limits on parents' discretion in selecting the appropriate developmental, remedial or enriching instruction that furthers the goals of the student's present or future IEPs. The costs to the District of providing the awarded hours of compensatory education should not exceed the full cost of the services that were denied. Full costs are the salaries and fringe benefits that would have been paid to the actual professionals who should have provided the District services and the actual costs for salaries, tuition and transportation for contracted services. This principle sets the maximum cost of all of the hours or days of the compensatory education awarded. The parents may balance expensive and inexpensive instruction or services so long as the total cost and hours do not exceed the maximum amount. The parents also may use fewer hours of expensive services so long as the maximum amount is not exceeded. Finally, the parents may not be required to make co-payments or use personal insurance to pay for these services.

The time for utilizing compensatory education awarded may extend beyond age 21 up to Student's 26th birthday. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990). Such flexibility is particularly crucial in a case like this one where Student is nearing the end of high school. Although the compensatory education may not be used to pay for tuition, books or fees at a post-secondary institution (college or trade school), the hours may be used for SAT and/or ACT preparation, and tutoring, counseling, and assistive technology including hardware and software for use in a post-secondary setting.

Although the Parents are requesting compensatory education services from the beginning of the 2009-2010 school year, the evidence does not support this claim. Student ended the 2008-2009 school year with respectable grades, and showed improved organizational skills. It took several months for Student's subsequent academic decline to become evident, but at the first marking period, coinciding with the annual IEP revision in fall 2009, the District should have been on notice that there may have been further issues. Student's being psychiatrically hospitalized a month later immediately turned the deep pink flags bright red. Certainly by early January 2010 at the latest, even before Student returned to the District from placement in inpatient psychiatric hospitalization and partial

psychiatric hospitalization, a Permission to Evaluate should have been issued, with a new evaluation in place for review sixty calendar days after the PTE was received by the District. Allowing time for preparation, mailing, parental review and signing, the date of January 10, 2010 is being estimated as being the date the District would have received the approved PTE, making March 11, 2010 the sixtieth calendar day by which the report would have been available. A new appropriate IEP considering all Student's emotional and behavioral needs, as well as needs for specially designed instruction in academic areas of weakness, should have been in place at the latest by March 21, 2010.

I find that the standard for awarding compensatory education set out by the Commonwealth Court of Pennsylvania in *B.C. v. Penn Manor School District*, No. 1150 C.D. 2005, 2006 Pa. Commw. LEXIS 445 (8/15/06), is unworkable in this case. In *B.C.* the court held that "where there is a finding that a student is denied a FAPE and ... an award of compensatory education is appropriate, the student is entitled to an amount of compensatory education reasonably calculated to bring him to the position that he would have occupied but for the school district's failure to provide a FAPE." In the instant matter there was no testimony directed toward what would be needed to bring Student to the position student would occupy but for the denial of FAPE and I cannot construe such a calculation. Accordingly I will award full days of compensatory education for every day school was in session and Student was in attendance for all or part of the day from March 21, 2010 to the end of the school year in June 2010. Student continued to decline academically during the 2010-2011 school year. Although District staff continued to provide statements of concern, they time and again failed to offer a reevaluation and failed to produce meaningful appropriate IEP revisions. Accordingly, Student is entitled to full days of compensatory education from the first day of the 2010-2011 school year through December 15, 2010.

Section 504

The Parents articulated a claim under §504 of the Rehabilitation Act of 1973, 29 U.S.C. §793 *et seq.* Parents, however, adduced no explicit evidence of discrimination on the basis of disability, and did not argue that the evidence established a separate and distinct claim under §504 in addition to the District's alleged violations of IDEA. Their 504 claim was based entirely upon the same facts that they asserted in support of their IDEA claims. They produced no evidence of intentional discrimination against Student, and would, in any event, be entitled to no more relief than they will obtain on the IDEA claims that will be allowed.

Dicta

One specific point in the Parents' case bears discussion. This hearing officer is of the opinion that the IEP team's including an SDI in the 2008 IEP and subsequent IEPs concerning exposing Student to positive peer groups was ill-advised. Teenagers in particular invariably choose their own friends in spite of parental expectations, and all parents and schools can do is make a wide variety of interesting and appropriate activities available. Aside from [specific elective], the District high school had many options for Student, none of which were appealing to Student. The Parents' expectation that the

District should create an extracurricular activity specifically to meet Student's interests was unreasonable, and there was no guarantee that Student would have participated if one were created. As the Parents believed that their child needed to be exposed to "more positive" peers they had the option of enrolling Student in any one of a wide variety of community activities which Student may or may not have chosen to attend. It also should be obvious to the reader that choice of clothing style and musical preferences may not be a good indicator of whether a teenager is "positive" or not.

Order

It is hereby ordered that:

1. The Downingtown Area School District failed to offer Student a free appropriate public education from March 21, 2010 to the end of the school year in June 2010 and from the first day of the 2010-2011 school year through December 15, 2010.
2. As the Downingtown Area School District failed to offer Student FAPE, Student is entitled to full days of compensatory education during the time period delineated above. The compensatory education is to be used according to the guidelines above.

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

December 7, 2011

Date

Linda M. Valentini, Psy.D., CHO

Linda M. Valentini, Psy.D., CHO
PA Special Education Hearing Officer
NAHO Certified Hearing Official