

PENNSYLVANIA
SPECIAL EDUCATION HEARING OFFICER

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

5797/05-06 AS& 5807/05-06

File Number

E. M.
Child's Name

Xx/xx/xx
Date of Birth

10/07/05
Dates of Hearing

Open
Type of Hearing

For the Student:

Parent

For the Keystone Central School District:

Ms. Judith Petruzzi
Special Education Director
Keystone Central School District
64 Keystone Central Drive
Mill Hall, PA 17751

Karl A. Romberger, Jr., Esq.
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Date of Hearing:	October 7, 2005
Receipt of Transcript:	October 12, 2005
Date of Decision:	October 27, 2005
Hearing Officer:	Daniel J. Myers

BACKGROUND

Student is a xx year old student of the Keystone Central School District (School District) who has been identified in the past as a child with attention deficit hyperactivity disorder, inattentive type (ADHD-Inattentive), and with a specific learning disability in the areas of reading and written expression. When her parent requested an IEP meeting to develop an IEP for Student, the School District requested parental permission to evaluate Student for the purpose of updating an earlier evaluation report. Student's parent requested a due process hearing seeking, among other things, "that the needed determination and provision of special education and related services for [Student] ... move forward." For the reasons described below, I find that it is the Student's parent, not the School District, who has prevented Student from receiving special education and related services, and I therefore deny the relief requested by Student's parent.

ISSUES

1. Whether or not the School District denied Student a free and appropriate public education (FAPE) during any portion of the 2003-2004 school year that has not already been adjudicated?
2. Whether or not the School District denied Student FAPE during the 2004-2005 school year?
3. Whether or not Section 614(a)(1)(D)(ii)(III) of the IDEIA, 118 STAT. 2703, serves to absolve the School District of its obligations to provide Student with FAPE during any portion of either the 2003-2004 or 2004-2005 school years?

FINDINGS OF FACT

1. Student, whose date of birth is xx/xx/xx, is a xx year old resident of the School District. (SD 1)
2. Student attended her neighborhood school for grades 1-3. (N.T. 108)
3. Student attended a cyber, or virtual, charter school for 4th grade, 2002-2003. (N.T. 29, 59)
4. In the summer of 2003, the parents notified the District that they wished to re-enroll Student in the School District. In re the Educational Assignment of E.M., Spec. Educ. Op. No. 1473 (2004); SD 50

References to "P," "SD," and "HO" are to the Parent, School District, and Hearing Officer exhibits, respectively. References to "N.T." are to the transcript of the October 3, 2005 hearing session.

5. In August 2003, Student's Parent gave to the School District a privately-secured neuropsychological evaluation report by Dr. L. (N.T. 28, 102; SD 49C-1; P 1)
- Student's Wechsler Intelligence Scale for Children, 3rd Edition (WISC-III) standard scores were 93 Verbal, 90 Performance, and 91 Full Scale. (P 1)
 - Wechsler Individual Achievement Test 2nd Ed. (WIAT-II) standard and grade equivalence scores were:

Subtest	Standard Score	Grade Equivalency
Numerical Order	91	3.5
Written Expression	84	3.0
Spelling	83	2.3
Reading	76	2.2
BASIC ACADEMIC SKILLS INDEX	83	2.7
WRITTEN LANGUAGE COMPOSITE	82	2.7

- Dr. L noticed moderate difficulty with tasks involving sustained attention, concentrations and cognitive focus. (P 1)
- He diagnosed ADHD-inattentive, along with problems with reading, writing, and organization. (N.T. 103)
- He recommended special instruction in reading, spelling and expressive writing, as well as preferential seating, repeating directions, checking to see if Student has heard directions, class notes, use of rulers, book marks and reading tools with windows, chunking on the page, frequent breaks, extended time for writing, an organizer, quiet room for tests, reading tests aloud, allowing verbal rather than written responses, daily reading of high interest materials, regular expressive writing activities, word games, and concentration games. (P 1)

4th grade 2003-2004

- At parent request, Student was assigned to the 4th grade when she reentered the School District for 2003-2004. (N.T. 29, 59)
- On September 4, 2003, Student's parent granted the School District permission to conduct its own multidisciplinary evaluation of Student. In re the Educational Assignment of E.M., Spec. Educ. Op. No. 1473 (2004); SD 50
- On or about November 26, 2003, the School District issued an evaluation report (ER), (N.T. 28; SD 49C-3; P 2; In re the Educational Assignment of E.M., Spec. Educ. Op. No. 1473 (2004); SD 50) which included an occupational therapy screening, and which found, among other things:
 - That Student's reading skills were significantly discrepant from her ability;

- b. That Student's decoding, spelling and writing skills were below age/grade level expectations;
 - c. That Student had a specific learning disability in reading and needed specially designed instruction to improve decoding skills , improve reading fluency, and increase sight word vocabulary;
 - d. That Student also needed to work on expressive writing skills; and
 - e. That recommended interventions based, in part, upon Dr. L's recommendations. (P 2)
- 9. On or about December 15, 2003, Student's parents rejected the School District's ER and requested an independent educational evaluation (IEE) at public expense. (N.T. 31; SD 49C-8) Student's parents were dissatisfied because the ER did not appear to address everything contained in Dr. L's report. (N.T. 103) They asked the School District to provide a broad range of information and documents, including: (1) a list of all tests performed on Student; (2) copies of all notes made by all staff with respect to all tests administered; (3) a list of all personnel involved in the testing and their qualifications; and (4) a list of all people contacted in regard to Student and all notes made of those conversations. (In re the Educational Assignment of E.M., Spec. Educ. Op. No. 1473 (2004); SD 50)
- 10. On December 19, 2003, the School District requested a due process hearing, believing that its ER was appropriate. (In re the Educational Assignment of E.M., Spec. Educ. Op. No. 1473 (2004); SD 50)
- 11. On or about December 31, 2003, Student's parent filed a complaint with the Division of Compliance, Bureau of Special Education, Pennsylvania Department of Education (PDE). (N.T. 34; SD 49C-15)
 - a. On January 28, 2004, PDE issued a complaint investigation report determining that the ER had been timely and that parental participation requirements had been satisfied. (SD 49C-22)
 - b. On January 30, 2004, PDE issued another complaint investigation report determining that the School District had not failed to comply with record review and participation requirements, and that the request of Student's parents regarding a review of Student's records cannot suspend ER and IEP deadlines. (SD 49C-22) ²
- 12. Meanwhile, on January 14, 2004, the School District issued a Notice of Recommended Educational Placement (NOREP) with a proposed individualized education program (IEP) offering learning support services to address goals in spelling and reading fluency and decoding, with program modifications and specially designed instruction that included preferential seating, chunked assignments, and extra time for assignments. (SD 49C-21)

² Although the third page of PDE's January 30, 2005 complaint investigation report is missing from the record, the report's conclusions are adequately described in the report's 4th and 5th pages. (SD 49C-22)

13. On or about February 26, 2004, Hearing Officer B. Smith conducted a due process hearing to determine the appropriateness of the School District's ER as well as Student's entitlement to an IEE at public expense. Hearing Officer Smith concluded that the ER was appropriate, and he denied the request for an IEE at public expense. (In re the Educational Assignment of E.M., Spec. Educ. Op. No. 1473 (2004); SD 49A; SD 50; N.T. 32)
14. On or about March 25, 2004, Student's parent filed another request for due process hearing. (SD 49D)
15. On April 12, 2004, the appeals panel affirmed Hearing Officer Smith's February 2004 decision. (In re the Educational Assignment of E.M., Spec. Educ. Op. No. 1473 (2004); SD 50)
16. On April 30, 2004, Hearing Officer Smith granted the request of Student's parents and dismissed their second, March 2004, due process hearing request. (SD 38)
17. Student's 4th grade Terra Nova standardized test results indicate basic level skills in reading and math. (N.T. 40; SD 68)
18. On May 21, 2004, Student's parent wrote to the School District noting a definite improvement in Student's attitude toward School (SD 36; N.T. 120)

5th grade, 2004-2005

19. Before this school year started, Student's Parent and her 5th grade teacher talked about Student's needs, and discussed effective instructional strategies, such as preferential seating, that Student ultimately received throughout year. (N.T. 80-82) Student's parent stipulated at the hearing that Student was not on medication during 5th grade. (N.T. 83)
20. On or about November 19, 2004, Student received a noontime detention as a consequence for pushing another child. (N.T. 42, 77; SD 32) Noontime detention means that a student loses up to 30 minutes of noontime recess. (N.T. 42-43) Student's Parent believes that Student was simply reacting to undue provocation from another child who was harassing and bullying Student. Student's parent asserts that Student's reaction (i.e., pushing another child) was a manifestation of Student's disability. (SD 32)
21. It appears that, sometime during 2004-2005, Student also received a noontime detention as a consequence for failing to complete homework. Student's teacher and her parent exchanged correspondence regarding incomplete assignments. Student's parent asserted to the teacher that Student's disorganization, lack of focus and forgetfulness are inherent behaviors of Student's ADD-Inattentive. They developed a daily procedure whereby Student's Parent would check

Student's homework and initial a homework book to ensure that homework was performed and returned to school. Student also worked on her homework in school. (N.T. 45, 77-78; SD 30, SD 31)

22. Student's homework problems did not impact her academic progress. Although no curricular modifications or adaptations were provided, Student's teacher testified that Student showed growth throughout 5th grade, demonstrating proficiencies in some areas and developing/emerging skills in other areas. (N.T. 75-76, 78) Student's 5th grade PSSA scores indicated that she was proficient in reading and math. (SD 24; N.T. 50) Her 5th grade, 3rd marking period, report card includes teacher comments that Student was receiving small group instruction in reading, and that decoding and fluency was improving. (SD 68)
23. On April 5, 2005, Student's parent wrote to Student's teacher, acknowledging that he had refused special education services, but reminding Student's teacher that state and federal special education regulations "expressly prohibit penalizing or punishing a child for behavior related to a disability." (SD 30)
 - a. Student's parent then expressed his opinion that, as a result of these regulations, "there is not a lot that can be done except remind [Student] to try harder to improve" when she forgets or does not finish her work.
 - b. He further opined that the School District is prohibited from imposing upon Student any: 1) detentions, including in-class, playground, and regular detentions; 2) extra work; 3) demeaning, derogatory or embarrassing remarks; 4) demerit slips for missing assignments; 5) separate seating; 6) and withholding of field trips or other class rewards. (SD 30)
24. On April 7, 2005, the School District requested permission to evaluate Student. (SD 28, SD 29; N.T. 46) On April 12, 2005, Student's parent responded that he was confused by the request because the School District already knew that Student has a disability and is in need of special education services. (N.T. 47; SD 27)
25. On or about April 25, 2005, Student's Parent filed a complaint with PDE, alleging that the School District had failed to conduct a complete functional behavioral assessment as part of its initial ER, and that the School District was using aversive techniques to inappropriately punish Student for behavior that was a result of her disability. (SD 25)
 - a. On June 8, 2005, PDE issued its complaint investigation report concluding that no corrective action was required. (SD 25; N.T. 49)
 - b. PDE determined that a functional behavioral assessment had not been required during Student's 2003 evaluation because Student did not exhibit behavioral difficulties warranting such an assessment, no one had requested such an assessment, and the focus of that evaluation had been academic rather than behavioral.

- c. PDE further found that Student had received noontime detention for inappropriate conduct on November 17, 2004 and noontime detention for failure to complete a homework assignment on April 22, 2005, that Student had not been suspended during that school year, and that special education regulations concerning the discipline of students with disabilities do not apply to students with disabilities whose parents refuse consent for special education services. (SD 25)
26. On or about July 19, 2005, Student's parent requested that the School District schedule an IEP meeting to develop an IEP for Student's upcoming 6th grade year, 2005-2006. (P 3; P 4; SD 23)
 27. In response, on or about July 22, 2005, the School District requested from Student's parent permission to evaluate Student in order to update evaluation information that had been developed in Student's 4th grade school year. (P 4; SD 21; SD 22)
 28. On July 27, 2005, Student's parent reiterated his request for an IEP team meeting, without referring to the request for permission to evaluate, and he asked that the School District issue written notice, pursuant to 34 CFR §300.503(a), if the School District refused his request for an IEP meeting. (P 3; SD 20)
 29. On July 29, 2005, the School District issued a letter refusing to convene an IEP team meeting. (P4; SD 19) The School District also asserted that previous evaluation data was outdated and required up-dating. (P 4; SD 19)
 30. On August 1, 2005, Student's parent wrote to the School District, stating that he could neither refuse nor consent to a reevaluation of Student because he could not discern any reasonable basis for believing that a reevaluation was necessary, required or warranted. He further did not believe that conditions warranted reevaluation and he did not believe that any of Student's teachers had requested a reevaluation. He therefore "deferred" his decision regarding permission to evaluate Student. (P 5; SD 18; N.T. 52)
 31. On August 8, 2005, Student's parent issued a letter to the School District revoking, rescinding and withdrawing any and all previous expressions of consent and/or permission, explicit or implied, written or verbal. (SD 16)
 32. On August 12, 2005, Student's parent filed with the School District a complaint and request for due process hearing. (SD 15; SD 14) Among the relief suggested for resolution was:
 - a. A written statement from the School District acknowledging Student's identification and eligibility for special education and related services;
 - b. That the School District willingly allow the IDEIA process to proceed so that the needed determination and provision of special education and related services for Student can move forward;

- c. That the person most culpable for discrimination be prohibited from further interaction with Student or her parent in the development of an IEP;
- d. That the School District sign a consent agreement
 - i. affirming its commitment to obey applicable laws,
 - ii. affirming its refusal to allow any personnel to discriminate against children with disabilities and their parents,
 - iii. stating its willingness to provide immediate, intensive special education training to its personnel;
 - iv. requiring a compliance survey of all parents of children with disabilities; and
 - v. requiring an intensive "child find" to discover any previously unreported students with disabilities;
- e. That the School District and PDE sanction School District personnel as necessary; and
- f. That PDE and other agencies take any other investigatory and/or remedial action as necessary.

(SD 15)

- 33. On or about August 23, 2005, the School District filed, on behalf of Student's parent, a request for due process with the Office for Dispute Resolution, and scheduled a resolution meeting for August 29, 2005. (P 6; SD 13)
- 34. On or about August 25, 2005, Student's parent informed the School District that he did not believe that any resolution meeting could commence before: 1) the School District issued written notice "for each instance in the complaint where the [School District] proposed and/or initiated action without giving proper Prior Written Notice;" and 2) a response to the complaint of Student's parent. (P 7; SD 12)
- 35. The School District met, as scheduled, for the August 29, 2005 resolution meeting, but no such meeting occurred because Student's parent did not attend. (SD 13; N.T. 54, 67)

6th grade, 2005-2006

- 36. Student's parent, 6th grade home room teacher, and middle school principal all talked with each other at the beginning of the school year regarding Student's needs. Student's Parent informed them that Student has ADHD-Inattentive, and he shared written information regarding ADHD. (N.T. 85-86, 95)
- 37. Student's 6th grade home room teacher testified that, although Student is successful in the school setting, she is not successful in homework completion.
 - a. She further testified that Student is not a fluent reader, that spelling and reading are Student's lowest grades, and that Student's reading grade equivalency is 4.7. She testified that Student receives preferential seating,

teacher modeling, hands-on teaching, small groups, one-on-one instruction, an assignment book, and a teacher web page with homework listed. (N.T. 85-88)

- b. Student's Parent believes that Student's biggest problem today is organizational and that, without any accommodations, she will become frustrated and become generally unsuccessful. (N.T. 18, 109)

38. On or about August 26, 2005, I was assigned to serve as hearing officer in this matter. On September 21, 2005, I denied the motions of Student's parent: 1) that I recuse myself; and 2) to dismiss the due process hearing. I also established my expectations for the hearing regarding appropriate party behavior, arguments, scheduling activities, and legal citations. (HO 2; SD 1)
39. I conducted a hearing on October 7, 2005, at which Student's parent appeared pro se. Although I perceived that Student's parent might want to argue that the School District had violated Student's Section 504 rights, both parties convinced me that they lacked sufficient notice to litigate any issues relating to Section 504, because I had not listed this as an issue in my pre-hearing correspondence. (N.T. 12, 128; HO 2)
40. School District Exhibits SD 1-69 were admitted without objection. (N.T. 130)
Parent Exhibits 1 - 9 were admitted into the record without objection. (N.T. 130)
41. Since 4th grade, the School District has never denied Student access to its general curriculum. (N.T. 56)
42. Since 4th grade, Student has never been suspended or removed from school for more than 10 days. (N.T. 43)
43. Since its July 2005 request, the School District has never received affirmative permission from Student's parent for evaluation of Student. (N.T. 51)
44. The School District desires a new evaluation because it suspects that Student may no longer be eligible for special education services:
 - a. The School District suspects, based upon cyber charter school progress notes indicating 0% to 9% work completion and "Incomplete" grades in every subject at year-end, that the apparent learning disability identified in Student's 2004 ER may simply have reflected a lack of instruction.
 - b. The School District suspects, based upon Student's apparent success in school without special education services, that gaps in Student's education have closed since the 2004 ER, and that Student may not be in need of special education services.
 (N.T. 40-41, 48; SD 68)

45. Student's parent contends that the School District employed aversive techniques in disciplining Student and punished Student for behaviors that were manifestations of her disability. (N.T. 42, 66, 112)

- a. He contends that two noontime detentions during 2004-2005 were aversive disciplinary techniques because they denied fresh air to Student. (N.T. 66, 113)
- b. He contends that an undated incident in which Student was publicly humiliated by being required to move her seat to the front of the class constituted an aversive technique.
- c. He contends that the specific Student behaviors resulting in the two noontime detentions, i.e., pushing another student and failing to complete homework, are manifestations of Student's ADHD-Inattentive. (MT. 20, 106, 113)
- d. He contends that the behavior involved in the public humiliation, i.e., Student's talking in the back of the classroom, was a manifestation of her ADHD-Inattentive. (N.T. 106, 114-115)

46. I find, as matters of fact, that:

- a. The record lacks evidence that Student's noontime detentions deprived her of fresh air. There is no evidence that, had she not been detained, Student would have been outside, nor is there evidence that the air in the locations in which she was detained was stuffy, stale, or otherwise unhealthy.
- b. The record lacks evidence that Student was, in fact, forced to pick up her chair and move it to the front of the room. This was simply a vague reference without any supporting factual information to substantiate it.
- c. The record lacks sufficient evidence, concerning the particular circumstances of the specific behaviors in question, linking those particular behaviors to Student's disability.
 - i. Student's parent apparently assumes that all incidents of forgetfulness, all pushing of other students in reaction to bullying and harassment, and all talking in the back of class, is always a manifestation of ADHD-Inattentive.
 - ii. I believe the record must contain something more than mere assumption in order to link the specific Student behaviors in question on those particular days with her disability.
 - iii. Examples of "something more" in the record might be factual descriptions of the behaviors and their stimuli, or the specific opinions of persons with expertise.

47. I find as a matter of fact that the list of alleged aversive techniques that are listed by Student's parent in SD 20 are not, per se and unequivocally, prohibited by state and federal regulations. (SD 20)

48. This decision is issued:

- a. 76 days after the due process hearing request was filed;

- b. 62 days after my assignment as Hearing Officer to the case;
- c. 20 days after the hearing session; and
- d. 15 days after receipt of the transcript.

DISCUSSION

The Individuals with Disabilities Education Act (IDEA) requires the School District to provide a "free appropriate public education" to all students who qualify for special education services. 20 U.S.C. §1412 This requirement is met by providing personalized instruction and support services to permit Student to benefit educationally from the instruction, providing the procedures set forth in the Act are followed. Board of Education of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982) The Rowley standard is only met when Student's program provides her with more than a trivial or de minimis educational benefit. Volk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3rd Cir. 1988) The burden is on the School District to establish that a child's educational program complies with the IDEA. Oberti v. Board of Education, 995 F.2d 1204 (3rd Cir. 1993) The appropriateness of the IEP is to be judged based on information known at the time it is drafted. Fuhrmann v. East Hanover Board of Education, 993 F.2d 1031 (3rd Cir. 1993)

The Individuals with Disabilities Education Improvement Act of 2004 (IDEIA) further provides that, if the parent of a child with a disability, as defined in Section 602 of the IDEIA, refuses to consent to the receipt of special education and related services, or fails to respond to a request to provide such consent, the School District shall not be considered to be in violation of its FAPE requirement to that child, and it shall not be required to convene an IEP meeting or develop an IEP. Section 614(a)(1)(D)(ii)(III) of the IDEIA, 118 STAT. 2703

The School District did not deny Student FAPE during any portion of the 2003-2004 school year.

Student's Parent asserts that the January 14, 2004 NOREP and proposed IEP constituted an illegal change in educational placement even though the IEP was never implemented. (N.T. 104, 120) He further contends that his "revocation" of his previously-granted consent to the December 2003 ER invalidated any subsequent NOREPs and proposed IEPs based upon that ER. (N.T. 104; SD 49C-17; SD 49C-18)

I conclude that the School District's proposal to change a student's educational program and placement, was simply a proposal or suggestion and, unless it was actually implemented, it cannot constitute an actual change in Student's educational program and placement. Further, Student's parent filed his second request for due process hearing on or about March 25, 2004, which was after the January 2004 NOREP and proposed IEP. Because this due process hearing request was dismissed by Hearing Officer Smith at the request of Student's parents on or about April 30, 2004, issues that might have been raised relating to pre-March 2004 matters must be considered waived. (SD 49D; SD 38)

Between March 25, 2004 and the end of the 2003-2004 school year, Student's 4th grade Terra Nova standardized test results indicated basic level skills in reading and math, and her parent wrote to the School District noting a definite improvement in Student's attitude toward School. (N.T. 40, 120; SD 36; SD 68) Considering these positive circumstances, along with the facts that Student had been identified as a student with disabilities, and that special education and related services had been refused, I conclude that Student was not denied a FAPE for any period of the 2003-2004 school year.

The School District did not deny Student FAPE during the 2004-2005 school year.

Student's parent notes that neither IDEA nor IDEIA limits or restricts rights, procedures, or remedies available under the Constitution, ADA, Section 504 or other federal laws protecting the rights of children with disabilities. (N.T. 16-17; P 9) ³ Student's Parent asserts that Student is protected by the disciplinary and change-of placement provisions of IDEA and its implementing regulations even if Student's parent refuses to consent to special education services. (N.T. 113) He further asserts that, whereas the behaviors of students without disabilities can be corrected and punished, the behaviors of students with disabilities, even those for whom special education services have been declined, can only be corrected - they cannot be punished. (SD 26; SD 30) Student's parent asserts that proscribed punishments include assignment of extra work, demerit slips, time-outs, and detentions, whether in-class, lunch-time, or after school. (SD 26; SD 30)

During the 2004-2005 school year, Student received two noontime detentions, one for pushing another student in response to harassment and bullying, and one for failing to complete assignments. Student's parent also contends that, at some time, possibly during this school year, Student was publicly humiliated by being required to move her seat to the front of the class as punishment for talking in the back of the classroom. (N.T. 20, 42, 66, 106, 112-115) Student's parents contend that these School District activities: 1) constitute improper punishment of Student for behaviors that are manifestations of her disability; and 2) constitute illegal, aversive disciplinary techniques.

I disagree. The state regulation describing the term "aversive techniques" refers to corporal punishment, locking students into rooms, use of noxious substances, deprivations of basic human rights, electric shock, demeaning treatment, patterns of suspension, and punishment for manifestations of disability. 22 Pa. Code § 14.133(e) None of the School District activities complained of, i.e., noon time detentions and

³ At the hearing, Student submitted a list of statutory and case law citations. Because this was the first exhibit introduced by Student's parent at the hearing, I initially designated it as "P 1." (N.T. 17) Subsequently, Student's parent introduced other exhibits that were already bound and placed behind tabs numbered "1 – 8." (N.T. 128) Accordingly, I determined that this one page exhibit of head notes, originally designated as P 1, would be re-designated as P 9. (N.T. 128)

requiring Student to move her chair, reasonably fit within the categories listed in Section 14.133(e).

I believe that the regulation's reference to "demeaning treatment" refers to treatment that can be considered demeaning from an objective, not a subjective, view. In other words, even if I assume that Student subjectively felt demeaned when she was asked to move her chair (and it must be assumed, because there is no evidence that she felt demeaned), what is prohibited is treatment that reasonable people would consider to be demeaning. There was no evidence in the record that would support a finding that reasonable people would consider it to be demeaning treatment for a teacher to request a student, who is talking in the back of the class, to move her chair to the front of the class.

Similarly, I believe that the regulation's reference to "punishment for manifestations of disability" requires objective evidence regarding the "punishing" nature of the discipline. In this case, moving a talking student to another part of the room might have been remedial, i.e., designed to stop the problem, not punitive. Similarly, it was not clear from the record whether the noontime detentions were intended to be punitive – they might have been intended as an opportunity for finishing incomplete work and for removing Student from a conflict situation. The lack of any evidence regarding the purpose of the detentions makes it difficult for me to conclude that they were intended to be "punitive."

Further, I believe there must be some objective link between the punished behavior and the disability. I am not willing to assume, as Student's parent apparently does, that any and all forgetfulness, pushing of other students, and talking in class, are per se manifestations of an ADHD-Inattentive condition. While it is certainly possible that these particular episodes of Student's forgetfulness, impulsiveness and distractibility were manifestations of her ADHD-Inattentive condition, I need more than simply a father's assertions to that effect before I can find that the School District has violated Student's entitlement to FAPE, if any. For example, appeals of manifestation determination reviews often involve expert testimony, or at least factual evidence regarding the actual behavior being punished, its antecedent stimulus, and its comparison to the similar, or dissimilar, behaviors of either this or other Students with the disability in question. Such objective evidence linking the underlying behavior to the disability was lacking in this case.

Section 614(a)(1)(D)(ii)(III) of the IDEIA, 118 STAT. 2703, serves to absolve the School District of its obligations to provide Student with FAPE during any portion of either the 2003-2004 or 2004-2005 school years.

Section 614(a)(1)(D)(ii)(III) states:

(III) EFFECT ON AGENCY OBLIGATIONS.—If the parent of such child refuses to consent to the receipt of special education and related services, or the parent fails to respond to a request to provide such consent—

(aa) the local educational agency shall not be considered to be in violation of the requirement to make available a free appropriate public education to the child for the failure to provide such child with the special education and related services for which the local educational agency requests such consent; and

(bb) the local educational agency shall not be required to convene an IEP meeting or develop an IEP under this section for the child for the special education and related services for which the local educational agency requests such consent.

I conclude that this provision of the IDEIA clearly absolves the School District of its FAPE obligations in Student's case, even if the School District's actions might otherwise have been considered denials of FAPE to a child with disabilities.

CONCLUSION

Student's parent requested a due process hearing, alleging that Student has been denied FAPE and seeking, as relief, that the School District "willingly allow the IDEIA process to proceed so that the needed determination and provision of special education and related services for [Student] can move forward." (SD 15) As noted above, I conclude that the School District has not denied FAPE to Student.

I further find, similar to Hearing Officer Smith in his 2004 decision, that it is not the School District's behavior, but rather the passive-aggressive, "cherry-picking" behavior of Student's parent, that is the cause for any failure of the parties "to proceed... [to] the needed determination and provision of special education and related services" to Student.

Accordingly, no further action will be required of the School District with respect to this matter.

ORDER

For the reasons described above, I ORDER that:

- ☐ The School District did not deny Student FAPE during any portion of the 2003-2004 school year.
- ☐ The School District did not deny Student FAPE during the 2004-2005 school year.
- ☐ No further action is required of the, School District.

Daniel J. Myers
Hearing Officer

October 27, 2005

Re: Due Process Hearing
File Number 5797/05-06 AS
Student

School District