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PENNSYLVANIA

Special Education Hearing Officer

Decision ODR#6336/05-06

Due Process Hearing

Student

Date of Birth: xx/xx/xx

Date of Hearing: April 25, May 30, June 29, 2006

Open Hearing

Parties to the Hearing:

Mr. and Mrs. Parent

Methacton School District
1001 Kriebel Mill Road
Norristown, PA 19403-1047

Representative:

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Transcript Received: July 3, 2006

Closing Statement Received, File Closed July 14, 2006

Date of Decision: July 24, 2006

Hearing Officer: Max Wald, Ed.D.

Background

Student is [an elementary school-aged] child living with Parent(s) within the Methacton School District (hereinafter District). The Student has been identified as a child with a disability and is currently assigned to an Emotional Support Class provided by the County Intermediate Unit (hereinafter IU).

Prior to enrollment in the District and IU the Student attended four day care centers but was asked to leave each one of them because of temper outbursts that resulted in aggressive and physical behavior toward children and adults. This behavior remains and is periodically exhibited at the present time.

The Student entered the kindergarten in the District and was assigned to an IU class outside of the District. As of June 2006 the Student has completed her first grade experience and has according to her teacher made minimal progress academically despite multiple IEPs

During the 2005-2006 school year the Parents requested the administration of an Independent Educational Evaluation (IEE). The District agreed to pay for the IEE to the extent of the costs exceeding the family's medical coverage.

During the course of the IEE the Parents after a period of strained relationships with the District filed for a due process hearing claiming that Student had been denied a free appropriate public education (FAPE) for the period covering the 2004-2005 and 2005-2006 school years (kindergarten and first grade),

Upon notice of the due process hearing the District withdrew its offer to pay the excess, above insurance, costs of the IEE. Thus FAPE, IEE, compensatory education, and assignment to an approved private school (APS) became the focus of the hearing along with the independent evaluator's assertion that the child, among other disabilities, was also autistic.

After the hearing commenced, the District agreed to pay the full cost of the IEE and the Parents indicated that they would not consider sending their daughter to an APS and insisted that Student remain in a public school setting.

The remaining issues for the hearing were thus compensatory education and FAPE, and the Student's identification.

Issues

1. Did the School District offer a free appropriate public education to Student during the 2004-2005 and 2005-2006 school years?
2. If School District did not offer a FAPE during the period in question is the Student entitled to compensatory education and in what amounts?
3. Was the Student properly identified as a student in need of emotional support?

Findings of Fact

1. The Parents and the Student reside within the boundaries of the School District. The Student entered the School District via the IU for the 2004-2005 school years. Prior to entering the School District kindergarten from an early intervention program, (Preschool Intervention Program –PIP) the Student was evaluated in the spring of 2004 and found eligible for special education. She was identified as a student with an emotional disturbance and a speech and language impairment. There was no prior identification of a disability on the autistic spectrum. (NT 41, 209 505-506, S-5 at 1)
2. Beginning at age 2 the Student was experiencing behavior difficulties including anger, tantrums, and aggressiveness at both home and school and in day care. The Student was psychiatrically identified with Oppositional Defiant Disorder and Adjustment Disorder of Childhood with Anxious Mood. (NT 42, 162, S-2 at 1, S-5 at 12-16, S-24 at 3)
3. Student received early intervention services after a 9/12/2001 request. Services included, “wraparound,” social worker visitation, and enrollment in an early intervention unit. (NT 43, P-1 at 1)
4. During the 2003-2004 school year the Student attended the Preschool Intervention Program provided by the [Redacted] Mental Health and Retardation Center. The School emphasized a behavior skills management program and included twice monthly intervention by a psychiatrist. As of 3/31/03 during early intervention, the Student displayed extreme temper outbursts as well as difficulties in interactions with children and adults. (NT 41, 69-170, S-2)
5. The Student is a child with an emotional disturbance and attends an IU emotional support class outside of the District. She has emotional and behavioral problems that significantly interfere with her learning and ability to function socially with others. (NT 52-53, 54, 119, 357, 516-517, S-24 at 7, S-58 at 2, 596)

6. Behavior Intervention Plans are part of all of the IEPs crafted and are designed to reduce the student's incidents of non-compliance along with addressing academic needs. (NT 57, S-6, S-10, S-41, S-57)
7. The District's August 9, 2004 Notice of Recommended Educational Placement (NOREP) signed by the Parent recommended the Student's assignment to an emotional support classroom for all academic instruction. (NT 57, 282, S-7)
8. IEP team meetings were held frequently throughout the 2004-2005 school year during which the Student had continuous "ups and downs" in behavior and progress. (NT 63, 118)
9. The NOREP dated 3/3/2005 was not signed by the Parent. This NOREP, however, was implemented since it was unsigned but not rejected. (NT 66, 200, S-11)
10. The NOREP dated 4/25/2005 was signed and approved by the Parent, (NT 70, S-15)
11. Throughout the 2004-2005 and 2005-2006 school years the Student in class was not listening, was running away, [and exhibiting aggressive behaviors]. Incidents of non-compliance during kindergarten and first grade impacted heavily on school achievement. The Student refused to perform tasks and [redacted]. (NT 79, 572, 575, 623, S-24 at 8, S-28 at 3)
12. Upon arriving at school each day the Student had to be physically removed from the school bus and [assisted] into the school building. The Parent, in this regard, was concerned about [the assistance]. (NT 83, S-26 at 20)
13. The District agreed to pay the costs of an Independent Educational Evaluation of the Student. The amount to be paid was portion not paid for by the Parent's insurance company. The offer was withdrawn when a request for a due process hearing was filed. Subsequently, on June 26, 2006 the School District agreed to pay the full cost of the Independent Educational Evaluation of Student. (NT 88, 126, 216, 235 S-30 at 3, S-46, P-44, P-54)
14. The District agreed to provide a one-on-one aide for the Student at the 1/05/2006 IEP team meeting. None had been assigned by 1/13/06 but a substitute was in place. (NT 89, 92, 213-216, 458, S-32)
15. The Student was prescribed Ritalin as of January 2006, a portion of which was administered at school. (NT 90, 136, 197)
16. The Parent did not sign the NOREP dated 1/31/2006. (NT 95, S-41)

17. The Student was taken by the Parent to the office of Dr. K on 2/7/06 and participated in an Independent Educational Evaluation. (NT 97, S-45)
18. The Parent indicates that improvement and growth in behavior and emotional control have taken place during the 2005-2006 school year. (NT 130, 155)
19. During sessions at home when instruction is attempted by the Parent, the Student, if frustrated, will walk away or loudly refuse to participate. (NT 140)
20. The Parent during the IEP team meetings displayed outbursts of anger and would leave the meeting and subsequently return. At times the Parent's sister would "fill in for her" in discussions that took place. (NT 179-180)
21. The Parent's sister, a practicing therapist, explained aspects of the IEP during the discussion and development process that the Parent did not understand. (NT 182-183, 185-186)
22. The Student receives substantial academic instruction at school. The Parent does not believe it is the right kind of instruction though instruction is delivered by a teacher who focuses on academics throughout the day. Language Arts is delivered through the Harcourt Brace Program and the Modern Curriculum Press Plaid Phonics Series. Mathematics is delivered through the Touch Math Program. (NT 189, 410-411, 576)
23. The Director of Special Services for the District is employed by DCS Solutions Company and assigned as a consultant to the District. (NT 234)
24. The Parent signed and approved the 2004-2005 IEP on 8/13/2004. The included Behavior Intervention Plan was reviewed and again approved in February, 2005 and again reviewed and revised April, 2005, and again in November 30, 2005. (NT 210-212, S-26)
25. The District and Parent held a resolution meeting on 3/6/2006. The Parent at the meeting requested placement in an APS. The District secured permission from the Parent to release the Student's records as part of the APS referral process and, were the IEP team to so recommend such placement, would be willing to fund the tuition costs. (NT 220-222, S-47, S-48)
26. An LEA representative was not present at the July 29, 2004 IEP team meeting. (NT 248, 539, S-6)
27. The IEP team meeting on 5/24/06 focused on the Parents' lack of interest in an APS placement for their daughter. The Parents wanted the IU emotional support class and also discussed the administration of Ritalin and the assignment of a one-on-one aide. The focus was not on IEP goals. The goals

in this IEP remain the same as in 1/2006 IEP. (NT 265-266, 287, S-41 at 10, S-57 at 9)

28. The Wilson Reading Program was listed in the January 4, 2006 IEP and was initiated on January 13, 2006. (NT 276, 288, 449, S-41 at 15)
29. The Parent was in agreement with the contents of the 5/24/05 IEP and behavior plan and acknowledged the presence of a number of new activities along with the continuation of a number of previously employed strategies. (NT 298-34, 307, S-57)
30. The Parent feels that the IU is reluctant to accept the Student continuation in the program because of the Parents' self acknowledged aggressive verbal abuse of the staff for which she has apologized. (NT 311-312, S-16, S-28 at 2, 3, S-44)
31. A behavior management plan outlining behavior procedures was sent home at the beginning of the 05-06 school year indicating how children will be reinforced and how negative behaviors will be handled. (NT 322-323, P-29 at 145)
32. Present education levels were updated periodically through curriculum assessments and other standardized tests. (NT 334, S-19)
33. Many behaviors interfere with the Student's performances. It is difficult to measure her skills and learning. (NT 347)
34. The Student has average intelligence, very poor social skills and a lot of tantrum behavior. (NT 349, 540-541, S-5 at 3, S-45 at 1)
35. The Student is a multi-handicapped child who requires a very intensive and highly coordinated program of special education. (NT 358, S-45 at 31)
36. The Independent Educational Evaluator feels goals are vague and incomplete but offers little in the way of suggestions for revision nor takes into consideration goals utilized in Language Arts Program cited in the IEP. (NT 391-392)
37. The Student's classroom teacher utilized the Harcourt Brace Language Arts Program for K-2 instruction. This program has components in reading and writing. Additionally, Modern Curriculum Press Plaid Phonics Series is also used to teach reading. Mathematics is taught using "Touch Math." All programs are multi-sensory. (NT 410-411, 413-414, 449)
38. A goal in Phonemic awareness was added to the 4/14/05 IEP and was not in the 2/9/05 IEP. The Present Levels of Educational Performance obtained from

the curriculum assessment, Dynamic Indicators of Basic Early Literacy Skills (DIBELS) were up dated on a weekly basis. (NT 416, S-10, S-14, S-19, S-21, S-22, S-23)

39. During the Student's kindergarten year, 2004-2005, there were periods of time when academic achievement increased together with incidents of behavioral acting out. (NT 425, S-18, S-19, S-20, S-23)
40. With the assignment of a one-on-one aide, academic achievement has minimally increased and acts of physical and verbal aggression along with acts of non-compliance have minimally decreased as shown in 5/24/06 IEP. (NT 4555-459, S-57)
41. The Student's teacher is presently working under an intern certification. She is certified as a regular education teacher and is one course short of certification in special education. She has also, received training from the IU in behavior management, IEP writing and implementation of curricular programs along with the opportunity of shadowing her predecessor. (NT 320, 324, 329, 414, 461, 465, 485)
42. The April 2005 IEP contains no goals in writing. The "Writing" PLEP, however, is noted and other Language Arts goals are evident. Emphasis in on behavior. The teacher felt that the child was on grade level in writing. (NT 473-474, S-14 at 5)
43. Behavioral interventions applied to the Student were often not listed on anecdotal records. Progress in Harcourt Brace and Modern Curriculum Press Plaid were also noted, along with noted progress in "Phoneme Segmentation". The occasional lack of notation is attributed to computer program malfunction. (NT 477-479, 481-482, S-23, S-53)
44. Though progress has been made in academic achievement it has been minimal in the areas of Math and Language Arts. Lack of progress has been due to non-compliant behavior, along with verbal and physical aggression. (NT 467, 491, 519-520, 526-527, 544, 595)
45. In September, 2005 (Report Date: 11/18/2005) the Student was re-evaluated to determine whether the current placement was appropriate. (NT 506, S-24)
46. Student's initial evaluation, which took place on 6/22/2004, indicated that the Student met the criteria for a student with Emotional Disturbance and a student with Speech and Language Impairment. It is likely that Student's test results in this evaluation were depressed because of her failure to cooperate with the examiners. (NT 506, S-5 at 3, 11)

47. In November 2005 the Student's need for support and services to "maintain appropriate behavior and assist her learning exceeds the resources currently available in her current Emotional Support placement." Student may benefit from a smaller school setting that offers a more therapeutic learning environment. (S-24 at 3, S-26 at 3, S-47)
48. The 11/18/2005 and 5/5/2006 Reevaluation Report indicated that the Student continues to be eligible for special education with a disability of Emotional Disturbance and additional disabilities of Specific Learning Disability and Speech and Language Impairment. (NT 511, 524 at 11, S-58 at 8)
49. On 11/30/2004 the Student [made a comment which] was dealt with within the classroom. The school psychologist was not notified. The issue was addressed in a 12/16/05 psychiatric evaluation. The Student denied the threat but acknowledged that when angry she will [use physical aggression] and that at times she needs restraints. Her behavioral outbursts interfere with her learning. (NT 478-479, 531-532, S-23 at 2, S-28 at 4-5)
50. The Student had a Behavior Intervention Plan, dated 7/29/2004 upon entering the District. The behaviors identified for intervention were "Non-compliance" (refused, leaves assigned area without permission, and does not follow teacher directions). (NT 556, S-6 at 18)
51. Behavior Intervention Plans were prepared for the Student on 2/9/05, 4/14/05, and 11/30/05. A functional Behavior Analysis was reported on 11/18/05. Changes in strategies were effected as needed. (NT 558, 559, 560, 561, 581, S-10 at 17, S-14 at 21, S-41 at 20, S-24 at 6)
52. Non-compliant behavior on the Student's part was minimal at first (9/2004) and escalated from January 2005 through March, 2006. From March through April 2006 behaviors were stable at their March levels but peaked on April 24, 2006 and declined somewhat on May 1, 2006 (NT 566,570, 608, S-49 at 4 a-c)
53. Goals and Objectives to address the Student's specific needs were not based on standard curricular programs such as Harcourt Brace or Modern Curriculum Press Plaid. (NT 414-415)
54. Dynamic Indicators of Basic Early Literacy Skills 6th Ed. (DIBELS) was utilized to gauge progress in phonemic awareness/fluency. Progress was noted on a weekly basis though not apparent on the charts provided. (NT 446-448, S-19 to S-22)
55. The Wilson Foundation Program, a supplemental program utilized to address reading deficiencies as an intervention strategy was initiated with the 1/4/2006 IEP. (NT 449-450, S-41 at 15)

56. Behavior and strategies for changing behavior were consistently reviewed for effectiveness and when necessary revised. (NT 581)
57. The IEE recommended a substantial number of interventions for students with autism. The Student, however, was identified as emotionally disturbed and learning disabled. (NT 582-584)
58. The Specially Designed Instruction portions of the 9/8/2004 IEP and the 2/18/2005 IEP Behavior Intervention Plans contained generally similar strategies. The plans were however detailed and specific with modest changes made as needed. (NT 598-600, 612, S-6 at 18-20, S-110 at 19-20)
59. A psychiatric evaluation of the Student was completed on March 31, 2003. The Student was diagnosed with Oppositional Defiant Disorder along with Adjustment Disorder of Childhood with Anxious Mood. Prior to the evaluation, while in the waiting area, the Student was observed interacting appropriately with other children and from time to time approaching adults to open pleasant and appropriate conversations. No mention of Autism was made in the report. (S-2 at 2-3)
60. Age appropriate receptive and expressive language skills were identified in the April 7, 2003 Speech and Language Evaluation. The Parent also reported use of child's advanced language skills when Student was 5 years, 9 months old. (S-5 at 10, S-9 at 1)
61. Therapeutic sessions with a psychologist were terminated during 2005 when the psychologist was unable to "manage" the Student's behavior. (S-28 at 2)

Discussion and Conclusions of Law

The issues in this very difficult and emotionally charged hearing has focused on whether or not a free appropriate public education (FAPE) has been provided to a little [redacted] who has been identified first as emotionally disturbed and subsequently learning disabled and then arguably autistic with pervasive developmental disabilities, not otherwise specified. (PDD-NOS).

The Parents have asserted that for two years (2004-2005, and 2005-2006) the Student has not been provided a FAPE, and to remedy this deficiency they would like, for their child, a large number of compensatory education hours that will make things better.

In addition, the Parents are somewhat unhappy with the labels assigned to the Student and have in at least one instance attempted to thwart identification and programming in this process.

This hearing officer is now charged with the responsibility of making determination regarding service provided during the past two years.

This hearing officer after reviewing the evidence determines that the District did provide a FAPE for this student during the past two years. There were, however, periods of time when it was not apparent through the evidence that a FAPE was provided. Indeed the school psychologist testified that the needs of the child were beyond the resources of the classroom, and for this period of time a FAPE was not provided.

Further, this hearing officer is convinced that the identification of this child as emotionally disturbed and learning disabled is appropriate. There is not sufficient evidence that this child should be placed on the Autistic Spectrum with PDD, NOS.

First let us address the issue of **appropriate identification**. The Student has been appropriately identified as a child with a disability.

§300.7 Child with a disability.

(a) General.

(1) As used in this part, the term child with a disability means a child evaluated in accordance with §§300.530–300.536 as having mental retardation, a hearing impairment including deafness, a speech or language impairment, a visual impairment including blindness, serious emotional disturbance (hereafter referred to as emotional disturbance), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services. (2)(i) Subject to paragraph (a)(2)(ii) of this section, if it is determined, through an appropriate evaluation under §§300.530–300.536, that a child has one of the disabilities identified in paragraph (a)(1) of this section, but only needs a related service and not special education, the child is not a child with a disability under this part. (ii) If, consistent with §300.26(a)(2), the related service required by the child is considered special education rather than a related service under State standards, the child would be determined to be a child with a disability under paragraph (a)(1) of this section.

Upon entering the District for the 2004-2005 school year the Student was appropriately identified as Emotionally Disturbed.

In Pennsylvania, a serious emotional disturbance is defined as a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree which condition adversely affects educational performance: an inability to learn which cannot be explained by intellectual, sensory or health factors; 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 unhappiness or depression; a tendency to develop physical symptoms or fears associated with personal or school problems.

When the Student enrolled in the District she had already been involved in an early intervention program provided by the [Redacted] Mental Health and Retardation Center. This program emphasized behavior skills management and included twice monthly intervention by a psychiatrist. (NT 4) Prior to the Student's admission to the District she had been disenrolled from four day care centers and had been diagnosed in a psychiatric evaluation as sustaining symptoms of an Oppositional Defiant Disorder with additional diagnosis of Adjustment Disorder of Childhood with Anxious Mood. The Student's 4/15/2003 IEP (P-25) indicated that the Student was a child with a disability in the category of Emotional Disturbance. This diagnosis was born out in the Evaluation Report presented by the District on June 22, 2004. No mentions of learning disabilities or autism were present in any report to this date.

The November 18, 2005 Reevaluation Report (S-24 at 11) determined that in addition to Emotional Disturbance, the Student was now also in the disability category of Specific Learning Disability.

§300.7 Child with a Disability

(10) *Specific learning disability* is defined as follows:

(i) *General*. The term means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.

(ii) *Disorders not included*. The term does not include learning problems that are primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

This diagnosis was confirmed in the Independent Educational Evaluation provided by Dr. K (S-45) in her February 7, 2006 report. In this report the independent evaluator also added the possibility of the Student being on the Autistic Spectrum with Pervasive Developmental Disability, Not Otherwise Specified (PDD-NOS). This despite the Student's low score (3rd %ile) on the Gilliam Autism Rating Scale (GARS). Additionally, in none of the evidence, testimony or reports, was there any mention of typical behavior such as inflexible adherence to nonfunctional routines and rituals, persistent preoccupation with parts of objects, hand or finger flapping or twisting, avoidance of social interaction, or repetitive motions to name a few. As a matter of fact the Parent reported advanced articulation. Other reports, such as from a March 31, 2003 psychiatric evaluation (S-2) reported that while waiting to see the evaluator the Student was observed interacting appropriately with other children and from time to time would approach adults to engage in pleasant and appropriate conversations.

This Hearing Officer concludes that in the area of diagnosis/identification that District did not err. The preponderance of evidence indicates that the Student fell first into the category of Emotional Disturbance and subsequently into the additional category of

Specific Learning Disability. There is no evidence of this child falling onto the Autistic Spectrum at this time.

It should also be noted that in various evaluations there is mention of a Speech and Language Disability. The Parent wanted it clearly understood that in her estimation this disability no longer exists and she does not wish to have it addressed.

A major issue in this dispute is whether during the 2004-2005 and 2005-2006 the Student was offered a Free Appropriate Public Education (FAPE).

As previously stated this Hearing Officer after weighing the information available determines that a preponderance of the evidences is convincing that for the most part a FAPE was provided though for a brief period the evidence does not show it was offered.

§300.13 Free appropriate public education. As used in this part, the term *free appropriate public education* or *FAPE* means special education and related services that—

- (a) Are provided at public expense, under public supervision and direction, and without charge;
- (b) Meet the standards of the SEA, including the requirements of this part;
- (c) Include preschool, elementary school, or secondary school education in the State; and
- (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of §§300.340–300.350.

The Parents, in this matter, have asserted that the District did not offer a FAPE for two school years, 2004 to 2006. The Parents allege that the Individual Education Program crafted by the IEP team for these two years was not appropriate and was not designed to enable the Student to make meaningful progress that was more than minimal and that the IEP was not complete and fully descriptive of the Student’s program. What then is an appropriate IEP?

An appropriate IEP is one that meets the procedural and substantive regulatory requirements and is designed to provide meaningful educational benefit to the child. (Board of Education v. Rowley, 458 U.S. 176, 102 S. Ct. 3034 (1982); Rose by Rose v. Chester County Intermediate Unit, 24 IDELR 61 (E.D. PA. 1996)). The IEP must be likely to produce progress, not regression or trivial educational advancement [Board of Educ. v. Diamond, 808 F.2d 987 (3d Cir. 1986)]. The IEP must afford the child with special needs an education that would confer meaningful benefit. Polk v. Central Susquehanna IU #16, 853 F.2d 171, 183 (3rd Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989), citing Diamond, held that “Rowley makes it perfectly clear that the Act requires a plan of instruction under which educational *progress* is likely.” (Emphasis in the original). The Diamond and Polk standard based on meaningful educational benefit is incorporated into state regulations wherein FAPE is defined at 22 Pa. Code §14.1 in part as:

(iv) individualized to meet the educational or early intervention needs of the student; (v) reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress; (vi) provided in conformity with an IEP.

IEPs are crafted to reflect the levels of achievement of each child, along with her needs, strengths, and how, among other things, these needs and strengths will be addressed with the intention of providing the Student with a free appropriate public education. Indeed the IDEA clearly addresses the nature of the contents of an IEP.

§300.347 Content of IEP.

(a) *General.* The IEP for each child with a disability must include—

- (1) A statement of the child's present levels of educational performance, including— (i) How the child's disability affects the child's involvement and progress in the general curriculum (i.e., the same curriculum as for nondisabled children); or (ii) For preschool children, as appropriate, how the disability affects the child's participation in appropriate activities;
- (2) A statement of measurable annual goals, including benchmarks or short-term objectives, related to— (i) Meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum (i.e., the same curriculum as for nondisabled children), or for preschool children, as appropriate, to participate in appropriate activities; and (ii) Meeting each of the child's other educational needs that result from the child's disability;
- (3) A statement of the special education and related services and supplementary aids and services to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child— (i) To advance appropriately toward attaining the annual goals; (ii) To be involved and progress in the general curriculum in accordance with paragraph (a)(1) of this section and to participate in extracurricular and other nonacademic activities; and (iii) To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section;
- (4) An explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in paragraph (a)(3) of this section;
- (5)(i) A statement of any individual modifications in the administration of State or district-wide assessments of student achievement that are needed in order for the child to participate in the assessment; and (ii) If the IEP team determines that the child will not participate in a particular State or district-wide assessment of student achievement (or part of an assessment), a statement of— (A) Why that assessment is not appropriate for the child; and (B) How the child will be assessed;
- (6) The projected date for the beginning of the services and modifications described in paragraph (a) (3) of this section, and the anticipated

frequency, location, and duration of those services and modifications; and (7) A statement of— (i) How the child’s progress toward the annual goals described in paragraph (a)(2) of this section will be measured; and (ii) How the child’s parents will be regularly informed (through such means as periodic report cards), at least as often as parents are informed of their nondisabled children’s progress, of— (A) Their child’s progress toward the annual goals; and (B) The extent to which that progress is sufficient to enable the child to achieve the goals by the end of the year.

An examination of the IEPs for this Student has convinced the Hearing Officer that the parts of the IEP that need to be present are available and part of the IEP for the past two years. Could they have been, in parts, been written more clearly, contained more information, have a few more goals? Yes! As with any undertaking there is a range from unsatisfactory to excellent. These IEPs were satisfactory in that they contained all of the necessary elements and were designed to likely produce progress, not regression or trivial educational advancement [Board of Educ. v. Diamond, 808 F.2d 987 (3d Cir. 1986)]. The IEP must afford the child with special needs an education that would confer meaningful benefit.

It must be noted that the July 29, 2004 IEP team did not have an LEA representative who signed the attendance register portion of the IEP. The presence of an LEA representative is a requirement under the regulations of the IDEA.

§300.344 IEP team.

(a) *General.* The public agency shall ensure that the IEP team for each child with a disability includes—

- (1) The parents of the child;
- (2) At least one regular education teacher of the child (if the child is, or may be, participating in the regular education environment);
- (3) At least one special education teacher of the child, or if appropriate, at least one special education provider of the child;
- (4) A representative of the public agency who— (i) Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities; (ii) Is knowledgeable about the general curriculum; and (iii) Is knowledgeable about the availability of resources of the public agency;**
- (5) An individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in paragraphs (a) (2) through (6) of this section;
- (6) At the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and
- (7) If appropriate, the child.

The issue of an LEA representative was addressed at the hearing (NT-248, 539, S-6). It could not be determined, however, whether there was a lack of the presence of an individual or whether there was merely the lack of a signature.

The IEP that was crafted at that particular IEP meeting contained the elements of an appropriate IEP. Though the signature of the LEA was not on the document, it does not appear to this Hearing Officer to be a fatal flaw. §300.344(a) (4) indicates that **A representative of the public agency who— (i) Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities; (ii) Is knowledgeable about the general curriculum; and (iii) Is knowledgeable about the availability of resources of the public agency** must be present at an IEP meeting. It is evident that the Special Education Supervisor who signed the document and was present at the meeting by virtue of her position meets the qualifications that the IDEA sets forth as stated above. This Hearing Officer finds no reason, therefore, to find the IEP as inappropriate and award compensatory education, especially in view of the evidence which convincing that a FAPE had offered and delivered.

The Parents base their claim of a denial of a FAPE and for compensatory education on a variety of issues. They are as follows:

1. The Student's teacher was inexperienced and unqualified.
2. Goals and objectives in the IEP were vague.
3. Specially designed instruction focused on behavior rather than academics.
4. All goals and objectives were not spelled out in greater detail.
5. The Student made only minimal progress.

The combined effect of these issues has come together to the point that the Parent asserts that the Student has been denied a free appropriate public education for the past two years.

This hearing officer found little evidence to support this contention with the exception of one relatively brief period of time.

The Student's Teacher is inexperienced and unqualified.

§300.23 Qualified personnel. As used in this part, the term *qualified personnel* means personnel who have met SEA-approved or SEA-recognized certification, licensing, registration, or other comparable requirements that apply to the area in which the individuals are providing special education or related services. (Authority: 20 U.S.C. 1221e-3)

The evidence indicates that the teacher in question, Ms. F, is serving under an intern certification, one course away from traditional certification. She presently holds full certification as a regular education teacher and is enrolled in a master's degree program in special education. Prior to serving as the teacher of this class she served in the classroom as a special education aide. The teacher, whom the Hearing Officer finds quite

credible, testified that she has and continues to receive substantial training and support from the Intermediate Unit staff. She is closely supervised and mentored by her supervisor and convinced the Hearing Officer through her testimony and that of her supervisor that she is qualified for this position and capable of carrying out her duties.

Reference was also made regarding the lack of certification of the one-on-one aide hired in January 2006. This aide is a college graduate without special education certification who also receives training and support while on the job. No evidence that this aide requires certification as a teacher was provided.

One of the supervisors, Ms. L, who testified as being responsible for the program had substantial qualification as both a supervisor and a teacher and demonstrated through testimony knowledge of her field.

Mr. S, who is serving as the Director of Pupil Services is wholly qualified to serve in the position.

There is no evidence to support the contention of the Parent that a FAPE was denied because of the lack of qualifications of the Staff.

Goals and Objectives in the IEP were Vague

§300.347 Content of IEP.

(2) A statement of measurable annual goals, including benchmarks or short-term objectives, related to— (i) Meeting the child’s needs that result from the child’s disability to enable the child to be involved in and progress in the general curriculum (i.e., the same curriculum as for nondisabled children), or for preschool children, as appropriate, to participate in appropriate activities; and (ii) Meeting each of the child’s other educational needs that result from the child’s disability;

This assertion based upon the Independent Evaluator’s report was not convincing. The goals and objectives in the IEPs though not always expansive were not vague. They were specific and measurable. The IE was asked how the goals could have been written to make them better. A satisfactory response was not provided.

Could they have been more specific? Yes. Were they unsatisfactory to the point of unacceptable and denying a FAPE? Not in the opinion of this Hearing Officer. Focus was placed on the goals in the area of behavior. Each of the IEPs developed for the Student contained a Behavior Intervention Plan which was developed by a behavior specialist with the teacher and supported by the IEP team. These behavior plans all contained Annual Goals, Short Term Objectives, a process for Data Collection, and Specially Designed Instruction. (i.e. S-6 at 18-20)

The Specially Designed Instruction portion of the PIP contained prevention (antecedent) strategies, a section on replacement behavior, and consequences for both when the

Student performs the replacement behavior and when the Student demonstrates the behavior of concern.

A section dealing with “Adjustment of Learning Environment to Support Development of Positive Behaviors” was also part of the plan. This section contained items dealing with Documentation of Interventions, Rules and Consequences, Environmental Considerations, Curricular and Instructional Accommodations, Communication between Home and School, Social Skills and Behavioral Accommodations.

Evidence of Event and Behavior Recording was provided through testimony and exhibits (S-3). The nature of the non compliance was recorded although the antecedent was handled in another manner. In any event the Hearing Officer finds the BIPs adequate and not a representation of a denial of a FAPE.

Specially designed instruction focused on behavior rather than academics and All goals and objectives were not spelled out in greater detail

This Hearing Officer finds that there indeed was a focus on the behavior of this Student. One must be reminded that this eligible child entered the District after having attended an early intervention program that focused on behavior, that she had been disenrolled from four early childhood programs, had a history of physical and verbal aggression toward children and adults [redacted]. She had been difficult to evaluate and had been dismissed by a therapist because she was unable to manage her behavior during the therapy session. Clearly an IEP needs to address first things first. A teacher can not focus only on academics when behaviors such as described are taking place and indeed they did.

The Independent Evaluator opined that “emotional and behavior concerns sort of took center stage and that academic skill development issues were pretty much neglected.” (NT 379)

Yes and no! Emotional and behavioral issues did in the opinion of the Hearing Officer receive much attention, but so did academic issues. The IEPs for this Student contained academic goals that on the surface appeared meager and minimal. When, however they were combined with her emotional and behavioral needs they were adequate. Asking a first grader to write her name, identify letters and numbers, and arrange letters by upper and lower case might seem inadequate as a goal for some, but not for this youngster. In any event there were other goals that were imbedded with the academic programs in use in the classroom that will be addressed later.

IDEA 2004, it should be noted (and as a matter of dicta) deleted the requirement of a statement of short-term objectives for all children except those taking alternate assessments aligned to alternate achievement standards. According to the Senate Committee Report:

While benchmarks and short-term objectives are thought by some to help track the child’s progress, their inclusion in IEPs contributes greatly to the paperwork

burden on educators and parents, and often bears no relationship to the non-linear reality of a child's development. Special education practice via short-term objectives too often focuses on achieving only small incremental improvements in student performance to the detriment of more effective long range planning. Short-term objectives and benchmarks can focus too much on minor details and distract from the real purpose of special education, which is to ensure that all children and youth with disabilities achieve high educational outcomes and are prepared to participate fully in the social and economic fabric of their communities.

Both education officials and the President's Commission on Excellence in Special Education have found that benchmarks and short-term objectives to be unnecessary and time consuming. Some teachers have commented that their lesson plans that are aligned with the district curriculum frameworks are more useful than the benchmarks and short-term objectives required by IDRA

The committee expects that eliminating the requirements for benchmarks and short-term objectives will reduce unproductive paperwork and allow greater attention to be focused on the child's annual IEP goals and on the methods of measuring progress and reporting that progress to parents in a meaningful way. S.Rep.No. 108-185 (2003)

The teacher followed the IEP when she appropriately provided classroom instruction in the Language Arts and Mathematics using curriculum materials provided by the I.U. for the Language Arts and Mathematics. The language arts program utilized materials from the Harcourt Brace Program along with the Modern Curriculum Press-Plaid program. Rather than relying only on the goals included in the IEP, the teacher kept track of progress using the goals imbedded in the programs. For example, notations were made weekly using the Dynamic Indicators of Basic Early Literacy Skills 6th Edition (DIBELS). The DIBELS showed progress and though modest indicated to the Hearing Officer that the frequent revisions in strategy were fruitful for this youngster who was so needy.

Mathematics was approached through the Touch Mathematics program and again, in addition to the IEP goals had its own set of benchmarks. All programs were multi-sensory.

The overall program in regards to behavior and academics was balanced which is not to say equal each day. It was pointed out in testimony that during periods of time when incidents of non-compliant behavior showed significant increases, it was quite possible that the instances were compacted into one or more days each month, meaning on other days progress was made in both behavior and academics, not always measurable in conventional ways, but nevertheless progress.

The Student made only minimal progress.

The evidence is replete in information that the child has emotional and behavior problems that significantly interfere with learning and ability to function socially with others. IEP team meetings were held frequently to deal with steady ups and downs in behavior and academic progress. The Parent however opined (NT 130, 155) that improvement in behavior and emotional growth had taken place during the 2005-2006 school year. It can be said that in addition to attention to behavior, there is substantial focus on academic activities.

Progress when compared to traditional growth factors has been minimal. However when growth/progress is compared to the possibilities for this one student as IDEA requires, progress is sufficiently adequate to state that the Student was not denied a FAPE for the 2004-2005 school year and up to the November 18, 2005 in the next school year. Up to this point the IU/District had met their obligation under IDEA to continuously review the Student's progress and make the necessary changes in strategy and program to keep things moving though slowly.

The Reevaluation Report (S-24 at 3, S-26 at 3, S-47) of November 18, 2006 indicated that the Student's need for support and services to "maintain appropriate behavior and assist her learning exceeds the resources currently available in her current Emotional Support placement." The report went on to suggest that the Student may benefit from a smaller school setting that offers a more therapeutic learning environment.

This change in events suggested that a new and more dramatic approach needed to be taken in order to assure the delivery of a FAPE. The January 4, 2006 IEP (S-32, S-41) added a one-on-one aide and introduced the "Wilson Foundation Reading" program for which the teacher had received prior training. The swift action on the part of the District to respond to newly identified need is commended. It reinforces this Hearing Officer's previous opinion that the District responded satisfactorily to the Student's needs, provided a FAPE, and adjusted strategies and programs as needed.

The new IEP did not take into consideration the recommendation for a therapeutic environment recommended for this youngster. The recommendation in effect was for placement in an Approved Private School. The District, with the Parent's approval sent out letters of application to a variety of schools and the Student was accepted at one of them. This brought about a flurry of activity on the part of the District and the Parent. While the Parent was initially amenable to the movement of her child to an APS, she later withdrew her agreement. The District, in the Hearing Officer's opinion was not sufficiently aggressive in seeking this transfer.

In M.C. v. Central Regional School District, 81 F.3d 389, 396 (3d Cir. 1996) the court stated that:

A child's entitlement to special education should not depend upon the vigilance of the parents (who may not be sufficiently sophisticated to comprehend the problem) nor be abridged because the district's behavior did not arise to the level of slothfulness or bad faith. Rather, it is the responsibility of the child's teachers,

therapists, and administrators-and the multi-disciplinary team that annually evaluates the student's progress – to ascertain the child's educational needs, respond to deficiencies, and place him or her accordingly.

The District continued to do all they could to help the Student make meaningful progress. And though in the Parent's view there was an improvement, it appears in the view of other IEP team members it was, at this point, not sufficient. The District should have requested a due process hearing with the intent of seeking alternative placement. Even though the Parent was opposed to an APS placement, the District had the obligation to advocate for the child in this instance.

This Hearing Officer therefore intends to award compensatory education for a period of time between January 5, 2006 and May 24, 2006 when a new IEP was crafted for the 2006-2007 school year.

Compensatory education is an in-kind remedy designed to provide an eligible student with the services he should have received pursuant to a free appropriate public education (FAPE). When a student has been denied the appropriate educational program that he/she should have received as **the Student** has been, compensatory education is an in-kind remedy. [Lester H. v. Gilhool, 916 F. 2d 865 (3d Cir. 1990), cert. denied 499 U.S. 923, 111 S.Ct. 317 (1991)] A child is entitled to compensatory education services if the child is exceptional and in need of special education and related services and if through some action or inaction of the District the child was denied FAPE.

As the Pennsylvania Special Education Appeals Panel held in In Re: the Educational Assignment of J. B., Special Education Opinion #981 (1999), compensatory education is designed to remedy failure to provide an appropriate education for a period of time. In addition to Lester H. v. Gilhool, see also Carlisle Area School District v. Scott, 62 F.3d 520 (3d Cir. 1990), Pittsburgh Board of Education v. P.D.E., 581 A.2d. 681 (Pa. Cmwlth, 1990), Johnson v. Lancaster Lebanon Intermediate Unit 13, 757 F.Supp. 606 (ED PA, 1991).

The amount of compensatory education to be awarded will be calculated to take into consideration the following decision:

In M.C. v. Central Regional School District,³⁵ the Court of Appeals for the Third Circuit established the standard for compensatory education. The school district, however, may not be able to act immediately to correct an inappropriate IEP; it may require some time to respond to a complex problem. Thus, our holding can be summarized as follows: a school district that knows or should know that a child has an inappropriate IEP or is not receiving more than a *de minimis*

educational benefit must correct the situation. If it fails to do so, a disabled child is entitled to compensatory education for a period equal *for the school district to rectify the problem* [stress added]. Districts have 45 school days to complete an evaluation or reevaluation and 10 additional school days to complete the Comprehensive Evaluation Report. Then they have another 30 calendar days to develop an IEP after issuance of CER and another 10 school days to implement that IEP. (§14.25(m) (1, 2) (Appeals Panel, Special Education Opinion 1122)

The end date for consideration for compensatory education will be May 24, 2006. This is the date that a new IEP was crafted. All parties agreed to and were satisfied with contents of the new document. The beginning date for consideration is when the District knew that the child's needs exceeded the resources within the classroom. This date of awareness is or should be November 18, 2005. Allowing for the days indicated in the *M.C. v. Central Regional School District*, the Court of Appeals for the Third Circuit for implementation etc., this takes us to April 3, 2006. Taking into consideration five days for spring break, this comes to 32 days for which compensatory education is due in the areas of Language Arts and Mathematics. Thirty-two days at 3 hours per day calls for 96 hours of compensatory education.

The last issue that needs to be addressed, but does not call for a decision on the part of the Hearing Officer is the matter of payment for the Independent Educational Evaluation provided for the Student.

Prior to the request for a due process hearing the District agreed to pay for an IEE. When the Parent filed for a due process hearing, the District withdrew its offer to pay for this evaluation. The dates on which this hearing took place were: April 23, May 30, and June 29, 2006. On June 26, 2006 the District informed the Parent that it agreed to reimburse them the full cost of the Independent Educational Evaluation. Though the District has requested that I not address this issue because it is resolved, I can not help but opine that the reimbursement had a relationship with the on-going hearing process. I am aware that such a relationship will have an impact on the matter of prevailing party and the effect on the reimbursement of attorney fees. I agree that I am unable to award reimbursement because it is a [moot] point and has been resolved, but I would be remiss if I did not mention this issue in the text of my decision.

In summary, the Student in all but during the designated time was offered a free appropriate public education. The District did all that it could in scheduling meetings, revising strategies and programs, developing behavior plans and managing behavior to bring about more than de minimis progress on the part of this Student. Additionally, the Student has been appropriately identified as a child in the categories of emotional disturbance and specific learning disability.

Order

It is hereby ordered that:

1. Student has been properly identified as falling within the IDEA eligible categories of Emotional Disturbance and Specific Learning Disability.
2. The District offered a free appropriate public education for the 2004-2005 school year, but only partially for the 2005-2006 school year.
3. The District will provide compensatory education to the Student for the period from April 3, 2006 to May 24, 2006, (32 days) for three hours each day or a total of 96 hours. The Student's Parents shall decide how the compensatory education hours shall be spent so long as they take the form of appropriate developmental, remedial or enriching instruction that furthers the Student's needs and furthers the goals of the Student's present or future IEPs. These services may occur during the weekday after school, on weekends and during the summer months, when convenient for the Student and the Student's Parents.
4. The IEP dated May 25, 2006 will be the current IEP subject to the regulations promulgated by the IDEA.

July 24, 2006

Max Wald
Max Wald, Ed.D.
Hearing Officer