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PENNSYLVANIA
SPECIAL EDUCATION HEARING OFFICER

6367/05-06 KE
File Number

Student
Child's Name

Xx/xx/xx
Date of Birth

5/30/06, 5/31/06
Dates of Hearing

Closed
Type of Hearing

For the Student:

Mr. and Mrs. Parent

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Dates of Hearing:	May 30 and 31, 2006
Date Record Closed:	July 1, 2006
Date of Decision:	July 11, 2006
Hearing Officer:	Daniel J. Myers

Background

Student is a resident of the Southern Lehigh School District (School District) who is currently enrolled in a charter school. Student seeks compensatory education from the School District, alleging that it denied a free and appropriate public education (FAPE) to Student when: 1) it excluded him from school for ten days or longer in November and December 2004 without a manifestation determination; 2) it failed to program appropriately for Student for the 2004-2005 and 2005-2006 school years; and 3) it failed to conduct an appropriate evaluation of Student's anxiety and emotional condition.

For the reasons described below, I find generally for the School District, i.e., that it was not required to conduct a manifestation determination, nor did it fail either to program appropriately for Student for the 2004-2005 and 2005-2006 school years or to conduct an appropriate evaluation of Student's anxiety and emotional condition. I do find, however, that the School District denied FAPE to Student when it did not adequately provide education during his house arrest in November and December 2004.

Issues

- Whether or not the School District denied FAPE to Student by excluding him from school for ten days or longer in November and December 2004 without a manifestation determination?
- Whether or not the School District denied FAPE to Student by failing to program appropriately for Student for the 2004-2005 and 2005-2006 school years?
- Whether or not the School District denied FAPE to Student by failing to conduct an appropriate evaluation of Student's anxiety and emotional condition?

Findings of Fact

1. Student, born xx/xx/xx, is a [teenaged], 8th grade resident of the School District (School District) with an undisputed specific learning disability in the areas of reading, written expression, spelling and mathematics. (SD 1; N.T. 22) ¹
2. On February 18, 2004, while he was in 5th grade, Student read 4th grade words from the SRA Reading Mastery Series with an average of 80% accuracy, reading 86 words correct per minute with one error. (SD 2, p.2) His IEP goal was to increase his overall reading skills to a middle 5th grade level. (SD 2, p.5) To accomplish this, the School District utilized the SRA Reading Mastery program to address decoding and fluency and, to a lesser degree, reading comprehension. (N.T. 394-395) The School District also used

¹ References to "HO," "P," and "SD" are to the Hearing Officer, Parent, and School District exhibits, respectively. References to "N.T." are to the transcript of the hearing sessions conducted on May 30 and 31, 2006.

novels and other curriculum-based reading materials to address comprehension skills such as inferential and factual questions, making predictions, understanding cause and effect, and identifying the main idea. (N.T. 395)

3. In writing, Student scored 3 out of a 5 point rubric in Content, Organization, Voice and Word Choice, and he scored 2 out of a 5 point rubric in sentence fluency and conventions. (SD 2, p.3) To address writing, the School District used the SRA Expressive Writing program to develop topic sentences, supporting details, closing, capitalization and punctuation. (N.T. 396-397) For spelling, the School District used SRA's Corrective Spelling Through Morphographs (SD 2, p.3), and Instant Spelling Words for Writing, which uses words seen in everyday writing and written communication rather than words in isolation. (N.T. 397)
4. In math, Student was frustrational at the 5th grade level in subtraction and division, instructional at that level in addition, and he had mastered 5th grade multiplication. (SD 2, p.3) His IEP goal was to achieve 80% accuracy in 5th grade level math computations and concepts. (SD 2, p.8) To achieve this goal, the School District used the Saxon Math program to address specific math skills, and which regularly repeated and practiced those skills throughout the year. (N.T. 398)

2004-2005, Sixth Grade

5. The School District continued to implement Student's February 18, 2004 for the first half of 6th grade.
6. On October 12, 2004, Student received a lunch detention and verbal warning for failing to report to a teacher's room for make up work. (SD 17, p.1, 3)
7. On October 29, 2004, Student received a detention for disruptive behavior in class. (SD 17, p.1, 4)
8. On Wednesday, November 10, 2004, Student responded to the taunts of another student by [making a verbal threat]. (SD 17, p.1, 5; N.T. 58, 67-68, 182-186; P4, p.1) In response to Student's statements, the School District called the police as well as Student's parents. (N.T. 72; P 4, pp.1-2)
9. Apparently, the local police officer intended to take Student to the police station just to scare Student. Once at the police station, however, Student was charged with making terroristic threats and then held in the local juvenile detention facility until his preliminary hearing. (N.T. 75-76, 187)
10. On November 11, 2004, the School District "indefinitely suspended" Student until further notification from the Superintendent. (SD 17, p.1; N.T. 153, 162-165; P4, p.1) School District policy does not define the term "indefinite suspension," and School District personnel were unclear regarding its definition. (N.T. 162-164, 258; P 5, pp.12-14)

11. Ordinarily, Student's stay at the juvenile detention facility would last a few hours, or perhaps even overnight. Because Student was charged at the end of the day before the Veterans Day holiday, however, Student actually remained in the local juvenile detention facility from Wednesday, November 10 until Friday, November 12. (N.T. 79)
12. At Student's preliminary hearing on Friday, November 12, the juvenile court master placed Student on house arrest until his adjudication hearing. (SD 17, p.6; 86, 187)
13. On November 19, 2004, the School District began sending school work home to Student. (SD 17, p.6) Inexplicably, however, the School District only provided two sessions of homebound instruction (2.5 hours each) to Student while he was incarcerated and on house arrest from November 11 through December 7, 2006. (SD 16, p.1; N.T. 84-85, 266-267)
14. Ultimately, Student was away from school for 16 school days from November 11 through December 7, 2004, 10 of which were recorded as a suspension and 6 of which were recorded as excused absences. (SD 16, p.1)
15. On or about December 8, 2004, Student returned to school, at which time the School District and Student's family developed a plan for complying with a Court order that restricted Student's interaction with [several] particular students. (N.T. 172, 188-190; SD 3)
16. On December 20, 2004, the School District requested permission to conduct a functional behavioral assessment. (SD 4)
17. For some reason, a manifestation determination hearing that was scheduled for December 21, 2006, but subsequently cancelled by Student's parent due to a scheduling conflict, was never rescheduled. (P 5, pp.1-4)
18. On January 5, 2005, Student's IEP team convened to address concerns expressed by Student's parents regarding behavior and discipline. (N.T. 431-432, 478-480; SD 5)
19. On January 17, 2005, Student began counseling with a private therapist to address depression and anxiety. (P 3, p.3) Student was diagnosed with adjustment disorder with anxiety, depression and behavior issues. (P 3, p.1-2)
20. On January 20, 2005, Student's criminal charges were disposed of and Student was found guilty of a summary offense of disorderly conduct. (N.T. 86)
21. On January 28, 2005, A Woodcock-Johnson III Test of Achievement indicated the following:

Subtest or Cluster	SS	GE	AE
Spelling	89	4.4	9.2
Reading fluency	89	4.5	9.11

Subtest or Cluster	SS	GE	AE
Academic skills	92	5.2	10.8
Broad reading	94	5.3	10.9
Calculation	93	5.3	10.10
Math calculation skills	94	5.6	11.1
Math fluency	98	6.2	11.7
Letter-word identification	98	5.9	11.8
Passage comprehension	101	6.7	11.9
Broad math	100	6.5	12.0
Applied problems	108	8.1	13.5

(N.T. 356-357; SD 6; SD 20)

22. On February 2, 2005, a Functional Behavioral Assessment (FBA) indicated that neither teachers nor Student's Parents identified any significant problem behaviors. Classroom observations indicated attentive, appropriate behaviors. The FBA concluded that there was no need for a behavior plan at this time. (SD 4; SD 7; SD 8; P4, p.9,10; N.T. 347-352)
23. On February 9, 2005, Student's new, annual IEP reiterated Student's need for learning support services in reading, written expression, spelling and mathematics, as well as a learning support study skills class two times per week. (SD 6; SD 22, p.5; N.T. 420-422) Student's reading goal was increased from a beginning 5th grade level to a beginning 6th grade level. Student's math goal was increased to 6th grade level materials and mastery was increased to 85% accuracy. (SD 2, p. 15; SD 6, p. 12; N.T. 400-407, 427-429)
24. Student had regressed in spelling between Fall 2004 and Winter 2005. Student's new IEP, therefore, called for continued learning support with the same short term objectives until satisfactory achievement of the goal. (N.T. 406-407, 425-426)
25. On April 5, 2005, Student received a Saturday detention for fooling around with a student that resulted in injury. (SD 17, p.1,8)
26. On April 25, 2005, Student ceased weekly therapy with his private therapist. (P 3, p.1)
27. On April 28, 2005, Student received a detention for being disruptive in class. (SD 17, p.1, 7)
28. School District officials testified that Student's behavior in 6th grade was typical of his middle school peers. (SD 17; N.T. 190-191, 349) Academically, Student received Bs in math, Language arts, Science and Social Studies, and a C in Reading. (SD 15, p.3) Student's 6th grade Terra Nova test indicated average scores in Reading, math, science and social studies, with below average performance in language arts. (P2, p.1, 3) At no time did Student's teaching team, which regularly met each week to discuss any concerns regarding students, express any academic or behavioral concern. (N.T. 192-194, 414-415, 431; SD 22, p.13-14)

2005-2006, Seventh Grade

29. On September 29, 2005, Student received a detention related to a food fight in the cafeteria. (SD 17, p.2, 9)
30. On November 4, 2005, Student was noted for being disrespectful to a teacher, but apparently no consequence was attached to the behavior. (SD 17, p.2, 10)
31. Student's weekly teacher team meetings, however, did not discuss any significant behavioral or disciplinary concerns regarding Student. (SD 22, pp. 13-14)
32. During the second quarter of his 7th grade school year, Student's teaching team did raise some academic concerns because Student's grades had begun to drop slightly and he did not appear to be putting in as much effort as he had earlier in the year. (SD 22, p. 15) The IST team decided to require that Student meet with his learning support teacher during his activity period at the end of the day, in addition to his regular study skills class, that Student's agenda book be signed and checked daily, both at home and at school, and that the School District send home a weekly newsletter that listed all upcoming tests and assignments (SD 22, pp. 15-16)
33. On December 20, 2005, Student received detention for talking back to a teacher (SD 17, p.2, 11)
34. On January 26, 2006, Student was involved in a fight with another student on the bus, for which he was assigned a Saturday detention to be served on February 4, 2006. (S 17, pp. 2, 12; N.T. 182)
35. Before he could serve his detention, Student's parents unilaterally enrolled Student into the [redacted] partial hospitalization program for a month. (N.T. 311-312, 321-322, 333)
36. On February 9, 2006, Student's IEP team convened to develop Student's annual IEP. (SD 9) Student's reading comprehension of 6th grade materials had increased from 77% in November 2005 to 89% in February 2006. (SD 22, p.11) Over the same time, Student's multiplication of multi-digit numbers by double digit numbers increased from 75% accuracy to 85% accuracy. (SD 22, pp. 11-12) In writing, Student progressed from writing a two paragraph essay with significant assistance in November 2005 to completing such writing task independently in February 2006. (SD 22, p.12)
37. On February 11, 2006, Student's parents had Student privately evaluated by the Huntington Learning Center. (SD 18) A Slosson Oral Reading Test indicated a 6.5 grade level sight word reading level. (SD 18, p.6,15) An Informal Reading Inventory for oral reading indicated 40% comprehension of 6th grade reading materials, and 20% comprehension of 7th and 8th grade reading materials. (SD 18, p.7,15) An Informal Reading Inventory for silent reading indicated 30% comprehension of 6th and 7th grade reading materials, and 10% comprehension of 8th grade reading materials. (SD 18, p.8,15)

A CAT achievement test indicated Student was at the 19th percentile in vocabulary, 44th percentile in reading comprehension, and 79th percentile in math concepts and applications when compared to grade level peers. (SD 18, p.10)

38. On February 27, 2006, Student's parents rejected the School District's proposal to continue Student's learning support services at essentially the same level with updated goals, and they requested a special education due process hearing. (SD 9, p. 25; SD 10; SD 13)
39. In March 2006, upon his release from [partial hospitalization], Student's parents unilaterally enrolled him into a charter school. (SD 16, p.2; SD 22, p.22; N.T. 137-138, 312)
40. On March 22, 2006, an unsuccessful resolution session was conducted. (SD 14)
41. On May 9, 2006, Student's private therapist provided to the School District a summary of Student's treatment from January 17 to April 25, 2005. She stated that, while Student acknowledged that he could have handled the November 2004 peer conflict better, Student and his family were significantly affected by the School District's extreme and severe response to the situation. (P 3, p. 2; N.T. 336)
42. I conducted an evidentiary hearing in this matter on May 30 and 31, 2006. Student's parents' exhibits P1, P2, and P4 through P6 were admitted into the record without objection. (N.T. 484) P3 was admitted over the School District's objection. (N.T. 96, 484) School District exhibits SD 1 through SD 20 were admitted into the record without objection. (N.T. 485) On June 15, 2006, the parties deposed a witness who was unavailable on the scheduled hearing dates, and her deposition is marked as SD 22. (N.T. 481-482, 485) An exhibit introduced during the deposition was marked as SD 21. (SD 22, p. 18) Both SD 21 and SD 22 are admitted into the record.

Discussion

The School District did not deny FAPE to Student in November and December 2004 by failing to conduct a manifestation determination

The Individuals with Disabilities Education Improvement Act (IDEIA) and its implementing federal and state regulations require school districts to assure that all children with disabilities receive a free and appropriate public education (FAPE). 20 U.S.C. §1412; 34 CFR Part 300; 22 Pa. Code Chapter 14 While School Districts may apply their discipline codes to students with disabilities, those students cannot be punished for manifestations of their disabilities. In Re K.D. and the Harbor Creek City School District, Special Education Opinion

No. 1711 (2006) The IDEIA's manifestation determination requirement applies to a disciplinary change in placement, which means either a removal of more than 10 consecutive days or a pattern of shorter removals that total 15 days in a school year. 20 U.S.C. §§ 1415(k)(1)(A) and 1415(k)(4)(A) (2004); 20 U.S.C.A. §§ 1415(k1)(B) and 1415(k)(1)(E)(2005); 34 C.F.R. § 300.519; 22 Pa. Code §14.143(a); In Re A.P. and the Oxford Area School District, Special Education Opinion No. 1744 (2006)

Student contends that he was denied FAPE because the School District actually excluded Student from school for more than 10 days without a manifestation determination. Student contends that the 16 school days that he was either incarcerated or on house arrest between November 11 and December 8, 2005 constitute a de facto suspension. Student notes that the School District originally issued an "indefinite suspension" and Student suggests that the School District simply changed its records to reflect the 16 day period as a 10 day suspension plus 6 excused days in order to avoid liability for failing to conduct a manifestation determination.

I reject this argument. Admittedly, the School District itself is not certain of the length of that suspension, with documents and testimony ranging from "indefinite" to "ten days." (SD 17; p. 1; P 4, p.1; N.T. 153, 162-165, 258) And the School District decision to record 10 of the 16 school days between November 11 and December 8 as a suspension, with the remaining 6 school days recorded as excused absences appears to be contrived to avoid liability for a manifestation determination. (SD 16, p.1)

It is not clear to me, however, that the School District ever really suspended Student at all. Just because it alleges that it suspended Student does not make it so. During the time in question, Student apparently was not free to attend school and the School District apparently was not free to prevent (or suspend) Student from attending. Rather, the School District simply chose

to classify as a “suspension” some of the days from November 11 through December 7, 2004, when Student was either in police custody or on house arrest.

Student’s Parents argue that the School District constructively suspended Student for the entire 16 school days by manipulating the criminal justice system into ordering Student’s incarceration and house arrest from November 11 through December 7, 2004. I reject this argument because the record lacks evidence supporting it. In this case, Student [made verbal threat]. (SD 17, p.1, 5; N.T. 58, 67-68, 182-186; P4, p.1) The School District’s response to Student’s statements, i.e., to call the police as well as Student’s parents, was not unreasonable. (N.T. 72; P 4, pp.1-2) In fact, apparently the local police officer simply intended to take Student to the police station for the purpose of scaring Student. (N.T. 75-76, 187) The School District’s behavior in calling the police appears reasonable and not manipulative.

In addition, Pennsylvania’s Supreme Court has recognized that schools are given the monumental charge of molding our children into responsible and knowledgeable citizens; that part of a school’s awesome charge is to balance the exercise of rights that enrich learning with order and a safe and productive school environment; and that balancing the constitutional rights of schoolchildren and the necessity for a school environment that is conducive to learning is a complex and delicate task. J.S. v. Bethlehem Area School District, 807 A.2d 803 (2002) The Court of Appeals for the Ninth Circuit has specifically noted that school officials are justified, given the modern rash of violent crimes in school settings, in taking very seriously student threats against faculty or other students. Lovell v. Poway Unified School District, 90 F.3d 367 (9th Cir. 1996) Even the Special Education Appeals Panel is not unmindful, especially in the public perception in the wake of Columbine and the Twin Towers, that safety of students is a paramount concern. T.A. and the Philadelphia School District, Special Education Appeal No.

1237 (2002) Obviously, Congress has balanced society's "zero tolerance" for dangerousness with its concomitant commitment of "zero reject" of students with disabilities. Id.

Once at the police station, however, Student was charged with making terroristic threats and then held for two nights in the local juvenile detention facility until his preliminary hearing. (N.T. 75-76, 187) Not surprisingly, the juvenile court judge chastised the local district attorney for overreacting. (SD 17, p.6; 86, 187) While this experience must have been devastating to Student and to his family, it does not appear to be a School District manipulation of the criminal justice system that was intended, as alleged by Student, to result in a constructive 10+ day suspension from school.

The School District admits that it suspended Student for 10 days although, as noted above, I am not certain that it really suspended Student at all during the period of incarceration and house arrest. Also as noted above, school districts may impose disciplinary suspensions of up to 10 consecutive or 15 cumulative days without being considered to have changed the Student's placement and, therefore, without being required to conduct a manifestation determination. Thus, the School District was not required, in this case, to conduct a manifestation determination. Accordingly, I conclude that Student was not denied FAPE in this case because he was not subjected to a disciplinary change of placement requiring a manifestation determination.

The School District did not deny FAPE to Student by failing to program appropriately for Student for the 2004-2005 and 2005-2006 school years – except for the time during which he was on house arrest.

It is well settled that compensatory education is an appropriate remedy where a school district knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only trivial educational benefit, and the district fails to remedy the problem.

M.C. v. Central Regional School District, 81 F.3d 389 (3rd Cir. 1996). Such an award compensates the child for the period of time of deprivation of special education services, excluding the time reasonably required for a school district to correct the deficiency. Id.

Student alleges that the School District failed to provide appropriate programming for the 2004-2005 and 2005-2006 school years. He contends that his 5th grade (February 2004) IEP lacks baselines for the reading goals, making it impossible to determine how much progress Student is expected to make in a year. He complains that his 6th grade (February 2005) IEP reading goals do not address decoding or word attack. He contends that his 6th grade (February 2005) IEP and 7th grade (February 2006) IEP contain the same math goal. He argues that the School District improperly relied upon a general rubric as a progress measure in writing. I reject Student's arguments.

Student's 5th grade (February 2004) IEP indicates, as a baseline, that he read 4th grade words from the SRA Reading Mastery Series with an average of 80% accuracy, reading 86 words correct per minute with one error. (SD 2, p.2) In math, Student was frustrational at the 5th grade level in subtraction and division, instructional at that level in addition, and he had mastered 5th grade multiplication. (SD 2, p.3) In writing, Student scored 3 out of a 5 point rubric in Content, Organization, Voice and Word Choice, and he scored 2 out of a 5 point rubric in sentence fluency and conventions. (SD 2, p.3) These are sufficient baseline data.

In 5th and 6th grades, the School District utilized the SRA Reading Mastery program to address decoding and fluency and, to a lesser degree, reading comprehension. (N.T. 394-395) The School District also used novels and other curriculum-based reading materials to address comprehension skills such as inferential and factual questions, making predictions, understanding cause and effect, and identifying the main idea. (N.T. 395) While any IEP can be

picked apart, the School District's use of the SRA and curriculum-based reading materials sufficiently address Student's decoding and word attack needs, just as much as they address his reading comprehension needs.

When I compare Student's 6th and 7th grade IEP math goals, they do not appear identical to me. (SD 6, p.5; SD 9, pp. 11-12) The 7th grade IEP contains two pages of math goals, addressing both calculations and problem-solving skills at either the 7th or 6th grade levels, depending upon Student's needs. (SD 9, pp. 11-12) These are not the same goals as were in the 6th grade IEP. (SD 6, p.5)

In addition, while the Appeals Panel has held previously that the state PSSA writing rubric does not meet the requirements of objective measurement required by IDEA and special education regulations, In Re R.U., Special Education Opinion No. 1492 (2004), the School District's IEPs do not use the state PSSA rubrics. In assessing Student's present education levels, they use two different writing rubrics, i.e., the Periodic Reading Survey and the District Writing Assessment. (SD 2, p. 3) Thus, case law disapproving of the use of state PSSA rubrics does not appear to be applicable to this case.

I note that Student also suggests that his 6th grade Terra Nova test indicates scores far below proficient in reading, language, math, science and social studies. (P 2, p.1-2) That test's "Observations" section notes, however, that the performance levels are based upon an expectation that a child will be at the proficient level or above "by the end of Grade 8." (P 2, p. 2) Thus, Student's "below proficient" Terra Nova scores in 6th grade do not appear to be indicative of a problem.

Finally, I note that, during the second quarter of his 7th grade school year, Student's teaching team did raise some academic concerns because Student's grades had begun to drop

slightly and he did not appear to be putting in as much effort as he had earlier in the year. (SD 22, p. 15) The School District properly responded to those IST observations by requiring that Student meet with his learning support teacher during his activity period at the end of the day, in addition to his regular study skills class, that Student's agenda book be signed and checked daily, both at home and at school, and that the School District send home a weekly newsletter that listed all upcoming tests and assignments (SD 22, pp. 15-16) It appears, then, that the School District was properly programming for Student and appropriately monitoring Student's progress under his IEPs.

I conclude that the School District's IEPs, and its implementation of those IEPs, for the 2004-2005 and 2005-2006 school years were appropriate and that Student was not denied FAPE as the result either of inappropriate programming or failure to properly implement an IEP.

I do, however, conclude that the School District denied FAPE to Student for a period of 4 school days during his incarceration and house arrest from November 11 through December 7, 2004. In this case, 16 school days elapsed while Student was in the juvenile detention facility and on house arrest. (SD 17, p.6; N.T. 86, 187) Assuming, as the School District alleges, that Student was suspended for 10 of those 16 school days, the School District was obligated to provide homebound instruction to Student for the remaining 6 school days. In fact, the School District only provided two days of homebound instruction to Student. (SD 16, p.1; SD 17, p. 6; N.T. 84-85, 266-267) By the School District's own subjective count, then, it had an obligation to provide 4 additional days of homebound education to Student. To the extent that any School District preparations or site inspections were required before homebound instructors could visit Student at home, those preparations or site inspections should have been performed during the 10

school day suspension period to enable homebound instruction to begin immediately upon day 11. (N.T. 85)

To remedy this denial of homebound instruction, Student is entitled to 10 hours of compensatory education (2.5 hours x 4 days.) In Re D.S. and the Penn-Delco School District, Special Education Opinion No. 1719 (2006)

The School District did not deny FAPE to Student by failing to conduct an evaluation of Student's anxiety and emotional condition

Evaluation of a student's needs is a fundamental element in the provision of FAPE to a student with a disability. 34 CFR §§300.320, 300.531 In this case, there is no dispute among the parties that Student has a specific learning disability. The question is whether he should have been evaluated for emotional and anxiety issues.

Student argues he should have been evaluated after his December 2004 return to school from house arrest because he had begun to exhibit signs of anxiety and depression and his behavior had changed drastically. The School District disagrees that Student's behavior demonstrated a reason to evaluate Student, and the School District argues that, to the extent that Student's parents contend that there are behavioral assessments during the November 2004 house arrest and February 2006 partial hospitalization that demonstrate behavioral and emotional needs, those assessments are not in the record.

Before his November 2004 incarceration and house arrest, Student had been involved in two disciplinary incidents: 1) on October 12, 2004, for failing to report to a teacher's room for make up work (SD 17, p.1, 3); and 2) on October 29, 2004, for disruptive behavior in class. (SD 17, p.1, 4) After his return from house arrest, and for the remainder of 6th grade, Student was involved in two disciplinary matters: 1) on April 5, 2005, for fooling around with a student that

resulted in injury (SD 17, p.1,8); and 2) on April 28, 2005, for being disruptive in class. (SD 17, p.1, 7) This does not appear to be a significant change in behavior.

In 7th grade, Student was involved in 4 disciplinary matters: 1) on September 29, 2005, Student received a detention related to a food fight in the cafeteria (SD 17, p.2, 9); 2) on November 4, 2005, for being disrespectful to a teacher, but apparently no consequence was attached to the behavior (SD 17, p.2, 10); 3) on December 20, 2005, for talking back to a teacher (SD 17, p.2, 11); and 4) on January 26, 2006, Student was involved in a fight with another student on the bus, for which he was assigned a Saturday detention to be served on February 4, 2006. (S 17, pp. 2, 12; N.T. 182)

Immediately after his return from house arrest, Student's IEP team convened on January 5, 2005, in response to concerns expressed by Student's parents regarding behavior and discipline. (N.T. 431-432, 478-480; SD 5) The IEP team decided to conduct a Functional Behavioral Assessment (FBA) which, on February 2, 2005, indicated that neither teachers nor Student's Parents identified any significant problem behaviors, classroom observations indicated attentive, appropriate behaviors, and the FBA concluded that there was no need for a behavior plan at that time. (SD 4; SD 7; SD 8; P4, p.9, 10; N.T. 347-352) School District officials testified that Student's behavior in 6th and 7th grades was typical of his middle school peers. (SD 17; N.T. 190-194, 349, 414-415, 431; SD 22, p.13-14)

In this case, the School District witnesses were credible, professional in demeanor, well-qualified, and knowledgeable about their areas of professional expertise as well as about Student. Their opinions are supported by the evidence in the record. The School District responsibly conducted an FBA in January 2005 after Student's parents raised concerns. Student's fooling around and disruptive/disrespectful behaviors are relatively minor and it is disheartening, but

believable, that they are typical of that middle school's students. At no time did Student's teaching team, which regularly met each week to discuss any concerns regarding students, express any academic or behavioral concern. (N.T. 192-194, 414-415, 431; SD 22, p.13-14) The January 26, 2006 bus fight is more concerning, but cannot serve as a basis for finding that the School District should have evaluated Student either in 6th grade or the first semester of 7th grade. It is interesting to hear that there are behavioral assessments during the November 2004 house arrest and February 2006 partial hospitalization that demonstrate behavioral and emotional needs but, as the School District noted, those assessments are not in the record.

Since January 2006, Student has been unilaterally removed from the School District by his parents, first in a one-month partial hospitalization program and then in a charter school. (SD 16, p.2; SD 22, p.22; N.T. 137-138, 311-312, 321-322, 333) The School District was reasonably entitled to wait until Student's return from the partial hospitalization before initiating its own evaluation, and since Student's enrollment in the charter school the School District has not been under an obligation to evaluate Student.

Accordingly, I conclude that the record does not establish that the School District denied FAPE to Student by failing to conduct an evaluation of Student's anxiety and emotional condition.

CONCLUSION

For the reasons described above, I find that the School District was not required to conduct a manifestation determination, nor did it fail either to program appropriately for Student for the 2004-2005 and 2005-2006 school years or to conduct an appropriate evaluation of Student's anxiety and emotional condition. I do find, however, that the School District denied FAPE to Student when it did not adequately provide education to Student during his house arrest in November and December 2004. To remedy this denial of homebound instruction, Student is entitled to 10 hours of compensatory education (2.5 hours x 4 days.)

ORDER

- The School District shall provide to Student 10 hours of compensatory education.

Daniel J. Myers
Daniel J. Myers
Hearing Officer

July 11, 2006

Re: Due Process Hearing
File Number 6367/05-06 KE