

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

PENNSYLVANIA

SPECIAL EDUCATION HEARING OFFICER

DECISION

Child's Name: B.T.

Date of Birth: [redacted]

Date(s) of Hearing: August 31, 2006; September 7, 2006

CLOSED HEARING

ODR NO. 6524/05-06 AS

Parents

Parent[s]

Parents' Representative:

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School District:

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Dated Transcript Received:

Date Closing Arguments Received: 9/24/06

Date Record Closed: 9/24/06

Date of Decision: 10/8/06

Hearing Officer: Margaret Drayden, Esq.

Précis

Student is a [teenager] who has received special education services since [Student] was 3 years old. In January 2005, while attending [redacted] School District, [Student] was placed on a 3-month instruction-in-the-home placement at Parent's request due to misbehaviors and Parent's concerns. Student remained in that placement and in December 2005 and moved into the District with an expired NOREP and an IEP which would expire within days. The District offered an IU center-based program which Parent rejected. Parent filed for a due process hearing for failure to provide FAPE in a LRE.

Stipulations

1. The parties agreed that occupational therapy services provided during the 2005-06 school year were provided.
2. The parties agreed that the speech and language services identified in the April 2006 proposed IEP are appropriate.

Findings of Fact

1. Student is an identified child whose date of birth is [redacted]. (S-11.)¹
2. At the time Parent filed for this due process hearing (5/12/06), Student resided in the District. (Id.)
3. Student's first CER was written when Student was 3 years old. (Id.)
4. On 2/1/99, Student was admitted to [redacted] Behavioral Services Child Partial Hospitalization Program for 25 days and a psychiatric summary concluded:
 - Axis I – Attention Deficit Hyperactive Disorder (ADHD), Oppositional Defiant Disorder (ODD), R/O Bipolar Disorder, Mixed, R/O Dysthymia, Parent/Child Conflict, R/O Severe Learning Disability;
 - Axis II – No diagnosis;
 - Axis III – Childhood Asthma;
 - Axis IV – Psychosocial Stressors – Moderate: Family Conflicts;
 - Axis V – GAF upon discharge = 50.²

¹ Parents' exhibits are noted as "P-"; School District exhibits are noted as "S-"; Hearing Officer exhibits are referenced as "HO-"; Noted Transcript is referenced as "NT"; Findings of Fact are noted as "FF".

² The Diagnostic and Statistical Manual of Mental Disorders ("DSM-IV"), published by the American

Recommendations included: identification as a student with emotional support needs; wraparound services; continued mental health treatment; and medication. (Id.)

5. On 4/9/99, Student was admitted to [another] Behavioral Health Care Services Child Inpatient Program for severe emotional and behavioral problems including: hitting, kicking, threatening to kill himself or for someone to kill [Student]. Medical and clinical courses of treatment were implemented. Discharge diagnosis was reported as:
 - Axis I – ADHD, ODD;
 - Axis II – Diagnosis deferred;
 - Axis III – Asthma;
 - Axis IV – Psychosocial and Environmental problems; No contact with father; single parent household; witnessed mother beating neighbor;
 - Axis V – GAF (Admission) – 25, GAF (Discharge) – 40. (Id.)Recommendations included: return to the Partial Program and behavioral health, 40 hours/week of Therapeutic Support Staff (TSS) in the home/school, 4 hours/week of Mobile Therapy in home/school, and 4 hours/week of behavioral specialist in home/school. Student was discharged on 4/13/99. (Id.)
6. On 4/22/99, a psychiatric evaluation reported that Student was readmitted to the partial hospitalization program for severe aggression and opposition following the 4/9/99 – 4/13/99 hospitalization. During the 4/9/99 hospitalization, Student was placed on Risperdal, which dramatically decreased [Student’s] aggressive activity. (Id.)
7. Student attended Kindergarten during the 1998-99 School Year. Parent reported that toward the end of that school year Children and Youth recommended she remove Student from [Redacted] Elementary and place [Student] in [Redacted] Charter School. (Id.)
8. 5/14/99, during Student’s 1998-1999 kindergarten year, [Redacted] School District (HSD) evaluated Student while [Student] was in a regular education kindergarten class. Assessments included: WISC-III, WIAT, Beery-Buktenica On Developmental Test of Visual-Motor Integration, Achenbach Child

Psychiatric Association, uses a multi-axial approach. Axis I lists clinical (mental) disorders; Axis II – developmental disorders and personality disorders; Axis III – physical conditions; Axis IV – severity of psychosocial stressors; and Axis V – global assessment of functioning, which is the level of functioning at the present time and the highest level within the past year.

Axis IV represented the clinician’s estimation of the client’s overall severity of life stress in the past year. There are six categories/scores associated with this Axis: 1. No stress; 2. Mild stress; 3. Moderate stress; 4. Severe stress; 5. Extreme stress; and 6. Catastrophic stress.

Axis V (Global Assessment of Functioning) has scores ranging from 1 to 100, with 100 being optimal. A score in the 91-100 range shows no symptoms impairing functioning. The DSM-IV lists a score of 41-50 as “Serious symptoms (e.g., suicidal ideation, severe obsessional rituals, frequent shoplifting) OR any serious impairment in social, occupational, or school functioning (e.g., no friends, unable to keep a job).”

Behavior Checklist, Records Reviews and Observations. The WISC-III indicated a FSIQ of 98; the WIAT placed [Student's] academic skills in the average range with Standard Scores ranging from 88 – 103; the VMI revealed average to low average development of visual-motor skills (SS=90). Behaviors noted on the CBCL found to impact on Student's academic performance included social problems, attention problems, aggressive behaviors, withdrawn behaviors, thought problems and delinquent behaviors. (Id.)

9. A 2d ER, dated 8/26/99 – just 3 months later – was at Parent's request. The ER concluded, *inter alia*, that “emotional support itinerant” should be explored. (Id.)
10. Student attended first grade (1999-2000 school year) in a partial placement at [redacted private school] with the remainder at [Redacted] Charter School. (Id.)
11. On 10/4/99, a Psychological Evaluation by a licensed psychologist reported diagnoses of ADHD, ODD, and R/O PDD. (Id.)
12. On 10/14/99, a Psychological Evaluation by a certified school psychologist noted that while there may be a discrepancy between academic ability and achievement, it was uncertain whether this was due to a poor kindergarten experience or the result of behavioral issues.(Id.)
13. On 11/04/99, a Psychiatric Evaluation was completed through Cornell Abraxas Outpatient Mental Health Services. Student was referred for continued treatment and medical recommendations due to [Student's] previous history of behavioral problems. The report included:
 - Axis I – ADHD, ODD, PDD (by Mother's Report), R/O Expressive and Receptive Language Disorder;
 - Axis II – No diagnosis;
 - Axis III – History of Asthma, Nocturnal Enuresis;
 - Axis IV - Psychosocial stressors are severe and include mother with mental health issues, father absent from home, corporal punishment and social and academic stressors;
 - Axis V – GAF 40-45.

Recommendations included: medication consisting of Risperdal and Depakote, continued wraparound services, and progress reports by mother. (Id.)

14. On 12/10/99, Student was evaluated by a licensed psychologist. The resulting report noted that the psychiatrist at Cornell Abraxas diagnosed Student with ADHD and Asperger's Disorder and that Student had bitten a TSS's hand and required restraint. The psychologist concluded Student continued in need of home and community-based services and offered diagnoses of ADHD, ODD and Asperger's Disorder by History. (Id.)
15. On 12/21/99, a 3d CER issued. Student was still in first grade (1999-2000 school year) and attending [Redacted] Charter School. [Student] was referred for behavior and academic concerns. [Student] was noted to take Depakote and Risperdal, which had a positive affect on [Student's] learning but [Student] was unable to control [Student's] aggressive and disruptive classroom behaviors. A Functional Behavior Assessment reported Student “at times is very aggressive in the classroom. Discipline reports for the month [sic] of October and December say [Student] frequently hits, shoves, knocks over desks, crawls on

- the floor, refuses to follow directions, leaves the room without permission and kicks objects.” (Id.)
16. Despite the misbehaviors noted in the 12/21/99 CER, the CER concluded that Student “is currently not eligible for Special Education.” It recommended that “[i]f at the end of the school year there is still concern about [Student’s] lack of achievement, [Student] should be tested again. [Redacted] is pursuing hospitalization at [Redacted] Child Psychiatric Unit to get [Student’s] medications corrected.” (Id.)
 17. On 2/12/00, Student was readmitted to [Redacted] due to “significant emotional and behavioral problems, which included self-harm behaviors that were noted to be that [Student] was banging [Student’s] head on the walls at school.” Student was discharged on 2/17/00. (Id.)
 18. On 3/13/00, a 4th CER issued. Student was still a student at [Redacted] Charter School. [Student] was referred for behavior and academic concerns. It noted, *inter alia*, improved behaviors after [Student’s] return from [Redacted], and that Student needed learning support for reading, writing and math skills and recommended “supplemental intervention in the resource instructional environment.” (Id.)
 19. On 3/13/00, an IEP was developed to meet Student’s learning disabilities; Student was in the regular education classroom for instruction for all except 2 hours/week. (Id.)
 20. On 4/25/00, Parent requested – in writing – that Student be placed in a center-based emotional support classroom operated by the Intermediate Unit. (Id.)
 21. On 5/23/00, [Redacted] completed a psychiatric evaluation; Student was referred for an inability to function in school. The diagnostic report included:
 - Axis I – ADHD, combined type, ODD, Parent/Child Relational Problem, Asperger’s Syndrome (by History), Enuresis, Nocturnal and Diurnal Type;
 - Axis II – Deferred;
 - Axis III – Childhood Asthma;
 - Axis IV – Psychosocial Stressors – current classroom setting;
 - Axis V – GAF = 45.Recommendations included: Partial hospitalization, continued psychotropic medication and wraparound services, and psycho-educational testing. (Id.)
 22. On 7/12/00, Student was admitted to the inpatient Unit at [Redacted] Medical Center and was not discharged until 8/3/00 due to “increased aggression, severe separation anxiety, disruptiveness in class including throwing chairs and desks and threatening teachers with bodily harm, nocturnal and diurnal enuresis.” (Id.)
 23. On 8/23/00, Parent signed a 2d NORA placing Student in a full-time emotional support placement at [Redacted] Academy (Id.)
 24. On 8/28/00, an integrated treatment plan developed by [Redacted] at [Redacted] Community and Home-Based Services was implemented by TSS and a Behavioral Specialist. Student’s primary diagnoses were listed as ADHD and ODD. (Id.)
 25. On 10/17/01, a 3d NORA issued and was signed on 12/1/01 recommending a full-time emotional support placement at [Redacted] Academy. (Id.)

26. On 10/17/01, an IEP was offered which noted no need for Extended School Year (ESY) as [Student] was retaining information. Student's needs included, *inter alia*, reading comprehension, identification of [Student's] anger and acceptance of consequences for [Student's] behaviors. Measurable Annual Goals were not included. (Id.)
27. The Family moved out of [Redacted School District] for part of 2002-03, but when they returned in 2003, Student attended a split placement at [Redacted] and [Redacted]. (Id.)
28. In June 2004, Student was evaluated on the WIAT II and noted to be reading at Level C in Corrective Reading; [Student] was also evaluated with the WISC-III, which yielded at FSIQ of 76 (borderline range). (Id.)
29. The 2004-05 school year (Student's 6th grade year) started at [Redacted] Elementary School, in a regular education class, with learning support (1/2 hour in the morning and 2 hours in the afternoon) and 3 hours of Emotional Support Itinerant (ESI) per week. (Id. at 6; NT at 54-55.)
30. On 10/21/04, Student was noted to be reading, writing and spelling at the 2d grade level; [Student] was at level B in SRA Phonemics; and at the beginning of 2d grade level in math. (S-11.)
31. On 10/25/04, an OT Report concluded that Student was "struggling with academic work and displaying inappropriate behaviors to cover the difficulties [Student] was experiencing." (Id.)
32. On 12/22/04, the IEP team met and updated Student's 9/8/04 IEP by adding OT, updated Present Levels/Data Page, and noted "Sensory diet choices and build in sensory breaks as choices". (S-3.)
33. The 12/22/04 IEP has numerous dates on different pages: pp.4 and 6: 9/8/4, pp.5,8,9,13 are undated, p.7: 11/23/04, p.10: 1/21/05, cover sheet: 12/22/04. (S-1.)
34. The 12/22/04 IEP, p. 13, listed the LRE Educational Placement as: Learning Support Monitor; Location: Instruction in the home for no more than 3 months – 30 min OT/week, 1 hr ESI, 4 hours academic/week. (S-1.)
35. On 1/14/06, Student got into an altercation with another pupil [redacted]. (NT at 49-50.)
36. Parent testified that [redacted]. (Id.)
37. Parent, concerned that the District was not following the Behavior Management Plan ("BMP") and afraid that Student would [suffer consequences because the Redacted School District was not] implementing the BMP, requested "homebound" until the situation was resolved. (NT at 50-53; S-11.)³
38. On 1/21/05, [Redacted School District] issued a NOREP, changing placement to "Instruction in the home for 5.5 hours per week: 4 hours academic, 1 hour ESI, 30 min. OT." This placement was limited to 3 months. The NOREP was not signed

³ Although exhibits and testimony used the terms "homebound" and "instruction in the home" interchangeably, the Appeals Panel, in Spec. Educ. Op. No. 1485, footnote 1, clarified: "This panel recognizes the differences between homebound instruction and instruction in the home. The latter is special education and related services delivered to an eligible child in his/her home who 'because of a medical condition... [is] unable to leave home to attend school', while homebound instruction is instruction for a student (not necessarily an eligible student) who is 'temporarily excused from attending school because of urgent circumstances such as a temporary physical condition.'" Student is an eligible student and the placement, as specified in the 1/21/05 NOREP, is "instruction in the home."

- by Parent but by an advocate who identified himself as Parent's "Power of Attorney" on the 12/22/04 cover page of the IEP. (S-1; NT at 48-49, 81.)
39. The 1/21/05 NOREP stated the change in placement was proposed due to "Parent request due to concerns of continued emotional difficulties despite interventions stated in IEP." No other options were considered, but the NOREP stated "other options are being explored" and an evaluation, consisting of the WISC-III, WIAT-II, SAED Rating Scales, Behavioral Charting, WJ-III, weekly data collection, Parent input, teacher input, anecdotal [sic] records," was to be conducted. (Id.)
40. Parent testified this evaluation never occurred. (NT at 53.)
41. Although there was a change of placement, there was no updated IEP, other than [Redacted School District] adding, "Instruction in the home for no more than 3 months – 30 min OT/week, 1 hr ESI, 4 hours academic/week" to the last page of the IEP. That notation was not dated and it could not have been part of the 12/22/04 meeting, because the decision to change Student's placement did not occur until after [redacted event] on 1/14/05.. (S-1; NT at 62-63.)
42. Despite Parent's contacting [Redacted School District], there was no further change in Student's placement (NT at 57.)
43. On 8/9/05, [Redacted School District] issued a Reevaluation Report (RR), stating Student's school was "[Redacted]/Homebound" and [Student's] educational program was "Learning Support Resource with Emotional Support Itinerant and Occupational Therapy". It further reported that a WISC III was administered on 6/11/04 by a certified school psychologist and Student had a FSIQ of 76; that the WJ-III was given on 5/21/05 and 6/10/05; that Student was currently taking 60 mg of Strattera daily (a medication for ADHD) as well as Risperdal (a neuroleptic medication) and an inhaler for [Student's] asthma; it stated that:
"[Student] began the school year at [Redacted]. [Student] was receiving learning support services for Reading, Language Arts and Math. [Student] had a personal aide for instruction beginning in October. [Student] had 20 office referrals and 9 official suspensions. There was a crisis plan as well as individual behavior plan. The IEP team met weekly to discuss and problem solve. Discipline referrals were submitted for fighting, disrespectful and disruptive behaviors, and refusal to cooperate with adults." (S-2; NT at 165-66, 328.)
44. If [Redacted School District]'s 2004-05 school year started at the beginning of September, there would have been approximately 17 weeks of school by mid-January, meaning Student averaged slightly more than 1 referral per week. (Id.)
45. This 8/9/05 RR reported Student's placement changed in January to instruction in the home and then the next sentence stated Student began receiving homebound instruction in January. (Id.)
46. The RR reported that Student received "4 to 5 hours weekly along with ½ hour of Occupational Therapy. An hour of emotional support itinerant services were included in the 4 to 5 hours a week." However, the 1/21/05 NOREP called for 5.5 hours per week, with 4 hours of academics, 1 hour of ES, and ½ hour of OT. (Id., S-1.)
47. The RR included the teacher's April report which stated that the "Occupational

- Therapist will begin to see [Student] at [Redacted] school. After [Student's] OT session, [Student] will read to [pupil], a second grader at [Redacted]. To build sight words and fluency skills, [Student] will practice one story for [a] whole week." The May report included "[Student] did a super job while reading to a few students at [Redacted]. The students were disruptive at first but once [Student] started reading, [Student] did well and the students responded." (Id.)
48. The RR reported Student received ESY 3 days per week for the 5-week period. The ESI teacher's input included: "[Student] needs to continue working on anger management and coping skills. [Student] has not made any verbal threats to [Redacted] School District Staff in my presence. However, [Student] has made threats towards [Student's] TSS. [Student] has also postured several times indicating that [Student] would hit someone or run away. With redirection, [Student] has made the right choice and sat back down. Since [Student]'s in summer school with so few other students and not a regular daily program the goals for self-regulation are not able to be fully worked on. We have discussed those goals. [Student] is a wonderful young [student] that is able to articulate [Student's] concerns and frustrations very well." (Id.)
49. The RR used Behavior Rating Scales for the [Redacted] School setting as well as instruction in the home. The information was provided by the special education facilitator, parent input, teacher input, agency input, and "based on observations of the child, weekly and monthly IEP team meetings". The list included 42 observations, including very minor things, such as: makes unnecessary comments, has difficulty accepting change, constantly fidgeting, and inattentiveness to what others do. It also included issues of self esteem: easily upset by constructive criticism, overly critical of self, lacks self confidence, easily flustered and confused, tense and unable to relax. It included "impertinence, sauciness" and it included serious behaviors such as: profane language swearing cursing, is verbally aggressive with teachers, fights with peers, provokes peers to verbal and physical assault. (Id.)
50. Parent's expert opined that these behaviors are not unusual for a child with diagnoses of ADHD and emotional disturbance. (NT at 451.)
51. Parent's expert further opined that the behavior rating scales may have been a list where teachers and others just checked things off, such as "impertinence and sauciness", which Parent's expert testified "is clearly from the protocol itself." (NT at 451-52.)
52. Parent's expert testified that the RR was notably deficient in that it had no signatures and contained no recommendations for the IEP team. (NT at 326-27.)
53. The 10/25/04 Occupational Therapy Report, which had a handwritten notation of "12/22 OT present levels for IEP", was included as part of the RR. (S-2.)
54. The OT therapist reported Student did not interact with [Student's] peers until they started an altercation, whereupon Student "became verbally aggressive, using foul language." (Id.)
55. The OT Report incorrectly stated Student's age as [redacted], when, in fact, Student was [older]. Even with the incorrect chronological age, the Beery-Buktenka Development Test of Visual-Motor Integration, Motor Coordination,

- and Visual Perception scores were in the low and very low range for [Student's] misstated age and grade. (Id.)
56. On 12/5/05, Student was enrolled in the District, albeit without immunization records, which arrived on 12/9/05. (NT at 131.)
 57. The District made timely efforts to obtain school records from [Redacted School District]. (NT at 133-34.)
 58. The District Director of Special Education ("Director") spoke with the [Redacted School District] director, who shared Student's history, including [the] search for an ES placement and recommended an ES placement to Director. (Id, 163-65.)
 59. The District has an ES resource room for middle school where students come for a period a day for social skills, study skills, etc. Children with more complex ES needs attend [Redacted] School (NT at 137, 177-78, 205-06.)
 60. On 12/12/05, the Director issued a Referral to the [local] Intermediate Unit ("IU") for an emotional support classroom placement for Student. Under "Reason for Referral" is written: "Move-In from [Redacted] School District. Instruction in the home/Emotional Support Itinerant, OT; recommendation includes full time Emotional Support" The fax cover sheet indicates 30 pages were being sent to [the] IU. (NT at 162-63;P-1; S-11.)
 61. It is the District's standard operating procedure to initiate a contact with the IU if it appears a student may need services the District does not provide. (NT at 201.)
 62. Parent's expert opined that the District was already making a placement recommendation for a full-time emotional support classroom in a center-based placement. (NT at 339.)
 63. On 12/13/05, the District asked Parent to a meeting at the Middle School because its written record "was so sketchy at that point". (Id.)
 64. The 12/13/05 meeting was attended by a school psychologist, occupational therapist, guidance counselor, special education teacher, Director, and Parent. (135-37.)
 65. The District proposed [Redacted] School, which is operated by the IU, and has an adventure-based education curriculum. (NT at 137-39, 287-90.)
 66. Upon Parent's rejection of [Redacted], the District offered [Redacted] with its 45-day diagnostic classroom. This is also a[n] IU-operated, center-based placement. (NT at 140-41, 206-07, 335-36.)
 67. On 12/14/05, Parent filed for a due process hearing. (NT at 146; S-4.)
 68. On Friday, 12/16/05, the District issued an Invitation to Participate in an IEP, scheduled for Monday, 12/19/05 at [Redacted]. In addition, the Director spoke with Parent via telephone and discussed the IEP meeting date and time with her. (NT at 140-143, 220-21, S-15.)
 69. Mother testified she didn't get the Notice and that she didn't understand that the meeting was an IEP meeting, but went because she was told to meet with them. (NT at 62-63.)
 70. On 12/19/05, an IEP meeting was held at [Redacted] and attended by the [Redacted] Supervisor of the ES program (the IU Supervisor), a special education teacher, the IU psychologist, Student, Parent, and Director. No

- regular education teacher attended this meeting. (NT at 142-44, 337; S-15, S-16.)
71. Parent's expert found it "odd" that an IEP meeting would be held at a[n] IU center-based placement when Student, new to the District, had not been in any IU placement. (NT at 336.)
 72. Parent's expert opined that if a district were not attempting any education in the regular education arena, it would not invite a regular education teacher. (NT at 337.)
 73. On 12/20/05, a Resolution Meeting was held; the District continued to offer the [redacted] 45-day diagnostic placement which Parent continued to reject, Parent asked for a learning support classroom in [Student's] home school which the District declined, and the parties agreed to the District conducting an evaluation with Student continuing to receive instruction in the home. The parties further agreed the hearing would either be continued until the evaluation was completed and a program and placement recommendation made or withdrawn without prejudice. (NT at 146-49;S-7.)
 74. The District implemented the expired NOREP and 12/22/04 IEP from [Redacted School District] the week of December 19, 2005. (NT at 168; S-18.)
 75. On 1/10/06 District issued a Permission to Reevaluate, on 1/23/06 Parent gave a verbal agreement, and on 1/24/06, Parent signed said form. (NT at 149-50, 186; S-9, S-11.)
 76. The District did not receive consent for release of information for several of Student's behavioral health care providers until the April 2006 IEP meeting. (NT at 172-75.)
 77. On 3/27/06 the RR issued. Among the tests given, the Woodcock-Johnson III Tests of Achievement were administered on 12/20/05 by Student's teacher, the day of the Resolution Meeting, and 1 month and 4 days before the District had Parent's written permission to re-evaluate. The Conners' Rating Scales was given on 1/23/06, and the Social Skills Rating System was also given on 1/23/06. (NT at 243, 356-360; S-9, S-11.)
 78. The RR included parental input, observations by Student's instruction in the home teacher, evaluation by a speech therapist, evaluation by an occupational therapist, update by Student's probation officer, an interview of Student by a school psychologist intern, a psychiatric consultation, and a psychological evaluation conducted almost 2 years prior to the RR. (S-8, S-11.)
 79. The Director of Psychological Services ("DPS") testified the team which reviewed Student's records noted how consistent the record was of Student's behaviors over time and across settings, and that Student had received special education services since early intervention. (NT at 231-32.)
 80. The 7/1/04 Psychological Evaluation (a 36-page report) incorporated into the District's 3/27/06 RR identified 6 factors which make it difficult for Student to function successfully at home and in school: neurobehavioral disorders, executive function disorder, a learning disability, secondary emotional issues, ineffective coping techniques, and environmental problems. (S-8; S-11.)
 81. The 7/1/04 Psychological Evaluation also noted Student "was previously diagnosed with the following neurobehavioral disorders: Asperger's Disorder,

Bipolar Disorder, Attention Deficit Hyperactivity Disorder – Combined Type, Oppositional Defiant Disorder, Separation Anxiety Disorder. The testing that I did supported all of these diagnoses. Essentially, what this means is that [Student] has a serious mental illness that would significantly interfere with [Student's] day-to-day functioning. [Student's] neurobehavioral disorders make it difficult for [Student] to interpret accurately what is happening in [Student's] environment and to respond to it appropriately. [Student's] perception of reality is qualitatively different than the perceptions of the average student [Student's] age. [Student] might feel threatened by a statement that the average student would interpret as appropriate correction. Furthermore, [Student] does not have the capacity to inhibit [Student's] behavior. Consequently, [Student] is responding without thinking. This combination results in much inappropriate behavior. However, what is important to keep in mind is that [Student's] behavior makes sense to [Student]. [Student's] neurobehavioral disorders seriously interfere with [Student's] capacity to function in school and at home.” (S-8, S-11.)

82. The 7/1/04 Psychological Evaluation recommended Student “be placed in a regular sixth grade program and that [Student] be provided with a tutor who would be responsible for [Student's] educational program. [Student's] tutor would need to be a certified teacher who had training in learning disabilities, neurobehavioral problems, and emotional disorders.” (S-8, S-11.)
83. A 2/28/06 Psychiatric Consultation was included in the RR. The psychiatrist recommended “maximal levels of support. These may include a decreased class size, an increase in teacher-to-student ratio, an extremely structured classroom setting, a behavioral plan integrated into the school day, and social skills training. Typically, this level of support can be found in an emotional support classroom. Given the fact that the [Redacted] Middle School does not have such a classroom, [Student's] educational needs would best be met through placement in an emotional support classroom at a different site.” However, the doctor makes an educational leap from an ES classroom in the District to recommending a “center placement” without considering any less restrictive placements. (NT at 350-52; S-10.)
84. The 2/28/06 Psychiatric Consultation reported DSM-IV diagnoses:
- Axis I – Cognitive Disorder NOS (deficits in executive functioning), Mixed Receptive-Expressive Language Disorder, Developmental Coordination Disorder (deficits in visual motor, visual perceptual and fine motor coordination), Reading Disorder, Mathematics Disorder, Disorder of Written Expression, Attention-Deficit/Hyperactivity Disorder by History, Oppositional Defiant Disorder by History
 - Axis II – Borderline Intellectual Functioning (Full Scale IQ 76)
 - Axis III – No Diagnosis
 - Axis IV – Psychosocial Stressors – Single parent household, paternal uninvolved, mother with mental health issues
 - Axis V – Current GAF: 30
85. The RR included Parent's preference for Student to be in a small class, that “if [Student]'s recommended anywhere else, I will go with instruction in the

home...I would prefer a gradual re-entry process with no more than a ½ day to start...maybe to go in for speech, OT, some learning support and maybe computer...all at once would shock [Student]...but through this I would like to keep instruction in the home.” (S-11.)

86. A WISC-III was not given because the District wasn’t looking at an IQ dependent disability and the District had previous reports of IQ scores and a functional behavior assessment was not done because student was not in the presence of peers. (NT at 247-48.)
87. The Parent’s expert would have wanted the RR to have a current IQ since Student had been out of the classroom since January 2005 and would want a functional behavior assessment which would have led to a development of a behavior intervention plan (“BIP”). (NT at 366.)
88. The DPS testified that the District could accommodate Student’s learning disabilities but not [Student’s] behavioral needs. (NT at 252.)
89. On 3/27/06, the District mailed a copy of the RR to Parent and scheduled an IEP meeting for 4/25/06. Based on the RR, the District recommended [Redacted] School for Student. (NT at 157; S-12, S-14.)
90. On 4/19/06, the District mailed an Invitation to Participate in the IEP team Meeting on 4/25/06. (S-13.)
91. On 4/25/06, the IEP Team meeting was held and while the IU lead teacher was present, there was no regular education teacher in attendance. (NT at 370-71; S-14.)
92. Parent did not agree with the District’s proposed IEP. (NT at 87-88.)
93. Parent’s expert noted the proposed IEP failed to note anything about behavior under Functional Needs. The IEP does not appropriately address Student’s functional needs in terms of behavior and [Student’s] disability, how it affects [Student’s] ability to function in a school setting. (NT at 372-73.)
94. Parent’s expert testified there was no goal for reading comprehension. (NT at 375.)
95. Parent’s expert testified the IEP Measurable Annual Goal of structured role play is to be charted only once per month which he termed “woefully low.” (NT at 376-77.)
96. Parent’s expert testified that the BIP and Crisis Management Plan are the types of things typically done to enable a student in a public school setting. (NT at 380.)
97. Parent’s expert testified that the psychological consultation (listed under Supports for School Personnel Provided for the Child) of once per month for 15 minutes is “very low”. (NT at 382.)
98. On 4/25/06, the District’s NOREP proposed a “full-time emotional support in a[n] IU run classroom” and noted the other option considered was “learning support in regular school” but was rejected because “this option does not meet [Student’s] level of academic, emotional and behavioral needs”.
99. On 5/12/06, Parent filed for a due process hearing. (S-14.)
100. The Director testified the IEP team discussed a regular education classroom “because of what the mother was interested in,” but “[o]n the school district side we just didn’t feel that that was based on the information we had that that was

- going to be the most appropriate placement.” (NT at 208-09.)
101. The specific supplementary aids and services considered at that meeting included a behavior plan, a 1-on-1 teacher assistant support, academic modifications to the curriculum. (NT at 209-10.)
 102. The Director testified that the District was unable “to do an intensive functional behavior assessment to make a behavior plan” because Student was not in a setting with peers. (NT at 211.)
 103. The Director testified she had never before seen a 90-day NOREP with no follow-up NOREP, which is the situation [Redacted School District] presented. (NT at 213.)
 104. The Director testified that while it was possible for the District and Parent to agree to a temporary placement while Student was tested, it was unlikely because the temporary placement would then become the pendent placement. (NT at 213-14.)
 105. Parent’s expert testified districts can write interim placements and District could have written a 45-school day interim placement, (NT at 429-50.)
 106. Student’s 1-on-1 learning support teacher (“teacher”) testified that Student’s ES goals take place “within the routine of teaching” and that they “just naturally happen.” (NT at 280.)
 107. Student’s teacher wrote the IEP academic goals and some of the specially designed instruction (“SDI”) as well as present levels, which included the achievement testing. (NT at 280-81.)
 108. Student’s teacher observed Student had difficulties with focus and attention, off-task behaviors and conversations. (NT at 282.)
 109. Parent did not receive any progress reports on the 12/22/04 IEP goals. (NT at 284.)
 110. Student functions on approximately a 3d or 4th grade level in math, reading and writing; in the 2006-07 school year, Student is in 8th grade. (NT at 290-91, 298-99.)
 111. The District’s middle school learning support classroom doesn’t “provide instruction in science and social studies or any of the encore classes, only reading, writing and math.” This is because they are only resource-level classrooms; a part-time class would include more academics, but that is not offered at middle school. (NT at 299.)
 112. Teacher opined that Student is unlikely to get to grade level due to [Student’s] learning disabilities but could expect to get to a level where [Student] could function – for example, read a newspaper. (NT at 292.)
 113. Student is large for [Student’s] age [redacted]. (NT at 294.)
 114. Student has participated in sports – [redacted] – while in the District with no behavioral problems. (NT at 90-92; 294-95; S-18.)
 115. Student is seen on an ongoing basis by a psychiatrist and a counselor (NT at 83-85, 122-24.)
 116. Teacher testified that although a number of goals and short-term objectives were identified as “mastered” by [Redacted School District] in the 12/22/04 IEP, due to inconsistency in [Student’s] education [Student] lost a lot of those skills. (NT at 300-01.)

117. Parent's expert testified that after he reviewed the exhibits he found nothing to conclude that Student could not received FAPE in a District classroom and nothing in the record that supported a placement in a full-time emotional support center-based program. (NT at 330-31, 340-41, 380, 384, 395-96.)
118. Parent's expert opined that the District didn't consider contiguous or neighboring school district's for P/T or F/T ES programs where Student could have contact with nondisabled peers. (NT at 392, 428, 437-38.)
119. Parent's expert opined Student did not receive FAPE in the LRE by receiving instruction in the home from December 2005 through the close of the 2005-06 school year in June 2006. (NT at 396.)
120. Parent's expert would not characterize Student's first half of the 2004-05 school year at [Redacted] Elementary as successful. (NT at 404.)
121. Parent's expert would have recommended a primarily emotional support program with substantial amount of learning support with the academics. (NT at 427-28.)
122. Parent's expert testified the District's proposed IEP does not reflect the needs of an ES student, but primarily a student with a learning disability and OHI – ADHD – which impacts the behavior. (NT at 362, 372-379.)

Witness Credibility

1. Parent – Parent was very credible. She has but a 7th grade education and because of this she is particularly concerned about her son's education and she seeks an appropriate education for [Student]. She answered all questions thoroughly, honestly, and to the best of her ability. (NT at 79, 238.)
2. Director of Special Education – Has an Undergraduate degree in Special Education from Penn State, 2 Master's degrees, certifications as a teacher of mentally and physically handicapped, elementary principal, secondary principal and supervisor of special education. She has 4-1/2 years experience as the Director in this District, was previously a supervisor of special education in another district, an asst. middle school principal, a learning support/special education teacher and an emotional support teacher. Her appearance and manner were professional and courteous. However, her testimony showed the District's foregone conclusion that Student could not be served in the District and the District gave no serious consideration to any placement other than at the IU. As the Director of Special Education, she should be aware of the continuum of placements and insistent upon considering how a full array of supplemental aids and services could enable an identified student to participate in a less restrictive environment. Due to this, her testimony is discounted.
3. Director of Psychological Services - Has a Bachelor's degree in psychology from Buffalo State College, a Master's and educational specialist certificate from IUP and a Ph.D. from IUP in school psychology. He had 8 years' experience as a school psychologist before coming to the District and has 4 years' experience as Director of Psychological Services at the District. His demeanor was professional and courteous.

His testimony focused on the RR and how various testing occurred, as well as the types of support classes available in the District. However, he experienced the same single-focus on the IU placements as did the Director of Special Education, and for the same reasons his testimony is discounted.

4. Learning Support Teacher - Has a Bachelor's degree in special education and is certified to teach the physically and mentally handicapped. She has been a learning support teacher in the District for 12 years and has also worked as an emotional support teacher and a life skills teacher. She has been Student's teacher since [Student] began receiving services in the District. She spoke knowledgeably about Student and [Student's] strengths and needs. Her testimony was credible.

5. Parent's Expert – Has a BS in Biology: Chemistry/Psychology Minor from St. Joseph's University, a MA in Education and teacher's certifications from St. Joseph's University, and Post-Masters and Special Education Certification as Supervisor of Special Education from Lehigh University. He has over 30 years in the Educational field, including 27 years experience as a former special Education School District, Intermediate Unit and Private School Administrator, and 17 years as a Special Education Hearing Officer for Pennsylvania. Mr. K is recognized in this hearing as an Expert Witness. He provided clear, evenhanded explanations of documents; for example, at NT at 346-47, when asked if the District created an unusual delay in not issuing the Permission to Evaluate, he responded: "I do think it's a delay perhaps of about a week, but I'm not sure it's an unusual delay..." And when he pointed out weaknesses – such as the psychiatrist's recommendation of a center-based placement, he softened the criticism by stating "I'd like to think that all of us are child advocates." Mr. K proffered possible solutions to issues regarding placement, obtaining a functional behavioral assessment, pointed out lapses in the proposed IEP, etc. His testimony was exceptionally credible.

Issues

1. Did the District deny Student a free appropriate public education ("FAPE") in the least restrictive environment ("LRE") from December 5, 2005, the date of enrollment, through the end of the 2005-06 school year?
2. Did the District deny access to a FAPE due to Student's disabilities and was Student excluded from [Student's] educational program?

Discussion and Conclusions of Law

Jurisdiction

A due process hearing is a hearing authorized through special education laws of both federal and state legislation. The jurisdiction of such a hearing is highly

circumscribed. A hearing officer cannot decide any issue – no matter how significant – which is outside those narrowly defined parameters. Thus, any concerns parents may have regarding education services which concern matters beyond those parameters are beyond the purview of this process and this Hearing Officer.

Witness Credibility

Within the context of the special education arena, “Hearing officers are empowered to judge the credibility of witnesses, weigh evidence and, accordingly, render a decision wherein the hearing officer has included ‘findings of fact, discussion and conclusions of law. . . [and] the decision shall be based solely upon the substantial evidence presented at the hearing.’”⁴ Quite often, testimony – or documentary evidence – conflicts; this is to be expected for, had the parties been in full accord, there would have been no need for a hearing. Thus, as stated, part of the responsibility of the Hearing Officer is to assign weight to the testimony and documentary evidence of facts which concern a child’s special education experience.

Hearing Officers have the plenary responsibility to make “express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses” and “give some reason for discounting”⁵ or crediting evidence. Further, Hearing Officers’ decisions are to “specifically mak[e] credibility determinations among the various witnesses and contrary expert opinions”.⁶ The Third Circuit, in Shore Regional High School Bd. Of Educ. v. P.S., 381 F.3d 194 (3d Cir. 2004), held that “if a state administrative agency has heard live testimony and has found the testimony of one

⁴ Spec. Educ. Op. No. 1528 (11/1/04), quoting 22 PA Code, Sec. 14.162(f). See also, Carlisle Area School District v. Scott P., 62 F.3d 520, 524 (3rd Cir. 1995), cert. denied, 517 U.S. 1135 (1996).

⁵ Blount v. Lancaster-Lebanon Intermediate Unit, 2003 LEXIS 21639 at *28 (2003).

⁶ *Id.* at *34.

witness to be more worthy of belief than the contradictory testimony of another witness, that determination is due special weight. *Id.*,⁷ Carlisle Area School v. Scott P., 62 F.3d 520, 527-29 (3d Cir. 1995). Specifically, this means that a District Court must accept the state agency’s credibility determinations ‘unless the non-testimonial, extrinsic evidence in the record would *justify* a contrary conclusion.’ Carlisle, 62 F.3d at 592 (emphasis added). In this context the word ‘justify’ demands essentially the same standard of review by a federal appellate court. See Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 574 (1985).”⁸ This court further held that “the task of evaluating [witnesses’] conflicting opinions lay in the first instance with the ALJ in whose presence they testified.”⁹

Similarly, credibility has been addressed in various jurisdictions. Looking to California, Stevens v. Parke Davis & Co., 9 Cal.3d 51, 67-68 (1973) held that a trier of fact may “accept part of the testimony of a witness and reject another part even though the latter contradicts the part accepted....[and also] reject part of the testimony of a witness, though not directly contradicted, and combine the accepted portions with bits of testimony or inferences from the testimony of other witnesses thus weaving a cloth of truth out of selected material.” Further, a fact finder may reject the testimony of even an expert witness, although not contradicted. Foreman & Clark Corp. v. Fallon, 3 Cal.3d 875, 890 (1971) California courts have also found that “one credible witness may constitute substantial evidence”. Kearl v. Bd. Of Medical Quality Assurance, 189 Cal.App.3d 1040, 1052. (1986).

⁷ Citing S.H. v. State-Operated School Dist. of City of Newark, 336 F.3d 260, 271 (3d Cir. 2003)

⁸ Shore Regional at 199.

⁹ *Id.* at 201.

Burden of Proof

The burden of proof consists of both the burden of production and the burden of persuasion. Neither the IDEA nor the IDEIA¹⁰ addressed the subject of burden of proof and therefore the question of which party bore the burden was handled on a state-by-state basis with only a handful of states passing any laws or regulations on the matter. In Pennsylvania, the burden in an administrative hearing challenging an Individualized Education Program (“IEP”) generally fell to the LEA. Recently, however, the United States Supreme Court addressed this issue in Schaffer v. Weast, 126 S. Ct. 528 (2005). In the concluding paragraph of the Opinion of the Court, Justice O’Connor held: “The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief.”¹¹ In Antoine M. v. Chester Upland School District, Civ. Action No 05-3384, (E.D.Pa. Mar. 14, 2006), the Court held that even where the challenge is not to the sufficiency or appropriateness of an IEP, but rather for the failure to find a child eligible for one, “the overarching logic of Schaffer – that, in the context of the IDEA, the party bringing the challenge bears the burden of proof...[and] [a] student’s challenge to a district’s determination that he or she is not eligible for an IEP should not be treated any differently than a challenge to the adequacy of an IEP.” Thus, where a “case is brought solely under the IDEA and arises in a state lacking a statutory or regulatory provision purporting to define the burden of proof in administrative hearings assessing IEPs, *Schaffer* controls.”¹²

The burden of persuasion in an administrative proceeding lies with the party

¹⁰ The IDEIA is variously referred to in case law as the IDEIA or IDEA 2004. In either event, it is one and the same.

¹¹ 126 S.Ct. at 537.

¹² L.E. v Ramsey Bd. Of Educ., 435 F.3d 384, 391 (3d Cir. 2006).

seeking relief.¹³ This requires the Hearing Officer to make a determination of whether or not the evidence is “equipoise” rather than preponderant. Preponderance of the evidence is defined as evidence presented by one party that is of greater weight or more convincing than the evidence offered by the other party. In other words, where there is evidence which tips the scales, the party which presented that evidence prevails. However, where the Hearing Officer finds the evidence is equally balanced on an issue, the non-moving party prevails.

After a close examination and analysis of all of the evidence and the testimony, this Hearing Officer did not find “equipoise”. Thus, the burden of persuasion was not at issue in this case.

Issue No. 1. Did the District deny Student a free appropriate public education (“FAPE”) in the least restrictive environment (“LRE”) from December 5, 2005, the date of enrollment, through the end of the 2005-06 school year?

Initially, the issue of pendency must be addressed. Student entered the District with an expired NOREP and an IEP, dated 12/22/04, which expired within days of [Student’s] enrollment. The District implemented the IEP the week of 12/19/05. However, Parent filed for a due process hearing 8 days before the IEP expired. Pendency is governed by 34 C.F.R. Sec. 300.514(a)¹⁴ and provides:

“during the pendency of any administrative or judicial proceeding regarding a complaint under Sec. 300.507, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement.”

¹³ Greenwood v. Wissahickon Sch. Dist., Civ. Action No. 04-3880 (E.D. Pa. Feb. 3, 2006) (“Hence, because there is no Pennsylvania law imposing the burden on the district, *Schaffer* applies and the burden of persuasion at the administrative level in Pennsylvania is now on the party contesting the IEP”.)

¹⁴ Updated regulations take effect and supercede the current regulations on 10/13/06. The updated corresponding regulation is found at Section 300.518.

This case presents a unique situation of a 3-month NOREP wherein Student would receive instruction in the home. Unfortunately, [Redacted School District] failed to issue an updated NOREP and Student remained in that placement. In a parallel case, the Appeals Panel addressed the issue of an IEP which provided for “its own termination at the conclusion of the then current school year” and found the document did not mention “any exception thereto or, equally important, reinstatement of the [previous] IEP.” Further,

“[c]urrent practice does not support maintaining that the [previous] IEP is somehow reconstituted by the expiration of the one agreed to the following May 21. Were that reasoning to prevail, every time an IEP in effect the previous school year was not timely revised for a new school year, the one from two years earlier would automatically be effective again. Since there is presumably a reason for replacing an IEP, specifically that it is no longer appropriate, there can be no justification for reconstituting it when its successor is not revised.”

In this case, the last agreed upon placement, pursuant to the expired NOREP, was instruction in the home.

Therefore, the pendency during this and the prior due process hearing requested on 12/14/05, is instruction in the home.

The IDEIA provides that identified students are to be educated to the maximum extent appropriate with children who are not disabled.¹⁵ To that end, “special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aides and services cannot be achieved satisfactorily.” 20 U.S.C. Sec. 1412(a)(5)(A); 34 C.F.R. Sec.

¹⁵ 20 U.S.C. Sec. 1412(a)(5)(A). Nonetheless, this provision is not intended to convert “a statutory benefit for a disabled child into a bar to an otherwise appropriate education.” County Sch. Bd. Of Henrico County, VA, v. R.T., a minor, et al., 433 F.Supp.2d 657, 670 (May 26, 2006) at fn.6.

300.550.

The Third Circuit addressed the issue of least restrictive environment in Oberti v. Board of Education of Clementon School District,, 995 F.2d 1204 (3d. Cir. 1993). The court set forth what is now a famous two-part test to determine the appropriateness of a student's placement. First, the court determines whether education in the regular classroom with supplementary aids and services can be achieved satisfactorily.¹⁶ To accomplish this, Oberti set forth three factors: (1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom with supplementary aids and services; (2) a comparison of the educational benefits available in a regular class and the benefits provided in a special education class; and (3) the possible negative effects of inclusion on the other children in the class.¹⁷ If there is a determination that the child cannot be educated in the regular education classroom, the second part of the test is considered. At that point, the court must decide whether the district has mainstreamed the child to the maximum extent appropriate.¹⁸

Part I of II-Part Test

Factor No. 1 – Reasonable efforts to accommodate in the regular education classroom with supplementary aids and services

Placement must be in the least restrictive environment where Student can receive a meaningful educational benefit.¹⁹ Oberti requires that before a placement other than the regular education class can be considered, “the school ‘must consider the *whole range* of supplemental aids and services, including resource rooms and itinerant instruction,’ *Greer*, 950 F.2d at 696, speech and language therapy, special education training for the

¹⁶ *Id.* at 1215.

¹⁷ *Id.* at 1220.

¹⁸ Girty v. Sch. Dist. of Valley Grove, 163 F.Supp.2d 527, 533 (W.D.PA 2001)

¹⁹ See S.H. v. State-Operated Sch. Dist. of the City of Newark, 336 F.3d 260, 272 (3d Cir. 2003).

regular teacher, behavior modification programs, or *any other available aids or services* appropriate to the child's particular disabilities. The school *must also* make efforts to modify the regular education program to accommodate a disabled child." Oberti, 995 F.2d at 1216 (emphasis added). Absent this "serious consideration to including the child in a regular class with such supplementary aids and services and to modifying the regular curriculum to accommodate the child, *then it has most likely violated the Act's mainstreaming directive*. 'The Act does not permit states to make mere token gestures to accommodate handicapped students; its requirement for modifying and supplementing regular education is broad.' *Daniel R.R.*, 874 F.2d at 1048; see also *Greer*, 950 F.2d at 696." Oberti, 995 F.2d at 1216 (emphasis added.)

While the District went through the motions of discussing an in-District placement, the evidence is preponderant that such discussion was done solely to mollify Parent. The District, while certainly not acting in bad faith, determined early on that Student would attend a[n] IU program and placement. The record is bare of any evidence showing the District offered any less restrictive placements such as a part-time, or even full-time, emotional support program in a neighboring school district.²⁰ Additionally, only a minimal number of supplemental aids and services were purportedly even considered in the 4/25/06 IEP meeting, and, even more telling, there is nothing in the District's exhibits which indicates any supplementary aids and services were considered. There was no discussion of special teacher training, co-teaching, consultation for the regular teacher, or any other well-accepted inclusion techniques. See Girty, 163 F.Supp.2d at 536 ("simple techniques exist which could be used to facilitate Spike's

²⁰ Interestingly, the District's decision to use the IU schools appears implied in the 2/28/06 psychiatric consultation. There the doctor recommended not only an ES program but opining that "a center placement" could meet Student's needs.

inclusion in regular education instruction....with a small amount of research into the methods that many school districts already use, a program beneficial to Spike could be developed.”); Blount, 2003 LEXIS 21639 at 27 (“A review of the record... does not show that the IU proposed any specific supplementary aids and services,....The IU did not present any evidence as to what specific supplemental aids and services it considered. Its exhibits...make no reference either to those specific supplementary aids and services typically available to comparable children, or to any actually considered by the relevant decision-makers in the instant case.”) and Oberti, 995 F.2d at 1211 found

“a number of commonly applied strategies...could be used, in combination, by the School district to integrate Rafael in a regular classroom, including: (1) modifying some of the curriculum to accommodate Rafael’s different level of ability; (2) modifying only Rafael’s program so that he would perform a similar activity or exercise to that performed by the whole class, but at a level appropriate to his ability; (3) ‘parallel instruction,’ i.e., having Rafael work separately within the classroom on an activity beneficial to him while the rest of the class worked on an activity that Rafael could not benefit from; and (4) removing Rafael from the classroom to receive some special instruction or services in a resource room, completely apart from the class. Dr. Brown explained that with proper training a regular teacher would be able to apply these techniques and that, in spite of Rafael’s severe intellectual disability a regular teacher with proper training would be able to communicate effectively with Rafael. Dr. Brown also testified that many of the special educational techniques applied in the segregated Winslow class could be provided for Rafael within a regular classroom....[Further] speech and language therapy Rafael needs could be most effectively provided within a regular classroom....language and speech therapy could easily be provided by a therapist inside the regular class during ongoing instruction if the therapist were able to collaborate ahead of time with the instructor regarding the upcoming lesson plans....Dr. McGregor...testified that, given the resources and expertise available to public schools ... the School District should be able to design an inclusive program for Rafael with assistance from professionals who have experience integrating children with disabilities in regular classes.”) Steps such as these are what Oberti referred to as “reasonable efforts to include him in a regular classroom with supplementary aids and services”. Oberti, 995 F.2d at 1204.

Certainly, absent the legally mandated full range of supplementary aids and services, Student is unlikely to receive the educational benefit to which [Student] is

entitled from any placement other than the center-based classroom proposed by the District. This Hearing Officer does not dispute that the emotional support class in the IU could be an optimal placement. Nonetheless, the legal standard is not what is optimal. Rather, it is the least restrictive environment where student can obtain an adequate or “meaningful educational benefit in light of [Student’s] individual needs and potential.”²¹

Factor No. 2 - A comparison of the educational benefits available in a regular class and the benefits provided in a special education class

This portion of the analysis requires (1) a heavy reliance on the “testimony of educational experts”, and, (2) a requirement that the Hearing Officer “must pay special attention to those unique benefits the child may obtain from integration in a regular classroom which cannot be achieved in a segregated environment, i.e., the development of social and communication skills from interaction with nondisabled peers”.²² (emphasis added.) The second element was discussed at length by the Oberti court. It found a

“fundamental value of the right to public education for children with disabilities is the right to associate with nondisabled peers....Thus, a determination that a child with disabilities might make greater academic progress in a segregated, special education class may not warrant excluding that child from a regular classroom environment. We emphasize that the Act does not require states to offer the same educational experience to a child with disabilities as is generally provided for nondisabled children. [cites omitted.] To the contrary, states must address the unique needs of a disabled child, recognizing that that child may benefit differently from education in the regular classroom than other students. See *Daniel R.R.*, 874 F.2d at 1047. In short, the fact that a child with disabilities will learn differently from his or her education within a regular classroom does not justify exclusion from that environment.” Oberti at 1216-1217.

A. Testimony of Educational Experts

Although the District did not offer any of its witnesses as experts, all 3 witnesses were experienced professionals and their testimony is accorded due weight. While

²¹ T.R. v Kingwood Township Bd. of Educ., 205 F.3d 572, 578 (3rd Cir. 2000).

²² Oberti at 1216.

neither the Director of Special Education nor the Director of Psychological Services appeared to have much personal knowledge of Student, this Hearing Officer did not find that a hindrance to their testimony as their involvement was more administrative and included records review and evaluation and ascertaining Student's behavioral and learning needs. What was of great concern, as stated, *infra*, was their foregone conclusion – based on the records – that Student would only benefit from the IU placement where [Student] would have no interaction with nondisabled peers.²³ It was for that reason that this Hearing Officer discounted their testimony. The Student's teacher's testimony, while helpful in understanding Student's current educational program, strengths and needs, did not rise to the level of expert witness.

Parent's expert, on the other hand, presented an even-handed picture of Student's needs and the District's response to those needs. His review of documents provided an obviously experienced view and his comments were very insightful. He testified that the District could have provided a short-term placement in the school setting to allow for a functional behavioral analysis, which is essential to a clear understanding of Student's present level of emotional support need. He found the District could provide an educational experience for Student which would provide FAPE. Additionally, and most persuasively, he correctly and clearly showed that even if the District were unable to accommodate Student, that there were multiple other placement choices available which the District did not consider, including neighboring and contiguous school districts which offer part and full time ES programs.

²³ Uncontroverted testimony is that Student currently engages in District team sports and that there have been no reports of misbehaviors.

B. Requirement that Hearing Officers “must pay special attention to those unique benefits the child may obtain from integration in a regular classroom which cannot be achieved in a segregated environment.”

While the District would have to accommodate Student’s disabilities to meet Student’s needs, this is “not a legitimate basis upon which to justify excluding a child’ from the regular classroom unless the education of other students is significantly impaired.”²⁴

On the other hand, there certainly are benefits to the District’s proposed segregated placements. Small class size is very appealing, as is the immediate access to a special education teacher with years of experience, and the potential benefits from the embedded adventure-based program. In comparing the benefits, this Hearing Officer must again turn to Oberti. “[A] determination that a child with disabilities might make greater academic progress in a segregated, special education class may not warrant excluding that child from a regular classroom environment.”²⁵

It appears to this Hearing Officer that while a segregated, center-based emotional support class could offer a high degree of personal attention as well as supplementary aids and services individualized to Student’s educational needs, Student could experience a meaningful educational benefit from a less restrictive placement than the IU where [Student] has no opportunity for interaction among [Student’s] nondisabled peers. This conclusion is bolstered by the evidence that the [Redacted] School District changed Student’s placement from a regular education classroom to more restricted placements and, later, to instruction in the home upon Parent’s insistence.

Factor No. 3 - The possible negative effects of inclusion on the other children in the class.

²⁴ Oberti at 1222.

²⁵ Oberti at 1217.

Oberti requires a consideration of any disruptive behaviors which could negatively impact upon the education of other classroom children.²⁶ There is no dispute that Student's behaviors are problematic and must be addressed through [Student's] IEP and, more specifically, [Student's] BIP. However, the District presents a Catch-22. It is unable to conduct a Functional Behavior Analysis ("FBA") upon which to base a BIP because Student receives instruction in the home, but the District will not place Student in a classroom in order to conduct the FBA. The rationale for this position is that any change – even temporary – would change pendency which the District is unwilling to do, unless it is to a[n] IU segregated placement. The District points to the fact that Student has behavior issues, which is exactly the reason the Student needs a current, appropriate BIP.

Student has not been in a classroom environment for close to 2 years and to exclude a student based on behaviors that far removed from the present is unavailing. The District cannot state with any degree of certainty what negative effects, if any, of inclusion on other children in the class currently exist.

Part II of II-Part Test

The second part of the test, which is a determination as to whether the school has mainstreamed the child to the maximum extent appropriate, is reached only if there is a finding that placement outside of the regular classroom is required.

Certainly the District has not presented evidence to show that it has made efforts to mainstream this Student. It has offered instruction in the home and continues to offer instruction in the home unless and until Parent agrees to a segregated, center-based placement.

²⁶ Id. at 1217.

The foregoing leads to the conclusion that the District did not seriously consider any placement with supplementary aids and services other than the IU emotional support placement. The District is responsible for offering a continuum of placements and the IEP team should have looked closely at each placement option, starting in the least restrictive environment and, if finding that inappropriate for Student even with the “whole range of supplementary aids and services”, looking at the next placement option with that same full complement of supplementary aids and services, and so on, until the team found the least restrictive environment wherein Student could receive FAPE. This Hearing Officer is not stating that the IEP team would necessarily find that Student could be educated in a regular education classroom even with all the supplementary aids and services provided. Parent’s expert posited that Student would benefit from a combination of learning and emotional support and that if the District were unable to provide such a program, it could look to “its neighboring and contiguous school districts or through the IU to look for a placement in a public school district.” (NT at 427-28.) Certainly, this thinking comports with Oberti and with Special Educ. Op. No. 1437:

“Moreover, the record is clear that the District chose Steven’s ACE placement unilaterally and without due consideration of any other placement options.

“*Oberti* instructs that a District must make sufficient efforts to include the child in non-segregated programming to the maximum extent possible. Hence a District must offer a continuum of placements designed to meet the needs of its eligible students. 34 C.F.R. Secs. 300.550, 300.551. In this case the record is clear that the District failed to establish...that it gave proper consideration to any placement other than the ACE program. (fn 16)

“(fn 16) By way of dicta, the panel observes that there are several factors which must be considered whether a student may be included in a regular education program. Those factors include consideration of the possible negative effect which the student’s inclusion may have on the education of other children in the

classroom. *Oberti*, 995 F.2d at 1217. It may well be that Steven requires a segregated placement outside of the regular education classroom; however, **such a decision may only be made upon application of all of the *Oberti* factors. Such was not done here.**” (Emphasis added.)

Based on the foregoing Oberti analysis, this Hearing Officer finds the evidence preponderant that the District failed to make requisite efforts to accommodate Student in a regular education or learning support classrooms, as well as failed to consider any part-time or full-time emotional support placements in neighboring school districts which might have met Student’s needs when provided appropriate supplemental aids and services.

Compensatory Education Awards

A student is entitled to compensatory education starting when the District knew or should have known that it had not provided FAPE. The period of compensatory education is equal to the period of deprivation, excluding the time reasonably required for the District to rectify the deprivation.²⁷

The law does not require a finding of bad faith or egregious circumstances in order to award compensatory education; neither does it depend upon the vigilance of the parents. M.C. v. Central Regional Sch. Dist., 81 F.2d 389 (3d Cir. 1996). Compensatory education is an appropriate remedy to cure the violation of statutory rights while the child is entitled to those rights. Big Beaver Falls Area Sch. Dist. v. Jackson, 615 A.2d 910 (1992); M.C. v. Central Regional Sch. Dist. *supra*. Courts have found that compensatory education is the appropriate remedy where there is a finding of denial of a FAPE, even where the student maintained good grades and made educational progress. Punxsutawney Area Sch. Dist. v. Kanouff, 719 A.2d 198 (1999). Obviously, then, a

²⁷ M.C. v. Central Regional Sch. Dist. 81 F.3d 389 (3d Cir. 1996).

program which confers only trivial or minimal benefit is not appropriate. Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3d Cir. 1988).

Nature of Compensatory Education Award

Three Appeal Panel decisions are particularly helpful in elucidating the nature of compensatory education awards and provide guidance for this decision.

First, Spec. Educ. Op. No. 1481, p. 13, explains:

The compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product or device that assists him in overcoming the effects of having been denied FAPE. To that end, the compensatory education shall be in addition to, and not supplant, educational services and/or products/devices that should appropriately be provided by the district through student's IEP, to assure meaningful educational progress. These compensatory education services may occur after school hours, on weekends and/or during summer months when convenient for STUDENT and his parents. The hours and nature of compensatory education created by this paragraph may be implemented at any time from the present to student's 21st birthday, as determined by the IEP team.

Second, Spec. Educ. Op. No. 1431 (2004), pages 10-13, clarifies the award should meet the present need of Student, rather than provide a simple replacement of services denied through lack of FAPE:

“Compensatory”, and court interpretations of it in education, continue to suggest to this Panel, as they have in the past, a preferred remedy that replaces precisely what was denied. In a strict sense, compensating for educational deprivation entails, to the extent possible, providing those specific services that should have been a part of FAPE in the first place. Otherwise, the relationship between conduct resulting in denial of services and the remedy, likely necessary to prevent the latter from becoming punitive, can be tenuous.

Nevertheless, service-for-service remedial replacement may not always be “compensatory”, particularly where a student can no longer derive “meaningful educational benefit” from them. Failing to provide that benefit, and in turn an appropriate education, is what we believe compensatory education seeks to address, and not the simple absence of a particular service. Conversely, awarding

the identical service later, from which obtaining such benefit has become impossible, is not compensatory and emphasizes the service rather than the benefit.

Consequently, we believe the equitable nature of this remedy permits, when previously denied services are no longer appropriate, discretionary substitution of others. In the first instance, the latter should be directed towards achieving what was or should have been the goals of the deprived services, but this too may fall victim to the deleterious effect time can have on appropriateness. Where that too is the case, then we see a substituted service in furtherance or enrichment of the student's then current IEP documented educational goals generally as "compensatory".

Decisions as to the form, location, scheduling, and costs, so long as they remain roughly equivalent to the public costs of these substituted services, can rest with no other than the parent. These controversies incept in district failure to provide "meaningful educational benefit", and if they then influence substituted services to remedy that, the rule prohibiting their profit therefrom is besmirched. It is, in fairness, parents who expend the due process proof and remedy seeking effort, and who must likely deal with making the student available for compensatory services. We see no impropriety, therefore, in parental fashioning of the delivery vehicle for substituted services, if the services are developmental, remedial, or enriching instruction in furtherance of the then pending or a future IEP. See In Re the Educational Assignment of B.R., Special Education Opinion 1102 (2001). Obviously, then parents' discretion is not complete, and a district is not faced with a fait accompli, as it may challenge parental selections in the proper forum. It was, then, completely acceptable for this District not to have a role in determining the nature of the compensatory education remedy.

...

It is insignificant that the goals and services student is recognized as needing are not documented in an IEP, since the focus of compensatory education is and should be that which was denied and not where its need is memorialized.

Further, in its Exceptions, the District seeks a limit on the rate for compensatory education services selected by parents. In fact, B. R. and too numerous to cite cases following it, in some instances, support limiting such costs to what the district would have incurred, since the services are in the nature of compensation rather than damages. We believe the line of demarcation for applying this limitation can only rest in the fact that this remedy is equitable, and facts such as parental inability to secure properly selected services at the district's rate or cost may justify not applying it. Nonetheless, on this record no factual basis is established for not applying the limitation....

Lastly, further discussion regarding the cost to the District for providing services and the

Hearing Officer's authority to order specific services or programs is discussed in Spec. Educ. Op. No. 1122 (2001), p. 9:

.... Except in unusual circumstances, the cost to a district of providing the awarded hours of compensatory education should not exceed the full cost of the services that were denied. Full costs are the salaries and fringe benefits that would have been paid to the actual professionals and paraprofessionals who should have provided the District services and costs for salaries, tuition and transportation, etc. for contracted services. This principle sets the maximum cost of all of the hours or days of compensatory education awarded. Parents may balance expensive and inexpensive instruction or services so that the average cost is below the maximum amount. Parents may also use fewer hours of expensive services as long as the maximum amount is not exceeded. Finally, parents may not be required to make co-payments or use personal insurance to pay for these services.

....

By way of dicta, we inform the District (and other interested parties) that this rationale does not preclude a Hearing Officer from ordering specific services or programs as compensatory education in some cases.

I hereby adopt the rationale of these three Appeal Panel decisions and award the following:

Compensatory education for the time period of December 5, 2005 through the end of the 2005-06 school year, less any school holidays and days when Student was absent or ill. The award is for full school days.²⁸ The District is also entitled to a reasonable period in which to rectify the denial of FAPE²⁹ and this Hearing Officer finds that 3 weeks would permit the IEP team to meet and consider the range of supplementary aids and services as well as the continuum of placements, and reach an agreement as to what would provide Student FAPE.³⁰

Issue No. 2 - Did the District deny access to a FAPE due to Student's disabilities and was

²⁸ Keystone Central Sch. Dist. v. E.E., 2006 U.S. Dist. LEXIS 46420 (M.D. PA 2006).

²⁹ M.C. v. Cent. Reg'l Sch. Dist., 81 F.3d 389, 397 (3d Cir. 1996).

³⁰ This 3-week period also includes the time from date of enrollment until Student's immunization records arrived.

Student excluded from [Student's] educational program ?

Parents framed in this issue in terms of a Section 504 claim. Section 504 provides, in pertinent part:

“No otherwise qualified handicapped individual in the United States...shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination in any program or activity receiving federal financial assistance.”³¹

Section 504 bars all federally funded entities, including public schools, from discriminating on the basis of disability.³² The Third Circuit court, in Ridgewood Bd. Of Educ. v. N.E., 172 F.3d 238, 253 (3d Cir. 1999) held that in order to establish a violation of Section 504, a plaintiff must prove (1) [Student] is “disabled” as defined by the Act; (2) [Student] is ‘otherwise qualified’ to participate in school activities; (3) the school receives federal financial assistance; (4) [Student] was excluded from participation in, denied the benefits of, or subject to discrimination at, the school; and (5) plaintiff must demonstrate that defendants know or should be reasonably expected to know of [Student's] disability. Indiana Area Sch. Dist. v. H.H., 45 IDELR 155 (W.D. Pa 2006) held, however, that failure to provide a FAPE was not a “*per se* discrimination under Section 504”. In this case, Parent told the District that she wanted her [child] to have “a gradual re-entry process with no more than a ½ day to start...but through this I would like to keep instruction in the home.”³³ Parent cannot have it both ways – she cannot ask to retain instruction in the home and at the same time claim that the District is discriminating against her son by providing the very same thing. This claim is denied.

³¹ Rehabilitation Act of 1973, Section 504, 29 U.S.C. Sec. 794(a).

³² Susavage v. Bucks County Sch. Intermediate Unit No. 22, No. Civ.A. 00-6217, 2202 WL 109615, (E.D. Pa. Jan. 22, 2002)

³³ FF #85.

ORDER

For the reasons hereinabove discussed, it is Ordered:

1. The School District is ordered to compute the number of days Student from 12/5/05 through the end of the 2005-06 school year and provide Student with compensatory education as provided in this Decision.
2. Parent's discrimination claim is denied.

Margaret Drayden

Margaret Drayden

October 8, 2006