

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

Due Process Hearing for L.B.

Date of Birth: [REDACTED]

ODR File Number:

Dates of Hearing: September 28, 2006, October 19, 2006, October 31, 2006

HEARING

Parties:

[REDACTED]

Representative:

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Date Final Transcript/Exhibits Received: November 7, 2006

Date Closing Statements Received/
Record Closed: November 17, 2006

Date of Decision: December 2, 2006

Hearing Officer: Joy Waters Fleming, Esq.

Background

[REDACTED], “Student”, is currently [REDACTED] years old and in the first grade in the East Penn School District, “District”. (FF. 1) Student and his parents, “Parent”, are residents of the District. Parent filed this request for due process seeking reimbursement for a privately obtained independent educational evaluation and challenging the appropriateness of the District’s programming and placement. (FF. 83)

A hearing was originally scheduled to commence on September 12, 2006. Upon un-opposed motion by Parent counsel, that hearing was continued until September 28, 2006 because of a death in his family. The hearing sessions concluded on October 31, 2006.

Issues

Did the District deny Student a free appropriate public education from April 2006¹ by:

- 1) failing to identify a language-based learning disability;
- 2) failing to develop an IEP for implementation in the 2006-2007 school year with appropriate modifications, aids, supports and services;
- 3) failing to develop an implement an appropriate behavior support plan for Student;
- 4) failing to appropriately consider and provide extended school year services during the summer of 2006;
- 5) failing to incorporate the recommendations of the private evaluator that Student required a program exposure to non-disabled peers to make progress;

¹ This date was referenced in Parent counsel’s letter requesting the due process hearing and was agreed upon by counsel when the issues were recited for the record.

6) failing to reimburse Parents for an IEE conducted by Mr. B?

Findings of Fact

1. Student, [REDACTED] is currently [REDACTED] years of age and in the first grade in the East Penn School District.
2. As a preschooler, Student exhibited many behavioral concerns and received both psychological and psychiatric evaluations. (SD-1.3-5, SD-1-17-20, SD-1, 27-33, SD- 8.3, 8.5)
3. In 2003, the IU conducted a speech and language evaluation. (SD-1.27)
4. After the speech/language evaluation, the IU concluded that Student was not a child with a disability, that he exhibited appropriate auditory comprehension and expressive communication but that he had a mild articulation disorder. (SD-1.27-33)
5. Although various interventions were attempted at his preschool, Student's difficult behavior persisted. (SD-1.11-16)
6. During the 2005-2006 school year, Student attended a full-day experimental kindergarten program in the District. (SD-8:36, N.T.² 155-158)
7. The full day program was recommended for Student to permit him to explore concepts in language, math and social skills development than would otherwise be unavailable in the usual half-day program. (N.T. 156-158)
8. Early in his kindergarten school year, Student displayed difficult behavior and physical aggression in the classroom. (N.T. 159)

² The reference tot N.T. is followed by either I, II, III to reference either the first, second or final hearing session.

9. In September, Parent provided Student's kindergarten teacher with background information on Student. (N.T. 12-13)
10. In September, Student was able to recognize three out of twenty-six capital letters, one out of twenty-six lower case letters. (SD-4, N.T. 72 II)
11. At the end of September 2005, a remedial assistant was placed in Student's kindergarten classroom for the benefit of the entire class. (N.T. 31, 120 II)
12. Later in the fall, an aide was assigned specifically to Student during the school day as well as an aide for dismissal transition. (N.T. 34, 121 II)
13. The aide assigned to help Student with dismissal transition was in place until approximately February 2006. (N.T. 35, 122 II)
14. On October 6, 2005, Student was referred to the instructional support team, "IST", to address concerns about academic performance, poor impulse control and off task oppositional and disruptive behaviors. (SD 5.2, SD-8.7, N.T. 14-29, 159-164)
15. Student's behavior was often aggressive and included hitting, kicking, biting, spitting and throwing furniture and materials in the classroom which resulted in his removal from the classroom on many occasions. (SD-8.12, SD-21, N.T.14-29, 159-164 II)
16. After the IST meeting, several recommendations were made to address Student's oppositional and disruptive behaviors. (SD-8.8, N.T. 30-II)
17. The IST recommended that Student receive a multi-disciplinary evaluation. (SD-5, N.T. 29-30 II)
18. On October 20, 2005, Parent consented to an evaluation of Student. (SD-6.2, SD-7.2)
19. On November 16, 2005, the IST met again to discuss Student's progress and review the success of the interventions. (SD-8.9)

20. On January 4, 2005, the guidance counselor conducted an observation of Student in his classroom during which time he experienced a tantrum lasting thirty-five minutes. (SD-8.12)
21. On January 26, 2006, the team issued its evaluation report. (SD-8)
22. The District's evaluation report considered data from previous psychological, speech and psychiatric evaluations, parental information, IST notes, classroom observations and intellectual and aptitude assessments. (SD-8)
23. On the Wechsler Preschool and Primary Scale of Intelligence-Third Edition (WPPSI-III), Student is credited with a verbal score of 95, a performance score of 108 resulting in a full scale IQ of 100. (SD-8.14)
24. On the WIAT-II, Student was credited with standard scores ranging from 69 in word reading to 98 in math reasoning. (SD-8.15)
25. Based on the results of the DIBELS, the evaluator concluded that Student had inconsistent acquisition of reading skills and that he required continued instructional support and intervention. (SD-8.11)
26. After a speech language evaluation, the therapist concluded that Student qualified as a student with a speech-language impairment and that he should receive support services in a small group setting. (SD-8.19)
27. As part of its evaluation to determine Student's emotional and behavioral characteristics, the District administered the Achenbach Behavioral Checklists, the Attention Deficit Hyperactivity Rating Scale IV, the Conners' Parent and Teacher Rating Scale-Revised: Long Version, the Differential Test of Conduct and Emotional Problems, the Scale of Assessing Emotional Disturbance, the Social-Emotional Dimension Scale-Second Edition and the Behavior Assessment System for Children. (SD-8.19-8.28)
28. The speech therapist recommended that Student receive goals designed to address his needs in the areas of articulation,

- pragmatic/social language, following directions and word-finding skills. (SD-8.19)
29. As part of the evaluative process, the District conducted a functional behavioral assessment, "FBA". (SD-8.29-34)
 30. As part of the FBA, the school psychologist conducted a teacher interview, an observation of Student, a review of educational records and analysis of Student's on-task, off-task and time out behaviors. (SD-8.29)
 31. Based on all of the evaluative data, the team concluded that Student was eligible for special education as emotionally disturbed and speech and language impaired and that he was in need of specially designed instruction. (SD-8.38, SD-9.2, N.T. 260-264 III)
 32. The evaluation report recommended that Student receive specially designed instruction within a highly structured emotional support classroom with a low student to teacher ratio, behavior management and that he receive instructional activities to develop appropriate social skills and that he receive speech therapy. (SD-8.39)
 33. On January 31, 2006, a meeting was held with Parents to discuss the evaluation report. (SD-9.2, 10.1)
 34. Parents indicated their disagreement to the evaluation report by their signatures. (SD-9.2, 8.44, 10.1)
 35. On February 3, 2006 and February 6, 2006, Student was suspended from kindergarten for kicking, biting and spitting on school staff. (SD-10.2)
 36. On February 6, 2006, Parent requested Student's educational records and requested an independent evaluation. (SD-9)
 37. On February 10, 2006, the District in a letter to Parent offered to review Student's educational records with her, advised that the request for an IEE at public expense was under consideration and that the existing crisis plan would continue to be implemented. (SD-10)

38. On February 22, 2006, the team met, issued a draft IEP with accompanying behavioral intervention plan (BIP) and NOREP recommending that Student be placed in full-time emotional support. (SD-12.1, N.T. 130 II)
39. The proposed emotional support placement contemplated that Student would spend 21-60% outside the regular education classroom. (SD-12.19)
40. Parent did not attend the February 22 IEP meeting. (N.T. 181-183 II, 370-373 III)
41. The February IEP summarized Student's needs, strengths and progress in the curriculum and contained math, reading, writing, organizational, speech-language goals. (SD-12)
42. In the February IEP, the team determined that Student did not require ESY. (SD-12)
43. The February IEP indicated that Student exhibited behaviors in the classroom that impeded his learning and that of others. (SD-12)
44. A behavioral intervention plan, "BIP" accompanying the February IEP included student objectives, behaviors to be taught, evaluation methods, reinforcement strategies and consequences. (SD-12.33)
45. On March 7, 2006, Parent requested a due process hearing and an April hearing date was established. (ODR records, N.T. 373-375, 378 III)
46. On March 15, 2006, the District denied Parent's request for an IEE at public expense. (SD-16)
47. On March 17, 2006, an independent evaluator, Mr. B, conducted an evaluation of Student. (SD-22, SD-26, N.T. 36-37, 50)
48. On March 30, 2006, Mr. B observed the Student at school. (N.T. 37)
49. As a result of the testing, Mr. B concluded that Student had a specific learning disability in reading and spelling, ADHD, ODD, a

- generalized anxiety disorder and that his inappropriate behavior was attributable to dysregulation, a neurobehavioral disorder and anxiety. (SD-22.3, N.T. 49, N.T. 284-287 III)
50. In his testimony, Mr. B concluded that Student was emotionally disturbed. (N.T. 102-103, 130 I)
 51. The April date for the due process hearing was continued and a new hearing date of May 22, 2006 was established. (SD-24, N.T. 379 III)
 52. At the end of April 2006, the District assigned a full-time one-on-one aide to Student. (N.T. 37 II)
 53. On or about May 9, 2006, the District received Mr. B's "report to the IEP team". (SD-22)
 54. On May 16, 2006, the IEP team convened with Parent to discuss the results of the IEE. (SD-23.2)
 55. At that meeting, an IEP was presented with seven goals designed to address Student's math, reading, speech and behavior needs. (SD-23)
 56. The May IEP was accompanied by a BIP. (SD-23.26)
 57. On May 16, 2006, Parent did not approve the NOREP accompanying the IEP and requested a due process hearing. (SD-23)
 58. On May 17, 2006, Parent through counsel, withdrew her first request for a due process hearing. (SD-24.1)
 59. By the end of the 2005-2006 school year, Student was able to recognize twenty-three out of twenty-six capital and lower case letters, repeat word pairs and apply rhyming to six out of six pairs and read twenty out of thirty-two kindergarten sight words. (SD-4, SD-27.6, N.T. 73)
 60. Throughout the 2005-2006 school year, Student's kindergarten teacher collected data related to Student's on-task, off-task, disruptive off-task behaviors, his aggression, re-direction, compliance, non-compliance, time out, self-directed time out, group participation and

- behavior necessitating removal from the classroom. (SD-9, SD-29³, Stipulation of Parties, N.T. 49-53, 171-172, II N.T. 49-53 III)
61. During the 2005-2006 school year, Student's kindergarten teacher utilized a variety of interventions, instructional modifications and reinforcements, exclusively for Student and recommended by the IST as a means to address Student's behavioral challenges. (SD-8, SD-27.30, N.T. 42-48, 54-57, 59, 61-66 II)
 62. During the school year, to address Student's behavior, a variety of interventions and services were employed including an adult assistant in the classroom, a one on one aide in the afternoon and at dismissal and various temper management strategies. (SD-8, SD-19, N.T. 30-37 II, N.T. 41-66 II, 107-108, 120-123, 167-168 II)
 63. During the school year, Student's kindergarten teacher modified her instruction by adding concrete constructive components to the activities, choosing a place for an activity to allow for a sensory break, rearranged the class schedule to accommodate Student and implemented a variety of reinforcement strategies to facilitate pro-social behaviors. (SD-27.30, N.T. 117, 193-194 II, 232-233 III)
 64. During the 2005-2006 school year, Student's kindergarten classroom was regularly disrupted by his outbursts and compromised the teacher's ability to teach. (N.T. 20, 26, 28, 41, 145 II)
 65. During the 2005-2006 school year, Student's kindergarten teacher was hit, spit upon and on one occasion had her eyeglasses broken by Student. (N.T. 15-16, 28-29,
 66. Student's temper outbursts were peppered throughout the day frequently without any specific antecedent. (N.T. 19, 24, 40 II)
 67. When Student had a temper outburst, he cried, became angry, shouted and sometimes grabbed and threw things. (N.T. 22, 29 II)

³ Counsel agreed to the inclusion of this evidence after the record was closed in this matter. These records were originally requested from the District but were not provided to Parent counsel until after the due process hearing concluded.

- Student's outbursts lasted anywhere from five to forty-five minutes and frequently necessitated the involvement of other school staff including the school psychologist, principal and the implementation of a crisis plan. (N.T. 23, 26, 39-40 II)
68. During the 2005-2006 school year, the District implemented a crisis plan to alert building staff that assistance was needed in Student's classroom. (N. T. 59)
 69. Student had no IEP in place during the 2005-2006 school year. (N.T. 139 II N.T. 388-390 III)
 70. Although discussed, Student did not receive ESY services during the summer of 2006. (N.T. 285, 397 III)
 71. For the summer of 2006, Student was recommended for participation in the District's jump start program, a three week opportunity to review, practice and maintain academic skills. (N.T. 73)
 72. On August 23, 2006, the District received the full IEE. (SD-26, SD-27, N.T. 380 III)
 73. On September 6, 2006, the IEP team met and proposed an IEP to address Student's program needs for the 2006-2007 school year. (N.T. SD-27, N.T. 380)
 74. The September IEP identified that Student had needs in reading, math, social/emotional and speech-language.
 75. The proposed IEP described Student's progress in the regular education curriculum as compromised because of his low frustration level, lack of coping skills when faced with non-preferred tasks, difficulty with peer interaction, the need for speech language services. (SD-27.8)
 76. The September IEP proposed nine goals designed to address Student's reading, math, language, behavioral and social needs. (SD-27, N.T. 380 III)

77. The September IEP proposed an extensive list of program modifications and specially designed instruction to be implemented for Student on a daily basis, through the school day and across all settings. (SD-27.21)
78. In the proposed IEP, Student was to receive individual speech-language support for 120 minutes and small group support for 120 minutes per month.
79. The District proposed a part-time emotional support placement at an elementary school three miles from Student's home.
80. The District's proposed elementary emotional support classroom would be staffed by a full-time teacher with three full-time aides for eight children, one aide assigned specifically to Student. (SD-27.21, N.T. 150-15, 159 II)
81. Under the proposed placement, Student would receive art, music, physical education, library, and homeroom activities such as morning song, calendar, projects, story time and reading buddies in the regular education setting and math, reading and social skills instruction in the emotional support classroom. (SD-27.24)
82. The September IEP was accompanied by a BIP that included student objectives, behaviors to be taught, evaluation methods, reinforcement strategies and consequences. (SD-27.29, 27.30)
83. On July 28, 2006, Parent, through counsel requested a due process hearing.

Discussion

The IDEA requires that states provide a "free appropriate public education" "FAPE" to all students who qualify for special education services. 20 U.S.C. §1412. In Board of Education of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982), the U.S. Supreme Court held that this requirement is met by providing personalized instruction and support services to permit the child to benefit educationally from the

instruction, providing the procedures set forth in the Act are followed. The *Rowley* standard is only met when a child's program provides him or her with more than a trivial or *de minimus* educational benefit. Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3rd Cir. 1988). This entitlement is delivered by way of the IEP, a detailed written statement arrived at by the IEP team which summarizes the child's abilities, outlines goals for the child's education, and specifies the services the child will receive. Oberti v. Board of Education, 995 F.2d 1204 (3d Cir. 1993). School districts are not required to provide the optimal level of services. Carlisle Area School District v. Scott P., supra. However, a program that confers only trivial or minimal benefit is not appropriate. Polk.

The appropriateness of the IEP is judged based on information known at the time it is drafted. Fuhrman v. East Hanover Board of Education, 993 F.2d 1031 (3d Cir. 1993). Under the IDEA and its implementing regulations, an IEP for a child with a disability must include present levels of educational performance, measurable annual goals and short term instructional objectives, appropriate objective criteria by which it may be determined on at least an annual basis whether short term objectives are being achieved, and the specially designed instruction which will be provided. 34 C.F.R. §300.347. Of utmost import, the IEP must be responsive to the child's identified educational needs. §300.346. Pursuant to because Schaffer v. Weast, 126 S. Ct. 528 (2005), the Parent bears the burden of proof in this due process proceeding.

IEE Reimbursement

Early in the 2005-2006 school year, Student displayed difficult behavior and physical aggression in the classroom. (FF. 2-8) In October, Student was referred to the instructional support team, "IST", to address concerns about academic performance, poor impulse control and off task oppositional and disruptive behaviors. (FF. 14-15) After the IST meeting, several recommendations were made to address Student's oppositional and disruptive behaviors including that Student receive a multi-disciplinary evaluation. (FF.16-17) On October 20, 2005, Parent consented to an evaluation of Student. (FF. 9, 18) On January 26, 2006, the team issued its evaluation report. (FF. 21-28) Shortly thereafter, at a meeting with Parents,

the evaluation was presented. (FF. 33) Parents indicated their disagreement to the report with their signatures. (FF. 34) On February 6, Parent requested an independent educational evaluation at public expense. (FF. 36) The District refused this request. (FF. 37, 46)

First, Parents contend that the District conducted evaluation was inadequate and that they are entitled to an independent evaluation at public expense. Specifically, Parents assert that the District evaluation was not appropriate because it failed to accurately identify Student as learning disabled and as “other health impaired” “OHI”. Furthermore, they contend that the District’s evaluation did not provide sufficient information to develop an appropriate IEP and behavior intervention plan, “BIP”.

Under the implementing regulations that govern the provision of special education, a Parent is entitled to reimbursement for a privately obtained evaluation in certain circumstances, as follows:

(b) Parent right to evaluation at public expense.

(1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency.

(2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either—

(i) Initiate a hearing under §300.507 to show that its evaluation is appropriate; or

(ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing under §300.507 that the evaluation obtained by the parent did not meet agency criteria.

(3) If the public agency initiates a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

(4) If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to

the public evaluation. However, the explanation by the parent may not be required and the public agency may not unreasonably delay either providing the independent educational evaluation at public expense or initiating a due process hearing to defend the public evaluation.

34 C.F.R. 300.502

Consistent with the above regulations, the Appeals Panel in In re: K.S. Spec. Ed. Op. No. 1760 set forth a four part analysis to determine whether a Parent can be reimbursed for an IEE. Those grounds are: 1) Whether the Parent expressed disagreement with the evaluation provided by the District; 2) Did the District, without unnecessary delay, initiate due process proceedings to determine the appropriateness of its evaluation; 3) Is the District's evaluation appropriate; 4) Is the Parent's IEE appropriate ?

In this case, the District completed its evaluation of Student in January 2006. (FF. 21) A team meeting was held, the evaluation results were discussed and Parents indicated their disagreement on the signature page of the ER. (FF. 19, 33-34) Shortly thereafter, on February 6, Parent contacted the District and requested an independent evaluation. (FF. 36) With respect to the first requirement that the Parent expressed disagreement with the evaluation obtained by the public agency. Thus the first factor has been satisfied.

Under the second requirement, the District, in this case did not agree to fund the private evaluation; nor did they "without unnecessary delay" commence a due process hearing to defend the evaluation that they provided. Instead, the Parent quickly requested a hearing ostensibly to address the reimbursement issue. (FF. 36, 45, 51) As the parties were already on their way to due process where the District would have had defend its evaluation this element has been satisfied.

The third requirement under K.S. requires a determination of the appropriateness of the District conducted ER. A properly conducted evaluation is crucial for the development of responsive programming for all disabled students generally and this student in particular. In this case, the chief complaint alleged by Parent is that the District provided evaluation did not recognize Student as eligible for special education on the basis of a specific learning disability or as other health impaired "OHI" thus an appropriate IEP and behavior intervention plan could not result. In support

of this contention, Parent presented the testimony of the independent evaluator, Mr. B. (FF.47-50) In his evaluation, Mr. B determined that Student had a specific learning disability in reading and spelling, ADHD, ODD, a generalized anxiety disorder and that his inappropriate behavior was attributable to dysregulation, a neurobehavioral disorder. (FF. 47-50) The IEE was provided to the District in brief form in early May and a more detailed version was made available in August. (FF. 53, 72)

Student was originally referred for a District evaluation to answer a host of questions including the basis for his behavioral difficulties as well as any discrepancies between his potential and functioning. (FF. 21) The District issued its initial evaluation report in January 2006. That evaluation report completely and comprehensively assessed Student in all areas of suspected disability. It was appropriate.

First, the evaluation conducted by the District complied with both the statute and the relevant regulations governing special education. *See generally*, 20 U.S.C. 1414 (b) and (c).

The relevant regulations to the IDEA provide:

Determination of needed evaluation data.

(a) Review of existing evaluation data. As part of an initial evaluation (if appropriate) and as part of any reevaluation under Part B of the Act, a group that includes the individuals described in §300.344, and other qualified professionals, as appropriate, shall -

(1) Review existing evaluation data on the child, including—

(i) Evaluations and information provided by the parents of the child;

(ii) Current classroom-based assessments and observations; and

(iii) Observations by teachers and related services providers; and

(2) On the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine –

(i) Whether the child has a particular category of disability, as described in §300.7, or, in case of a reevaluation of a child, whether the child continues to have such a disability;

(ii) The present levels of performance and educational needs of the child;

(iii) Whether the child needs special education and related services,

or in the case of a reevaluation of a child, whether the child continues to need special education and related services; and

(iv) Whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general curriculum.

(b) Conduct of review. The group described in paragraph (a) of this section may conduct its review without a meeting.

(c) Need for additional data. The public agency shall administer tests and other evaluation materials as may be needed to produce the data identified under paragraph (a) of this section.

(d) Requirements if additional data are not needed.

(1) If the determination under paragraph (a) of this section is that no additional data are needed to determine whether the child continues to be a child with a disability, the public agency shall notify the child's parents—

(i) Of that determination and the reasons for it; and

(ii) Of the right of the parents to request an assessment to determine whether, for purposes of services under this part, the child continues to be a child with a disability.

(2) The public agency is not required to conduct the assessment described in paragraph (d)(1)(ii) of this section unless requested to.

34 C.F.R. Section 300.533.

In this case, the District conducted evaluation summarized previous psychological, psychiatric and speech evaluations. (FF. 20, 22) It provided information from the Parent and detailed information on Student's social, physical and educational history from wrap around meeting summaries. (FF.27) Furthermore, IST plans and notes were incorporated providing detailed information regarding the behavioral approaches attempted with Student and their success. (FF. 22,) Curriculum based assessments conducted from September 2005 through January 2006 were also reproduced along with the results of classroom observations. (FF. 22) Overall, the District conducted evaluation was technically sufficient and complied with the applicable law.

The evaluation conducted by the District specifically found Student eligible for special education on the basis of emotional disturbance and a speech-language impairment. (FF. 21) The evidence has established that

conclusion to be accurate and the District conducted evaluation to be appropriate. The school psychologist credibly offered that Student's achievement was directly affected by his emotional disturbance, an express exclusion under the IDEA for purposes of determining a learning disability. See 34 C.F.R. 300.541. (FF. 31-32) On the contrary, in his report, Mr. B, when discussing Student's learning disability specifically excluded, the emotional disturbance "rule out" when he explained the rationale for his diagnosis but ultimately agreed that emotional disturbance should be Student's primary category for classification. (FF. 47, 50) The IEE obtained by Parent and supplied to the District provided additional information that ultimately proved useful by the team; however, the standard is not whether the IEE is better but rather whether the District provided evaluation was appropriate. It was. Based on this conclusion, analysis of the appropriateness of the IEE, obtained by Parent is not warranted. Parent shall not be reimbursed for the IEE.

FAPE: 2005-2006⁴

In February 2006, the IEP team met and drafted an IEP for the balance of Student's 2005-2006 school year. (FF. 38-39, 41) Parent did not attend that meeting. (FF. 40) That IEP fully and completely described Student's present levels of academic achievement, his functional performance, his strengths and needs, and provided goals intended to address Student's identified areas of weakness.

On March 7, 2006, the District sent the IEP to Parent, along with a NOREP, offering a special education program and placement. (FF.40) Parent did not return the NOREP nor communicate with the District either acceptance or rejection of the proposal. (FF. 40) No special education programming was implemented for Student. (FF. 69) In this same timeframe, Parent requested a due process hearing seeking an IEE funded by the District. (FF. 45) As a result, all negotiations and productive communication between the parties relative to the development of a program for Student slowed. (FF. 54) Student remained in his pendent placement, in the regular education setting. (FF. 69) Despite this status, the District continued to implement, through the IST, a variety of measures designed to address Student's complex behavioral needs chief of which was a detailed

⁴ Parties agree that if a claim for compensatory education arises, the applicable timeframe for computation is from April 2006 onward.

list of interventions incorporated in his kindergarten classroom. (FF. 11-13, 52, 61- 63) As a result, Student did make academic progress during the 2005-2006 school year. (FF. 10, 59) His behavioral progress, however, remained inconsistent. (FF.15, 60, 64-68)The IEP offered in February although not implemented, fulfilled all legal requirements and was responsive to Student's needs as determined by the January ER and was calculated to provide meaningful educational benefit.

On May 16, 2006, the IEP team convened with Parent in attendance. (FF. 54-56) After the meeting, Parent did not approve the NOREP accompanying the IEP. (FF. 57). As a result no IEP was in place during the 2005-2006 school year. Based on the foregoing circumstances, Parent has not established that the District failed to provide FAPE during the 2005-2006 school year.

ESY 2006

Parent also contends that Student was denied FAPE because of the District's failure to provide extended school years services, "ESY", during the summer of 2006. Federal and Pennsylvania special education regulations provide that determinations with respect to eligibility for ESY, and services necessary for the provision of FAPE in the ESY program, lie with the IEP team. 34 CFR §300.309(a); 22 Pa. Code §14.132. The purpose of ESY services is to avoid the regression and poor recoupment experienced by some eligible students. If regression during program breaks and subsequent recoupment makes it "unlikely the student will maintain the skills and behaviors relevant to IEP goals and objectives," then ESY is required, without which, the school year IEP would not provide FAPE. 22 PA Code § 14.132 (2) (iii).

In this case, the team concluded that Student did not require ESY services. (FF. 42, 70-71) The right to receive ESY is not mandated by the law only the right to consideration for such programming if specific criteria is satisfied. In this case, the Parent has not conclusively established that Student was denied FAPE because he did not receive ESY. On the contrary, the District, through testimony, has established that a consideration of ESY did occur. (FF. 42, 70) Accordingly, FAPE was not denied Student.

FAPE: September 2006-present

Finally, Parent contends that both the program and placement proposed for the current school year are inappropriate. Specifically, Parent asserts that the proposed emotional support placement is not consistent with the independent evaluator's recommendation. Additionally Parent contends that the offered modifications, aids and supports are insufficient and the proposed behavior support plan is inadequate. Based on the evidence presented, Parent has not established that the District has failed in its obligation to offer Student FAPE.

In his report, Mr. B concluded that Student would benefit from a positive behavior management plan, a crisis management plan, a consistent support person, speech- language therapy and a remedial reading program. (FF. 47-50) Furthermore, Mr. B opined that Student's programming should occur within a regular education program so that he could benefit from "good models from whom he can learn". (FF. 47-50) In support of this contention, Mr. B offered that on the day of his observation, Student appeared to take cues from other students. (FF. 47-50) The District, on the other hand offered the highly credible testimony of Student's kindergarten teacher who was with Student nearly every day. (FF.60-65) She was consistent in her testimony that modeling offered limited, if any, benefit to Student. (FF. 60-65) The documentary evidence also supports this conclusion as Student's behavior remained problematic most of the year although he participated in a regular education setting. (FF. 35, 66-68) If placed in a the recommended emotional support setting, Student would get the benefit of intensive intervention he so desperately needs as well as the opportunity to participate with his peers in regular education on daily basis. This mixture of both exposure to regular education with the added support of special education would give Student the added boost he needs to grow, develop and be taught the skills necessary for his both his academic an emotional success.

The modifications and supports offered by the District are adequate. The proffered IEP contained a detailed and complete list of specially designed instruction and program modifications designed to ensure Student's continued development. (FF. 73) Those services included the involvement of a one on one aide, social skills training, the inclusion of a crisis plan (also recommended by Mr. B) the teaching of anger management strategies among many, many others. (FF. 74-82)

In addition to the IEP, the District has also offered a BIP. (FF. 82) After a review of the record in this case, that too is sufficient and calculated to deliver FAPE to Student. In order for a BIP to be effective and address a Student's needs, the FBA upon which it is premised must be accurate. In this case, the District conducted a FBA as a component of its evaluation. (FF. 29-30, 43-44) From that information, a BIP was developed. (FF. 43-44) The ER and FBA completed in January 2006 identified Student as displaying poor impulse control, off-task, disruptive, defiant and aggressive behaviors. (FF. 21, 29-31) The ER recommended that Student receive SDI within an emotional support classroom, behavior management and social skills training. (FF. 21) Behavior support programs should include a variety of techniques which permit a student to develop and maintain skills which address problem behaviors. 22 Pa. Code. § 14.133. A behavioral intervention plan can include, when appropriate: (1) strategies, including positive behavioral interventions, strategies, and supports; (2) program modifications; and (3) supplementary aids and services that may be required to address the problem behavior.

The BIP in this case clearly lists Student's objectives, the behaviors in which he will receive instruction and the evaluation monitoring method. (FF. 56) The BIP contained a lengthy list of interventions and reinforcement strategies (consistent routine, extra privileges, contract, timer for self-monitoring, verbal reminders, tangibles) as well as consequences to be reviewed before certain behaviors. (FF. 56) Many of these strategies were also recommended by Mr. B. (FF. 47, 56) Overall, this BIP is appropriate and responsive to Student's needs as identified in the ER.

The proffered IEP and goals are also appropriate. Student has many, many strengths and certainly the ability to do well academically. (FF. 21, 23, 24, 73) He also has some academic deficits because of missed instructional opportunities. (FF. 21, 47, 64, 75) His reading needs as identified by the team included sound fluency, letter/sound relationships, word reading and vocabulary retrieval. (FF. 21, 76) In math, his needs are numerical literacy, math vocabulary and numerical operations. (FF. 21,76) By far his social/emotional needs overshadow the academic weaknesses. (FF. 75-76) His needs in that area are non compliance with directions, expression of anger, frustration, physically inappropriate behaviors and lacking self control. (FF. 21, 74) In speech language, Student has needs in articulation, social language, following directions and word finding. (FF. 28, 78)

Review of the proffered IEP in conjunction with the appropriate ER reveals that the team recommendations were adopted. The IEP contains both reading and math goals. (FF.75-77) It also contains the necessary goals designed to address Student's behavioral and speech-language needs. (FF. 78) In the emotional support classroom, Student can be taught to recognize his behavioral triggers and the focus can be jointly placed on behavioral management within an academic context. (FF. 79-81) Overall, the District has offered Student a program and placement for the 2006-2007 school year calculated to provide a meaningful, individualized educational experience. FAPE was offered to this Student.

ORDER

And now, this 2nd day of December 2006

1. The District has offered FAPE since April 2006;
2. The proposed program and placement of the District is appropriate;
3. The District's evaluation is appropriate and Parents are not entitled to reimbursement for the privately obtained independent educational evaluation.

Joy W. Fleming

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Special Education Hearing Officer