Pennsylvania
Special Education Hearing Officer

DECISION

Child's Name: MV

Date of Birth: xx/xx/xxxx

Dates of Hearing:
October 3, 2006, October 30, 2006, November 29, 2006
CLOSED HEARING
ODR #6822/ 06-07 AS

Parties to the Hearing:	Representative:
Parent	Drew Christian, Esquire 801 Monroe Avenue Scranton, PA 18510
Lakeland School District 1593 Lakeland Drive Jermyn PA 18433-9801	Jane M. Williams, Esquire Sweet Stevens Katz & Williams, LLP 331 E. Butler Avenue P.O. Box 5069 New Britain PA 18901
Date Record Closed:	December 5, 2006
Date of Decision:	December 19, 2006
Hearing Officer:	William F. Culleton, Jr., Esquire

INTRODUCTION

Student is a xx year old eligible resident of the Lakeland School District (District). (FF 1.) The Student has been diagnosed with bipolar disorder, pervasive developmental disorder, and oppositional defiant disorder. (FF 2.) Educationally she is identified with specific learning disability in mathematics and emotional disturbance. (FF 3.) Her Father (Parent) requested this due process proceeding, seeking compensatory education for the period from June 2005 to the date of the first hearing in this matter. (NT 506-7 to 13; S-43.)[1]

The Parent alleged that the District had failed to provide an adequate ESY plan for the summer of 2005 and had failed to implement the plan that it did provide. (S-43.) The Parent also claimed that the District had failed to provide FAPE in the 2005-2006 school year, and in the 2006–2007 school year up until the date of the first hearing, due to deficiencies in the Student's August 25, 2005 and November 2005 IEP documents. Ibid. Alleged deficiencies included omissions in the present levels of educational functioning, goals and objectives, specially designed instruction, progress monitoring and reporting, transportation services, as well as failures to implement the Student's IEP. Ibid. Finally, the Parent argued that the District had failed to provide an adequate ESY plan for the summer of 2006, and had failed to implement ESY during that summer. Ibid. The Parent also requested tuition reimbursement and an independent educational evaluation. Ibid.

While denying the Parent's factual allegations, the District raised a number of legal arguments. Regarding ESY for the summer of 2005, the District argued that this hearing officer was deprived of jurisdiction because a previous hearing officer and appeals panel had approved the ESY plan for the summer of 2005, and because the Bureau of Enforcement of the Pennsylvania Department of Education had exclusive jurisdiction to enforce those orders. (NT 17-15 to 18-2, 21-22 to 22-1.) Regarding the 2005-2006 school year, the District argued that the Student was placed by another agency in a residential treatment facility for the entire time, and thus the District had no responsibility for the Student's special education program, pursuant to 24 P.S. §13-1306 (1949)(amended June 7, 1993, P.L. 49, No. 16, §4). (NT 19-22 to 21-21.) Regarding ESY for the summer of 2006, the District argued that it had no responsibility, again relying upon § 1306, and that implementation had been impossible because it did not receive notice of the Student returning to its program in time to implement the ESY. (NT 22-2 to 11.)

[1] Although the Complaint Notice set an open ended date for the request for compensatory education, the parties subsequently stipulated to closing the relevant time period on the date of the first hearing session, October 4, 2006. (NT 506-7 to 13.)

PROCEDURAL HISTORY

The student was identified in first grade and has continued to be identified as Emotionally Disturbed. (FF 3.) The Student also has been receiving Learning Support since at least 2000, when she was in second grade, for difficulties with mathematics, and the District's current ER, dated March 30, 2005, identified her with Specific Learning Disability in mathematics reasoning. (FF 3.)

The Student's parents filed for due process in October 2004, when the Student was in seventh grade. (S-2 p. 3.) Subsequently, an IEE was performed by agreement of the parties. (S-2 p. 7.) In January 2005, the IEP team offered an IEP revision dated January 14, 2005, (S-7 p. 4), and the Parent signed a Permission to Evaluate. (FF 4.) An Evaluation Report was issued on March 30, 2005, recommending Full Time Emotional Support Services as well as special education services for Specific Learning Disability. (FF 4.)

Due process hearings were conducted before another hearing officer in April and May 2005. (S-2.) On appeal to the Special Education appeals Panel, the hearing officer's decision was upheld. (S-3.) The Panel ordered: "the District shall … re-issue its notice of recommended assignment, spelling out the private placement that it is proposing for the student." (S-3 p. 8.)

This due process request was filed on August 4, 2006. A resolution session was held on August 18, 2006, which resulted in settlement of issues concerning prospective relief, including the request for IEE. The hearing sessions were held on October 3, 2006, October 30, 2006 and November 29, 2006. In opening statements, it became clear that the Student had not been accepted to the private school identified in the Complaint Notice, and that the request for tuition reimbursement was therefore moot.

ISSUES

1. Is the Student entitled to compensatory education for the District's alleged failure to provide appropriate ESY services for the summer of 2005?

2. Was the District responsible for providing FAPE from July 2005 until August 2006, during which time the Student was placed in residential treatment facilities?

3. Is the student entitled to compensatory education for the District's failure to provide an appropriate IEP, and failing to provide appropriate monitoring, reporting, transportation and other services, which allegedly denied the Student FAPE for the 2005-2006 school year and the 2006-2007 school year until August 21, 2006?

4. Is the Student entitled to compensatory education for the District's failure to provide an appropriate IEP and educational services from August 21, 2006 until October 3, 2006?

FINDINGS OF FACT

1. Student is a xx year old eligible resident of the Lakeland School District (District). (NT 39-6 to 40-6, 42-24 to 43-15.)

2. The Student has been diagnosed with bipolar disorder, pervasive developmental disorder, and oppositional defiant disorder. (NT 42-24 to 43-2; P-1 p. 9.)

3. The student was identified in first grade and has continued to be identified as Emotionally Disturbed. The Student also has been receiving Learning Support since at least 2000, when she was in second grade, for difficulties with mathematics, and the District's current ER, dated March 30, 2005, identified her with Specific Learning Disability in mathematics reasoning. The Student is identified with emotional disturbance and specific learning disability in mathematics. (NT 43-8 to 15; P-1; S-3 p. 1 n. 1, S-17 p. 9, 17.)

4. On January 14, 2005, the IEP team offered an IEP revision, and the Parent signed a Permission to Evaluate. An Evaluation Report was issued on March 30, 2005, recommending Full Time Emotional Support Services as well as special education services for Specific Learning Disability. (S-2 p. 4, S-7 p. 4.)

5. An interim IEP was issued dated March 30, 2005 in which the District found the Student eligible for ESY services, set forth a goal for decreased behavioral incidents and specially designed instruction through journaling and structured recreational activities. (P-2 p. 8, 13.)

6. Due process hearings were conducted before another hearing officer in April and May 2005. That hearing officer found that the Student "was … provided with FAPE under an existing or interim IEP while the District was completing an evaluation." This finding covered the period between January 11, when the Student returned to school after a suspension, and March 30, 2005, when the District presented its ER. (S-2 p. 9.)

7. The hearing officer did not directly or specifically address whether or not the ESY component of the educational plan, as set forth in either the January IEP or the subsequent revision in March, was adequate. (S-2.)

8. The hearing officer ordered the District to "set in motion" the Intensive Interagency Coordination process to determine the appropriate placement for the Student's educational and mental health needs, and the District took steps to do so. (S-2 p. 12.)

9. On appeal to the Special Education Appeals Panel, the hearing officer's decision was upheld. The Panel ordered: "the District shall … re-issue its notice of recommended assignment, spelling out the private placement that it is proposing for the student." In response, the District issued a NOREP dated August 18, 2005 (S-3 p. 8, S-12.)

10. Both the January 14, 2005 and March 30, 2005 IEPs found the Student eligible for ESY services. The District provided no ESY services to the Student in June 2005, when the Student was living at home within the District's geographical boundaries. (NT 297-5 to 23, 391-4 to 292-6, 398-4 to 14, 402-11 to 403-22; S-7 p. 12, P-2 p. 8.)

11. On July 6, 2005, the Student was placed into [redacted], a residential treatment center, by the [redacted], a local mental health agency. The District did not choose or contract for the placement, although it agreed to pay for the placement. (NT 54-14 to 22, 59-11 to 12, 60-5 to 6, 410-14 to 411-12, 415-2 to 416-22, 479-6 to 9; S-4, S-5 p. 1.)

12. Residential treatment center provides educational services, through the [redacted] School. (S-8, S-12.)

13. Residential treatment center and School are located within the geographical boundaries of the Wilkes Barre Area School District. (NT 395-11 to 13; S-8.)

14. The District forwarded text books to residential treatment center on or about August 5, 2006, and the Student was offered educational services at residential treatment center before this date. (NT 405-6 to 21; S-10.)

15. The District issued two NOREPs for educational services at residential treatment center reflecting the placement by the mental health agency in residential treatment center and the provision of educational services by residential treatment center through the School. (NT 292-10; S-12.)

16. These NOREPs were issued for the purpose of complying with the Hearing Officer's order to initiate inter-agency coordination, which the District's Supervisor of Special Education interpreted as requiring the District to participate in the special education planning for the Student. (NT 283-17 to 284-3, 285-23 to 288-10, 415-2 to 417-7, 434-8 to 24; S-12.)

17. residential treatment center administered achievement testing to the Student while she was admitted there. (S-14 p. 8.)

18. The District's Special Education Supervisor and school counselor attended several meetings at residential treatment center, forwarded educational records on request, and signed a draft IEP revision that identified the District as the LEA for the Student. (NT 65-10 to 66-6, 70-14 to 71-3; S-10, S-14 p. 4.)

19. The District's Special Education Supervisor did not intend to be solely responsible for planning the educational services to be provided at residential treatment center, believing that a representative from Wilkes-Barre School District attended the IEP meeting in November 9. (NT 301-4 to 303-1, 407-1 to 16.)

20. The draft IEP revision was developed by residential treatment center and included recommendations of the District in its previous IEPs. It was to be discussed at a second IEP meeting, but the meeting was not held because the Student was withdrawn from residential treatment center on or about September 26, 2005. (NT 75-19 to 76-7, 300-20; P-8 p. 1, S-14.)

21. The IEP contained a provision that the Student would complete seventh grade work in the first quarter of the school year, in order to advance to eighth grade work during the year. This provision called for a combination of District and residential treatment center curriculum and materials, and for residential treatment center to determine whether or not the Student had learned the material. (NT 303-16 to 307-5.)

22. On September 26, 2005, the Student was removed from residential treatment center by the [mental health facility], at Parent's request. The District did not choose or contract for the placement (NT 76-3 to 7, 190-22 to 193-7, 434-8 to 17; S-14 p. 1.)

23. Shortly thereafter, the Student was placed at Residential Treatment Center Two near Allentown. Residential Treatment Center Two is within the geographical boundaries of the Salisbury School District. (NT 75-19 to 78-24, 437-11 to 20; P-7.)

24. Residential treatment center's practice was to send copies of educational materials to the District's Supervisor of Special Education Services. On October 3, 2005, residential treatment center sent her the Student's educational work product and on October 10, the Supervisor received a copy of the draft IEP from residential treatment center. (P-8 p. 1, S-18.)

25. Residential Treatment Center Two provided educational services through its [redacted] Center, located within the grounds of Residential Treatment Center Two. (NT 437-15 to 20; P-8 p. 1.)

26. On October 5 and 7, 2006, Residential Treatment Center Two administered two standardized achievement tests to the Student. (P-8 p. 5.)

27. On November 9, 2005, 44 days after the Student was removed from residential treatment center, Residential Treatment Center Two convened an IEP meeting for the Student, inviting the District's Supervisor of Special Education. (P-8.)

28. The IEP listed Salisbury School District as the local educational agency, and the LEA representative at the meeting was a representative of Salisbury. The District's representative was listed as present for purposes of transition. (P-8 p. 3, 4.)

29. The NOREP issued as a result of this IEP meeting, dated November 9, 2006, was signed by the Salisbury School District representative. (S-20 p. 23.)

30. The District also issued a NOREP, dated November 9 and signed on December 1, 2005 by the Superintendent of the District, reflecting that educational services were being provided by the Center at Residential Treatment Center Two. (NT 292-19 to 293-10, 337-22 to 338-22; P-9.)

31. This NOREP was issued for the purpose of complying with the Hearing Officer's order to initiate inter-agency coordination, which the District's Supervisor of Special Education interpreted as requiring the District to participate in the special education planning for the Student. (NT 283-17 to 284-3, 285-23 to 288-10, 294-12 to 19, 359-23 to 360-4, 434-18 to 436-22, 440-2 to 442-17; S-12.)

32. The District's Supervisor of Special Education attended the IEP team meeting on November 9, 2005, in which the November 9 IEP was discussed. The supervisor did not understand her role to be that of a representative of the responsible local educational agency. (NT 346-8 to 12, 359-23 to 360-4, 486-11 to 17.)

33. In December 2005 and March 2006, the District's Supervisor issued invitations to IEP meetings. The representative from Salisbury School District was invited and the District's Supervisor's actions did not constitute an assumption of responsibility for the Student's special education. (NT 447-20 to 450-7; S-22, S-30.)

34. On April 21, 2006, Residential Treatment Center Two revised its IEP for the Student, in order to reference a finding of ineligibility for ESY for the summer of 2006. The IEP lists Salisbury School District as the LEA, and the District is listed as "needed for transition services." The representative of Salisbury was present again. (NT 451-4 to 452-1; S-31.)

35. The Salisbury School District representative chaired all IEP meetings at Residential Treatment Center Two, and made and revised the IEPs. (NT 497-5 to 12.)

36. The District's Supervisor of Special Education participated in the telephone conversations in which the April 2006 IEP was planned, but she did not understand her role to be that of a representative of the responsible local educational agency. (NT 382-9 to 385-14.)

37. The District's Supervisor of Special Education forwarded the various documents concerning the IEP revision to the Parents and to the Center at Residential Treatment Center Two and otherwise corresponded regarding the ESY determination. (NT 452-8 to 455-22; S-21, S-32, S-33, S-34, S-36, S-37, S-40.)

38. In April 2006, it was anticipated that the Student would be considered for discharge from Residential Treatment Center Two in October 2006. (NT 388-10 to 16, 461-3 to 462-16.)

39. In August 2006, the Parent was advised that the Student was being considered for discharge from Residential Treatment Center Two. (NT 101-10 to 13.)

40. The Parent's attorney notified the District's attorney in the Complaint Notice, dated August 4. The District's attorney notified the District, by August 14. During this period, it was anticipated that the Parent would attempt to place the Student in a private school. (NT 386-18 to 387-7, 462-22 to 470-17, 511-25 to 512-8; S-43, S-45.)

41. The District was not aware of the impending discharge and the Parent's efforts to find a private school placement for the Student until the middle of August. (NT 102-13 to 103-9, 461-3 to 462-16.)

42. On or about August 15, 2006, the District received from the Center at Residential Treatment Center Two a progress report on the Student's goal achievement while at Center. This report indicated that the Student had been meeting her behavioral goals, as well as her goals in mathematics and reading, for part of the reporting period, but was still functioning substantially below grade level in academics, and did not meet her writing goals at all. (NT 113-6 to 10; P-20.)

43. The District prepared a notice requesting evaluation by a psychiatrist selected by the District, as well as a Permission to Evaluate. It presented these to the Parent at the resolution meeting on August 18. (NT 6 to 102-8, 173-15 to 174-22, 179-5 to 180-25, 581-7 to 585-17; P-14, S-46 p. 4, S-47, S- HO-1.)

44. On advice of counsel, the Parent did not sign these documents on August 18. In addition, it was understood as of that date that the Parent was planning to seek the Student's admission to a private school. As a result, the District's evaluation was delayed. (NT 174-1 to 22, 235-13 to 18, 581-7 to 585-17, 598-6 to 21.)

45. The Student was discharged to home from Residential Treatment Center Two on August 21, 2006. (NT 103-15 to 16.)

46. On August 25, the Parent called the Assistant Principal of the [District's] High School and informed him that the Student would not be admitted to a private school and would be coming to the District's [redacted] High School for the 2006-2007 school year. (NT 105-1 to 5, 511-25 to 512-8; S-58.)

47. On August 26, the District mailed an invitation to an IEP team meeting scheduled for August 29, the day before school was to begin, for the purpose of reviewing the existing IEP and formulating an interim plan for educational services. (NT 103-10 to 104- 5, 510-5 to 22; P-15, S-58.)

48. The Principal of the [redacted] High School called the Parent on August 26 to advise him orally of the meeting, and specifically told the Parent that the subject of the meeting would be to determine an interim placement for the Student. (NT 166-18 to 168-10, 182-18 to 22, 184-10 to 16, 541-13 to 543-2, 512-18 to 513-12, 570-19 to 25; S-50 p. 5, S-58.)

49. The Parent did not receive the written notice of the meeting until the day of the meeting, but he was able to participate in the meeting. (NT 104-6 to 105-5; P-15 p. 3.)

50. The District's Supervisor of Special Education was not at the meeting, as she had left her position, and there was no special education supervisor at the meeting. A school psychologist attended, along with the school's guidance counselor. No teachers attended, and a representative of Residential Treatment Center Two was not present. (NT 105-18 to 108-5, 252-10 to 15, 508-21 to 509-7; P-15.)

51. At this meeting, there was no discussion of the Student's need for special education services for academics, nor was there a review of the Residential Treatment Center Two report of the Student's academic achievement with regard to her special education goals while at Residential Treatment Center Two. There was no discussion of whether or not the Student had completed seventh grade work. (NT 107-5 to 20, 113-2 to 23, 513-13 to 515-12, 523-7 to 527-3.)

52. At this meeting, the District issued a NOREP providing for an interim placement of full time emotional support pending receipt of a psychiatric report, discharge summary from Residential Treatment Center Two, and a full re-evaluation by the District. The NOREP also provided for implementation of the Special Education Services referenced in the November 9, 2005 IEP. (NT 518-2 to 523-12, 527-9 to 16, 553-17 to 554-2, 562-1 to 563-9; P-13, P-17, S-58.)

53. At the meeting on August 29, the Parent signed two Permission to Reevaluate forms, calling for a comprehensive review of records, testing for cognitive ability and academic achievement, behavioral rating scales and review of current psychiatric evaluations and Residential Treatment Center Two recommendations. (NT 543-8 to 21, 546-25 to 547-10; S-51, S-52, S-58.)

54. The Parent indicated on August 29 that he would not bring the Student to attend school in a full time emotional support placement. He advocated for a regular education setting. (NT 538-3 to 541-12, NT 590-7 to 9.)

55. On August 30, the Parent provided to the District a discharge summary from Residential Treatment Center Two, indicating that the Student no longer needed a special education placement of full time emotional support. On the same day, the District changed the NOREP without reconvening the IEP team, and placed the student in regular education with one-to-one aide, crisis intervention and counseling, as well as itinerant learning support in mathematics. (NT 109-4 to 110-10, 114-23 to 116-9, 521-14 to 524-10, 530-3 to 531-25, 590-7 to 9; P-16, P-18, S-62.)

56. This NOREP was implemented during the month of September. The Student was returned to school in the ninth grade curriculum. (NT 113-24 to 115-17, 526-19 to 21, 567-16 to 23.)

57. On September 13, 2006, the District convened an additional IEP team meeting to review the documentation received from Residential Treatment Center Two regarding the Student's progress toward her goals. To this meeting, the District invited both Parents, a Residential Treatment Center Two representative, and both regular education and special education teachers. (NT 532-1 to 17, 547-11 to 550-15; P-20, S-61.)

58. In September 2006, the District began an evaluation process that had not been completed as of November 29, the date of the last hearing in this matter. (NT 534-19 to 535-536-12, 576-23 to 577-11, 593-19 to 596-13; S-58, S-64, S-65, S-66, S-67, S-68, S-69.)

59. On September 13, the Parent signed a Permission to Reevaluate form calling for a complete psychiatric evaluation by an independent psychiatrist. The district evaluation was delayed until after October 3, because the independent expert's report was not received. (NT 551-17 to 25, 585-18 to 588-4; S-63.)

DISCUSSION AND CONCLUSIONS OF LAW

2005 ESY Plan and Claim Preclusion

The issue of ESY for 2005 implicates two legal arguments made by the District. First, the District argues that the hearing officer lacks jurisdiction to decide the appropriateness of the ESY plan due to claim preclusion. Second, it argues that the hearing officer lacks jurisdiction to consider the implementation of the plan because such consideration is reserved to the exclusive jurisdiction of the Bureau of Compliance.[2]

As to the ESY plan, during the District's opening statement, this hearing officer asked whether or not the District was contending that the previous hearing officer had found the District's offer of ESY to be adequate. (NT 30-14 to 20.) Counsel carefully denied that this was the argument; rather, counsel clarified that this hearing officer lacks jurisdiction to decide the issue because it was "within the contents and the construct of hearings that were occurring in June and August of 2005." (NT 22 to 31-1.) Indeed this is accurate, because nowhere in the hearing officer's decision of June 20, 2006, or in the Appellate Panel's decision of August 11, 2005, did either decision advert to the provision of ESY at all. Yet, the ESY services would have had to be planned at the latest by March 2005. Basic Education Circular, Extended School Year Eligibility (April 1, 2003). Thus, they would have been part of the educational plan reviewed in the previous due process proceeding, (FF 5), and the argument seems to be that the Parent is precluded from raising that issue now because he should have raised it in the course of the previous due process proceedings.

This hearing officer agrees with the District on this legal issue. Claim preclusion or res judicata, precludes a party or his or her privy from relitigating all or part of a claim that was or could have been raised in a prior proceeding, as to which a final judgment has been rendered on the cause of action. Balent v. City of Wilkes Barre, 542 Pa. 555 (1995), In Re the Educational Assignment of K.B., A Student in the Sto-Rox School District, Special Education Opinion 1605 at 5 (2005); In Re the Educational Assignment of E.W., A Student in the Wilson School District, Special Education Opinion 1601 (2005) . This

[2] This hearing officer takes the reference to mean the Bureau of Special Education, Division of Compliance Monitoring and Planning.

doctrine applies if the moving party (here, the District) can establish identity of claims, issues and parties. K.B., above. Here, the claims were identical: in this due process proceeding and in the previous one, the claim was that the educational plan was inadequate. The issues were also the same: in both matters, the claims were based upon the requirements of the IDEA, 20 U.S.C. §1412 (a)(1), requiring the provision of FAPE. (S-2, S-43.) The parties or their privies were identical, because the Parent was a party to both matters. (S-2 p. 1, S-43 p. 1.)

The fact that there is no evidence that the issue was in fact raised, (FF 7), does not prevent claim preclusion, because the claim could have been raised in the previous proceeding. The hearing did not start until April 8, well after the ESY plan would have been required to be in place. Basic Education Circular, Extended School Year Eligibility (April 1, 2003). Thus, the Parent should have raised this claim in the previous proceedings, and this hearing officer is deprived of jurisdiction to resolve that claim.

2005 ESY Implementation and Jurisdiction

Regarding the implementation of ESY in the summer of 2005, however, the District raises a different argument: that the hearing officer is deprived of jurisdiction to reach the issue because the issue is subject to the exclusive jurisdiction of the Bureau of Special Education, Division of Compliance Monitoring and Planning. (NT 17-15 to 18-2, 21-22 to 22-1.) This hearing officer disagrees with the District's argument regarding implementation of ESY. Here, there is no order to provide ESY; therefore, the Bureau's exclusive jurisdiction does not apply. (FF 6, 7, 9.) Conversely, the IDEA clearly brings the Parent's claim regarding provision of ESY within the scope of due process, which includes "any matter relating to the … provision of a free appropriate public education to [a] child." 20 U.S.C. §1415 (b)(6)(A); Dispute Resolution Manual §101. Therefore, the hearing officer will review the implementation of the ESY plan.

Unfortunately, the record is very unclear as to whether or not any ESY was provided to the Student during the summer of 2005. The Parent's testimony was somewhat elliptical, implying ultimately that no services were provided, but at the same time evidencing his lack of knowledge of the facts. (NT 61-24 to 62-3, 238-10 to 240-7.) However, the District's evidence is not much more enlightening. The District's Supervisor of Special Education asserted that ESY services had been provided at residential treatment center. (NT 396-5 to 397-23, 403-17 to 404-7.) However, her knowledge was based upon her "understanding" of what residential treatment center had done; it was not personal knowledge. Ibid. Moreover, she based this understanding in part upon documents sent to her after the Student's discharge from residential treatment center, which contained undated work product and some work product dated in September, rather than in the summer of 2005. (NT 473-5 to 475-15.)

In sum, neither party presented reliable evidence on this issue. At best, the evidence is in "equipoise" and the hearing officer must be guided by the burden of persuasion in this matter, which is clearly upon the Parent. Schaffer v. Weast, 546 U.S. 49, 163 L.Ed.2d 387, 395, 397, 126 S.Ct. 528, 533-35 (2005). The Parent has failed to bear his burden on this issue, and no compensatory education will be awarded for the alleged failure to provide planned ESY services in the summer of 2005.

Compensatory Education and Responsibility of the District of Residence

The District also moves to dismiss the Parent's claims that the District failed to offer or provide FAPE for the 2005 to 2006 school year. The District argues that it was not responsible for planning or implementing the Student's educational program during that period because the Student was placed outside the geographic territory of the District in a residential treatment facility during the 2005 to 2006 school year. The District bases its argument on the Public School Code of 1949, as amended. 24 P.S. §13-1306 (1949)(amended June 7, 1993, P.L. 49, No. 16, §4). This statute provides that, whenever a child is an "inmate" of a residential facility, it is the "school district in which the institution is located" that bears responsibility for "providing the student with an appropriate program of special education … ." 24 P.S. §13-1306(c)(1). The District argues that it is the wrong party to respond regarding this compensatory education issue. The Parent presents three arguments in response.

First, the Parent argues that §1306 does not apply because the Commonwealth Court in a 1983 special education decision held, directly contrary to the language of the statute, that the District of residence retains the responsibility to provide special education services. Pires v. Commonwealth of Pa., 78 Pa. Commw. Ct. 127, 134, 467 A.2d 79, 83 (1983). The Court stated that §1306 did not "relieve the [district of residence in that case] from the responsibility of providing an appropriate educational and training program for [the child.]" Ibid. Moreover, the Court stated that the district of residence continued to be responsible for educational planning for the child. Ibid. Thus this case seems to contradict directly the language of §1306.

This hearing officer is not bound by Pires. The statute which the Commonwealth Court construed in Pires did not expressly provide that the host district is responsible for educational services of children placed within its confines. This language was added in 1993 by amendment, June 7, 1993, P.L. 49, No. 16, §4. Thus, to the extent that it bears on the issues in the present matter, the decision is effectively overruled by amendment of the statute and the express language of the statute therefore governs the decision in this case.[3] See also, Basic Education Circular, Educational Portions of "Non-Educational" Placements at note 1 (September 1, 1997) (making clear that the 1993 amendments place the burden on the "host" district); "Basic Education Circular, Nonresident Students in Institutions (July 1, 1999)[4]

The Parent's second argument is that the previous Appellate Panel's order required the District to adopt the out-of-district placements as its own. (NT 602-14 to 18.) The Parent argues that the order required the District to re-issue its NOREP for placement in a full time emotional support classroom, (S-3 p. 7, S-12), and in complying

[3] At the hearing, the hearing officer rested upon an alternate ground for considering Pires inapplicable: that it is distinguishable from the matter at hand. (NT 625-23 to 627-4.) Subsequent research leads this hearing officer to conclude that this alternate ground for decision is superfluous, since the case is clearly not binding for the reasons stated herein.

[4] Although these BECs by their terms expired in 2000 and 2004 respectively, they reflect the Department's interpretation of § 1306 in 1997 and 1999, well after the Pires decision and the amendment to §1306 in 1993. At this time the Department clearly read §1306 contrary to the holding of Pires and consistent with the position of the District in this matter. Moreover, the BECs are still listed in the Department's web site, which states that they are still in effect. Cf. NT 621-5 to 16.

with this order, the District essentially took responsibility for the provision of special education services at the placement mentioned in the NOREP. (NT 602-14 to 18.)

This hearing officer finds to the contrary. The Appellate Panel's order and decision nowhere reference the allocation of responsibility set forth in 24 P.S. §13-1306, and there is no basis upon which to impute to the Panel any intention to abrogate that statutory allocation of responsibility. There were two placements in residential treatment facilities outside the District, and the District did not select or contract with either of them; rather, both were selected by local mental health agencies at the request of the Parents. (FF 11, 22, 23.)

Moreover, the NOREPs themselves, (S-12)[5], are carefully drafted to make it clear that the District did not place the Student in the residential treatment facilities set forth therein. The only placement recommended (at paragraph 1 of the NOREPs) is generic: "Full – time educational program in an Emotional Support classroom outside the regular school setting." (FF 15.) No specific location is proposed. In the next sentence, the District identifies without recommending the School of residential treatment center. In the second paragraph of each NOREP, it is made clear that the reason for the placement in residential treatment center is medical necessity. At paragraph 3B, the District carefully records that the reason for rejecting less restrictive placement options was that the Student was registered or admitted to the RTF "by a mental health professional … ." (S-12 p. 1. .) In paragraph 5 of the NOREP, it again makes clear that the Student had been placed on medical recommendation, prior to the issuance of the NOREP. Thus, this hearing officer's understanding of the document is that it explicitly does not adopt the RTF placement as its own, and that it does not evidence any intention to adopt the responsibility for educational planning and service provision allocated by law to the district in which the RTF placement is located.

The Parent argues that the District was intricately involved in the provision of services to the Student, by reason of which it adopted responsibility for the Student's educational programming. (NT 603-24 to 604-13.) However, this hearing officer finds to the contrary. The District had been ordered to "set in motion" the Intensive Interagency Coordination process, and it did so. (FF 7; S-2 p. 12.) The District was responsible under 24 P.S. §13-1306(c)(2), and the relevant BEC, "Basic Education Circular, Nonresident Students in Institutions (July 1, 1999), to cooperate and keep informed of the Student's educational programming and progress, and it did so. (FF 25.)

For analysis, this argument must be considered with regard to two distinct periods of time. The first period is the relatively short time in which the Student was placed in residential treatment center, from July 6, 2005 until September 26, 2005, when she was removed and placed in Residential Treatment Center Two. (FF 11, 22, 23.) The second period is the Student's placement at Residential Treatment Center Two between July 7 or 8, 2005 and August 21, 2006. (FF 22, 23, 45.)

The Parent's argument has its strongest support in the record with regard to the former period of time. There is evidence that the School at residential treatment center considered the District to be the responsible local educational agency, even designating the District as the LEA on the IEP it drafted. (FF 18.) The District's Supervisor was quite clearly and substantially involved in the planning of the educational program. (FF

[5] The District's exhibit, (S-12), contains two NOREPs, with different dates and signatures but the same content.

11, 14, 15, 18, 21, 24.) The Supervisor took certain initiatives regarding educational programming. (FF 18, 21.) Moreover, there is no clear evidence of involvement by the Wilkes Barre district, in which residential treatment center is located, or any other district. (FF 13, 19.) From this circumstance, it might be inferred that the Supervisor was indeed assuming responsibility.

The weight of the evidence is to the contrary. None of these actions of the District went beyond the requirements of the law and of the relevant hearing officer and Appellate Panel orders. (FF 8, 9.) None can reasonably be said to amount to an adoption of responsibility that the governing law allocated to another district. Moreover, the law provides for altering this allocation of responsibility through a written agreement, to be approved by the Department of Education, 24 P.S. §13-1306(d); there is no evidence of such an agreement in the record, and the hearing officer must conclude that is was not done.

School tested the Student, initiated the IEP meeting, generated the IEP, and implemented all educational programming. (FF 14, 17, 20, 21.) In addition, the District's Supervisor of Special Education credibly testified that her involvement in the Student's educational programming was not intended as an assumption of responsibility for that programming. (FF 16, 19.) From the entire record, it appears to this hearing officer that the Supervisor assumed erroneously that the residential treatment facility assumed primary responsibility for the Student's education. Patently, neither she nor anyone else in this situation gave any thought to the requirements of §1306. Thus, the precise legal issue discussed in this decision was simply not part of the Supervisor's decision making criteria. The record as a whole leads this hearing officer to conclude that this Supervisor's behavior was predominantly motivated by an intention to comply with the hearing officer's order to engage in interagency coordination, which the Supervisor interpreted to require her to actively participate in the educational planning for the Student.

Even if the record supported the Parent's argument that the District assumed such responsibility, however, this hearing officer would find against the Parent on this point. The hearing officer is bound by the plain language of the law with regard to the Parent's argument. There was no written agreement to alter the allocation of responsibility of the "host" and "residence" districts in this case. Cf. BEC, "Basic Education Circular, Nonresident Students in Institutions (July 1, 1999).[6]

The second period of time as to which this argument applies is the time during which the Student was admitted in the Residential Treatment Center Two, which

[6] Even if the hearing officer is in error on this point of law, an award of compensatory education would not be appropriate here, because the District did not have adequate time to develop an appropriate special educational program of services. Assuming that the school year began as early as the end of August , 2005, the District would have been entitled to a reasonable period of time within which to assess the Student's needs and implement a program. Surely, admission to a residential treatment facility would qualify as a significant event meriting a review of the IEP with an eye to modifying the existing IEP to account for both changes in the Student's needs and the exigencies of educational programming in a new, institutional environment. The Student was withdrawn from residential treatment center within forty-five days of the start of the school year, and this hearing officer considers that period of time to be well within a reasonable period to be allowed the District for reassessing needs and programming. (FF 22, 23.) Thus, even if the District were held to be responsible during this period, the Student would not be entitled to compensatory education for this period.

encompassed most of the 2005-2006 school year and the summer of 2006. (FF 22, 23, 45.) The record for this period strongly negates any inference that the District assumed responsibility for educational programming. It is clear that the Center took the initiative in assuring special educational planning and services while the Student was in their program. (FF 25, 26, 27, 34.) Moreover, the Salisbury School District took an active role, was listed as the LEA in relevant documents, and chaired the meetings. (FF 28, 29, 34, 35.) The District's Supervisor of Special Education did participate, and even issued NOREPs and an invitation to an IEP meeting, but always considered her role to be cooperative pursuant to the hearing officer and Appellate Panel orders. (FF 28, 30, 31, 32, 33, 34, 36, 37.)

Thus, this hearing officer finds that the District did not adopt the responsibility for planning and providing special education services for the Student during either of the periods of time in question. (FF 7, 8, 9, 11, 15, 16, 19; NT 624-20 to 625-3.) The hearing officer at any rate is bound by the statute, 24 P.S. §13-1306(c)(1), which allocates this responsibility to the district in which the residential facility is located, in the absence of a written, signed agreement. As compensatory education is an equitable remedy, this hearing officer finds that it is not equitable or legally appropriate under the circumstances to order the District to provide compensatory education to the Student for alleged failures of another district to provide FAPE during the 2005-2006 school year.

Summer 2006 ESY – Planning And Implementation

The Parent argues that the District erred in denying eligibility for ESY for the summer of 2006. However, the record makes plain that the District was not responsible for ESY evaluation, planning and implementation for the summer of 2006. The student was in the Residential Treatment Center Two facility during the time at which the Department of Education requires districts to do ESY eligibility determinations. (FF 22, 23, 25, 45.) Basic Education Circular, Extended School Year Eligibility (April 1, 2003). Thus neither the denial of eligibility nor the failure to provide ESY can be imputed to the District.

Beginning Of 2006-2007 School Year

The Parent argued that the District did not follow legally required procedures and failed to consider the Student's special education needs for academics when it offered an educational plan upon her discharge from Residential Treatment Center Two. However, this hearing officer finds that the District did consider academics, that any procedural irregularities did not lead to a denial of FAPE, and that the equities in this case militate against an award of compensatory education for the period from the date of the Student's discharge from Residential Treatment Center Two on August 21 until the day of the first hearing in this matter, October 3.

The Parent's case is based largely upon his own testimony, which detailed the sequence of events from early August, when he was made aware that the Student's discharge was imminent, until the date of the hearings. (NT 101-10 to121-2.) This hearing officer finds the Parent's account of events unreliable in support of the procedural details to which he testified, and which form the basis of his complaint. The Parent's demeanor during cross examination was striking for its adversarial tone. The Parent also made definitive statements regarding the sequence and timing of the various notices and meetings that occurred in August, and more than once these statements were contradicted in the documentary record and by credible testimony.

There are a number of instances in which the Parent's statements were contradicted in the record. For example, on direct examination, the Parent implied that his first notice of the August 29 IEP meeting was when he arrived at the school building to pick up the Student's schedule and locker combination, (NT 105-1 to 5, 184-10 to 16); when confronted on cross examination, the Parent admitted that the school's Principal had notified him on the previous Saturday by telephone that there would be a meeting. (NT 166-12 to 168-19.) He maintained that the Principal of the high school had called him on a Saturday morning and told him that the meeting was to pick up the locker assignment and schedule; however, the Principal credibly contradicted this recollection of events. (FF 48.) In another instance, the Parent indicated that he did not know the purpose of the Salisbury representative's presence at IEP meetings at Residential Treatment Center Two, (NT 221-13 to 17); however, the District's Supervisor of Special Education testified credibly that the Salisbury representative chaired the meetings, (FF 35). In a third instance, the Parent contradicted himself on cross examination regarding whether or not he had requested tuition reimbursement for private school, at first suggesting, implausibly, that the District offered it without his requesting it. (NT 159-19 to 161-12.)

In sum, it appears that the Parent's testimony at times was more definitive than his actual recollection. This hearing officer therefore reduces the weight accorded to the testimony when it comes to highly specific statements of the sequence of events.

Viewing the record as a whole, this hearing officer concludes that there is no basis for awarding compensatory education for the period from the Student's discharge from Residential Treatment Center Two to October 3 when the hearing in this matter began. The District was caught on extremely short notice in this time frame. Even though it is plain that there was some likelihood of discharge after August 1, (FF 38, 39), there can be no firm date for discharge from a psychiatric treatment facility; it depends quite rightly upon the patient's needs, which are dynamic and not completely predictable. Indeed, at first, the District understood that the discharge would occur most likely in October. (FF 38.)

When it became clear that discharge would be in August, the District was stymied in its effort to plan for the Student's return. It was told that the Parent planned to place the Student in private school. (FF 40, 41, 44.) Even when the District presented requests for permission to begin evaluations and seek necessary medical records, the Parent refused to sign the permission forms and there was a two week delay in which the parties negotiated and worked toward an agreement. (FF 42, 43, 44.) This necessitated an emergent IEP meeting on the day before school began. (FF 44, 45, 46, 47, 50, 51, 52, 53.) Even after this, as the District went about implementing a thorough reevaluation in

September, there were delays in receipt of needed psychiatric information. (FF 53, 57, 58, 59.) Meanwhile, the District implemented – on the insistence of the Parent - an interim plan for placement in regular education at the grade indicated by the Student's age and previous educational attainment, with special education services such as a one-to-one attendant. (FF 54, 55, 56, 57.)

Any claim for delay in providing services must be weighed against the Parent's own responsibility for delaying the District's plan to begin evaluating the Student and planning educational placement and services. It makes no difference whether or not the Parent's reasons were appropriate, and this hearing officer makes no adverse inference about the Parent's reasons – indeed, it is understandable in the circumstances that the Parent would, for example, prefer to select the psychiatrist to evaluate his daughter, who suffered from a major mental disorder and was highly vulnerable. The point is that, in all fairness, the District should not be held accountable for delay when its efforts to plan ahead were thwarted and two weeks were lost that could have given its staff an opportunity to develop a more appropriate educational plan.

Entitlement to compensatory education begins to accrue when the district knew or should have known that the IEP is inappropriate or that the student was not receiving FAPE. M.C. v. Central Regional School District, 81 F.3d 389 (3d Cir. 1996). On the record in this matter, that point was not reached by October 3, 2006. Given the obvious need for reevaluation, and the many obstacles to quick gathering of information, the District reasonably needed the usual sixty day period in which to finalize a reevaluation in this matter, to determine the adequacy of the existing IEP, starting on August 29, when the Parent signed the Permission to Reevaluate for psychological evaluation. Thus, the right to compensatory education did not accrue during the period from August 29 to October 3, 2006, and an award will be denied.

CONCLUSION

This hearing officer has not reached the factual arguments on a substantial period of time encompassed by the Complaint Notice, because a state statute forbids him from assigning responsibility to the District for the period of July 6, 2005 to August 21, 2006. This is not to say that other districts are therefore immune from sharing the responsibility for any alleged failures to provide services in this matter; they are not before this hearing officer. Nor is it to say that the District would not ultimately bear some fiscal responsibility; this issue is clearly not within this hearing officer's jurisdiction. The only issue within this hearing officer's jurisdiction is: who had the obligation to take responsibility for providing services in the first instance. In the complex matter of allocated responsibility, only one thing is clear to this administrative hearing officer: that he is without authority to deviate from the clear dictates of §1306.

ORDER

1. The Student is not entitled to compensatory education for the District's alleged failure to provide appropriate ESY services for the summer of 2005.

2. The District was not responsible for providing FAPE from July 6, 2005 until August 21, 2006; therefore, the Student is not entitled to compensatory education for the District's alleged failure to provide an appropriate IEP, and failure to provide appropriate monitoring, reporting, transportation and other services, which allegedly denied the Student FAPE for the 2005-2006 school year and the summer of 2006 until August 21, 2006.

3. The Student is not entitled to compensatory education for the District's alleged failure to provide an appropriate IEP and educational services from August 21, 2006 until October 3, 2006.

December 19, 2006

_____

WILLIAM F. CULLETON, JR., ESQ.
HEARING OFFICER