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PENNSYLVANIA

Special Education Hearing Officer

Child's Name: A.P.

Date of Birth: xx/xx/xx

File Number: 7197/06-07 KE

Dates of Hearing: January 23, 2007; February 13, 2007; March 21, 2007

OPEN HEARING

Parties to the Hearing:

Mr. and Mrs.

Wyomissing Area School District
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Wyomissing, PA 19610-2636

Representative:

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Date Transcript Received:

March 26, 2007

Date of Decision:¹

April 2, 2007

Hearing Officer Name:

Gregory J. Smith

¹ The record was kept open until receipt of the transcript. This decision was rendered within 15 days of the closing of the record.

Background

Student is a xx-year-old fifth grade Student who resides with her parents within the area served by the Wyomissing Area School District. Student is eligible for special education and related services as a child with a disability who has been identified as having other health impairment. Student has been diagnosed with idiopathic neuropathy. She has a tracheostomy and is wheelchair and ventilator dependent. A private nurse accompanies Student in school to monitor Student's need for tracheal suctioning and to provide suctioning when needed. From approximately first grade through fourth grade Student's nurse was allowed to use her discretion to decide the location for suctioning in non-emergency situations. Most of the time Student would be suctioned in the regular classroom. If there was an exam or other quiet activity taking place in the classroom, Student's nurse would remove Student from the classroom for suctioning, unless it was an emergency. Starting in April 2006 Student's nurse was required to suction Student outside of the regular classroom except in emergency situations. Student's parents requested the present hearing seeking an order allowing the suctioning to be completed in the regular classroom and also seeking compensatory education for the times Student had been removed from the regular classroom for suctioning during the current school year.

Findings of Fact

1. Student is a xx-year-old (d.o.b. xx/xx/xx) fifth grade Student who resides with her parents within the area served by the Wyomissing Area School District (District). (N.T. at 101, 400; S-1, S-2)
2. Student is eligible for special education and related services as a child with a disability who has been identified as having other health impairment. Student has been diagnosed with idiopathic neuropathy. She has a tracheostomy and is wheelchair and ventilator dependent. (N.T. at 91, 303-304; P-5, P-11, S-1, S-2, S-7)
3. A private nurse accompanies Student in school to monitor Student's need for tracheal suctioning (suctioning) and to provide suctioning when needed. The services of the private nurse are paid for by Student's father's insurance. (N.T. at 208-209, 405-406, 467-468; S-1, S-2)
4. Student first enrolled in the District as a kindergarten Student. She attended Elementary from kindergarten through fourth grade. Elementary is a District school that educates Students in kindergarten through fourth grade. (N.T. at 400, 424, 465, 467; S-1)
5. At about the time of Student's enrollment in the District, the District's Director of Pupil Services established the following procedures for Student's nurse to follow when suctioning Student:
 1. Whenever possible, tracheal suctioning will continue to be performed outside of the classroom.
 2. When suctioning outside of the classroom is not possible due to the urgency of the need, in-class tracheal suctioning is allowable, as long as the following conditions are met:
 - a. During the suctioning there are no Students within a 2 foot radius of the procedure site. In cases where other Students may be in close physical proximity the nurse will move [Student] to an isolated location in the classroom.
 - b. The nurse will insure that hands are washed and surfaces and equipment in the immediate area are immediately sanitized. S-6 at 2
(N.T. at 409-410, 469; S-6, S-8)
6. From approximately first grade through fourth grade Student's nurse was allowed to use her discretion to decide the location for suctioning Student in non-emergency situations. Most of the time Student would be suctioned in the regular classroom. If there was an exam or other quiet activity taking place in the classroom,

Student's nurse would remove Student from the classroom for suctioning, unless it was an emergency. (N.T. at 101, 219-220)

7. In preparation for Student's transition to fifth grade a re-evaluation was begun in March 2006. (N.T. at 104; P-2)

8. On April 6, 2006 Student's nurse was required to start suctioning Student outside of the regular classroom except in emergency situations. (N.T. at 115, 222-224; P-5)

9. Between April 6, 2006 and the end of the 2005-2006 school year, Student was removed from the regular classroom for suctioning three or four times per week. (N.T. at 183-189, 224-227; P14)

10. On May 11, 2006 an Individualized Education Program (IEP) team meeting was held. At the end of that meeting the location for Student's suctioning was discussed. (N.T. at 109-110; S-1)

11. On May 20, 2006 a Notice of Recommended Educational Placement (NOREP) was issued. The NOREP and the IEP were sent to Student's parents. The IEP included an Individualized Health Care Plan (Health Care Plan) developed by the District's school nurse and dated May 17, 2006. The Health Care Plan included the following provisions (among others):

- * [Student's] one-to-one nurse should remain in sufficient proximity (within earshot) to [Student] to monitor need for suctioning.
- * [Student] is to be removed from the classroom to the nearest safe environment when suctioning is required and will be returned immediately afterward, unless emergency circumstances require suctioning in the classroom. S-1 at 27
(N.T. at 110-111, 409, 483; P-5, P-6, S-1)

12. At the start of the 2006-2007 school year Student began to attend the Elementary Two. Elementary Two is a District school that educates Students in fifth and sixth grades. (N.T. at 173, 400, 402; S-2)

13. On September 11, 2006 an IEP team meeting was held. At that meeting Student's parents requested that Student not be removed from the classroom for suctioning. (N.T. at 127, 128-130, 435)

14. The IEP issued as the result of the September 11, 2006 IEP team meeting included the Health Care Plan that had originally been developed on May 17, 2006 and attached to the May 11, 2006 IEP. That Plan continued to require that Student be suctioned outside of the regular classroom except in emergency situations. (S-2)

15. The September 15, 2006 IEP included a proposed program, which has been implemented, which called for Student to participate in the regular education program, with appropriate supports, for most of the school day. The only course that Student does not take that other Students in her grade in the District normally take is Spanish. During the time period that Spanish is taught, Student receives language arts support. (N.T. at 402; S-2)

16. During the current school year, over a period of 73 days in which Student attended school, she was suctioned a total of 26 times in the regular classroom and five times outside of the regular classroom. (N.T. at 442-443)

17. The suctioning procedure consists of preparing the equipment for suctioning, including unwrapping a catheter wrapped in plastic; turning on a two minute alarm that will sound if the suctioning is not completed in time; disconnecting Student's ventilator; passing a catheter down the tracheal tube one or two times to perform

the actual suctioning; re-connecting Student's ventilator; disconnecting the suctioning tube and catheter; and either storing the suctioning tube and catheter for later cleaning or cleaning the suctioning tube and catheter immediately. (N.T. at 99, 180-181, 196-198, 211-217, 256, 412, 446; P-29)

18. Suctioning in the regular classroom takes between 90 seconds and four minutes to complete. (N.T. at 211-215, 416, 418)

19. When Student is moved to a location outside of the classroom for suctioning she is typically suctioned in the hallway. That process adds approximately two minutes to the total time needed for suctioning. (N.T. at 449)

20. While Student is being suctioned she is unable to use her assistive technology devices including her head pointer, computer keyboard, microphone, and voice amplifier. (N.T. at 445)

21. Student's father testified that no parent, teacher, or administrator has ever complained to him that suctioning Student in the regular classroom was disruptive. (N.T. at 102-104, 123)

22. Student's mother testified that no Student, parent, or teacher has ever complained to her that suctioning Student in the regular classroom was disruptive. (N.T. at 187-188)

23. Student's private nurse testified that no Student or teacher has ever complained to her that suctioning Student in the regular classroom was disruptive. (N.T. at 221, 230)

24. The principal at Elementary Two testified that no Student or parent has ever complained to her that suctioning Student in the regular classroom was disruptive. (N.T. at 423)

25. The school nurse who wrote the Health Care Plan testified that no Student has ever complained to her about suctioning Student in the regular classroom. (N.T. at 489-490)

26. The principal at Elementary Two testified that she had observed some Students looking at Student during suctioning and a "handful" of Students did not continue working. (N.T. at 416)

27. Student's teacher testified that she had observed some Students look at Student during suctioning, blush, and/or appear to be worried or concerned. (N.T. at 44)

28. Student made academic progress during the past several years in which her nurse was allowed to suction Student in the regular classroom. During the current school year, Student earned the following grades in the first marking period: Reading B-, Writing/English B-, Spelling A, Math B+, Science/Health B+, Social Studies A+. (N.T. at S-1, S-2, P-1, P-31)

29. There has been no reduction in other Students' performance as the result of Student being suctioned in the regular classroom. (N.T. at 424)

30. On December 6, 2006 Student's parents filed a due process complaint and requested the present hearing. In their complaint Student's parents suggested the following resolutions:

1. Directing the District to permit [Student's] nurse to suction her in class as necessary.
2. Awarding [Student] compensatory education in the amount of 45 minutes per day from the start of the 2006-2007 school year until the District reverses its misguided hallway-suctioning policy. P-8 at 3

Issues

Does the removal of Student from the regular classroom for tracheal suctioning deny Student a free appropriate public education?

Is Student entitled to compensatory education for the times she has been removed from the regular classroom for tracheal suctioning during the current school year?

Discussion

The Individuals with Disabilities Education Improvement Act of 2004 (IDEA) 20 U.S.C. §1400 *et seq.*, is the Federal Statute designed to ensure that "all children with disabilities have available to them a free appropriate public education," (FAPE) §1400(d)(1)(A). Under the IDEA, school districts must create an individualized education program (IEP) for each child with a disability. §1414(d). An appropriate program is one that is provided at no cost to the parents, is provided under the authority of the District, is individualized to meet the educational needs of the child, is reasonably calculated to yield meaningful educational benefit, and conforms to applicable federal requirements. *Rowley v. Hendrick Hudson Board of Education*, 458 U.S. 176 (1982); 20 U.S.C. §1401(8). The Third Circuit Court has interpreted *Rowley* as requiring school districts to offer children with disabilities individualized education programs that provide more than a trivial or *de minimus* educational benefit. *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3rd Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989). Specifically, the Third Circuit defined a satisfactory IEP as one that provides "significant learning" and confers "meaningful benefit." *Id* at 182-184. see also *Board of Education of East Windsor Sch. Dist. v. Diamond*, 808 F.2d 847 (3rd Cir. 1986); *J.C. v. Central Regional Sch. Dist.*, 23 IDELR 1181 (3rd Cir. 1996) The implementing Regulations for the IDEA can be found at 34 C.F.R §300 *et seq.*

In the present matter Student's parents have challenged the appropriateness of removing Student from the regular classroom for suctioning and have sought an order allowing Student to be suctioned in the regular classroom and an award of compensatory education. The Supreme Court has held that the "burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief... the rule applies with equal effect to school districts: If they seek to challenge the IEP, they will in turn bear the burden of persuasion." *Schaffer v. Weast*, 126 S.Ct. 528, 537 (2005) In so doing the Court found no reason to depart from "the ordinary default rule that plaintiffs bear the risk of failing to prove their claims." *Id* at 534

The *Schaffer* decision by the Supreme Court effectively settled a split, present in the Circuit Courts, in assigning the burden of proof. As noted in *M.S. v. Ramsey Bd. of Educ.*, 435 F.3d 384 (3rd Cir. 2006) the Third Circuit Court had previously placed the burden of proof on the school district. However, in *M.S. v. Ramsey* the Third Circuit Court found *Schaffer* controlling and extended the reach of *Schaffer* writing "It would be unreasonable for us to limit that holding to a single aspect of an IEP, where the question framed by the Court, and the answer it provided, do not so constrict the reach of its decision." at 5

Shortly after the Third Circuit issued its decision in *M.S. v. Ramsey*, the Eastern District Court of Pennsylvania issued its decision in *Greenwood v. Wissahickon*, 2006 U.S. Dist. LEXIS 4274 (E.D. Pa. 2006). The *Greenwood* Court concluded that *Schaffer v. Weast* "effectively overturned the Third Circuit's holding in *Oberti v. Bd. Of Educ. Of Borough of Clementon Sch. Dist.*, 995 F.2d 1204, 1207 (3rd Cir. 1993), which had placed the burden of proving compliance with the mainstreaming requirement upon the school district regardless of who brought the action." at 2 The *Greenwood* Court went on to state that "the burden of persuasion at the administrative level in Pennsylvania is now on the party contesting the IEP." at 7

It should be noted that in their analyses the above referenced courts have limited themselves to the burden of persuasion and have not considered the burden of production. As noted by the Supreme Court, the burden of persuasion addresses “which party loses if the evidence is closely balanced.” *Schaffer* at 533-534

Because it is Student’s parents who have challenged the appropriateness of removing Student from the regular classroom for suctioning and have sought an order allowing Student to be suctioned in the regular classroom as well as an award of compensatory education, it is Student’s parents who carry the burden of persuasion on both of the issues presented at this hearing and discussed below.

Does the removal of Student from the regular classroom for tracheal suctioning deny Student a free appropriate public education?

Student’s parents have asserted that the District’s proposed program failed to provide FAPE to Student because it failed to educate her in the least restrictive environment (LRE) that was appropriate. Specifically, Student’s parents claimed that the requirement that Student be removed from the regular classroom for suctioning fails to educate Student in the LRE. It is important to note that Student’s parents did not raise a claim regarding who must provide the suctioning, the parent or the District, or what personnel must provide the suctioning. It was not disputed in the present matter that the private nurse that accompanies Student in school in order to provide the suctioning is the one that is currently providing the suctioning, nor was it disputed that the nurse is paid for by Student’s father’s insurance, what was in dispute was the location where that suctioning should take place, either within or outside of the regular classroom.

Although courts have addressed the scope of school district’s responsibility in providing medically related services, see *Irving Independent School Dist. V. Tatro*, 468 U.S. 883 (1984), requiring a school district to provide clean intermittent catheterization for a kidney patient, and *Cedar Rapids Community School District v. Garrett F.*, 526 U.S. 66 (1998), requiring the provision of nursing services to a ventilator dependent Student, this hearing officer has found no case law (nor direct reference in the IDEA legislation or implementing Regulations) that set precedent in this jurisdiction regarding the location for the provision of medically related services generally or tracheal suctioning specifically. The case before this hearing officer appears to be one of first impression in the Commonwealth of Pennsylvania.

The one case cited by the District, *Special School District 6, South Saint Paul*, 23 IDELR 119, does not set precedence in this jurisdiction. It is also not particularly instructive because the fact specific dispute in that case was quite distinct from the present case. In that case the school nurse was providing the suctioning and she testified that an out of classroom location would allowed her to make better medical judgments, that the machine was quite loud, and that the procedure took about 10 minutes to complete. In the present matter there was no evidence presented that the medical judgment of Student’s private nurse was affected during in-classroom suctioning, the machine used with Student does not appear to be so loud as to be disruptive, and the procedure takes far less time than in the Minnesota case.

With a case of first impression, as with all special education cases, the appropriate place to start the analysis is the actual language found in the IDEA. The IDEA requires that:

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and 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 aids and services cannot be achieved satisfactorily. 20 U.S.C. §1412(a)(5)(A)

Nearly identical language can be found at 34 C.F.R §300.144 in a Section titled “Least Restrictive Environment (LRE).”

In *Oberti v. Board of Education*, 995 F.2d 1204 (3rd Cir. 1993) the Third Circuit Court addressed the LRE issue, or what is commonly termed the IDEA’s mandate for inclusion (called “mainstreaming” at the time of the *Oberti* decision). In *Oberti* the Court established a two-part test to determine whether or not a school district’s proposed program met the requirement that a child’s education be provided in the LRE that is appropriate. That two-part test was based on the Fifth Circuit Court’s earlier ruling in *Daniel R. R. v. State Board of Educ.*, 874 F.2d 1036 (5th Cir. 1989). The first prong of the *Oberti* test is to consider whether or not the child can be educated satisfactorily in the regular classroom with supplementary aids and services. The second prong of that test is only applicable when a child cannot be educated satisfactorily in the regular classroom with supplementary aids and services. In that case, consideration must be given to the question of whether or not the school district has proposed a program that includes the child with non-disabled children to the maximum extent possible. Courts since *Oberti* have regularly applied this two-part test. see *Girty v. School District of Valley Grove*, 163 F.Supp. 2d 527 (W.D. Pa. 2001)

The first prong of the *Oberti* test includes three factors that should be considered. As stated by the *Oberti* Court:

In sum, in determining whether a child with disabilities can be educated satisfactorily in a regular class with supplemental aids and services (the first prong of the two-part mainstreaming test we adopt today), the court should consider several factors, including: (1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other Students in the class. *Oberti*, 995 F.2d at 1217-1218

Each of those factors will be discussed below.

The first factor addresses the efforts that the District has made to include the child in the regular classroom. Student first enrolled in the District as a kindergarten Student. At that time the District established a policy whereby Student would be suctioned outside of the regular classroom whenever possible. As Student progressed through the elementary grades that policy was not enforced and the location for Student’s suctioning was left to the discretion of her private nurse. Most of the time Student would be suctioned in the regular classroom. If there was an exam or other quiet activity taking place in the classroom, Student’s nurse would remove Student from the classroom for suctioning, unless it was an emergency. In preparation for Student’s transition to fifth grade a re-evaluation was begun in March 2006. Then, on April 6, 2006 Student’s nurse was required to start suctioning Student outside of the regular classroom except in emergency situations. At the present hearing Student’s nurse estimated that she removed Student from the regular classroom for suctioning three or four times per week between April 6, 2007 and the end of the 2005-2006 school year.

On May 11, 2006 an IEP team meeting was held. At the end of that meeting the location for Student’s suctioning was discussed. On May 20, 2006 a NOREP was issued and sent to Student’s parents along with an IEP. The IEP included an Individualized Health Care Plan developed by the District’s school nurse and dated May 17, 2006. The Health Care Plan included a requirement that Student be suctioned outside of the regular classroom except in emergency situations. The Health Care Plan, including the requirement that Student be suctioned outside of the regular classroom except in emergency situations, was included in an IEP developed in September 2006 and has been in effect during the current school year. Although the requirement to suction outside of the regular classroom has been in effect during the current school year, for the most part Student has actually been suctioned in the regular classroom during the current school year. During one period of 73 days

that Student attended school in the current school year, her teacher observed 31 incidences of suctioning. All but five of those were performed in the regular classroom.

Student made academic progress during the elementary school years in which her nurse was allowed to suction her in the regular classroom. During the current school year, a period in which there has been a policy change, but Student has still been mostly suctioned in the regular classroom, Student has earned the following grades: Reading B-, Writing/English B-, Spelling A, Math B+, Science/Health B+, Social Studies A+. Clearly Student has been able to make academic progress while being suctioned in the classroom for the past several years.

Considering all of the above, it is the conclusion of this hearing officer that with the appropriate supports, particularly her private nurse accompanying her to perform the suctioning, the efforts by the District to include Student in the classroom have been successful.

Turning to the second factor, that of the comparable benefits of education in the regular classroom versus education in a separate setting. Clearly there are no educational or other benefits to Student gained from being removed from the regular classroom for suctioning. The estimates of the total time it would take to remove her from the classroom, suction her, and return her to the classroom ranged from three and one-half minutes to six minutes. It would be impossible for Student to pay attention to anything happening in the regular classroom during that period of removal. On the other hand, although while being suctioned Student is unable to use her assistive technology devices, including her head pointer, computer keyboard, microphone, and voice amplifier, it is unknown how much attention (if any) she is able to give to the classroom activities during in-class suctioning. Even if the answer is zero, that she cannot pay attention at all during suctioning, the difference in the amount of time for the suctioning procedure in and outside of the classroom, estimated at two minutes to take her outside of the classroom and then return her to the classroom, tilts the balance toward suctioning in the classroom.

Lastly, the third factor, the potential negative effects of the child's inclusion on other Students needs to be considered. In considering this factor, the *Oberti* Court wrote:

A third factor the court should consider in determining whether a child with disabilities can be educated satisfactorily in a regular classroom is the possible negative effect the child's inclusion may have on the education of the other children in the regular classroom. While inclusion of children with disabilities in regular classrooms may benefit the class as a whole, see supra n.24, a child with disabilities may be "so disruptive in a regular classroom that the education of other Students is significantly impaired." 34 C.F.R. § 300.552 comment (citing 34 C.F.R. part 104 -- Appendix, Para. 24); see *Greer*, 950 F.2d at 697; *Daniel R.R.*, 874 F.2d at 1048-49. Moreover, if a child is causing excessive disruption of the class, the child may not be benefiting educationally in that environment. Accordingly, if the child has behavioral problems, the court should consider the degree to which these problems may disrupt the class. In addition, the court should consider whether the child's disabilities will demand so much of the teacher's attention that the teacher will be required to ignore the other Students. see *Daniel R.R.*, 874 F.2d at 1049.

We emphasize, however, that in considering the possible negative effect of the child's presence on the other Students, the court must keep in mind the school's obligation under the Act to provide supplementary aids and services to accommodate the child's disabilities. see *Greer*, 950 F.2d at 697. An adequate individualized program with such aids and services may prevent disruption that would otherwise occur. See *id.* With respect to the concerns of nondisabled children in the regular classroom, we note that the comment to 34 C.F.R. § 300.552 (citing 34 C.F.R. part 104 - Appendix, Para. 24) reads: "It should be stressed that, where a handicapped child is so disruptive in a regular classroom that the education of other Students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore, regular placements would not be

appropriate to his or her needs. . . ." On the other hand, "a handicapped child who merely requires more teacher attention than most other children is not likely to be so disruptive as to significantly impair the education of other children." *Greer*, 950 F.2d at 697. *Oberti*, 995 F.2d at 1217

In the present matter Student's suctioning simply does not cause the level of disruption discussed by the *Oberti* court. Student's mother, father, and private nurse, along with her principal and the District's school nurse, were all asked some version of whether or not they had received complaints about Student's suctioning being disruptive. All of those individuals testified that they had not received any complaints about the suctioning. The only testimony about any complaints about the suctioning was the principal's vague second-hand report of the possibility that two parents may have complained to the school nurse about the suctioning. However, neither the school nurse nor any other testimony or evidence on the record corroborated that vague second-hand report.

The principal did testify that she had observed some Students looking at Student during suctioning and that a "handful" of Students did not continue working. And Student's teacher testified that she had observed some Students look at Student during suctioning, blush, and/or appear to be worried or concerned. But none of those reports reached the level of disruption discussed in *Oberti* where the Court used the term "excessive disruption." Those reports do not appear to be excessive disruption. More importantly, there has been no reduction in other Students' performance as the result of Student being suctioned in the regular classroom. Clearly, this does not reach the level of disruption discussed in *Oberti* because Student's suctioning is not "so disruptive in a regular classroom that the education of other Students is significantly impaired." *Oberti* at 1217 Lastly, there was no testimony that Student's suctioning would "demand so much of the teacher's attention that the teacher will be required to ignore the other Students," *Id* at 1217 which was another factor weighed by the *Oberti* Court.

Considering all of the above, it is the conclusion of this hearing officer that Student's suctioning in the regular classroom is not disruptive as defined and discussed by the *Oberti* Court.

The *Oberti* Court did open the possibility of considering a fourth factor, that of the cost of inclusion. 995 F.2d at 1218, footnote 25 The cost of inclusion need not be considered here because neither party raised the cost of inclusion as an issue at the present hearing.

In summary, it is the conclusion of this hearing officer that Student has been successfully suctioned in the regular classroom over many years and has continued to make educational progress during that time, that there is no benefit derived from removing her from the classroom for suctioning, and that suctioning in the regular classroom does not cause the level of disruption discussed in *Oberti*. It is therefore the conclusion of this hearing officer that Student can be educated satisfactorily in the regular classroom, including having her suctioning completed in the regular classroom, with supplementary aides and services.

Having concluded that Student can be educated satisfactorily in the regular classroom with supplementary aides and services, there is no need to consider the second prong of the two-part *Oberti* test relating to a child who cannot be fully included and the question of whether or not the school district has included that child with non-disabled children to the maximum extent possible. *Girty v. School District of Valley Grove*, 163 F.Supp. 2d 527 (W.D. Pa. 2001)

Because Student can be educated satisfactorily in the regular classroom, including having her suctioning completed in the regular classroom, with supplementary aides and services, it is the conclusion of this hearing officer that removing Student from the regular classroom for suctioning violates the IDEA inclusion mandate, fails to educate her in the LRE, and is a denial of FAPE.

Is Student entitled to compensatory education for the times she has been removed from the regular classroom for tracheal suctioning during the current school year?

In *Educational Assignment of H.D.*, Spec. Ed. Op. 1360 (Pa. 2003) the Appeals Panel summarized the basis for the determination of whether or not compensatory education is owed a Student:

Compensatory education is an appropriate remedy where a school district knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only trivial educational benefit, and the district fails to remedy the problem. *M.C. v. Central Regional School District*, 81 F.3d 389 (3rd Cir. 1996). Such an award compensates the child for the period of time of deprivation of special education services. at 6

In the present matter there was no evidence presented that Student has received only “trivial educational benefit” as the result of her having been removed from the regular classroom for suctioning. In fact, as discussed above, during the current school year Student has earned the following grades: Reading B-, Writing/English B-, Spelling A, Math B+, Science/Health B+, Social Studies A+. Clearly she has received an educational benefit from her program this school year.

As noted above, it was the parents who carried the burden of persuasion in this matter. They failed to meet that burden on this issue. In addition to the above noted evidence showing that Student received more than mere trivial educational benefit during the current school year, there was little evidence presented documenting actual removal from the regular classroom for suctioning this school year. Student’s teacher testified that during one period of 73 days of Student’s attendance she witnessed 31 suctioning episodes, but only five other those were outside of the classroom. There was no other evidence presented that conclusively confirmed any other removals from the classroom during the current school year. Even taking the longest estimated time for suctioning and adding to it the estimated time to remove Student from the classroom and return her to the classroom, which would total 6 minutes, the total period of deprivation for the current school year attributable to suctioning and established on the record at the present hearing would be 30 minutes. Using Student’s nurse’s estimate the total may be as little as 16.5 minutes. Whether the period of deprivation was 16.5 minutes or 30 minutes, that amount of deprivation up until this point in the current school year is not enough to warrant an award of compensatory education, especially in light of the above noted educational progress Student has shown. It is the conclusion of this hearing officer that Student is not entitled to compensatory education for removals from the regular classroom for suctioning that have occurred during the current school year.

* * *

Above this hearing officer concluded that removing Student from the regular classroom for suctioning violates the IDEA inclusion mandate, fails to educate her in the LRE, and is a denial of FAPE. In reaching that conclusion, he did not consider the procedure by which the requirement to remove Student from the regular classroom for suctioning was added to Student’s IEP because consideration of that procedure would not have altered the final conclusion. The District is cautioned that an Individualized Health Care Plan, developed by the school nurse, written almost a week after the IEP team meeting, and attached to the IEP and sent to the parents, does not match the procedures required under the IDEA and its implementing Regulations for the development of the IEP. The requirement is that all aspects of the IEP are developed by and discussed by the IEP team.

Accordingly we make the following:

ORDER

The removal of Student from the regular classroom for tracheal suctioning does deny Student a free appropriate public education. The Wyomissing Area School District is directed to modify Student's individualized education program to allow suctioning within the regular classroom.

Student is not entitled to compensatory education for the removals from the regular classroom for tracheal suctioning that have occurred during the current school year.

Gregory J. Smith

Signature of Hearing Officer