PENNSYLVANIA

SPECIAL EDUCATION HEARING OFFICER

ODR File Number : 7324/06-07 KE
Student: NP
School District: Penn-Delco
Type of Hearing: Closed

For the Student:

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Due Process Hearing Request Date: January 28, 2007
Hearing Dates: March 27, April 26, and May 17, 2007
Date of Receipt of Transcript: May 23, 2007
Decision Date: May 30, 2007
Hearing Officer: Daniel J. Myers

BACKGROUND

Student is a xx year old former resident of the School District who attended the School District's elementary school from September 2000 (first grade) through April 13, 2005 (fifth grade). In January 2005, Student received a Section 504 Plan/Service Agreement for behavioral issues. In March 2005, he was found to be eligible for special education under the IDEA. On April 13, 2005 he was sent to a 45 day diagnostic placement at an Intermediate Unit (IU) facility. On April 19, 2005, he moved into a new school district, although he continued to attend the IU facility.

Student seeks compensatory education for the School District's alleged failure to provide a free and appropriate public education (FAPE) between 1st grade and when he left the School District. For the reasons described below, I conclude that the statute of limitations limits Student's recovery of compensatory education, and that none of the exceptions to the statute of limitations extends Student's compensatory education recovery period. For the period of time that is not limited by the statute of limitations, however, I find that the Student was denied FAPE, and I award compensatory education.

ISSUES

Whether or not the School District denied a free and appropriate public education to Student from 1st grade through April 19, 2005?

FINDINGS OF FACT

1. Student, whose date of birth is xx/xx/xx, is a xx year old former resident of the Penn-Delco School District. (N.T. 29, 171) [1] He attended the School District's elementary school from 1st grade through April 13 of his 5th grade school year. (N.T. 72, 78)

2. Student exhibited behavioral difficulties in 1st grade (2000-2001), which resulted in his referral to his elementary school's instructional support team (IST) program. (N.T. 32-35, 83, 285, 317; P8, p.1) A behavior plan was created and Student began attending a social skills group with the guidance counselor. (N.T. 158, 285-286)

3. To assist Student's behavioral needs in 2nd grade (2001-2002), the School District assigned him to a particular teacher who ran a highly structured classroom. (N.T. 314) His 2nd grade report card indicates that he still needed improvement in respecting rights and property of others, conflict resolution, self-control, respecting authority, appropriate peer interaction, and courtesy. (P8, pp.2, 3, 7; N.T. 95-96, 108, 320, 322)

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[1] References to "P," "SD," and "HO" are to the Parent, School District, and hearing officer exhibits, respectively. References to "N.T." are to the transcripts of the March 27, April 26, and May 17, 2007 hearing sessions.

4. Student alleges that he had 142 disciplinary referrals in 2nd grade, and that he ate his lunch in the school office 3-4 times per week as a consequence for disruptive behavior. (N.T. 42, 46, 47, 50, 70) Although the School District disputes these allegations, it lacks records and memories of Student's disciplinary referrals for that year. (N.T. 41, 43-45, 68, 73, 314) I need not render a factual finding regarding whether or not Student's file actually contained 142 disciplinary referrals because this 2nd grade time period falls outside the recovery period allowed in this case.

5. In 3rd grade (2002-2003) Student would be sent to the office approximately once per week for disciplinary problems, and to the school's IST screening coordinator/behavior specialist's office three times per week when he disrupted the class. (N.T. 55-58) A March 15, 2003 referral by the School District for a multidisciplinary evaluation indicated that Student was easily frustrated, threatening to others, and demonstrated little progress in controlling his behavior. (P9, pp.1, 4; N.T. 323) Student was not actually evaluated by the School District, however, but simply considered to be in the IST information-gathering process at that time. (N.T. 323) He was still attending weekly social skills instruction at school with the guidance counselor. (N.T. 158-160)

6. A June 6, 2003 School District memorandum indicated that, while Student's academic skills were in the high average range, he was demonstrating severe emotional/behavioral problems. (P4, p.1; N.T. 97-98) An Emotional and Behavioral Problem Scale contained standard scores of zero in interpersonal relations, inappropriate behavior, unhappiness/depression, physical symptoms/fears, social aggression/conduct disorder/social-emotional withdrawal, and aggressive/self-destructive. (P4, p.1) Student's 3rd grade report card indicated that Student needed improvement in self-control and appropriate interaction with peers. (P8, p.5)

7. Student began the 4th grade (2003-2004) sleeping in class, arguing with peers, going to the nurse's office twice per week, and spending up to ½ of each day in the school's IST screening coordinator/behavior specialist's office. (P10; SD 27; N.T. 59-62, 111, 235) At that time, Student was taking Straterra and Risperdal, as well as receiving regular therapy outside the school for ODD, depression and disruptive behavior disorder diagnoses. (P11, p.2; N.T. 96, 109, 190-192)

8. The School District's December 2003 evaluation report (ER) indicated a Wechsler Intelligence Scale for Children 4th edition (WISC IV) full scale IQ of 108 average-range intelligence. Student's broad reading skills were in the 78th percentile and his broad math skills were in the 84th percentile. (P11, p.1) The ER noted that, while Student's academic skills were at grade level, he did not always use his skills to his best advantage, and he did not complete independent work. It further found that Student demonstrated a weakness in following directions and

engaging in nonpreferred activities, and that he was experiencing emotional difficulty that negatively impacts his overall functioning. (P11, p.3)

9. The December 2003 ER found that Student did not need specially designed instruction, but rather suggested that a Section 504 agreement be created with appropriate supports. (P11, p.4; SD28; N.T. 119, 121, 286)

10. Also at that time, the School District did not have an emotional support classroom for elementary school children. (N.T. 333-335) No children in Student's elementary school building were receiving either itinerant emotional support services in a regular education classroom or emotional support services in a resource room setting. (N.T. 351-353) Only one student in the building required emotional support services, and he received those services in an educational placement outside of the School District. (N.T. 352)

11. Apparently as part of the Section 504 development, the School District analyzed Student's problem behaviors on March 24, 2004. (N.T. 162-163) Student's problem behaviors at that time were verbal and physical threats to peers, refusal to follow adult directions, threats to damage objects, and self-deprecating comments. The School District's hypothesis for these behaviors was that Student was acting out impulsively and oppositionally, when stressed, to release anger and to control the circumstances. (P13, p.1; SD24; SD25)

12. On April 2004, the School District developed a Section 504 service plan. (SD23; N.T. 287) Among other things, it incorporated student's artistic strength as part of the behavioral plan by using Friday mentoring sessions with the Art teacher as a motivator for good behavior. (N.T. 289, 341) The Section 504 plan resulted in greater behavioral success for the remainder of 4th grade. (N.T. 291, 316)

13. Between May and July 2004, Student and his mother moved out of the School District. The School District recommended, however, that Student finish the academic school year in its elementary school because the year was almost over. (N.T. 231-232; SD5; SD6)

14. Student's 5th grade (2004-2005) school year started poorly. (N.T. 339) He was suspended on the first day of school because he brought a realistic-looking toy gun to school and threatened other students with it. (N.T. 294) He did not complete school assignments, was not prepared for tests, did very little work in class, and he was impulsive and disrespectful towards others and their property. (P7, pp.2-3; SD22, p.4) He was suspended 2 or 3 times during the first semester, and he received 2 to 3 detentions per week. (N.T. 165-166, 332) His mother's fiancée, with whom Student and his mother were living, was believed to be dying of a terminal illness. (P10, p.4; N.T. 295) Also at that time, his outside therapist moved, so he stopped receiving any outside counseling. (N.T. 110, 343)

15. In October 2004, the School District requested assistance from the Intermediate Unit's (IU) behavior specialists. (N.T. 344) Student was exhibiting unprovoked and oppositional and aggressive behavior towards adult authority, leaving rooms without permission, almost hitting the principal, and picking up a chair to threaten another student. (P14, p.2; 171-172, 302) Student began spending most of his day in the school's IST screening coordinator/behavior specialist's office, with peers bringing class work down to Student in that office. (N.T. 64, 148, 152-153)

16. Student's behavior deteriorated even more after the January 2005 holiday break. (SD7; N.T. 346) An IU functional behavioral analysis and a revised Section 504 plan provided more structure but did not reduce Student's behavioral problems. (N.T. 148-153, 303-305, 333, 345; SD8; SD10; SD29; P15; P16) By March 2005, he had been sent to the office 31 times and absent from school 23 days. (SD13, p.3) When he performed his academic work, he was still on grade level, but his academic progress was suffering from failure to complete his work. (N.T. 306) Student was also engaged in fights and faced assault charges outside of school. (N.T. 175-176, 233)

17. A March 30, 2005 ER concluded that Student's behavior was negatively impacting his ability to access the curriculum, and it concluded that Student is a student with an emotional disturbance in need of specially designed instruction. (SD13, pp. 3-4) The ER concluded that more information was required and recommended a 45 day diagnostic placement at the IU's [redacted] School. (SD11; SD13; N.T. 221-222)

18. On April 1, 2005 Student's IEP team developed an IEP with goals for completing classroom assignments, responding appropriately to redirection, behaving appropriately in a group and when upset, and following school rules. His educational placement was to be an emotional support classroom 5 days per week at the IU's school. (SD 15) Student would also receive counseling services once per week for 30 minutes. (SD15, p.12)

19. The IU's School is a highly structured, tightly secured facility, with small class sizes and large classroom aides. (N.T. 307, 310) Student's class had six children. (N.T. 166-169) It offers a therapeutic setting, with regular counseling and social workers on site. (N.T. 356, 361) The School District has experienced a very high success rate with the IU's School, having sent 5 children (including Student), with 3 returning to the School District and 2 children (including Student) moving out of the School District. (N.T. 307)

20. On April 13, 2005, Student started attending the IU's School. The Notice of Recommended Educational Placement (NOREP) indicated that no options other than the IU's School were considered. (SD16; N.T. 225)

21. On April 19, 2005, Student and his parent moved from the School District. (SD17; N.T. 177-179, 190) He continued to attend the IU's School until April

2006, when he moved to a different part of the state to live with his biological father. (N.T. 269) He has since been diagnosed with post traumatic stress disorder, with stressors identified as both his experiences at home as well as at the IU's School. (N.T. 272-275)

22. Since April 2005, the School District's elementary school has had three different principals, with various office moves and loss of records. Many records relating to Student's behaviors from 1st through 4th grade were purged. (N.T. 313, 319, 325, 350)

23. From April 2003 through November 2005, Student's mother was employed in the IU's [redacted] departments. (N.T. 116-117)

24. On January 28, 2007 Student's parents requested a due process hearing. (P18; SD3) The parties conducted an unsuccessful resolution meeting on February 28, 2007. (SD18, SD19)

25. Student's parents contend that the School District's long-standing failure, from 1st grade forward, to address Student's dramatic and explicit emotional/behavioral needs constitutes the type of misrepresentation and withholding of information that triggers one or more of the exceptions to the two year statute of limitations for this type of case. (N.T. 52) For a long time, Student's mother simply assumed that Student was a very strong-willed child. (N.T. 81) The School District never told her either that she could request an educational evaluation of Student, or that she had any right to appeal any School District recommendation regarding her child's education. (N.T. 85-86, 97, 195, 236-237) She does not recall receiving a procedural safeguards notice from the School District, although she received so many documents from the School District that one of them might have been a procedural safeguards notice. (P1; P3; 87-89, 91, 199)

26. On March 27, 2007, a limited due process hearing was conducted for the purpose of determining whether the exceptions to the two-year statute of limitations applied in this case. At the end of that hearing session, I concluded that, as early as June 2003, and certainly by the time of the School District's December 2003 ER, Student's parent either knew, or she should have known, about the alleged actions that now form the basis of her January 28, 2007 due process hearing complaint. (N.T. 124)

27. I found on March 27, 2007, and I reiterate today, that there were no specific misrepresentations by the School District to Student's parent that the School District had resolved Student's problem. (N.T. 124) Further, although the School District was incorrect in telling Student's parent, before the March 2005 ER, that with average to above average grades Student was not eligible for special education programming, this is not, in my judgment, the equivalent of information withholding that would trigger an exception to the statute of limitations. (N.T. 124)

28. Student appealed my March 27 determination, which appeal was dismissed by the Appeals Panel as interlocutory on May 9, 2007. In Re N.P. a Student in the Penn-Delco School District, Special Education Opinion No. 1818 (2007); N.T. 371)

29. On April 26 and May 17, 2007, further due process hearing sessions were conducted to develop a record regarding the School District's provision, or denial, of a free and appropriate public education for the period of January 27, 2005 through April 19, 2005, when Student and his parent moved out of the School District. Student attended as well as testified at the hearing, and at that time he was personable, respectful, and exhibited no anger or disruptive behavior. (N.T. 182-183, 346) Parent Exhibits P1-P19 were admitted into the record without objection. (N.T. 128) SD1, SD26, SD 28 admitted without objection. (130)

DISCUSSION

Under the Individuals with Disabilities Education Improvement Act (IDEIA), the School District is required to provide a free appropriate public education (FAPE) to all Students who qualify for special education services. 20 U.S.C. § 1412 The School District program will meet its FAPE obligation if it provides special education and related services at public expense, that meet the standards of the state educational agency, and that are provided in conformity with an individualized education program (IEP.) Stroudsburg Area School District v. Jared N., 712 A.2d 807 (Pa. Cmwlth. 1998)

IDEIA expressly establishes a two-year limitation period to file a due process hearing from date when the parent or agency knew or should have known about the alleged action that forms the basis of the complaint. 20 USC § 1415 (f) (3) (c) Thus, it is the intent of Congress to limit such claims and to require parents to file such claims in a timely manner. In Re P.P. and the West Chester Area School District, Special Education Opinion No. 1757 (2006) This two-year limitations period provides no exception for child-find claims. In Re D.H. and the Kiski Area School District, Special Education Opinion No. 1672 (2005) For statute of limitations exceptions, the question is not whether or not an ER and/or IEP were appropriate in terms of FAPE, but rather whether they demonstrate the requisite misrepresentation or withheld information necessary to qualify as an exception to the statute of limitations. In Re S.C. and the Lake Lehman School District, Special Education Opinion No. 1800 (2007)

The United States Supreme Court has held that the burden of proof in an administrative hearing challenging a special education IEP is upon the party seeking relief, whether that party is the disabled child or the school district. Schaffer v. Weast, __ U.S. __, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005); In Re J.L. and the Ambridge Area School District, Special Education Opinion No. 1763 (2006) Because Student's parents seek relief in this administrative hearing, they bear the burden of proof in this matter, i.e., they must ensure that the evidence in the record proves each of the elements of their case. The U.S. Supreme Court has also indicated that, if the evidence produced by the parties is completely balanced, or in equipoise, then the party seeking relief (i.e., Student's parents)

must lose because the party seeking relief bears the burden of persuasion. Schaffer v. Weast, supra. Of course, where one party has produced more persuasive evidence than the other party, the evidence is not in equipoise.

The cornerstone of FAPE analysis is an IEP that need not provide the maximum possible benefit, but must be reasonably calculated to enable the child to achieve meaningful educational benefit. Board of Education v. Rowley, 458 U.S. 176, 73 L.Ed.2d 690, 107 S.Ct. 3034 (1983); Ridgewood Board of Education v. M.E. *ex. rel.* M.E., 172 F.3d 238 (3d Cir. 1999) Whether an IEP is reasonably calculated to afford a child meaningful educational benefit can only be determined as of the time it is offered to the student and not at some later date. Fuhrmann v. East Hanover Board of Education, 993 F.2d 1031 (3d Cir. 1993); Daniel G. v. Delaware Valley School District, 813 A.2d 36 (Pa. Cmwlth. 2002) It is rare, if ever, that an IEP document can be deemed perfect. In Re R.B. and the Eastern Lancaster County School District, Special Education Opinion No. 1802 (2007)

Special education regulations require school districts to ensure that to the maximum extent appropriate, children with disabilities are educated with children who are nondisabled and that removal of such children from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 CFR §300.114 School districts also must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities, and the continuum must make provision for supplementary services such as resource room or itinerant instruction provided in conjunction with regular class placement. 34 CFR §300.115 Courts have long recognized the tension within IDEA between the strong preference for mainstreaming/inclusion, and the requirement that schools provide appropriate individualized programs tailored to the specific needs of each disabled child. Oberti v. Board of Education, 995 F.2d 1204 (3d Cir. 1993) The Oberti court concluded that the key to resolving the tension between IDEIA's free appropriate program requirement and the Act's preference for inclusion lies in a school's proper use of supplementary aids and services because such aids and services may enable the school to educate a child with disabilities for the majority of the time within a regular classroom. In Re L-M.B. and the East Penn School District, Special Education Opinion No. 1795 (2007)

Student's claim is limited to the period of January 28, 2005 to April 19, 2005

In this case, Student and his parent moved out of the School District on April 19, 2005. (SD17; N.T. 177-179, 190) They did not request a due process hearing regarding the School District's duties toward Student until January 28, 2007. (P18; SD3)

Section 615(f)(3)(C) of the IDEIA requires a party to request a due process hearing within two years of the date that the party knew or should have known about the alleged action that forms the basis of the complaint. 20 USCS §1415(f)(3)(C) There are only two exceptions to this two year limitations period: 1) when the parent was prevented

from requesting a hearing due to specific misrepresentations by the School District that it had resolved the problem forming the basis of the complaint, 20 USCS §1415(f)(3)(D)(i); and 2) when the parent was prevented from requesting a hearing due to the School District's withholding of information from the parent that was required to be provided to the parent. 20 USCS §1415(f)(3)(D)(ii)

Student's parents contend that the School District's long-standing failure, from 1st grade forward, to address Student's dramatic and explicit emotional/behavioral needs constitutes the type of misrepresentation and withholding of information that triggers one or both of the exceptions to the two year statute of limitations. (N.T. 52) For a long time, Student's mother simply assumed that Student was a very strong-willed child. (N.T. 81) The School District never told her either that she could request an educational evaluation of Student, or that she had any right to appeal any School District recommendation regarding her child's education. (N.T. 85-86, 97, 195, 236-237) She does not recall receiving a procedural safeguards notice from the School District, although she received so many documents from the School District that one of them might have been a procedural safeguards notice. (P1; P3; 87-89, 91, 199)

Student also contends that the School District's lack of records indicates misrepresentation and/or withholding of information sufficient to trigger one or both of the exceptions. Although the School District disputes Student's allegation that he saw 142 disciplinary referrals in his 2nd grade file, the School District lacks records and memories of Student's disciplinary referrals for that year. (N.T. 41-47, 50, 68, 70, 73, 314) Since April 2005, the elementary school has had three different principals, with various office moves and loss of records. Many records relating to Student's behaviors from 1st through 4th grade were purged. (N.T. 313, 319, 325, 350)

Unfortunately, neither Congress nor the U.S. Department of Education has defined the critical phrases: 1) "specific misrepresentations…that it had resolved the problem"; and 2) "withholding of information…that was required…to be provided to the parents." I conclude, however, that Congress must have meant something more than just professional errors and misjudgments. Both phrases imply that there must be some sort of intentional action or knowing omission by a local education agency. Thus, I believe that "specific misrepresentation" must mean something similar to a lie, falsification, pretense, forgery, falsehood, deceit, dishonesty, deception, sham, fraud, ruse, hoax, subterfuge or trick. Similarly, I believe that "withholding of information" must mean something similar to shredding, burying, intentionally ignoring, concealing, covering up, hushing up, keeping secret, censoring or suppressing information.

Student argues that this case is similar to that of In Re C.M. and the Pocono Mountain School District, Special Education Opinion No. 1765 (2006), where the Appeals Panel determined that either the Pocono Mountain School District did not know that it was inappropriately placing C.M. into the English for Speakers of Other Languages (ESOL) classes, or it knowingly misplaced C.M., and then misrepresented through its assurances to the Parents that it was providing C.M. with appropriate services through ESOL and the numerous accommodations and supports. I disagree. The

Appeals Panel's holding in C.M. was obviously fact-specific, involving circumstances that are not comparable to those in this case. In C.M., the school district erroneously assumed for five years that a child's academic difficulties were related to the (assumed) fact that the child's primary language was Spanish. In fact, the child did not know any language other than English – which could easily have been verified at any time during the previous five years. In this case, while I do conclude below that the School District has failed to properly identify, evaluate and program for Student, it has not engaged in the type of egregiously erroneous and long-standing behavior found in C.M.

In this case, Student was referred to his elementary school's instructional support team (IST) program to address behavioral difficulties as early as 1st grade (2000-2001). (N.T. 32-35, 83, 158, 285-286, 317; P8, p.1) He was assigned to a specific, highly structured teacher in 2nd grade (2001-2002) to address Student's behavior needs. (N.T. 314) In 3rd grade (2002-2003) his class disruptions resulted in weekly office visits and trips to the IST screening coordinator/behavior specialist's office three times per week. (N.T. 55-58) In 4th grade (2003-2004) Student was sleeping in class, arguing with peers, going to the nurse's office twice per week, and spending up to ½ of each day in the school's IST screening coordinator/behavior specialist's office. (P10; SD 27; N.T. 59-62, 111, 235) He was also receiving regular therapy outside the school for ODD, depression and disruptive behavior disorder diagnoses, and a December 2003 ER recommended creating a Section 504 plan with behavioral supports. (P11, pp.2, 4; SD28; N.T. 96, 109, 119, 121, 190-192, 286)

While Student, of course, argues that this evidence is proof that the School District failed to timely identify, evaluate and program for Student, it similarly proves that Student's parents also knew, or should have known, about these facts which now form the basis of this due process complaint. It serves as the basis for my March 27, 2007 interim decision that, at least by the time of the School District's December 2003 ER, Student's parent either knew, or she should have known, about the alleged actions that now form the basis of her January 28, 2007 due process hearing complaint. (N.T. 124)

IDEIA requires parents to request due process within two years of the time that they knew, or should have known, about the actions forming the basis of a complaint. Certainly, by December 2003, Student's parents were aware of Student's behavior problems at school, and they were also aware that the School District had concluded that Student did not need specially designed instruction. Consequently, under IDEIA's 2 year statute of limitations, the time clock had started ticking and Student's parents had to file a due process hearing complaint regarding such School District action by December 2005.[2] They missed that deadline by over a year.

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[2] Of course, because IDEIA did not become effective until July 1, 2005 (118 STAT. 2803), parents arguably would not have known in December 2003 that they had two years within which to file a due process hearing request regarding the December 2003 ER. They must be considered to have known of this two year statute of limitations, however, by their filing deadline in December 2005.

Parental failure to have known of the facts underlying their complaint (and consequently to have failed to file a timely complaint) can be excused only if the School District specifically misrepresented, or withheld information, so as to prevent Student's parents from requesting due process sooner. Student's argument is, essentially, that the same School District errors and misjudgments that constitute denials of FAPE also constitute the "specific misrepresentations" and "withholding of information" that trigger the statute of limitations exceptions. I disagree. None of the facts regarding Student's behavior was news to Student's parents. Further, the School District's proposed solutions to a problem (even if they were erroneous solutions) do not equate to specific misrepresentations that a problem has been resolved. Finally, the School District's sharing of the information that it had (even if it was incorrect, or "should have been better" information) does not equate to "withholding of information" that would excuse parental failure to file a timely due process hearing complaint.

Accordingly, at least by the December 2003 ER, Student's parents knew, or should have known, of the actions forming the basis of this due process hearing complaint. For each day of alleged FAPE denial either before or after the December 2003 ER, they had two years within which to file a due process hearing request to complain of that day's FAPE denial. Thus, on January 28, 2005, they had two years within which to file a due process complaint regarding FAPE denial for that day forward. They did, indeed, file a timely due process hearing complaint for January 28, 2005 forward, on January 28, 2007. (P18; SD3) Thus, I conclude that the maximum time period for which Student might obtain a remedy in this matter is from January 28, 2005, until the date that he moved out of the School District on April 19, 2005.

Student was denied FAPE from January 28, 2005 through April 19, 2005

When a child's behavior impedes his or her own learning or that of others, the IEP team must consider what behavioral interventions are appropriate. 34 CFR 300.324(a)(2) 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 behavior.

Further, as noted earlier, school districts must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities, and the continuum must make provision for supplementary services such as resource room or itinerant instruction provided in conjunction with regular class placement. 34 CFR §300.115; Oberti v. Board of Education, 995 F.2d 1204 (3d Cir. 1993); In Re L-M.B. and the East Penn School District, Special Education Opinion No. 1795 (2007)

The School District contends that it responded reasonably and progressively to Student's behavioral problems over the years, especially in light of his appropriate

academic performance. (N.T. 382) They contend that he did not need specially designed instruction, just Section 504 accommodations in the nature of a behavior improvement plan, until 5th grade. They further contend that they timely and appropriately evaluated Student in 5th grade and developed an appropriate IEP in March 2005. (N.T. 383-385)

I disagree. It cannot seriously be disputed that, for years, Student's behavior impeded his own learning and that of others. In 3rd grade (2002-2003) Student went to the office weekly, and to the school's IST screening coordinator/behavior specialist's office three times per week, when he disrupted the class. (N.T. 55-58) He began the 4th grade (2003-2004) sleeping in class, arguing with peers, going to the nurse's office twice per week, and spending up to ½ of each day in the school's IST screening coordinator/ behavior specialist's office. (P10; SD 27; N.T. 59-62, 111, 235) In March 2004 he was verbally and physically threatening peers, refusing to follow adult directions, threatening to damage objects, and making self-deprecating comments. (P13, p.1; SD24; SD25; N.T. 162-163) Six months later, he was suspended on the first day of 5th grade because he brought a realistic-looking toy gun to school and threatened other students with it. (N.T. 294) He did not complete school assignments, was not prepared for tests, did very little work in class, and he was impulsive and disrespectful towards others and their property. (P7, pp.2-3; SD22, p.4) In October 2004, Student was exhibiting unprovoked and oppositional and aggressive behavior towards adult authority, leaving rooms without permission, almost hitting the principal, and picking up chair to threaten another student. (P14, p.2; 171-172, 302, 344) When he performed his academic work, he was still on grade level, but his academic progress was suffering from failure to complete his work. (N.T. 306)

Certainly, by the first date at issue in this case, i.e., January 28, 2005, the School District should have been further along than simply suspecting and evaluating whether Student might have a disability that required specially designed instruction. By that time, Student had been spending so much time each day out of his regular education classroom, as an "accommodation" in his 504 plan, that he started calling the IST coordinator's office his homeroom. (N.T. 64) Admittedly, it is a fuzzy line between regular education interventions and the need for special education (In Re J.S. and the Southeastern School District, Special Education Opinion No. 1804 (2007)), but such a persistent and restrictive academic setting simply cannot be considered a "regular education accommodation."

Thus, I do not accept the School District's contention that, until the March 30, 2005 ER, Student's behavioral problems had not negatively impacted his ability to access the curriculum, and Student had not, until then, been in need of specially designed instruction. (SD13, pp. 3-4) I conclude that the School District's failure to have reached such a conclusion, and to have appropriately programmed for Student, prior to January 28, 2005 constitutes a denial of FAPE as of January 28, 2005.

I reject the School District's analogies to other cases. In Jaffess v Council Rock School District, 46 IDELR 246, 106 LRP 64599 (E.D. Pa. 10/26/06) the child's accommodations were a Study Skills class, preferential seating, extra time to complete

tests and projects, access to teacher's notes, a "note buddy," a second set of textbooks, and the option to retake failed exams. See H.J. and the Council Rock School District, Special Education Opinion No. 1653 (2005) In this case, Student spent substantial time outside his regular education classroom in a highly restrictive setting. Similarly, in East Islip Free Union School District, 47 IDELR 210, 107 LRP 11708 (NY SEA 2/2/07), the child did not disrupt the classroom, was an eager participant in class, appeared happy and excited to learn, had excellent work habits, and produced excellent work in a timely manner – all in contrast to Student in the instant case. Finally, although the School District refers to In re A.H. and the Methacton School District, Special Education Opinion No. 1724 (2006) as an example of slow, progressive intervention allegedly comparable to this case (N.T. 388), it does not appear comparable at all because the student in that case appears to have had an IEP since 1st grade.

Furthermore, in this case, when the School District finally did develop an IEP on April 13, 2005, it placed Student at a highly restrictive 45 day out-of-district diagnostic placement at an IU facility – and it considered no other options. (SD11; SD13; SD 16; N.T. 221-222, 225) Probably, this is because the School District did not even have an emotional support classroom for elementary school children. (N.T. 333-335, 351-353) But regardless of the reason, while there is nothing wrong with seeking more information through a temporary diagnostic program, such diagnosis certainly could have occurred in a much less restrictive educational setting than the IU facility recommended by the School District.

Thus, I conclude that the School District denied a free and appropriate public education to Student for the entire time at issue in this case, i.e., from January 28, 2005 through April 19, 2005, both because the School District failed to properly identify, evaluate and program for Student during most of that time, and because its ultimate placement was not the least restrictive environment appropriate for Student. Consequently, I will award six hours of compensatory education for every day that Student attended school between January 28 and April 19, 2005. [3]

The School District is entitled to a 60 day reduction of the compensatory education award for a period of reasonable rectification. M.C v. Cent. Regional School District, 81 F.3d 389 (3d Cir. 1999) I find, however, that in this case the School District knew, or should have known long before January 28, 2005, that its identification, evaluation and programming for Student was inappropriate. See In Re L.C. and the Philadelphia School District, Special Education Opinion No. 1809 (2007) Thus, I will deem that the School District's 60 day reasonable rectification period should have commenced at least 61 days before January 28, 2005. The practical result in this case is that the award of compensatory education will not be reduced by the reasonable rectification period.

[3] Student will be assumed to have attended school unless the School District has specific documentation of absence on particular days.

CONCLUSION

Student attended the School District's elementary school from September 2000 (first grade) through April 13, 2005 (fifth grade). In January 2005, Student received a Section 504 Plan/Service Agreement for behavioral issues. In March 2005, he was found to be eligible for special education under the IDEA. On April 13, 2005 he was sent to a 45 day diagnostic placement at an IU facility. On April 19, 2005, he moved into a new school district, although he continued to attend the IU facility.

Student seeks compensatory education for the School District's alleged failure to provide a FAPE between 1st grade and when he left the School District. For the reasons described above, I conclude that the statute of limitations limits Student's recovery of compensatory education, and that none of the exceptions to the statute of limitations extends Student's compensatory education recovery period. For the period of time that is not limited by the statute of limitations, however, I find that the Student was denied FAPE, and I award compensatory education.

ORDER

- The School District denied a free and appropriate public education to Student from January 28, 2005 through April 19, 2005;

- The School District shall provide to Student 6 hours of compensatory education for every day that Student attended school between January 28, 2005 and April 19, 2005;

- Student will be assumed to have attended school unless the School District has documentation of his absence on specific days.

Daniel J. Myers

Hearing Officer
May 30, 2007

Re: Due Process Hearing
File Number: 7324/06-07 AS
Student: Student
School District: Penn-Delco