

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

PENNSYLVANIA
SPECIAL EDUCATION HEARING OFFICER

DECISION

DUE PROCESS HEARING

Name of Child: BC
ODR #7361/06-07 KE

Date of Birth: xx/xx/xx

Date of Hearing:
March 26, 2007

CLOSED HEARING

Parties to the Hearing:

Pocono Mountain School District
P.O. Box 200
Swiftwater, Pennsylvania 18370

Date Transcript Received:

Date of Decision:

Hearing Officer:

Representative:

Pro Se

Brian Ford, Esquire
KingSpry
One West Broad Street. Suite 700
Bethlehem, Pennsylvania 18018

March 31, 2007

April 12, 2007

Linda M. Valentini, Psy.D.

Background

Student is a xx-year-old eligible student enrolled in the Pocono Mountain School District (hereinafter District). He is classified as a student with an emotional disturbance. Two previous hearings under other hearing officers resulted in Student's being awarded compensatory education.

An interim decision dated March 26, 2007 addressed a time-sensitive discrete issue brought by the District (use of the compensatory education fund for a youth convention). That issue was presented along with a number of other issues listed below in this due process hearing requested by Student's mother (hereinafter Parent). On the morning of the hearing both the District and the Parent asked that another issue be addressed (use of the compensatory education fund for camp); this was permitted in the interest of economy of resources.

Issues¹

1. Did the District fail to provide a copy of Student's IEP to his Parent?
2. Did the District inappropriately reject programming requested by the Parent?
3. Did the District fail to follow Student's IEP?
4. Did the District exceed the legally defined number of suspensions for Student?
5. Did the District inappropriately change Student's placement by referring him to an alternative setting?
6. Did the District violate the previous compensatory education order(s) by refusing to provide \$300 for the Parent to donate to a Christian ministry that has been working with Student?
7. Did the District violate the previous compensatory education order(s) by refusing to pay for a drum set for Student?
8. Did the District violate the previous compensatory education order(s) by refusing to pay for Student's attendance at a camp that is sponsored by a Christian organization?
9. In order to be in compliance with a previous hearing officer's order, must the District initiate a due process hearing request whenever it believes that compensatory education services requested are not appropriate?

¹ In order to have the decision flow more smoothly, the issues are presented in a different order than articulated by the hearing officer at the outset of the hearing.

Findings of Fact

Background

1. Student is an eligible 9th grade student, classified as having an emotional disturbance. Student's most recent known psychiatric diagnosis (as of May 2006) is Schizoaffective Disorder. (S-5)
2. Student has moved through a series of inpatient, outpatient, and community-based mental health placements/programs/services interspersed with participation in special education emotional support programs/placements. (S-5)
3. By order dated August 8, 2003 Hearing Officer Linda Stengle awarded Student compensatory education. As of August 23, 2006 Student had \$21,840.29 of compensatory funds remaining. (S-4; P-10)

Did the District fail to provide a copy of Student's IEP to his Parent?

4. The Parent, by letter dated January 12, 2007 notes that she had been asking for a copy of Student's IEP developed in January 2006 and had not yet received it. (P-4)
5. In a telephone conversation in August 2006 the Parent asked for a copy of the January 2006 IEP. The District sent the January 2006 IEP to the Parent by certified and regular mail and left a copy of it in the office for the Parent. (NT 129-131, 233)

Did the District inappropriately reject programming requested by the Parent?

6. By letters dated January 12, 2007 and January 16, 2007 the Parent provided input regarding revisions to Student's IEP and Behavior Support Plan. (P-2; P-4)
7. The District attempted to meet with the Parent as part of the IEP team to discuss the Parent's requested revisions. (NT 100)
8. In January 2007 when it was revising Student's IEP after a manifestation determination meeting the District considered the Parent's input as articulated in her letters. (NT 137-139)
9. The Parent requested that Christianity not be "taken out" of his IEP, but referenced the January 2006 IEP as current rather than the August 2006 IEP. (NT 197, 265-266; P-2; P-4)
10. The Parent noted that a Christian aide would be most helpful to Student if an aide were needed. (NT 242; P-2; P-4)

11. Student receives the services of a one-to-one aide daily for the entire school day. (NT 170)
12. The Parent requested that the Supervisor of Special Education have the teachers speak to Student about Christianity. (NT 132-133)
13. The Parent asked that tutoring be added to the IEP. (P-2)
14. The District offered tutoring to Student on Saturday mornings to help him complete his school work and offered after school tutoring with late bus transportation. (NT 139)
15. The Parent asked that the IEP include computer privileges and “internet access to MySpace, a Christian Web Site”.² (NT 243-244, 266-267; P-2; P-4)
16. Personal use web sites such as MySpace are not permitted as per the District’s Internet use policy. (NT 214)
17. Student is permitted to use the computer as part of his behavior plan and he may do writing activities on the computer. (NT 133-134, 192)
18. The Parent asked that the District allow Student to listen to worship music [as part of the Behavior Support Plan]. (NT 260-261, 267; P-2; P-4)
19. The District will not write “worship music” into Student’s IEP, but the Parent may send him to school with Christian music and he will be allowed to listen to it through his headphones. (NT 295-296)
20. Listening to music on his headphones was added as part of the revised behavior plan in January 2007. (NT 138, 192; S-16)
21. The Parent asked that Student have music classes as part of his curriculum. (P-2)
22. If a student wants to participate in music class (chorus or band) for 9th grade the student has to try out during 8th grade, and then the activity would be scheduled for the coming year. Student did not try out and therefore he was not scheduled. (NT 132)
23. There are no music classes per se for 9th graders. (NT 138)

² The Parent withdrew her request to have Internet access to MySpace included as part of this hearing toward the end of the session. (NT 299)

Did the District fail to follow Student's IEP?

24. Following his discharge from an acute partial hospitalization program in April 2006, the District reevaluated Student, issued a reevaluation report in August 2006 and developed a new IEP in August 2006. (NT 52; S-5, S-6)
25. The District scheduled an IEP meeting with the Parent but on the day of the meeting the Parent telephoned to say that she could not attend, asking the District to mail the documents home. (NT 53-54)
26. The draft IEP was mailed home with a letter noting that it was the IEP the District would be implementing at the start of the school year. (NT 55)
27. The Parent did not communicate to the District in any way that she did not want the IEP implemented. (NT 55)
28. The District implemented the August 2006 IEP. (NT 54-55)
29. Despite having been told that the August 2006 IEP was going to be implemented, and despite not having specifically disapproved the August 2006 IEP, the Parent holds the belief that the current IEP is the one developed in January 2006. (NT 234)
30. Because Student was presenting several behaviors of concern beginning in November 2006 the District attempted to have the Parent come to the school for a meeting via letters sent by certified and regular mail and via phone calls. A meeting was scheduled for December 5th and rescheduled to December 18th at the Parent's request. The Parent did not attend the rescheduled meeting due to her work schedule. (NT 57-58, 139-140, 237; S-17, P-2)
31. The District revised the August 2006 IEP in December 2006, specifically addressing the behavior plan. (NT 57-58, 160; S-16)
32. The District informed the Parent that the changes would be implemented and the Parent did not object. (NT 58)
33. Following a Functional Behavioral Assessment triggered by Student's behaviors, in early January the District again reviewed and revised the IEP, specifically the behavior plan, in January 2007. (NT 59-62; S-23)
34. Prior to revising the IEP in January 2007 the District attempted via phone calls and letters sent by certified and regular mail to have the Parent participate in a meeting. The Parent responded by telephone but did not attend. In a January 8, 2007 letter the District noted that the Parent's input would be accepted for consideration in any form, including letters, telephone calls and emails. The

Parent believes that she does not have to physically go to meetings and is comfortable putting her input into writing. (NT 60, 185, 238, 268-269, 291-292; S-17)

Did the District exceed the legally defined number of suspensions for Student?

35. As an alternative to out-of-school suspension for three days or more, during the current school year the District initiated a pilot program called the "Academy" located in the District but outside Student's usual school building. (NT 65, 67-68)
36. The Academy is for regular as well as special education students and is a program where they receive social skills instruction, assistance in anger management and emotional regulation, and the opportunity to work on all their school work. The Academy has a special education teacher to follow a student's IEP. (NT 65-66, 68)
37. An out-of-school suspension is not appropriate for Student, as on several occasions he stated that he wanted out-of-school suspensions. He said that he has behaved inappropriately in order to get out of school and that he hates school and hates math. He stated he prefers being at home playing on the computer. (NT 66-67)
38. The District believed that if Student went to the Academy instead of to an out-of-school suspension he would be held accountable for his school work, learn how to problem solve, and work on conflict resolution and handling his anger and his emotions. (NT 67, 145-146)
39. On two occasions the District suggested that Student attend the Academy. (NT 68)
40. Student has not attended the Academy. The Parent left messages that she was not sending him and he remained at home. She noted her opposition to the Academy in a letter dated January 16, 2007, "My answer was and is no. We need to implement the Least Restrictive Program in Student's IEP", (NT 69, 151; P-2)
41. The Parent holds the belief that the Academy is an alternative school rather than a place for an in-school suspension. (NT 236, 240)
42. On the days that Student was kept home by the Parent in lieu of sending him to the Academy he was marked Absent. (NT 136-137, 207; S-29)
43. During the 2006-2007 school year, as of March 26, 2007, Student received out-of-school suspensions on November 1, 13, 14, 15, 17, 20, 22, and 28; on December 15 and 21; and on January 8 and 9 for a total of 12 days of out-of-school suspension. (S-29)

44. During the 2005-2006 school year Student received out-of-school suspensions on January 25, 26 and 27; and on January 17, 18, 19, 20, 25, 26 and 27 for a total of 10 days of out-of-school suspension. (P-6; P-7)

Did the District inappropriately change Student's placement by referring him to an alternative setting?

45. In January 2006 Student was involved in an altercation with another student, there was injury to the other student, and the incident was determined to be a manifestation of Student's disability. (NT 49, 115-116; P-6, P-8)
46. Due to emotional issues Student was having at the time of the incident, the District still recommended a 45-day alternative placement as a disciplinary action. (NT 49)
47. From among a few options the Parent selected [partial hospitalization program name redacted] as the site for the 45 day alternative placement, as her first choice was not immediately available. She did not challenge the District's proposal at an expedited due process hearing. (NT 51, 119-121)
48. Student attended the [redacted] acute partial hospitalization program for 45 days from January to April 2006. (NT 126; S-5)
49. The acute partial hospitalization program offers therapeutic support all day, in the form of individual and group counseling and social skills training, and also provides about an hour of academics per day. (NT 50)

Did the District violate the previous compensatory education order(s) by refusing to provide \$300 for the Parent to donate to a Christian ministry that has been working with Student?

50. On August 14, 2006 the Parent requested that the District provide a \$300 payment to the general works of the Christian youth ministry of the [redacted] Center. (NT 79, 249-250; P-2)
51. The Parent did not provide an invoice for services received along with this request. (NT 79)
52. Student participates in the ministry activities at [the Center] and this has helped to build his self-esteem and to improve his social skills. (NT 249)
53. There is no cost for Student's participation in the youth ministry activities at [the Center]. (NT 289)
54. [The Center] occasionally has trips, such as a trip to Dorney Park. The District paid for Student's participation in the Dorney Park trip. (NT 288-289)

55. By letter dated August 23, 2006 the District denied this request because it promoted Christianity. The letter notes that such a payment “is not an appropriate use of funds which are intended to provide educational or therapeutic services directly to Student. Moreover, it is not legally appropriate for the District to use compensatory education funds to pay a religious entity.” (NT 79; S-4)

Did the District violate the previous compensatory education order(s) by refusing to pay for a drum set for Student?

56. Student responds well to music and the District funded a guitar and guitar lessons for him, per Parent’s request, as part of his compensatory education services. (NT 63)
57. On August 14, 2006 the Parent requested that the District release funds as part of his compensatory education services for a set of drums for Student. The Parent did not request drum lessons. (NT 63-64, 245-247; P-2)
58. The District denied the request for payment for a drum set. As the District has previously purchased a guitar, the District’s Director of Special Education, “felt that we had already purchased a musical instrument, and ...felt that that was adequate”. (NT 80, 87-92; S-4)
59. In her letter of August 23, 2006 denying payment for a drum set the Director of Special Education wrote, “Although the District previously agreed to fund a guitar for guitar lessons, due to concerns about purchasing additional items that may or may not be used for reasons that support Student’s current educational goals, additional items for personal use will not be purchased. There is no way for the District to monitor that such items are used in ways consistent with ‘compensatory education’.” (S-4)

Did the District violate the previous compensatory education order(s) by refusing to pay for Student’s attendance at a camp that is sponsored by a Christian organization?

60. The District funded Student’s participation in a camp program for summer 2006 that is the same program for which it is denying reimbursement for the summer of 2007. (NT 252, 272, 274, 276; P-13)
61. Student’s social skills improved a great deal while he was at the camp in summer 2006. (NT 274, 277)
62. Student did not receive religious instruction at the camp last year and it is not expected that he will receive religious instruction at the camp this year. (NT 280)
63. The [A] Camp and the [N] Camp provide such typical camp activities as challenge course, vertical playpen, cliff rappelling, exploring, map reading,

compass and GPS use, fireside, sports and treasure hunts. These camps cost \$275 and \$295, respectively. (P-13)

64. The Off-Site [redacted] camp is a multi-sport adventure to southern New York, one day mountain biking in Minnewaska State Park, another day rock-climbing in southern New York, and three days hiking two of the highest peaks in the Catskills. This camp costs \$335. (NT 276-277, 279; P-13)
65. It is the Parent's expectation that Student would participate in all aspects of the camp program(s). (NT 282)

In order to be in compliance with a previous hearing officer's order, must the District initiate a due process hearing request whenever it believes that compensatory education services requested are not appropriate?

66. In his March 29, 2004 decision in a previous due process hearing involving use of the compensatory education award, Hearing Officer Gregory Smith ordered: "Upon receipt of a request for payment or reimbursement for payment for compensatory education services the Pocono Mountain School District must make that payment and or reimburse Student's parents for those services. If the District wishes to challenge the appropriateness of those services, it may only do so through the special education due process procedures available to it." [Emphasis added]³ (P-1)
67. The District's Director of Special Education is aware that if there is a dispute between a school district and a parent either party may file for due process, and that mediation, a pre-hearing conference and a resolution session are also possible. (NT 109)
68. The District did not file for due process, request mediation, hold a pre-hearing conference or conduct a resolution session regarding denial of any payments requested by the Parent, with the exception of adding the issue regarding payment for camp for the summer of 2007 to the present hearing. (NT 111-114)
69. The Parent wants a third party, or someone other than the Director of Special Education, to handle Student's compensatory education fund. The District's Superintendent has denied this request. (NT 252-253. 259; P-12)
70. Hearing Officer Smith ordered that Student's parents must provide the District, when requesting payment for compensatory education services, the name and address of the service provider, the exact services provided, the duration of those services, the dates that the services were provided, the cost of the services, the signature of the service provider, and either a request that the service provider be paid directly or a request for reimbursement with evidence that the parent has paid

³ The District did not appeal this aspect of the previous hearing officer's order.

the service provider. Services provided on multiple dates were to be itemized according to date, service, duration and costs. (P-1)

Discussion and Conclusions of Law

Jurisdiction

Special education issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 (“IDEIA”), which took effect on July 1, 2005, and amends the Individuals with Disabilities Education Act (“IDEA”). 20 U.S.C. § 1400 *et seq.* (as amended, 2004). Having been found eligible for special education, Student is entitled under the IDEIA and Pennsylvania Special Education Regulations at 22 PA Code § 14 *et seq.* to receive a free appropriate public education (FAPE).

Special Education Hearing Officers are empowered to hear and make decisions regarding issues related to the identification, evaluation and provision of a free appropriate public education to eligible students. As Special Education Hearing Officers have jurisdiction over matters involving FAPE, they also have jurisdiction over matters involving compensatory education awarded because of a denial of FAPE.

The District originally moved to dismiss the issues in this matter that dealt with use of Student’s compensatory education fund for possibly religiously-oriented purposes. On March 1, 2007 this hearing officer denied the District’s motion for dismissal of allegations related to use of compensatory education for a possibly religiously-oriented purpose and ruled that she would permit testimony in the hearing that would elucidate the dispute more clearly, writing, “If it becomes evident that the Parent’s complaint is in fact about religious discrimination and not about FAPE, then the issues will be dismissed”. Shortly thereafter, in a maneuver that seemed somewhat contrary to its original position, the District then moved that the hearing officer permit the District to add a new issue to the list of issues to be addressed at the hearing – an issue that was materially similar to several of the issues in the Parent’s complaint in that it dealt with use of the compensatory education fund for a possibly religiously-oriented purpose; that issue was addressed in the interim decision. On the morning of the hearing the District through its counsel asked that yet another possibly religiously-oriented issue - the summer camp - be added; as the Parent concurred, this hearing officer agreed. Finally, in yet another turn-about, in its opening statement and its closing argument the District maintained that a “religious discrimination issue” is not properly before this hearing officer. After hearing testimony and reviewing documentary evidence this hearing officer finds that the matters addressed in this hearing do not involve religious discrimination *per se* towards Student, but do involve FAPE, and are therefore under her jurisdiction.

Burden of Proof

In November 2005 the U.S. Supreme Court held that, in an administrative hearing, the burden of persuasion for cases brought under the IDEA is properly placed upon the party seeking relief. Schaffer v. Weast, 126 S. Ct. 528, 537 (2005). The party bearing the

burden of persuasion must prove its case by a preponderance of the evidence. The Parent bears the burden of proof in this matter.⁴ In assessing the evidence presented by the parties this hearing officer exercised her mandate to determine the credibility of witnesses and as necessary included this determination below.

Did the District fail to provide a copy of Student's IEP to his Parent?

No, the District did not fail in this regard.

*The public agency must give the parent a copy of the child's IEP at no cost to the parent.
34 C.F.R. § 300.322(f)*

The District provided credible evidence through the testimony of the Supervisor of Special Education that it did provide the Parent with a copy of Student's January 2006 IEP by certified mail and by regular mail, and left a copy at the office for the Parent to pick up. (FF 5) The Parent failed to meet her burden of proof that the document was not received in any of the three modes of transmittal and her remarks in regard to this issue were not credible.

Did the District inappropriately reject programming requested by the Parent?

No, the District did not fail in this regard.

*Each public agency must take steps to ensure that one or both parents of a child with a disability are present to each IEP meeting or are afforded the opportunity to participate.
34 C.F.R. § 300.322(a)*

In developing each child's IEP, the IEP team must consider the strengths of the child, the concerns of the parents for enhancing the education of their child, the results of the initial or most recent evaluation of the child and the academic, developmental and functional needs of the child. 34 C.F.R. § 300.324(1)

The Parent provided input to the IEP in telephone conversation(s) with District personnel and by two letters written in January 2007. (FF 6) The District attempted to meet with the Parent, but offered an opportunity for her to provide written input instead. (FF 7) The District established through credible testimony from the Supervisor of Special Education that when it revised Student's August 2006 IEP in January 2007 the District considered the Parent's input, accepting some items and not accepting others. (FF 8) Parents are members of the IEP team and a district must consider parental input, but a district is not obligated to include everything for which a parent asks in a child's IEP.

The Parent's requests to put specific references to Christianity into Student's IEP, in the form of including a preference for a Christian aide, having teachers talk to Student about Christianity when he needs to be calmed, and noting that he could listen to worship music as a behavioral incentive were not put into the IEP. Including specific references to a

⁴ On the issue addressed in the interim decision, the District bore the burden of proof.

particular religion in an IEP is inappropriate for several reasons, including but not limited to personnel issues and the necessary separation of church and state. The District is not prohibiting Student from listening to religious music brought from home when he earns a reward as part of his positive behavior plan.

At the Parent's request the District offered tutoring to Student after school and/or on Saturdays, but the Parent did not meet the burden of proof that there is a need for the specific inclusion of tutoring in the IEP nor did she establish why Student did not take advantage of the tutoring offered. Although the Parent withdrew the portion of her complaint dealing with MySpace, it is nevertheless noted that the District's Internet use policy forbids "personal use" websites as per the credible testimony of the 9th Grade Administrator of the [redacted] School. (FF 16) Student's IEP does include the use of a computer as a reward and the use of a computer for writing assignments. Music is not a part of the 9th grade curriculum, and as Student did not try out for chorus or band he is not rostered for these activities.

Did the District fail to follow Student's IEP?

The District did not fail to follow Student's current IEP which is the IEP written in August 2006 and revised in January 2007.

Each public agency must ensure that the IEP team reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved and revises the IEP as appropriate to address the results of any reevaluation conducted or other matters. 34 C.F.R. § 300.324(a)(6)(b).

Although the Parent holds the belief that the current IEP is that developed in January 2006, this belief is incorrect. Student had been admitted to a partial hospitalization program from January to April 2006 and subsequently the District had conducted a reevaluation to determine his special education needs. Following the reevaluation, the District revised the IEP to address the results of the reevaluation, and in response to renewed concerns about Student and the completion of a functional behavioral assessment, revised the IEP again in December 2006 and in January 2007.

At the Parent's request, in lieu of her participation at an IEP meeting the District sent the Parent a copy of the August 2006 IEP; the District informed the Parent that it would be implementing this IEP at the start of the school year; the Parent did not indicate that she objected to the August 2006 IEP or its implementation; the Parent did not request another IEP meeting be convened to discuss areas of the IEP with which she may have been in disagreement; and, the Parent did not file for a due process hearing in objection to the IEP. (FF 24, 26, 27, 28) In December/January 2006/2007, at the times the August 2006 IEP was being revised, the Parent provided input via phone calls and letters as described above. (FF 31, 33) The District provided credible evidence through the testimony of the Supervisor of Special Education that the August 2006 IEP with its December 2006 and January 2007 revisions is the current IEP. The Parent did not meet her burden of proving that any aspect of the current IEP was not being implemented.

Did the District exceed the legally defined number of suspensions for Student?

No, the District did not exceed the legally defined number of suspensions.

A change in placement because of disciplinary removals occurs when an eligible student who is not mentally retarded is suspended for more than 10 school days consecutively, or when the child has been subjected to a series of removals that constitute a pattern. The public agency determines on a case by case basis whether a pattern of removals constitutes a change of placement, and this determination is subject to a review through due process proceedings. 34 C.F.R. § 300.536(a)(b)

In school year 2005-2006 Student had 10 out-of-school suspensions (FF 44). During the 2006-2007 school year Student had 12 out-of-school suspensions. (FF 43). When the Parent refused to allow Student to attend the Academy to serve his in-school suspensions she kept him home, and he was correctly marked Absent as established by the Acting Supervisor of Special Education. (FF 40, 42) The District offered Student an appropriate educational program and placement in the least restrictive environment by offering the Academy; the Academy serves both regular education and special education students; the Academy is located within the boundaries of the District; the Academy had the means to implement the IEP; the Academy would have provided Student necessary counseling, anger management and social skills training. (FF 36, 38) The testimony of the Supervisor of Special Education was credible in this regard.

By way of dicta, it is noted and of some concern for the future that the District seems to apply its “progressive discipline” (one day, then three days, then five days) to special education students. (NT 219) This type of a progression can glide dangerously close to triggering a change in placement and suggests a one-size fits all system of discipline that is not appropriate for special education students, particularly those classified as emotionally disturbed. The credibility of the 9th Grade Administrator of the [redacted] School was somewhat diminished in this regard, as his approach is inconsistent with the individualization mandate of the IDEA. Fortunately Student has not yet reached the limit of allowable suspensions this school year as of March 26th.

Did the District inappropriately change Student’s placement by referring him to an alternative setting?

No, the District did not inappropriately change Student’s placement when it referred him to the [redacted] partial hospitalization program as the Parent agreed to this placement.

School personnel may consider any unique circumstances on a case-by-case basis when determining whether a change in placement is appropriate for a child with a disability who violates a code of student conduct. School personnel may remove a child with a disability to an appropriate interim alternative educational setting for not more than 10 consecutive school days and for additional removals of not more than 10 school days in that same school year for separate incidents of misconduct. 34 C.F.R. §300.530(a)(1)

At the time Student was referred to [the partial hospitalization program] he had engaged in aggressive behavior that, through the manifestation determination process, was properly deemed to be a manifestation of his disability. Nevertheless, as the behavior caused injury to another student and Student's behaviors had already become of serious concern, it was recommended and deemed necessary for him to have therapeutic mental health services to stabilize him. To this end the District consulted the Parent, and she agreed to his placement in a partial psychiatric hospitalization program under the auspices of [redacted].

Although the evidence was not entirely clear as presented through the Supervisor of Special Education, and it is moot as the Parent agreed to the [partial hospitalization] placement, it appears that the District extended its right under the IDEIA to place Student in an interim alternative educational setting for disciplinary purposes for 10 days (followed if necessary by an agreement from the parent for an extension or a due process hearing) to placement in a 45-day alternative educational setting for disciplinary purposes. However, again, the Parent agreed to the placement, and knowing the avenues open to her as she had participated in two previous due process hearings, she did not ask for a hearing to challenge the District's proposal.

Did the District violate the previous compensatory education order(s) by refusing to provide \$300 for the Parent to donate to a Christian ministry that has been working with Student?

No, the District did not violate the previous compensatory education order(s) by refusing to provide a donation to the Christian ministry that had been working with Student.

A donation to any non-profit organization, Christian or not, would not be an appropriate use of a compensatory education fund. A compensatory education fund is to be used for invoiced services and goods that make up for a prior deprivation of service. Although the Christian ministry appears to have been a most positive influence on Student, no specific invoiced service was provided and there was no cost or fee for Student's participation. On the occasion(s) that the youth ministry engaged in a social, secular activity such as an outing to Dorney Park, the District properly paid for this activity and must continue to do so.

Did the District violate the previous compensatory education order(s) by refusing to pay for a drum set for Student?

Yes, the District did violate the previous compensatory education order(s) by refusing to provide payment for a drum set for Student.

Pennsylvania Special Education Appeals Panels have on many occasions provided guidance for determining parameters for compensatory education. Citing B.R., Spec. Educ. Opinion No. 1102 (2001), the Panel in Spec. Educ. Opinion No. 1763 (2006) noted: "... compensatory education is a remedy which does not seek to give a student

that to which he is already entitled. As an eligible student is entitled to FAPE, it follows that compensatory education may not simply further current and future educational goals which are (or should be) included in his present IEP. Instead, compensatory education serves to make up for a prior deprivation of service. In addition, it is the parent who has properly sought and obtained an award of compensatory education from a school district which had deprived a student of FAPE. Just as a parent may choose the site of a private school placement, which will be upheld where a school district has denied FAPE so long as the placement is 'reasonable', then logically a parental selection of compensatory education services should be honored so long as the selection is appropriate and reasonable under the circumstances."

The Director of Special Education's testimony regarding why she denied payment for a drum set for Student was not credible, in contrast to the Parent's testimony on this issue which was complete and logical. The District acted arbitrarily in denying payment for a set of drums for Student. It is not at all unusual for young persons who are musically inclined to play more than one instrument and in some music specialization curricula at least two are required. The Parent credibly testified to Student's interest in drumming and to the benefit he seems to accrue from the activity. The District may not substitute its judgment for the judgment of the Parent unless, as in the case of the donation discussed above, the request is unquestionably impermissible. The District will be ordered to pay for, or reimburse the Parent for, a set of drums for Student. The cost may exceed the original price the District denied as there is no guarantee that the set the Parent found is still available and a new rather than a used set may have to be purchased.

Did the District violate the previous compensatory education order(s) by refusing to pay for Student's attendance at a camp that is sponsored by a Christian organization?

Although it is a close call, this hearing officer has determined that the District did violate the compensatory education order by refusing to pay for Student's attendance at a camp sponsored by a Christian organization. Unlike the intensely-focused and specifically purposed activity addressed in the interim decision, the camp program now being contemplated represents a normal, age-appropriate, peer and skill oriented activity that not only contributes towards Student's IEP goals but clearly can compensate for past deprivation. Student is a child who struggles with a very serious mental health issue that can be expected to substantially interfere with his educational progress as well as his adjustment after transition from school unless it is addressed in a variety of ways including, very importantly, the development of self-esteem, competencies, and peer relationship and socialization skills.

There is precedent for public funds being used for services that are provided for citizens under the auspices of religious faiths and organizations. In Pennsylvania under Act 89 children enrolled in non-public, including religious, schools receive counseling, reading and math tutoring, and speech/language therapy on site at their schools; these services are funded through public monies. Patients in hospitals, whether the hospital is owned and operated by a Roman Catholic religious order or another faith-based group, receive medical, dietary and other services; these services are routinely funded through Medicaid

or Medicare. There may be a “religious” atmosphere in the non-public schools and hospitals, but the services provided are funded by public monies. The public monies are not funding religion itself.

The brochure for the camp indicates that the program has a Christian focus and notes that counselors will model a faith that is relevant and genuine. However, in the three programs selected by the Parent, the campers will ordinarily be engaged in such typical camping activities as challenge course, vertical playpen, cliff rappelling, exploring, map reading, compass and GPS use, fireside, sports, treasure hunts, mountain biking, rock-climbing, and hiking. (FF 63, 64) Of particular relevance here is the fact that Student regularly associates with and has improved his socialization skills through interaction with the same types of youth who will attend the parentally-selected camp. The District funded Student’s attendance at this same camp last year, and Student developed friendships and acquired social skills with children who may be likely to enroll in the camp again this summer. The District has, properly, paid for recreational activities sponsored by the youth ministry Student attends. It is proper for the District to release compensatory education funds to the Parent for the camp upon provision of an invoice.

Given prior due process decisions specifically regarding this child, and given many Appeals Panel Opinions through the years, it is irrefutable that the use of the compensatory education fund is to be guided by the Parent. The Parent did candidly acknowledge in testimony that if he attends the camp Student will participate in all activities, whether they are typical camping activities or something that touches on religion. (FF 65) It seems equitable, therefore, in an abundance of caution, that a portion of the camp be funded by the Parent, while another portion be funded by the District through the compensatory education fund. This hearing officer has estimated that, for practical purposes, in a 15-hour camp day (7 am to 10 pm) for children ages 14 to 18, no more than a total of about three hours at the very most would involve religion-focused activity. Therefore, the District will be required to pay 80% of the cost of the camp and the Parent will pay the remaining 20%.

In order to be in compliance with a previous hearing officer’s order, must the District initiate a due process hearing request whenever it believes that compensatory education services requested are not appropriate?

Yes, in order to be in compliance the District must follow Hearing Officer Gregory Smith’s order.

A decision by a due process hearing officer or an appellate panel is a final decision unless the decision is appealed. 1 Pa Code §35.213 Failure to appeal an order constitutes a waiver of objections to the order and the order stands as written. Id. In this case, neither the Parent, nor the District, filed a successful appeal of the hearing officer’s order.

Specifically, upon receipt of the information specified in Dr. Smith’s order (FF 70), the District must pay the provider or purveyor or reimburse the Parent. If the District

believes that the request is inappropriate the District, after releasing the funds to the provider/purveyor or the Parent, may then avail itself of one or more of the due process mechanisms – hold a formal pre-hearing conference, request mediation, file for due process and convene a resolution session. (FF 70) As Dr. Smith explained in his decision (P-1), if it is determined that the item/service at issue was not appropriate an amount equal to the amount expended can be deducted from the account.

This hearing officer adds to Dr. Smith's order, however, that if the Parent refuses to attend a pre-hearing conference, mediation, and/or a resolution session on an issue regarding use of the compensatory education fund, the Parent will then automatically forfeit the issue, and an amount equal to the amount expended for the item or service in dispute will be deducted from the account.

Order

It is hereby ordered that:

1. The District did not fail to provide a copy of Student's IEP to his Parent.
2. The District did not inappropriately reject programming requested by the Parent.
3. The District did not fail to follow Student's IEP.
4. The District did not exceed the legally defined number of suspensions for Student.
5. The District did not inappropriately change Student's placement by referring him to an alternative setting.
6. The District did not violate the previous compensatory education order(s) by refusing to provide \$300 for the Parent to donate to a Christian ministry that has been working with Student.
7. The District did violate the previous compensatory education order(s) by refusing to pay for a drum set for Student and shall upon receipt of an invoice provide payment for a drum set directly to the seller or to the Parent for reimbursement.
8. The District did violate the previous compensatory education order(s) by refusing to pay for Student's attendance at a camp that is sponsored by a Christian organization. Upon receipt of invoices or other proof of payment the District shall reimburse the Parent for 80% of the total cost of the camp.
9. In order to be in compliance with Hearing Officer Smith's order, the District must pay for the service or item in dispute and then, if it believes that the compensatory education services or item(s) requested are not appropriate, may initiate a due process resolution mechanism, that is, a formal pre-hearing conference, a mediation request or a due process request with a resolution meeting. If the Parent refuses to participate in a due process resolution mechanism the Parent forfeits the issue and an amount equal to the disputed, already paid, amount will be deducted from the compensatory education fund.

April 12, 2007

Date

Linda M. Valentini, Psy.D.

Linda M. Valentini, Psy.D.

Hearing Officer