

This is a redacted version of the original hearing officer decision. Select details have been removed from the decision to preserve anonymity of the student as required by IDEA 2004. Those portions of the decision which pertain to the student's gifted education have been removed in accordance with 22 Pa. Code § 16.63 regarding closed hearings.

PENNSYLVANIA

SPECIAL EDUCATION HEARING OFFICER

DECISION

DUE PROCESS HEARING

Name of Child: J.G.

ODR #7420/06-07 LS

Date of Birth: [redacted]

Date of Hearing: April 25, 2007, May 17, 2007
July 17, 18, 19, 2007

CLOSED HEARING

Parties to the Hearing:

Wyoming Valley West School District
450 North Maple Avenue
Kingston, PA 18704

Parent[s]

Date Transcript Received:

Date of Decision:

Hearing Officer:

Representative:

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Drew Christian, Esquire
801 Monroe Avenue
Scranton, Pennsylvania 18510

July 25, 2007

August 4, 2007

Marcie Romberger, Esquire

BACKGROUND

Student [redacted] has been diagnosed with bipolar disorder, Pervasive Developmental Disorder, and Attention Deficit Hyperactive Disorder. Student began the 2006-2007 school year in Fifth Grade in the Wyoming Valley West School District without an IEP or GIEP. After a tumultuous year where Student was in and out of different placements including instruction in the home, Student's parents placed Student at [redacted], a residential treatment facility in [redacted state]. Student filed for a due process hearing to seek compensatory education, reimbursement for [the residential placement], and reimbursement for independent educational evaluations.

FINDINGS OF FACT

1. [Redacted.]
2. When Student was in the Second Grade, [Student] kept a journal in school where [Student] frequently wrote obsessive threats to [Student's sibling] and others. P-E. As a result, Student was observed by the guidance counselor. P-E.
3. During the 2004-2005 school year when Student was in Third Grade, Student's [redacted] teacher met with a retired special education teacher in the District and asked if she would be willing to tutor Student, an intelligent child with socialization issues and ADHD tendencies. N.T. 216.
4. Student's parents paid for the retired teacher to tutor Student in Third Grade. N.T. 217.
5. In April, 2005, a meeting was held to discuss Student's need for either a Section 504 Service Agreement or an Individualized Education Program (hereinafter "IEP"). At the meeting, the District requested Student's parents consent to an evaluation to determine eligibility under the Individuals with Disabilities Education Act (hereinafter "IDEA"), but Student's parents refused. P-D; N.T. 651-652.
6. In May, 2005, Student was evaluated by the Center for Neuropsychological Services. P-B. The WISC-IV showed Student to have high verbal comprehension skills and a significant weakness in processing speed. P-B. Although Student's written expression skills were in the high average range, Student's writing mechanics, language usage, and story construction skills were in the average range, and it took [Student] a long time to initiate and complete a very brief writing sample. P-B.
7. Testing by the Center for Neuropsychological Services also found Student to have significant attention and coping strategy limitations. P-B.

8. The summary of the report from the Center for Neuropsychological Services diagnosed Student as having bipolar disorder, processing speed weaknesses, slow reading rate, marked problems with written expression, significant problems with sustained attention and organization, difficulty with fine motor dexterity and speed, and social emotional difficulties. P-B.
9. The Center recommended that a “more comprehensive therapeutic support program for [redacted], emotionally fragile students” be considered for Student. P-B. It also stated that it was “extremely important” for Student to receive intensive social skills training and conflict resolution techniques. P-B. The Center also recommended Student receive intervention to develop written language skills. P-B.
10. [Redacted.]
11. Student provided the evaluation from the Center for Neuropsychological Services to the District before the 2005-2006 school year when Student entered Fourth Grade. P-B; N.T. 49.
12. Student was tutored during the Fourth Grade year, paid for by Student’s parents, until February, 2006. N.T. 217-218. Student’s tutor informed the District during the 2005-2006 school year that she had concerns with Student’s behavior and academics. N.T. 257.
13. During the 2005-2006 school year, Student had a Section 504 plan. N.T. 223. However, [Student’s] frustrations escalated during the school year. N.T. 223. In February, 2006, Student was placed by the District on homebound instruction for six weeks. N.T. 225. A physician’s note for homebound instruction was not obtained by Student until April 3, 2006. S-4.
14. Student’s tutor believed Student was eligible for special education services. N.T. 254.
15. When Student returned to school after placement on homebound instruction, [Student’s] Section 504 plan was not modified, nor was an evaluation completed to determine if Student required special education. N.T. 225. Student was provided with after school tutoring for four hours per week by the District. N.T. 227.
16. As a result of a previous request for due process, a settlement agreement was entered into which required the District to complete a comprehensive evaluation and prepare an Evaluation Report no later than April 30, 2006. S-3. It also waived any right of Student’s to compensatory education until June 15, 2006 should there not be an agreement to the offered IEP. S-3.

17. As a result of Student's request to perform the Woodcock Johnson as part of the evaluation, the District contracted with a school psychologist from another school district to complete the evaluation as the District did not possess this test. N.T. 132-133, 642.
18. The outside evaluator was instructed to conduct only the Woodcock Johnson and no other test/behavior scales. S-6. The evaluator was unable to complete testing on Student because Student refused to proceed with the test -- [Student] cried continuously and demonstrated oppositional and manipulative behaviors that interfered with obtaining reliable results. S-6.
19. After the failed attempt to complete the Woodcock Johnson, Student requested an evaluation by Ms. B. S-18. The District agreed to fund a functional behavioral analysis by Ms. B, a board certified behavior analyst. N.T. 65, 67; S-18.
20. On April 19, 2006, Student's family and District personnel met to discuss whether Student was eligible under IDEA. N.T. 644. Although the members of the team believed Student would qualify, the team was inconclusive under which exceptionality Student would be eligible. S-8; N.T. 645.
21. Prior to the meeting, no current assessments or data were proffered to determine Student's eligibility. S-8; N.T. 60.
22. A comprehensive evaluation was not completed by April 30, 2006, the date specified in the settlement agreement. N.T. 653. The District claims it could not complete the evaluations within the timelines because Student's parents postponed appointments with the evaluator of the Woodcock Johnson as a result of Student's medicine changes. N.T. 653-654. However, no behavior rating scales or any additional testing of any kind was conducted by the District even though this evaluation would have been an initial evaluation.
23. A behavior management plan and a math accommodations plan were developed May 1, 2006 by Student's guidance counselor. S-13, 14; N.T. 61. Student's mother had input into that plan. N.T. 136. No IEP was developed for the 2005-2006 school year. N.T. 61.
24. On May 9, 2006, the District and Student's family met to discuss the inability of the evaluator to conduct the Woodcock Johnson. S-18. Because the District did not get testing results from the Woodcock Johnson or from Ms. B and because the 60 day deadline for completing evaluations was forthcoming, the District issued a reevaluation report concluding additional testing was necessary. S-18; N.T. 643, 662-663.
25. The District issued a Permission to Evaluate on May 18, 2006. S-16; N.T. 64. Also on May 18, 2006, Student's mother and the District discussed the possibility

- of the District funding an independent educational evaluation by Dr. R in October, 2006. S-19.
26. The District did not agree to fund the independent educational evaluation by Dr. R, instead opting for its own psychologist to conduct an evaluation subsequent to the completion of Ms. B's functional behavioral assessment. S-20.
 27. Attempts by Student to have Ms. B begin testing before the end of the 2005-2006 school year were futile. N.T. 65. Ms. B agreed to complete the evaluation in September, 2006. Id. The District did not make attempts to contact Ms. B until the middle of September, 2006. N.T. 65, 66.
 28. The District told Student it could not develop an IEP for Student until it received Ms. B's evaluation. N.T. 65, 66.
 29. Student was admitted to Johns Hopkins Hospital in its Child and Adolescent Psychiatry Unit in August, 2006. P-E. Student's family paid for the evaluation. N.T. 81. Johns Hopkins diagnosed Student with Pervasive Developmental Disorder, Attention Deficit Hyperactivity Disorder, History of Chronic Tic Disorder, and history of Bipolar Disorder. P-E.
 30. Student was in the Fifth Grade during the 2006-2007 school year. N.T. 37.
 31. [Redacted.]
 32. On September 13, 2006, Student's mother provided Student's teacher and guidance counselor the Johns Hopkins report and Student's behavior plan and Section 504 agreement from the previous school year. S-32; N.T. 68-69, 83.
 33. During the first two weeks of the 2006-2007 school year, Student [redacted and] had difficulty attending in [the] placement. N.T. 67. [Student] was anxious, frustrated, and had a difficult time transitioning to the new classroom. Id.
 34. Student's teacher also noticed Student having difficulty with math and written expression. N.T. 368, 402, 404, 634. Student's teacher placed Student's math abilities at approximately a Third Grade level. N.T. 636.
 35. Student's mother contacted Student's former tutor to request that she tutor Student because [Student] was once again having difficulty with schoolwork. N.T. 229. The tutor began working with Student at Student's expense. N.T. 229. The District was aware of the extra tutoring. N.T. 230.
 36. The District did not provide Student with [Student's] medication at the correct time the first few days of school. N.T. 75. When Student's mother complained, the District made Student leave school and walk to a different school to obtain

[Student's] medicine at the correct time. N.T. 75. This had a negative effect on Student who has difficulty with transition. Id.

37. On September 14, 2006 at 9:00 a.m., Student's mother received a call from Student's guidance counselor requesting she come to the school to discuss Student's placement. N.T. 70. Student's mother was asked by the principal to take Student home and place [Student] on homebound instruction. P-H; N.T. 70, 623.
38. On September 14, 2006, the District issued a [recommendation] for homebound instruction as a result of "behavioral concerns that need resolution." P-H.
39. The District requested Student's parents obtain a doctor's note in order for Student to be placed on homebound instruction. S-27; N.T. 73. Student's mother did not want Student on homebound, but she was concerned about [Student's] mental state, so she obtained a doctor's note for homebound on September 21, 2006. S-27; N.T. 151.
40. On October 16, 2006, the District completed an Evaluation Report based upon an agreement reached at a resolution meeting held that day. S-32, 34; N.T. 152. The Evaluation Report consisted of a behavior rating scale and a functional assessment interview completed by the District. S-32.
41. The Evaluation Report identified Student as a child with a disability under the disability category, Other Health Impairment. S-32.
42. Also on October 16, 2006, the parties agreed the District would investigate and consider a residential placement for Student if and when the District believed no program in-District was appropriate for Student. S-33; N.T. 86, 551-552.
43. At one point in her testimony, Student's mother stated it was her belief that an agreement was reached at the October 16, 2007 meeting for Student to return to the District only until an appropriate residential placement could be located. N.T. 154. At another point, she testified that it was her understanding Student would return to the District and remain at the District so long as [Student's] placement was appropriate. N.T. 155.
44. On October 17, 2006, the District provided a list of out-of-district placements for Student to review. S-33; N.T. 91.
45. Student returned to school in October, 2006. At the request of Student's parents, Student was placed in the emotional support classroom without an IEP. S-34; N.T. 87, 155.
46. In order to transition to the school environment, Student went to school from 1:30 – 3:30 p.m. each day. S-34; N.T. 100. Student was to spend both hours in

- the emotional support program for two weeks and then slowly transition to [another] classroom. S-34, 35. However, after the first day, Student attended the emotional support classroom for one hour and the [other] classroom for one hour. N.T. 372-373.
47. [Student's] program later increased to 11:00 a.m. – 3:30 p.m. N.T. 100.
 48. During Student's abbreviated schedule, Student's tutor was paid by the District to assist Student in the classroom for a half hour per day and also to tutor [Student] for an hour per day at home. N.T. 232-233.
 49. At times, Student's tutor would remain with Student in the emotional support classroom instead of attending the [other] classroom. N.T. 233-234. The tutor did not see any individualized programming for Student in the emotional support classroom. N.T. 234-235. She also did not believe the emotional support class was appropriately meeting Student's needs. N.T. 235.
 50. The tutor did not see a positive behavior management plan being implemented at all in school. N.T. 238.
 51. Student's tutor raised concerns about Student's school program to District personnel. N.T. 243. She does not believe Student was provided a free appropriate public education in the District during the time that she worked with Student in the classroom. N.T. 250, 265-266.
 52. By November 14, 2006, the District located potential out-of-district placements that would accept Student; however, no arrangements were made for Student to be placed in any of those programs. S-37; N.T. 88-89.
 53. By the end of November, beginning of December, 2006, Student stopped attending the [redacted] class and remained in the emotional support class for the full day because Student was behaving better in the emotional support classroom. N.T. 377.
 54. The functional behavioral analysis was completed by Ms. B in the fall, 2006. P-F. It appears a copy of her draft recommendations was provided to Student on November 3, 2006, the facsimile date on the exhibit. P-F.
 55. In her report, Ms. B recommends working on Student's ability to socialize with others, improving attention to task, reducing off task behaviors, and decreasing noncompliance. P-F. She also recommends addressing Student's behaviors based upon the principles of applied behavior analysis. P-F.
 56. On December 6, 2006, Ms. B emailed her draft recommendations to the District. N.T. 411. The District Superintendent testified that the team did not have Ms. B's evaluation prior to the IEP meeting. N.T. 535, 536, 544-545.

57. On December 8, 2006, an IEP meeting was held. S-38; N.T. 93. At the meeting, Ms. B's draft recommendations were distributed to team members, including the District's Superintendent. N.T. 606-607. [Redacted.]
58. District personnel testified that an IEP was not developed earlier because the parties were waiting for the evaluation from Ms. B. N.T. 517-518.
59. The IEP team agreed to place Student in the emotional support classroom full time after Christmas break. The District Superintendent did not believe this was appropriate for Student, whom he felt could perform better in a regular education classroom with typical peers. N.T. 111, 507-508. However, since the team was focused on solving Student's behavioral issues, the emotional support class was determined to be the most appropriate. N.T. 111, 507-509.
60. The December 8, 2006 IEP lacks behavior goals, socialization goals, and written expression goals. S-38. No research based programs, social skills training, teacher notes to assist Student with writing notes from the board were provided as specially designed instruction. S-38. The IEP also does not contain anything pertaining to Student's weak processing speed. S-38; P-B. The IEP does not include an assistive technology evaluation even though Student has difficulty with writing and using certain typing programs. S-38.
61. The December, 2006 IEP does not contain baseline data. S-38. Data collection on the goals and on the behavior management plan has not been attempted. S-38.
62. The emotional support program Student attended after Christmas break had a total of eight or nine students in the classroom. N.T. 314.
63. Because Student was advanced in reading and spelling, Student's emotional support teacher advanced Student to a sixth grade reading book. N.T. 333. Student was also provided modifications to the curriculum in math because [Student] was not able to perform on grade level. N.T. 333-334. In fact, Student did not rise past third or fourth grade mathematics. N.T. 376.
64. No applied behavioral analysis was provided by the District although it was recommended by Ms. B, the independent evaluator. N.T. 99, 321-322. Other recommendations by Ms. B were not implemented, including placing Student in a class with good role models. N.T. 322, 329.
65. Student did not receive social skills training through a curriculum while at the District. N.T. 337-338.
66. No assistive technology evaluation was completed by the District even though Student had difficulty with writing and attempted typing programs. N.T. 326.

67. At the end of January, 2007, an educational consultant hired by Student contacted [the residential placement], a residential treatment facility in [redacted state], about admitting Student. N.T. 298.
68. On January 29, 2007, Student was removed from the emotional support classroom for the remainder of the school year. N.T. 392. On that day, Student refused to take a test and ripped up a book. The teacher kept [Student] in the classroom after school to complete the test. Student began crying when Student's mother picked Student up from school. N.T. 394.
69. On February 12, 2007, Student sent the District a letter with out-of-district placements she found through the educational consultant she hired. P-G; N.T. 113. One of the placements was [the residential placement]. P-G.
70. A meeting was held on February 26, 2007 with District personnel and Student's mother. S-49; N.T. 165. Student's mother did not want Student to be placed back in the emotional support classroom. N.T. 506. There were discussions regarding placing Student in a different elementary school where the District would develop a program specifically for Student. N.T. 506.
71. During this meeting, the District agreed for the first time with Student's mother that Student needed a residential placement and discussed the possibility of Student attending a residential placement in Pennsylvania. S-49; N.T. 165.
72. Also at this meeting, in-district placements were discussed for Student to attend while residential placements were sought. N.T. 166. Student's mother believed Student would not return to any District building. N.T. 167, 507. As a result, the District discussed instruction in the home as an alternative to a District placement until a residential placement was located. N.T. 167.
73. The District's Superintendent testified it was Student's request for instruction in the home and the District complied with Student's request. N.T. 507. Instead of instruction in the home, the District Superintendent would have liked Student to continue in the emotional support program, however, Student's family would not agree. N.T. 509.
74. Although District personnel testified the District did not agree with Student being placed on instruction in the home in February, 2007, it did not provide a NOREP for Student to continue in the emotional support classroom or take Student to a due process hearing.
75. On February 27, 2007, an IEP meeting was held and a Notice of Recommended Educational Placement was issued with a recommended placement of instruction in the home. S-44. Student's mother did not want Student placed in instruction in the home, but she felt there was no other option. N.T. 107, 111, 167-168.

76. Student was to receive 15 hours of instruction in the home per week, however, [Student] never received that amount. N.T. 108, 109.
77. Toward the end of February, 2007, Ms. B sent her final report and invoice to the District. N.T. 411, 413.
78. Also in February/March 2007, the District contacted Student's family to tell them it had sent letters to five private schools in Pennsylvania for Student. N.T. 121, 553.
79. A few weeks later, the District contacted Student's mother to inform her that two of the five schools contacted the District to state their programs were not appropriate for Student. N.T. 121.
80. Student's mother and District personnel visited an in-state placement, [redacted], for Student on April 13, 2007. N.T. 115. [redacted] told Student's mother and District personnel it was not appropriate for Student. N.T. 116-117.
81. By April 13, 2007, the District still had yet to locate a placement that would accept Student. N.T. 89.
82. Also on April 13, 2007, Student's mother met with Dr. R. N.T. 162. Dr. R provided a draft of her report to Student's mother. N.T. 162. Student's mother did not provide a copy of the draft to the District. N.T. 162.
83. [redacted] suggested another placement, [redacted], may be appropriate for Student. N.T. 117.
84. The District requested Student's family give consent for them to send Student's records to [redacted]. S-54. On April 24, 2007, Student's family did not give approval for any records to be sent to Martin Luther before seeing the school because the District had not requested consent from them for records before visiting [redacted]. N.T. 120.
85. On April 16 and 18, 2007, Student's mother visited [the residential placement] and another private placement suggested by her educational consultant. N.T. 114-115. She had made travel plans about three weeks before the appointment at [redacted]. N.T. 119.
86. Ms. B's final evaluation was provided to Student on April 24, 2007. N.T. 149.
87. On April 25, 2007, Student's counsel gave the District notice that Student was enrolling in [the residential placement]. N.T. 177.

88. On May 7, 2007, the District contacted Student's mother to schedule a visit to [redacted]. A date to visit the school was scheduled for May 31, 2007. N.T. 194. Only Student's mother attended the visit. N.T. 194-195.
89. [redacted] informed Student's mother the school was full and had no placement available for Student. N.T. 199.
90. Student entered [the residential placement] on May 10, 2007. N.T. 122. [The residential placement] is a residential treatment facility for emotionally and behaviorally disturbed children ages 4 to 12. N.T. 274.
91. Student also received an independent educational evaluation report from Dr. R on May 10, 2007 for which Student paid \$4000. P-I; N.T. 124, 648. The District did not receive the report until the end of the 2006-2007 school year.
92. [The residential placement] uses a "developmental relational model of treatment" which means the children are addressed at the developmental level that they present; for example, a ten-year-old behaving as if they were a two-year-old would be addressed as a two year old. N.T. 276.
93. According to the Director, all the children at [the residential placement] have damaged relationships with adults. N.T. 276.
94. [The residential placement] requires families to visit four times per year for family training. N.T. 287, 304.
95. [The residential placement] has an on-campus school for its 32 children enrolled at the facility. N.T. 277. There are three classrooms; normally there is not more than 10 to a class. N.T. 290. The classrooms are separated by grade, i.e. Kindergarten – Second Grade in one room, etc. N.T. 303.
96. If a child is performing academically below his or her grade, [the residential placement] may put the child in the class based upon where he or she is academically, even if he or she is age wise not appropriate for that class. N.T. 303.
97. Each classroom has a special education teacher and an aide. N.T. 290.
98. Towards the end of a child's stay at [the residential placement], the child can be enrolled in the local public school to get him or her ready to transition to his or her own public school. N.T. 287.
99. The Director of [the residential placement] was unsure if [the residential placement] developed a new IEP for Student. N.T. 291-292, 299. If it did not, it is working from the IEP developed by the District. N.T. 292.

100. The Director of [the residential placement] could not identify what type of supports Student was receiving in the classroom. N.T. 293. She could also not state what methodologies or curriculum is being used in the classroom with Student. N.T. 294, 295.
101. Student does not have [Student's] own computer at [the residential placement] nor does [the residential placement] have on staff someone who is qualified to conduct as assistive technology evaluation. N.T. 296.
102. Student receives one hour of individual therapy and three group therapy sessions per week at [the residential placement]. N.T. 292, 293. In therapy, Student is currently able to address [Student's] behavior as it relates to [Student's] family but not as it relates to the classroom. N.T. 281-282. Student is whiny and needs constant attention. N.T. 282.
103. For Student's mental health, [the residential placement] believes Student needs a residential program to be successful in all areas of life, including educational. N.T. 284-285.
104. [The residential placement] believes Student is making progress although there are times [Student] regresses. N.T. 282.
105. [The residential placement] charges \$370.00 per day for enrollment. N.T. 123. A normal stay at [the residential placement] is 18 to 24 months. N.T. 282. Student's family is paying for Student to attend [the residential placement]. N.T. 289.
106. It costs Student's family approximately \$2000.00 per visit to see Student at [the residential placement]. N.T. 206-207.
107. The District's Superintendent agrees a residential placement is the best placement for Student because of the issues they were seeing at school as well as the problems Student was having at home. N.T. 583.
108. During the past two years, Student's mother has seen Student become frustrated, hyper, sad, depressed, and angry. N.T. 38. Student also throws tantrums related to school work which consist of crying, screaming, and ripping pages. N.T. 38-39.

ISSUES 1

1 On July 17, 2007, Student raised a new issue for reimbursement for travel to and from in-state placements suggested by the District, i.e. Wordsworth and Martin Luther. N.T. 196. The District objected to the inclusion of this issue. N.T. 196. As it was not an issue presented at the onset of the hearing, I will not discuss or rule on this issue.

1. Was Student denied a free appropriate public education from June 16, 2006 to the present?
2. If so, is Student entitled to compensatory education?
3. Is Student entitled to tuition reimbursement for placement at [the residential placement] including travel expenses?
4. Is Student entitled to costs associated with the independent evaluations by Ms. B, Dr. R, and Johns Hopkins Hospital?
5. Should the District fund an independent IEP facilitator to assist the parties in developing an IEP for Student?

DISCUSSIONS AND CONCLUSIONS OF LAW

Burden of Proof

Following *Schaffer v. Weast*, 126 S. Ct. 528, 537, 163 L. Ed. 2d 387 (Nov. 14, 2005), and *L.E. v. Ramsey Bd. of Educ.*, 435 F.3d 384 (3d Cir. 2006), the burden of persuasion, as one element of the burden of proof, is now borne by the party bringing the challenge. As it was Student who filed this due process request, [Student] has the burden of persuasion. Pursuant to *Schaffer*, though, it only comes into play when neither party introduces preponderant evidence and, as a result, that evidence is fairly evenly balanced.

Free Appropriate Public Education

The Individuals with Disabilities Education Act (hereinafter “IDEA”), entitles each child with a disability a free appropriate public education (hereinafter, “FAPE”). The IDEA defines FAPE as special education and related services provided at public expense, under public supervision and direction, and without charge to the child’s family. 34 C.F.R. § 300.17. Special education for a student with disabilities can include instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings. 34 C.F.R. § 300.39. Although the IDEA mandates that all children with disabilities are educated with children who are not disabled to the maximum extent appropriate, it does provide for children with disabilities to be educated in special classes or separate schools, including residential facilities, 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 C.F.R. § 300.114(2).

In order to be entitled to FAPE, a child must have a disability established under the IDEA. In order to determine if a child is child with a disability under IDEA, a comprehensive evaluation must be completed. 34 C.F.R. §300.301(a).

A. Initial Evaluations

In conducting an initial evaluation, a school district must use a “variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining whether the child is a child with a disability.” 34 C.F.R. § 300.304. The initial evaluation should also include classroom-based observations and observations from the student’s teacher. 34 C.F.R. § 300.305. The child must be assessed in all areas related to the suspected disability, including, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. 34 C.F.R. § 300.304. The evaluation must be sufficiently comprehensive to identify all of the child’s special education and related services needs. 34 C.F.R. § 300.304.

The District agreed via settlement agreement to complete a comprehensive evaluation by April 30, 2006. S-3. It did not. The District claims that it did not complete a functional behavioral analysis prior to April, 2006 as per the settlement agreement because it was waiting for the report from Ms. B. It also claims that it was waiting for the Woodcock Johnson from the outside evaluator. N.T. 653-654. However, the District could have conducted behavior rating scales, intelligence testing, academic assessments, observations, interviews with Student’s teacher and tutor, and its own functional behavioral assessment while it was waiting for the results from the Woodcock Johnson and Ms. B’s assessment.

In contrast, the District did complete a behavior rating scale and a functional assessment for the October, 2006 Evaluation Report even though the District still had yet to receive Ms. B’s report. S-32. There is no information in the October, 2006 Evaluation Report that was not known or could not have been determined in April, 2006. Therefore, I find the District delayed completing the initial Evaluation Report and the determination of Student’s eligibility under IDEA to the prejudice of Student.

B. Eligibility

An initial evaluation is completed to determine if a child is eligible for special education services under IDEA as a child with a disability. There are thirteen categories in which a child can be eligible for special education under the IDEA. One category is emotional disturbance. Emotional disturbance is defined as

a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child’s educational performance:

- (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.
- (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
- (C) Inappropriate types of behavior or feelings under normal circumstances.
- (D) A general pervasive mood of unhappiness or depression.
- (E) A tendency to develop physical symptoms or fears associated with personal or school problems.

34 C.F.R. §300.8(c)(4). Another category under the IDEA in which a child can be eligible is Other Health Impairment. Other Health Impairment is defined as

having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that—

- (i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and
- (ii) Adversely affects a child’s educational performance.

34 C.F.R. §300.8(c)(9). In April, 2006, prior to an initial evaluation being completed, District personnel and Student’s mother met to discuss whether Student was eligible under IDEA, and if so, under what exceptionality. N.T. 644. Although the members of the team believed Student would qualify under the IDEA, the team was inconclusive under which exceptionality Student would be eligible. S-8; N.T. 645. Prior to the meeting, no current assessments or data were proffered to determine Student’s eligibility. S-8; N.T. 60. However, the District was aware Student had been identified with Bipolar Disorder and Attention Deficit Hyperactivity Disorder, was placed on homebound because of behavioral issues in the classroom, and was insufficiently being offered accommodations under a Student’s 504 Service Agreement. P-B; N.T. 49, 223, 225. Had the District completed an initial evaluation of Student in April, 2006 as discussed above, it could have identified Student as a child with a disability under either Emotional Disturbance or Other Health Impairment and provided Student with an IEP prior to the end of the 2005-2006 school year.

C. Individualized Education Program (IEP)

The IEP is the cornerstone of the special education program of a student. The IEP must include comprehensive present educational levels; measurable annual goals which point toward the child’s actual educational needs; 2 benchmarks or short term objectives

² 20 U.S.C. §1414(d)(1)(A), 34 C.F.R. §300.320. Bernardsville Board of Education v. J.H., 42 F.3d 149 (3rd Cir. 1994); Battle v. Commonwealth 629 F.2d 269 (3d Cir. 1980); David P. v. Lower Merion S.D., 1998 U.S. Dis. LEXIS 15160 (E.D. Pa. 1998).

relating to the goals to address the child's disability and from which progress can be monitored; 3 a statement of special education and related services and supplementary aids and services which meet the individual needs of the child as reflected in the CER and extend beyond mere classroom accommodations; 4 and an explanation of the extent to which the child will be educated with non-disabled children. 34 C.F.R. § 300.320; Polk v. Central Susquehanna Intermediate Unit, 853 F.2d 171 (3d Cir. 1988). At the beginning of each school year, each public agency must have in effect for each child with a disability within its jurisdiction an IEP. 34 C.F.R. § 300.323(a).

An IEP must be "reasonably calculated to enable the child to achieve meaningful educational benefit." Board of Education v. Rowley, 458 U.S. 176, 207, 73 L. Ed. 2d 690, 102 S. Ct. 3034 (1983). An IEP need not provide the maximum possible benefit to the child, but should provide for "significant learning." Montgomery Twp. Bd. of Educ. v. S.C., 135 Fed. Appx. 534, (3d Cir. 2005); Ridgewood Bd. of Educ. v. N.E. ex rel. M.E., 172 F.3d 238, 247 (3d Cir. 1999). More than a trivial educational benefit does not meet the meaningful benefit requirement. L. E. v. Ramsey Bd. of Educ., 435 F.3d 384 (3d Cir. 2006); Ridgewood.

"Only those procedural violations of the IDEA which result in loss of educational opportunity or seriously deprive parents of their participation rights are actionable." C.M. v. Bd. of Ed., 128 F. App'x 876, 881 (3d Cir. 2005); M.S. & D.S. v. Mullica Twp. Bd. of Educ., 2007 U.S. Dist. LEXIS 26952, (D.C.N.J. April, 2007).

Because the District was late in its issuance of an Evaluation Report, Student began the 2006-2007 school year without an IEP. When the District finally developed an IEP in December, 2006, the IEP was far from appropriate. It did not contain baseline data. S-38. It lacked behavior goals, socialization goals and written expression goals. S-38. No research based programs, social skills training, or teacher notes to assist [Student] with writing notes from the board were provided as specially designed instruction. S-38. The IEP also did not contain anything pertaining to Student's weak processing speed, nor did it include an assistive technology evaluation even though Student has difficulty with writing and using certain typing programs. S-38; P-B. In addition, data collection on the goals and behavior management plan has not been attempted. S-38.

D. Least Restrictive Environment

The IDEA requires a disabled child be placed in the least restrictive environment that will provide him/her with meaningful educational benefit. L. E. v. Ramsey Bd. of Educ. Least restrictive environment requires Districts to educate children with disabilities with children who are not disabled to the maximum extent appropriate. 34 C.F.R. §300.114. Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment should occur only if the nature or

3 Kelsey B. v. Camp Hill School District, ___ F.Supp.2d ___ CV-01-1082 (M.D.Pa. 2003).

4 20 U.S.C. §1414(d)(1)(A), 34 C.F.R. §300.320.

severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. Id.

Homebound instruction is "not intended as an education placement available when school districts do not know what else to do." Cordero v. Pennsylvania Dep't of Educ., 795 F. Supp. 1352 (M.D. Pa. 1992). Student should not have been placed on homebound instruction or instruction in the home in February, 2006, September, 2006, or February, 2007 for behavior problems because the District did not know how to program for Student.

However, since it did place Student on homebound instruction as a result of behaviors in the classroom, the District should have completed an initial Evaluation Report and IEP placing Student in a part time emotional support program upon return from homebound instruction during the 2005-2006 school year or at least for the beginning of the 2006-2007 school year. Another placement on homebound in September, 2006, should not have been the impetus for placing Student in an emotional support program.

There appears to be a difference in whether the District was to investigate out-of-District placements for Student's enrollment soon after the October 13, 2006 meeting or whether the possibility of private school placements was only to be considered after a full time placement in the emotional support classroom was attempted and failed. S-34-37, S-33; N.T. 154, 155, 551-552. However, for the purposes of my decision, it does not matter. Student was not provided an appropriate program since the beginning of the 2006-2007 school year. By the time the full time Emotional Support class was attempted, Student had regressed so much that a need for a residential placement was necessary.

Compensatory Education

The Federal Courts have held the right to compensatory education accrues when the school knows or should know that its IEP is not providing an appropriate education. M.C. v. Central Reg. Sch. Dist., 81 F.3d 389, 395 (3d Cir. 1996). If a school district fails to correct the situation, "a disabled child is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem." M.C., 81 F.3d at 397 (noting that "[t]he school district . . . may not be able to act immediately to correct and inappropriate IEP; it may require some time to respond to a complex problem"). P. v. Wissahickon Sch. Dist., 2007 U.S. Dist. LEXIS 44945, (E.D.Pa. 2007).

Student requests that I use the qualifiable method of determining compensatory education found in B.C. v. Penn Manor Sch. Dist., 906 A.2d 642 (Pa Commonwealth 2006), instead of the method used by the federal courts in IDEA cases for many years. M.C.; Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 249 (3d Cir. 1999). However, as B.C. v. Penn Manor was a case based solely on gifted education, I will determine compensatory education based on the quantifiable method used by the federal courts.

Student was not provided an appropriate program for the entire 2006-2007 school year. Without an initial evaluation or IEP developed prior to that school year, the District could not determine an appropriate placement for Student, nor could Student's teachers make appropriate accommodations for [Student] throughout the school day. Student's placements seemed one step behind [Student's] need. As a result of the inappropriate program and placement, including two placements on homebound instruction, Student is to receive compensatory education for the entire school day for each day in the 2006-2007 school year. In addition, since the District's Superintendent agrees Student is currently in need of a residential placement, Student is also entitled to a full school day's worth of compensatory education for each weekday during the summer until an appropriate residential placement can be found and Student accepted into that placement.

Reimbursement - Tuition

If the parents of a child with a disability enroll the child in a private school without the consent of or referral by the school district, a hearing officer may require the district to reimburse the parents for the cost of that enrollment if (1) the district did not provide the student FAPE; (2) the private school placement was appropriate for the student; and (3) the equities favor the student. Burlington School Committee v. Massachusetts Department of Education, 471 U.S. 379 (1985); Florence County Sch. Dist. v. Carter, 510 U.S. 7, 10, 16 (1993). 5

There was evidence entered into the record regarding the general program and placement at [the residential placement], but there was no testimony regarding Student's individualized program at [the residential placement]. In fact, it is unknown if [the residential placement] has developed an individualized program for [Student] even though [Student] has been there since May, 2007. N.T. 291-292, 299. There was no [redacted and] no information on how [the residential placement] is addressing Student's issues with written expression, math, and processing speed. There was no testimony as to what, if any, assistive technology Student is receiving. Moreover, Ms. B stated that applied behavioral analysis is critical to an appropriate program for Student, yet there is no evidence to show that [the residential placement] uses applied behavioral analysis. P-F; N.T. 293-295, 468. [The residential placement] also does not have the good role models surrounding Student as per Ms. B's recommendation. P-F.

As Student did not meet [the] burden of proving [the residential placement] is an appropriate placement for [Student], I cannot grant tuition reimbursement for Student's placement at [the residential placement]. 6

5 The IDEA lists some facts that would reduce or deny a student from receiving tuition reimbursement for failure to warn the District of his/her intention to enroll in a private school, but these will not be discussed here for the District did not provide any evidence to contradict Student's testimony that notice was provided, and because tuition is denied for other reasons.

6 Since I did not find [the residential placement] appropriate, there is no need to determine equities.

Reimbursement – Independent Evaluations

If a parent requests an independent educational evaluation at public expense, the public agency must either file a due process complaint to request a hearing to show that its evaluation is appropriate or ensure that an independent educational evaluation is provided at public expense. 34 C.F.R. §300.502(b). Courts have applied the regulation broadly to permit reimbursement not only when a student expressly disagrees with the evaluation, but also when a student fails to express disagreement with the District's evaluations prior to obtaining his/her evaluation. Lauren W. v. DeFlaminis, 480 F.3d 259 (3d Cir. 2007); Warren G. ex rel. Tom G. v. Cumberland County Sch. Dist., 190 F.3d 80, 87 (3d Cir. 1999).

Student failed to express disagreement to the District's May 9, 2006 Reevaluation Report, but asked the District in July, 2006 to fund an independent educational evaluation by Dr. R. S-18, 19. The District refused. S-20. However, the District did not file for a due process hearing to prove that its evaluation was appropriate. Even if it had filed for due process, it would not have been able to show Student's evaluation of May, 2007, was appropriate. Dr. R's report does also provide additional data which the District can use to find an appropriate residential program for Student. Therefore, I will grant Student reimbursement of the evaluation by Dr. R.

Student also asks for reimbursement for the functional behavioral assessment completed by Ms. B. The District has already agreed to fund this independent evaluation. S-18. Although the District claims it has yet to receive her report, Ms. B did provide recommendations to the IEP team in December, 2006 which the District could have and should have used to program for Student. P-J. I will order the District to provide reimbursement for Ms. B's report as soon as the District obtains a copy of Ms. B's final evaluation.

Student also requests that I provide reimbursement for the evaluation conducted at Johns Hopkins in August, 2006. Student did not make a request to the District for funding prior to this evaluation being conducted, so I will not grant reimbursement for this evaluation.

[Redacted Section]

IEP Facilitator

Student requests that I order the District to fund an independent facilitator to preside over subsequent IEP meetings between the parties.

In Saucon Valley Sch. Dist. v. Robert O., the Appeal Panel ordered the District to fund a special education expert to facilitate IEP meetings between the parties. The Court

held, in response to this order, “although the Panel may have the implicit authority to remedy non-compliance with the special education regulations, it does not have the authority to impose requirements in addition to those in the regulations.” 785 A.2d 1069 (Pa Commonwealth 2001). As ordering a facilitator to appear at an IEP meeting is imposing requirements in addition to those in the regulations, I do not have the authority to grant this request.

ORDER

1. Student was denied a free appropriate public education from June 16, 2006 to the present.
2. Student is entitled to compensatory education in the form of a full day for each day in the 2006-2007 school year as well as each weekday during the summer until an appropriate residential program has been identified and Student accepted into that placement.
3. Student is not entitled to tuition reimbursement for placement at [the residential placement] or travel expenses.
4. Student is entitled to costs associated with the independent evaluations by Ms. B and Dr. R. Student is not entitled to costs associated with the report from Johns Hopkins Hospital.
5. The District is not ordered to fund an independent IEP facilitator to assist the parties in developing an IEP for Student.

Marcie Romberger, Esquire
Hearing Officer