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PENNSYLVANIA

Special Education Hearing Officer

Child's Name: DM

Date of Birth: xx/xx/xx

File Number: 7487-06-07 KE

Dates of Hearing: May 22, 2007; May 23, 2007; June 1, 2007

CLOSED HEARING

Parties to the Hearing:

Mr. and Mrs.

Western Wayne School District
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Representative:

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Date Transcript Received:

June 8, 2007

Date of Decision:¹

June 20, 2007

Hearing Officer Name:

Gregory J. Smith

¹ The record was kept open until receipt of the transcript. Upon receipt of the transcript the record was closed. This decision was rendered within less than 15 days of receipt of the transcript and the closing of the record.

Background

Student is an xx-year-old twelfth-grade student who attends school in the Western Wayne School District (District). Student is eligible for special education and related services as a child with a disability who has been identified as having autism. Student's parents requested the present hearing because they believed that the District had not provided a free appropriate public education (FAPE) to Student for at least two years prior to their request for the hearing. They sought compensatory education for the District's alleged failure to provide FAPE. They also sought an order requiring the District to fund an independent educational evaluation assessing transition, an independent functional behavioral assessment, and an IEP facilitator to assist the IEP team in considering the independent evaluations and in developing an IEP. Lastly, Student's parents sought an answer to the question of whether or not the District may graduate Student from special education if he has completed all of his IEP goals.

Findings of Fact

1. Student is an xx-year-old (d.o.b. xx/xx/xx) twelfth-grade student who resides with his parents within the area served by the Western Wayne School District (District). (N.T. at 14, 18, 29-30; P-2, P-7, SD-37)
2. Student is eligible for special education and related services as a child with a disability who has been identified as having autism. (N.T. at 30; P-2, P-7, SD-37)
3. Student participated in an early intervention program during the 1992-1993 school year, attended pre-kindergarten during the 1993-1994 school year, and enrolled in kindergarten for the 1994-1995 school year. Student has received special education services since his enrollment in the District. (SD-52)
4. By the start of tenth grade, the 2004-2005 school year, Student's special education program and related services consisted of itinerant learning support, speech and language therapy, occupational therapy, and a personal aide. Goals in Student's individualized education program (IEP) included those related to his speech when reading and when in conversation, written expression in multi-paragraph informational pieces, understanding of common idioms, auditory reasoning and processing, sensory integration, motor planning, initiation of social conversations, social judgment, recall of the order of events when reading, and detection of the main idea when reading. (N.T. at 101; SD-49)
5. On February 15, 2005, while Student was still in tenth grade, an IEP team meeting was held and a new IEP was developed. The present educational levels indicated that Student was at the seventh grade level in math and eighth grade level in reading comprehension. Scores in reading rate, accuracy, and fluency were at or above grade level. Organization of ideas in written expression was noted as a weakness. Although some articulation difficulties continued to exist, his speech had improved. Difficulty was noted with peer relationships and social interaction. (N.T. at 31, 34, 36, 43; P-1, SD-40)
6. The February 15, 2005 IEP included goals related to written expression in multi-paragraph informational pieces, initiation of social conversations, social judgment, recall of the order of events when reading, detection of the main idea when reading, participation in group activities, computing with decimal numbers, dividing fractions, conversion of fractions and decimals, and the understanding of percentages. Related services included transportation, personal aide, parent counseling and training, and social skills training by the school social worker. Occupational therapy and speech and language therapy were removed from the IEP at the request of Student's mother. (N.T. at 32, 35-37, 47-48, 288-290, 292-293; P-1, SD-40)
7. The February 15, 2005 IEP included transition planning that consisted of pre-vocational skills training with Student participating in the Work-to-School program through the Office of Vocational Rehabilitation (OVR), receiving job coaching during the school day, taking the District's Consumer Skills class, and participation in school and community activities. (P-1, SD-40)

8. A Notice of Recommended Educational Placement (NOREP) was issued at the February 15, 2005 IEP team meeting and mailed to Student's parents on February 24, 2005, March 18, 2005, and May 3, 2005. The NOREP was returned as approved on May 11, 2005. The February 15, 2005 IEP was never implemented and, before September 2005, the social worker services were terminated at the request of Student's mother. (N.T. at 155, 171, 302; P-1, SD-41)
9. Student completed the 2004-2005 school year with a grade point average (GPA) of 94.75 and was ranked 17th out of 197 students. He completed course work in Driver's Education, Gym, English, American Cultures, Algebra I, Introductory Biology, Consumer Skills, and Human Ecology. (SD-39)
10. On September 19, 2005, near the start of eleventh grade, an IEP team meeting was held and revisions to the February 15, 2005 IEP were made. The two revisions to the IEP consisted of terminating social work services at the request of Student's mother and providing Student with a laptop computer for use at school and at home. (N.T. at 55, 57-58, 112-113, 155, 159; P-2, SD-37)
11. Copies of the IEP revisions were sent to Student's parents on September 28, 2005 and November 2, 2005. The IEP was not implemented until some point after November 2, 2005 when the District received Student's parents' approval of the program. (N.T. at 390; P-2, SD-37)
12. On March 14, 2006, while Student was still in eleventh grade, an IEP team meeting was held and a new IEP was developed. The present educational levels indicated that Student was at the eighth grade level in math and ninth grade level in reading comprehension. Scores in reading rate, accuracy, and fluency were at or above grade level. It was noted that Student had poor social skills when interacting with peers and unfamiliar adults. (N.T. at 60-61; P-3, SD-34)
13. The March 14, 2006 IEP included two goals, one related to reading comprehension and the other regarding career exploration. For career exploration Student was to develop a portfolio of career possibilities that would include information about each career, skills Student had related to each career, local schools that offer programs in each career, cost of tuition, starting salary, and the types of environments where the career was practiced. Related services included transportation, use of a computer, personal aide, and parent counseling and training. Goals and short-term objectives related to social skills and twice monthly meetings with the social worker to work on social skills training were removed from the IEP at the request of Student's mother. (N.T. at 63, 66-67, 174-175, 329-330, 531-532; P-3, SD-34)
14. The March 14, 2006 IEP included transition services that consisted of collecting information from two local colleges, attending presentations at his high school made by colleges and trade schools, receiving extra time and the assistance of a reader on the SAT, selecting courses for his senior year that were in the college prep career path, completing a college application in the fall of 2006, the opportunity to take college classes through a dual enrollment program, the opportunity to participate in a cooperative education program where he would work in a local business for part of the day, participation in school clubs, working with the District's OVR counselor to receive services from OVR, and enrollment in an independent living course. (N.T. at 68-69, 221-115, 228; P-3, SD-34)
15. The March 14, 2006 IEP was not implemented. (N.T. at 390-391; see also *In Re Educational Assignment of Student*, Spec. Educ. Op. 1817 (2007), stipulation 2, at 1)
16. Student completed the 2005-2006 school year with a GPA of 94.96 and was ranked 12th out of 180 students. He completed course work in Health, Technical Writing, World cultures, Spanish II, Geometry, Chemistry, and Independent Living. (SD-27)
17. On October 31, 2006, with Student in twelfth grade, an IEP team meeting was held and a draft IEP was developed. The draft IEP was neither offered to his parents nor implemented. (N.T. at 391-392; P-5, SD-20)

18. Following the October 31, 2006 IEP meeting the District requested that Student's parents provide feedback indicating what they would like to have provided to Student. On November 13, 2006 Student's mother provided the District with a list of six needs that her son had: skills to develop healthy and appropriate relationships, skills to live independently, education on human sexuality, career skill training and support, therapy with a professional trained in autism and Asperger's Syndrome, skills for post-secondary education. (P-6)
19. In the fall of 2006 Student's permission to reevaluate in speech and language was requested. On December 6, 2006 and February 27, 2007 the District sent permission to evaluate forms to Student's parents. The permission forms were not returned. (N.T. at 93; SD-15)
20. On December 19, 2006, an IEP team meeting was held and a new IEP was developed. The present educational levels indicated that Student was at or near grade levels in almost all areas, with the exceptions of areas related to reading comprehension and fluency; math calculation, applied problems, and reasoning; and written expression. Poor social skills continued to be noted as a weakness. (P-7)
21. The December 19, 2006 IEP included goals related to initiating independent work without prompting, developing strategies to address his anxiety in community post secondary settings, generating conversational topics in a therapeutic setting, improving social conversation skills, and initiating a conversation. Related services included transportation, use of a computer, personal aide, parent counseling and training, and social work services. (N.T. at 192; P-7)
22. The December 19, 2006 IEP included transition services that consisted of attending presentations at his high school made by colleges and trade schools, retaking the SAT while continuing to receive extra time and the assistance of a reader on the SAT, continuing to take courses in the college prep career path, the opportunity to take college classes through a dual enrollment program, and participation in the Pre-College Academy at Worthington Scranton (PAWS) program where he would attend a college class and learn about the college experience. (P-7)
23. The December 19, 2006 IEP was never implemented. (N.T. at 187-188, 198, 355-356, 389-390, 392)
24. As of March 6, 2007, Student had a GPA of 94.96 and was ranked 12th out of 182 students in his senior year. He was completing course work in Gym, British Literature, American Government, Spanish III, Algebra II, Physics, and Advanced Vocational Math. Student is also a member of the National Honor Society. (N.T. at 134-135, 227; SD-6)
25. During the 2006-2007 school year Student participated in the PAWS program. (N.T. at 72-73, 232-233, 497-498)
26. In the spring of 2007 Student's parents arranged for an independent transition services evaluation to be completed at their expense. That evaluator identified two areas of greatest concern: the reliance of Student on his personal aide and Student's deficits in the area of social skills. His recommendations addressed those areas of concern. (N.T. at 93-94, 431, 442, 444-448; P-10)

Issues

Did the Western Wayne School District provide a free appropriate public education to Student during the period from March 17, 2005 to the present?

Must the Western Wayne School District provide Student with compensatory education?

Must the Western Wayne School District pay for an independent educational evaluation addressing transition services?

Must the Western Wayne School District develop a transition plan for Student?

Must the Western Wayne School District pay for an independent functional behavioral assessment?

Must the Western Wayne School District provide an independent IEP facilitator to assist the IEP team in considering the independent evaluations and in developing an IEP that addresses Student's academic, social, and transition needs?

May the Western Wayne School District graduate Student from special education if he has completed his IEP goals?

Discussion

Student's parents have challenged the appropriateness of Student's IEPs and educational program since March 17, 2005, two years prior to their filing for the present hearing, and have sought compensatory education among other remedies. The Supreme Court has held that the "burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief... the rule applies with equal effect to school districts: If they seek to challenge the IEP, they will in turn bear the burden of persuasion." *Schaffer v. Weast*, 126 S.Ct. 528, 537 (2005) In so doing the Court found no reason to depart from "the ordinary default rule that plaintiffs bear the risk of failing to prove their claims." *Id* at 534

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

Shortly after the Third Circuit issued its decision in *M.S. v. Ramsey*, the Eastern District Court of Pennsylvania issued a decision in *Greenwood v. Wissahickon*, 2006 U.S. Dist. LEXIS 4274 (E.D. Pa. 2006) concluding that "the burden of persuasion at the administrative level in Pennsylvania is now on the party contesting the IEP." at 7

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

Because it is Student's parents who have requested the present hearing, they carry the burden of persuasion in this matter.

Did the Western Wayne School District provide a free appropriate public education to Student during the period from March 17, 2005 to the present?

A parent or school district may file a complaint and request a hearing on any matter relating to the identification, evaluation, or educational placement of a child with a disability, or the provision of FAPE to that child. 34 CFR §300.507(a)(1) That complaint must be regarding an alleged violation that has occurred (generally) within the two years prior to the filing of the complaint. 34 CFR §300.507(a)(2) In the present matter Student's parents alleged that the District failed to provide an appropriate education to their son from March 17, 2005, two years prior to their filing of the current complaint, until the present.

The Individuals with Disabilities Education Improvement Act of 2004 (IDEA) 20 U.S.C. §1400 *et seq.*, is the Federal Statute designed to ensure that "all children with disabilities have available to them a free appropriate public education," (FAPE) 20 U.S.C. §1400(d)(1)(A). The implementing Regulations for the IDEA can be found at 34 CFR §300 *et seq.* An appropriate program is one that is provided at no cost to the parents, is provided under the authority of the school district, is individualized to meet the educational needs of the child, is reasonably calculated to yield meaningful educational benefit, and conforms to applicable federal requirements. *Rowley v. Hendrick Hudson Board of Education*, 458 U.S. 176 (1982) The Third Circuit Court has interpreted *Rowley* as requiring school districts to offer children with disabilities individualized education programs that provide more than a trivial or *de minimus* educational benefit. *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3rd Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989). Specifically, the Third Circuit defined a satisfactory IEP as one that provides "significant learning" and confers "meaningful benefit." *Id* at 182-184. see also *Board of Education of East Windsor Sch. Dist. v. Diamond*, 808 F.2d 847 (3rd Cir. 1986); *J.C. v. Central Regional Sch. Dist.*, 81 F.3d 389 (3rd Cir. 1996), *cert. denied*, 519 U.S. 866

Under the IDEA, the mechanism through which an appropriate program is provided is by the development of an IEP, by an IEP team, and then through the implementation of that IEP and the provision of the program contained in that IEP to the student. 20 U.S.C. §1414(d); 34 CFR §300.320; 34 CFR §300.321; 34 CFR §300.323; 34 CFR §300.324

In the present matter, for much of the period in question, March 17, 2005 until the present, no IEP, in other words no program, was implemented for Student. When asked at the present hearing whether or not various IEPs were implemented, Dr. J, the Director of Instructional Services, under questioning by this hearing officer, testified as follows:

Q. ...looking at Parent's Exhibit 1... the February 15, 2005 IEP... Was Parent's Exhibit 1 ever implemented?

(Pause.)

A. No, I do not believe so.

Q. ...look at Parent's Exhibit 2... dated September 19, 2005... Following this revision, was the IEP implemented with the revision?

A. Yes, I believe so.

Q. Do you know when it was implemented?

A. It would have been implemented when I received this back.

Q. Do you have any idea when that was?

A. No I don't...

Q. Looking at Parent's Exhibit 2, page two, up in the right-hand corner there are some dates. And what does that indicate?

A. My secretary putting stickies on the paper to mail it. That's how we track our mailings, how many times we've mailed it, and whether or not it's been returned...

Q. ...I'd like you to look at Parent's Exhibit 3, which is the March 14, 2006 IEP. And can you tell me, was that ever implemented?

(Pause.)

A. The way it's – I believe that there is a signed NOREP for this, but I'm not a hundred percent sure. If the NOREP wasn't signed, sir, it was not implemented...

Q. ...Was it implemented?

A. It would have been implemented upon the receipt of the approval from the parent...

Q. ...We're going to move on to the October 31, 2006 IEP, which is Parent's Exhibit 5... was this IEP... offered to the parent?

A. I believe it was a working draft?

Q. I'm not sure what that means in relationship to my question... Was it offered to the parent?

A. With the NOREP?

Q. Yes.

A. No.

Q. ...then looking at Parent's Exhibit 7, which is December 19, 2006 IEP, was this offered to the parent?

A. Yes.

Q. And was it implemented?

A. No, we, um, may I elaborate?

Q. Yes.

A. We filed a due process asking for it to be implemented, asking for permission to be implemented. N.T. at 388-392

Dr. J has known Student since he was a pre-kindergarten student and she was his teacher in that class. She has obviously had a long and caring relationship with Student and a respectful relationship with his mother. Dr. J has gone out of her way to fully include Student's mother as a member of the IEP team and has respected her wishes for her son's education. There is no doubt that, in large part due to Dr. J's efforts, the District has fully met its' obligations under 34 CFR §300.322 to ensure that Student's parents have fully participated in the IEP process. As the District's representative, Dr. J has carefully avoided implementing programs that Student's mother has objected to or has even failed to approve. Similarly the District has not pushed to have evaluations completed when the parent did not return permission to evaluate forms. On the one hand the District should be applauded for the extent to which Student's mother was included in the decisions regarding her son's education. On the other hand, the District has gone so far in that direction that it has failed to fulfill all of its obligations under the law.

In the testimony quoted above, Dr. J testified that the March 14, 2006 IEP may have only been implemented if that IEP had been approved by Student's parents. But, she could not testify with any certainty as to whether or not that had taken place. She also testified that the December 19, 2006 IEP had never been implemented

because it had not been approved by Student's parents. As the District has recently learned in *In Re Educational Assignment of Student*, Spec. Educ. Op. 1817 (2007), an Appeals Panel decision regarding this same student:

The parent's lack of response and/or lack of agreement with the IEP did not prevent the District from implementing the services offered. Inaction by the parents is not the same as refusal or rejection of the IEP by the parents. *Student* at 3

As this hearing officer wrote in an earlier decision regarding this student:

When a school district proposes a new program, or modifications to an existing program of an already identified student, that school district does not have to obtain parental consent in order to implement the proposed program. The school district is only required to provide prior written notice to the parents. 34 CFR §300.503(a)(1) If the parents disagree with the proposed program in the IEP or NOREP, the parents may object to the proposed program and may, if they wish, request a due process hearing. 34 CFR §300.507(a)(1) But, nothing in Federal or State law requires the parents to do anything. If they want, they can choose not to respond.

On the other hand, nothing in either Federal or State law requires school districts to obtain parental approval to make changes to an existing program. Once notice is given to the parents, if the parents do not object to the proposed program, the school district is required to implement the program. As noted in 22 Pa Code §14.131(a)(2) "The IEP of each student shall be implemented as soon as possible but no later than 10 school days after its completion." (prior HO decision for *Student* at 2)

Based on the testimony of Dr. J, the February 15, 2005 IEP was not implemented. The implication of that is that as of March 17, 2005, the starting point for the alleged failure of the District to provide FAPE in the present matter, there was no IEP being implemented. According to Dr. J, there was no IEP in place until a revision was made on September 19, 2005. However, as Dr. J testified, and as was clearly the practice of the District, that IEP revision would not have been implemented until at least November 2, 2005, the time of the second request for parental approval of that IEP. So, at best, from November 2, 2005 until March 14, 2006 an IEP was being implemented for Student

It should be noted that when it is only revisions to an IEP that are made, and the full IEP is not redrafted, as was the case with the September 19, 2005 revision, there is no requirement that a NOREP be sent at all. 34 CFR §300.324(a)(6) Parents have the right to request a copy of the revised IEP, but school districts are not required to give any additional notice of the changes to the parents. Given that fact, coupled with the fact that approval of the program is never required for an already identified child, there was no reason that the District could not have implemented the September 19, 2005 revisions immediately.

Although Dr. J's testimony, quoted above, was less clear on whether or not the March 14, 2006 IEP had been approved by Student's parents and whether or not it had been implemented, the Appeals Panel found no such ambiguity when it referenced the parties' stipulation that Student's parents had not approved of the March 14, 2006 IEP in *In Re Educational Assignment of Student*, Spec. Educ. Op. 1817 (2007). In fact, in the spring of 2007 the District filed for a due process hearing on the claim that Student's parents had not approved the March 14, 2006 IEP. The District sought permission to implement the IEPs that had been proposed, but had never been approved by Student's parents. *Student*, Spec. Educ. Op. 1817 at 1 The conclusion must be that after March 14, 2006 no IEP was implemented. Further, because as Dr. J testified the October 31, 2006 IEP was a draft and was not offered to Student's parents and the December 19, 2006 IEP was not implemented because Student's parents did not give their approval of it, the result was that Student was without an IEP from March 16, 2006 until the present.

In summary, the only period between March 17, 2005, the start of the alleged period of deprivation, to the present during which there was any IEP in place was from a point on or after November 2, 2005 until March 14, 2006. Clearly, the answer to the question "Did the Western Wayne School District provide a free appropriate

public education to Student during the period from March 17, 2005 to the present?” must be “no”, at least for the periods from March 17, 2005 to November 2, 2005 and from March 14, 2006 through to the present because no program was offered through an IEP for Student during those periods of time.

Turing to the period from November 2, 2005 to March 14, 2006, the answer to the question of whether or not an appropriate program was provided is mixed. The September 19, 2005 revision to the February 15, 2005 IEP provided a program with goals in math, including computing with decimals, dividing fractions, conversion of fractions and decimals, and the understanding of percentages, that addressed Student’s needs in math; goals related to written expression in multi-paragraph informational pieces, which addressed his needs in written expression; and goals related to the recall of the order of events and detection of the main idea, addressing his needs in reading. Those needs, which could be termed Student’s more academic needs, appear to have been adequately addressed. What does not appear to have been addressed were his difficulties with peer relationships and social interaction. With the removal of speech and language services in February 2005, followed by the removal of social work services in September 2005, there was no one left to provide the social skills training that Student needed. While it is true that it was Student’s mother that requested that both of those services be terminated, that does not excuse the District from its obligation to provide what was so clearly needed by Student. Repeatedly in the testimony presented at the present hearing and in the various evaluation reports, IEPs, independent evaluations, and other documents introduced as exhibits references can be found to Student’s continued difficulties with peer relationships, social interactions, and initiating and sustaining conversations.

Considering all of the above, and after giving careful consideration to all of the available evidence, it is the conclusion of this hearing officer that the District failed to provide Student with a free appropriate public education from March 17, 2005 through to the present. For most of that period the District failed to provide any program and, even when it did provide a program, that program was lacking in the necessary social skills training to meet Student’s needs in that critical area.

Must the Western Wayne School District provide Student with compensatory education?

Student’s parents have sought compensatory education for the period from March 17, 2005, two years prior to their filing of the current complaint, through until the present. That time period complies with the general two-year time limit for seeking relief. 34 CFR §300.507(a)(2)

Compensatory Education is an appropriate remedy where a school district has failed to provide a student with an appropriate program. *M.C. v. Central Regional School District*, 81 F. 3d 389 (3rd Cir. 1996); *Lester H. v. Gilhool*, 916 F.2d 865 (3rd Cir. 1990), *cert. denied*, 488 U.S. 923 (1991) “Where an IEP confers only trivial or de minimus educational benefit, the student has been denied FAPE and is entitled to compensatory education. The period of compensatory education is equal to the period of deprivation, and accrues when the District knows, or has reason to know, that the student is not receiving an appropriate education. *In Re Educational Assignment of E.M.*, Spec. Educ. Op. 1799 (2007) at 5; *Ridgewood Board of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999)

Above it was decided that the District failed to provide Student with an appropriate program from March 17, 2006 through to the present. Although Student has done extremely well academically, earning average grades of “A” and maintaining his standing in the top 10 percent of his class, that does not absolve the District of its responsibility to provide Student the FAPE he is entitled to.

While the award of compensatory education may be reduced by the amount of time it would have reasonably taken to rectify the problem once the school district was aware of the problem, *M.C. v Central Regional School District*, 81 F.3d 389 (3rd Cir. 1996) no such reduction is warranted here because it was not the failure of the District to rectify an inappropriate program that is at issue, it was the failure of the District to implement any program. During the period in question Student should have been provided with a program that addressed his academic goals, his social skills, and his transition needs. From March 17, 2005 until a new or revised IEP was in place Student should have had the goals in his February 15, 2005 IEP addressed. He should have had social

skills training provided by the school social worker, he should have participated in the Work-to-School program through OVR and received job coaching during the school day, and he should have participated in school and community activities. Although he was provided with a personal aide and although he did enroll in the Consumer Skills class, there was much that was missing from his program. Without any IEP implemented there would not have been the math teacher working on the math goals, the English teacher and perhaps other teachers, including the American Cultures teacher, working on the writing and reading goals, the job coaching during the school day, the working on social skills with the social worker or with others, and there would not have been support for Student's participation in school and community activities.

Following the September 19, 2005 revision to the IEP Student apparently was provided with most of the above, except for receiving social work services. But, even if that was removed by agreement of the parties, Student still required some social skills training to be provided in order to meet his needs in that area. Therefore, that removal was not appropriate.

Following the March 14, 2006 IEP Student should have had teachers working with him on his reading comprehension goals, he should have had greater support in exploring possible careers, he should have been guided through the process of developing a portfolio of career possibilities that would include information about each career, skills Student had related to each career, local schools that offer programs in each career, cost of tuition, starting salary, and the types of environments where the career was practiced, he should have been encouraged to attend more presentations by colleges and trade schools, he should have been working with the District's OVR counselor to receive services available through OVR, and he should have completed a college application by the fall of 2006. The District's failure to implement that IEP deprived Student from the opportunity to have those services provided and to accomplish those goals. Even if that IEP had been implemented, there would have been a question as to why there were no math goals in that IEP even though his present educational levels still indicated he was functioning at the eighth grade level.

Finally, once the December 19, 2006 IEP had been completed, it should have been implemented, but it was not. It is noteworthy that the December 19, 2006 IEP reported weaknesses in reading comprehension and fluency; math calculation, applied problems, and reasoning; and written expression, but failed to include any goals in those areas. There should have been teachers working on goals for those areas, but clearly there could not have been because no goals were included to address those areas in that IEP. Even the goals in that IEP related to initiating independent work without prompting, developing strategies to address his anxiety in community post secondary settings, generating conversational topics in a therapeutic setting, improving social conversation skills, and initiating a conversation were not addressed in the program actually provided to Student because that IEP was never implemented. It appears that the only parts of the December 19, 2006 IEP that were provided were transportation, a personal aide, and participation in the PAWS program.

It is always difficult to estimate the amount of actual deprivation that has occurred and equitable compensation for that deprivation. Considering that no IEP was implemented during most of the period in question, the inappropriateness of the September 19, 2005 revision to the IEP, and the extent of the goals, related services, and specially designed instruction that were included in or should have been included in Student's various IEPs, it is the conclusion of this hearing officer that an equitable remedy would be the equivalent of two hours per school day for each day Student attended school from March 17, 2005 until the end of the 2006-2007 school year. The two hours per school day represents an estimate of the average number of hours across all school days of the amount of staff time that would have been needed to provide an appropriate program if one had been implemented. That accounts for learning support services, regular education teachers working with Student, instruction and practice given in social skills training, the work of the District's OVR counselor, the work of the social worker, the work developing Student's career portfolio, the work helping Student complete a college application, the work supporting Student's participation in school and community activities, and the work to address all of Student's goals and to provide all of the opportunities called for in the various IEPs that were never implemented.

Although no IEP was implemented during much of the period in question, any argument that Student is entitled to full days of compensation cannot be justified for two reasons: First, Student has made considerable academic progress during his high school career, as is evidenced by his GPA, class standing, and membership in the National Honor Society, indicating that he has gained some educational benefit from his program. Second, Student's mother is not without fault in this matter. Her continued pattern of not responding to NOREPs and requests for reevaluation, or waiting until multiple requests have been sent to her before responding, surely delayed the implementation of her son's program. While, as discussed above, it is the District that has the legal responsibility to move forward and implement the proposed program, Student's mother's actions in this matter unnecessarily complicated the District's attempts to provide her son with an appropriate program. That fact, coupled with the estimate of time for implementation of the IEPs discussed above, suggests that two hours per day is an equitable remedy, even if no IEP was in place for entire days.

The total number of hours of compensatory education can be calculated by taking the total number of days that school was in session from March 17, 2005 through until the end of the 2006-2007 school year, subtracting the number of days that Student was absent from school, and multiplying that result by two hours per day. "If the District is unable to document Student's attendance for any day covered in this award, it shall be assumed that Student was not absent, and the number of days of compensatory education shall be the number of days that school was in session." *In Re Educational Assignment of E.M.*, Spec. Educ. Op. 1799 (2007) at 5.

The Commonwealth Court has recently adopted a somewhat different standard for determining the amount of compensatory education owed. *B.C. v. Penn Manor*, 906 A.2d 642 (Pa. Comwlth. 2006) Because *B.C.* was regarding a gifted student and because Appeals Panels since *B.C.* have continued to apply the standard developed by the Third Circuit for IDEA cases, this hearing officer adopted the Third Circuit's standard for the present decision.

Turning next to what services must be provided, it has become standard in the Commonwealth to leave the selection of what programs and services the compensatory education will provide up to the parents. As noted in *In Re Educational Assignment of E.M.*, Spec. Educ. Op. 1799 (2007):

The Parent may select the form of compensatory education so long as it addresses any appropriate developmental, remedial, or enriching instruction that furthers the goals of the Student's pendent or future IEPs. Such hours must be in addition to the Student's then current IEP and may not be used to [supplant] such services. The cost to the District of providing the awarded hours of compensatory education should not exceed the full cost of the services that were denied. Full costs are the salaries and fringe benefits that would have been paid to the actual professional and paraprofessionals who should have provided the District's services and the actual costs for salaries, tuition and transportation, etc. for contracted services. This principle sets the maximum cost of all of the hours or days of compensatory education awarded. The Parent may balance expensive and inexpensive instruction or services so that the average cost is below the maximum amount. The Parent may also use fewer hours of expensive services as long as the maximum amount is not exceeded. at 5-6

The above is not to say that the parties cannot work together in determining potential programs and services. In fact, given the educational expertise of District staff, that would be a wise course of action. However, in the end, the final decision as to what programs and services will actually be selected must be made by Student's parents.

Must the Western Wayne School District pay for an independent educational evaluation addressing transition services?

Student's parents have requested that the District be ordered to pay for an independent educational evaluation (IEE) addressing transition services. In the spring of 2007 Student's parents arranged for an independent transition services evaluation to be completed at their expense. That evaluator identified two areas of greatest concern: the reliance of Student on his personal aide and Student's deficits in the area of social skills. His

recommendations addressed those areas of concern. Nothing in that evaluation provided new information that the District was unaware of. The District had previously identified both concerns as items that needed to be addressed. Where the District failed was not in understanding Student's needs, it was in actually implementing any programs to address those needs. Therefore, because the IEE did not provide any new and useful information to contribute to the development of programs for Student, payment for that evaluation must be denied.

Similarly, to the extent that this request was for another IEE to be provided at District expense, that too must be denied. The information available to the IEP team has been sufficient for it to develop appropriate programs for Student, including appropriate transition services programs for Student. Where the District has failed is that it has not fully implemented the transition services parts of Student's program. Student's parents have failed to show what other information would be or could be gathered in another IEE focused on transition planning that would be useful to the IEP team in developing a transition plan. Because of that, their request for an IEE at District expense must be denied.

Must the Western Wayne School District develop a transition plan for Student?

Student's parents have failed to prove that the transition plans and services developed for Student are not appropriate. They have only established that those plans and services have not been fully implemented. Because the transition plans have not been proven to be inappropriate, this hearing officer cannot order the District to develop a new transition plan at this time.

Because some time has passed since the last transition plan was proposed and much time has passed since a transition plan was implemented, what is needed is for the IEP team to meet and determine whether or not the transition plan in the last proposed IEP is still appropriate. If it is, then that should be implemented. If it is not, then a new transition plan must be developed and it must be implemented within 10 school days unless objected to by Student's parents. 22 Pa Code §14.131(a)(2)

Must the Western Wayne School District pay for an independent functional behavioral assessment?

Student's parents failed to present any evidence that Student exhibited the types of behaviors typically assessed through a functional behavioral assessment. His mother testified that Student has not had any behavioral difficulties during the past two years. See N.T. at 127. The only problem "behaviors" appear to be those related to social interactions and those do not raise to the level of concern that would warrant a functional behavioral assessment. Because of that, the parents' request for an independent functional behavioral assessment must be denied.

Must the Western Wayne School District provide an independent IEP facilitator to assist the IEP team in considering the independent evaluations and in developing an IEP that addresses Student's academic, social, and transition needs?

There was no evidence to suggest that an IEP facilitator would have improved prior IEP team meetings or is needed for the success of future IEP team meetings. The record is replete with references that suggest that the IEP process has been one of cooperation and mutual agreement. As noted above, District staff treated Student's mother as a full member of the IEP team. The District agreed to remove services from the IEP that the District thought should be included when it believed that Student's mother was requesting their removal. While there may have been some confusion, at least in hindsight, over whether or not Student's mother wanted the services removed or really just wanted a different person to provide those services, there is nothing to suggest that the District did not listen to Student's mother and try to act to address her concerns about for her son's program. Similarly, the District took great care not to implement changes to Student's program until Student's mother approved those changes. Although, as discussed above, that may have not been the best legal course of action, it demonstrated the degree to which this District worked with Student's mother to allow her to participate in the

IEP team in a and full meaningful way, not just on the design of her son's program, but also through the approval of that program.

The parents failed to meet their burden of proof to establish that an independent IEP facilitator is need. They failed to present any evidence that showed that the IEP team was not functioning as it is intended to function. Because of that, the District cannot be required to provide an independent IEP facilitator. That does not mean that the parties cannot jointly request the services of an IEP facilitator for any future IEP team meetings. It just means that based on the evidence presented at the present hearing, this hearing officer cannot order that an independent IEP facilitator be provided.

May the Western Wayne School District graduate Student from special education if he has completed his IEP goals?

This last issue must be dismissed because it was a purely hypothetical question. First, there was no evidence presented that showed that Student had completed all of his IEP goals. In fact, it is impossible to determine exactly what his current IEP goals are because, as discussed above, no IEP has been in place for well over a year. Second, except for a single statement by Dr. J that Student would graduate on June 8, (see N.T. at 345) there was no evidence presented that the District was actually terminating Student's special education services or had proposed terminating those services.

In sum, Student's parents failed to meet their burden of proof to even establish that the District was about to graduate Student from special education. Without that, there is no factual dispute for this hearing officer to resolve. While a parent, or school district, may file a complaint and request a hearing on any matter relating to the identification, evaluation, or educational placement of a child with a disability, or the provision of FAPE to that child, 34 CFR §300.507(a)(1) that complaint must be regarding an actual violation that has occurred. 34 CFR §300.507(a)(2) Because a hearing officer is only empowered to rule on real disputes and not hypothetical matters, this issue must be dismissed.

Accordingly we make the following:

ORDER

The Western Wayne School District did not provide a free appropriate public education to Student during the period from March 17, 2005 to the present.

The Western Wayne School District must provide Student with compensatory education.

The Western Wayne School District is not required to pay for an independent educational evaluation addressing transition services.

The Western Wayne School District is not required to develop and implement a transition plan for Student unless the IEP team determines that the current transition plan is no longer appropriate.

The Western Wayne School District is not required to pay for an independent functional behavioral assessment.

The Western Wayne School District is not required to provide an independent IEP facilitator to assist the IEP team in considering the independent evaluations and in developing an IEP that addresses Student's academic, social, and transition needs.

The issue of whether or not the Western Wayne School District may graduate Student from special education if he has completed his IEP goals is dismissed.

Gregory J. Smith
Signature of Hearing Officer