

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

**HEARING OFFICER DECISION/ORDER  
SPECIAL EDUCATION HEARING FOR T.S.  
(FILE NO. 7646/06-07 LS)  
SLIPPERY ROCK AREA SCHOOL DISTRICT**

**Date of Birth:** xx/xx/xx  
**Type of Hearing:** Closed  
**Dates of Hearing:** 6/11/2007; 7/10/07; 7/26/07

**I. PARTIES TO THE HEARING**

**PARENTS:**

**DATE TRANSCRIPT RECEIVED:**

7/28/07

**PARENTS' REPRESENTATIVE:**

Pamela Berger, Esquire  
434 Grace Street  
Pittsburgh, PA 15211

**HEARING OFFICER:**

Dorothy J. O'Shea, Ph.D.

\_\_\_\_\_  
**Signature: Hearing Officer**

**DISTRICT CONTACT:**

Ms. Lynn Francisco  
201 Kiester Road  
Slippery Rock, PA 16057

**DATE OF DECISION/ORDER:**

8/08/07

**DISTRICT'S REPRESENTATIVE:**

Thomas Breth, Esquire  
Dillon, McCandles, King, Coulter, &  
Graham L.L.P.  
128 West Cunningham Street  
Butler, PA 16001

**HEARING OFFICER DECISION/ORDER  
STUDENT v. SLIPPERY ROCK AREA SCHOOL DISTRICT**

**II. BACKGROUND INFORMATION**

Student was a xx year old, eligible student during the 2006-2007 school year. On May 17, 2007, Student's Parents made a due process hearing request, alleging that Student has been denied a free, appropriate public education (FAPE) by the Slippery Rock Area School District ("the District"). His Parents alleged that Student has received inappropriate disciplinary action and has also been discriminated against on the basis of his disability. Student's Parents contended that he has not received an appropriate reevaluation, and has not received an appropriate Individualized Education Program (IEP) in his least restrictive environment (LRE).

**III. FINDINGS OF FACT**

1. Student, a District resident, was born xx/xx/xx (Hearing Officer Exhibit 1, page 1: HO 1, 1).
2. Student attended Middle School as a sixth grader during the 2006-2007 school year (Parents' Exhibit 4, pages 1-2: P4, 1-2).
3. Student previously was enrolled in the [redacted] School District and attended [redacted school] (P8, 2).
4. When in kindergarten, Student had made suicidal statements (P8, 2-3).
5. Student received the diagnoses of Attention Deficit with Hyperactivity Disorder (ADHD) and Asperger's Syndrome in second grade (P8, 2-3; Notes of Transcript 28-29: NT 28-29).
6. Student was identified as a student with learning difficulties and a speech and language disability, and in need of specially designed instruction (P2, 2; P8, 1-3).
7. On December 19, 2002, his Parent signed a Notice of Recommended Educational Placement (NOREP) agreeing that Student would receive "full time language support" (HO 7,11-12).
8. The December 19, 2002 action was on the basis that Student had "significant deficits in both receptive and expressive language" (HO 7,11-12).
9. Student was placed in the Language Class in second grade, and in third grade, attended learning support for Reading, Math, and Language (P2, 2).
10. Since his arrival in the District, Student has received support services (i.e., learning support/resource room and speech/language support) (P8, 2-3).
11. On April 16, 2003, Student's Parent agreed to a NOREP recommending that Student receive "learning support in part time learning support and itinerant speech or language" (HO 7, 9-10).
12. The April 16, 2003 proposed action was on the basis that "Student has been diagnosed with Asperger's and severe ADHD. He has behaviors that interfere with his learning" (HO 7, 9-10).
13. On January 8, 2004, the District proposed that Student be dismissed from speech/language support. His Parents did not sign the NOREP (HO 7, 7-8).
14. On March 17, 2005, his Parent agreed to a NOREP recommending that Student receive learning support in a resource room and itinerant speech/language support (HO 7, 5-6).
15. On October 20, 2005, the District issued a Reevaluation Report stating, "Student has been diagnosed as having ADHD and takes medication at home to help control his attention and impulse control. Due to Student's lower rate of acquisition and retention of new academic material, Student continues to be eligible for special education services" (P2, 1).
16. Student's October 20, 2005 Reevaluation Report noted Student was receiving learning support for Reading, Math, and Language Arts, as well as speech support (P2, 2).
17. In Grade 5, during the 2005-2006 school year, Student's District educational placement was "regular education/learning support/speech or language consultation" (P2, 1).

***Facts Relating To Student's 2005-2006 IEP***

18. Student's IEP team met and offered him an IEP November 3, 2005 (P7).

19. Student's November 3, 2005 IEP named IEP team participants, including Student's mother, a regular education teacher, a special education teacher, and the Local Educational Agency (LRE) representative (P7, 2).
20. Student's November 3, 2005 IEP discussed special considerations naming only Student's communication needs (P7, 3).
21. Student's November 3, 2005 IEP named his present levels of functional performance indicating that Student's speech needs would be addressed through a "consult basis" (P7, 6).
22. Student's November 3, 2005 IEP named how Student's disability affects involvement and progress in the general education curriculum (P7, 4-6, 12).
23. Student's November 3, 2005 IEP provided evidence of progress monitoring (P7, 7-11).
24. Student's November 3, 2005 IEP described Student's participation in state and local assessments (P7, 13-14).
25. Student's November 3, 2005 IEP named annual goals related to support within the inclusion setting and study strategies room, Mathematics, Reading, Spelling, and Language (P7, 16-20).
26. Student's November 3, 2005 IEP indicated he needed the related service of speech/language support (P7, 22).
27. Student's November 3, 2005 IEP described Student's program modifications and specially designed instruction (P7, 21).
28. Student's November 3, 2005 IEP named supports for school personnel provided for Student (P7, 22).
29. Student's November 3, 2005 IEP considered Student's need for Extended School Year (ESY) services, determining that Student was not eligible for ESY (P7, 23-24).
30. Student's November 3, 2005 IEP named his educational placement (i.e., learning support resource room; itinerant speech or language) (P7, 25).
31. Student's November 3, 2005 IEP named his LRE calculating that he receive 15 special education hours outside of the regular education classroom, at least 21% of the day (P7, 25-27).
32. On November 3, 2005, his Parent agreed to a NOREP recommending that Student receive learning support in a resource room and itinerant speech and language (HO 7, 3-4).

***Facts Relating To Student's LRE Claim***

33. During the 2006-2007 school year, Student attended Middle School initially receiving instruction in the learning support classroom at the same level of support as in the previous school year (P8, 2-3).
34. Student's father met with the District's LEA and requested that Student be placed out of special education (NT 87-88, 97-99).
35. Student no longer left the regular classroom (NT 32-33, 87-88).
36. Student's grades suffered and he began failing his subjects (P13; NT 89-90, 103).
37. Student began having problems on the bus (NT 89-91).
38. On November 9, 2006, the District held a meeting to discuss Student's behaviors, noting "problems daily with him off task. Sometimes he's sent to the office. When he is non-compliant he isn't disruptive until pressed to do his work" (School District 12, page 1: SD 12, 1).
39. Student's Parents met with school officials and were given the option of sending Student to an approved school or to the District's Alternative Education Program (NT 92, 113-115).
40. In response, the District and Parents agreed to keep Student in his regular school (NT 88-89).
41. On November 10, 2006, the District proposed an "Alternative Education Program Contract" that Student and his Parents accepted (P3, 2).
42. The Alternative Education Program was described as a "temporary placement programming for students who have exhibited learning problems in academics or as a result of resistant, reluctant, or disruptive behavior in the regular school setting" (P3, 3,6).
43. Student was to receive instruction in the Alternative Education Program in English, Math, Science, Social Studies, and Reading (P3, 3).
44. His teacher's responsibilities for Student in the Alternative Education Program included, "daily assignments, teach on grade level, character education, talk as needed, attendance, behavior, weekly grades, communication thru (sic) agenda" (P3, 5).

45. Student's responsibilities in the Alternative Education Program included, "concentrate, focus, fill out agenda daily, talk about probs (sic), ask to see Dr. O, correct mistakes, attendance" (P3, 5).
46. His Parents' responsibilities for Student in the Alternative Education Program included, "sign agenda, attendance, get meds (sic), communication thru (sic) agenda" (P3, 5).
47. On December 6, 2006, his Parent agreed to a NOREP recommending that Student receive "his specially designed instruction...delivered in the alternative education program for all academics. He receives anger management and character education to address behavior concerns" (HO 7,1-2).
48. District officials reported that the Alternative Education Program was a regular education environment (NT 141-142, 159-160).
49. District officials reported that the Alternative Education Program was entirely voluntary and that Student could have withdrawn at any time (NT134-135, 157).

***Facts Relating To Student's Most Recent Evaluation Report***

50. On October 25, 2006, Student's Parents requested that the District reevaluate Student due to Student's "great difficulty attending to class work and homework" (P1).
51. The October 25, 2006 request for an evaluation noted, "In school he has been placed in ALC for a duration of one day...Student has been placed in the office during classes, for behaviors that are unclear to us..." (P1, 1).
52. On October 26, 2006, the District issued a "Permission to Reevaluate/Agreement to Waive Reevaluation" form (P1, 2).
53. On January 26, 2007, the District issued a Reevaluation Report at the Parents' request (P8, 1-12; NT 366-367).
54. The January 26, 2007 Reevaluation Report summarized existing evaluation data administered in November 2002 (P8, 2).
55. In November 2002, given the Wechsler Intelligence Scale for Children, Third Edition, Student scored a Verbal IQ of 84, Performance IQ of 104, and a Full Scale IQ of 93 (P8, 2).
56. On the Wechsler Individual Achievement Test, Student's November 2002 tests were Reading standard score of 83 and Mathematics standard score of 77 (P8, 2).
57. Based on Student's November 2002 evaluation, he was determined to continue to be eligible for learning support (P8, 2).
58. Student's January 26, 2007 Reevaluation Report summarized a September 2006 report by Dr. N from the [redacted] Health System, commenting on Student's assessment for mood disorder, ADHD, depression, Asperger's disorder, and obsessive compulsive disorder (P8, 2).
59. Student's January 26, 2007 Reevaluation Report provided information by Student's Parents, current classroom observations, and observations by teachers and service providers (P8, 3-5).
60. Student's January 26, 2007 Reevaluation Report did not provide curriculum-based assessments (P8; NT 382-383).
61. Student's January 26, 2007 Reevaluation Report provided observations during current testing (P8, 4) and results of current academic assessment from the Kaufman Test of Educational Achievement, Second Edition (KTEA-II) (P8, 5-6).
62. Student's January 26, 2007 Reevaluation Report reported that the administration of the KTEA-II was discontinued because of Student's "emotional and behavioral presentation" (P8, 10; NT 119, 368-369).
63. Student's January 26, 2007 Reevaluation Report indicated that Student did not cooperate during the testing conducted by the school psychologist (P8, 5-6).
64. Student's January 26, 2007 Reevaluation Report invalidated Student's achievement results (P8, 5-6, 10-11).
65. Student's January 26, 2007 Reevaluation Report summarized results of the Behavioral Assessment Scale for Children, Second Edition (BASC-II) rated by Student, his parent, and his Alternative Education Teacher (P8, 6-7).
66. Student's Parents completed the BASC-II on October 26, 2006, when Student was still in the regular classroom (P8, 6-7; NT 377-378).

67. Student and his Alternative Education Teacher completed the BASC-II form three months later, after Student was placed in the Alternative Education Program for more than two months (P8, 6-7; NT 377-389).
68. Student's January 26, 2007 Reevaluation Report concluded that Student is a child with a primary disability of "emotional disturbance." Student's secondary disability category was noted as "Specific Learning Disability" (P8, 11; NT 376-378, 381-382).
69. Student's January 26, 2007 Reevaluation Report did not assess Student's speech and language needs (P8; NT 370-371).

***Facts Relating To Current IEP Claim***

70. Student began the 2006-2007 school year with an IEP written on November 3, 2005 IEP (P7).
71. Student's November 3, 2005 IEP did not indicate that he had behavioral problems but noted communication concerns (P7, 3).
72. On December 6, 2006, Student's IEP team met and offered Student another IEP (SD 10, 1-20).
73. Student's December 6, 2007 IEP named IEP team participants, including Student's mother, Student, a regular education teacher, a special education teacher, and the LRE representative (SD10, 3).
74. Student's mother signed receipt of a Procedural Safeguard Notice on Student's December 6, 2006 IEP (SD 10, 3).
75. Student's December 6, 2006 IEP named special considerations including, "behaviors that impede his... learning or that of others." His IEP noted, "Participates in the alternative program, anger management, character education" (SD 10, 4).
76. Student's December 6, 2006 IEP named his present levels of academic achievement stating, "Because he is easily distracted and off task it is better that his specials are taken in the alternative ed. setting. This will ensure success also tailor the program to meet many of Student's needs-anger management, conflict resolution, social skills, communication" (SD 10, 6).
77. Student's December 6, 2006 IEP named his present levels of functional performance stating, "he requires a lot of one on one instruction. He is unable to function successfully and appropriately in large group instruction. He is easily distracted, side tracked or bored...He has difficulty finding words to communicate how he is feeling or what he is thinking" (SD 10, 6).
78. Student's December 6, 2006 IEP named how Student's disability affects involvement and progress in the general education curriculum reporting, "He is unable to sit and work on an assignment that requires reading or writing. He is unable to work independently without reinforcement or individual attention. He does not communicate when he becomes unhappy/withdrawn. He is unable to delay gratification" (SD 10, 7).
79. Student's December 6, 2006 IEP named four annual goals related to language arts, spelling, reading, and mathematics (SD 10, 8-9).
80. Student's December 6, 2006 IEP described how Student's progress toward meeting the four goals will be measured and when periodic reports on progress will be provided to his Parents: "Teacher made tests, daily observation, tests provided by the texts, weekly grades on Edline, interims in agenda, report cards" (SD 10,8-9).
81. Student's December 6, 2006 IEP did not have goals related to Student's behavior needs (SD 10, 8-9; NT 165-168).
82. Student's December 6, 2006 IEP did not have goals related to Student's speech needs (SD 10, 8-9; NT 162-163).
83. Student's December 6, 2006 IEP described Student's participation in state and local assessments (SD 10,10).
84. Student's December 6, 2006 IEP described Student's program modifications that named, "adaptive P.E., extra time for assignments and tests, and adaptive specials" (SD 10, 13).
85. Student's December 6, 2006 IEP named supports for school personnel provided for Student (SD 10,14-15).
86. Student's December 6, 2006 IEP considered Student's need for ESY, determining that Student is not eligible for ESY (SD 10, 15).
87. Student's December 6, 2006 IEP named his educational placement (i.e., learning support part-time delivered in the alternative program). The IEP stated, "he participates for all academics in the LS

- program/alternative program due to his significant needs and behavior concerns” (P6, 14-15; SD 10, 16-17).
88. Student’s December 6, 2006 IEP named his LRE calculating he receives 15 special education hours outside of the regular education classroom that is at least 21% of the day (SD 10, 17).
  89. Student’s December 6, 2006 IEP indicated he did not receive any related services (SD 10, 20).
  90. On March 9, 2007, Student’s IEP team met to revise Student’s IEP (SD 10, 2; SD 13, 1-2).
  91. Student’s March 9, 2007 IEP team participants included Student’s mother, Student’s father, a regular education teacher, a special education teacher, the LRE representative, a school psychologist, a “BCM,” [redacted agency] representatives, and the Parents’ attorney (SD10, 2).
  92. Student’s March 9, 2007 IEP revised his present levels of academic achievement stating, “Student attends computer and home-ec in the regular program. He needs to be re-focused in computers at times. He is working on academics in the alternative classroom. He is working to get caught up from his disciplinary action...The alternative program address (sic) his behavioral issues: anger management, character ed., conflict resolution” (SD 10, 5).
  93. Student’s March 9, 2007 IEP revised how Student’s disability affects involvement and progress in the general education curriculum, reporting, “His focusing has increased and is no longer a need at this time. He is self monitoring his behavior better. This behavior could reoccur at anytime” (SD 10, 7).
  94. Student’s March 9, 2007 IEP revised Student’s program modifications and specially designed instruction that added, “Availability of a paraprofessional in the classroom to keep Student on task as needed. Can be used in the hallway as needed if issues arise” (SD 10, 13).
  95. Student’s March 9, 2007 IEP revised Student’s educational placement naming, “Emotional/Learning Support Part-time, Delivered in the Alternative Program” (SD 10, 16-17).
  96. The District provided data on Student’s academic assignments and assessments (SD 11, 1-22).
  97. Student received low achievement in a majority of his Tests and Skills, measured on the IOWA Tests, given in April 2007 (P12, 1).
  98. Student has a recognized learning disability in reading (P8; NT 123-124).
  99. Student received failing grades in Consumer Education and Reading on his final report card during the 2006-2007 academic year (P13).
  100. Student’s final report card during the 2006-2007 academic year did not contain correctly averaged final grades (NT 418, 454-455).

***Facts Relating To Disciplinary Claim***

101. On February 23, 1998, the District revised its policy on “Unlawful Harassment” (SD 7, 1-5).
102. On October 26, 1998, the District approved its policy on “Terrorist Threats/Acts” (SD 8, 1-2).
103. Page 21 of the District’s Student/Parent Handbook defined terms related to harassment and discipline hearings (SD 9).
104. On August 29, 2006, Student and his Parent acknowledged receipt of a copy of the Middle School Student Agenda Handbook (SD 6,1).
105. On February 12, 2007, Student received a 10-day in-school suspension for making a threatening comment at a community dance that was not on school property (SD 1, 1; NT 178-179, 182-183, 425-430).
106. The dates of Student’s in-school suspension were from February 12, 2007 through February 26, 2007 (SD 1, 1).
107. From February 20, 2007 through February 23, 2007, Student was placed in the “Alternative Learning Center” that is not the same placement as the Alternative Education Program (SD 5; NT 179-180, 183).
108. On February 22, 2007, Student made a verbal threat against a teacher (SD 3; NT 184).
109. On February 26, 2007, Student received a 10-day out of school suspension from February 26, 2007 through March 9, 2007, for “harassment, threatening a teacher, misbehavior, disrespect” (SD 2, 1; P4, 1).
110. Student’s suspension was rescinded (NT184-185).
111. On February 27, 2007, Student’s Parent waived his right for an informal hearing, scheduled for March 1, 2007 (SD 1, 3; SD 5, 1; NT 179-186).
112. Student did not receive a Manifestation Determination Review (NT 130-132).

113. On March 29, 2007, Student “left lunch without permission” and received detention (P5, 2).
114. On April 12, 2007, Student received another detention because he “left lunch without permission” (P5, 1).
115. On May 22, 2007, Student’s Alternative Education teacher described Student’s inappropriate behavior in an email (P9).
116. On May 30, 2007, Student’s Alternative Education teacher described Student’s inappropriate behavior in another email (P10).
117. Student’s inappropriate behavior from mid-February 2007 through May 30, 2007 received annotations in a District log provided by Student’s Alternative Education teacher (P11, 1- 5).

***Facts Relating To Discrimination On Basis Of Disability Claim***

118. The Alternative Education Program’s booklet provided that a student showing lack of improvement in attendance, behavior, or academics would lead to a parent conference and potential removal from the program (P3, 4-5).
119. Student received serious disciplinary referrals throughout the 2006-2007 school year (SD 1, SD 2, SD 3, SD 5; P4; NT 182-185).
120. Student was not permitted to attend specials, outside of the Alternative Education classroom, but he remained in the Alternative Education Program (NT 39-51).
121. Student was not permitted to attend Art outside of the Alternative Education classroom, but he remained in the Alternative Education Program (NT 114).
122. Student was not permitted to attend Band outside of the Alternative Education classroom, but he remained in the Alternative Education Program (NT 422-423).
123. Student was not permitted to eat lunch outside of the Alternative Education classroom, but he remained in the Alternative Education Program (NT 39-51).
124. Student received “Adaptive Physical Education” in the Alternative Education Program, away from opportunities with his normal peers (SD 10; P 6).
125. Student received “shop” in the Alternative Education Program, away from opportunities with his normal peers (SD 10; P 6).
126. Student was excluded from a school dance at school because he was deemed disruptive (NT 128-129).
127. Student did not receive individualized, supplemental aids and services in the Alternative Education Program based on his behavioral, social and/or communication needs (NT 109-110).
128. District officials testified there is a nexus between Student’s off-school behavior and Student’s in-school discipline (NT 430-440).

***Facts Relating To May 17, 2007 Due Process Hearing Request***

129. In May of 2007, Student’s Parents made an undated Due Process Hearing Request alleging Student’s denial of a FAPE (HO 2).
130. On May 8, 2007, the Office for Dispute Resolution assigned the Hearing Officer to conduct the Administrative hearing that she scheduled for June 11, 2007 (HO 1, 1-3).
131. On May 8, 2007, the Hearing Officer received a May 3, 2007 Fax from the District challenging the sufficiency of the Parents’ undated Due Process Hearing Request (HO2, 1-5).
132. On May 8, 2007, the Hearing Officer determined that the Parents’ original Due Process Hearing Request was insufficient, but afforded the Parents the opportunity to amend their request (HO 2, 1).
133. On May 17, 2007, the Parents made another Due Process Hearing Request (HO 4, 1-2).
134. On May 17, 2007, after a three-way telephone conference call with the parties’ representatives and the Hearing Officer, the parties agreed to the hearing issues; the District did not object to the hearing initiation, scheduled for June 11, 2007 (HO 3, 1-4; NT 22-27).
135. The May 17, 2007 Due Process Hearing Request alleged claims related to Student’s reevaluation, IEP, LRE, FAPE, discipline, and whether or not Student was discriminated against on the basis of his disability (HO 4, 1-2).
136. The May 17, 2007 Due Process Hearing Request stated that Student’s Parents sought six months of compensatory education and an appropriate placement in Student’s LRE (HO 4, 1-2).

137. The May 17, 2007 Due Process Hearing Request stated that Student should be provided with an independent psycho-educational evaluation and should have an IEP based on his new evaluation (HO 4, 1-2).

138. On May 31, 2007, the parties conducted a resolution meeting that did not result in a resolution (HO 5, 1).

139. On June 11, 2007, Student's due process hearing initiated (NT 1).

140. On June 11, 2007, the parties agreed to the hearing issues on the record (NT 22-27).

141. Student's due process hearing reconvened at the parties' request of continuances to July 10, 2007 (HO 6, 1) and July 26, 2007 (HO 8, 1-2).

#### IV. ISSUES

The parties agreed to the hearing issues on the record (NT 22-27):

- Did the District educate Student in the least restrictive environment with the appropriate supports and services?
- Did the District offer to Student an adequate evaluation report to support Student's IEP?
- Did the District subject Student to inappropriate disciplinary actions?
- Did the District discriminate on the basis of Student's disability?
- Is Student's current IEP inappropriate because it excludes social skills, communication skills, and a behavior plan?

#### V. DISCUSSION AND CONCLUSIONS OF LAW

##### *Burden of Proof and Witness Credibility*

The United States Supreme Court has held that the burden of proof in an administrative hearing challenging an IEP is upon the party seeking relief. The burden of persuasion, as an element of the burden of proof, rests with Student's parents/petitioners, who raised their due process claims on or about May 17, 2007 (HO 4, pages 1-2). See *Schaffer v. West*, 126 S.Ct. 528 (2005), which makes this principle applicable when the evidence presented by both sides is of nearly equal weight, (i.e., in "equipoise"). Also, during the instant proceedings, Student's Parents held the burden of production. Thus, Student's Parents presented their case-in-chief first.

Based on this Hearing Officer's authority to assess the credibility of witnesses and to weigh evidence (See *Carlisle Area School District v. Scott P.*, 62 F.3d 520,524 (3rd Cir. 1995), cert. denied, 517 U.S. 1135 (1996)), and based on preponderant evidence, Student's Parents have met their burden and have established each of their allegations. They did so by a preponderance of the evidence, thereby making it unnecessary to apply *Schaffer*.

##### **Issue 1. Did The District Educate Student In The Least Restrictive Environment With Appropriate Supports And Services?**



In order to ensure a free, appropriate public education (FAPE), federal mandates of the *Individuals with Disabilities Education Act of 2004* (IDEA) (Public Law 108-446) direct that an eligible student must be assured of an appropriate education, based on needs. U.S.C. §1401(8). One of the basic principles of the IDEA is known as the “least restrictive environment” (LRE) principle. Student must receive his education in the LRE, appropriate to meet his needs.

At Section 300.116, an LRE placement decision is described:

*“In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency shall ensure that--*

*(a) The placement decision--*

*(1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and*

*(2) Is made in conformity with the LRE provisions of this subpart, including §§300.114 – 300.118.*

*(b) The child's placement--*

*Is determined at least annually;*

*Is based on the child's IEP; and*

*Is as close as possible to the child's home.*

*(c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled;*

*(d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and*

*(e) A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general curriculum.”*

The District must ensure that to the maximum extent appropriate, Student, an eligible child with a disability, is educated with children who are nondisabled and that his removal from the regular educational environment occurs only if the nature or severity of his disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. The key to addressing the IDEA’s FAPE requirement and the Act’s preference for opportunities in the general education curriculum lies in the LEA’s proper use of supplementary aids and services because such aids and services, “*may enable the school to educate a child with disabilities for the majority of the time within a regular classroom.*” See, *Oberti v. Board of Education*, 995 F.2d 1204 (3d Cir. 1993).

THE FOLLOWING POINTS ARE RELEVANT BASED ON THE FACTUAL EVIDENCE OF RECORD:

▪ Student's educational placement received multiple changes throughout his District participation (i.e., resource room, part-time support, itinerant, consult, inclusion, Alternative Education Program). Student apparently was diagnosed previously in April 2003 with Asperger's and severe ADHD, displayed severe speech/language difficulties, and had recognized behaviors that interfered with his learning (HO 7, 9-10). By October 2005, Student was taking medication at home that reportedly helped to control his attention and impulse control (HO 7, 10). However, Student continued to display speech difficulties and had a lower rate of acquisition and retention of new academic material, so he continued to be eligible for speech/language services and learning support (P2, 1).

▪ Despite his known problem behaviors, Student's 2005-2006 IEP team (P7) never noted behavioral considerations that necessitated behavioral goals addressed through special education or related services. Student's November 3, 2005 IEP team reported on special considerations naming only Student's communication needs (P7, 3). The District noted significant deficits in both receptive and expressive language (HO 7, 11-12), however, Student did not receive goals related to his speech/language needs. His annual goals only related to support within the inclusion setting and study strategies room, focusing on academic areas, such as Student's Mathematics, Reading, Spelling, and Language Arts (P7, 16-20).

▪ The District's Alternative Education Program was described as a "*temporary placement programming for students who have exhibited learning problems in academics or as a result of resistant, reluctant, or disruptive behavior in the regular school setting*" (P3, 3,6). Student's continued educational placement at the District's Alternative Education Program was not a temporary placement, but relied primarily on the testimony of District personnel and their accounts of Student's inappropriate behaviors. The District did not explain clearly why Student's Parents were provided only the option of "approved school or the District's Alternative Education Program" (NT 92, 113-115). The District provided testimony that the Alternative Education Program was a "*regular education*" placement meant to support Student. This Hearing Officer did not find credible, the District's explanation that Student's placement was "*regular*" or a "*support*" to Student.

▪ Student displayed behaviors that interfered with his learning and were known to the District as early as the 2002-2003 school year (HO 7, 9-10), but were not addressed appropriately by his IEPs (P7, 3; SD 10, 4, NT 89, 165-168). The District apparently chose to place Student in an Alternative Education Program for students with acute learning and behavioral needs prior to formally assessing Student's needs for such a placement and without the benefit of Student's access to the use of appropriate supplementary aids and services in his general education environment (or, for that matter, in his learning support environment). The restrictiveness of the Alternative Education Program setting was more a punishment than a support. Student's opportunities to progress academically, behaviorally, or socially were seriously delimited by his placement. The Middle School Principal testified on Student's confinement to the Alternative Education Program in December 2006 for safety-in part to protect Student from peers who were angry with him (NT 176-222). The District's LEA testified that Student's in-school suspension was given for a remark made at a community dance that made him

suspect as “*dangerous.*” Student was given more serious discipline for saying that he would “*get*” a teacher and for inappropriately commenting on a female student’s attire (SD 1, SD 2, SD 3, SD 5, P4; NT 178-179).

▪ Although an experienced teacher holding special education credentials, Student’s Alternative Education teacher’s testimony concerning the appropriateness of Student’s placement was diminished by her lack of substantiated data concerning Student’s need for the Alternative Education Program placement and her lack of substantiated data concerning Student’s behavioral, emotional, and/or social progress exhibited in her classroom (NT 356-357). Student did not receive opportunities for participation in the general education curriculum. The District’s *Alternative Education Program Contract* that Student and his Parents accepted (P3, 2) described Student’s chance to receive academic curriculum classes that would “*match their corresponding regular education courses to the extent possible*”(P3, 4). However, the Alternative Education teacher testified she used curriculum materials that were different than those used in the general education curriculum (NT346). She provided a teacher-made curriculum that she developed to address “*character*” and “*anger management*” (NT 354-356). However, Student’s IEP did not have goals for “*character education, anger management, and conflict resolution*” (NT 357). Specially designed instruction, individualized to Student’s behavioral, communication, and social needs, was lacking. Student also received “*adaptive physical education*” and “*shop,*” but these were used as punishments in the Alternative Education Program. Student’s March 9, 2007 IEP added, “*Availability of a paraprofessional in the classroom to keep Student on task as needed. Can be used in the hallway as needed if issues arise*” (SD 10, 13). There were no data to support the use and availability of the paraprofessional, or what constituted “*on task as needed*” or “*if issues arise.*”

▪ Student’s placement in the Alternative Education Program was devoid of positive interventions, relied on punishment, and is not his least restrictive environment. Student’s placement in the Alternative Education Program was initiated prior to the District’s reevaluation of Student and prior to data verifying that Student needed such a restrictive placement. As described in the Alternative Education Program Handbook, such a placement is “*for students who have exhibited learning problems in academics or who have exhibited resistant, reluctant, or disruptive behavior in the regular school setting*” (P3, 3,6).

The Parents have established through testimony and evidence that the District did not change Student’s IEP to address Student’s learning, behavioral, communication, and social needs. Instead, the District placed restrictions on Student’s access to the school population. The Parents have established that the District did not educate Student with appropriate supplementary aids and services; the Parents have established that Student did not receive his education in the LRE.

## **Issue 2. Did The District Offer To Student An Adequate Evaluation Report To Support Student’s IEP?**

At 34 CFR § 300.303 (a), a public agency must ensure that the reevaluation of each child with a disability is conducted in accordance with §300.304 through §300.311 (1): “*If the public agency determines that the*

*educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or (2) If the child's parent or teacher requests a reevaluation."*

THE FOLLOWING POINTS ARE RELEVANT BASED ON THE FACTUAL EVIDENCE OF RECORD:

▪The District's January 26, 2007 reevaluation of Student was inappropriate. His ER was not sufficiently comprehensive to identify all of Student's special education and related services needs enabling Student to be involved in and progress in the general education curriculum. §300.304 (b). The testimony of the District's school psychologist was diminished, as Student's current ER did not assess Student's needs in all areas related to Student's suspected disability, including his communication needs. Student's communication needs previously were identified by the District as *significant deficits* in both receptive and expressive language (HO 7,11-12), but Student's January 26, 2007 Reevaluation Report did not assess Student's speech and language needs at all (P8). Student had received speech and language therapy, and no current assessment data were included in his ER.

▪The District's January 26, 2007 Reevaluation Report (P8) changed Student's primary disability to an "*emotional disturbance*," however; the evaluation was inadequate and not comprehensive. It lacked Student's current levels of educational functioning and did not meet the requirement of 34 CFR 300.304-305. In 2002, Student was identified as a student with a severe discrepancy between his ability and achievement (P8, 2). Student's Reevaluation Report did not provide curriculum-based assessments (P8) and reported that the administration of the KTEA-II assessing his achievement was discontinued because of Student's "*emotional and behavioral presentation*" (P8, 10). Because Student did not cooperate during the testing (P8, 5-6), his January 2007 Reevaluation Report invalidated Student's achievement results (P8, 5-6, 10-11).

▪Based on BASC-II ratings by Student, his parent, and his Alternative Education Teacher (P8, 6-7) that were obtained during different times and for different purposes, (i.e., raising reliability questions of BASC-II interruptions given such circumstances), (P8, 6-7; NT 377-389), Student's January 2007 Reevaluation Report concluded that Student is a child with a primary disability of "*emotional disturbance*." Student's secondary disability category was noted as "*Specific Learning Disability*" (P8, 11). His ER offered no additional levels of emotional support after a reported recommendation of eligibility of an "*emotional disturbance*."

Parents have a right to an Independent Educational Evaluation (IEE) at public expense if they disagree with an evaluation obtained by a public agency and the agency fails to show that its evaluation is appropriate. §300.502(b). Student's Parents disagreed with the District's evaluation and showed that it is inappropriate to meet Student's needs (HO4, P8). The District failed to show that its January 2007 Reevaluation Report of Student was appropriate. The Parents established that Student's Reevaluation Report was insufficient in scope

and information to support programming through his 2006-2007 IEP. Therefore, Student is entitled to an IEE at public expense.

### **Issue 3. Did the District Subject Student To Inappropriate Disciplinary Actions?**

*Article XIX-C of the Public School Code, 24 P.S. §19-1901-C et. seq.*, permits districts to establish alternative education programs in which “*disruptive students*” can be alternatively placed to meet their academic needs. These programs are approved by the Pennsylvania Department of Education. Students need not be on suspension or expulsion status to be placed in such a program. A student who is a “*disruptive student*” as defined by the Act can be administratively placed in the program after an informal hearing before the building principal, subject to periodic review to determine whether the student is ready to return to the regular school curriculum. A “*disruptive student*” is defined as:

*“A student who poses a clear threat to the safety and welfare of other students or the school staff, who creates an unsafe school environment or whose behavior materially interferes with the learning of other students or disrupts the overall educational process. The disruptive student exhibits to a marked degree any or all of the following condition:*

*(i) Disregard for school authority, including persistent violation of school policy and rules.*

*(iii) Violent or threatening behavior on school property or during school-affiliated activities.*

*(iv) Possession of a weapon on school property, as defined under 18 Pa.C.S. §912 (relating to possession of weapon on school property).*

*(vi) Misconduct that would merit suspension or expulsion under school policy.”*

The Act specifically excludes from the definition of “*disruptive student*” a student who is eligible for special education. It states: “*No student who is eligible for special education services pursuant to the Individuals with Disabilities Education Act (Public Law 91-230, 20 USC §1400 et seq.) shall be deemed a disruptive student for the purpose of this act, except as provided for in 22 Pa. Code §14.35 (relating to discipline).”*

THE FOLLOWING POINTS ARE RELEVANT BASED ON THE FACTUAL EVIDENCE OF RECORD:

■ Although not officially labeled a “*disruptive*” student pursuant to Article XIX-C of the Public School Code, the District treated Student as if he were. Student lost educational opportunities throughout the 2006-2007 school year, without the benefit of a functional behavioral assessment (FBA) and without individualized behavioral goals proposed for his IEP. Remarks that Student allegedly made at the school dance held off school property in February 2007 resulted in Student’s in-school suspension (SD 1). However, from February 20, 2007 through February 23, 2007, Student was placed in the “*Alternative Learning Center*” ( not the same placement as the Alternative Education Program) (SD 5, NT 179-180). When in the suspension room, Student said that he hated

a teacher for sending him to the office and she is “*gonna get it*” (P11). The District viewed Student’s statement as another threat and began Student’s suspension to the *Alternative Learning Center*, which was rescinded, to prevent an excess of days of suspension.

▪ Student was not given an out-of school suspension, nor did the District initiate a 45-day emergency placement. No manifestation determination meeting was ever held. Student continued to receive his education in the Alternative Education Program for *students who have exhibited learning problems in academics or as a result of resistant, reluctant, or disruptive behavior in the regular school setting*” (P3, 3,6). Subsequently, Student was disciplined again for telling a girl to cover up her body parts. The District responded to Student as if he were a “*disruptive*” student who threatened others.

▪ Student’s Alternative Education teacher testified that the “*Progress Report*” forms cited in the Alternative Education Program Booklet provided to Student’s Parents upon their agreement to place Student into her Program (P3, 7-9) were never used (NT 347-352). Student’s Alternative Education teacher also testified she used a program-wide behavior plan, but that plan was not presented on the record (NT 349-356).

▪ Student’s Alternative Education teacher’s curriculum and strategies were not part of Student’s IEP and so were not part of his special education. His IEP stated that Student must remain in the Alternative Education room, but provided no measurable goals and individualized, specially designed instruction to allow him to learn how to return to the school population and function within it without difficulties. Student’s problems escalated over the course of the 2006-2007 school year, and his educational achievement on national testing (P12) and failing grades (P13) underscored his regression during his placement in the Alternative Education Program. Student’s Alternative Education teacher did not calculate Student’s final grades accurately at the end of the 2006-2007 school year. She stated that it was the Parents’ responsibility to call the District if there were a problem with how she reported Student’s grades on his final report card (NT 418, 454-456).

Based on the testimony and evidence of record, the District subjected Student to prolonged inappropriate disciplinary actions through Student’s participation in an Alternative Education Program that was not tailored to Student’s individualized needs, and is not his LRE. Further, the District subjected Student to status as a “*disruptive student*,” but did not afford him the disciplinary protections, pursuant to the IDEA. §§300.530-300.536. The Parents established that the District subjected Student to inappropriate disciplinary actions.

#### **Issue 4. Did The District Discriminate On The Basis Of Student’s Disability?**

Students with disabilities are protected from discrimination on the basis of their disabilities by *Section 504 of the Rehabilitation Act of 1973*, 20 U.S.C. §794 (“*Section 504*”), and its implementing regulations, 34 C.F.R., Part 104. Section 504 prohibits discrimination by setting forth the following:

*“No otherwise qualified handicapped individual in the United States...shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination in any program or activity receiving federal financial assistance.” Rehabilitation Act of 1973, Section 504, 29 U.S.C. § 794(a).*

As an eligible student under Chapter 14 in Pennsylvania, Student may use the procedures for requesting assistance under 22 Pa. Code § 15.8(a) (relating to procedural safeguards) to raise claims regarding denial of access, equal treatment, or discrimination based on handicap. Because he is raising a claim of discrimination, Student is a protected handicapped student. 22 Pa. Code § 15.2 (relating to definitions). Student must be afforded an equal opportunity to participate in his school programs and extracurricular activities to the maximum extent appropriate. Student needs reasonable accommodation in his regular education class. 45 C.F.R. § § 104.34, 104.37.

Section 504 bars all federally funded entities, including public schools, from discriminating on the basis of disability. *Susavage v. Bucks County Schools Intermediate Unit No. 22*, 2002 WL 1096115 (E.D. 2002). Section 504 protects students from harassment based on disability because harassment is a form of discrimination. Districts can be liable for harassment of students with disabilities whether the harasser is a district employee or another student. The harassment must be so severe, pervasive, and offensive that it deprives the student of educational opportunities. *M.P. v. Indep. Sch. Dist. No. 721*: No. 02-2608, 2003 U.S. App. LEXIS 7133 (U.S. Ct. App. 8th Cir. 4/16/03. *York Sch. Dept.*: 01-97-1063, 27 IDELR 54 (OCR E.D. Boston 5/9/97).

In order to be disability discrimination that is prohibited by Section 504, the intimidation or abusive behavior toward a student must be based on the student's disability and must create a hostile environment that interferes with the student's participation in or receipt of benefits, services, or opportunities in the institution's program. *Lancaster (CA) School District*, OCR Letter of Findings, 40 IDELR 240 (September 24, 2003). In order to constitute harassment under Section 504, actions must be severe, persistent, and pervasive to such a degree that it creates a hostile school environment. *In Re C. M.*, Spec. Ed. Opin. 1220 (2002) at 10.

In order to prevail on a harassment theory under a civil rights statute such as Section 504, a plaintiff must prove: (1) that the actions in question were taken by the actor on the basis of disability (or other classification in the civil rights statute), (2) that the alleged harassment discrimination was pervasive and regular, and (3) that the actions were objectively seen as harassment discrimination, (*i.e.*, that the actions would have had an exclusionary effect on a reasonable person with ordinary sensibilities in the same position). *Kunin v. Sears Roebuck & Co.*, 175 F.3d 289, 293 (3<sup>rd</sup> Cir. 1999); *Andrews v. City of Philadelphia*, 895 F.2d. 1469, 1482 (3<sup>rd</sup> Cir. 1990). Conduct that is undoubtedly inappropriate and that might cause distress and discomfort to a reasonable person is not discriminatory harassment if it is not severe, persistent, and pervasive. *Saxton v. AT&T*, 10 F.3d 526, 534 (7<sup>th</sup> Cir. 1993). To be considered as discriminatory harassment, an action must be not just subjectively harassing but objectively harassing and the action must have been taken on the basis of disability. A conflict does not ripen into a disability harassment claim simply because one of the parties has a disability. *Walton v. Mental Health Association of Southeastern Pennsylvania*, 168 F.3d 661 (3<sup>rd</sup> Cir. 1999).

THE FOLLOWING POINTS ARE RELEVANT BASED ON THE FACTUAL EVIDENCE OF RECORD:

- In Student's case, the record of evidence establishes that Student was not provided an equal opportunity to participate. Student needed, but did not receive, reasonable accommodation in the general education curriculum. What Student received in his Alternative Education Program consistently denied Student opportunity to participate in his school programs and extracurricular activities. 45 C.F.R. § § 104.34, 104.37. This denial was severe, persistent, and pervasive to such a degree that it created a hostile school environment for Student. Student was inappropriately treated as if he were a "*disruptive student*" (Article XIX-C of the Public School Code, 24 P.S. §19-1901-C et. seq.) and he regressed while in the Alternative Education Program.
- The District argued that there was a "*nexus*" established between Student's school discipline and Student's behavior at the school dance that occurred off school property. Student was not under the District's supervision at the time of the infraction. Student had not disrupted school operations with a *true threat* (based on reasoning of an analysis used in *J.S. v. Bethlehem Area School District*, 807 A.2d 847 (Pa. 2002). It is noted that the J.S. Court did find that J.S. could be disciplined by the school district). Importantly, the Court in *J.S.* considered whether J.S.'s threat was conditional, whether it was made directly to the intended victim, whether the person making the threat had made similar threats to the same person on other occasions, and whether the victim had reason to believe that the maker of the threat was violent. The District offered no data that such an analysis was done for Student.

Based on testimony provided by District personnel and by Student's Parents, there was no analysis done and an insufficient nexus between Student's behaviors at the community dance and school operations (NT430-440). Student was inappropriately treated as if he were a "*disruptive student*." The District did not afford him the disciplinary protections, pursuant to the IDEA. §§300.530-300.536. Accordingly, the Parents have established that the District discriminated on the basis of Student's disability.

**Issue 5. Is Student's Current IEP Inappropriate Because It Excludes Social Skills, Communication Skills, And A Behavior Plan?**

The IDEA's substantive component requires that eligible children be provided with a FAPE, one which "*consists of educational instruction specifically designed to meet the unique needs of the child, supported by such services as are necessary to permit the child 'to benefit' from the instruction.*" 20 U.S.C. § 1412(1).

Student's Parents questioned Student's educational placement in his LRE, necessitating a procedural and substantive review of his pendent IEP. See *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1034 (3d Cir. 1993). Substantive violations are those that result in a child's failure to make meaningful progress. An IEP satisfies the state's duty to provide a FAPE only if it is "*reasonably calculated*" to enable the



child to receive educational benefits. Although the IEP must be designed to produce educational benefits, it need not provide the child with a “*potential-maximizing*” education. See, *Hendrick Hudson District Bd. of Ed. v. Rowley*, 458 U.S. 176, 207, 188-89 (1982). A program that confers only trivial or minimal benefit is not appropriate. *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3d Cir. 1988).

THE FOLLOWING POINTS ARE RELEVANT BASED ON THE FACTUAL EVIDENCE OF RECORD:

- The Parents established that Student’s IEP did not address Student’s needs appropriately. His IEP did not address Student’s behavioral needs appropriately (i.e., no goals were provided in the December 2006 IEP to address this area of Student’s needs). Further, Student’s communication and social needs consistently were noted as concerns on District evaluation reports, classroom observations, and by his teachers and Parents, but were not addressed adequately in Student’s IEP. No goals and progress monitoring of Student’s individualized behavioral, social skills, or communication needs were evident during the 2006-2007 school year.
- It is noted that the IDEA only expressly requires a FBA and a behavioral intervention plan (BIP) upon removal of an eligible child for 10 school days in a school year. 34 C.F.R. § 300.520(b)-(c).e. Otherwise, there is no such obligation under the IDEA except to the extent implicit in the requirement that the IEP team “*consider, if appropriate, strategies, including positive behavioral interventions, strategies, and supports to address ... behavior [that impedes the child’s learning or that of others].*” Courts have been averse to introduce best practice in the absence of legal standards for FBAs and BIPs. (See, e.g., *Alex R. v. Forestville Valley Cmty. Sch. Dist.*, 375 F.3d 603 (7th Cir. 2004); *Robert B. v. West Chester Sch. Dist.*, 44 IDELR ¶ 123 (E.D. Pa. 2005). However, it is quite clear that Student required individualized support to address his behavioral and social needs that were not being addressed through an FBA, BIP, and/or appropriate strategies to address his behavior.
- In the instant case, while the District took the position that the Alternative Education Program was a voluntary program, it appeared to be one devoid of individualized goals to help Student make meaningful educational gains. Student’s behavior impeded his learning. Student had experienced removal for 10 school days (at least) in a school year; however, the District did not initiate an FBA and timely revisions to his IEP that addressed Student’s specific needs in communication, behavior, and social skills. More specifically, based on the information that the IEP team knew or had reason to know at the successive points during the 2006-2007 school year, any behavior-related provisions and interventions promulgated by the District (i.e., “*anger management, character ed., conflict resolution*”) (SD 10, 5-6) were not reasonably responsive and not calculated to yield meaningful benefit to Student. Therefore, based on a preponderance of evidence as established by the Parents, the District denied a FAPE to Student. Student’s IEP was inappropriate and not based on Student’s needs.

The evidence and documents of record support the Parents in their claims that Student has been denied a FAPE. Because he has been denied a FAPE, Student is entitled to compensatory education.

### ***Compensatory Education Award***

Student is entitled to compensatory education starting when the District knew or should have known that it had not provided FAPE. The period of compensatory education is equal to the period of deprivation, excluding the time reasonably required for the District to rectify the deprivation. The law does not require a finding of bad faith or egregious circumstances in order to award compensatory education; neither does it depend upon the vigilance of the parents. *M.C. v. Central Regional Sch. Dist.*, 81 F.2d 389 (3d Cir. 1996).

Compensatory education is an appropriate remedy to cure the violation of statutory rights while the child is entitled to those rights. *Big Beaver Falls Area Sch. Dist. v. Jackson*, 615 A.2d 910 (1992); *M.C. v. Central Regional Sch. Dist.*, *supra*. Courts have found that compensatory education is the appropriate remedy where there is a finding of denial of a FAPE. *Punxsutawney Area Sch. Dist. v. Kanouff*, 719 A.2d 198 (1999).

### ***Nature of Compensatory Education Award***

Recent Appeal Panel decisions are particularly helpful in elucidating the nature of compensatory education awards and provide guidance for this decision. First, *Spec. Educ. Op. No. 1481*, p. 13, explains:

*The compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product or device that assists him in overcoming the effects of having been denied FAPE. To that end, the compensatory education shall be in addition to, and not supplant, educational services and/or products/devices that should appropriately be provided by the district through student's IEP, to assure meaningful educational progress. These compensatory education services may occur after school hours, on weekends and/or during summer months when convenient for STUDENT and his parents. The hours and nature of compensatory education created by this paragraph may be implemented at any time from the present to student's 21<sup>st</sup> birthday, as determined by the IEP team.*

Second, *Spec. Educ. Op. No. 1431* (2004), pages 10-13, clarifies that the award should meet the present need of Student, rather than provide a simple replacement of services denied through lack of FAPE:

*"Compensatory", and court interpretations of it in education, continue to suggest to this Panel, as they have in the past, a preferred remedy that replaces precisely what was denied. In a strict sense, compensating for educational deprivation entails, to the extent possible, providing those specific services that should have been a part of FAPE in the first place. Otherwise, the relationship between conduct resulting in denial of services and the remedy, likely necessary to prevent the latter from becoming punitive, can be tenuous.*

*Nevertheless, service-for-service remedial replacement may not always be "compensatory", particularly where a student can no longer derive "meaningful educational benefit" from them. Failing to provide that benefit, and in turn an appropriate education, is what we believe compensatory education seeks to address, and not the simple absence of a particular service. Conversely, awarding the identical service later, from which obtaining such benefit has become impossible, is not compensatory and emphasizes the service rather than the benefit.*

*Consequently, we believe the equitable nature of this remedy permits, when previously denied services are no longer appropriate, discretionary substitution of others. In the first instance, the latter should be directed towards achieving what was or should have been the goals of the deprived services, but this too may fall victim to the deleterious effect time can have on appropriateness. Where that too is the case, then we see a substituted service in furtherance or enrichment of the student's then current IEP documented educational goals generally as "compensatory".*

*Decisions as to the form, location, scheduling, and costs, so long as they remain roughly equivalent to the public costs of these substituted services, can rest with no other than the parent. These controversies incept in district failure to provide “meaningful educational benefit”, and if they then influence substituted services to remedy that, the rule prohibiting their profit therefore is besmirched. It is, in fairness, parents who expend the due process proof and remedy seeking effort, and who must likely deal with making the student available for compensatory services. We see no impropriety, therefore, in parental fashioning of the delivery vehicle for substituted services, if the services are developmental, remedial, or enriching instruction in furtherance of the then pending or a future IEP. See In Re the Educational Assignment of B.R., Special Education Opinion 1102 (2001). Obviously, then parents’ discretion is not complete, and a district is not faced with a fait accompli, as it may challenge parental selections in the proper forum. It was, then, completely acceptable for this District not to have a role in determining the nature of the compensatory education remedy.*

...

*It is insignificant that the goals and services student is recognized as needing are not documented in an IEP, since the focus of compensatory education is and should be that which was denied and not where its need is memorialized.*

*Further, in its Exceptions, the District seeks a limit on the rate for compensatory education services selected by parents. In fact, B. R. and too numerous to cite cases following it, in some instances, support limiting such costs to what the district would have incurred, since the services are in the nature of compensation rather than damages. We believe the line of demarcation for applying this limitation can only rest in the fact that this remedy is equitable, and facts such as parental inability to secure properly selected services at the district’s rate or cost may justify not applying it. Nonetheless, on this record no factual basis is established for not applying the limitation....*

Lastly, further discussion regarding the cost to the District for providing services and the Hearing Officer’s authority to order specific services or programs is discussed in *Spec. Educ. Op. No 1825 (2007)* p. 15 and *Spec. Educ. Op. No. 1122 (2001)*. *Spec. Educ. Op. No. 1122 (2001)*, p. 9: reiterated:

*... Except in unusual circumstances, the cost to a 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 professionals and paraprofessionals who should have provided the District services and 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. Parents may balance expensive and inexpensive instruction or services so that the average cost is below the maximum amount. Parents may also use fewer hours of expensive services as long as the maximum amount is not exceeded. Finally, parents may not be required to make co-payments or use personal insurance to pay for these services.*

....

*By way of dicta, we inform the District (and other interested parties) that this rationale does not preclude a Hearing Officer from ordering specific services or programs as compensatory education in some cases.*

Because he has been denied a FAPE during the 2006-2007 school year, that seriously impeded Student’s right to a FAPE, Student is entitled to compensatory education. Student’s compensatory education is awarded at five (5) school days a week, all school weeks, for the entire 2006-2007 school year.

**HEARING OFFICER ORDER**

**In RE: Special Education Hearing for Student (File No. 7646/06-07 LS)  
Slippery Rock School District**

**AND NOW, this 8<sup>th</sup> day of August 2007, this Hearing Officer orders the Slippery Rock School District to take the following action:**

1. Within 35 calendar days of receipt of this Decision/Order, the District shall initiate Student's IEE. Student is entitled to an IEE at District expense. The IEE shall address Student's current ability, achievement, behavioral, emotional, functional, processing, speech and language, and social needs.
2. Upon 5 calendar days of receiving the IEE in Number 1 above, Student's multidisciplinary evaluation team shall review all IEE findings and recommendations, incorporating relevant findings and recommendations into Student's in-depth, comprehensive Reevaluation Report.
3. Upon 25 calendar days of receiving the IEE in Number 1 above, Student's IEP team shall reconvene for the purpose of updating Student's program and placement in Student's LRE. Student's IEP team shall consider all information available to it in making the determination(s) and in revising Student's IEP and his LRE.
4. Student's compensatory education is awarded at five (5) school days a week, all school weeks, for the entire 2006-2007 school year. The total compensatory education hours are to supplement, not replace appropriate instruction according to Student's IEP.
5. Student's Parents shall decide how the compensatory education hours should be spent so long as they take the form of appropriate developmental, remedial or enriching instruction that furthers Student's needs and furthers the goals of Student's present or future IEPs. These services may occur during the weekday, on weekends and during the summer months, when convenient for Student and Student's Parents.
6. The District shall be advised that the cost to the District in Student's awarded hours of Compensatory Education shall not exceed the full cost of awarded services that were denied.
7. The District shall be advised that the District has discriminated against Student.
8. The District shall be advised that the District is barred from future discrimination against Student.

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**Dorothy J. O'Shea, Ph.D.**

**Hearing Officer**

**DECISION DATE:** \_\_\_\_\_