

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

Decision

Due Process Hearing for TW

Date of Birth: xx/xx/xx

File Number: 8245/07-08AS

Dates of Hearings:

February 20, 2008; March 3, 2008; March 19, 2008; April 11, 2008; April 25, 2008;
May 2, 2008; May 21, 2008; May 28, 2008

CLOSED HEARING

Parties:

Mr. and Mrs.

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Date Closing Arguments Received

June 16, 2008

Date of Decision:

June 27, 2008

Hearing Officer:

David F. Bateman, PhD

I. BACKGROUND

Student is a primary school age eligible former resident of the School District (District) who was labeled as a student with an emotional disturbance, and whose Parents requested this Hearing on three specific issues. They seek an award of compensatory education for inappropriate services from the beginning of the 2006-2007 school year to August 2007. They seek compensatory education for a lack of related services provided during the 2006-2007 school year, and they seek compensatory education for extensive time on the bus as Student was transported to and from school. The District alleges the program was appropriate, and the student is due compensatory hours for missed related services, but not to the extent demanded by the Parents.

II. FINDINGS OF FACT¹

A. Background

1. Student was born on xx/xx/xx. Student is currently xx-years of age (S-2).
2. Student was a resident of the District for the period in question (NT 27).
3. Student was eligible for special education and related services as a student requiring emotional support (S-68).
4. The Parents completed a child and family profile form on October 27, 2003. The Parents describe Student committing violence towards others (S-1).
5. An evaluation report was completed on May 11, 2004 (S-3). Problems with sensory registration and overstimulation were noted. Student was found eligible for the category of developmentally delayed (S-3, p. 11).
6. The Intermediate Unit (IU) completed a speech and language evaluation on April 19, 2005 (S-4). This evaluation report recommended no direct speech/language therapy at this time (S-4, p. 4).
7. A wraparound treatment plan was developed on May 16, 2005 (S-5). The diagnoses listed are ADHD, separation anxiety, bipolar disorder, conduct disorder and stuttering.

¹ References to notes of testimony will be designated "NT" followed by the relevant page number. References to District evidentiary exhibits will be designated "S" followed by the relevant exhibit number. References to Parents' evidentiary exhibits will be designated "P" followed by the relevant exhibit number. Findings of Fact will be designated by "FF" followed by the relevant fact number.

8. Student received an early intervention IEP on June 9, 2005 (S-7). This IEP provided supports for family services, and individual occupational and physical therapy.
9. [Mental Health Agency] completed a psychological evaluation on September 9, 2005 (S-31). The report found a diagnosis of bipolar NOS, stuttering by history, asthma, and family conflict.
10. [Mental Health Agency] completed an evaluation on December 19, 2005 (S-9). This evaluation recommends a behavioral specialist consultant (BSC) for four hours a week, a mobile therapist for four hours a week, a therapeutic staff support for 20 hours a week (S-9, p. 5). These supports were due mainly to Student's conduct disorder.
11. The District provided a permission to evaluate on February 10, 2006 (S-13). The Parents provided their consent for the evaluation.
12. School health records provided to the District in 2006 indicate problems with bipolar, separation anxiety, PDD tendencies, among other problems (S-15).
13. On May 18, 2005 [Mental Health Agency #2] diagnosed Student with bipolar disorder, stuttering, and oppositional defiance disorder (S-6).
14. A wraparound treatment plan was developed on May 19, 2005 (S-16). The diagnosis listed are intermittent explosive, PDD-NOS, ODD, and parent-child relationship problems.
15. On August 25, 2005 [Mental Health Agency] completed a psychiatric/psychological evaluation (S-8). This evaluation provided a

diagnosis of bipolar disorder and stuttering. Student's teacher stated Student was aggressive in the classroom (S-8, p. 2).

16. The Parent stated she wanted Student registered and evaluated for kindergarten on February 8, 2006 (S-10). The Parents provided copies of Student's records including an IEP, an ER, a PT and OT report (S-10, p. 2).
17. The District referred Student for an evaluation on February 10, 2006 (S-11). The reason listed for the referral is early intervention.
18. The District issued an evaluation report on June 5, 2006 (S-18). This report found Student eligible for special education and related services as a student with serious emotional disturbance (S-18, p. 14). The evaluation also recommends an updated evaluation from a school-based physical therapist (S-18, p. 15).
19. The District sent a copy of the evaluation report to the Parents on June 6, 2006 (S-19).
20. An early intervention IEP was completed on June 8, 2006 (S-20). This IEP states Student is unsafe to be in the classroom (S-20, p. 3).
21. The District requested placement at [redacted] School for a full-time placement on July 28, 2006 (S-21).
22. An evaluation report from [Mental Health Agency] found a diagnosis of Asperger's Syndrome on August 14, 2006 (S-23, p. 4).

23. On August 14, 2006 the Parents signed an IEP meeting waiver stating they waived the time period between a multidisciplinary evaluation and an IEP meeting (S-25).
24. An IEP meeting was held on August 14, 2006 (S-24). This IEP provided for speech, occupational therapy, and physical therapy, and placement at [School 2].
25. A copy of the same IEP (S-24) from the Parents (P-1) has emotional support listed as services instead of learning support services.
26. The Parents signed an IEP invitation on August 14, 2006 (S-27).
27. The District initiated a referral to the IU on August 15, 2006 (S-30). The purpose of the referral was to obtain an emotional support placement for the 2006-2007 school year.
28. A Notice of Recommended Educational Placement (NOREP) was issued on August 15, 2006 (S-28). This NOREP recommended a Part-Time emotional support at School 2 in [town redacted], PA for 60-day interim placement. The Parent approved this recommendation on August 21, 2006 (S-28, p. 2).
29. The District sent a letter to School 2 on August 15, 2006 seeking continued implementation of Student's program (S-29).
30. There is evidence a fax was sent to the District on September 21, 2006 containing an evaluation of Student (S-26).
31. On November 17, 2006 the Parent signed a release of records to help obtain a private school placement (S-34).

32. On November 21, 2006, the District initiated referrals to [Private Schools A, B, C, D and E]. (S-35).
33. On November 27, 2006 School A rejected Student for admission (S-36).
34. On November 28, 2006 School C sent a letter to the Parent approving an intake evaluation for admission (S-37).
35. On December 1, 2006 School D rejected Student for admission due to its focus on autism (S-40).
36. On December 6, 2006 School C sent a letter to the District accepting Student (S-41).
37. On December 7, 2006 School C sent a letter to the Parent stating the admissions team would accept Student (S-42).
38. On December 7, 2006 School E rejected Student for admission based on the history of aggression (S-44).
39. The District issued a NOREP on December 7, 2006 (S-43). This NOREP recommended full-time leaning support with behavioral support at School C. The Parent approved the recommendation.
40. On December 7, 2006 the Parent signed the paperwork required by the Pennsylvania Department of Education for reimbursement to an approved private school (S-45).
41. On December 26, 2006 [Mental Health Agency] developed goals for continuation of Student's wraparound service (S-46).
42. [Mental Health Agency] completed a psychological evaluation report on January 18, 2007 (S-47). This report recommends efforts to develop

socialization, physical and occupational therapy, and another psychological evaluation in four months.

43. School C issued a progress report for January 2007 (S-51). This report indicates Student has only been there a few weeks and that Student can be very disrespectful.
44. On January 19, 2007 the Parent requested a physical therapy evaluation (S-49).
45. A meeting was held on February 12, 2007 to discuss Student's behaviors (P-3). The Parent complained about School C and requested placement at School E (NT 401, 427).
46. On February 13, 2007 the District initiated the reevaluation process (S-52).
47. The March 2007 report card from School C indicates no specific grades but contain numerous comments about Student's behaviors (S-65).
48. The District completed a physical therapy evaluation on March 7, 2007 (S-58). The report recommends weekly physical therapy to promote age appropriate gross motor skills, with focus on higher level balance and coordination skills as well as ball skills, to facilitate interaction/play with peers (during both gym class and recess).
49. [Redacted] Occupational Therapy Services completed an occupational therapy evaluation on March 7, 2007 (S-59). This report concludes Student requires extra assistance to participate in Student's curriculum.

50. On March 26, 2007 the District sought a release from the Parents to release documents to out of district placements (S-63).
51. Scores from the Group Reading Assessment and Diagnostic Evaluation on May 1, 2007 indicate possible problems with oral language skills (S-67).
52. The IU sent an email to the District on March 29, 2007 stating occupational therapy services will begin on April 16, 2007 (S-64).
53. The District issued an evaluation report on May 29, 2007 (S-68). This evaluation report concludes a disability category of autism along with that of emotional disturbance.
54. The District issued an IEP on May 30, 2007 (S-70). This IEP was developed for the 2007-2008 school year.
55. The District issued a NOREP on May 30, 2007 (S-69). This NOREP provided ESY services for the summer of 2007.
56. There are numerous reports of problems on the bus during the 2006-2007 school year (S-32). Reports include spitting, hitting, shouting, kicking, and spreading feces (NT 522).
57. School C provided a notice of no more transportation from June 4, 2007 to September 2007 (S-72). This was based on Student's statements that Student would bring a gun on the bus and kill people (NT 546).
58. The Parent agreed to a risk assessment on June 4, 2007 for the purpose of determining whether Student was a danger to self and/or others (S-73).

59. On June 5, 2007 the District sent a letter to the Parents enclosing the reevaluation report and the physical therapy report (S-75).
60. On June 7, 2007 the District requested a risk assessment based on threats by Student to kill others with a gun (S-76). Also, Student was suspended from the bus for nine days.
61. On June 11, 2007 School C sent a letter to the District including a copy of the IEP and ER (S-77).
62. On June 11, 2007 School C sent a copy of the IEP and ER to the Parents (S-78).
63. On June 27, 2007 the District sent a letter to the Parent regarding the need for the risk assessment (S-80).
64. On July 17, 2007 the Parent contacted the District regarding problems in ESY and bussing (S-83, p. 2).
65. On July 18, 2007 the District sought a release from the Parents to release documents to out of district placements (S-84).
66. On July 23, 2007 the IU completed a psychiatric assessment for risk assessment. The diagnosis and recommendations include Asperger's Syndrome and Oppositional Defiant Disorder (S-86).
67. Student currently lives in [another] School District (NT 624).

III. ISSUES PRESENTED

- 1) Is Student eligible for compensatory education for inappropriate services for a denial of a free appropriate public education for the school year of 2006-2007 and the summer of 2007?

- 2) Is Student eligible for compensatory education for a denial of a free appropriate public education for excessive transportation time?

- 3) What is the appropriate amount of compensatory education due for a lack of related services during the 2006-2007 school year?

IV. DISCUSSION AND CONCLUSION OF THE LAW

Student's Educational Placement

The legal standard to which the District is held, in educational matters such as this, is clearly established by statute and the courts. The IDEA, as interpreted by the Supreme Court, does not require states to develop IEP's that "maximize the potential of handicapped children," but merely requires the provision of "some" educational benefit. *See Board of Education v. Rowley*, 458 U.S. 176, 189 (1982). In further defining "some" educational benefit, the Court held IDEA requires that the public school program provide access to specialized instruction and related services which are "reasonably calculated" to provide the student with some educational benefit. *Id.* at 207-208. Further clarified by the Second Circuit, what

the statute guarantees is an “appropriate” education, “not one that provides everything that might be thought desirable by ‘loving parents.’” *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989). The Third Circuit has adopted this minimal standard for educational benefit, and has refined it to mean that more than “trivial” or “de minimus” benefit is required. *See Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 1179 (3d Cir. 1998), *cert. denied* 488 U.S. 1030 (1989). *See also Carlisle Area School v. Scott P.*, 62 F.3d 520, 533-34 (3d Cir. 1995), quoting *Rowley*, 458 U.S. at 201; (School districts “need not provide the optimal level of services, or even a level that would confirm additional benefits, since the IEP required by IDEA represents only a “basic floor of opportunity”).

Moreover, the Third Circuit has determined that a student’s demonstrated progress in an educational program is sufficient to show that a school district’s IEP allows for significant learning and provides meaningful benefit as necessary to satisfy the *Rowley* interpretation of IDEA’s FAPE standard. *See Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 242 (3d Cir. 1999). Given that actual progress establishes that a student with a disability received an appropriate educational benefit, it is therefore also part of the determination as to whether a reimbursement award is due.

The Parents as a part of this case that Student was inappropriately not allowed to attend regular education and placed in a more restrictive setting.

A parallel goal of the IDEA is that disabled children be educated in classrooms with non-handicapped children “to the maximum extent appropriate.”

20 U.S.C. § 1401(33). The IDEA's mainstreaming requirement has been construed to "prohibit a school from placing a child with disabilities outside of a regular classroom if educating the child in a regular classroom with supplementary aides and support services can be achieved satisfactorily." *Oberti v. Board of Education*, 995 F.2d 1204, 1207 (3d Cir. 1993). The IDEA requires states to "educate handicapped children with non-handicapped children whenever possible." *Rowley v. Board of Education of Hendrick Hudson Central School District*, 458 U.S. 176, 202 (1982). Therefore, a school district is obliged to balance the goal of providing a student with some educational benefit with a goal of providing that benefit in the least restrictive environment. *Hall v. Shawnee Mission Sch. Dist.*, 856 F.Supp. 1521, 1528 (D. Kan. 1994).

Private special education placements are among the most restrictive on the IDEA's spectrum of placements. Given their restrictive nature, removal of a student with disabilities to a private setting has only been held to comply with the LRE mandate in extremely limited situations for students with severe disabilities, who prove themselves unable to function in a more mainstream environment. In *Carlisle*, the Third Circuit recognized, at least with respect to residential placements, that:

Residential placement at MSB is not, of course, the least restrictive educational environment. The least restrictive environment is the one that, to the greatest extent possible, satisfactorily educates disabled children together with children who are not disabled, in the same school the disabled child would attend if the child were not disabled. *See* 20 U.S.C. § 1412(5)(B) (requiring maximal educational integration of disabled children with children who are not disabled, and restricting separate schooling to situations when the nature or severity of the disability is such that education in regular classes with

the use of supplementary aids and services cannot be achieved satisfactorily).

Id. at 1024 (citations omitted; emphasis supplied).

Clearly then, a private placement can be consistent with the IDEA's LRE requirement for some students with disabilities

In this instance Student has not been educated in a regular education classroom. Prior to kindergarten, Student attended the Intermediate Unit (IU) early intervention program to address Student's violence and aggression problems (S-1). On the child and family profile form for the IU the Parent(s) list multiple problems with violence and aggression, most notably violence towards Student's baby brother. This form was completed when Student was less than three years of age (S-1, p. 1).

Student received services at the IU and at the seven-month reevaluation Student's mother still described Student as violent (S-3). Student was still three-years of age.

Student continued to receive services from the IU in [redacted] Program while Student was four and five years of age. During this time there are numerous examples that Student was extremely violent and aggressive towards others, which included hitting, kicking, screaming, cursing, punching others, and threatening behaviors (S-17). There are also notations of Student calling the teacher a bitch, and a fucking asshole (S-17, p. 16).

At the time for enrollment into kindergarten Student was diagnosed with: bipolar disorder, ADHD, separation anxiety, conduct disorder, intermittent explosive disorder, pervasive developmental disorder, oppositional defiant disorder,

and parent/child relation problems (S-18, see also NT 1185). Clearly, Student was not a typical student applying for a first experience in school.

The District then completed an evaluation of Student, led by Dr. who testified at length about his evaluation (NT 47-196). The Parents argue successfully that Dr. did not complete a kindergarten readiness scale relating to reading and writing (NT 122). However, as noted above, Student was a student who engaged in frequent violent behaviors in multiple settings, Dr.'s evaluation focused on the problem behaviors Student exhibited and made recommendations based on that focus after consulting with the teachers and reviewing Student's previous behavior.

Dr. made the recommendation that Student needed a more restrictive placement than a regular education classroom (NT 173). Given the numerous examples of severe aggressive and violent behaviors Student demonstrated during the preschool setting (NT 117, 1244, 1324) Student's behavior would clearly limit Student's ability to learn, and of those around Student.

There was discussions about half-day kindergarten program (NT 1149-1150), however, Student was provided services at the School 2 partial hospitalization program (NT 1164).

The Parents argued that at no time Student was provided an opportunity to participate in a regular classroom, and only after that failed should a more restrictive setting be considered. While that is the recommended method of ensuring students with disabilities are not immediately placed in a more restrictive setting and denied opportunities for interaction with non-disabled peers based solely on their disability (see for example *Oberti*). That is not the case here. It is clear

through the testimony and evidence presented that numerous supports in very intensive settings were tried with Student as a part of Student's preschool experience. It is also clear that Student still engaged in severe and aggressive behaviors necessitating a more restrictive setting. The District was correct in recommending a placement in a more restrictive setting.

Parents Claim for Compensatory Education

Parents make a claim for compensatory education. Compensatory education may be an appropriate equitable remedy only when the responsible educational authority has failed to provide a child with a disability with an appropriate education as required by the IDEA. The purpose of compensatory education is to replace lost educational services. *See Todd v. Andrews*, 933 F.2d 1576 (11th Cir. 1991). *See also Lester H. v. Gilhool*, 916 F.2d 865 (3rd Cir. 1990); (An IDEA eligible student is entitled to an award of compensatory education only if FAPE is denied by the school district); and *M.C. v. Central Regional Sch. Dist.*, 81 F.3d 389 (3rd Cir. 1996). Here, Student did make meaningful educational progress during the school years in question.

This Hearing Officer has reviewed carefully the educational programs in effect for Student.² For numerous reasons as described below, this Hearing Officer concludes the IEP and program and services implemented during the this period were appropriate.

²The analysis of the content of the IEP is very similar to the analysis and content of the IEP as found in appeals panel decision of September 15, 2003. *In re K.G.*, Pa. SEA no. 1400.

After attending the IU program Student was transferred to School 2 and Student stayed there for the first sixty days of Student's kindergarten placement due to request from the Parents (S-28). School 2 was a partial hospitalization program, and it is clear Student received no occupational therapy, physical therapy, and speech and language therapy while Student was there (NT 37). It is also clear the District knew little about the program for Student at School 2 and that Student made little academic progress (NT 296, 300, 372-373).

After leaving School 2, Student was transferred to School C (NT 1314), where Student attended from December 2006 until the end of the ESY program in the summer of 2007. The Parents allege Student did not make progress and actually regressed during that time (NT 853-854).

Teachers from School C testified that Student made progress both socially and academically. Specifically, the teachers stated they spent a lot of time working with Student on social skill building, feeling identification and expression, and working to develop appropriate social and emotional skills (NT 1230-1449). They testified that Student made progress in dealing with Student's aggression, and also with Student's behavioral needs (NT 1244). Additionally, testimony from Student's teachers indicates that while Student was at School C Student did not try to hurt a teacher or another student in any way (NT 1293-1294). This is important to note given Student's history of violence and aggression towards others.

Parents provided no information indicating Student did not make progress or that Student regressed (other than language problems at home) (NT 854). Again, they make the argument that Student was not afforded an opportunity for

integration with non-disabled peers (Parent's Closing at 12). However, as noted above this was a student that was dangerous to self and others and those behaviors needed to be addressed before Student could be integrated with others.

Throughout the testimony and evidence presented, the Parents were not able to demonstrate that Student did not receive a free appropriate public education. There are some procedural violations, however, Student did make progress and Student's behavior did improve (see for example the teachers testimony at NT 1230-1449).

The District admits it owes Student compensatory education for occupational therapy and physical therapy (Parents Closing at 14). Student was not provided occupational therapy services from December 2006 until the April 16, 2007, missing 17 weeks of instruction, or 8.5 hours of instruction. Student was not provided physical therapy from December 2006 until June 2007, at the rate of 30 minutes per month for a total of 3.5 hours. The Parents argue that Student should have received occupational therapy, physical therapy and speech therapy while Student attended School 2 for 60 days. The District maintains it was not responsible for providing services during that time. Student should have received occupational and physical therapy while he attended School 2 as it was listed in Student's IEP. Therefore, in addition to what the District stipulated in their closing argument (District Closing at 15), Student is due the equivalent of eight weeks of occupational therapy, four hours of instruction, and two months of physical therapy or one hour of instruction.

Transportation

The Parents allege a denial of FAPE due to excessive time spent in providing transportation to Student. PDE has guidelines regarding the length of transportation to and from school, specifically recommending a child should not spend more than one hour on a bus going to school and one hour returning from school. These are recommended guidelines. This is not a definite limit, but a recommendation. There was no evidence or testimony forwarded as a part of this Hearing that the length of transportation for Student to School C denied Student FAPE. Actually, the opposite is true. As was found earlier in this Decision, the placement and progress Student made at School C indicate Student was provided FAPE and received an appropriate education. Yes, it would have been nicer if it was closer to Student's home, but Student's severe and aggressive behaviors demanded the services and education Student received at School C.

V. ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that Student to be awarded four hours of compensatory education in occupational therapy and one hour of compensatory education in physical therapy. All other claims are dismissed.

Date

Hearing Officer