Pennsylvania
Special Education Hearing Officer

DECISION

Child's Name: TQ

Date of Birth: xx/xx/xx

Dates of Hearing:
1/23/08, 2/6/08, 2/25/08, 3/6/08
CLOSED HEARING
ODR #8330/07-08 KE

Parties to the Hearing:	Representative:
	Dennis C. McAndrews. Esquire McAndrews Law Offices, P.C. 30 Cassatt Avenue Berwyn, PA 19312
Springfield Township School District 1901 Paper Mill Road Oreland, PA 19075	Claudia L. Huot, Esquire Wisler Pearlstine, LLP Office Court at Walton Point 484 Norristown Road, Suite 100 Blue Bell, PA 19422
Date Record Closed:	March 21, 2008
Date of Decision:	April 5, 2008
Hearing Officer:	William F. Culleton, Jr., Esquire

INTRODUCTION AND PROCEDURAL HISTORY

Student is a xx year old eligible resident of the Springfield Township School District (District). (NT 14.) He is identified with emotional disturbance. Ibid. The Student has a history of diagnoses for depressive disorder, anxiety disorder, alcohol and substance abuse and sleep disorder. (P-1 p. 15, S-37.) He has exhibited school attendance problems. Parents requested due process, seeking an appropriate interim program and placement and compensatory education from the beginning of the 2005-2006 school year until an appropriate program and placement should be provided.

The District resisted the proposed relief, arguing that the Student and the Parents had repeatedly interfered with its attempts to perform multidisciplinary evaluations. It asserted that the District had offered and provided a FAPE during the years in question, and that the Parents' request for relief was partially barred by the relevant limitations period in the IDEIA.

The Parent[1] requested a comprehensive educational evaluation in April 2005. The District issued an initial evaluation report in September 2006, and it offered an IEP in October 2006. In August 2007, the District received a private psychoeducational report. The District issued a reevaluation report in September 2007[2], and it offered a revised IEP in September 2007. The Parents requested due process by letter of counsel dated November 29, 2007, which was received by the Office for Dispute Resolution on December 5, 2007. The District convened a resolution session on December 19, 2007, with no agreement. Four due process hearing sessions were held between January 23, 2008 and March 6, 2008. The parties agreed to provide written summations and briefs on March 21, 2008, and the record[3] closed on that date.

---

[1] Only the Mother testified; therefore, all references to the Parent refer to the Mother.

[2] The reevaluation report was the product of an agreement by the Parents to withdraw a pending due process request on condition that the District perform the reevaluation and include a publicly funded psychiatric evaluation.

[3] The Parents' exhibits in this case include a two page educational record for another student. This occurs in P-86, a set of reports that were introduced in evidence concerning the District's screening program known as "SITE". These reports pertained to the 2004-2005 school year,

ISSUES

1. From November 29, 2005 until November 29, 2007, did the District fail to comply with its Child Find obligations under IDEA to identify the Student as a Child with a Disability?

2. From November 29, 2005 until November 29, 2007, did the District fail to offer or provide the Student with a reasonable opportunity to receive meaningful educational benefit?

3. From May 2006 until June 2007, did the District discriminate against the Student on account of his disability by prosecuting a truancy action against him and his parents, and subsequently prosecuting a dependency action?

4. Were the District's Evaluation of September 26, 2006 and re-evaluation of October 12, 2007 appropriate?

5. Should the hearing officer award compensatory education for the period from November 29, 2005 until November 29, 2007?

6. Should the hearing officer award reimbursement of the costs of an independent educational evaluation dated August 10, 2007?

7. Should the hearing officer order the District to convene an IEP team meeting and develop an appropriate IEP?

---

but were admitted by stipulation, with the exception of the pages pertaining to the other student, pages 16 and 17. The hearing officer excluded these two pages from evidence over the objection of Parents' counsel, and reserved judgment on whether or not they are relevant. (NT 629-635.) He now finds them to be irrelevant and excludes them from evidence. However, Parents' counsel argued that the documents should be preserved in the record for appeal. The hearing officer therefore has copied and redacted these two pages, and enclosed the original "hearing officer's" exhibit in an envelope marked "confidential" which he will forward to ODR with the exhibits in this case.

FINDINGS OF FACT

1. By letter dated April 19, 2005, the Parent requested that the District school psychologist evaluate the Student concerning his oppositional behavior "about going to school." The Parent did not at this time request a comprehensive psychoeducational evaluation. (NT 172, 372-274; P-2, S-5.)

2. As of April 19, 2005, and continuously throughout all relevant time periods, the District knew or should have known that the Student was suffering from an emotional or psychological problem, including possible depression, which may have resulted in his failure to attend school regularly, a behavior that directly interfered with the Student's opportunity to benefit from education. (NT 433-434; P-2 to 3, P-6 to 8, P-19 p. 4, P-20 to 25, P-26, P-27 to P-28.)

3. In May 2005, the District's disciplinarian filed a private criminal complaint in juvenile court against the Parent based upon the Student's truancy. (P-1 p. 4-6.)

4. As of January 2006, the District was on notice of the Student's severe problem with seasonal allergies and its potential impact on his attendance. (S-11.)

5. Possible depression, anxiety disorder and substance abuse disorder were brought to the District's attention repeatedly throughout the 2005-2006 school year. (NT 379-383, 385-386; P-7, P-10.)

6. The Student's academic potential is very high. (P-45.)

7. The Parent cooperated with the District's personnel and welcomed team based decision making. (P-32, S-27, S-28.)

8. The District's written policy on attendance, truancy and excused absence did not have a procedure for excusing absences based upon medical or mental health reasons. As a consequence the Parent did not have guidance as to the necessary content of medical

notes or the frequency with which they were needed. (NT 140, 191-194; P-84, S-27.)

9. During the 2005-2006 school year, the District's disciplinarian declined to excuse lateness, even of a few minutes, without a doctor's note. The notes provided by the Parent often were rejected as inspecific. (NT 79-82; S-27.)

10. The District commenced a multidisciplinary evaluation in April 2005 and made efforts to complete it during the summer. (NT 370-375, 378-381; P-18, S-2 to 5.)

11. In September 2005, the Parent and the District's school psychologist spoke by telephone and the Parent requested that the evaluation not be completed. The District complied with the Parent's request. (NT 380-381, 481-482; P-9.)

12. The Student's attendance problems continued throughout the 2005-2006 school year. (NT 380, 388; S-5, 9, 17.)

13. There were indications of social isolation at home during the 2005-2006 school year; however, teachers reported adequate social interaction in school. (P-5, P-8, P-18, S-14.)

14. The District was on notice as of March 2006 that the Student's psychiatrist considered punitive approaches to the Student's truancy to be inappropriate. However, this advice was not provided directly by the doctor. (P-18, S-23, S-24.)

15. In the 2006-2007 school year, teachers' reports about the Student's social skills were mixed, but several teachers observed and reported that the Student was exhibiting social isolation and deficits in social skills. (P-28 to 31.)

16. The District concluded that the Student was able to use social skills during instructional time, such as working with partners or in small groups, but tended to isolate himself at other times during the school day. (P-33.)

17. There were indications of chronic physical complaints, which were said to cause the Student's absences and lateness. (P-8, P-18, S-11.)

18. In March 2006, the Student was diagnosed with depression and anxiety by a private psychiatrist. (P-18.)

19. In March 2006, the District sought permission to evaluate. (P-10.)

20. The District performed an initial evaluation during the period from March 2006 until September 2006 when the Evaluation Report was issued. (P-10 to 15, P-18.)

21. The 2006 ER was based upon an interview with and observation of the Student, parental and teacher input, and multiple administrations of one standardized inventory to the Parent only. The District was prepared to utilize additional instruments, but the Student refused to participate. The psychologist also considered medical and other health care reports in the records. (NT 385-394, 476-481; P-18.)

22. The Student was highly resistant and uncooperative, and as a result, the District's school psychologist made judgments not to seek some sources of data that would ordinarily have been sought, but depended upon the Student's cooperation. (NT 508-511; P-18 p. 6-7.)

23. In September 2006, the school psychologist encouraged the filing of truancy papers in order to put pressure on the Parents to cooperate with testing and evaluation. (P-1 p. 18 – 20.)

24. In September 2006, the District classified the Student with serious emotional disturbance based upon diagnoses of depression and anxiety, and recommended itinerant emotional support services, social services and consideration of alternative educational programming in the form of attending community college classes. (P-18.)

25. In October 2006, the District was notified that the Student was seeing a therapist. (P-33 p. 3.)

26. In November 2006, the District was notified that the Student's psychiatrist diagnosed him with anxiety disorder and sleep disorder and concluded that this was causing the Student's truancy problems. (P-33 p. 3, S-22, S-23.)

27. As of November 2006, the District was on notice of the Student's severe sleep disorder and diagnosed anxiety disorder, and their possible impact on his attendance. (S-22, S-23.)

28. In December 2006, the District was notified that the Student's psychiatrist recommended a later start time for school. (P-33 p. 3.)

29. The school disciplinarian did not accept these notes as sufficient to allow excuses for non-attendance and lateness. (NT 79-82, 97-102, 290-291.)

30. Frequently during the relevant period, the District applied "non-credit status" as a consequence of the Student's truancy. Under this disciplinary rule, the Student handed in "make up" work for his missed assignments but was not permitted to receive credit for the work unless his attendance improved. This had the effect of increasing the Student's anxiety about attending school and increasing his resistance to attending. (NT 141, 163-164; P-1 p. 120.)

31. The District did not consider modifying or eliminating that disciplinary policy for the Student, even though non-attendance was considered to be a manifestation of the Student's disability. This was contrary to school policy prohibiting application of aversive consequences for manifestations of disability. The Student's only alternatives were to accept this disciplinary consequence and thus lose credit or seek education at a different school. (NT 98-99, 295, 641-646, 861-862.)

32. In October 2006, the District offered an IEP which set goals for school attendance, transition services, and specially designed instruction through the itinerant emotional support teacher, consisting of weekly half hour meetings to review attendance, academic progress and stress, and to teach coping skills. (P-19, P-57.)

33. The District placed the Student in itinerant emotional support in October 2006. (P-20.)

34. The itinerant emotional support teacher has been effective and helpful to the Student when he is in school, but her services are limited to the school building. (NT 220.)

35. The transition plan was not specific because the Student did not specify any goals, and school personnel were not familiar enough with him to address this issue at the time of the IEP meeting. (NT 200-201.)

36. From October to November 2006, the Student continued to exhibit absenteeism and lateness. (P-33 p. 3.)

37. In November 2006, the District attempted to accommodate the Student's or block of the day to the last. (P-33 p. 3.)

38. In December 2006, the Student objected to this schedule change and the school counselor offered an agreement by which the Student could return to first period of physics if he was present for ten school days in a row without absence or lateness. The Student was unable to meet this requirement. (P-33 p. 3, P-40.)

39. In December 2006, the District scheduled an IEP meeting but the Parent and Student did not attend. Instead, they spoke with the school principal and it was arranged that the Student could return to early classes if he attended two classes per day for five days. (P-33 p. 3.)

40. In November 2006 the District filed juvenile dependency papers against the Student and his

Parents, based upon his truancy. Prior to filing and again in pretrial proceedings, the school disciplinarian declined to discuss the Student's disability and ways to accommodate it to avoid the truancy action, consistent with the Student's IEP. (NT 99-102, 110-119, 209, 306-309; P-1 p. 25, 26, 28, 38, 42, S-27, S-28.)

41. The Student perceived this proceeding as a threat to remove him from his home, and experienced substantially increased anxiety as a result from December 2006 to April 2007 when the court hearing took place. (NT 99-102, 289, 483-485, 878-880; P-1 p. 78, P-25.)

42. The Parent requested her doctor's support for homebound instruction to allow the Student to get credit for his work, because the Student's work was not honored pursuant to the school's non-credit policy. (NT 205-207.)

43. In January 2007, the District changed the placement to Homebound, based upon the recommendation of the Student's psychiatrist, and without an IEP or provision of special education services. The psychiatrist indicated that the purpose was for diagnosis and medication trials. (NT 692-691; P-22, 24, 33 p. 3, S-36, S-37.)

44. In March 2007, the Student returned to school with itinerant emotional support services. (P-23.)

45. The Student's attendance declined substantially during the 2006-2007 school year, and he was absent in the period immediately after his return from homebound placement in April 2007. (NT 771; P-34, P-45 p. 3.)

46. The District's disciplinarian filed an additional juvenile dependency petition to add the allegations of additional days of unexcused absence and forwarded this to the court before the hearing on the November petition. (NT 312-315; P-1 p. 80.)

47. In April 2007, the Student pled guilty to truancy in juvenile court and was placed in protective supervision for monitoring of school attendance by a

private agency contracted by the court. (P-33 p. 3.)

48. The Student experienced heightened anxiety and self destructive ideation during the period prior to adjudication. (NT 91-94, 98-103, 111-114, 158, 203-206; S-54 p. 2.)

49. The student's attendance improved substantially during the period of protective supervision, and the Parent reported an improvement in the Student's mood during that period of time. (NT 211-213; P-33 p. 3-4,S-54 p. 2.)

50. In the Spring of 2007, the Parent requested due process in order to obtain an independent educational evaluation at public expense. (S-45.)

51. In May 2007, pursuant to a resolution session, the District offered to re-evaluate the Student, including a psychiatric evaluation. (P-27.)

52. The Student's grades reflect a substantial adverse impact that his absenteeism had on his ability to benefit from educational services. (NT 163; P-33.)

53. In June 2007, the District provided a functional behavior assessment as part of the re-evaluation agreed upon. This assessment concluded that there were no antecedents at school that contributed to the Student's absenteeism, and that the function of absenteeism was to alleviate anxiety and get more sleep. (P-33.)

54. The court's jurisdiction ended and the Student was released from the program as of September 2007. (P-40.)

55. The District provided a re-evaluation report in September 2007, amended in October 2007. (P-40.)

56. The September 2007 re-evaluation report noted that both of the independent evaluation reports provided to the District had supported continuation of the court-ordered supervision until it could be

faded as the Student learned to attend school independently. (P-40.)

57. The September 2007 re-evaluation report recommended continuation of itinerant emotional support, addition of itinerant learning support for purposes of relieving stress by giving the Student additional time during the school day in which to complete school assignments, and consideration of accepting community college credits or reducing case load. (P-40.)

58. In September 2007, the District offered an IEP providing goals for attendance; one period per week of itinerant emotional support; and five periods per week of learning support, each period of which would be eighty-two minutes long. In addition, the IEP offered related services in the form of a counseling service in the home every morning to help the Student get up and go to school. (NT 164-P-45.)

59. After the court ordered supervision expired because the Student aged out, the Student's absenteeism recurred. (NT 771; P-34, P-40, P-56.)

60. The Student expressed embarrassment over being assigned to the learning support classroom and the school's itinerant emotional support counselor arranged to accommodate this need by obtaining permission for the Student to work in the library. (P-48.)

61. In November 2007, the District offered a behavior intervention plan with strategies for intervention to encourage attendance. (NT 166-168; S-81.)

62. The strategies were based upon the services of the counseling service that was to travel to the Student's home to assist him in getting to school in the morning. (P-65, S-81.)

63. The plan provided two meetings with emotional support staff per week, a doubling of the previous level. (S-81.)

64. The plan provided for the Student to elect to attend his first class of the day in the last period of the day. (S-81.)

65. The plan provided that the in-home counselor would decide if absences were to be excused or not excused in conjunction with the Student and the Parent. Doctor notes were no longer required. (NT 166-168, 223; S-81.)

66. The behavior intervention plan set forth a measurable annual goal of 80% attendance for the school year and a rule for use of non-credit status that permitted credit to be awarded based upon 80% attendance in eight out of ten days. (S-81.)

67. In December 2007, the Student's substantial absences jeopardized his opportunity to graduate. During the first half of the 2007-2008 school year, the Student failed to meet virtually all of his goals. (NT 771; P-91, S-82, S-83, S-65.)

68. In December 2007, the District reinstated the Student's credit status to enable him to continue to work toward graduation. (P-62.)

DISCUSSION AND CONCLUSIONS OF LAW

The District was and is obligated to provide the Student with a free and appropriate public education ("FAPE"), in accordance with an Individualized Education Plan reasonably calculated to enable the child to receive meaningful educational benefit. Bd. of Educ. v. Rowley, 458 U.S. 176, 206 (1982). "The education provided must be sufficient to confer some educational benefit upon the handicapped child." L. E. v. Ramsey Bd. of Educ., 435 F.3d 384, 390 (3d Cir. 2006). Under the IDEA, an IEP must include goals, "including academic and functional goals designed to … meet each of the child's other educational needs that result from the child's disability … ." 34 C.F.R.§ 200.320(a). See, M.C. v. Central Regional School District, 81 F. 3d 389, 393-394 (3rd Cir. 1996). These needs include behavioral, social and emotional skills. Ibid. In determining whether or not progress was meaningful, the hearing officer is guided by the principle that meaningful benefit is to be gauged in relationship to the student's intellectual

potential. In re Educational Assignment of M.P., Spec. Educ. Op. 1812 at 7 n. 51 (April 12, 2007).

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

In a gifted education case, the Commonwealth Court rejected the M.C. standard for compensatory education, holding that the student is entitled to an amount of compensatory education reasonably calculated to bring him to the position that he would have occupied but for the school district's failure to provide a FAPE. B.C. v. Penn Manor School District, 906 A.2d 642 (Pa. Cmwlth. 2006). Regardless of whether or not this gifted case applies in an IDEA setting, the hearing officer will not apply the B.C. standard here. It is not possible on this record to determine what position Student would have occupied had he received FAPE when it was due him. Cf. In Re A.Z. and the Warwick School District, Special Education Opinion No. 1783 (2006) (compensatory education awards would be the same whether Appeals Panel used the M.C. analysis or the B.C. analysis). Therefore, the Student will be made whole with an order structured under the traditional test set forth in M.C.

Since the Parents here are challenging the provision of FAPE, they are the moving party and they bear the burden of persuasion in the administrative hearing. Schaffer v. Weast, 546 U.S. 49, 62 (2005).

IDEA LIMITATION PERIOD

Parents based their claims on both the IDEA and §504 of the Rehabilitation Act of 1973. (NT 16-31.) This is

significant especially in this matter because the limitation period set forth in the IDEA operates to remove all IDEA issues from consideration for the period between April 2005, when the Parent first asked the District to perform a psychological evaluation of the Student's frequent refusal to attend school, and November 29, 2007, when the Parent filed her Complaint. (NT 46-47.)

Although Parent's counsel argues in his written summation that the IDEA limitations period does not apply, this argument comes too late in the process. At the outset of the hearing, Parent, through counsel,[4] conceded that, for purposes of this matter only, the IDEA limitation period would be considered to have barred all IDEA claims arising prior to a date two years before the Parent filed her complaint. (NT 44-49.) Therefore, by agreement, the issues for the hearing were limited to IDEA claims arising on or after November 29, 2005. Ibid.[5]

This makes relevant the Parent's claim that the District failed to comply with its nondiscrimination obligations under §504.[6] The Parent asserts that the mandate of §504 includes a "child find" requirement, as well as a requirement to provide FAPE, and that the District failed to comply with both of these obligations with regard to the Student, from April 2005 until November 29, 2007. (NT 46-47; HO 1.)[7] Thus, the Parent argues, her §504 claims are unaffected by the IDEA limitations period, and indeed any limitations period. Consequently, she claims compensatory education services for this time period.

The Parent argues that "the additional protections of section 504 apply" where "section 504 confers different or greater rights" than the IDEA. (HO-1.) However, here the Parent did not assert "different or greater rights" than

[4] Parent was represented by the same firm throughout; however, the attorney handling the case originally left the firm, and the Parent's written closing was written by founder of the firm. (NT 356.)
[5] The hearing officer also limited the relevant time period in the hearing by ruling. He set the end of the relevant period as the date of filing of the complaint, November 29, 2007. (NT 49-55.)
[6] Additionally, the Parent asserts discrimination through the inappropriate referral of the Student's truancy to juvenile and family court processes in 2006, during the period in which IDEA claims are not barred by the IDEA limitation period. (NT 50-51.)
[7] The written summations are marked and included in the exhibits as HO-1 (Parents' Closing Argument) and HO-2 (District's Closing Statement).

what she could have asserted under the IDEA, except to argue that her §504 claims were not barred by the IDEA limitation period. The §504 "child find" does not differ materially from that set forth in the IDEA. 20 U.S.C. §1412(a)(3)(A); 34 C.F.R. §104.32(a). W.B. v. Matula, 67 F.2d 484, 501 (3rd Cir. 1995). Nor do the respective provisions for eligibility on account of emotional disturbance differ materially, at least as applied to the matter at hand. 34 C.F.R. §104.3(2)(i)(B); 34 C.F.R. §300.8(c)(4)(i). In this case, there was no disagreement that the Student qualified with a serious emotional disturbance.

Substantial authority rejects such an approach. Where, as here, the asserted wrongs are could be asserted under either the IDEA or §504, it would be inappropriate to allow a parent to circumvent the procedural limitations of the IDEA by simply asserting the same claims under §504. There is no basis to apply procedural standards that differ from those governing the application of the IDEIA to these facts. In the Matter of the Educational Assignment of P.P., A Student in the West Chester Area School District, Spec. Ed. Opinion 1757 (August 2006). To do so would be contrary to federal policy as expressed in the limitations period of the IDEIA. M.D. v. Southington Bd. Of Educ., 334 F.3d 217, 222 (2d Cir. 2003).

Moreover, federal cases instruct that the Pennsylvania two year statute of limitations for personal injury is to be imputed to section 504 claims. Sutton v. West Chester Area School District, 2004 U.S. Dist. LEXIS 7967 at 25 (E.D. Pa. 2004). Therefore, this hearing officer will not extend the applicable limitations period based upon the characterization of the claims as arising under §504.

CHILD FIND

The Parents assert that the District failed in its obligation to identify the Student as a child with a disability and provide him with either an IEP or a §504 service plan between November 29, 2005 and the date of the initial evaluation report in September 2006. The hearing officer finds that the District was on notice that the Student suffered from physical and/or emotional disabilities that would have justified at least a §504

service plan, as early as April 2005.[8] (FF 1-5.) Therefore, the hearing officer finds that as of November 29, 2005, the District was obligated to identify the Student as a child with a disability under §504 and provide him with a service plan. Compensatory education will be awarded, but not for the entire period in question.

On September 21, 2005, the District was in the process of evaluating the Student for special education, based upon facts that had been brought to its attention about the Student's disabilities and their relationship to his chronic absences. (FF 10-11.) However, the Parent specifically requested that the District desist in its efforts, giving as her reason that she wanted to support the Student's expressed desire to try to comply independently. The District complied in good faith with this request. The hearing officer finds that its decision to cooperate with the Parent was well founded, because the Student's problems presented a difficult issue of behavior management, and the District's judgment to work carefully with the Parent was taken in reasonable recognition of the delicacy of the Parent's efforts to secure regular attendance. The District's decision was fully in keeping with the principle inherent in the IDEA that local educational agencies should work with parents cooperatively for the best interests of students.

The hearing officer allows a reasonable period – sixty days - for reassessment of the efficacy of the Parent's efforts. Ridgewood, 172 F.3d supra. Thus, by November 20, 2005, the District's obligation to evaluate under §504 arose once again, and it failed to do so until March 17, 2006, when it commenced a multidisciplinary evaluation

[8] The District's witnesses testified that the numerous letters they received from various health care professionals were contradictory as to the nature of the Student's health issues and never clearly supported excusing the Student's lateness. (NT 433-436.) The hearing officer, weighing this testimony in light of the entire record, finds that the District was fairly on notice that health issues were preventing the Student from attending regularly, and that the District's close reading of these letters unfairly placed a high standard of proof upon the Parent to prove that the Student should be excused for his absences. The District showed no legal basis for such hypertechnical inflexibility. The hearing officer finds, on the contrary, that the many notes the parent provided placed the burden upon the District to inquire further in a reasonable way as to the appropriate course to take in light of the notes. Any ambiguity should have been resolved by reasonable consultation and further inquiry, not by simply rejecting the notes based on their linguistic flaws.

under the IDEA. (P-10.) Compensatory education will be awarded for that period of time. The award will be based upon full school days, because the hearing officer finds that the deprivation of opportunity was pervasive throughout the entire day for each day of deprivation.

The Parents argue that the District should have developed a §504 plan while it was evaluating the Student. Whatever the legal merits of such an argument, it does not apply in this case. The gravamen of this case is the Student's adamant refusal to accept any intervention, especially evaluation of any kind. The District's school psychologist was well aware of this, as the Student had resisted her efforts to evaluate during the Spring and summer of 2005. (FF 10, 11, 21, 22.) Therefore, it was reasonable for the District to conclude that the course most likely to yield a meaningful evaluation was to minimize the quantity of evaluative procedures, in hopes that the Student would tolerate enough procedures to yield a meaningful evaluation. (FF 21, 22.) Under these circumstances, the hearing officer will not award compensatory education from March 17, 2006 to September 2006, when the initial evaluation report was issued.[9]

OFFERED PROGRAM AND PLACEMENT

The hearing officer finds that the District offered a minimally adequate program and placement. The October 2006 and October 2007 IEPs addressed the Student's primary educational need: his absenteeism. (FF 32, 33, 58.) They provided adequate baseline information on this need, including in 2007 the District's finding that the Student was socially isolating himself. They set forth goals that were measurable. They provided an inclusive placement. They provided specially designed instruction in the form of weekly sessions with the emotional support teacher, aimed at providing training in problem solving and coping skills.

In 2007, the IEP provided additional specially designed instruction[10] in the form of learning support for a

[9] The hearing officer declines to order compensatory education for any period in excess of the sixty school days allowed for evaluation, 22Pa. Code §14.123, for equitable reasons. The Student's resistance not only would have delayed the course of the evaluation, but also required careful handling by the school psychologist. Under these circumstances, the hearing officer considers it equitably inappropriate to award compensatory education for any resultant delay.

[10] The Parents challenged the adequacy of the 2007 re-evaluation at the outset of the hearing, but the record is not adequately developed on

substantial amount of time each day, aimed at reducing the Student's anxiety by allowing him to engage essentially in self directed study while in school. (FF 58.) In addition, the IEP provided related services in the form of a counseling service provided in the home to help the Student get to school.

The Parent argues that these IEPs were inappropriate because of numerous deficiencies. They argue that the goals were not measurable, an argument that the hearing officer rejects. They argue that the goals were merely duplicative of the ordinary disciplinary process of monitoring and reporting absences. Here the hearing officer agrees that there is little if any difference between these goals and the normal attendance enforcement process; however, the primary educational need in this case was to increase attendance, and the District cannot be faulted for addressing it directly, nor for using its existing mechanisms to monitor progress.

The problem is that the goals are not in any way calibrated to the Student's existing baseline performance in attendance; rather they posit unrealistic attainment for this Student by requiring 80% attendance. There are no interim benchmarks or objectives that would provide a differentiated, step by step measurement of realistic short term progress.

The Parents argue that the allocation of time to emotional support services was inadequate. However, the hearing officer finds little support in the record for this position. Indeed, there was general testimony suggesting that fifty minutes per week was preferable to thirty, but this difference does not rise to the level of an inappropriate offer. There was no expert testimony criticizing the emotional support services; indeed, the record suggests that these services were efficacious. (FF 34.) The independent evaluation reports provided to the District supported continuation of the placement without criticizing the amount of time allocated for emotional support. (FF 56.) Weighing the evidence in the record, the hearing officer finds that the preponderance of evidence supports the reasonableness of the offer.

---

this issue. The hearing officer's review of this re-evaluation discloses no reason to find it inadequate, and thus this aspect of the Complaint is dismissed. (P-40.)

The Parents also argue that the IEPs fail to offer research-based therapeutic modalities, such as parent training, "cognitive therapy", and therapy directed at desensitization, which they claim would be appropriate for this Student's needs. No expert testimony nor learned treatise was introduced into evidence to prove that these failures rendered the IEPs inappropriate. Indeed, the District knew of no expert evaluation of the Student that had concluded that any of these modalities would be appropriate treatments for the Student's individual needs. (NT 869.) The Parents established that these modalities exist and are generally thought to apply to problems similar to those exhibited by the Student. They failed to introduce evidence that such modalities were indicated for the Student in particular. Thus, the Parents have failed to introduce preponderant evidence that the District's failure to offer these modalities rendered their offer inappropriate.

Moreover, as to the "cognitive therapy" and desensitization therapy, it is plain that any such offer would have been futile, given the Student's longstanding and adamant refusal of all psychotherapy or personal intervention into his psychological problems. (NT 840-841, 870-873.) The Student had refused both outside psychotherapy and more intensive intervention in the school setting, repeatedly over a long course of time, and adamantly. (FF 11, 21, 22, 38, 39, 60.) Thus, even without the guidance of expert testimony, the hearing officer declines to accept the notion that "cognitive therapy" or school avoidance desensitization would have been a magic therapeutic bullet in this case – despite its support in the literature for efficacy in addressing depression, some forms of anxiety and obsessive thinking that may contribute to depression and school avoidance. Even the Parent agreed that such an offer by the District would have been futile. (NT 227-228.)

As to parent training, this suggestion plainly has merit, but that is a far cry from saying that its absence rendered the IEPs facially inadequate. There is no evidence that such training could have been expected reasonably to so alter the Parents' efficacy that they could have found a way to overcome the Student's treatment resistance and oppositional stance toward all interventions offered. The evidence simply is too sparse to sustain such a conclusion.

The Parents also argue that the District's offer was deficient in that it failed to provide adequate transition services. However, in the 2006-2007 school year, the District points out that it was stymied in this planning by the Student's unwillingness to assert a clear goal for life beyond high school, (FF 35), and by his narrow and adamant refusal of all suggested alternatives to receiving educational services physically located at other institutions. (NT 494-495.) Even so, the District's transitional plan reflects the minimum requirements of the law: its elements are facially coordinated and focused on results; it addresses employment, education, community living and community services[11]. It offers services appropriate to the potential – but at the time unknown - goals of the Student. Thus, it cannot be said that this IEP was so deficient that it was not reasonably calculated to provide adequate transitional services. The IEP posits action steps for three alternative types of life goal, and the hearing officer finds inadequate evidence to show that these steps were inadequate under the circumstances.

As to the 2007-2008 school year transition plan, this appropriately addresses the transition needs of a college-bound student. By this time, the Student had narrowed his goals to college.

In sum, the program and placement offered by the District had its flaws, but the evidence is preponderant that it was reasonably calculated to provide meaningful intervention to allow the Student to attend school.[12] Thus, the program and placement were adequate under the IDEA. The failure to improve the Student's attendance is significant only in hindsight. And the 2007 IEP added substantially different and greater services, many of which were plainly the result of a reasonable evaluation of the better-understood needs of the Student in light of lived experience. (FF 58-66, 68.) These substantial adjustments

[11] There was no question in the record that the Student possesses functional living and cognitive skills needed to succeed after high school; thus, there was no need to offer services addressed to these kinds of need in the transition plan.

[12] In their summation, the Parents requested compensatory education on account of the denial of ESY in the summers of 2006 and 2007. The record was not adequately developed on this issue and accordingly, this request for relief is dismissed.

to the District's offer rendered it reasonable in light of what the District knew in October 2007.

Despite the above finding, the hearing officer cannot ignore the abject failure of the District's offer to help the Student in any way in the 2006-2007 school year. The Student's attendance plummeted. (FF 36, 45.) His behavior alone demonstrated serious distress, anxiety and emotional disturbance. (FF 25, 26, 27, 28, 41, 48.) He expressed suicidal ideation. (FF 48.) His opposition became less and less papered over by the veneer of rationality that he typically displays. His physicians recommended placement on homebound instruction for a two month period in the middle of the year. (FF 43.) The hearing officer finds that this was not in spite of the best efforts of the District to implement its program. Rather, the hearing officer finds that the District's failures in implementation of its offered placement and program had a substantial causal relationship to the Student's severe regression during that school year.

IMPLEMENTATION DURING 2006-2007 SCHOOL YEAR: APPLICATION OF DISCIPLINE AND REFERRAL TO JUVENILE AND FAMILY COURTS

The hearing officer finds that the District's implementation of its disciplinary policies to control truancy was undertaken without regard for the Student's identification as a disabled child. This failure to accommodate took two forms: first, the inflexible implementation of the District's "noncredit" policy in the context of a failure to provide necessary protocols for determining excused absence for emotional disturbance; and second, the decision to refer the Student to juvenile court for truancy and to family court later.

The evidence is preponderant that the District's truancy officer enforced truancy policies without regard to the IEP or to the legal mandate to accommodate disabled children. The school's policy on excused absence failed to address excused absence due to emotional disturbance. (FF 8.) The school's disciplinarian was inflexible in his application of this policy, inspecific as to what information he needed, and unwilling to make his own conclusion that the Student's absences should be excused when faced with clear medical advice that they were caused by emotional disturbance as well as genuine physical

ailments. (FF 3, 5, 9, 14, 17, 25, 26, 27, 28, 29.) He failed unreasonably to accommodate his disciplinary decisions in light of the Student's anxiety disorder and concomitant educational needs, in plain disregard of the Student's identification as disabled due to emotional disturbance. (FF 30, 31.) The disciplinarian also proceeded autocratically, without adequately consulting with the Parent in order to weigh her input into his decision making, thus contradicting a fundamental premise of the IDEA. His application of this rule to the Student contradicted school policy prohibiting application of aversive consequences for manifestations of disability, and contradicted federal policy to the same effect.

The evidence is preponderant also that the application of the "non-credit" policy to the Student greatly exacerbated his anxiety, depression, anger, oppositional behavior and isolation. (FF 30.) It resulted in increasing absences and eventually forced the Student into homebound instruction because his mother decided that failure in school because of the policy would cause greater emotional harm to the Student than withdrawal from regular education. (FF 42, 43.) It also led to such increases in anxiety that the Student's physicians attempted an extensive series of diagnostic and medication trials, necessitating homebound instruction for two months. (FF 43.)

In November 2006, and again after the Student attempted and failed to return to school in April 2007, the school made good on a plan to pressure the Student and his mother into overcoming his disabilities by force of law, by instituting truancy proceedings. (FF 23.) This plan was adopted by the special education operatives within the school as well as by the disciplinarian. (FF 23.) It was executed by the disciplinarian without consulting with the Parent and without entering into a problem solving negotiation, even when called to the court for a pretrial meeting designed to forge compromise. (FF 40, 46.) The disciplinarian ignored the Student's disability and implemented this plan without regard to the existing IEP. (FF 40, 46.)

This was clearly contrary to state policy regarding the use of criminal and quasi-criminal processes to control the behavior of disabled children. The Department of Education has interpreted the schools' statutory

obligations to permit and encourage the avoidance of criminalization. Basic Education Circular, Compulsory Attendance and Truancy Elimination Plan, (August 8, 2006). (P-88.) The introduction to this BEC calls upon school districts to have in place a "continuum of prevention and intervention strategies", making "every effort … to keep youth in school and reduce the school districts' referrals to the courts … . Children are truant for many reasons and schools should seek to understand and address those issues." Ibid. at 1. The BEC also instructs that Pennsylvania law "broadly defines absences as excused when a student is prevented from attendance for mental, physical, or other urgent reasons." Id. at 3. Moreover, "reasonable allowances should be made to accept parents' explanations for their child's absences without initiating any punitive response." Id. at 3. This obligation to avoid criminalization is even clearer when read in light of the District's obligations under the IDEA.

The District argues that it was obligated to enforce the State's attendance laws in this case. This argument goes too far, for there is substantial authority that the District had legal authority to avoid criminalizing the Student's symptoms. While the statute does by its terms prohibit "irregular attendance" even for children who are disabled, 24 P.S. §13-1329, it permits an exception for disabled children who are "unable to profit from further public school attendance … ." 24 P.S. §13-1330(2). In addition, the statute provides for home schooling of handicapped children, 24 P.S. §13-1327(d). Private tutoring also may be an option. 24 P.S. §13-1327(a). Thus, even in this statute, there is recognition that compulsory attendance ought not be enforced where disability makes that unreasonable, and there are alternative dispositions.

Where, as here, the District's decision to refer for truancy proceedings was in the face of its clear awareness that this Student's behavior was secondary to an established, diagnosed mental or emotional disability, its argument that it was compelled to bring these proceedings is implausible. Indeed, the District made much of its previous latitude in excusing absences to avoid referral for truancy proceedings; thus, it knew that it had flexibility and it knew how to exercise that flexibility without referral for quasi-criminal proceedings. (FF 31, 37, 38, 39.)

Similarly implausible is the school disciplinarian's testimony defending his decision to prosecute for truancy. The hearing officer gives little weight to the disciplinarian's testimony because he finds it less than reliable, based upon the witness' demeanor, the way he chose to answer questions, and facial implausibility of some of his answers. Contrary to the District's assertions, the hearing officer finds that its referral to the quasi-criminal juvenile truancy proceedings was a conscious choice of strategy, not a grudging compliance with either state law or policy.

The hearing officer credits the Parent's testimony that these proceedings had a deep emotional impact upon the Student that exacerbated his depression and anxiety. (FF 41, 48.) The Parent overall presented as sincere and willing to concede whenever the District had done positive things. She was relatively sophisticated because of her special education background, and even in her reporting of fact. The documentation in this case shows a Parent who desired only to work with the District as a member of a team, and to rely upon the expertise of its special education personnel. (FF 7.) The Parent also can be expected to know her child, a presumption that is supported in this record.

There is no doubt that, contrary to the District's argument, referral of the Student to the juvenile justice system was a punitive action. (P-88 p. 8). The Student was compelled to attend. There were threatened consequences, including separation from his family. He "pled guilty." (FF 47.) He received what can only have been viewed by him as a sentence of protective supervision.

The hearing officer finds that the District's use of truancy exacerbated the underlying causes of the Student's absenteeism – i.e., the disability itself – despite its apparent short term efficacy. The long term course of the Student's absenteeism supports this conclusion, since his behavior reverted immediately upon cessation of the protective supervision. The consequences of this strategy when coupled with the inflexible application of the "non-credit" policy deprived the Student of meaningful educational progress in the student's area of need – school attendance, during the 2006-2007 school year.

The District points out the beneficial results of the truancy proceeding – the court appointed probation monitor that frightened the Student into attending school. Through near perfect attendance from April 2007 to June 2007, the Student was able to obtain credit under school policy for his make up work. (FF 49.) Consequently he was able to pass his courses and earn academic credits toward graduation, which was his goal and desire. In the process, his mood elevated according to his Parent. (FF 49.)

However, this short term success should not be exaggerated. The main thing accomplished was that the Student was able to free himself of the District's inflexible "non-credit" system for absences, thus obtaining credit for work that he had submitted previously but obtained no credit, as well as new work for which he would have been denied credit regardless of its indication of learning and achievement. In other words, the District used force to propel the Student over a disciplinary barrier that they had erected unnecessarily against the Student. The record shows that there was little else accomplished. The Student remained socially isolated while in school. (FF 15, 16, 55.) He reverted to absenteeism as soon as the force of the court order expired. (FF 59.)

The documentary record discloses that the Parents' independent experts recommended continuation of the court-ordered probation program forcing him to attend school. (FF 56.) After carefully weighing this evidence against the contrary facts in the record, the hearing officer concludes that it is not dispositive. These experts did not testify in the due process proceeding; thus, they were not subject to cross examination, and the hearing officer will give their reports substantially less weight. Nor did these succinct recommendations advert at all to the effect of the District's use of "non-credit" status to discipline the Student, which exacerbated his anxiety. Thus, their opinions cannot be read as evaluations of the District's implementation of the Student's educational program. When these reports are weighed against the entire record in this matter, the evidence is preponderant that the District's application of discipline and court proceedings deprived the Student of meaningful educational benefit in the 2006-2007 school year.

The hearing officer will award compensatory education services to the Student to make him whole or at least

attempt to mitigate the harm that was done. The award will allocate full school days, since the deprivation of FAPE led to exclusion from school for most of the school year, through unabated; this impacted the Student's ability to keep up with his peers in academic subjects, and although he was able to make up the work and pass, given his high potential, it reduced his grades significantly. The District's disciplinary actions also directly resulted in the Student withdrawing from school on homebound instruction, where he received minimal academic education and no social skills training. While he did attend school, the exacerbation of his symptoms led to minimal progress in the educational values centrally associated with inclusive education: socialization with typical peers. Thus, for the entire 2006 to 2007 school year, the Student was deprived of a FAPE, because of the glaring failure to appropriately address his need to overcome school avoidance. This deprivation pervaded each school day on which he was not provided with adequate services.

IMPLEMENTATION DURING 2007-2008 SCHOOL YEAR UNTIL NOVEMBER 29, 2007

The hearing officer has found that the District's offers of October 2006 and September 2007 were adequate. It remains to consider the impact of the 2007 offer upon the Student's opportunity for educational benefit from the beginning of the 2007-2008 school year until the date of filing of the Parents' request for due process on November 29, 2007. While noting that the Student's attendance has not improved substantially, this is not the test of the District's compliance with the IDEA. Carlisle Area Sch. V. Scott P., 62 F. 3d 520, 534 (3d Cir. 1995.) Rather, the test is whether or not the District has recognized the need for changes in placement or program within a reasonable time.

It was reasonable to give the 2007 IEP a sixty day period of assessment. Thus, the District was obligated to review the Student's performance and adjust its program accordingly. This the District did. In November 2007, the District provided a behavior intervention plan. (FF 61.) In this plan it effectively abandoned its longstanding adherence to the "non-credit" disciplinary rule as applied to the Student by making two further accommodations: it allowed the Student to choose between taking his assigned

first block course in that block or at the last block of the day, effectively giving him a free period in which he would not be marked late, and it allowed his at-home counselor to determine whether or not to excuse either lateness or absence. (FF 62-66, 68.) These changes were planned during the sixty day period for reevaluation of the program and were implemented in November 2007. Under these circumstances, the evidence is preponderant that the District continued to attempt to adjust its services to meet the Student's needs. Compensatory education will not be awarded for this period of time.

ADEQUACY OF EVALUATION; REIMBURSEMENT FOR IEE

The Parents request a ruling that the District's evaluation of 2006 was inadequate and an award of reimbursement for the independent evaluations they provided to the District in 2007. The hearing officer finds that the District's evaluations were adequate and declines to award reimbursement.

The record was sparse regarding the appropriateness of the October 2006 initial evaluation. The report itself and the testimony of the school psychologist reveal that it was based upon an observation of and interview with the Student, parental and teacher input, and one standardized instrument. The Student refused to cooperate and no further testing could be done. (FF 21, 22.)

Under the circumstances, the hearing officer concludes that the evaluation was adequate. The Student's issues were limited to emotional, behavioral and social needs, all focused in the Student's absenteeism. The Student was completely resistive, showing hostility to the evaluation process by ripping up a BASC inventory, and the school psychologist was forced to use judgment as to the best course in light of this resistance. (FF 24.) The evaluation was a year delayed because of the Student's previous refusal, and the psychologist believed that it was important to have the Student identified so that services could be offered. (FF 11, 19.) The evidence is preponderant, in the absence of any expert testimony criticizing these judgments, that the District's evaluation under these circumstances was not inappropriate.

The Parents make much of the fact that one of the witnesses did not know that the Student had been evaluated

for gifted services in 2000, and that the gifted CER had not been reviewed in preparation of the 2006 evaluation. However, a review of this document, (P-92), shows that it contained little information of relevance. At no point did it advert to absenteeism as a problem. It notes certain personality traits and family dynamics, but offers little insight into these that would have added materially to relevant data base in 2006. The absence of this document from the otherwise considerable documentation reviewed in this evaluation does not render the evaluation inappropriate.

The 2006 evaluation is found to be adequate. Consequently, the Parents' request for reimbursement of the cost of independent educational evaluations is denied.

PROSPECTIVE RELIEF

The Parents in their summation urge this hearing officer to order prospective relief in the form of re-evaluation and specific treatment modalities. While the hearing officer finds that the District's efforts in the relevant period were reasonably calculated to provide some educational benefit, it is clear that they did not succeed. Therefore, prospective relief is necessary.

In ordering prospective relief, the hearing officer is conscious of the limitations properly surrounding this authority. The hearing officer begins with a presumption that administrative officials will act in good faith and competently, and in this matter the record supports that presumption, with the glaring exception of the District's utilization of truancy policies in disregard of the mandates of state and federal policy regarding disabled children, as discussed above.

At the same time, the hearing officer finds that the time has come that reasonable persons will reconsider the strategies utilized so far that have failed to bring this Student to school. Much time has elapsed during the due process procedures, and graduation time is rapidly approaching. Therefore, he will order that the District convene an IEP team meeting forthwith to reconsider the services it is presently offering to the Student.

This reconsideration shall address the applicability, if any, of research based therapeutic or educational

modalities known to have documented success in addressing school phobia and school refusal. The IEP team must consider the availability of such modalities regardless of their availability within the District, and regardless of the necessary site of delivery, whether it be in the local high school, the home, a separate therapeutic setting or elsewhere.

This reconsideration of the existing program shall also consider the efficacy of the present services being delivered by the [redacted] program. In such review, the IEP team shall apply research based therapeutic principles to determine efficacy.

This reconsideration shall also consider the extent if any to which the Student will need the District's support in transitioning to college. Again, services necessary to address educational need in light of disability should not be limited to available programming within the District.

This reconsideration of program must consider also the Student's wishes and willingness to cooperate with therapeutic modalities. This Student is a young adult in chronology and in life experience. His autonomy is rightly and necessarily respected, while at the same time recognizing any limitations imposed by his disabling conditions. If at all possible, the Student should be welcomed to participate in the IEP team meeting so that all concerned can attempt to reach an effective therapeutic alliance.

Finally, this reconsideration shall take into account the role of the District's truancy reduction policies in light of its state and federal mandates under the IDEA and §504. The reconsideration should be guided by the needs of the Student in light of his anxiety disorder, and in consideration of the history of exacerbation of symptoms due to the District's application of truancy policies to him in the past.

ORDER

1. From November 29, 2005 until March 17, 2006, the District failed to comply with its Child Find obligations, under IDEA and §504 of the Vocational Rehabilitation Act of 1973, to identify the Student as a child with a disability.

2. From March 17, 2005 until the beginning of the 2006-2007 school year, the District did not fail to offer or provide the Student with a reasonable opportunity to receive meaningful educational benefit.

3. From the first to last day of the 2006-2007 school year, the District failed to provide the Student with a reasonable opportunity for meaningful educational benefit, due to its enforcement of truancy policies without regard to the Student's disabilities.

4. The District's enforcement of its truancy policies against the Student constituted discrimination under §504 of the Vocational Rehabilitation Act of 1973.

5. The District's Evaluation of September 26, 2006 and Re-evaluation of October 12, 2007 were appropriate.

6. Compensatory education is awarded to the Student on the basis of full days as follows:
   a. For every school day in which school was in session from November 29, 2005 until March 17, 2006;
   b. For every school day in which school was in session during the 2006-2007 school year;
   c. A full school day shall be six hours.[13]

7. The compensatory education ordered above shall not be used in place of services that are offered in the current IEP or any future IEP. The form of the services shall be decided by the Parent, and may include any appropriate developmental, remedial, or enriching instruction, or therapy. The services may be used after school, on weekends, or during the summer, and may be used after the Student reaches 21 years of age. The services may be used hourly or in

[13] The District's IEP reported 2055 school hours per week. (P-19.)

blocks of hours. The costs to the District of providing the awarded hours of compensatory education shall 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 who should have provided the District services and the usual and customary costs to the District for any contracted services. The District has the right to challenge the reasonableness of the cost of the services.

8. The District shall convene an IEP team meeting forthwith, to reconsider the program currently being provided to the Student.

   a. The team shall address the applicability, if any, of research based therapeutic or educational modalities known to have documented success in addressing school phobia and school refusal.

   b. The team shall address the efficacy of the present services being delivered by the [redacted] program, in light of the research based modalities described above.

   c. The team shall address the extent if any to which the Student will need the District's support in transitioning to college.

   d. The team shall address the Student's wishes and willingness to cooperate with therapeutic modalities.

   e. The team shall address the role of the District's truancy reduction policies in light of its state and federal mandates under the IDEA and §504. The team shall be guided by the needs of the Student in light of his anxiety disorder, and in consideration of the history of exacerbation of symptoms due to the District's application of truancy policies to him in the past.

William F. Culleton, Jr. Esq.

_____

WILLIAM F. CULLETON, JR., ESQ.
HEARING OFFICER

April 5, 2008