

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.

PENNSYLVANIA
SPECIAL EDUCATION HEARING OFFICER

DECISION
DUE PROCESS HEARING

Name of Child: JK
ODR #8453/07-08 LS
Date of Birth:
Xx/xx/xxx

Dates of Hearing:
May 19, 2008
May 28, 2008
June 16, 2008
June 24, 2008
September 12, 2008
September 15, 2008
September 23, 2008

CLOSED HEARING

Parties to the Hearing:
Mr. and Mrs.

Pleasant Valley School District
Route 115
Brodheads ville, Pennsylvania

Date Closing Arguments Received:

Date of Decision:

Hearing Officer:

Representative:

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October 3, 2008

October 7, 2008

Linda M. Valentini, Psy.D.

Background

Student is a teen-age eligible student enrolled in the Pleasant Valley School District (hereinafter District). The District has classified Student as a student with a specific learning disability, an other health impairment (ADHD), Asperger's Disorder and speech/language impairment.

Mr. and Mrs. (hereinafter Parents) requested this hearing because they believed that the District's Assistive Technology Evaluation was inappropriate, and that the IEP was inappropriate in that, among other things, it did not provide for a one-to-one aide, did not include an appropriate functional behavioral analysis and an appropriate behavior support plan, and was not designed/implemented such that Student could make/made meaningful educational progress.

The District raised a standing objection, its position being that the issues raised by the Parents were not ripe for hearing as the IEP team had not considered them. Throughout the term of the hearing the hearing officer gave repeated instructions that the parties hold an IEP meeting, and at least one was held, however by the last date of the hearing the issues remained unresolved.

Issues¹

1. Should Student receive an independent Assistive Technology Evaluation at the District's expense?
2. Were the 2006-2008 Functional Behavioral Plans (FBAs) and Behavioral Support/Intervention Plans (BIPs) the District developed for Student appropriate and were the BIPs appropriately followed?
3. Is it necessary that Student be provided with a one-to-one aide in order for Student to receive FAPE?
4. Should the recommendations of the independent educational evaluator be incorporated into Student's IEP?
5. Did the District deny Student FAPE for the 2006-2007 and/or the 2007-2008 school years? If the District denied Student FAPE for any or all of this period is Student entitled to compensatory education, in what amount and in what kind?

Stipulation

The parties stipulated that at the Assistive Technology Evaluation conducted by the District pursuant to a Resolution Session, the Student was not present and there were no computers or computer software present to be used as part of that evaluation. (NT 17)

¹ The issues are distilled from the parties' opening statements and from the colloquy found on pages 338 through 349.

Findings of Fact

Should Student receive an independent Assistive Technology Evaluation at the District's expense?

1. At a Resolution Meeting on March 4, 2008 the parties agreed that the District would “provide an assistive technology evaluation”. At a further Resolution Meeting on March 27, 2008 the parties added, “AT Qs [Assistive Technology Questions]: computer programs useful/visual learner; hands-on tech.” (P-1)
2. The Assistive Technology Evaluation was conducted by an employee of IU []. (NT 300)
3. The Assistive Technology evaluator articulated her role as, “To support the team in assessing Student’s need for assistive technology”. (NT 307)
4. The Assistive Technology evaluator always suggests that the students attend the evaluations. (NT 957)
5. The Assistive Technology evaluator testified, “It’s always good to have them at the meetings so they can tell us what they – what they would want to use and not want to use. And if there’s anything that we’re not – we don’t realize that they’re not being able to do”. (NT 955-956)
6. Parent testified that it had been discussed that Student would be present for the Assistive Technology Evaluation. (NT 1035)
7. The Assistive Technology evaluator expected to meet Student at the Assistive Technology Evaluation. (NT 308)
8. Student was not invited to/present at the Assistive Technology Evaluation held in the District Offices. Student was right next door² in the middle school. (NT 1036)
9. On the day of the Assistive Technology Evaluation meeting the Parent asked where Student was and did not receive a response. (NT 1036)
10. On the day of the Assistive Technology Evaluation meeting the Assistive Technology evaluator suggested that Student should be present and was told that the Parent did not want Student to be there. (NT 957-958)
11. Despite expecting Student to be at the Assistive Technology Evaluation, the Assistive Technology evaluator brought no computer hardware or software to the Evaluation to try with Student. (Stipulation, NT 17)

² Literally; the hearing officer was in both buildings which are steps away from each other.

12. The Parents' understanding was that various devices/technologies would be available at the Assistive Technology Evaluation for Student to try. (NT 287-288)
13. The Assistive Technology evaluator has never met Student. (NT 307)
14. The Assistive Technology evaluator did not speak with Student after the evaluation. (NT 961)
15. The Assistive Technology evaluator did not observe Student in the classroom. (NT 962)
16. Although she attended the two-hour Assistive Technology Evaluation, the Assistive Technology evaluator did not read Student's IEP and did not know what it required of or for Student. (NT 959-960)
17. The Assistive Technology evaluator was not aware of the definition of "direct assessment", the practice recommended by the organization that offers voluntary certification for Assistive Technology evaluators. (NT 302, 964)
18. The Assistive Technology evaluator leaves it up to the IEP team to decide whether parents of the student being assessed will be asked to complete an informational checklist to help inform the assessment. The Parents were not asked to complete such a checklist. (NT 974)
19. The Assistive Technology evaluator did not know whether checklists were given to Student's computer teachers. She did not herself check in with any of the teachers. (NT 976)
20. The Assistive Technology Evaluator did not receive checklists from any of Student's regular education teachers. (NT 978)
21. The only checklists the Assistive Technology Evaluator received were from the special education teacher who was Student's 8th grade case manager and Student. (NT 977-978; S-7)
22. Student's form, titled, "Hey, Can I Try That" appeared to be filled out partially by Student and partially by another person, who appeared to be an adult. (NT 312-319)
23. The special education teacher who completed a checklist in preparation for the Assistive Technology Evaluation was not present at the Assistive Technology Evaluation. The Assistive Technology evaluator expected Student would be there. (NT 229-230, 975)
24. The outcome of the Assistive Technology Evaluation was that Student was given a set of highlighters for school use and a set of highlighters for home use. Although Student was observed by Student's 8th grade learning support teacher to

- be using the highlighters on several occasions, no one showed Student what to do with the highlighters or what to highlight. Additionally the Parents assumed Student could not use highlighters with school property such as textbooks and Student's reading stories. (NT 271-273, 274, 298, 737-743)
25. The independent educational evaluator has been trained to use the Assistive Technology SETT Framework, and in the course of his professional duties is responsible for identifying assistive technology that would help students succeed in the college setting, teach them to use the tools, and then assess if they are using them successfully. (NT 206)
 26. The independent educational evaluator, whom the hearing officer judged to be competent to critique the Assistive Technology Evaluation performed by the District, notes that he would have expected to see some type of assessment of Student's ability to use high level assistive technology, for example how well Student uses a computer, how many words a minute Student types. He would expect to see some consistency between the Assistive Technology Evaluation and the IEP. He would expect to see an assessment of how well the tools and strategies Student is using are working for Student, and statements about exactly how Student is going to use assistive technology to learn and study. (NT 127-129, 207-211)
 27. The independent educational evaluator believes that the tools he recommended in his report of April 2007 should have been explored in the Assistive Technology Evaluation, i.e. print to voice software, a talking calculator, a talking dictionary, the Kurzweil program. (NT 211-212)
 28. The independent educational evaluator believes that the way to assess if these tools are appropriate for Student is to have Student demonstrate using them, even something like using a highlighter, to the person doing the assessment and to Student's teacher. (NT 215-216)
 29. In the reading class addressing phonics and decoding, during the second half of 8th grade the teacher used an interactive computer white board and when Student used this technology, Student learned the skills so well that the teacher considered Student one of the "stars" of that class. Student also was able to access Microsoft Power Point, Microsoft Paint, and Cam Studio with laptops to create a video and record Student's and other students' voices. Using this technology was a significant motivator for Student. (NT 841-858)

Were the 2006-2008 Functional Behavioral Assessments (FBAs) and Behavioral Support/Intervention Plans (BIPs)³ the District developed for Student appropriate and were the BIPs appropriately followed?

³ BIP (Behavior Intervention Plan) and BSP (Behavior Support Plan) are used interchangeably in the record and in this decision.

30. Student's behavior was never a major problem in school. (NT 874)
31. Student's behaviors were typical of students Student's age. (NT 874, 877)
32. In the 6th grade, Student sat at a table and kicked the legs of other students also seated at the table, but the kicks were not vicious and were more like the horseplay typical of the other students in Student's class. (NT 876)
33. In another incident Student snatched Student's own necklace back from another student, and the necklace hit the student. (NT 875)
34. The special education teacher for 7th grade did not believe that an FBA or a BSP were needed since it was the beginning of the year and Student responded to redirection when it was necessary. (NT 895)
35. Nevertheless, at the request of the Parents the District convened a team (guidance counselors for 6th and 7th grades, 6th and 7th grade learning support teachers, 6th and 7th grade regular education teachers, vice-principal, special education supervisor, behavior specialist consultant [BSC] and Parent). The team completed a Functional Behavioral Analysis on September 29, 2006, District staff collected behavioral data in the classrooms during October 2006, and constructed a Behavioral Support Plan on November 29, 2006. (NT 870-873; P-18)
36. The FBA identified inappropriate Behaviors, Slow Triggers underlying the behaviors, Fast Triggers (antecedents) precipitating the behaviors, the Perceived Function of the behaviors and the Actual Consequence of the behaviors. (P-18)
37. Data collection was completed on behaviors: inappropriate touching, refusing to do homework at school, not eating lunch, and other behaviors. (P-18)
38. Data collection referenced the places or occasions when the behaviors were likely to be seen: transitioning between classes, at locker, other student makes comment to Student, end of day, given a direction to complete an assignment, does not understand the assignment, another student in seat. (P-18)
39. Data collection identified the perceived functions of the behaviors: get/obtain (attention, understanding of assignment, assistance with assignment, interaction with peers) and escape/avoid (work or undesirable activity, being accountable, boredom). (P-18)
40. Data collection identified the actual consequences: told to stop, got chart, wrote letter, said sorry and item removed or repaired. (P-18)
41. The majority of the behaviors took place in 4th period reading class, held roughly between 11:15 and noon, in the special education room. (P-18)

42. No behaviors occurred in 1st period geography, 2nd period specials, 6th period specials, 7th period lunch (except not eating lunch), 8th period language arts. (P-18)
43. The Behavior Support Plan identified various positive interventions (learning importance of eating regularly, providing schedule of specific times to “escape”, verbal praise, bear bucks, non-verbal reinforcement, having a variety of snacks available, attaching a tactile stimulator to binder at student’s choice). (P-18)
44. The school-based team implemented the BSP. (NT 874)
45. The 7th grade learning support teacher’s opinion was that although Student didn’t need the BSP Student enjoyed and benefited from getting the praise and the bear bucks, and “it didn’t hurt” to have the plan. (NT 874, 877)
46. The 8th grade special education teacher/ case manager who was with Student virtually every day during the 2007-2008 school year, was unaware of any occurrence during that school year where Student hit, kicked, or inappropriately touched another student. (NT 493, 495, 508)
47. Student always completed the work that the 8th grade special education teacher asked Student to complete, and Student followed directions. (NT 493-494, 508)
48. Student did not try to avoid work any more than a typical eighth grader, and Student was usually able to communicate to Student’s special education teacher about the class work. (NT 494)
49. Student did not exhibit any behavior issues or require any behavioral interventions in 8th grade language arts class. (NT 1012, 1014)
50. Student’s homeroom and U.S. history teacher noted only one behavioral issue, not serious enough to require any disciplinary action. (NT 988)
51. The speech language therapist noted that, typical of other eighth grade[rs], Student would occasionally make inappropriate comments, but with verbal cueing, would apologize and Student required no other behavioral interventions. (NT 1001)

Is it necessary that Student be provided with a one-to-one aide in order for Student to receive FAPE?

52. The independent educational evaluator opined that Student needed a one-to-one aide to address intertwined behavioral, academic and social issues. (NT 122)
53. In later testimony the independent educational evaluator declined to call that individual an aide, “no, I would rather call it a support teacher”. (NT 172)

54. The qualification this support teacher should have, according to the independent educational evaluator is a college degree, or at minimum an associate's degree if the person had the right training in behavioral techniques, educational techniques and social skills training. (NT 172-173)
55. The Child Behavior Checklist provided by the independent educational evaluator was completed by 4 Regular Education Teachers, 1 Special Education Teacher, and Student's Mental Health Provider 50 Therapeutic Staff Support worker (TSS). None of the regular education teachers' ratings resulted in a clinically significant T-score (70 and above) in any area assessed. The special education teacher's ratings resulted in one clinically significant T-score on Rule-Breaking Behavior. The TSS's ratings resulted in clinically significant T-scores on three areas – Anxious/Depressed, Social Problems, and Thought Problems. (P-3)
56. No regular education teacher's judgments resulted in a clinically significant T-score (64 and above) on the Internalizing, Externalizing or Total Problems Scales. Both the special education teacher and the TSS's ratings resulted in clinically significant scores on Externalizing and Total Problems. (P-3)
57. Student's 8th grade homeroom and United States history teacher, testified that in his class with thirty-two students, a teacher and an aide Student received a 90 average, in history, which is a high "B," just shy of an "A." Student did not require any behavioral interventions in the class. (NT 985-986, 991)
58. The homeroom/US history teacher noted that by the end of the 2007-2008 school year, Student seemed to be on "autopilot," and needed little direction to keep Student on task. (NT 991)
59. Student had health class with approximately twenty-four students and one teacher, science class with approximately twenty-two students, one teacher, and an aide, and math with eleven students, one teacher and, occasionally, Student's TSS worker. Student has remediation with fourteen students, one teacher, and an aide every other day, and Student goes to lunch.
60. In language arts class, which Student attended with twenty-two students, one regular education teacher, one special education teacher and one paraprofessional, Student's behaviors are not interfering with Student's education. (N.T. 383-384, 1006).
61. Student functioned in each class with no serious behavioral concerns and no one-on-one aide. (NT 379, 381-383, 385)
62. Student benefits from the level of support Student is provided. For example, a research assignment called for a lengthy written report on a topic that was not self-selected. While Student initially had trouble conducting the necessary

- research for a written project, the special education teacher helped Student narrow Student's research and follow a targeted approach to researching and writing, such that Student was able to complete the research while some other students found it too difficult to complete their research reports. (NT 459, 462, 1006-1008)
63. Student did not leave any of Student's classes without permission during the 2007-2008 school year (NT 519)
 64. Student is able to seek help from Student's teachers when Student has a question, and initiated seeking assistance from Student's 8th grade special education teacher/case manager. (NT 385, 497, 522, 1001)
 65. Student's IEP goals also call for Student to seek assistance from Student's guidance counselor, or an administrator. (S-9)
 66. Student questioned Student's 8th grade special education teacher/case manager about why Student had to have a TSS in the room with Student in math, but accepted the situation when the teacher assured Student that the TSS was not going to always be there. (NT 501-502)
 67. The Provider 50 mental health agency determined that TSS would be discontinued at the end of the 2007-2008 school year as Student was not exhibiting behaviors that warranted this service. (NT 292, 369)

Should the recommendations of the independent educational evaluator be incorporated into Student's IEP?

68. The independent educational evaluator made a number of recommendations following Student's April 2007 evaluation, and also made some recommendations relative to the May/June 2007 IEP. (S-9, P-3)
69. The independent educational evaluator raised some but perhaps not all his recommendations at the two IEP meetings he attended. Notably these IEP meetings were also attended by an IEP facilitator. (NT 178-179)
70. The independent educational evaluator recommended that the IEP contain fewer goals and objectives. (NT 125, 174)
71. The independent educational evaluator recommended that an objective should look at a single skill. (NT 190-191)
72. The independent educational evaluator recommended that a baseline measure be identified for each present level. He believes that the teachers have done this well for reading by using the QRI. (NT 132-133)

73. The independent educational evaluator recommended that the present levels of academic achievement and functional performance be written clearly so that the Parent can understand where Student is, whether that level is acceptable for Student's age and grade, and where Student needs to be. (NT 130)
74. The independent educational evaluator recommended that when writing the annual goals and objectives the conditions under which Student will be assessed should also be identified, along with what objective measures Student will be measured, and the performance criteria. (NT 134-137)
75. The independent educational evaluator recommended that there be one method used to monitor Student's progress listed in the IEP. (NT 179-182)
76. The independent educational evaluator recommended that the method chosen to evaluate Student's progress be objective. (NT 183-185)
77. The independent educational evaluator recommended that the IEP specify the Specially Designed Instruction that will be used to teach Student the various reading, math, writing and social skills. (NT 167-168, 173, 193)
78. The independent educational evaluator recommended that as part of the support for regular education teachers there should be a half-day in-service training about Student and Student's IEP, with later follow-up discussion, and that the IEP should be specific about time and length of meeting, parental participation, etc. (NT 175-178)
79. The independent educational evaluator recommended that whenever a percentage is used as a criterion in the IEP, how the percentage was determined be explained to the Parents. (NT 189)
80. The independent educational evaluator recommended that social skills training objectives be included in Student's IEP. (NT 192)
81. The independent educational evaluator recommended that the District build trust with the Parents by showing them the progress monitoring assessments and how they were administered. (NT 194-199)
82. The independent educational evaluator testified that all his recommendations can be summarized as 'teach Student strategies'. (NT 200)

Did the District deny Student FAPE for the 2006-2007 and/or the 2007-2008 school years? If the District denied Student FAPE for any or all of this period is Student entitled to compensatory education, in what amount and in what kind?

Classification

83. The District completed a Reevaluation Report on 4-17-07, revised on 4-24-07, which noted Student as having classifications of Asperger's Disorder, specific

- learning disability, other health impairment (ADHD) and speech/language impairment. (NT 59)
84. In spite of Student's Asperger's Disorder Student scored in the 69th percentile on a test of pragmatic language. (NT 60)
85. On a test of language processing Student scored well when single words were offered but had difficulty with tasks requiring more language processing. (NT 60)
86. The independent educational evaluator also found that Student met criteria for Asperger's Disorder, specific learning disability, and other health impairment (ADHD). He noted difficulties in the area of executive functioning. (NT 116; P-3)
87. The independent educational evaluator viewed the District's finding of a speech/language impairment as being a deficit in social language that was part of the Asperger's rather than a separate classification. (NT 117-118; P-3)

Ability vs. Achievement

88. On the Woodcock Johnson III Test of Cognitive Abilities (WJ III) administered by the independent educational evaluator in April 2007 Student scored as follows: General Intellectual Ability Standard Score 90, 26th percentile; Verbal Ability SS 92, 29th percentile; Thinking Ability SS 92, 29th percentile; Cognitive Efficiency SS 92, 29th percentile. (P-3)
89. WJ-III Cluster scores were as follows: Comprehension-Knowledge Cluster Standard Score 92, 29th percentile; Long-Term Retrieval Cluster SS 94, 34th percentile; Visual-Spatial Thinking Cluster SS 103, 59th percentile; Auditory Processing Cluster SS 104, 61st percentile; Fluid Reasoning Cluster SS 81, 10th percentile; Processing Speed Cluster SS 97, 42nd percentile; Short-Term Memory Cluster SS 91, 27th percentile; Phonemic Awareness Cluster SS 107, 68th percentile. (P-3)
90. On the Woodcock Johnson III Tests of Achievement (WJ III TA) administered by the independent educational evaluator in April 2007 Student scored as follows: Broad Reading Standard Score 89, 23rd percentile, Letter-Word Identification SS 88, 21st percentile; Passage Comprehension SS 81, 10th percentile, Reading Fluency SS 97, 42nd percentile; Broad Mathematics SS 84, 15th percentile, Calculation SS 87, 19th percentile, Applied Problems SS 93, 32nd percentile, Math Fluency SS 72, 3rd percentile; Broad Written Language SS 84, 14th percentile, Spelling SS 80, 9th percentile, Writing Samples SS 75, 5th percentile, Writing Fluency SS 95, 37th percentile; Oral Language-Standard SS 92, 30th percentile, Story Recall SS 97, 42nd percentile, Understanding Directions SS 92, 29th percentile. (P-3)

91. WJ III TA Cluster Scores were as follows: Total Achievement Standard Score 87, 19th percentile; Math Calculation Skills SS 78, 7th percentile; Written Expression Skills SS 90, 25th percentile; Academic Skills SS 81, 10th percentile; Academic Fluency SS 92, 29th percentile; Academic Applications SS 85, 16th percentile. (P-3)
92. The only Significant Discrepancies (at + or – 1.30 SD) between ability and achievement were found on Fluid Reasoning (-1.47 SD) and Math Calculation Skills (-1.27 SD). (P-3)
93. The independent educational evaluator noted that both the teachers' observations and his own testing demonstrated that Student has inconsistent cognitive abilities. (NT 63-64)
94. The 7th grade learning support teacher testified that when she taught Student a concept in the classroom, Student could do it in the classroom, but when Student had to do it in an assessment without any prompts, Student couldn't do it. (NT 913, 921)
95. Another example of Student's inconsistency pointed out by the independent educational evaluator is that on the PSSA achievement testing Student scored at a lower level than Student demonstrated in class and than Student demonstrated on individual testing with the independent educational evaluator. (NT 74-75)
96. Student's PSSA scores were as follows: Grade 6 Reading – Below Basic (956), Grade 7 Reading – Below Basic (1046), Grade 8 Reading – Below Basic (numerical score unavailable); Grade 6 Math – Below Basic (1146), Grade 7 Math – Below Basic (954), Grade 8 Math – Below Basic (numerical score unavailable). (NT 149, 1042; P-12, P-13)
97. The independent educational evaluator does not believe that the PSSA provides an appropriate baseline because it is too general and does not give a fluency measure. (NT 132)

2006-2007

98. Student's annual IEP review was due in November 2006 of 7th grade and the learning support teacher prepared a draft. The Parents and the District could not come up with mutually agreeable dates for the meeting. This IEP was not approved and therefore not implemented. (NT 877; S-50)
99. The District drafted another IEP in February 2007 and the IEP team, with the Parent in attendance, convened. The IEP was updated with any new information, speech/language goals and behavior goals were added, and some planning for transition from 7th to 8th grade was added. The Parents did not approve this IEP. (NT 885; S-54)

100. There were six or seven meetings concerning Student during the 2006-2007 school year; these were IEP meetings, FBA meetings and a mediation. There were 22 people at the first IEP meeting, on September 6, 2006. (NT 275-282)

101. Despite these meetings, for the entirety of 7th grade the District had to implement the last-agreed-upon IEP, the 6th grade IEP dated November 15, 2005, since the Parents did not approve of either IEP drafted during 7th grade. (NT 886-887; S-41)

2007-2008

102. The independent educational evaluator participated as a member of Student's IEP team for purposes of contributing to drafting the May/June 2007 IEP. The Parents approved the May/June 2007 IEP on August 30, 2007. (NT 126; S-9, P-23)

103. The Parents were both present at the May/June 2007 IEP meeting, as were a parent advocate from Parents' Exchange, a disabilities advocate, a targeted case manager, a Provider 50 representative and an IEP facilitator from ODR. The District was represented by the principal, a regular and two special education teachers (the 8th grade special education teacher's having been present by the Parents' request), the director of special education, a speech/language therapist, a school psychologist, and two guidance counselors. (NT 390391; S-9, P-23)

104. Student's IEP for 2007-2008 comprises 36 pages. It includes statements of Student's present levels based upon objective testing (QRI) of reading skills, teacher's professional assessment of Student's writing skills, objective testing (CBA) of math skills and a line of inquiry related to behavior needs. Although not required, an FBA and a BIP are also included in the IEP. The IEP sets out measurable annual goals for advancement in Student's areas of need and specific benchmarks or short term objectives related to meeting the goals. (S-9, P-23)

105. Particularly related to Student's Asperger's and concomitant speech/language impairments there is a precise and detailed speech/language section addressing making inferences, understanding idioms and acquiring vocabulary which dovetails with Student's reading comprehension instruction. The speech/language section also addresses speaking/listening objectives related to eye/face contact in conversation. (S-9, P-23)

106. The IEP contains 32 separate and specific elements of special education (specially designed instruction), and puts forth the related services (speech/language and occupational therapy) to be provided to Student, as well as a statement of the supports for school personnel that will be provided. It puts forth the extent to which Student will not be educated with nondisabled peers. (S-9, P-23)

107. A week before school started the special education teacher/ case manager met in school with Student and Student's Parent and physically went through Student's schedule including showing Student where Student's locker would be and practicing with the lock. (NT 391-392)
108. During the 2007-2008 school year, in addition to the hearing sessions there were two Resolution Sessions and at least one IEP meeting. (NT 282)
109. Student received reading with Student's special education teacher/ case manager in a class of eight students, Student received math instructions with this same teacher in a group of eleven students, and received language arts with this teacher, a regular education language arts teacher and a teacher associate. (NT 373-374, 380)
110. Student participated in a regular education homeroom class and then had a Level 1 (top academic level) US history with the homeroom teacher and a bachelor's level teacher associate who provides assistance under the special education teacher's daily direction in a class of 32 students. (NT 375-377)
111. For the 2007-2008 school year, Student attended two reading classes per day, a phonics skills building class with only two or three students taught by a learning support teacher, and a reading comprehension building program called Soar to Success with the special education teacher/ case manager. (NT 377-378, 380)
112. In math class the students were working on the 8th grade curriculum at a slower pace than the regular education students. Student is supplied with or makes note cards to break down the steps for math operations and uses a calculator. (NT 383)
113. Student attended a regular education health class with twenty-four students and one teacher. (NT 379)
114. Student had lunch with the regular education population. Student sits with the same group of students every day; these students like the same kind of music as Student does. (NT 381)
115. Student had science with 22 students, a teacher and the same teacher associate who is with the class for history. (NT 382)
116. Student had language arts primarily addressing writing with about 22 students, the special education teacher/case manager, a regular education teacher and another teacher associate. (NT 384)
117. At the end of each day Student had "remediation" class with the special education teacher/ case manager, the associate teacher [every other day], and

- fourteen students. In this class they worked on homework, studies for upcoming tests, and utilize computer programs for remediation of specific skills. (NT 385)
118. Student has speech/language services once every six-day cycle. (NT 388)
119. At the beginning of the 2007-2008 school year, when reading a sixth-grade-level passage, Student's fluency was 109 words per minute with a comprehension of 37.5 %. By the end of the 2007-2008 school year, Student read a sixth-grade-level passage at 108 words per minute, with 100% comprehension. (NT 426; S-8)
120. At the beginning of the 2007-2008 school year, when reading an upper-middle-school-level passage Student's comprehension was 12.5%. By the end of the 2007-2008 school year, Student's comprehension was 60% for that same level.
121. In February 2008, Student was able to read a high-school-level passage at 118 words per minute, with 98% accuracy and 90% comprehension. (NT 425; S-8)
122. On the 4Sight sixth-grade-level reading test administered in September 2007 Student scored a Basic 1152; that score increased to a Basic 1274 in May 2008. (NT 588; S-21, S-30)
123. At the beginning of the 2007-2008 school year, Student could write one paragraph of more than five sentences with each sentence containing at least 15 words. By the end of the school year, Student was able to write five paragraphs. (NT 457, 1013-1014; S-9)
124. On the 4Sight sixth-grade-level math test administered in September 2007 Student scored a below basic 1129; that score increased to a Basic 1274 at the end of the year. (NT 480; S-8)
125. During the 2007-2008 school year, Student successfully completed a research paper, an assignment that most students Student's age find difficult and that some do not even finish. (NT 459, 462)
126. Because Student experienced significant discomfort when presenting Student's report orally to Student's peers Student's grade was adjusted to accommodate for his specific disability and Student passed the presentation portion of the assignment. (NT 1009-1010.)
127. Student's May/June 2007 IEP to be implemented in the 2007-2008 school year called for Social Skill instruction with Student's guidance counselor either individually or in a group one time per a six day cycle. Student's 8th grade Learning Support teacher testified that Student received that service fewer than

ten times. (NT 654, 778-783; S-9)

Credibility of Witnesses

Hearing officers are empowered to judge the credibility of witnesses, weigh evidence and, accordingly, render a decision incorporating findings of fact, discussion and conclusions of law. The decision shall be based solely upon the substantial evidence presented at the hearing.⁴ Quite often, testimony or documentary evidence conflicts; this is to be expected as, had the parties been in full accord, there would have been no need for a hearing. Thus, part of the responsibility of the hearing officer is to assign weight to the testimony and documentary evidence concerning a child's special education experience. Hearing officers have the plenary responsibility to make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses". Blount v. Lancaster-Lebanon Intermediate Unit, 2003 LEXIS 21639 at *28 (2003). This is a particularly important function, as in many cases the hearing officer level is the only forum in which the witnesses will be appearing in person. Witness credibility is incorporated as appropriate below.

Discussion and Conclusions of Law

Burden of Proof

In November 2005 the U.S. Supreme Court held that, in an administrative hearing, the burden of persuasion for cases brought under the IDEA is properly placed upon the party seeking relief. Schaffer v. Weast, 126 S. Ct. 528, 537 (2005). The Third Circuit addressed this matter as well more recently. L.E. v. Ramsey Board of Education, 435 F.3d 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006). The party bearing the burden of persuasion must prove its case by a preponderance of the evidence. This burden remains on that party throughout the case. Jaffess v. Council Rock School District, 2006 WL 3097939 (E.D. Pa. October 26, 2006). As the Parent asked for this hearing, the Parent bears the burden of persuasion. However, application of the burden of persuasion does not enter into play unless the evidence is in equipoise, that is, unless the evidence is equally balanced so as to create a 50/50 ratio. In this case, on each issue, the evidence was not in equipoise.

Should Student receive an independent Assistive Technology Evaluation at the District's expense?

A school district is responsible for evaluating a special education student's needs to assess whether an assistive technology device is appropriate for the student. 20 U.S.C. §§ 1401. That assistive technology evaluation should include a functional evaluation of the student in the student's customary environment. *Id.* An assistive technology device is "any item, piece of equipment, or product system, whether acquired commercially off the

⁴ Spec. Educ. Op. No. 1528 (11/1/04), quoting 22 PA Code, Sec. 14.162(f). See also, Carlisle Area School District v. Scott P., 62 F.3d 520, 524 (3rd Cir. 1995), cert. denied, 517 U.S. 1135 (1996).

shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of children with disabilities.” 20 U.S.C. § 1401(1).

Pursuant to a Resolution Meeting the District agreed to conduct an Assistive Technology Evaluation of Student. (FF 1) The Parents assert that the District’s Assistive Technology Evaluation was inappropriate and seek an independent Assistive Technology Evaluation at public expense. The ordinary standard for an award of an independent educational evaluation at public expense is parental disagreement with a school district’s evaluation as provided in the IDEA’s implementing federal regulations at 34 CFR§300.502(b)(1)(2)(3). Based upon the evidence presented, this hearing finds that the Assistive Technology Evaluation conducted by the District was inappropriate.

Although the District’s Assistive Technology Evaluation is deficient in several respects (the evaluator failed to gather data from Student’s regular education teachers, failed to read Student’s IEP, failed to gather possible hardware and software to use during the evaluation) (FF 11, 16, 18, 19, 20, 21, 23) the most striking failure was that Student, an 8th grade student, was not present at Student’s own Assistive Technology Evaluation. (FF 8, 13) The testimony differed as to why Student was not present, and the District claims that the Parents did not want Student there. On this point the hearing officer finds the Parent’s testimony during the Parents’ case in chief and in rebuttal testimony highly credible. (FF 4, 5, 6, 7, 9,10) Unlikely as the District’s assertion seems, and this hearing officer does not find the District’s assertion credible, even if a parent did not want a student at an Assistive Technology Evaluation it would be the responsibility of the evaluator to make it clear that the student must be present and to defer the evaluation until the student was present. The Assistive Technology Evaluator was the responsible professional and if she is doing an evaluation in which her practice and the accepted practice is to have the child there then she should have pursued the point, regardless of the source of the resistance. Notably, the Assistive Technology Evaluator made no effort to meet Student at any time before or after the evaluation so she could directly assess Student’s needs. (FF 14, 15) It is no wonder that the sole recommendation for assistive technology for this student was the provision of/use of highlighters. (FF 24) This hearing officer found the testimony of the Assistive Technology Evaluator in support of the District’s position not to be credible, primarily due to the strikingly passive and superficial role she assumed. Although she presumably has expertise in conducting Assistive Technology Evaluations, she took no lead in deciding who should complete the questionnaires, did not ask who helped Student complete Student’s questionnaire, did not read Student’s IEP, did not insist that Student be present at the Evaluation even though her belief was that the student should be present, and never met or observed Student.

At one point in the proceedings there was a brief suggestion by District’s counsel that what was done was not an evaluation (“I would object to the term evaluation. As I read this, it’s an assistive technology SETT framework. I still don’t know what its purpose is, actually, so---it’s a framework, not an evaluation, as far as I can see.”) (NT 216). This hearing officer must agree with the independent educational evaluator that what was done by the Assistive Technology Evaluator was not an Assistive Technology Evaluation. (FF 26, 27, 28)

The District agreed to perform an Assistive Technology Evaluation of Student. What the District produced was either not an evaluation at all, or if it was an evaluation it was an inadequate evaluation. The Parents have met their burden of proof on this issue and the District will be ordered to fund an independent Assistive Technology Evaluation by an agency or an evaluator of their choice, the results of which must then be shared with both parties.

Were the 2006-2008 Functional Behavioral Plans (FBA) and Behavioral Support/Intervention Plans (BIP) the District developed for Student appropriate and were the BIPs appropriately followed?

The IDEIA provides that “in the case of a child whose behavior impedes Student’s learning or that of others, ... appropriate strategies, including positive behavioral interventions, strategies, and supports to address that behavior” must be considered. 20 U.S.C. § 1414(d)(B)(3)(I). Pennsylvania law implementing the IDEIA requires that “[b]ehavior support programs and plans must be based on a functional assessment of behavior and utilize positive behavior techniques. When an intervention is needed to address problem behavior, the types of intervention chosen for a particular student or eligible young child shall be the least intrusive necessary.” *See* 22 Pa. Code § 14.133(a).

As detailed in Sp. Educ. Op. 1724 (April 2006) however, the IDEIA “only expressly requires an FBA and a BIP upon removal of an eligible child for 10 school days in a school year⁵” which did not arise in this case. The Panel also noted that “the courts have been averse to importing best practice in the absence of legal standards for FBAs and BIPs.⁶” Although at the time this decision is being written the Commonwealth has moved to a one-tier system, the complaint was filed within the period when the two-tier system was in place and if appealed, this decision will be reviewed under the two-tier system. Whether one-tier or two-tier, the substantive law at the base of the Panel’s holding has not changed.

The behaviors that Student displayed in 6th grade were typical of Student’s peers. (FF 30, 31, 32) No FBA or BSP was needed, but at the Parents’ request at the beginning of 7th grade the District agreed to provide these for Student. (FF 35) The 7th grade special education teacher did not see the need for an FBA or a BIP. (FF 34) In 8th grade the special education teacher who was with Student virtually every day did not see Student exhibiting any of the behaviors listed in the FBA any more than any other eighth grade student. Student’s regular education homeroom and history teacher and Student’s speech/language therapist did not testify to any behavioral concerns about Student. (FF 46, 47, 48, 49, 50, 51)

⁵ 34 C.F.R. § 300.520(b)-(c). Moreover, the 2004 IDEA Amendments do not add any requirements applicable to this case. 20 U.S.C.A. §§ 1415(k)(1)(D) and 1415(k)(1)(F).

⁶ *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).

Since Student did not need either the FBA or the BSP the inquiry could end here, but this hearing officer chose to review both carefully and to review the testimony of the independent educational evaluator. The FBA and the BSP were well done in that they were detailed, data-based and outcome driven and represented a positive approach to any behavioral concerns that may have been identified. (FF 36, 37, 38, 39, 40, 41, 42, 43, 44)

In this regard the testimony of the District's witnesses, including the two special education teachers, the homeroom/history teacher, the reading teacher and the speech/language therapist was persuasive. The independent educational evaluator's credibility was diminished in this area, as his criticisms of the District's efforts on Student's behalf in this regard were overly inclusive. His recommendations for a behavior plan, even if one were needed, went well beyond considerations of "best practice", and were not reflective of the standard of "appropriateness". The Parents failed to meet their burden of proof on this issue.

Is it necessary that Student be provided with a one-to-one aide in order for Student to receive FAPE?

Special education includes supportive services, which if necessary could be a one-to-one aide. The independent educational evaluator proposed that Student be provided with "a support staff assigned not necessarily to Student but to Student's classes...kind of keeping an eye on things and being able to move in when necessary". (FF 52) He also backed off from calling this person an "aide" and opted for the nomenclature "support teacher". (FF 53, 54) Although this type of personal one-to-one "support teacher" may arguably be appropriate in some circumstance with some students, this hearing officer is not at all persuaded that such an arrangement would be appropriate for Student, and in fact given Student's response to the TSS and Student's stage of adolescent development would likely be inappropriate, as the presence of such a person risks stunting Student's social development and sense of competence. Student is using the supports offered to Student by the regular and special education teachers and the instructional assistants. (FF 57, 58, 59, 60, 61, 62, 63, 64) It is necessary to remember that the IDEIA does not require a district to offer an eligible student the best of all possible services, nor to maximize the student's potential, but only to provide such supports as to allow the student to make meaningful educational progress, that is, more than minimal progress. With the same condition stated above with regard to citing the Appeals Panel, it is noted that a Panel has held that "When behaviors, even if problematic, do not interfere seriously with the student's education or the education of others, a one-on-one aide is not necessary." Spec. Ed. Op. 1702 (March 9, 2006).⁷ Notably Student's behaviors in school during 7th and 8th grades do not in any way reach the level of what this hearing officer would consider "problematic" based upon the evidence provided by both parties.

⁷ Parents in *K.R.* appealed the Appeals Panel decision regarding, *inter alia*, the decision that a one-on-one aide was not necessary and therefore K.R. was not denied a FAPE when [that student] was not provided such an aide. In *K.R. v. School District of Philadelphia, et al.*, 2008 WL 2609810 (E.D.Pa., June 26, 2008), the Court found no reason to depart from the Hearing Officer's and Appeal's Panels findings and granted the defendant's Motion for Judgment on the Administrative record.

Additionally, providing Student with a personal “support teacher” to move in and assist Student academically as needed goes well beyond what is necessary to provide Student with FAPE and may actually be harmful in the long run. The recommendation of the independent educational evaluator in this regard is deemed to be entirely unrealistic insofar as it requires a one-to-one person; the types of support he envisioned the person providing are the types of support that the teachers and instructional aides are providing and must look for opportunities to provide. The Parents did not meet their burden of proof on this issue.

Should the recommendations of the independent educational evaluator be incorporated into Student’s IEP?

The IDEA’s implementing regulations require that an independent evaluation provided by parents “must be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child.” 34 C.F.R. §300.502(c)(1). Therefore, the District must comply with this requirement and “consider” the IEE.

Although decisions outside the Third Circuit are not binding, it is instructive to look at the nature of “consider” as addressed by the Second Circuit in T.S. v. Bd. Of Educ. of the Town of Ridgefield, 10 F.3d 87, 89 (1993):

No definition of the term “considered” is offered in either the federal or state regulations. Nor do they require that the [Planning and Placement Team] assign a specific weight to any item of information presented to it for its consideration.... Plain meaning is ordinarily our guide to the meaning of a statutory or regulatory term. [Internal citations omitted.] The plain meaning of the word “consider” is “to reflect on: think about with a degree of care or caution.”...Nothing in this definition suggests that every member of a body must read a document in order for the body collectively to ‘consider’ it....

Other circuits have also given a limited reading to the term “considered” in this context. The First Circuit stated ... that the regulatory requirement for an IEE to be “considered” by a public agency does not mandate “that there be substantive discussion” of the IEE. And the Eighth Circuit indicated ... that an IEE had been adequately “considered” when it was read by the public school’s director of special education, concluding by noting that two members of that team read the IEE and the court found “that the consideration given to the IEE was sufficient to satisfy [parent’s] due process rights under the IDEA.”

The Parents have the right to present their IEE to the IEP team and have it considered. In the instant matter the independent educational evaluator had a considerable amount of input into the IEP for the 2007-2008 school year as he personally participated in two IEP meetings. Some of his input was adopted by the IEP team and some was not. Notably, in his written report the independent educational evaluator himself appropriately recognized the limits of his contributions to the IEP team in the IEE as follows: “The following are

my recommendations to the team. I fully expect the team to change these recommendations by eliminating some, modifying others, and generating new recommendations based on the knowledge of the team.” (P-3).

This Hearing Officer lacks jurisdiction to require the District to incorporate any recommendations from the IEE into Student’s IEP. Having said that, she must recognize however, that many of the recommendations cited in certain specific Findings of Fact, above, find their support in common sense, in case law, and in training/support provided by PaTTAN regarding writing appropriate IEPs. (FF 71, 72, 73, 74, 75, 7, 77, 79, 80, 81) The District should consider taking advantage of the independent educational evaluator’s expertise in these specific regards.

Did the District deny Student FAPE for the 2006-2007 and/or the 2007-2008 school years? If the District denied Student FAPE for any or all of this period is Student entitled to compensatory education, in what amount and in what kind?

Special education issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 (“IDEIA” or “IDEA 2004” or “IDEA”), which took effect on July 1, 2005, and amends the Individuals with Disabilities Education Act (“IDEA”). 20 U.S.C. § 1400 *et seq.* (as amended, 2004). “Special education” is defined as specially designed instruction...to meet the unique needs of a child with a disability. ‘Specially designed instruction’ means adapting, as appropriate to the needs of an eligible child ...the content, methodology, or delivery of instruction to meet the unique needs of the child that result from the child’s disability and to ensure access of the child to the general curriculum so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children. C.F.R. §300.26

In *Board of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034, 3051 (1982), the U.S. Supreme Court articulated for the first time the IDEA standard for ascertaining the appropriateness of a district’s efforts to educate a student. It found that whether a district has met its IDEA obligation to a student is based upon whether “the individualized educational program developed through the Act’s procedures is reasonably calculated to enable the child to receive educational benefits.”

Meaningful educational benefit must relate to the child’s potential. *See T.R. v. Kingwood Township Board of Education*, 205 F.3d 572 (3rd Cir. 2000); *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999); *S.H. v. Newark*, 336 F.3d 260 (3rd Cir. 2003) (district must show that its proposed IEP will provide a child with meaningful educational benefit).

A school district is not required to maximize a child’s opportunity; it must provide a basic floor of opportunity. *See Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290 (7th Cir.), *cert. denied*, 488 U.S. 925 (1988). In a homespun and frequently paraphrased statement, the court in *Doe v. Tullahoma City Schools* accepted a School District's argument that it was only required to "...provide the educational equivalent of

a serviceable Chevrolet to every handicapped student." and that "...the Board is not required to provide a Cadillac..." *Doe ex rel. Doe v. Bd. of Ed. of Tullahoma City Sch.*, 9 F.3d 455, 459-460 (6th Cir. 1993)

Thus, 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").

Student is a student who when assessed by the independent evaluator tested out as functioning cognitively at the lower end of the average range with some areas closer to the middle of the average range. (FF 88) Student's achievement was generally consonant with Student's ability, with two discrepancies that were statistically significant. (FF 89, 90, 91, 92) Moreover, across and within settings (classroom, independent evaluation, PSSAs) Student's test results are inconsistent. (FF 93, 94, 95)

2006-2007

Well into the hearing it came to light that during the 2006-2007 (7th grade) school year, the District had no choice but to continue implementing the November 15, 2005-November 14, 2006 IEP that was written in the fall of 6th grade. (FF 101) The Parents did not attend the November 2006 IEP meeting nor approve the draft IEP created for that meeting, and although the Parent attended an IEP meeting in February 2007 they did not approve the revised draft IEP. (FF 98, 99) Notably, according to the Parent, six or seven IEP and/or FBA and or mediation meetings were held that year; the first meeting in September 2006 was attended by 22 people. (FF 100) A new IEP drafted with direct input from the independent educational evaluator in May and June 2007 was approved by the Parents on August 30, 2007 for implementation in 8th grade (2007-2008 school year). In *Spec. Educ. Op. No. 1648 (2005)*, the Pennsylvania appeals panel noted, as it relates to the district's obligations to provide FAPE, "if evidence were preponderant that the parent precluded the District from fulfilling its obligations to evaluate and develop an appropriate IEP", the parents would not be eligible for the compensation they sought. *See also, e.g., Patricia P. v. Bd. of Educ.*, 203 F.3d 462 (7th Cir. 2000); *Great Valley Sch. Dist. v. Douglas M.*, 807 A.2d 315 (Pa. Commw. Ct. 2002).

A great deal of District staff time and effort was put into developing an appropriate program for Student, and despite their regular participation the Parents could not agree on what the District was offering. In consideration of the equities, this hearing officer therefore will not examine the IEP from the 2005-2006 school year with regard to

whether or not it offered Student FAPE for the 2006-2007 school year or consider compensatory education for that year.

As it was the Parents' actions or inactions that led to an IEP for 2006-2007 not being adopted and implemented, and because a parent's obstruction cannot then result in a decision in the parent's favor, and because no evidence was presented that would equitably allow this hearing officer to fashion an award of compensatory education, even if one was warranted, the District will not be required to provide Student with compensatory education for the 2006-2007 school year.

2007-2008

The IEP for the 2007-2008 school year was created over the course of two IEP meetings in May and June 2007. The independent educational evaluator attended and participated in these meetings. The Parents were both present, as were a parent advocate from Parents' Exchange, a disabilities advocate, a targeted case manager, a Provider 50 representative and an IEP facilitator from ODR. The District was represented by the principal, a regular and two special education teachers, the director of special education, a speech/language therapist, a school psychologist, and two guidance counselors. (FF 102, 103)

In the instant matter the independent educational evaluator provided a considerable amount of testimony criticizing an IEP that he had spent two meetings helping to create. He was much more directly involved in Student's IEP than the independent evaluator who provided input in *Derek B. v. Donegal Sch. Dist.*, 47 IDELR ¶ 34, at *142 (E.D. Pa. 2007) wherein the federal district court's comments were as follows:

This is not to say that the District's IEPs were without flaws...However...flaws in this regard did not render the IEPs inadequate.... Even to the extent that Plaintiffs have shown that [the Student's] rate of progress was slow, Plaintiffs have not demonstrated that ...the weaknesses in the IEP ... are ... so serious that they prevented [the Student] from receiving FAPE. In fact, the IEPs do not appear vague, nor do they seem to exclude necessary goals. On the contrary, they are relatively detailed, although not as detailed as [an expert witness/independent evaluator's] reports, and appear to have been thoughtfully designed to benefit [the Student]. It is entirely possible that an IEP written by [the expert witness/independent evaluator] would have been better than the School District's ..., [but] the IDEA does not ask the public schools to guarantee the very best.

In the instant matter, along with the independent educational evaluator and various other support persons, both parents attended meetings to create the 2007-2008 IEP in May and June 2007 and the Parents approved the IEP at the end of August 2007. In *Hinson ex rel. N.H. v. Merritt Educational Center* (D.D.C. October 2008) the court ruled that the student's individualized education plan (IEP) was appropriate, as required by the IDEA, despite claims by the student's Parent that the IEP was not appropriately tailored to address the student's deficits which impacted Student's ability to access the general curriculum. The Parent in that case fully participated in the IEP development process,

fully agreed with the substance of the IEP as drafted at a meeting, and signed the IEP indicating an agreement.

Although the IEP for 2007-2008 was created with input by the independent educational evaluator and the Parents and approved by the Parents, and on these facts alone could be considered appropriate, this hearing officer will examine both the IEP and its implementation.

The IEP for each child with a disability must include a statement of the child's present levels of educational performance; a statement of measurable annual goals, including benchmarks or short-term objectives, related to meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum and meeting the child's other educational needs that result from the child's disability; a statement of the special education and related services and supplementary aids and services to be provided to the child...and a statement of the program modifications or supports for school personnel that will be provided for the child to advance appropriately toward attaining the annual goals (and) to be involved and progress in the general curriculum...and to be educated and participate with other children with disabilities and nondisabled children; an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class... CFR §300.347(a)(1) through (4)

Student's IEP for 2007-2008 comprises 36 pages. It includes statements of Student's present levels based upon objective testing (QRI) of reading skills, teacher's professional assessment of Student's writing skills, objective testing (CBA) of math skills and a line of inquiry related to behavior needs. Although not required, an FBA and a BIP are also included in the IEP. The IEP sets out measurable annual goals for advancement in Student's areas of need and specific benchmarks or short term objectives related to meeting the goals. (FF 104) Particularly related to Student's Asperger's and concomitant speech/language impairments there is a precise and detailed speech/language section addressing making inferences, understanding idioms and acquiring vocabulary which dovetails with Student's reading comprehension instruction. The speech/language section also addresses speaking/listening objectives related to eye/face contact in conversation. (FF 105) The IEP contains 32 separate and specific elements of special education (specially designed instruction), and puts forth the related services (speech/language and occupational therapy) to be provided to Student, as well as a statement of the supports for school personnel that will be provided. It puts forth the extent to which Student will not be educated with nondisabled peers. (FF 106) The IEP was appropriately implemented (FF 107, 108, 109, 110, 111, 112, 113, 114, 115)

The special education teacher/ case manager testified at length about the assessments used throughout the year to monitor Student's progress in Student's areas of need. Although, as all witnesses for both parties agreed, Student is inconsistent, particularly when taking tests, the classroom assessments showed that from the beginning of the 8th grade year to the end of that year Student made meaningful educational progress. (FF 119, 120, 121, 122, 123, 124, 125) Although the Parents point to Student's continuing to

score Below Basic in reading and math on the PSSA's it is noted that although Student does have a specific learning disability and is progressing at a grade level that is behind Student's nondisabled peers, on the PSSAs Student is compared to Student's grade-mates. (FF 96) Further, the independent educational evaluator discounted the value of the PSSA's as appropriate measures of progress, a position with which this hearing officer agrees. (FF 97) Additionally, it is noted that in educational testing done by the independent educational evaluator Student scored better than would be expected given the PSSA scores Student had achieved. (FF 90, 92, 93) Finally, referencing *Rowley* and *Rowland M v. Concord Sch. Comm.*, 910 F 2d 983 (1st Cir. 1990), the Pennsylvania Special Education Appeals Panel in Spec. Educ. Opinion No. 1867 (March 2008), cited here under the same understanding as stated above noted, "Although actual progress can demonstrate that an IEP provided FAPE; the inverse of this rule – that a lack of progress necessarily indicts an IEP's inadequacy – contradicts the fundamental concept that "[a]n IEP is a snapshot, not a retrospective."

While IEPs are not to be viewed as documents guaranteeing a specific educational outcome, they are however documents that guarantee specific services to be provided a student. There is no dispensation to a district of this accountability and responsibility. There was convincing evidence presented that Student did not receive the amount of social skills training Student was supposed to receive as per Student's IEP. (FF 127) Student's resistance to being part of a "lunch group with selected students" is not the fault of the District and in fact this strategy seems unnecessary for Student. However, it was evident that the District did not meet its responsibility to provide the "social skills instruction with guidance counselor individually or in group" specified in the IEP. Therefore Student entitled to compensatory education in the area of social skills training.

Compensatory education is an appropriate remedy where a school district has failed to provide a student with FAPE. *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). For many years the period of compensatory education has been calculated to be equal to the period of deprivation, less a reasonable rectification period. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999) In a gifted education case the court placed its focus on what it will take to bring the student to the point Student should have been if not for the deprivation of FAPE. *B.C. v. Penn Manor*, 906 A.2d 642 (Pa. Cmwlth. 2006)

It is this hearing officer's determination that in order to remedy Student's deprivation of social skills training during the 2007-2008 school year and bring Student to the point where Student would be but for the deprivation of FAPE, Student must be provided with compensatory education services in the form of weekly one-hour social skills training sessions for a period of one year (52 sessions) with a speech/language therapist, a licensed psychologist, or other professional or agency qualified to provide social skills training to an adolescent on the autistic spectrum. The service provider is to be chosen by the Parents. Sessions may take place after school or on the weekends and should continue through the summer. Because social skills development is important during this stage of Student's development, this award must be used within one year of the date of

this decision, or if the decision is appealed and upheld, within one year of the final order of the Appeals Panel. The total cost of these services must not exceed the total cost (salary and fringe benefits) the District would have borne had its employee(s) provided these services.

This hearing officer feels compelled to add a comment by way of dicta. Following assessment, the independent educational evaluator made five overall recommendations, three of which addressed the need for the adults to work together as a team (emphasis added): “[Student’s] disabilities...**will require a lot of hard work on everyone’s part** to manage effectively”; **“this involves a good working relationship among the adults”**; **“understanding everyone on the team’s point of view”**; **“choose the intervention that will meet the needs of the greatest number of team members involved”**; **“The best approach is to work together as a team.”** (P-3) Clearly [the independent educational evaluator] detected notable difficulties with the IEP team members’ ability to work together (NT 118-119). This hearing officer has also concluded that this is the case. Despite at least two Resolution Meetings before the hearing began, and at least one IEP meeting after the hearing began, and despite being allowed to spend over three hours before the start of the fourth hearing session to attempt to work things out with the assistance of competent counsel the parties could not come to an amicable agreement. They have to work together for at least four more years. The parties are strongly urged to put aside their past differences and work together for Student’s benefit. Student is a nice youth by all accounts, and more emphasis on Student’s abilities while still addressing Student’s disabilities in a spirit of cooperation may give Student the best chance to become a well functioning independent individual.

Order

It is hereby ordered that:

1. Student must receive an independent Assistive Technology Evaluation at the District's expense.
2. It was not necessary for Student to have an FBA and a BSP for the time period covered in this matter (2006-2007 and 2007-2008 school years). Nevertheless the FBAs and the BIPs developed at the Parents' request were appropriate and were appropriately followed.
3. It is not necessary that Student be provided with a one-to-one aide in order for Student to receive FAPE.
4. It is not within this hearing officer's authority to order that the recommendations of the independent educational evaluator be incorporated into Student's IEP.
5. The District did not deny Student FAPE for the 2006-2007 school year. During the 2007-2008 school year the District failed to provide Student with the amount of social skills training specified in Student's IEP and thus in this one respect denied Student FAPE. Student must be provided with compensatory education services in the form of weekly one-hour social skills training sessions for a period of one year (52 sessions) with a speech/language therapist, a licensed psychologist, or other professional or agency qualified to provide social skills training to an adolescent on the autistic spectrum. The service provider is to be chosen by the Parents. Sessions may take place after school or on the weekends and should continue through the summer. Because social skills development is important during this stage of Student's development, this award must be used within one year of the date of this decision, or if the decision is appealed and upheld, within one year of the final order of the Appeals Panel. The total cost of these services must not exceed the total cost (salary and fringe benefits) the District would have borne had its employee(s) provided these services.

October 7, 2008
Date

Linda M. Valentini, Psy.D.
Linda M. Valentini, Psy.D.
Hearing Officer