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Pennsylvania Special Education Hearing Officer

DECISION

Child's Name: Student

Date of Birth: xx/xx/xx

Dates of Hearing:
June 12, 2008, August 7, 2008, September 24, 2008
CLOSED HEARING
ODR #8650/07-08 LS

Parties to the Hearing:

Forest City Regional School District
100 Susquehanna Street
Forest City, PA 18421-1355

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Drew Christian, Esquire
801 Monroe Avenue
Scranton, PA 18510

Angela Januski Evans, Esquire
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October 10, 2008

October 25, 2008

William F. Culleton, Jr., Esquire

INTRODUCTION AND PROCEDURAL HISTORY

Student (Student) is an elementary school aged eligible resident of the Forest City Regional School District, and Student is identified as a child with a disability for special education purposes, due to autism. (NT 27-28.) During the 2006-2007 school year, the Student was in early intervention through the Northeastern Intermediate Unit (IU). During the 2007-2008 school year, the Student was enrolled in the District's full time, regular education kindergarten class at the [redacted] Elementary School (School). (Parent) requested due process asserting that the District's program for the Student in kindergarten was inappropriate, and requesting, among other things, compensatory education and an independent educational evaluation. (P-16.) The District asserts that its evaluation and program are adequate and that the Student made meaningful educational progress during Student's kindergarten year.

The hearing was conducted on three dates from June 12, 2008 until September 24, 2008. The record closed on October 10, 2008, upon receipt of written summations from the parties.

ISSUES

1. Did the District fail to provide a FAPE to the Student by failing to offer and implement appropriate transition services when the Student transferred from early intervention to kindergarten in the 2007-2008 school year?
2. Was the District's evaluation report, dated November 20, 2007, appropriate?
3. Did the District fail to provide a FAPE to the Student by failing to offer an appropriate IEP in January 2008?
4. Did the District fail to provide a FAPE to the Student by failing to appropriately implement the IEP offered in January 2008?

5. Should the hearing officer award compensatory education for all or part of the time period beginning on the first day of school in the 2007-2008 school year and ending on the last day of school for that year?
6. Should the hearing officer order an independent educational evaluation at public expense?

FINDINGS OF FACT

1. The Student was first diagnosed with developmental delays, which qualified Student for early intervention. (NT 117.)
2. At the time of transition to kindergarten, the Student displayed clinically significant dysfunctional behaviors including social isolation, lack of social communication skills, inability to conform to classroom routine, defiance, poor attention span, escape behaviors, angry outbursts, verbally and physically aggressive behaviors, stereotyped and repetitive behaviors, difficulty with transitions and difficulty with bathroom needs. (NT 37-42; P-2, P-3, P-6.)
3. The Student received early intervention services through the Northeastern Intermediate Unit. (P-1.)
4. The IU offered an IEP on April 16, 2007, containing a transition plan; however, the Parent did not take home a copy of the full IEP. Transition was discussed at the meeting on April 16, 2007. (NT 123-125; P-1, P-20.)
5. The transition plan does not identify problems or set forth specific strategies to address them. It was not individualized to address the Student's needs. (NT 638; P-20.)
6. The April 2007 IEP addressed the Student's needs for social development and better transitioning behaviors. It did not address dysfunctional or oppositional behavior, unusual idiosyncratic behaviors, or toileting problems. (P-1, P-20.)

7. The April 2007 IEP did not include or recommend a functional behavior analysis or behavior support plan. (P-20.)
8. The Parent approved the offered IEP. (NT 121-123; P-1, P-20.)
9. When the Student arrived at Student's regular education kindergarten class, and for the first two weeks of school, there was no accommodation for Student's disabilities, and there were no special education services or transitional services for a period of up to two weeks. The District assigned an aide to provide one-to-one assistance to the Student for the rest of September and part of October. (NT 35-36, 235.)
10. Through referral by the Student's pediatrician, the Parent provided to the District a psychological evaluation dated September 17, 2007, from a local health agency, describing the Student's behaviors and suggesting treatment goals for following directions, compliance with limits, social skills, and reduction of stereotypical and repetitive behaviors. (NT 37-41; P-2, P-3.)
11. The Parent obtained a psychiatric evaluation dated October 1, 2007, from the same health agency, which also diagnosed Autistic Disorder and recommended a comprehensive psychoeducational evaluation. The District was notified that a comprehensive psychoeducational evaluation was recommended. The psychiatrist deferred initiation of medication therapy. (P-7, P-8.)
12. On September 18, the District obtained a permission form for evaluation. (P-4.)
13. The District offered an IEP on September 19, 2007. The IEP addressed the Student's need to develop social skills, follow directions in the classroom, attend, transition and conform to classroom routine. (P-5.)
14. The District's special education teacher was not present for the meeting. (NT 45; P-5.)
15. The September 2007 IEP did not specifically address in the Present Levels section the Student's escape behaviors, verbal and physical

aggression, angry outbursts, stereotyped and repetitive behaviors or difficulties with bathroom needs. (NT 46, 172-175; P-5.)

16. The classroom participation goal, including social interaction and transitioning, was not measurable as written, and did not proceed from a baseline. Progress monitoring was not based upon systematic data collection. (P-5.)
17. The social skills goal, including social interaction and transitioning, did not proceed from a baseline. Progress monitoring was not based upon systematic data collection. (P-5.)
18. Specially designed instruction for the Student's behaviors and social development consisted of small group instruction and use of objects and pictures. (P-5.)
19. Support for school personnel consisted of consultation with the special education director once per week. There was no coordination between the classroom teacher and the TSS worker supplied by the local health agency. (NT P-5.)
20. The September 2007 IEP did not include or recommend a functional behavior analysis or behavior support plan. (P-5.)
21. The District's intention was to rely upon the local health agency to provide both planning and services to address the Student's educational needs in the areas of behavioral control and social development. The health agency provided a therapeutic behavior management plan that was implemented by the TSS worker who began in October. This plan was not educational in nature. Its goals were three month goals, not annual goals. (NT 235, 435, 453-455, 457-459, 636-642; P-11.)
22. The kindergarten teacher did not consider herself responsible to implement the IEP and there was no one at first who was responsible. There was no support for the kindergarten teacher when the Student began in her class. (NT 158-172, 175, 192-193.)
23. The Student made some progress by the end of the first calendar quarter of services, but Student exhibited substantial problems in

behavior and social skills until January. (NT 170-179, 183, 198, 224, 227-228, 235-236, 456-457; P-8.)

24. The District provided an Evaluation Report on November 20, 2007. (P-8.) The evaluation recognized all of the Student's dysfunctional behaviors except Student's problems with bathroom needs in school. It identified the Student with Autism and recommended IEP programming for all of the Student's behaviors, specifying following directions, compliance with limits, social skills, and reducing stereotypical and repetitive behaviors. (P-8.)
25. The Student received a pull out reading class with the special education staff. (NT 182-185.)
26. In December, 2007, the District's supervisor of special education criticized the general education teacher for planning the Student's schedule with the Parent. She instructed the teacher to discuss all matters with the team, including herself, before discussing with the Parent. (P-9.)
27. On December 10, 2007, the local health agency psychologist issued an updated report recommending continuation of TSS services. (P-12.)
28. The report noted improvement in the Student's behavior, including elimination of escape behaviors, "dramatically reduced" oppositional and defiant behaviors, minimal initial development of peer relationships, and reduction of stereotypical and repetitive behaviors. (P-11.)
29. The report noted that all improvements were dependent on redirection by the TSS worker and all were due to the behavioral plan and interventions provided by the TSS worker through the health agency. (P-11.)
30. On December 12, 2007, the health agency psychiatrist deferred medication therapy. (P-12.)
31. The District offered an IEP on January 16, 2008. The IEP addressed the Student's need to develop social skills, follow

directions in the classroom, comply with limits, attend, and conform to classroom routine. (P-14.)

32. The January 2008 IEP did not specifically address in the Present Levels section the Student's escape behaviors, verbal and physical aggression, angry outbursts, stereotyped and repetitive behaviors difficulties with transitions or difficulties with bathroom needs. (P-14.)
33. In the January 2008 IEP, the classroom participation goal, including following directions and compliance, was not measurable as written, and did not proceed from a baseline. Progress monitoring was not based upon systematic data collection. (P-14.)
34. The social skills goal, including eye contact and social pragmatic language skills, was not measurable and did not proceed from a baseline. (P-14.)
35. Specially designed instruction for the Student's behaviors and social development consisted of small group instruction and use of objects and pictures. There was no provision for coordination with either the Behavior specialist from the health agency or the TSS providing services in the classroom. (P-14.)
36. Support for school personnel consisted of consultation with the special education director once per week. (P-14.)
37. The January 2008 IEP did not include or recommend a functional behavior analysis or behavior support plan. (P-14.)
38. The TSS worker left the program on January 28, 2008. However, this did not cause a substantial degradation of the services provided nor did it lead to substantial regression in the Student's behavior and utilization of skills. The District assigned an aide to replace the TSS worker. (NT 229-230, 505-507, 567-568.)
39. After the TSS worker left the classroom, the District provided the Student with small group instruction in reading. This was in addition to the speech and language services that Student was

receiving twice every six days. (NT 185, 310-312, 413-414, 456, 567-568.)

40. After the TSS left the classroom, the Student's behavior regressed and Student displayed increased aggressiveness. As a result, the Parent took Student to the psychiatrist who prescribed a low dose of an antipsychotic medication sometimes prescribed for autistic children. The Parent noted an improvement in the Student's behavior after the medication was started. (NT 98-99.)

41. By April 2008, the Student was demonstrating improved behavior in class participation, behavior control and social skills. The regular education kindergarten teacher and the school aide worked competently with the Student. (NT 230-231, 337-339, 345-347, 465, 469; S-18.)

42. In April 2008, the Student continued to have substantial deficits in social communication skills, including language comprehension, making requests appropriately, refraining from negative behavior to get attention and social pragmatics. (NT 340-347, 369; S-18.)

43. By the end of the year, the Student was socializing better with other students, participating in whole group instruction, and making progress academically. (NT 230.)

DISTRICT'S EVALUATION METHOD AND INFORMATION RELIED UPON

44. The District's evaluators considered the September 2007 psychological evaluation provided by the Parent, a behavior report provided by the TSS worker, and a speech and language evaluation. (P-8.)

45. The District's evaluators considered history and current behavioral observations provided by the Parent and by the Student's Father through interview, and the results of the Behavioral Assessment for Children, Second Edition (BASC-II), provided by the Parent, the Father, and the Student's step-father. (P-8.)

46. The District's evaluators considered the results of the Behavioral Assessment for Children, Second Edition (BASC-II), provided by the pre-kindergarten teacher and the kindergarten teacher. The kindergarten teacher was interviewed. (P-8.)
47. The Student was observed in the classroom and during testing. (P-8.)
48. The District's evaluators administered standardized instruments to test for cognitive ability (WPPSI-III) and academic achievement (WIAT-II). A standardized test of visual motor integration (VMI) was also administered. (P-8.)

DISCUSSION AND CONCLUSIONS OF LAW

BURDEN OF PROOF

The burden of proof is composed of two considerations, the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact.¹ The United States Supreme Court has addressed this issue in the case of an administrative hearing challenging a special education IEP. Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005). There, the Court held that the IDEA does not alter the traditional rule that allocates the burden of persuasion to the party that requests relief from the tribunal. Therefore, the burden of persuasion is upon the Parents.

The Court noted that the burden of persuasion determines the outcome only where the evidence is closely balanced, which the Court termed "equipose" – that is, where neither party has introduced a preponderance of evidence² to support its contentions. In such unusual circumstances, the

¹ The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact (which in this matter is the hearing officer).

² A "preponderance" of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. Dispute Resolution Manual §810 (please note that the Manual was promulgated before the Supreme Court ruled in Schaffer v. Weast, at a time when the Local Educational Agency had the burden

burden of persuasion provides the rule for decision, and the party with the burden of persuasion will lose. On the other hand, whenever the evidence is clearly preponderant in favor of one party, that party will prevail.

THE DUTY TO PROVIDE A FREE APPROPRIATE PUBLIC EDUCATION THROUGH AN INDIVIDUALIZED EDUCATIONAL PROGRAM

A school district offers FAPE by providing personalized instruction and support services pursuant to an IEP that need not provide the maximum possible benefit, but that must be reasonably calculated to enable the child to achieve meaningful educational benefit. Meaningful educational benefit is more than a trivial or de minimis educational benefit. Whether an IEP is reasonably calculated to afford a child educational benefit can only be determined as of the time it is offered to the student and not at some later date. 20 U.S.C. §1412; Board of Education v. Rowley, 458 U.S. 176, 73 L.Ed.2d 690, 102 S.Ct. 3034 (1982); Ridgewood Board of Education v. M.E. ex. rel. M.E., 172 F.3d 238 (3d Cir. 1999); Stroudsburg Area School District v. Jared N., 712 A.2d 807 (Pa. Cmwlth. 1998); Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3rd Cir. 1988) Fuhrmann v. East Hanover Board of Education, 993 F.2d 1031 (3d Cir. 1993); Daniel G. v. Delaware Valley School District, 813 A.2d 36 (Pa. Cmwlth. 2002)

The IDEA requires a local educational agency to address every substantial educational need of the child with a disability, including behavior and social skills. If the IEP is inadequate in any material way, it is inappropriate as a matter of law. Rose v. Chester Co. Intermed. Unit, 196 WL 238699, 24 IDELR 61, aff'd 114 F.3d 1173 (3d Cir. 1997). This is reflected in the requirements for both evaluations and individual education plans.

The local educational agency must conduct a “full and individual initial evaluation” 20 U.S.C §1414(a)(1)(A). The child must be “assessed in all areas of suspected disability.” 20 U.S.C. §1414(b)(3)(B). The regulation implementing this statutory requirement adds that this

of persuasion in Pennsylvania and elsewhere in the federal Third Judicial Circuit. Thus, the first sentence of section 810, indicating that the LEA has the burden in most cases, is outdated and was effectively overturned by Schaffer).

includes “social and emotional status” 34 C.F.R. §300.304(c)(4). The regulations require that the evaluation procedures “assist in determining ... [t]Student content of the child’s IEP. 34 C.F.R. §300.304(b)(1). The evaluation must be “sufficiently comprehensive to identify all of the child’s special education and related services needs” 34 C.F.R. §300.304(c)(6).

The IEP must be specific enough to address all of the child’s needs which are identified, both academic and functional. 20 U.S.C. §1414(d)((1)(A)(i)(II), (IV); Christen G. v. Lower Merion Sch. Dist., 919 F.Supp. 793 (E.D. Pa. 1996). The child’s developmental and functional needs must be considered. 20 U.S.C. §1414(d)(3)(A)(iv). Where a child’s behavior impedes learning, the IEP team must consider strategies to address that behavior. 20 U.S.C. §1414(d)((3)(B)(i).

CREDIBILITY

The hearing officer finds that, in general, the Parent was credible. The hearing officer has no doubt that the Parent was seeing the behaviors that she described at home. However, the hearing officer gives reduced weight to her statements regarding what was happening in school, because she did not observe at school. (NT 153.) Her memory of communications to her from school officials is limited, and her responses to questions were literal and concrete; thus, the hearing officer is hesitant when drawing inferences based solely upon the Parent’s recollection of what was said to the Parent. (NT 152-153.)

Similarly, the hearing officer finds that the testimony of the special education director will be given less weight with regard to the progress the Student made and the appropriateness of the District’s planning to address the Student’s emotional, behavioral and social needs. The director, though there is no doubt of her essential honesty and sincerity, was clearly defensive and prone to some embellishment under cross examination. (NT 581-646, 608-609.)

APPROPRIATENESS OF DISTRICT TRANSITION SERVICES

The hearing officer finds that the District’s educational plan and implementation were inadequate with regard to the Student’s transition to kindergarten. The Student was coming from early intervention, and the

District was specifically on notice as of April 2007 that Student was experiencing developmental delays and serious emotional, behavioral and social deficits. (FF 1-8, 10, 11.) The District's director of special education attended the IEP team meeting where this was discussed and an IEP was approved.

The transition plan in the IEP was inadequate because it was not individualized. (FF 4.) It was simply a form advising the Parent that there would be meetings and information about transition. There is no evidence that the District ever planned to address the Student's specific needs. While the plan clearly was to rely upon the early intervention IEP while the District was evaluating the Student – a plan that the papers in this case preponderantly demonstrate was the routine practice – that IEP was clearly deficient in its failure to even minimally address all of the Student's needs with regard to emotions, behavior control and social skills. (FF 5-8.) Moreover, the IEP was deficient in its failure to provide baselines in these areas of functioning, measurable goals and adequate provision for progress monitoring. (FF 5.) Its specially designed instruction was also inadequate, because it was essentially a generalized statement of approach and failed to address the Student's specific needs. (FF 5-6.)

Without an adequate plan, the Student's transition to kindergarten was disastrous. Student was completely out of control and the regular education teacher was calling the Parent for help in responding to a crisis on the fly. (FF 9, 14, 19, 22.) If there were a proper plan in place, the teacher would have been equipped to address the Student's needs so that Student's early weeks of kindergarten could be a meaningful learning experience. Instead, the record shows that the Student was not provided a meaningful education in the early weeks of Student's kindergarten year.

The hearing officer finds that the District abnegated its responsibility to plan for the Student's education from the beginning of school in 2007 until January 29, 2008. There was no appropriate educational plan regarding the Student's emotions, behaviors and social education. (FF 13-20.) The Parent went to her doctor, who referred her to medical services through the local health service provider. (FF 10, 11.) When that agency provided a clinical plan and a TSS worker in the classroom, the District simply adopted the medical services as its educational services, without any assessment of the Student's needs from an educational standpoint. (FF 21-22.) The purposes and assessment criteria of clinical service providers are not

necessarily the same as that of educators. (FF 21.) The District therefore did not discharge its responsibilities under the IDEA through the medium of the behavioral health service provider.

The record shows that as a consequence, what was addressed was the immediate management need – to get control of the Student’s physical behavior so that Student would no longer disrupt the class. With a 1:1 worker directly managing the Student’s behavior while Student was in class, the crisis subsided. (FF 23, 28.) The Student was able to conform to classroom needs. However, Student’s more complex needs were not being addressed. There was no plan to teach Student the social communication and pragmatic skills needed to interact successfully with others. (FF 23, 24, 26, 28, 29, 32.) This was apparent as late as April 2008. (FF 42.)

The Student remained highly distractible in class, continued to engage in unusual behaviors, and was highly dependent upon redirection by the TSS worker as late as January. (FF 23, 24.) There was no plan to intervene directly to address the Student’s attention problems, and there was no plan to wean Student of Student’s dependence on the continuous prompting of the TSS worker. (FF 29, 32-37.) There was little coordination between the regular education teacher and the TSS worker. (FF 22, 26.)

APPROPRIATENESS OF EVALUATION

The hearing officer must determine whether or not the District’s evaluation as reported in April 2008 was appropriate. 34 C.F.R. §300.502(b)(2)(i); §300.502(b)(3). In making this determination, the hearing officer applies the legal requirements for appropriate evaluations set forth in the IDEA and its implementing regulations at 20 U.S.C. §1414; 34 C.F.R. §300.15; and 34 C.F.R. §300.301 through 311. These requirements apply to re-evaluations as well as initial evaluations. 34 C.F.R. §300.303(a). If the District’s evaluation was inappropriate, the Parent is entitled to an independent educational evaluation at public expense. 34 C.F.R. §300.502(b)(2)(i); §300.502(b)(3).

The IDEA obligates a local educational agency to conduct a “full and individual initial evaluation” 20 U.S.C §1414(a)(1)(A). The child must be assessed with regard to “social and emotional status” 34 C.F.R. §300.304(c)(4). Assessments and other evaluation materials must “include

those tailored to assess specific areas of educational need" 34 C.F.R. §300.304(c)(2).

The Act sets forth two purposes of the required evaluation: to determine whether a child is a child with a disability as defined in the law, and to "determine the educational needs of such child" 20 U.S.C. §1414(a)(1)(C)(i). It requires the use of "a variety of assessment tools and strategies to gather relevant functional, develop, and academic information" 20 U.S.C. §1414(b)(2)(A); 34 C.F.R. §300.304(b). The agency must "use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors" 20 U.S.C. §1414(b)(2)(C). The purpose of assessment tools and materials is to obtain "accurate information on what the child knows and can do academically, developly and functionally" 20 U.S.C. §1414(b)(3)(A)(ii).

Further, the regulations require that the evaluation procedures "assist in determining ... [t]Student content of the child's IEP. 34 C.F.R. §300.304(b)(1). The evaluation must be "sufficiently comprehensive to identify all of the child's special education and related services needs" 34 C.F.R. §300.304(c)(6). At least one federal court has interpreted the IDEA to require that the evaluation be "sufficient to develop an appropriate IEP" Brett S. v. West Chester Area School District, No. 04-5598 (E.D. Pa., March 13, 2006), at 25.

The IDEA requires the local educational agency to conform to extensive procedures in order to provide an appropriate evaluation. Courts have approved evaluations based upon compliance with these procedures alone. See, e.g., Eric H. v. Judson Independent School District, 2002 U. S. Dist. Lexis 20646 (W.D. Texas 2002).

The agency may not use "any single measure or assessment" as a basis for determining eligibility and the appropriate educational program for the child. 20 U.S.C. §1414(b)(2)(B); 34 C.F.R. §300.304(b)(2). The agency must review classroom based assessments, state assessments and observations of the child. 20 U.S.C. §1414(c)(1)(A)(ii),(iii); 34 C.F.R. §300.305(a)(1). Observations must include those of teachers and related services providers. 20 U.S.C. §1414(c)(1)(A)(iii); 34 C.F.R. §300.305(a)(1)(iii).

The agency must use technically sound testing instruments. 20 U.S.C. §1414(b)(2)(C); 34 C.F.R. §300.304(b)(3). All such instruments must be valid and reliable for the purpose for which they are used, be administered by trained and knowledgeable personnel and be administered in accordance with the applicable instructions of the publisher. 20 U.S.C. §1414(b)(3)(A); 34 C.F.R. §300.304(c)(1).

The agency must utilize information provided by the parent that may assist in the evaluation. Ibid. This must include evaluations or other information provided by the parents. 20 U.S.C. §1414(c)(1)(A)(i); 34 C.F.R. §300.305(a)(1)(i). Part of any evaluation must be a review of relevant records provided by the parents. 34 C.F.R. §300.533(a)(1)(i). As part of any re-evaluation, the IEP team and appropriate professionals, with “input from the child’s parents,” must “identify what additional data, if any, are needed to determine ... [t]Student present levels of academic achievement and related develop needs of the child” 20 U.S.C. §1414(c)(1)(B)(ii); 34 C.F.R. §300.305(a)(2). The parent must participate in the determination as to whether or not the child is a child with a disability. 34 C.F.R. §300.306(a)(1).

The evaluation required in the IDEA is an educational evaluation, not a medical one. The IDEA repeatedly characterizes the evaluation as educational. The parental right that triggered the District’s instant request for due process is set forth in 20 U.S.C. §1415(b)(1). The Act entitles a parent to an independent “educational” evaluation at public expense, id., not to an independent medical evaluation. The purpose of assessment tools and materials is to obtain “accurate information on what the child knows and can do academically, developmentally and functionally” 20 U.S.C. §1414(b)(3)(A)(ii). See also, 20 U.S.C. §1414(b)(3)(C) (“educational needs”); 20 U.S.C. §1414(b)(4)(A) (same); 20 U.S.C. §1414(c)(1)(B)(i)(same).

The regulations define “evaluation” to be:

Procedures ... to determine whether a child has a Disability and the nature and extent of the special education and related services that the child needs [.]

In the present matter, there was no issue regarding the instruments used – whether or not they were technically sound, 20 U.S.C.

§1412(b)(2)(C), properly administered, 20 U.S.C. §1412(b)(3)(A), or discriminatory, ibid. There was no issue as to qualifications of the District's school psychologist to administer the psychological testing instruments utilized in the evaluation, 20 U.S.C. §1412(b)(3)(A).

In the present matter, the Parent criticizes the evaluation report in only two areas of concern: the evaluation of reading skills and the evaluation of behavioral and social issues. The hearing officer finds that the evaluation was adequate regarding the first issue and inadequate regarding the second.

Regarding reading, the Parent argues that the District should have conducted further testing to evaluate whether or not the Student had specific learning problems in reading, and in order to determine whether or not the Student needed a pull-out special education reading program. The Parent's primary concern is that the District provided intervention that may have been unnecessary, by placing the Student in a pull-out special education reading class. As to this contention, the Parent has not carried her burden of persuasion. The evidence is preponderant that the District made adequate inquiry into the Student's reading skills, and utilized more than one form of assessment, by considering the WIAT-II word reading score and the DIBELS reading scores administered in the classroom. (FF 24.) The evaluation cautioned that the at risk finding for the DIBELS fluency assessments were suspect, because they were obtained at a time when the Student's behavior was interfering with Student's functioning. Even so, the District decided to provide specialized instruction in reading. (FF 25, 39.) The preponderance of the evidence is that this evaluation and response are not inadequate.

As to behavior, the Parent argues that the evaluation was deficient because it did not adequately assess the Student's emotional needs, Student's behavioral problems and Student's social skills needs. In particular, it did not include an appropriate functional behavior analysis. Considering all of the evidence of record, especially the District's admitted intent to rely essentially upon the clinical – not educational – behavior planning of the health agency, the hearing officer finds that the preponderance of the evidence supports the Parent's assertion that the District's evaluation was inadequate. (FF 24.)

While the report did address behavioral concerns and did recommend that the IEP address them, it did not test or evaluate behavior beyond the

BASC scores. These scores clearly raised a very red flag regarding emotional needs, behaviors and social skills. However, the BASC is only a screening instrument. It is not appropriate to rely upon it alone to assess the role of emotional, behavioral and social skills deficits in interfering with the Student's education and the Student's needs for education in the areas of dealing with emotions, controlling behavior for purposes of participation in the least restrictive educational setting, or development in the area of behavior. And such assessment is essential to enable the IEP team to develop an appropriate educational plan to address the Student's needs in these areas. Since further assessment of these needs was not accomplished, the District violated the IDEA requirements that an evaluation not rely solely upon a single assessment instrument to determine educational needs, and that it employ a variety of strategies in assessing educational needs. The District will be ordered to further assess behavior by providing an independent educational evaluation at public expense in the areas of emotional development, behavior control and social skills.

APPROPRIATENESS OF JANUARY 16, 2008 IEP

The January 2008 IEP was inappropriate with regard to the Student's emotional, behavioral and social skills needs. (FF 32-37.) It did not address all of the needs identified in the Evaluation Report, and it did not provide measurable goals as to all of the Student's needs. It failed to provide adequate specially designed instruction or related services for these needs.

IMPLEMENTATION OF DECEMBER 2007 IEP

The evidence is preponderant that the District continued after January 16 to address the Student's needs in the same inadequate way in which it had addressed them since September 2007. However, after the TSS worker left the classroom on January 28, 2008, the District assumed full responsibility for special education programming and implementation. (FF 38-43.) The District improved its implementation of services to the Student for Student's emotional, behavioral and social needs beginning on January 29, 2008. The special education director became more involved, the coordination between the teacher, special education staff and medical staff improved. Although the TSS staff member demanded to be reassigned away from the District, the District replaced her immediately and magnified its efforts to address the

Student's educational needs.³ Special education staff increased their observations of the Student in the classroom and devised an informal plan to address the Student's behaviors in the absence of the TSS worker. Additional pullout reading services were added. The hearing officer does find preponderant evidence that the District implemented its IEP inadequately from this date until the end of the school year.

The Parent argues that the January 2008 IEP was not implemented properly because the TSS worker left the program in February. However, the preponderance of the evidence is that this did not cause a substantial degradation of the services provided nor did it lead to substantial regression in the Student's behavior and utilization of skills. (NT 229.)

COMPENSATORY EDUCATION

In the present matter, the hearing officer finds that the Student did not receive meaningful educational benefit in the areas of behavioral control and social skills development from the beginning of school in 2007 until January 28, 2008, inclusive. While there is evidence of improvement in the Student's compliance with classroom routine before that, this is based upon hearsay reports from unidentified persons, and the extent of the improvement was limited. The teacher indicated that substantial behavioral and social development issues remained until the middle of the school year. The District, further, was relying upon inadequate educational evaluation and planning, abnegating its responsibility by adopting without careful analysis the medical treatment plan devised by the health care agency. Weighing all of the evidence of record, the hearing officer finds that the Student's progress was not meaningful during this period of time, and that Student is entitled to compensatory education. Compensatory services will be awarded for five hours per day, equitably taking into account the length of the school day in this full time kindergarten program (approximately

³ The Parent argues that the District special education director became hostile toward the TSS worker because that worker was criticizing the services provided by the District. The evidence does not preponderantly support this assertion. On the contrary, the evidence shows that the TSS worker was inexperienced in the educational setting, and may have failed to recognize the coordination and team consultation needed in order to make educational recommendations to parents. (NT 494-495.) Ultimately, though she was criticized for perceived inappropriate statements, it was the worker who forced the issue, not the District. Thus, the hearing officer cannot infer from this episode a failure to provide a FAPE.

seven hours), as well as the fact that the Student was getting special education pull out services for five hours per week and some academic programming during the regular school day.

The hearing officer will not accord the usual offset for reasonable identification and rectification of deficiencies, because the District was on notice of the Student's needs in April of the preceding year and failed to plan to address those needs.

INDEPENDENT EDUCATIONAL EVALUATION

Because the District failed to adequately assess the Student's emotional, behavioral and social skills needs, its evaluation failed to assess all areas of the Student's need, as required by the IDEA. Therefore, an independent educational evaluation will be ordered.

CONCLUSION

Weighing the evidence as stated above, the hearing officer finds that the District failed to properly evaluate the Student and failed to provide meaningful educational benefit to Student by failing to properly address all of Student's educational needs. Therefore, compensatory education and an independent educational evaluation will be ordered.

ORDER

1. The District failed to provide a FAPE to the Student by failing to offer and implement appropriate transition services when the Student transferred from early intervention to kindergarten in the 2007-2008 school year.
2. The District's evaluation report, dated November 20, 2007, was inappropriate.
3. The District failed to provide a FAPE to the Student by failing to offer an appropriate IEP in January 2008.

4. The District failed to provide a FAPE to the Student by failing to appropriately implement the IEP offered in January 2008 until January 28, 2008.
5. The District is ordered to provide compensatory education to the Student in the amount of five hours per day for every school day from the first day of the 2007-2008 school year until and including January 28, 2008.
6. 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 and utilization of 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 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.
7. Within fifteen days of the date of this order, the District shall make available to the Parent all information concerning its criteria for evaluations pursuant to 34 C.F.R. §300.502(a)(2) and §300.502(e). The District shall fund an independent educational evaluation at public expense by an evaluator chosen by the Parent, consistent with agency criteria as set forth by law. The evaluation shall be limited to the areas of emotional development, behavior control and social skills.

William F. Culleton, Jr. Esq.

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

October 25, 2008