

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

Child's Name: Student

Date of Birth: xx/xx/xx

Dates of Hearing:

May 19, 2008, June 13, 2008, July 23, 2008, July 24, 2008, August 4, 2008, September 10, 2008, September 11, 2008

CLOSED HEARING

ODR #8698/07-08 KE

Parties to the Hearing:

Souderton Area School District
760 Lower Road
Souderton, PA 18964-3211

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

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October 10, 2008

October 24, 2008

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INTRODUCTION AND PROCEDURAL HISTORY

Student (Student) is a pre-teen aged child who was during all times relevant to this due process matter a resident of the Souderton Area School District (District). (NT 10.) The Student at all relevant times was identified as a child with a disability for special education purposes under the category of Serious Emotional Disturbance. (NT 11-12.) On or about March 20, 2008, the Student was placed in an institutional residential setting, and came under the jurisdiction of another school district for educational programming. (NT 11.)

(Parents) requested due process by letter of counsel on April 3, 2008, alleging a failure to provide FAPE, and sought compensatory education and an Independent Educational Evaluation. The Parents complained that the Student experienced serious, pathological emotional difficulties, leading to dysfunctional and aggressive behaviors and a decline in Student's academic progress in mathematics, reading and writing. The District denied that the Student's academic progress declined, and asserted that it had provided FAPE during the relevant period. It also asserted that the Student's bad behaviors were caused by factors outside of the District's control and that it had provided the best educational services possible under the circumstances.

The hearing was conducted on seven dates from May 19, 2008¹ to September 11, 2008. The parties requested written summations, and the deadline was extended at request of counsel. The record closed on October 10, 2008, upon receipt of the summations.

ISSUES

1. Did the District offer an appropriate IEP to the Student during the relevant time period (from the first day of school in September, 2006 until the date on which Student left the District, March 20, 2008)?

¹ This hearing session was adjourned at the outset to permit the parties to engage in the resolution meeting required under the IDEA. 20 U.S.C. §1415(f)(1)(B)(i). After the parties failed to reach an agreement, the hearing recommenced on June 13, 2008.

2. During the relevant time period, did the District appropriately implement the IEP so as to provide the Student with a free and appropriate public education?
3. Did the District fail to provide the Parents with notice and a reasonable opportunity to participate in an IEP meeting in February, 2008?
4. Should the hearing officer award compensatory education to the Student for any part of the relevant period, and, if so, should that award be measured in full school days?

FINDINGS OF FACT

MEDICAL AND FAMILY HISTORY

1. The Student, a native of [state redacted], has a long history of being neglected and mistreated as a child. Student was abandoned by Student's natural mother and placed in a series of foster homes and residential treatment centers in [state redacted]. (P-1.)
2. The Student has been medicated with medications for mood disorders and ADHD from an early age. (P-1, S-26.)
3. The Student has been diagnosed with Depressive Disorder, Oppositional Defiant Disorder, Attention Deficit Disorder, Reactive Attachment Disorder and Post Traumatic Stress Disorder. (P-1, P-3, P-6, S-106.)
4. Evaluations in the Student's record indicate that Student had adequate cognitive abilities, was motivated to succeed in school, and was a hard worker. (NT 46; S-1 p. 3, S-2 p. 1-2, S-6 p. 1.)
5. Evaluations in the Student's record indicate that Student was easily frustrated and prone to resultant angry outbursts and acting out physically. Reports indicated that Student's primary impediment to learning was emotional instability. Student's only

exceptionality is Serious Emotional Disturbance. Student's only placement was Emotional Support, full time. (NT 11-12; S-1 p. 7, S-2, S-4, S-5, S-6 p. 3, S-14.)

6. In addition to angry outbursts and acting out through non-compliance, verbal aggression and physical aggression, the Student frequently engaged in manipulative behavior. (NT 462-463.)
7. The Student exhibited a tenuous contact with reality, and exhibited distorted social perceptions and occasional lapses into rich but unhealthy, possibly violent fantasy, or at least misinterpretation of events. (NT 1081-1083, 1088-1091, 1138, 1190; P-6.)
8. The Parents took custody of the Student on August 4, 2006, when Student was xx years old, and Student lived with them as foster child for about one year – during which Student was placed in fifth grade in the District. In August 2007, the Parents adopted the Student. (P-1, S-1.)
9. On September 11, 2007, the Parents and the Student began family therapy. (P-2.)
10. In November 2007, the Student was hospitalized for psychiatric care. (S-97.)
11. In November 2007, the Student alleged abuse by the Father and on November 26, 2007, Student was removed from the Parents' home by the Montgomery County Office of Children and Youth (OCY), and legal custody was transferred to OCY by court order in December 2007. (P-11, S-51, S-54.)
12. The Student's teacher and other IU staff reported the alleged abuse to OCY, which triggered the removal. (S-82 p. 11-13, 17.)
13. The Student was placed in a foster home, but was removed due to uncontrollable behavior and was placed at the [school redacted] School in Plymouth Meeting on March 20, 2008. (NT 581-582, 842; P-11, S-57-60, S-100 p. 13-14.)

14. In December 2007, the Student was accepted for residential placement at the [redacted residential treatment center]. (P-4.)
15. A March 2008 forensic psychological evaluation requested by the Montgomery County Office of Children and Youth Services found that the Student was experiencing severe emotional and psychiatric disturbance, and recommended that the Student be placed in a residential setting with structured behavioral systems and continuous psychiatric monitoring. (P-6.)

EDUCATIONAL SERVICES PROVIDED BY THE DISTRICT

16. The Student was placed in the Emotional Support class operated by the Montgomery County Intermediate unit (IU) and located at the [redacted] Elementary School in the North Penn School District. (P-1, S-7, S-10.)
17. The IU special education teacher, who taught the Student in Student's Emotional Support class, was informed of the assessments of the Student in Student's placements in [state redacted], and was aware of Student's emotional and behavioral difficulties. (NT 455-462.)
18. The Student's special education teacher utilized an eclectic approach that combined techniques that she gathered from training and internet research. (NT 521-527.)
19. In mathematics, the teacher utilized a published general education series for curriculum, which was tied to State anchors, and a published assessment tool, both of which were sequential and data driven. She supplemented these curricula eclectically with materials aimed at accommodating her students' learning differences. (NT 594-601, 670-671.)
20. In writing, the teacher used an eclectic approach based upon training she has received, and emphasizing quantity of words produced in a time period. The method also was aimed at encouraging written expression. No grade level rubric was

utilized, and the progress reporting was based only on words written per time period. (NT 472-475, 511-516, 606-613.)

21. The District requested and received permission to evaluate, including a functional behavioral assessment, on August 29, 2006. (NT 46-47; S-11.)
22. The District convened an IEP meeting on August 29, 2006, and offered an IEP to the Parents, based upon present levels of functioning provided from the Student's last evaluation in [state redacted] on or before May 2005. (NT 48-49, 475-476; S-1, S-12.)
23. The District offered a behavior intervention plan, written by the IU, on August 29, 2006. (S-12, S-13.)
24. In mathematics, the IEPs offered two measurable goals tied to the sequential computation and application probes used in class and thus to the baselines in the PLAA section. (NT 595-600; S-12, S-33, S-69.)
25. In reading, the IEPs offered one goal which addressed word reading, but did not address fluency or comprehension. (NT 602, 603, 614-617, 625-627, 644-646; S-12, S-23, S-33, S-69.)
26. In writing, the IEPs offered a goal in legible word writing, but did not address punctuation, spelling, grammar, capitalization or written expression. When Student started with the District, the Student was spelling at a second grade level; however, Student's grade level in spelling was not addressed in subsequent PLAA or goals. (S-12, S-23, S-33, S-69.)
27. The District convened an IEP meeting on December 8, 2006. The District offered a revised IEP, with new baselines for mathematics, reading and writing. It appended a functional behavior analysis and behavior support plan, based upon the baseline of nine weeks of school, or one quarter of the IEP year. Related services included a social skills group, 30 minutes per week. (S-23.)
28. On December 14, 2006, the Parents requested a full evaluation and signed a request for re-evaluation form. (NT 530; S-25, S-90.)

29. At the December 2006 IEP meeting, the Parents advised the IEP team and the special education teacher that the Student was seeing a psychiatrist and that they were seeking wraparound services for the Student. (NT 530, 940-941; S-90.)
30. The Student's dysfunctional behaviors and Student's academic underperformance were attributable to Student's psychiatric disorder. (NT 525.)
31. On January 2, 2007, the IU provided a re-evaluation report and requested Parents to sign a NOREP for the December 8, 2006 IEP. (S-26.)
32. The re-evaluation did not address the impact of the Student's psychiatric disorder upon Student's behavior or Student's ability to perform academically. Rather, it addressed behavior solely through the paradigm of applied behavior analysis, which the IU's behavior analyst implemented without regard to the Student's psychiatric disorder. (NT 1185-1188; S-26, S-33.)
33. On February 12, 2007, the District convened an IEP meeting and offered a revised IEP with new goals in mathematics and reading, based upon fourth grade probes. The School Psychologist did not attend. (S-23, S-33.)
34. The February 12, 2007 IEP offered no new goal in writing. (S-23, S-33.)
35. The February 12, 2007 IEP continued the Student's behavioral program without changes. Baselines for goals were changed to reflect serious behavioral regression between September 2006 and February 2007. (S-23, S-33.)
36. On June 7, 2007, the District agreed to include the Student in general education science class, starting in September 2007. (S-41, S-46.)
37. The Student received thirty six hours of private tutoring at [redacted] Center during the spring and summer of 2007. Thirty

one hour was devoted to reading and five hours were devoted to mathematics. (NT 237 – 252; P-5, P-9, P-10.)

38. The Student's dysfunctional behavior included enuresis during the day in the school setting, as well as at home, both day and night. The Parents and their consultants disagreed with the District and the IU about the appropriate way to address this behavior. (NT 539; S-82, S-95 p. 1-8, S-96 p. 3-4, 7.)
39. The Parents and the special education teacher disagreed on the appropriate ways to respond to the Student's manipulation, noncompliance, verbal aggression and physical aggression. The Student made allegations about the Parents to the special education teacher and other IU staff, and these staff questioned the Parents' disciplinary approach in the home. (NT 532-539, 572-582; S-55, S-56, S-82, S-92, S-94, S-95 p. 4-9, S-96 p.4, 8-9, 11-12.)
40. The special education teacher gave credence to the Student's allegations against the Parents and believed that something was not right in the home. Other IU and District officials considered the Parents to be difficult people. (NT 532-535, 548, 551-554; S-92, S-96 p. 4.)
41. The District did not address the concerns about disciplinary response to bad behavior in school, the Student's manipulative behavior, Student's habitual misrepresentation or Student's enuresis through a psychiatric assessment, functional behavior assessment, behavior intervention plan or research based techniques. (NT 537-546, 550, 563-568, 648-649, 1119-1123, 1157-1164, 1178, 1187, 1192-1193, 1196; S-33, S-41, S-92, S-94, S-95, S-112.)
42. The District inquired, but ultimately did not consult with the Student's therapist, although he was advising them on handling the enuresis. (NT 537-546, 547-550, 1199.)
43. In or before October 2007, and more than once in November 2007, the Parents requested a full evaluation of the Student. (NT 535-536, 550-551, 556; S-93.)

44. On November 26, 2007, the Parents requested a re-evaluation of the Student, including an Occupational Therapy evaluation to address the Student's difficulties with handwriting. (S-50, S-82.)
45. The IU's special education supervisor requested an OT evaluation but it was never performed. (NT 557-559; S-82, S-102.)
46. On January 29, 2008, the Student was removed from school and placed in a partial hospitalization program, where Student remained until February 25, 2008, when Student was certified as able to return to school. (S-71.)
47. On February 8, 2008, the District offered a new behavior support plan, which changed the behavioral goals to reduce expectations for behavioral improvement, and changed the program offered to address behavior by adding specific teaching techniques that addressed the Student's individual needs. (S-33, S-68.)
48. The Student was suspended from school for three days, on or about February 27 for violation of the school code of conduct. Student was hospitalized immediately. (S-72, S-102.)

IEP MEETING OF FEBRUARY 4, 2008

49. On February 4, 2008, the District invited the Montgomery County OCY-appointed case worker to an IEP meeting on February 8, 2008. Parents were notified by telephone, and requested an adjournment. (S-62-65.)
50. The District took the position that the court's custody order vested educational rights in the OCY, and declined to change the meeting date. (S-65.)
51. The IEP meeting was held without the Parents. (S-69.)

PROGRESS IN MATHEMATICS

52. On February 6, 2007, the Student's special education teacher reported that the Student had mastered some of Student's mathematics goals and that Student was making progress academically. (NT 623; S-32, S-87.)
53. Progress monitoring as of February 7, 2006 showed that the Student had mastered Student's mathematics goals in second grade computation and application. (NT 594-606; S-42, S-87.)
54. The February 12, 2007 IEP showed that the Student had made progress in mathematics. Student advanced from the second grade mathematics series to the third grade series. Student showed new abilities in adding and subtracting, identifying digits, and recognizing and labeling fractions. Student scored a higher number of correct answers in mathematics application and computation, both in the higher grade series. Student was learning but still had difficulty in multiplication facts, and was beginning concepts in division. (NT 623-626; S-23, S-33, S-87.)
55. Progress monitoring as of November 26, 2007 showed that the Student had mastered Student's mathematics goals in fourth grade computation and application. (S-49, S-87.)
56. On February 8, 2008, the District offered an IEP that showed progress made by the Student in Mathematics, including instruction in the fifth grade curriculum, and new skills in decimals, prime and composite numbers, multiplication and division, rounding, measuring, fractions and geometry. (S-33, S-69, S-87.)
57. The Student scored below basic in mathematics in the 2007 PSSA testing, which was administered in accommodated circumstances. (S-33, S-83.)

PROGRESS IN READING

58. The February 12, 2007 IEP showed that the Student had not made progress in reading. Student remained at the third grade level of performance, although Student scored a higher number of correct

responses on the DIBELS, and Student's goal was increased for word reading to a fourth grade level. The trend line for goal attainment was negative. (NT 594-606, 625-627; S-23, S-33, S-87, S-108.)

59. Testing in reading at the Center in March 2007 showed below average functioning, in the second and sixteenth percentiles, for word reading and comprehension, based on nationally normed tests. (NT 221-224; P-5.)
60. The Student scored below basic in reading in the 2007 PSSA testing, which was administered in accommodated circumstances. (S-33, S-83.)
61. June 2007 progress reports showed that the Student had not mastered Student's fourth grade reading goal, though the teacher reported progress and competence on this goal. (NT 521-523; S-42, S-87.)
62. The Center tutoring during the spring and summer of 2007 addressed word attack, vocabulary building and comprehension. Through standardized progress testing, the Student showed substantial progress in word attack and vocabulary, including advances in grade level functioning, as measured on a national, not a state, level. (NT 237 – 252, 270-271; P-5, P-9, P-10.)
63. Progress monitoring as of November 26, 2007 showed that the Student had mastered Student's fourth grade reading goal in word reading. (S-49 .)
64. On February 8, 2008, the District offered an IEP that showed progress made by the Student in reading. Student was instructed and tested at the fifth grade level, and scored well in comprehension, word attack and oral reading fluency. (S-33, S-69.)

PROGRESS IN WRITING

65. IEPs from August 2006, December 2006 and February 2007 showed that the Student made no progress in writing fluency. (S-12, S-23, S-33.)
66. The February 12, 2007 IEP showed that the Student had not reached Student's goal in writing legible words within three minutes, but there was an upward trend in performance. (NT 627-628; S-23, S-33.)
67. June 2007 progress reports showed that the Student had not mastered Student's writing goal, though the teacher reported progress and competence on this goal. The graphic trend line was negative. (NT 606-613; S-42, S-87.)
68. The Student scored basic in writing in the 2007 PSSA testing, which was administered in accommodated circumstances. (S-33, S-83.)
69. Progress monitoring as of November 26, 2007 showed that the Student had not mastered Student's writing goal. (NT 472-475, 511-516; S-49, S-87.)

PROGRESS IN BEHAVIOR CONTROL

70. The February 12, 2007 IEP showed that the Student had regressed to a significant extent behaviorally since December 2006. (S-23, S-33, S-84, S-112.)
71. The Student's behavior escalated in seriousness in May and June 2007, when Student bit a staff member causing bleeding, and attempted to destroy valuable classroom equipment. (S-40, S-42, S-55 p. 17, S-112.)
72. The special education teacher viewed these behaviors as an impediment to successful inclusion in science class, but agreed to include the Student in science at the insistence of the Parents. (NT 631-634.)

73. Progress monitoring as of November 26, 2007 showed that the Student had not mastered Student's behavioral goals, but the number of incidents of verbal and physical aggression had declined from the level reported in the February 2007 IEP. This level was still higher than that reported in the December 2006 IEP for noncompliance, but was lower for verbal and physical aggression. (NT 561-561; S-23, S-49, S-84, S-98 p. 1, S-112.)
74. Progress monitoring as of February 8, 2008 showed that the Student had not mastered Student's behavioral goals, and that the number and seriousness of incidents of noncompliance, verbal and physical aggression had increased substantially from the level reported in November 2007. (NT 563-564, 1185-1188; S-49, S-68, S-84, S-100 p. 1-12, S-101, s-104, S-112, S-122.)
75. The Student's behavior did not improve meaningfully from December 2006 to June 2007. It fluctuated wildly during that period of time. The levels of verbal and physical aggression reported in February 2008 were comparable to those reported in February 2007, and the levels of noncompliant and physically aggressive behavior reported in February 2008 were greater than those reported in December 2006. (S-23, S-33, S-68, S-84, S-112.)

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.² The United States Supreme Court has addressed this issue in the case of an administrative hearing challenging a special education IEP. Schaffer

² 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).

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 “equipoise” – that is, where neither party has introduced a preponderance of evidence³ to support its contentions. In such unusual circumstances, the 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.

EQUITABLE ESTOPPEL

In its summation, the District asserts that the Parents are equitably estopped from asserting a failure to provide a FAPE because they asserted that the Student made academic progress while enrolled in the District. The District asserts a Verified Answer to Petition that the Parents filed on December 6, 2007 with the Juvenile Court Division of the Montgomery County Court of Common Pleas. (S-118.) The hearing officer, having reviewed this document, finds that it does not contradict the Parents’ position in this matter. The District’s quotations are taken out of context. The Parents’ position in this document was twofold: first, the Student had made academic progress due to the tutoring they had provided to Student at Center; second, the District in its records had asserted that the Student had made progress “in reading, writing and math.” Accordingly, the hearing officer will not apply the doctrine of equitable estoppel in this administrative matter.

THE DUTY TO INDIVIDUALIZE EDUCATIONAL PLANNING

³ 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 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).

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 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 makes a finding as to the credibility of the special education teacher. It was patent from this teacher's demeanor that she was hostile toward the Parents in this case. It was also beyond cavil that she accepted the Student's accusations against the Parents as true, and was visibly upset by them. Her emotional investment was apparent in the hearing room, demonstrated in a variety of ways - from her clipped way of answering questions posed by Parents' counsel, to several places where she seemingly conveniently did not recall key facts, to the tone of her voice as she related events that were emotionally charged for her. It was also clear that the District's officials were on her side, at one point even passing a note to assist her to add graphic detail to her account of events and justify why she believed the seemingly outlandish and exaggerated claims of the Student.

The hearing officer does not reach a judgment about these officials or this teacher. The facts of this matter are unusual and troubling; it was clear that everyone in the room was emotionally affected by the history in this case and the imagined pain and suffering of this child. Professional educators cannot be faulted for their own assessments of familial situations, and there is no judgment here as to whether those assessments were correct. Of course, their duty to report suspected abuse must always be respected, for it is necessary that such accusations be investigated by appropriate agencies.

Nevertheless, the hearing officer finds that the teacher's and the District's handling of the situation, and the credibility of their defense, is imbued with this view of the Parents as a kind of negative "type" of parent, or as "difficult." The hearing officer gives less weight to the teacher's assertions from memory - or lack thereof - and especially to her subjective assessment of the Student's progress in her class. The hearing officer finds that some of the assessments of this witness were unduly expansive or embellished. Where such assessments seem to clash with the documentary record in this matter, the hearing officer will rely upon the documents.

In addition to her hostility to the Parents, the teacher demonstrated a defensiveness that further undermines her credibility. In particular, she repeatedly asserted implausibly that the Student's behavior was not out of the ordinary for her classroom. This flies in the face of common experience, because the Student was overturning desks and throwing things that could injure someone. (FF 5-6.) It contradicts the record, because the Student was removed from the classroom more than once and hospitalized due to Student's behavior. (FF 46, 48.) It strains credulity that all the students in the teacher's classroom – even an emotional support classroom - were throwing cell phones and being committed periodically. Moreover, the record makes it clear that the Student's deliberate enuresis in class was a unique and deeply disturbing manifestation of Student's pathology. (FF 38.)

BEHAVIORAL CONTROL

The District placed the Student in a kind of “catch-all” emotional support setting, served by a no doubt talented and most caring individual whose entire educational experience was in the most restrictive possible settings, including home services and the IU's ES class. (FF 16-18.) Because this teacher employed an eclectic approach to special education, the research basis for her methods and conclusions as to the Student's progress remains unclear. (FF 18.)

In August 2006, the IU provided a behavior support plan based upon the Student's history in Student's previous placements. (FF 22-23.) By December 2006, the IU had completed a Functional Behavior Analysis, and it offered a behavior support plan based upon that. (FF 27.) It is significant to this hearing officer that the actual behavior plan was not changed materially during the year between December 2006 and February 2008, during which time it became obvious that the Student's behaviors, including violence, oppositional behavior, disruptive behavior, enuresis and lying were disrupting Student's education and that of others. (FF 23, 27, 33, 35, 41, 47.)

The behavior plan was based solely upon the findings and recommendations of the IU's behavior specialist. (FF 32.) The specialist made it clear that she paid no attention to the Student's psychiatric problems, though she was aware of them. Thus, the behavior specialist did not take the Student's diagnosed psychiatric conditions in to account, and she did not

address all of the behavioral manifestations of those conditions – even though it was and is plain that those behaviors substantially interfered with the Student’s ability to learn in accordance with Student’s potential, which appeared from most evaluations to be within the average range, (FF 4). During the entire relevant time, the specialist did not specifically account for the Student’s repeated lying, Student’s manipulative behaviors, Student’s enuresis in school, though these prominently disrupted Student’s education, caused heightened stress and conflict between the teacher and Student’s Parents, and directly interfered with Student’s time in class and Student’s access to learning. (FF 30, 41.) While the specialist explained that manipulateness was addressed, because the behavior plan assumes that all behavior is manipulative, she did not explain to this hearing officer’s satisfaction why the important issues of enuresis and lying were not addressed.

The specialist, of course, was following her methodology and its underlying theoretical paradigm, which limits “functions” of behavior to limited categories. However, the IEPs throughout this period were based solely upon this specialist’s recommendations, without drawing from any other discipline that would consider itself equipped in theory or practice to deal with a childhood mental illness and its impact upon learning. Although a psychiatrist conducted a minimal inquiry by observing the Student, no psychiatric evaluation was done to deal with the effects the Student’s disorders upon learning and how to accommodate them in the classroom. There is no evidence that the IEP strategies were informed by the therapists and evaluators that the Parents and the OCY had employed in the case. The IEP had no goals addressing enuresis, lying, manipulation or the underlying emotional dynamics that were causing this behavior. (FF 41.)

The record shows preponderantly that these problems eventually overwhelmed the educational setting. (FF 9-15, 46, 48.) The Student’s disruptive behaviors, which had subsided for a time, returned with greater frequency and intensity. Student was “daydreaming” in class, and the teacher had more and more difficulty holding Student’s attention for learning. (FF 7.) Hospitalization followed, and the Student’s educational career with the District ended. (FF 11-13.)

The District argues that it should not be held accountable for forces that were outside of its control. If it had done all it needed to do in order to address the Student’s psychiatric condition, this hearing officer would agree.

However, the hearing officer finds that in this case, the District gave scant attention to the Student's psychiatric condition and how it interfered with the Student's learning. (FF 1-7, 17, 29, 32.) Since it has the clear legal obligation to address all of the Student's educational needs, and since the Student's psychiatric condition caused behaviors that manifestly interfered with Student's educational progress, the District will be held accountable for failing to take reasonable measures to address these behaviors.

It is true that the law does not require a local educational agency to cure a psychiatric disease – or to be strictly liable when the force of a disorder debilitates the child's ability to learn. However, the law does require the responsible agency to acknowledge and address the disorder, and devise specially designed instruction that is tailored to the individual characteristics of the Student's disabled functioning. The District did not do this.

The District tries to paint the Parents as the chief and proximate cause of the Student's difficulties coping with Student's mental illness. The hearing officer finds that there is not preponderant evidence that the Parents' disagreements with school staff, mainly about disciplinary measures and the handling of the enuresis, (FF 38, 39), prevented the District or the IU from dealing with the Student's needs. Rather, the evidence is preponderant that the District failed to provide an IEP that addressed all of the Student's needs, through a behavior support plan that addressed the full range of Student's dysfunctional behaviors.⁴ This contributed to a lack of progress directly in the educational area of behavioral control, and secondarily in reading and writing.

MATHEMATICS

The program offered by the District was reasonably calculated to provide the Student with meaningful progress in mathematics. (FF 19, 24, 27, 33.) The IEP established measurable base lines and the goals were measurable in utilizing those baselines. There were goals in the major areas

⁴ In this regard, the IEPs provided thirty minutes of counseling with the school counseling per week, a level of related service that was plainly inadequate for this profoundly disturbed child. Despite the dramatic fluctuations of the Student's behavior throughout the relevant period, this service did not change in character, in focus or in quantity of time provided.

of deficiency set forth in the PLAA section of the IEP. The teacher utilized a published, recognized curriculum for general education which is tied to Pennsylvania curriculum anchors and is sequential and data driven. (FF 19.) She modified this to meet the learning differences of her students, including the Student. The record demonstrates adequate progress monitoring.

The evidence is preponderant that the Student made meaningful progress in mathematics during the relevant period. (FF 52-57.) Present levels of academic achievement in the IEPs and progress monitoring records show that the Student advanced in the grade level of the curriculum that Student was being taught. Student also acquired numerous skills in mathematics. Student's progress was continuous throughout the relevant period of time.

READING

The program offered by the District was not reasonably calculated to provide the Student with meaningful progress in reading. (FF 18, 25, 27, 33.) The IEP established measurable base lines, but there was only one goal that addressed reading, and this did not address vocabulary, word attack or comprehension sufficiently to address the Student's needs. Testing as late as April 2007 showed that the Student was seriously deficient in vocabulary and total reading, and below grade in comprehension.

The evidence is preponderant that the Student did not make meaningful progress in reading. (FF 58-64.) In February 2007, Student was functioning at the third grade level for instruction, according to the PLAA in Student's IEP and the results of the January evaluation. (FF 58.) Student was below basic in Student's PSSA test in the Spring of 2007. (FF 60.) In the Fall of 2007, Student did advance in grade for word reading and comprehension, but only after receiving 31 hours of private tutoring at Parents' expense that emphasized vocabulary and word attack, and that demonstrated improvement of about one grade level. (FF 62-64.) Thus, balancing areas of progress and lack of progress, the hearing officer concludes that the Student did not make meaningful progress in reading during the relevant period, due to the services provided by the District.

WRITING

The District failed to offer services reasonably calculated to provide the Student with meaningful progress in writing. (FF 20, 26.) The single goal in the IEP tested only writing fluency, and did not address punctuation, spelling grammar, capitalization or written expression. The teacher used her own eclectic style, and did not use a research based program in writing. Grade-level rubrics were not utilized in assessments. Spelling was not addressed. Progress monitoring was scant.

The evidence is preponderant that the Student did not make meaningful progress in writing. (FF 65-69.) None of Student's IEPs showed any progress until the last one, offered in February 2008, in which the Student was reported to have increased the number of legible words written within three minutes. There is no evidence of any progress in punctuation, spelling, grammar or capitalization.

FAILURE TO INCLUDE PARENTS IN IEP MEETING

There is no dispute that the District convened an IEP meeting in February 2008 without the Parents. (FF 49-51.) The Parents argue that this was a violation of the IDEA, and that the hearing officer should order some unspecified relief in consequence of this act. The hearing officer declines to enter an order regarding this act.

The District argues that the Parents by this time had been stripped of their parental rights, including the prerogative to make educational decisions for their child, by the court order which authorized OCY to take custody, including legal custody. The District argues that the term legal custody includes the right to make educational decisions. The record clearly supports their argument that this is why the District did not include the Parents.⁵

⁵ In fact, the District did notify the Parents by telephone and seemed willing to have them participate in person or by telephone. The parents insisted on in-person participation with their attorney and asked for an adjournment to a date when they and their attorney would be available. The District declined.

The record demonstrates to this hearing officer's satisfaction that the court never intended to strip the Parents of educational decision making. (P-8.) However, the hearing officer considers this matter so unique that an order is not warranted. The District's legal position was legally plausible, and the original court order was ambiguous. The IEP meeting was convened at a time when the Student was in foster care and adamantly refused any contact with the Parents.

The District, though it appears that they were wrong technically about the Parents' rights to attend, did not act willfully in taking a facially plausible legal position. Moreover, the hearing officer perceives no benefit that could derive from any order regarding this incident, which he regards as unique. The record does not support a finding that the exclusion of the Parents caused or contributed to a denial of FAPE, and the Parents' role vis a vis the Student is better addressed in Juvenile Court.

REQUEST FOR AN INDEPENDENT EDUCATIONAL EVALUATION

The Parents raised this request in their Complaint Notice, but not in their opening statement; the hearing officer did not include it as one of the issues to be dealt with in the hearing. (NT 14-38.) They did not reiterate this request in their written summation. (HO-1.) Therefore, the Parents have abandoned this request and it is dismissed.

REQUEST FOR TUITION REIMBURSEMENT

For the first time in their written summation, the Parents request reimbursement for the tutoring that they provided the Student through Center. The IDEA precludes this relief. It requires a parent to plead his or her requests for relief, and precludes administrative adjudication of any claims not pleaded in the request for due process. 20 U.S.C. §1415(b)(7)(B). Moreover, the Parents did not raise this request for relief in their opening statement, and it was not listed as an issue for the hearing. (NT 14-38.) Under these circumstances, it would be unfair to the District if the hearing officer should reach this issue. Accordingly, this request for relief is dismissed.

COMPENSATORY EDUCATION

Compensatory education may be awarded for the period of deprivation of FAPE, with an offset for the period of time reasonably needed to discover and remedy the deficiencies in the district's services to the student. Ridgewood Board of Education v. M.E. ex. rel. M.E., 172 F.3d 238 (3d Cir. 1999); M.C. v. Central Regional School District, 81 F.3d 389 (3rd Cir. 1996).

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

Here, the Student was deprived of meaningful education in the areas of behavior control, reading and writing. However, Student benefitted from the District's services in the area of mathematics. The record discloses that the special education teacher devoted a disproportionate amount of time to teaching mathematics in her class room; therefore, the award will be reduced by more than one period per day. Accordingly, the hearing officer equitably reduces the hours to be awarded by two hours per day. The school day was seven hours, (S-33 p. 19); therefore, five hours per school day will be awarded.

The period of time for compensatory education is from the first day of school until March 20, 2008, when the Student left the District. However, this will be offset for a reasonable period for rectification; in this case, the hearing officer finds that the period from the first day of school until the District offered an IEP based upon its own observations of the Student in class, December 8, 2006 constitutes a reasonable rectification period. In

addition, the hearing officer reduces the period of the award from February 8, 2008 until March 20, 2008, for two reasons. First, on February 8, 2008, the District offered a substantially improved amended IEP that may have addressed the needs left unaddressed in the previous IEP. Second, from that date forward, the Student's education was so substantially disrupted due to Student's illness and its behavioral manifestations that the District was obstructed from implementing its IEP effectively. In sum, compensatory education will be awarded consisting of five hours per day for every school day from December 8, 2006 until February 8, 2008.

The District urges the hearing officer to restrict the award in such a way as to prevent the Parents from determining its use. The hearing officer declines to do so. Although outlandish allegations were made against the Parents, the record does not support a finding by a preponderance of the evidence that the Parents can be expected to utilize such an award irresponsibly. If such a result is anticipated, the Juvenile Court would be a more appropriate tribunal to police the Parents' use of the award for the benefit of the Student.

CONCLUSION

Weighing all of the evidence as stated above, the hearing officer finds that the District failed to provide a FAPE to the Student during the relevant period of time. Compensatory education will be ordered. However, full days will not be awarded, because the Student did derive some benefit from the District's services in the area of mathematics. The Parents' request for an independent educational evaluation and tuition reimbursement are dismissed. No order will be issued regarding the District's failure to include the Parents in the February 2008 IEP meeting.

ORDER

1. The District did not offer an appropriate IEP to the Student during the relevant time period (from the first day of school in September, 2006 until the date on which Student left the District, March 20, 2008).

2. The District did not implement the IEP appropriately during the relevant time period, so as to provide the Student with a free and appropriate public education.
3. No order will issue regarding the District's convening of an IEP meeting without the presence of the Parents in February, 2008.
4. The District is ordered to provide compensatory education to the Student in the amount of five hours per day for every school day from December 8, 2006 until February 8, 2008.
5. The compensatory education ordered above shall not be used in place of services that are offered in the current IEP or any future IEP.
6. Unless otherwise determined by court order, the form and utilization of services shall be as follows: The form of services decided by the Parent, and may include any appropriate developmental, remedial, or enriching instruction, or therapy, as long as they are directed to mathematics, social skills, speech pragmatics and therapy for behavior as set forth above. 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.

William F. Culleton, Jr. Esq.

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

October 24, 2008