

*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 Due Process Hearing Officer

Re: ODR No. 8706/07-08 KE  
JR  
Bethlehem Area School District

### CLOSED HEARING

For the Student:

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For the School District:

Bethlehem Area School District  
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Date of Due Process Hearing Complaint:	April 8, 2008
Date of Resolution Meeting:	May 8, 2008
Dates of Hearing:	June 4, 2008 and June 10, 2008
Date Record Closed:	July 7, 2008
Date of Decision	July 15, 2008
Hearing Officer:	Daniel J. Myers

## **BACKGROUND**

Student is a nonverbal, low-functioning child with autism in the process of transitioning from a partial hospitalization program to a program and placement within the School District. The parties disagree over whether or not Student's one-to-one assistance must be provided by a single, particular individual dedicated to serving only Student throughout the day or may be provided by one or more different individuals over the course of the day. The parties also disagree over whether Student has been denied a free appropriate public education (FAPE) since April 2006. For the reasons described below, I find that Student's one-to-one assistance need not be provided by a single, particular individual dedicated to serving only Student throughout the day, and I find that Student was denied FAPE for the 2006-2007 school year and ½ of the 2007-2008 school year.

## **ISSUES**

- Whether Student's one-to-one assistance must be provided by a single, particular individual dedicated to serving only Student throughout the day or may be provided by one or more individuals over the course of the day?
- Whether Student has been denied a free appropriate public education since April 2006?

## **FINDINGS OF FACT**

1. Student, whose date of birth is xx/xx/xx, is a nonverbal teenage resident of the School District who has been diagnosed with autism, mental retardation, bipolar disorder, epilepsy and tuberous sclerosis. (N.T. 24-25, 35, 320, 559; P15; S2;

- S48; S49)<sup>1</sup> Student is motivated by verbal and physical praise (hugs and high fives) from people Student knows. (N.T. 418) Student has great difficulty transitioning to new activities, whether in school or at home, often dropping to the floor and refusing to get up. (N.T. 31-32, 254-255, 313-314, 417, 451) Student also engages in frequent aggressive and self-injurious behaviors that include hitting, kicking, throwing, banging Student's head into walls and biting self. (S2; N.T. 25-30) Student's IEPs contain goals to address pro-social behavior, transitioning between activities, life skills, and communication needs. (S31; S49) Student also receives speech and language therapy, occupational therapy, and adapted physical education as related services. (S48, pp.7,8; S49, pp.30,31; N.T. 320)
2. In February 6, 2006, Student's self-injurious behaviors were observed 50-220 times per day, physical aggression to others was observed 100-200 times per day, aggression towards property was observed 20-75 times per day, and escape behaviors were observed 5-20 times per day. (P3; S10; S16)
  3. In April 2006, to address Student's aggressive and self-injurious behaviors, Student began attending the Autistic Partial Hospitalization Program at [redacted] Academy (Academy),<sup>2</sup> which is operated by Intermediate Unit [redacted]. Student received services from a certified special education teacher, a master's level mental health clinician, a bachelor's level mental health worker, and three

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<sup>1</sup> References to "N.T." are to the transcripts of the June 4 and June 10, 2008 hearing sessions. References to "HO", "P" and "S" are to the Hearing Officer's, Parents' and School District's exhibits, respectively.

<sup>2</sup> This program was formerly known as the [redacted] Academy. (N.T. 304)

associate teachers. (N.T. 439–440) The staff to student ratio in Student’s Academy classroom was 5:6, and Student was provided with one-to-one assistance at all times. (N.T. 94, 102, 306, 314, 326, 428, 534–535; P2; S10; S18; S31; S49) Student had an IEP as well as a treatment plan to address mental health needs. (N.T. 429–430) Therapeutic activities included art, music and pet therapies as well as recreational activities to assist in developing socially appropriate behaviors. (N.T. 514) Initially, Student frequently laid on the floor, attempted to bang Student’s head, or pinch and hit to keep people at a distance. (N.T. 309, 311-312, 324-325; S18) Academy’s initial goal for Student simply was to maintain Student’s safety and the safety of other students, and to familiarize Student with the classroom setting and program. (N.T. 302-303, 311, 315) Student’s aggressive behaviors eventually decreased and Student became more engaged in the school program. (N.T. 315) The Academy staff encouraged Student to make transitions independently through verbal prompts, and escorted Student using a two-person assistive technique if needed. (N.T. 328, 356-358)

4. In October 2006, Student’s IEP was revised to add a behavior management plan. (S18, p.2; S20) In December 2006, Student’s parent requested a 1:1 aide for Student. (P3) In January 2007, Student’s parent requested that Academy place padded head gear on Student when necessary for Student’s safety. (P5; N.T. 52) In February 2007, Student’s physician recommended that Student not be restrained due to Student’s respiratory difficulties, and that Student have one-on-one assistance with all activities. (S23; N.T. 53) In May 2007, Student’s parent renewed a request for a copy of Student’s picture exchange communication

- system (PECS) book and also asked for permission for Student's mental health behavioral specialist consultant (BSC) to visit the classroom. (S34; N.T. 57-60)
5. Data recording Student's self-injurious behaviors indicate that they were occurring as often as 541 times per week in October 2006, but decreased to a high of 356 times per week in January 2007, and a high of 46 times per week in May 2007. (S39, p.4) Data recording Student's aggressive behaviors indicate that they were occurring as often as 118 times per week in September 2006, decreased to a high of 74 times per week in December 2006, spiked to a high of 147 times per week in April 2006, and decreased to a high of 52 times per week in late April 2006. (S39, p.1)
  6. In May 2007, Academy's psychiatrist recommended that Student be discharged from Academy because Student was not benefiting from the mental health portion of the program. (N.T. 433–435, 519) At the same time, Student's private psychiatrist recommended that Student receive homebound instruction for the rest of the school year because Student was experiencing such severe anxiety and behavior issues about school. (S35)
  7. From June 7 through June 25, 2007, Student received homebound instruction from a School District teacher. (S35; S38; N.T. 456) Student's homebound instructor, a special education teacher who previously worked with students with profound autism and implemented a life skills curriculum similar to that required in Student's IEP, addressed five of Student's IEP goals, including: sorting and matching items; name stamping; table setting; hand washing; and community integration. (S38; N.T. 137-138, 146 –147, 155–158) Student's performance on

- these goals was not as successful during homebound instruction as in the classroom because the School District's homebound instructor received no information from Intermediate Unit's Academy about Student's instruction, the teacher did not have sufficient supplies, and the teacher did not have sufficient assistance in handling Student and tracking data. (N.T. 63-64, 147-148, 150-153, 160; P7; P8)
8. In August 2007, a Child and Adolescent Service System Program (CASSP) meeting was conducted, at which it was reported that Student would be discharged from Academy because Student could not take advantage of the therapeutic component of the program. (S43; P9; N.T. 172, 478-479, 521-524) Student's parent visited and approved a multiple disabilities support class at one of the School District's high schools (High School 1), and the local mental health/mental retardation agency approved assignment of Student's therapeutic autistic support staff (TAS) to attend school with Student on a full day basis in order to support Student's transition and train the classroom aide. (N.T. 71, 174-179, 190-191, 262, 295) The School District then began searching for an additional classroom aide to serve in Student's proposed classroom. (N.T. 478, 480-481, 524-525, 561-562) While the search continued for an aide to serve in Student's classroom, the parties agreed that Student would return to Academy for the beginning of the 2007-2008 school year.
9. Because additional classroom assistance never was obtained for Student's proposed classroom in High School 1, Student remained at the Academy for the entire 2007-2008 school year. (P12 pp. 3, 6; N.T. 187, 482-483)

10. During the 2007-2008 school year, Academy's staff to student ratio was no more than 6:8, and one-to-one assistance was provided to Student at all times. (N.T. 466) Student's IEP was revised in September 2007 to include the use of a wheelchair to assist Student in transitioning from one activity to another throughout the school day. (S-44; N.T. 368– p. 369) Student's teacher was finding that, without the wheelchair, Student's floor-dropping behaviors during transitions was creating safety concerns for Student and staff and was causing Student to miss important school activities. (N.T. 369-371, 422-424; S45; P11)
11. Student's teacher testified that Student made minimal progress for the first half of the 2007-08 school year. (S45; P11; N.T. 371-373, 394-396) In fact, Student's teacher agrees with the Academy psychiatrist's May 2007 report that, at that time, Student was not benefiting from the mental health portion of the program. Student's teacher does not agree with that psychiatrist's post-May 2007 reports to the same effect, however, because the teacher saw increasing improvement in Student's behaviors over the course of the 2007-2008 school year. (N.T. 414-416) Student's teacher testified that, beginning in about February, 2008, Student's behavior showed significant improvement and Student began to make more substantial progress toward Student's IEP goals. (N.T. 375-377, 415-416) Data recording Student's self-injurious behaviors indicate that they were occurring as often as 243 times per week in October 2007, but decreased to a high of 104 times per week in January 2008, and a high of 91 times per week in early April 2008. (S51, p.1) Data recording Student's aggressive behaviors indicate

- that they were occurring as often as 421 times per week in October 2007, but decreased to a high of 44 times per week in February 2008, and a high of 62 times per week in early April 2008. (S51, p.2)
12. Student's TAS agrees that Student's behaviors in the community have shown a marked improvement since February 2008. (N.T. 283)
13. In March 2008, the parties met to discuss a School District suggestion that Student attend a multiple disabilities classroom in a different high school (High School 2). (N.T. 485, 527, 574-575, 571) Sufficient staffing already existed in that classroom and the School District's Special Education Director believed that one of the current staff members in that classroom would work very well with Student. (N.T. 568-569, 576-577) This option was not considered previously because the children attending the High School 2 class were older than Student, exceeding the applicable regulatory age ranges. (N.T. 527-528) The School District proposed seeking a waiver to the age range restriction. (N.T. 571-572) The School District made arrangements for Student to transition to the High School 2 classroom in the beginning of April pending parental approval. (N.T. 529-530) After visiting the High School 2 classroom, however, Student's Parent rejected it with concerns about the physical characteristics of the classroom and apparent disagreement with the classroom teacher about the use of age-appropriate reinforcers. (N.T. 530-532; S47) In addition, despite the Special Education Director's statements to Student's parent regarding one of the current staff members who would work very well with Student, Student's parent learned



that Student would not have a single, particular individual dedicated to serving only Student throughout the day. (N.T. 79; P12, p.5)

14. On April 8, 2008, Student's parent requested a due process hearing, seeking to have Student placed at the High School 1 classroom, seeking assignment of a single, particular individual dedicated to serving only Student throughout the day, and seeking compensatory education from April 2006 to present. (P16) The School District filed an Answer to the Complaint on April 17, 2008, and the parties conducted a resolution meeting on May 8, 2008. I conducted a due process hearing on June 4, 2008 and June 10, 2008. I met Student, off the record but in the presence of both parties, in an air-conditioned, first floor room one hour prior to the June 10, 2008 hearing. Consistent with testimony by both parties' witnesses, I observed Student's nonverbal, transition-resistant behaviors requiring constant adult supervision. (N.T. 240) Parent exhibits P1-P5, P7-P13, and P15-P17 were admitted into the record. (N.T. 589) Parent exhibits P6 and P14 were withdrawn. (N.T. 589) School District exhibits S1-S53 were admitted into the record. (N.T. 591) Hearing Officer exhibit HO1 is admitted into the record. The record was closed on July 7, 2008, when the parties submitted their written closing arguments. (N.T. 597)
15. Student's family practice physicians have recommended that Student have "one on one assistance with all activities during school as [Student] is not capable of doing anything for self" (S23), and "In terms of medical management, it is recommended that [Student] have aids available on a one to one basis at all times in school as well as at home to assist with daily living needs and safety concerns."

(P15) Student's private psychiatrist wrote that "It is medically necessary that [Student] has a one to one during [Student's] summer school program...for safety reasons. [Student] needs to have someone with [Student] at all times" (P8), and "It is medically necessary that [Student] has a one on one assistant as well as a one on one aide during school and summer." (P17) None of these physicians consulted with school staff before making these recommendations. (N.T. 134, 384)

### **CONCLUSIONS OF LAW**

16. The record in this case was closed on July 7, 2008, when the parties submitted their post-hearing briefs. Student's post-hearing brief now concedes agreement with the School District regarding the High School 2 classroom program and placement. Accordingly, there is no longer a dispute regarding the School District's proposed High School 2 classroom program and placement.
17. Student's post-hearing brief also raises a new issue. Student now requests a consistent method of augmentative assistive communication to be developed and used both at home and at school. This communication-system issue was not raised in Student's original complaint. (P16) Thus, I will not consider it now.
18. Thus, I conclude that the only remaining disputes in this particular case are Student's requests for compensatory education and for a single, particular individual dedicated to serving only Student throughout the day.

### **DISCUSSION**

Under the Individuals with Disabilities Education Improvement Act (IDEIA), the School District is required to provide FAPE to all Students who qualify for special

education services. 20 U.S.C. § 1412 The School District program will meet its FAPE obligation if it provides at public expense personalized instruction and support services to permit the child to benefit educationally from the instruction, that meet the standards of the state educational agency, and that are provided in conformity with an individualized education program (IEP.) Board of Education of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982); Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3rd Cir. 1988); Stroudsburg Area School District v. Jared N., 712 A.2d 807 (Pa. Cmwlth. 1998)

The United States Supreme Court has held that, in a special education administrative hearing, the burden of persuasion (which is only one element of the larger burden of proof) is upon the party seeking relief, whether that party is the disabled child or the school district. Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005); In Re J.L. and the Ambridge Area School District, Special Education Opinion No. 1763 (2006) If the evidence produced by the parties is completely balanced, or in equipoise, then the non-moving party prevails and the party with the burden of persuasion (i.e., the party seeking relief) must lose. Schaffer v. Weast, supra. If the evidence is not in equipoise, but rather one party has produced more persuasive evidence than the other party (regardless of who seeks relief), then the Supreme Court's ruling is not at issue – in that case I must simply find in favor of the party with the more persuasive evidence.

**Student does not require a single, particular individual  
dedicated to serving only Student throughout the day**

Parent argues that private physicians and psychiatrist have consistently recommended a single, particular individual dedicated to serving only Student throughout the day in the classroom. The School District argues that these are medical

recommendations that only call for one-to-one assistance, and not a single, particular individual dedicated to serving only Student throughout the day. The School District also argues that it would be detrimental for Student to have a single, particular individual dedicated to serving only Student throughout the day because Student needs to learn to work with different individuals.

I agree with the School District that the physicians' and psychiatrist's recommendations are medical, not educational, prescriptions that were not developed through consultation with educational professionals. (N.T. 134, 383-384) Further, these recommendations do not call explicitly for a single, particular individual dedicated to serving only Student throughout the day, but rather they call for 1:1 assistance throughout the day without regard to whether the assistance is provided by the same individual or by several different individuals. (P-8; P15; P17; S23)

I completely reject the School District's additional argument that it would be detrimental for Student to have a single, particular individual dedicated to serving only Student throughout the day. This argument lacks any support in the record and appears to be manufactured solely for the purpose of litigation defense. None of Student's IEPs indicate any concern regarding over-dependence upon particular individuals nor do they identify any need to reduce such dependence. (S1; S6; S18; S25; S31; S44; S49) This, of course, is because Student's behavioral and communication needs are so basic that the last thing anyone is concerned about at this time is Student developing a dependence upon particular individuals. In fact, given the fact that Student is motivated by verbal and physical praise (hugs and high fives) from people Student knows (N.T. 418), familiarity and even dependence upon particular individuals might help Student in developing

positive communication and behavioral skills. I suspect this is why the School District's Special Education Director suggested that one of the current staff members in the proposed High School 2 classroom would work very well with Student. (N.T. 568–569, 576–577)

On this issue, however, Student has offered no evidence that Student needs a single, particular individual dedicated to serving only Student throughout the day. As noted above, the medical recommendations from Student's physicians and psychiatrist do not constitute such evidence. While there is no dispute that Student requires one-to-one assistance at all times, there simply is no evidence in the record indicating that such assistance must be provided by the same individual throughout the day. Accordingly, I will not order that the School District provide a single, particular individual dedicated to serving only Student throughout the day.

**Student was denied a free appropriate public education for the 2006-2007 school year and for ½ of the 2007-2008 school year**

Parent argues that Student is entitled to two years of compensatory education for the denial of FAPE because Student made minimal progress since Student's Academy placement in April of 2006. Parent notes that Student's 2006-2007 third and fourth quarter progress reports indicate that Student made minimal progress throughout that school year. (S29; S37) Parent further argues that, although Academy staff and the August 2007 CASSP team concluded that Student was not benefitting from the Academy placement, Student nevertheless remained at the Academy for the entire, subsequent 2007-2008 school year. Parent contends that any improvement in Student's behaviors during the 2007-2008 school year is attributable to the lack of demands placed upon Student at the Academy rather than to any educational benefit received. (N.T. 385-386)

The School District argues that Student's parent originally agreed to Student's Academy placement in April 2006 (N.T. 94, 102, 591), and that there is no question Student has made progress on Student's IEP goals since February 2008. (N.T. 375-377) The School District argues that any lack of progress between April 2006 and February 2008 is attributable to Student's disability as well as Student's substantial absences from school.

I agree with the School District to a point, but not completely. It is undisputed that Student has difficulty with change. (N.T. 31, 254-255, 311-314, 451) Academy's initial goal in April 2006 simply was to maintain Student's safety and the safety of other students, and to familiarize Student with the classroom setting and program. (N.T. 302-303, 311, 315) At that time, Student's self-injurious behaviors were observed 50-220 times per day, physical aggression to others was observed 100-200 times per day, aggression towards property was observed 20-75 times per day, and escape behaviors were observed 5-20 times per day. (P3; S10; S16) The School District and the Academy clearly needed the remainder of the 2006-2007 school year to develop Student's comfort level and reduce Student's self-injurious and aggressive behaviors.

After beginning the 2006-2007 school year, however, Student's self-injurious behaviors were occurring as often as 541 times per week in October 2006, decreasing to a high of 356 times per week in January 2007, and further decreasing to a high of 46 times per week in May 2007. (S39, p.4) Aggressive behaviors occurred as often as 118 times per week in September 2006, decreased to a high of 74 times per week in December 2006, spiked to a high of 147 times per week in April 2006, and decreased to a high of 52 times per week in late April 2006. (S39, p.1) By the end of the 2006-2007 school year, in

May 2007, Academy's psychiatrist recommended that Student be discharged from Academy because Student was not benefiting from the mental health portion of the program. (N.T. 433-435, 519) Student's teacher agrees with the Academy psychiatrist's May 2007 report that, at that time, Student was not benefiting from the mental health portion of the program. (N.T. 414-416) At the same time, Student's private psychiatrist recommended that Student receive homebound instruction for the rest of the school year because Student was experiencing such severe anxiety and behavior issues about school. (S35) The School District's homebound instruction from June 7 through June 25, 2007, was not designed to provide meaningful educational benefit. Student's homebound instructor received no information from the Academy about Student's instruction, did not have sufficient supplies, and did not have sufficient assistance in handling Student and tracking data. (N.T. 63-64, 147-148, 150-153, 160; P7; P8) Despite the School District's speculation that Student's absences prevented Student from making educational progress, there are no data in the record specifically supporting this hypothesis. The record clearly indicates that Student did not receive FAPE during the 2006-2007 school year.

Regarding the 2007-2008 school year, however, Student's Academy teacher credibly testified that, while Student made minimal progress for the first half of the 2007-08 school year, he saw increasing improvement in Student's behaviors in the second half of the 2007-2008 school year. (S45; P11; N.T. 371-373, 394-396, 414-416) Beginning in about February, 2008, Student's behavior showed significant improvement and Student began to make more substantial progress toward Student's IEP goals. (N.T. 375-377, 415-416) Student's mental health TAS agrees that Student's behaviors in the community have shown a marked improvement since February 2008. (N.T. 283) Data recording

Student's self-injurious behaviors indicate that they were occurring as often as 243 times per week in October 2007, but decreased to a high of 104 times per week in January 2008, and a high of 91 times per week in early April 2008. (S51, p.1) Data recording Student's aggressive behaviors indicate that they were occurring as often as 421 times per week in October 2007, but decreased to a high of 44 times per week in February 2008, and a high of 62 times per week in early April 2008. (S51, p.2) From these data, as well as the credible testimony of Student's teacher and TAS, I conclude that Student did not receive FAPE during the first half of the 2007-2008 school year, but that Student did receive FAPE during the second half of the 2007-2008 school year.

### **Student's Compensatory Education Award**

Student argues that the only appropriate remedy for the School District's denial of FAPE is to award hour-for-hour compensatory education for the education lost by Student. M.C. V. Central Regional School District, 81 F. 3d 898 (3<sup>rd</sup> Cir. 1996); In Re RR and the Souderton Area School District, Special Education Opinion No. 1859 (2008) Parent argues that, because Student's FAPE deprivation was total and encompassed Student's entire school day, Student's compensatory education award should cover each hour of Student's entire school day for the full two year time period.

Parent argues that the Commonwealth Court's holding in B.C. v. Penn Manor District, 906 A. 2d 642 (Pa. Comwlth. 2006), that compensatory education should be "reasonably calculated to bring (the student) to the position that they would have occupied but for the school district's failure to provide a FAPE," should not apply here because Penn Manor was not intended to be applied to special education cases, but only to gifted education cases. Parent also argues that Penn Manor standard is very vague,



raises more questions than it answers, and appears to require expert testimony from both sides which would strap the financially disadvantaged parent.

Parent argues that, if the Penn Manor standard does apply, the record of Student's positive responses to Student's TAS's consistent one to one support in the home establishes that similar progress could have been made at school with similar, consistent one to one support. Parent argues that this establishes Student's need for a consistently applied form of assistive communication, which in turn requires an augmentative assistive communication evaluation to determine the form of communication appropriate for Student. Parent argues that this also establishes Student's need for trained staff to implement this system both at school and at home. Parent further argues that Student needs a detailed, comprehensive transition plan with increased community based activities and instruction. Parent contends that Student continues to need significant behavioral support and intervention, which must be pervasive and delivered on a one to one basis.

The School District argues that, under either the M.C. or Penn Manor standards, Parent has not presented evidence that enables me to calculate how much compensatory education is necessary to address the FAPE denial. The School District notes that Student's Academy partial hospitalization program was a very specialized program intended to address mental health needs that may have impeded Student's ability to make educational progress and, although Parent did not access Student's mental health services, Student did make progress within the classroom. (N.T. 375-377, 429-430) The School District also argues that any equitable determination of compensatory education

should consider Student's numerous absences from school and that no award should be given for the periods of time that Student was absent during the 2006-07 school year.

As noted above, I conclude that Student was denied FAPE for the 2006-2007 school year and for ½ of the 2007-2008 school year. It appears that I can choose either the M.C. or Penn Manor analyses in fashioning appropriate compensatory education relief. What appears to be important in both analyses is some sort of evidentiary support and a reasoned explanation for the award.

I shall order compensatory education in the form of 540 hours of services by a Board Certified Behavior Analyst, 270 hours of services by a Master's level certified special education teacher with at least 10 years experience working with nonverbal autistic students who are cognitively low functioning, and a written plan developed by Student's IEP team describing how these services shall be coordinated with each other and with all of the other educational and mental health services that Student receives. The evidentiary basis and rationale for this compensatory education award is as follows.

Two themes that I have observed in this case are that Student has very basic needs for methods of receptive and expressive communication, and many caring parents and professionals have served Student, albeit in a haphazard, disorganized manner.

For some reason(s) that no one understands, Student did not start demonstrating significant behavioral improvement until Student had been at Academy for nearly a year and a half. Beginning in about February 2008, however, Student's behavior showed significant improvement and Student began to make more substantial progress toward Student's IEP goals. This was confirmed by Student's teacher as well as the TAS. (N.T. 247-248, 375-377, 415-416) Possibly, this behavioral improvement has something to do

with consistency in teaching communication skills, although the record lacks data supporting any hypothesis as to why Student's behavior improved. Student's parent certainly believes that consistency in teaching communication skills is necessary, which appears to explain why they are asking for a single, particular individual dedicated to serving only Student throughout the day could provide some. Consistency also appears to be the basis for Student's new request, first raised in the post-hearing brief, for a consistent method of augmentative assistive communication to be developed and used both at home and at school. My problem, if I have not adequately explained it already in this decision, is that the record lacks data or evidence supporting Student's reasonable assumption that consistency is the key to Student's communications needs. At this point and based upon this record, it is simply hypothesis.

I believe, however, that an independent Board Certified Behavior Analyst and an independent Master's level certified special education teacher with at least 10 years experience working with nonverbal autistic students who are cognitively low functioning (who hopefully will be coordinating with each other), will enable the parties to develop the data they need to better understand what motivates Student's behavioral improvements and how Student's receptive and expressive communication skills can be improved.

For reasons that I can't understand, the parents and many professionals who were meeting and ostensibly coordinating with each other were operating in a very unsystematic fashion. Student's changing litigation postures and the Academy's continuing recommendations to discharge Student despite Student's improved performance after February 2008 are just two examples of the poor communication,

confusion, and lack of cohesive structure that exists in Student's programming. This is not surprising, given the fact that our culture and governments perceive such a distinction between home and school that two distinctly separate systems exist for providing services to meet the complex needs of the same child whose disability does not make such a home/school distinction. Nevertheless, it is possible that Student will benefit from a more coordinated approach that might be promoted by an independent Board Certified Behavior Analyst, and an independent Master's level certified special education teacher cognitively low functioning, coupled with a written plan developed by Student's IEP team describing how their services shall be coordinated with each other and with all of the other educational and mental health services that Student receives.

I believe that this compensatory education award is justified under either the M.C. or the Penn Manor analyses. Consistent with M.C., the 540 and 270 hour awards correlate (2:1 and 1:1, respectively) to the 180 school days of the 2006-2007 school year and the 90 days of the 2007-2008 school year during which Student was denied FAPE. Any allowance under M.C. for School District rectification of FAPE denial is covered by the pre-2006-2007 school year time that Student spent at the Academy in the Spring 2006. Consistent with Penn Manor, the award of specific, coordinated services by experienced, independent specialists, coupled with a written plan developed by the IEP team, is reasonably calculated to bring Student to the position that Student would have occupied but for the School District's failure to provide a FAPE during 2006-2007.

**CONCLUSION**

The parties do not dispute Student's program and placement for the 2008-2009 school year with the exception of the composition of Student's one-to-one assistance. I conclude that Student's one-to-one assistance need not be provided by a single, particular individual dedicated to serving only Student throughout the day. The parties also dispute whether Student has been denied FAPE in the past. I conclude that Student has been denied FAPE for the 2006-2007 school year and for ½ of the 2007-2008 school year, and I award compensatory education accordingly.

**ORDER**

- Student's one-to-one assistance need not be provided by a single, particular individual dedicated to serving only Student throughout the day
- Student has been denied FAPE for the 2006-2007 school year
- The School District shall provide Student compensatory education in the form of:
  - 540 hours of services by a Board Certified Behavior Analyst;
  - 270 hours of services by a Master's level certified special education teacher with at least 10 years experience working with nonverbal autistic students who are cognitively low functioning, and;
  - A written plan developed by Student's IEP team describing how these services shall be coordinated with each other and with all of the other educational and mental health services that Student receives.

*Daniel J. Myers*

Daniel J. Myers  
Hearing Officer

July 15, 2008

Re: ODR No. 8706/07-08 KE  
Student  
District