

This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

Pennsylvania

Special Education Hearing Officer Decision

Due Process Hearing
NW (#8860/07-08 AS)
Date of Birth: xx/xx/xx
Dates of Hearing: June 25, July 9, August 11,
September 11, & 24, 2008
Closed Hearing

Parties to the Hearing

<u>Parent</u> Parent	<u>Representative</u> Pamela E. Berger, Esq.	<u>Transcript Completed</u> September 30, 2008
<u>School District</u> Franklin Area	<u>Representative</u> Patricia K. Smith, Esq.	<u>Date of Decision</u> October 24, 2008
		<u>Hearing Officer</u> David Y. K. Lee

II. BACKGROUND

Student is an xx-year-old student in the Franklin Area School District (hereafter District). During the 2007-2008 school year, Student was an eligible third grade student receiving special education services in an Emotional Support (hereafter ES) classroom. The parent¹ opined that Student's Individualized Education Plan (hereafter IEP), especially that of behavior intervention, was not properly implemented.

III. FINDINGS OF FACT

1. Student, date of birth xx/xx/xx, is a student in the District. (P. #9.)
2. Student has been raised by Student's grandmother, since eight months of age. (N.T. 130-132.)
3. Student enrolled in the District in January, 2006, as a first grade student when Speech and Language (hereafter S/L) Support was continued from Student's previous enrollments. (N.T. 531-532. P. #3 & #4 @ 2.)
4. Due to behavior and academic concerns, a Permission to Evaluate was obtained from the parent by signature on April 11, 2006. (N.T. 532. S.D. #4.)
5. An Evaluation Report (hereafter ER), dated May 18, 2006, indicated that "Student meets the eligibility requirements as a student in need of ES and Learning Support (hereafter LS) services". (S.D. #4. P. #4 @ 8.)
6. An IEP, dated June 1, 2006, for Student's 2006-2007 second grade year indicated resource LS and S/L services. (N.T. 537. P. #5 @ 12.)

¹ [Grandmother], who performs all parental functions, is Student's maternal grandmother who raised Student since eight months of age. (N.T. 130.) The question of educational rights is not before this Hearing Officer. Parent, in this Discussion, will be used to reference Ms. [redacted].

7. Academic goals were identified in S/L, Math, Reading, English. (P. #5 @ 7-9.)
8. Behavior goals addressed primarily the issue of compliance to teacher directives and school rules. (P. #5 @ 10.)
9. Separate pages titled IEP Behavior Program were included, referencing time-out for non-aggressive inappropriate and aggressive behaviors. (P. #5 @ 15, 17.)
10. A Notice of Recommended Educational Placement (hereafter NOREP) was signed by the parent on June 1, 2006, placing Student in resource LS. (N.T. 538. S.D. #5.)
11. A Functional Behavioral Assessment (hereafter FBA) was conducted by the District on December 20, 2006, resulting in a Behavior Plan (hereafter BP). (N.T. 527-528, 543, 561-562. S.D. #6. P. #6.)
12. The BP differed from the previous IEP Behavior Program in the location of time-out being changed from the Principal's office to the IST room. (N.T. 540-542, 559-560.)
13. At the beginning of February, 2007, Student was admitted to the partial hospitalization program for three months at the Psychiatric Center (hereafter Psychiatric Center) where Student also attended school, due to statements of self-harm. (N.T. 205-209, 544-545. P. #7 @ 3.)
14. In anticipation of Student's return to the District, the parent approved a NOREP, dated April 27, 2007, placing Student in full-time ES in Student's neighborhood school. (N.T. 209, 593-594. P. #8.)
15. It was acknowledged and disclosed on the NOREP that the inclusion of Student would make the age range in the ES classroom more than three years. (N.T. 547-550, 593-394.)

16. The April 27 IEP with an implementation date of May 3, 2007, referenced a “point/level” system used in the ES classroom. (N.T. 289. P. #7 @ 7.)
17. The separate pages previously listed as IEP Behavior Program referencing time-out were not carried over. (F.F. #9.)
18. The IEP team on October 8, 2007, reconvened upon parent request, concluded that no change was necessary to the existing IEP. (N.T. 159, 218-219, 332. P. #9.)
19. Student was without Student’s prescribed medications from around September, 2007, to March, 2008. (N.T. 60-61, 160-162, 212-216, 449-450.)
20. The parent’s concerns regarding Student being restrained centered around incidents that occurred in March, 2008. (N.T. 23-29, 32-36, 345-360, 441-444, 450-451. P. #1 & #2. S.D. #1 & #2.)
21. Student’s IEP was revised on April 14, 2008, with the specific additions of a BP and a Crisis Intervention Plan. (N.T. 57, 88, 189. P. #16.)
22. Although the term “time-out” was not used in the BP, the procedure for cooling off was more clearly described. (P. #16 @ 12.)
23. Due process hearing sessions were held on June 25, July 9, August 11, September 11 and 24, 2008.²

IV. ISSUES (N.T. 5-10.)

1. Was Student denied a Free and Appropriate Program of Education (hereafter FAPE) due to an inappropriate IEP?

² Availability of witnesses during the summer months, as well as unexpected emergency, contributed to the length of these proceedings. The parties agreed to submit written Closing Statements by October 10, 2008. (N.T. 82, 247, 414, 614.)

2. Was Student improperly restrained?
3. Did the use of the time-out room constitute discrimination under Ch. 15?
4. Was the District in violation of the age range limit for students in the ES classroom?
5. Is Student entitled to a neuropsychological evaluation?
6. Is Student entitled to compensatory education award?

V. DISCUSSION AND CONCLUSIONS OF LAW

The issues raised by the parent centered primarily around Student's BP, or lack of, and the lack of academic progress during Student's placement in the ES classroom. The time-frame of this review will therefore be from the time of Student's placement in May, 2007, to May, 2008, when a due process complaint was filed.³

³ The implementation date of the IEP was May 3, 2007, and the Complaint was filed on May 15, 2007. (P. #7 @ 1. S.D. Closing Statement.)

Appropriateness of IEP

The IEP is a written statement arrived at by the IEP team which summarizes Student's abilities, outlines goals for Student's education, and specifies the services Student will receive.⁴

...IEP means a written statement for each child with a disability that is developed, reviewed, and revised in a meeting in accordance with 300.320 through 300.324, and that must include—

(1) A statement of the child's present levels of academic achievement and functional performance...

(2)(i) A statement of measurable annual goals, including academic and functional goals...34 CFR §300.320(a)

⁴ See Oberti v. Board of Education, 995 F.2d 1204 (3d Cir. 1993).

The record is clear that Student's educational placement was changed to that of a full-time ES classroom when Student returned from Student's partial program at Psychiatric Center. After three months of treatment at Psychiatric Center, communication between Psychiatric Center and the District as part of the discharge planning indicated the recommendation of an ES placement. (N.T. 546-547.) The parent participated in the IEP meeting in preparation for Student's return and agreed to the ES placement. (N.T. 546-547. F.F. #14.) Since the IEP was prepared prior to Student's return to the District⁵, the "present levels" section of the IEP consisted of information up to the time of Student's placement at Psychiatric Center on February 2, 2007. (N.T. 328-329. P. #7 @ 3.) When compared with the previous IEP, the academic goals remained the same word for word. (P. #5 @ 8 & 9. P. #7 @ 8 & 9.) The point/level system of the ES classroom was added as the behavioral component of the IEP. (N.T. 335-336. P. #7 @ 7.)

The lack of updated present levels regarding academic achievement is troublesome. Student was in a partial hospitalization program at Psychiatric Center where Student also attended school.

Q. Okay. During the period of time that [Student] was in Psychiatric Center for February, March, and April, what information during that time would you have gotten from Psychiatric Center? [Student] attended school in Psychiatric Center?

⁵ The IEP team met on April 27, 2007, and Student apparently returned the following week on May 3rd. (P. #7.)

A. [Student] did. Weekly phone calls from a classroom teacher. We sent books and assignments for them to complete with Student there. The teacher gives weekly reports to our school psychologist in terms of progress.(N.T. 546.)

The District, therefore, should have had sufficient data over three months for the IEP team to have a perspective of Student's instructional levels in order to identify baselines for the development of measurable academic goals. Instead, the academic goals were copied word for word from the IEP of June 1, 2006, which was almost a year old. The impression is that the IEP team did not review any data, or did not have an understanding, with regard to Student's educational needs. This Hearing Officer notes that the IEP team included, among others, Student's previous LS teacher. The IEP team did not, however, include the school psychologist to whom Psychiatric Center gave weekly reports of Student's progress. Furthermore, Student's receiving ES teacher could not really identify any baseline information on the IEP. (N.T. 329-331 335-337.) It is difficult to understand how the goal of "given specially designed instruction" (P. #7 @ 8 & 9.) can be operational without identification of instructional levels. Thus, the IEP of April 26, 2007, was faulty in its inception⁶ for the lack of meaningful present levels and substantiated academic goals.

⁶ Fuhrman v. East Hanover Bd. of Educ., 993 F.2d 1031, 1040 (3d Cir. 1993). The adequacy of an IEP can only be determined as of the time it is offered and not at some later date.

The parent alleged that Student did not have a BP specific to Student. The IEP referenced five objectives for Student within the ES classroom's point/level system. (N.T. 289-290, 335. P. #7 @ 7.) At the time of the IEP development, the behaviors were targeted and written by the LS teacher who had Student prior to Student's placement at Psychiatric Center. Neither the IDEA nor Ch.14 mandates a specific format for a BP.⁷ Under best practice procedures, there would be a systematic gathering of data leading to the identification of target behaviors. (N.T. 560-562.) The application of the point/level system of the ES classroom was a reasonable beginning point for Student since behavior objectives in a partial hospitalization setting might not be easily transferred to a classroom setting. It is also not clear from testimony that behavior objectives and plans were provided to the District by Psychiatric Center. The approximately one month of school left in the 2006-2007 school year in the ES classroom would have provided opportunities for the gathering of behavioral data. Given the time-line of Student's return from Psychiatric Center and Student's placement back in the District, the BP portion of the IEP will not be disturbed for the duration.

⁷ 34 CFR §300.324(a)(2)(i). 22 PA Code §14.133(a).

Shortly after the beginning of third grade in the ES classroom, the IEP team met on October 8, 2007, upon parent request. It is not clear as to the reason for the meeting although the classroom teacher thought the focus was on some behavior problems. (N.T. 218, 333.) This Hearing Officer notes that it would have been the start of a period of time when Student was without medication. (F.F. #19.) Nevertheless, an IEP resulted with the notation "IEP will remain the same". The implementation date was October 15, 2007. (N.T. 159, 332. P. #9 @ 1.) Although the testimony was that the IEPs were the same without new goals since there was not a "modification page", a careful comparison of the two IEPs shows a number of noticeable differences. (N.T. 332. P. #7 & P. #9.) If there were no changes to the IEP, the District could have simply added a new cover sheet with the new dates and the notation of no change. The contents of the IEP, instead, were retyped, whether or not the wordings were changed. The following is a partial listing of noticeable, and not insignificant, differences:

- a. The "present levels" section (@ 4) was shortened to one paragraph. It pertained to information prior to Student's partial hospitalization at Psychiatric Center. Even though Student had been in the ES classroom for at least two months, academic instructional levels continued to be absent.
- b. Short Term Objectives in Reading (@ 8) were reduced from four to two. In the absence of progress data and instructional levels, the reason for the change cannot be ascertained.
- c. Short Term Objectives in Math (@ 8) were reduced from six to three. Similarly, the reason for the change is far from clear.

d. Short Term Objectives in Spelling and Math (@ 9) were completely omitted. The measurable annual goal was written as “when given specially designed instruction, Student will correctly construct complete sentences and spell weekly spelling words”. It is not clear how this goal can be measured without identifiable instructional levels.

e. Short Term Objectives in Behavior (@ 7) were simplified to one page from two separate pages with the continuation of the point/level system. Perhaps this change was due to the fact that Student had been doing well in Student’s behavior but there was no indication of such in the present levels section. (N.T. 213, 552.)

The October 8, 2007 IEP was therefore faulty for the lack of required elements in accordance with 34 CFR §300.320.⁸ Furthermore, it is questionable as to how it was being implemented since the ES classroom teacher did not seem to be familiar with its content. (N.T. 328-333, 335-336.) The classroom teacher might indeed have “inherited” Student’s IEP. The disclaimer that she did not write the IEP is not persuasive. The IEP certainly could have been revised, with appropriate updated data, after having worked with Student in the classroom.

Restraining of Student

⁸ See also Oberti v. Board of Education, 995 F.2d 1204 (3d Cir. 1993). The IEP is a detailed written statement arrived at by the IEP team which summarizes the abilities, and outlines goals for the child’s education.

Documents submitted in support of the allegation that Student was improperly restrained in violation of Ch. 15 revolved around two incidents that occurred in March, 2008. (N.T. 485-486. F.F. #20.) These incidents, which occurred within five days of each other, were documented by the ES classroom teacher and the Therapeutic Support Staff (hereafter TSS). Following a careful reading of the documents and review of testimony, it is the opinion of this Hearing Officer that the reported physical contacts that occurred did not constitute a violation of Ch. 15 governing discrimination of qualified handicapped students. The incidents occurred when there were reasons to believe that Student's actions could be of danger to self and others. Actions purported to be "restraints" were reasonable prevention of potential danger in a public school setting. Student's Wraparound Service provider opined that "books can be replaced" in advocating a completely "hands-off" approach with Student. (N.T. 20, 431, 445-447, 487-489, 491-492.) The position taken may indeed be appropriate in a therapeutic environment, the potential destruction of materials and of harm in a public school setting is not without consequence to public resources which are not unlimited.

Use of Time-out

There was much discussion regarding the use of time-out as a behavior management technique for Student. The District used the terms "time-away" and "time-out" to distinguish two different locations. The consequence of time-away referred to a space in the hallway outside the ES classroom. The consequence of time-out referred to a separate room on the ground floor of the building. The two consequences were viewed by the District as sequential. In other words, time-out would apply if time-away did not work. (N.T. 409-410.)

This Hearing Officer notes that time-away and/or time-out were not identified in the IEP of April 27, 2008, which was to be implemented in the ES classroom. Time-out was mentioned in the BP developed on December 20, 2006, which was before Student went to Psychiatric Center. (N.T. 526-527, 540-542, 559-560. P. #6 @ 3.) Testimony was given to the intention of adding the BP to the IEP at a meeting to be held in January, 2007, which did not occur because Student was then placed in Psychiatric Center. (N.T. 544. S.D. #7.) If the intention was to utilize the same BP when Student returned to the District in May, 2008, it was completely missed at the IEP meeting in April, 2008. The ES classroom teacher testified that she never saw the BP and was under the impression that Student did not have a separate BP. (N.T. 325-326, 361.) Reference to the concept of time-out, although the actual term was not used, as a behavior management tool did not appear until the IEP of April 14, 2008. (F.F. #22.)

Although not mentioned in the IEP or in a BP, time-out was utilized by the District on more than one occasion. (N.T. 18, 29, 35-38, 498-499, 520, 523, 540-541, 553.) It is not at all clear that the District had an adequate understanding, or consistent understanding among different individuals, regarding the purpose of time-out as a behavior management technique. The distinction, other than the physical location, given between time-away and time-out is curious. The distinction between time-out and punishment blurs by the way time-out was assigned and the amount of time Student had to remain in time-out where Student also did Student's school assignments. (N.T. 18-19, 50-51, 341-343, 411-413, 575-580.) Since the appropriateness, or adequacy, of Student's IEP for third grade was previously determined, the present discussion only lends further support to the previous determination.

The parent claimed Ch. 15 violation in the use of time-out as punishment for Student. Time-out as applied was not exclusive to Student (N.T. 413.), and Student was provided with and did complete Student's classroom assignments in the presence of Student's TSS. The action did not constitute discrimination due to Student's handicap under Ch. 15. Even in the contrary, remedy is already determined to be available under the IDEA and Ch. 14.

In dicta, the District is advised to be specific regarding the target behavior(s) to be addressed in the BP eventually developed on April 14, 2008. (F.F. #21.) A broad statement such as Student should follow school and classroom rules 95% or more does not identify what specific behaviors need to be modified or replaced. The FBA should identify, by data collection over time, specific behaviors to be targeted. It is not a "Prevention Strategy" to select a behavior to target weekly. To this end, the District may wish to seek consultation from available resources in the area of FBA and BP development.

Age range violation

The age range of the students in the ES classroom was greater than the allowable limits. The parent opined that there should have been a waiver offered by the District before Student was placed.

The District did not dispute the fact that Student was outside the age range of three years in the classroom when Student was placed. This Hearing Officer notes that Student was a year older than the average second grade students when the placement was made because Student had been held back in Kindergarten. (N.T. 204.) The IEP team considered the minimal variance of age and the fact that Student could walk from home to Student's neighborhood school. The parent was a member of the IEP team and was aware of the variance. (N.T. 549-550, 562-564, 593. P. #8.) The placement of Student, therefore, was within the intent of §14.142(f).⁹ The District is advised to consider putting the variance justification in the IEP instead of the NOREP.

⁹ 22 PA Code §14.142(f). "...unless an exception is determined to be appropriate by the IEP team and is justified in the IEP." The 2008 update, §14.146(b), contains similar language.

Neuropsychological evaluation

The parent opined that Student is in need of a neuropsychological evaluation primarily due to the diagnosis of holoprosencephaly¹⁰. There was no testimony given to show how a neuropsychological evaluation would add to the provision of services necessary for Student's educational needs. This Hearing Officer notes that Student has been a long standing client with mental health providers. Student has been seen by different psychiatrists. An abnormal development of the brain is not an unequivocal cause for a neuropsychological evaluation for educational planning. Furthermore, 34 CFR §§300.304 & 300.305 on evaluation procedures and requirements do not make the distinction between a comprehensive psychoeducational evaluation and a neuropsychological evaluation. The parent did not, therefore, sustain the burden of proof¹¹ for a neuropsychological evaluation at public expense.

Compensatory education

Compensatory education is an in-kind remedy. By providing additional future

¹⁰ An autosomal anomaly resulting in an incomplete development of the brain with mild to severe outcome.

¹¹ See Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005).

educational services, a student can be compensated for past denial of due process rights or educational programming that Student should have received. A disabled child is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem.

M.C. ex rel. J.C. v. Central

Regional School District, 81 F.3d 389, 108 (3d Cir. 1996).

Student is entitled to compensatory education due to the inadequate IEP for the time he was placed in the ES classroom. For approximately one month at the end of second grade and one month at the beginning of third grade, the IEP was inadequate for the lack of operational present levels and measurable annual academic goals. For the rest of third grade until April 14, 2008, Student's IEP was inadequate with regard to academic and also behavioral goals.

If the District had taken the steps to revise and update Student's IEP, there would have been instructional and behavioral data available without having to start the process of evaluation from the beginning. Time will therefore not be subtracted for the period of deprivation in the calculation of compensatory award. Student's IEP of April 26, 2007 shows 35 hours of special education services per week. (P. #7 @ 13.) Student's IEP of October 8, 2007 shows 27³/₄ hours of special education services per week. (P. #9 @ 13.) The total number of compensatory education hours is therefore reasonably approximated to be (27hrs./week x 4weeks/month x 7months) 756 hours to bring Student to the position that Student would have occupied but for the failure to provide a FAPE.¹² The hours of compensatory education may be in the form of academic remedial activities or tutoring, and social skills training, to be provided after school hours, during school breaks, and/or on weekends. The parties may agree to reimburse the parent for similar activities purchased by the parent not to exceed the average salary of a special education teacher plus benefits for the determined number of hours.

Accordingly, it is hereby ordered:

VI. ORDER

The LEA is ordered to take the following action:

1. The District is to provide Student with 756 hours of compensatory education consistent with the Discussion above.

The LEA is not ordered to take the following action:

¹² See B.C. v. Penn Manor, 906 A.2d 642 (Pa. Commonw. 2006).

1. The District is not ordered to conduct a neuropsychological evaluation.

October 24, 2008

Date

Hearing Officer

David Y. K. Lee

David Y. K. Lee