

*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: AB

Date of Birth: xx/xx/xxxx

Date of Hearings:  
September 29 & December 18, 2008  
January 30, February 19 & February 20, 2009

**CLOSED HEARING**

ODR Case # 9170-08-09-LS

Parties to the Hearing:

Ms. Katherine Pude  
Assistant Superintendent  
Bradford Areas School District  
P.O. Box 375  
Bradford, PA 16701

Representative:

Pamela Berger, Esquire  
434 Grace Street  
Pittsburgh, PA 15211

George Joseph, Esquire  
Quinn, Buseck, et. al.  
2222 W. Grandview Blvd.  
Erie, PA 16506

Date Record Closed:

March 16, 2009

Date of Decision:

March 31, 2009

Hearing Officer:

Jake McElligott, Esquire

## **INTRODUCTION AND PROCEDURAL HISTORY**

Student is a 7-year old student residing in the Bradford Area School District (“District”) who has been identified as a child with a disability under the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEIA”)<sup>1</sup> and Chapter 14 of the Pennsylvania education regulations (“Chapter 14”)<sup>2</sup>. Specifically, Student has been diagnosed with autism and tuberous sclerosis, a condition which leads to lesions on the brain and other organs, as well as a seizure disorder. The parents allege that the District has denied the student a free appropriate public education (“FAPE”) in the 2007-2008 school year and, additionally, seek an order for the student’s placement for the 2008-2009 school year.

For the reasons set forth below, I find in favor of the parents.

## **ISSUES**

Did the District provide a FAPE to Student in the 2007-2008 school year?

If not, does the District owe Student compensatory education for this deprivation of FAPE?

What is the appropriate current placement for Student ?

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<sup>1</sup> It is this hearing officer’s preference to cite to the pertinent federal implementing regulations of the IDEIA at 34 C.F.R. §§300.1-300.818.

<sup>2</sup> 22 PA Code §§14.101-14.163.

## **FINDINGS OF FACT**

1. Student resides in the Bradford Area School District.
2. Student is diagnosed with autism spectrum disorder and tuberous sclerosis and also suffers from a seizure disorder. Student displays significant developmental delays in all skill areas, including communication, social, fine and gross motor, adaptive, and cognitive/academic. (Hearing Officer Exhibit ["HO"]-1; Parents' Exhibit ["P"]-14).
3. In the spring and summer of 2007, parents and the District began to explore Student's transition from an early intervention program to a regular education kindergarten class in the District with various supports, including speech and language services. This was the initial placement contemplated by the parents and the District for the 2007-2008 school year. (P-4; Notes of Testimony ["NT"] at 202-209).
4. The individualized education plan ("IEP") for the 2007-2008 school year was developed in July 2007 and designed for implementation in a regular education kindergarten with pull-out services for speech and language instruction. (P-8).
5. The July 2007 IEP indicated strengths in making progress in all developmental areas, responding well to Verbal Behavior instruction, improving communication skills and behavior, enjoyment of other children, learning of new signs every day and improving self-help skills. (P-8 at page 5.)
6. The July 2007 IEP included seventeen goals in the following areas: pre-academic skills (2 goals), self-help skills, behavioral skills, attending skills, leisure time engagement, receptive and expressive language (2 goals), vocalizing recognizable words, requests without prompting, pre-writing skills, skipping in a straight line, kicking a moving ball, use of playground slides and climbing devices, and catching objects. (P-8 at pages 9-17.)
7. The July 2007 IEP included, as part of its program modifications and specially-designed instruction, ABA/Verbal Behavior. (P-8 at page 25.)

8. The July 2007 IEP included, as part of the explanation of his educational placement, the following: “(Student ) will receive verbal behavior intensive teaching sessions in a special setting (speech and language therapy room or sensory room). He will also receive intensive teaching sessions in the regular education kindergarten classroom. Verbal behavior natural environment teaching will occur in all areas of the school building, including the playground....He will utilized (sic) an individualized specially designed curriculum consisting of verbal behavior tasks mixed in with general education curriculum activities.” (P-8 at page 29).
9. ABA/Verbal Behavior is a program of learning where a student is taught language and, by extension, learns through a 3-step process of pre-behavioral stimuli, the actual behavior, and the consequences that maintain the behavior. An example given through expert testimony at the hearing was the presentation by the speaker of a cup (pre-behavioral stimuli), the identification by the speaker of the object as a cup (the actual behavior), and an agreement by the listener, through nodding and eye contact, that the listener agrees and/or recognizes the object as a cup (the consequence that maintains the behavior). (NT at 462-464, 884-886).
10. Many times, in teaching situations using ABA/Verbal Behavior with students with developmental delays, the three step process is much more structured and segmented, working on basic communication skills at a fundamental level. (NT at 464).
11. Using ABA/Verbal Behavior, the student and teacher work to have the student “tact”, that is label or identify an object, and “mand”, that is make a request for an object. (NT at 464, 884-887).
12. A technique employed in teaching an ABA/Verbal Behavior program is often referred to as intensive teaching or discrete trial training. The expert witness who testified at the hearing noted that these two techniques are nearly identical. (NT at 466-468, 884-887).
13. Intensive teaching/discrete trial training involves the rapid use of tacting or manding to allow the student to build vocabulary and deepen communication skills, at the same time helping the student meet behavioral goals. Beyond tacting and manding, the student may progress to intraverbal skills involving filling blanks to complete meaning statements for meaning. (NT at 466-468, 884-887).

14. An ABA/Verbal Behavior program with intensive teaching/discrete trial training involves meticulous and voluminous data-gathering on each individual tact or mand activity. (School District ["S"]-3; NT at 414-415, 463-465).
15. Two critical components of ABA/Verbal Behavior are pairing and reinforcement. Pairing involves a bond between the teacher and student so that interaction with the teacher is seen as something highly desirable by the student. This is especially important for students with developmental delays so that the student does not resist instruction or seek to escape from the teaching environment. Reinforcement involves reinforcing the behavior (the tact, the mand or the intraverbal) that the teacher seeks from the interaction. The consistent use of reinforcers is important to motivate and reward the student in the teaching environment. (NT at 466-470, 884-886).
16. The July 2007 refers to various elements of ABA/Verbal Behavior in the section on program modifications/specially designed instruction, including "pairing will be used to establish the learning environment as reinforcing", "mand training to develop independent requests", differential reinforcement will be used to shape verbal/sign productions", and "use of intensive teaching strategies to increase functional communication". (P-8 at page 26).
17. In August 2007, given continuing disagreements over the details of the student's IEP, the District proposed a placement in an autism support classroom in [Redacted Program], ("BOCES"), the New York equivalent of a Pennsylvania intermediate unit ("IU"). The parents agreed, and the student attended this BOCES placement for the 2007-2008 school year. (S-1; NT at 107, 215-216).
18. After IEP team meetings in mid-August, Student's IEP was revised on August 23, 2007 before he began attending the BOCES placement. (P-9).
19. There was no legally-constituted IEP team meeting for the revision of the July 2007 IEP on August 23, 2007. Apparently, the parent, the District school psychologist and BOCES employees attended a meeting on August 23, 2007 to discuss IEP revisions. Only the school psychologist signed the attendance sheet. In the days thereafter, apparently signatures were gathered from attendees at the meeting (including parent), as well as others who did not attend the August 23<sup>rd</sup> IEP meeting, including a building

principal listed as the representative of the District and an assistant superintendent. (P-9 at pages 2-3; NT at 779-783).

20. The student began attending the BOCES autism support placement in September 2007 with a revised IEP dated September 5, 2007. (P-9).
21. The September 2007 IEP contains identical strengths as the July 2007 IEP, namely making progress in all developmental areas, responding well to Verbal Behavior instruction, improving communication skills and behavior, enjoyment of other children, learning of new signs every day and improving self-help skills. (P-9 at page 6; P-8 at page 5.)
22. The September 2007 IEP contains the identical seventeen goals as the July 2007 IEP including goals in the following areas: pre-academic skills (2 goals), self-help skills, behavioral skills, attending skills, leisure time engagement, receptive and expressive language (2 goals), vocalizing recognizable words, requests without prompting, pre-writing skills, skipping in a straight line, kicking a moving ball, use of playground slides and climbing devices, and catching objects. (P-9 at pages 10-24; P-8 at pages 9-17.)
23. The September 2007 IEP contains an identical entry for ABA/Verbal Behavior as part of program modifications and specially-designed instruction as is contained in the July 2007 IEP. (P-9 at page 28; P-8 at page 25.)
24. The September 2007 IEP contains identical entries for use of various elements of ABA/Verbal Behavior in the section on program modifications/specially designed instruction as are contained in the July 2007 IEP, including “pairing will be used to establish the learning environment as reinforcing”, “mand training to develop independent requests”, differential reinforcement will be used to shape verbal/sign productions”, and “use of intensive teaching strategies to increase functional communication”. (P-9 at page 29; P-8 at page 26).
25. The September 2007 IEP changes the explanation of ABA/Verbal Behavior in terms of describing the educational placement: “(Student ) will utilized (sic) an individualized specially designed curriculum consisting of verbal behavior tasks.” (P-9 at page 34).

26. The September 2007 IEP also includes a detailed behavior plan to address Student 's chin popping behavior. (P-9 at pages 25-27).
27. Throughout Student 's educational history, he has continually exhibited the self-injurious behavior of chin-popping. In engaging in this behavior, Student hits his chin from below with the palm of his hand or the back of his hand. It has been viewed by witnesses in these proceedings as an escape behavior to avoid engaging in instruction, although Student chin pops at all times, including at home. This behavior has the potential to cause severe damage, either from a particularly sharp blow or from the repeated blows over time. (P-12, P-13; NT at 51, 78-81, 253, 258, 452-453, 486, 488-489, 894-895, 1083).
28. On October 9, 2007, in an entry in the communication log sent back and forth between the parent and Student 's teacher at the BOCES, parent indicates her excitement at proposed IEP goals that the BOCES staff was considering for Student . (P-20 at 10/09/07 entry).
29. The September 2007 IEP was revised on November 1, 2007. Occupational therapy services were increased from one 30 minute session per week to two 30 minute sessions per week. Speech and language therapy services were increased from three 30 minute sessions per week to five 30 minute sessions per week. (P-10 at page 28).
30. The November 2007 IEP revisions also included wholesale changes in Student 's goals from the September 2007 IEP. Four of the goals (skipping in a straight line, kicking a moving ball, use of playground slides and climbing devices, and catching objects) remained the same. Each of the remaining thirteen goals was removed from the IEP. The thirteen goals in the September 2007 IEP were replaced by nine entirely new goals in the November 2007 IEP. (P-10 at pages 10-18; P-9 at 10-24).
31. The November 2007 IEP goals included use of words/word approximations/signs, imitation of consonant-vowel combinations, speaking/signing a mean of 2-word expressions, following verbal instructions, pre-academic skills (such as identifying colors, shapes, numbers, letters, and puzzle-working), completing block designs, increased social skills, attending issues, and fine motor skills. (P-10 at pages 10-18).

32. Student's IEP team did not meet to discuss the November 2007 IEP. The goals were written by the BOCES teacher, speech/language therapist, and occupational therapist and relayed to the District school psychologist. The school psychologist spoke with Student's parent by phone and received verbal approval of changes to the related services and goals. The goals were not shared with the parent before the phone conversation. (NT at 288-291, 783-790).
33. The school psychologist testified that she felt that these changes constituted minor revisions to the IEP and so did not necessitate an IEP meeting. The IEP includes two attendance sheets, neither one of which is dated. The first attendance sheet (P-10 at page 2) is the attendance sheet circulated to various individuals after the August 23, 2007 meeting (see Finding of Fact 19). The second attendance sheet (P-10 at page 3) does not appear on any of the other IEPs and includes only the names of the school psychologist and the parent. (P-10 at pages 2-3; NT at 786-790).
34. The November 2007 IEP formed the basis for Student's instruction at the BOCES placement through the end of the 2007-2008 school year. (P-10).
35. The District monitored the student's progress only through quarterly reports supplied to it by the BOCES. (P-11; S-4; NT at 790-791, 827, 839).
36. The quarterly progress reports speak only to the nine goals developed by the BOCES staff in November 2007. There are no progress reports on the seventeen goals in the August/September 2007 IEPs that were in effect from August 23<sup>rd</sup> through November 1<sup>st</sup>. There are, however, first quarter progress reports for the nine goals that, ostensibly, were not implemented until November 1<sup>st</sup>. There are no progress reports for the four goals (skipping in a straight line, kicking a moving ball, use of playground slides and climbing devices, and catching objects) that were present in the August, September, and November IEPs. (P-1; S-4).
37. Student made halting but measurable progress on the nine goals in the November 2007 IEP. (S-4).
38. Over the course of 2007-2008 school year, the student's chin popping behavior markedly increased, with recorded chin pops as follows: September-12.3 recorded chin pops/documentated school



day, October-16.0, November-24.5,<sup>3</sup> January-27.2, February-17.6, March-24.0, April-30.6, May-71.4, June<sup>4</sup>-62.0. (S-3; P-15 at page 11).

39. This data was not reported to the District in the progress reports and was not requested by the District. As of March 2008, the District and the parent were unaware of the chin-popping data collection. (P-11, P-18 at page 1; S-4).
40. In late February 2008, in a chance social encounter with the District school psychologist, the parent voiced various concerns about Student 's BOCES program. (NT at 791).
41. Throughout March and April 2008, the parent, the District, and the BOCES communicated on scheduling behavioral consultations and an IEP meeting. (P-18).
42. On March 28, 2008, a behavior consultant observed Student in the classroom. His recommendations included more consistent use of a token board, use of a picture exchange communication system, building leisure skills, training of staff and aides, and increased communication among team members. (P-19).
43. Student 's IEP team met on May 9, 2008. (NT at 799-800).
44. In May 2008, the BOCES was informed by the New York Department of Education that New York education regulations did not allow a BOCES to provide services to students from another state. Therefore, Student would not be able to continue at the BOCES placement. Because transitions are difficult for Student , and because the BOCES only received notice of this limitation in May, the BOCES received permission to continue to provide extended school year services to Student in the summer of 2008. (NT at 973-975).
45. An IEP dated June 8, 2008 was proposed for Student 's 2008-2009 school year. (P-16).
46. In August 2008, a functional behavior assessment was performed to address Student 's chin popping behavior. The assessor

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<sup>3</sup> Student missed many, if not most, of the school days in December due to various medical issues. Only one data sheet was presented for December. Therefore, chin popping in December was excluded.

<sup>4</sup> Certain data recording sheets for June 2008 are illegible. The calculation of the chin pops recorded in June 2008 are only for the sheets which are legible.

- hypothesized that during task demand situations (such as intensive teaching/discrete trial training, speech instruction, group activities, and transitions), Student employs chin popping to (1) gain adult attention, (2) avoid or postpone a task, or (3) stimulate himself during downtime, waiting periods or when not engaged in activities. (P-15).
47. The parents filed a complaint on August 12, 2008. (HO-6).
  48. Due to the inability of the BOCES to continue to serve as Student's placement, the parties required a due process order to determine Student's placement pending the outcome of this due process hearing. The first session of this hearing on September 29, 2008 was dedicated to the issue of Student's pendent placement. (NT at pages 1-229).
  49. The parents claimed that the appropriate pendent placement was an at the student's neighborhood school. The District claimed that the appropriate pendent placement was an autism support classroom run by the local IU in a neighboring school district. The testimony largely revolved around issues of safety in transporting Student. In October 2008, this hearing officer ruled that the student's pendent placement would be at the IU autism support classroom. (HO-9).
  50. Before the February 19, 2009 session, parents filed a motion for reconsideration of the pendent placement, contending that the pendent placement at the IU autism support classroom was inappropriate. The District filed a response, indicating that the IU autism support classroom was appropriate, citing, among other factors, that Student's attendance at the placement has been limited. (HO-7, HO-8).
  51. Student's schedule in the IU autism support classroom runs from 10 AM to 2:30 PM. He does not eat in the cafeteria, instead eating in the autism support classroom. His interactions with peers in the regular education kindergarten classroom are very limited. (P-17; NT at 724-726).
  52. Student was originally to share the autism support classroom with three other students. One of those students was successful in the regular education environment and no longer receives services in the autism support classroom. A second student receives two half-hour sessions in the autism support classroom, one in the morning, one in the afternoon; Student is present for that student's afternoon session. A third student receives two hours of

instruction in the autism support classroom, time which is split up over the course of the day; Student shares certain time with the student in the class, although the student spends time in the classroom prior to Student's 10 AM arrival time. (NT at 743-747).

53. At the conclusion of the hearing, the parties agreed that the decision on Student's placement for the remainder of the 2008-2009 school year would be made as part of this decision and not be a separate decision. (NT at 1124-1125).

## **DISCUSSION AND CONCLUSIONS OF LAW**

The provision of special education and related services for students with disabilities is addressed in federal law ("IDEIA") and Pennsylvania law ("Chapter 14").<sup>5</sup>

### Substantive Deprivation of FAPE

To assure that an eligible child receives a free appropriate public education,<sup>6</sup> an IEP must be "reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress."<sup>7</sup> 'Meaningful benefit' means that a student's program affords the student the opportunity for "significant learning."<sup>8</sup> More specifically, a student's IEP must include specially designed instruction designed to meet the unique needs of the child and must be accompanied by any necessary related services to permit the child to benefit from the instruction.<sup>9</sup>

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<sup>5</sup> 34 C.F.R. §§300.1-300.818; 22 PA Code §14.101-14.163.

<sup>6</sup> 34 C.F.R. §300.17.

<sup>7</sup> Board of Education v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982).

<sup>8</sup> Ridgewood Board of Education v. N.E., 172 F.3d 238 (3<sup>rd</sup> Cir. 1999).

<sup>9</sup> Rowley; Oberti v. Board of Education, 995 F.2d 1204 (3<sup>rd</sup> Cir. 1993).

In this case, Student's IEPs were reasonably calculated to yield meaningful education benefit. At the BOCES placement, Student received an ABA/Verbal Behavior program in line with his IEPs. (FF 31, 37). The progress reports indicate that Student made progress on most of his IEP goals (FF 35), and BOCES employees who testified were credible as to their interactions with Student and their estimations of his progress. Although the parents ultimately disagreed with the provision of this program, and with aspects of the intensive teaching/discrete trials employed by the BOCES, it is the conclusion of this hearing officer that the BOCES employed the specially-designed instruction and related services as it was required to in the student's IEPs.

The District, however, failed in the provision of a FAPE in its handling of Student's chin popping behaviors. Even though Student's IEP was being implemented at the BOCES, the District remains ultimately responsible for the provision of FAPE to Student. Chin popping has always been a challenge in educating Student. (FF 26, 27, 38, 39). Yet the District was in no position to know about the pronounced and continual rise in Student's chin popping behavior because it did not observe the BOCES placement and stayed in only minimal contact with the BOCES until March 2008. (FF 35, 39). The District's involvement with Student's program at the BOCES came only upon the parents' request. (FF 40). At the outset of the 2007-2008 school year, Student's chin popping was

problematic; month by month, the chin popping increased, and the District put itself in the position of not being able to respond.

Accordingly, there will be an award of compensatory education for the District's failure to provide a FAPE due to the District's non-involvement in monitoring and programming for Student's increased chin popping throughout the 2007-2008 school year.

Procedural Deprivation of FAPE

The District is correct when it asserts in its closing argument that procedural violations of IDEIA and/or Chapter 14 do not necessarily lead to a denial of FAPE. Procedural violations must result in the loss of educational opportunity, or in the infringement of parents' rights to participate in the IEP process, or deprive a student of educational benefits.<sup>10</sup>

In this case, however, there were numerous, serious procedural violations that, taken all together, amount to a denial of a FAPE. First, the September and November IEPs were created without the convening of the IEP team. (FF 19, 32, 33). In the November 2007 IEP, every goal not related to gross motor skills—thirteen in all—were entirely replaced without the convening of the IEP team; the goals were simply written by the BOCES teacher and service providers. (FF 32). Contrary to the

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<sup>10</sup> See Eskambia County Bd. of Educ. v. Benton, 406 F.Supp. 2d 1248 (S.D. Ala. 2005); Souderton Area Sch. Dist. v. J.H., 2009 WL 349733 (E.D. Pa. 2009).

District's school psychologist's assertions, these changes were not mere revisions to Student 's IEP (FF 33); this was an entirely new IEP.

The District relied only on the quarterly progress reports provided by the BOCES, yet these progress reports, as to the 1<sup>st</sup> quarter of the school year, were flawed. (FF 35). The 1<sup>st</sup> quarter progress reports were based on the November 2007 IEP goals, but these goals were only adopted by the District through its flawed IEP process on November 1, 2009. There was no progress report based on the goals in the September 2007 IEP which was in effect for most of, if not all of, the 1<sup>st</sup> quarter of the school year. (FF 36). In effect, then, one of two things occurred: there was no progress monitoring of the September 2007 goals, or the November 2007 goals formed the basis of Student 's 1<sup>st</sup> quarter instruction long before November 1, 2007. Either occurrence is a serious procedural violation. Progress on the four goals based on Student 's gross motor skills were never reported. (FF 36).

Taken all together, these procedural violations amount to a denial of a FAPE to Student . Granted, the BOCES appropriately implemented an IEP that was flawed in its inception and in its progress reporting. But this does not excuse numerous, serious procedural violations. Simply put, a district cannot claim that it is shielded from remedy for an IEP it had created outside of the IEP team process by out-of-district educators because it shared on the phone with parents some vague notion of goal-changing and then appropriately implemented that IEP.

Accordingly, there will be an award of compensatory education for the District's failure to provide a FAPE due to the numerous and serious procedural violations in the design of the September and November 2007 IEPs and the progress reporting for those IEPs.

#### Compensatory Education

Compensatory education is an equitable remedy that is available to a claimant when a school district has been found to have denied a student a FAPE.<sup>11</sup> The right to compensatory education accrues from a point where a school district knows or should have known that a student was being denied a FAPE.<sup>12</sup>

The U.S Court of Appeals for the Third Circuit has held that a student who is denied a FAPE “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.”<sup>13</sup> In 2006, however, the Pennsylvania Commonwealth Court explicitly rejected the Third Circuit’s ‘compensatory education equals the period of deprivation’ calculation.<sup>14</sup> Instead, the Commonwealth Court found “more persuasive and workable”<sup>15</sup> a ‘compensatory education equals an amount for rectification’ calculation— “the student is entitled to an amount of compensatory education reasonably calculated to bring him to

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<sup>11</sup> Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990); Big Beaver Falls Area Sch. Dist. v. Jackson, 615 A.2d 910 (Pa. Commonw. 1992).

<sup>12</sup> Ridgewood; M.C. v. Central Reg'l Sch. Dist., 81 F.3d 389 (3d Cir. 1996).

<sup>13</sup> M.C. at 397.

<sup>14</sup> B.C. v. Penn Manor Sch. Dist., 906 A.2d 642 (Pa. Commonw. 2006)

<sup>15</sup> Id. at 650.

the position that he would have occupied but for the school district's failure to provide a FAPE".<sup>16</sup>

First, I must determine when the District knew or should have known it was denying Student a FAPE.

Regarding the substantive denial of a FAPE for the District's non-involvement in monitoring and programming for Student's increased chin popping throughout the 2007-2008 school year, it is the considered opinion of this hearing officer that, had the District been appropriately monitoring Student's chin popping, it would have taken action in December 2007 to investigate the issue and begin processes to address it. In September 2007, Student averaged 12.3 chin pops per day. In October 2007, he averaged 16.0 chin pops per day. In November 2007, his chin pops increased 50% to 24.5 chin pops per day. (FF 38). Thus, had the District been appropriately monitoring Student's chin pops, it knew or should have known that it needed to initiate action in December 2007 such that it could and should have had plans to address the chin popping in place, or at least in motion, in January 2008.

Regarding the procedural denial of a FAPE for the District's numerous and serious procedural violations in the design of the September and November 2007 IEPs and the progress reporting for those IEPs, it is the considered opinion of this hearing officer that the District knew or should have known that its September/November 2007 IEP

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<sup>16</sup> Id. at 651.



processes were flawed from the outset. Likewise, the deficiencies in the progress reports (both as to the 1<sup>st</sup> quarter anomaly and the missing gross motor goals) should have been apparent to the District early on. But from August 23, 2007, the District mishandled the IEP meeting, compounded by a deeply flawed process in the creation of the November 2007 IEP.

Second, I must determine the amount of compensatory education necessary to bring Student to the position that he would have occupied if the District had not denied him a FAPE. The substantive denial of FAPE is very serious. Over the course of the 2007-2008 school year, Student continually deepened his chin popping behavior. At this point in his behavioral development, it may be very difficult to have Student avoid such behavior in the future. Regardless, it seems appropriate that two hours per school day might enable Student to begin re-working his behaviors. The procedural denial of FAPE is serious as well. In a way, the District is fortunate that the BOCES appropriately implemented the inappropriately designed IEP. As indicated above, however, this does not excuse the District's omissions. It seems appropriate that one hour per school day would account for (1) the problematic stance of Student's 1<sup>st</sup> quarter reporting/instruction, (2) the lack of any indication of reporting/instruction on Student's gross motor skills goals, and (3) the sense that the professional educators at the District were content to have Student educated under an IEP designed outside of the IEP team process.

As for the nature of the compensatory education award, the parents may decide how the hours should be spent so long as they take the form of appropriate developmental, remedial or enriching instruction or services that further the goals of Student 's current or future IEPs. These hours must be in addition to the then-current IEP and may not be used to supplant the IEP. These hours may occur after school, on weekends and/or during the summer months, when convenient for Student and his parents

There are financial limits on the parents' discretion in selecting the appropriate developmental, remedial or enriching instruction that furthers the goals of Student 's IEPs. The costs to the District of providing the awarded hours of compensatory education must not exceed the full cost of the services that were denied. Full costs are the hourly salaries and fringe benefits that would have been paid to the District professionals who should have provided services to Student .<sup>17</sup>

An award of compensatory education will be fashioned accordingly.

Appropriate Placement for Student

Both federal law, at 34 C.F.R. §§300.114-120, and Pennsylvania law, at 22 PA Code §14.145, require that the placement of a student with a disability be in the least restrictive environment ("LRE").

Pursuant to the mandate of 34 C.F.R. §300.114(a)(2):

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<sup>17</sup> While BOCES professionals actually provided these services, the ultimate responsibility lies with the District. Therefore, the calculation of the financial aspect of the award is based on District salaries and benefits.

“Each (school district) must ensure that to the maximum extent appropriate, children with disabilities...are educated with children who are nondisabled, and...separate schooling...occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”

Pursuant to 34 C.F.R. §300.116(b)(2-3), however, the notion of LRE for a student’s placement has additional contours:

“In determining the educational placement of a child with a disability...each (school district) must ensure that...the child’s placement...is based on the child’s IEP and is as close as possible to the child’s home.”

Additionally, to comply with LRE mandates, the school district must ensure that “unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled.” 34 C.F.R. §300.116(c).

In this case, there is no dispute that Student ’s placement in the IU autism classroom is highly restrictive. Student spends his entire day nearly alone in a room without any students, let alone non-disabled peers. (FF 51, 52). It is clear that student’s placement at the IU autism classroom does not comply with LRE mandates.

Accordingly, an order will be entered for Student ’s placement to be in a less restrictive environment.

## **CONCLUSION**

The District denied Student a free appropriate public education through substantive and procedural violations in the design and

monitoring of his 2007-2008 school year. Compensatory education will be awarded as a result of these denials. Furthermore, the current placement for Student violates the least restrictive environment mandates of federal and Pennsylvania laws.

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### **ORDER**

In accord with the findings of fact and conclusions of law as set forth above, the student is entitled to an award of compensatory education in an amount calculated as follows:

- 2 hours per school day for the 2007-2008 school year for the substantive violations of a free appropriate public education; and
- 1 hour per school day for the 2007-2008 school year for the procedural violations of a free appropriate public education.

Furthermore, forthwith the District shall make preparations to implement Student 's current IEP at a District elementary school. Student 's IEP team shall meet to determine if it is possible to implement his IEP at Student 's neighborhood school; if not possible, however, the

implementation shall be at a District elementary school where it is possible. The District may use any combination of District or non-District employees, District or non-District resources, and independent consultants that the IEP team determines is appropriate to provide Student with a free appropriate public education in the least restrictive environment.

*Jake McElligott, Esquire*

Jake McElligott, Esquire  
Special Education Hearing Officer

March 31, 2009