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Pennsylvania  
Special Education Hearing Officer

DECISION

Child's Name: AS

Date of Birth: xx/xx/xx

Dates of Hearing: 9/22/08, 10/29/08, 10/30/08

CLOSED HEARING

ODR No. 9131/08-09 LS

Parties to the Hearing:

Representative:

Parent

Parent Attorney:

Ms.

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School District

School District Attorney

Pottsville Area

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Date Record Closed: November 4, 2008

Date of Decision: November 19, 2008

Hearing Officer: Anne L. Carroll, Esq.

**INTRODUCTION AND PROCEDURAL HISTORY**

Student, a teen aged student currently enrolled in a cyber charter school, is eligible for special education services under the categories of other health impairment (OHI) and specific learning disability (SLD).

Although Student has resided in the Pottsville Area School District since the middle of the 2001/2002 school year, for most of that time Student received educational services in therapeutic placements selected by Student's Mother in consultation with community mental health organizations or Schuylkill County Children and Youth Services due to serious behavior issues/mental health concerns. The District had no role in either initiating or selecting those placements/programs.

Student re-enrolled in the District in August 2006 as an 8<sup>th</sup> grade middle school student upon returning home from a residential treatment and educational facility located in another county. Contending that the District failed to provide Student with sufficient supports and services to assure Student's success in the District placement, Student's Mother seeks two years of compensatory education, from July 2006 until the start of the 2008/2009 school year. The compensatory education claim includes the summers of 2007 and 2008, when Student's Mother contends Student should have been provided with extended school year (ESY). She also seeks payment for an independent neuro-psychological evaluation.

The due process hearing in this matter was conducted over three sessions from the end of September to the end of October 2008.

## **ISSUES**

1. Is the Pottsville Area School District required to provide Student with compensatory education for the 2006/2007 and/or 2007/2008 school years, including summers, and if so, for what period(s) and in what amount?
2. Should the Pottsville Area School District be required to fund an independent neuro-psychological evaluation of Student ?

## **FINDINGS OF FACT**

1. Student is a teen aged child, born xx/xx/xx. Student is a resident of the Pottsville Area School District and is eligible for special education services. (Stipulation, N.T. pp. 13, 14)
2. Student has a current diagnosis of Other Health Impairment due to Attention Deficit/Hyper Activity Disorder (ADHD) and Specific Learning Disability (Disorder of Written Expression) in accordance with Federal and State Standards. 34 C.F.R. §300.8(a)(1), (c)(9), 10); 22 Pa. Code §14.102 (2)(ii); (P-27, P-43).
3. Student moved into the Pottsville Area School District in February 2002. After an initial evaluation completed in July 2002, Student was determined to be IDEA eligible based upon specific learning disabilities and began receiving special education services in a District learning support class. (N.T. pp. 34, 36; P-4, P-5, P-6)
4. Near the end of the 2003/2004 school year, because of escalating problem behaviors at home Student began receiving therapeutic services in a partial hospitalization program at the recommendation of a counselor from a community behavioral health service organization. Student initially attended the program, which was conducted by the organization that employed the counselor, after school hours each day.(N.T. pp. 40, 41,177--179; P-11; S-1)
5. Not long after the 2004/2005 school year began, Student was hospitalized due to increasingly aggressive behaviors at home and began receiving Student's educational services in the partial hospitalization program under the direction of the Schuylkill County Intermediate Unit. (N.T. pp. 51, 57, 180; P-13)
6. In January 2005, Student's Mother agreed to a brief residential placement in the [redacted] as recommended by a community mental health agency because Student's behaviors were becoming more problematic in the partial

- hospitalization program. In April 2005, Student returned to the partial hospitalization program. (N.T. pp. 57--60, 181, 182; P-14, P-15)
7. At the beginning of the 2005/2006 school year, Student entered [redacted], another residential placement, where Student remained until August 2006. During Student's stay at [second residential facility], several evaluations were completed and Student received educational services in accordance with an IEP dated 12/14/05. Schuylkill County Children and Youth Services strongly suggested the [second residential facility] placement due to Student's threats of suicide and combative behaviors at home. (N.T. pp. 74, 182--186; P-18, P-19, P-20, P-21, P-22, P-27)
  8. When Student returned to the District as an 8<sup>th</sup> grade student at the beginning of the 2006/2007 school year, Student's Mother approved implementation of the [second residential facility's] IEP, pursuant to which Student was initially placed in a full-time emotional support class. During the first half of the school year, Student was academically successful, as indicated by Student's report card grades (passing to above average), and generally good behavior. By December 2006, however, Student had already missed a significant number of school days. (N.T. pp. 76, 77, 186, 187, 271; P- 24, P-28, S-4)
  9. Student's IEP team met several times during the 2006/2007 school year to adjust Student's academic program. At Student's Mother's suggestion, Student began receiving academic instruction in math, science and social studies in regular education classes, ultimately receiving only reading and English instruction in the emotional support classroom. The District also conducted a behavior assessment and the IEP team developed strategies to address Student's increasing problems with school. Student typically did not use the strategies in Student's IEP which required Student to initiate assistance, such as obtaining a pass to see the teacher designated to provide Student with one to one academic support. (N.T. pp. 87, 98—101, 103, 125, 126, 190, 191, 200—203, 207—210, 272, 274, 296; P-30, P-31, P-34, S-4)
  10. During the third and fourth quarters of the 2006/ 2007 school year, Student's grades dropped, Student's on-task behaviors decreased, problem behaviors increased and Student continued to miss school. Student also frequently arrived late and sometimes left school during the day. Student received several detentions during the second and third quarters, which the school sometimes permitted Student to serve in an alternative education setting during the school day due to transportation problems. (N.T. pp. 77—79, 82, 84, 89, 230, 276, 277, 288, 289; P-25, P-29, P-43, S-5, S-12)
  11. In March 2007, a goal for using problem-solving techniques in stressful situations was added to Student's IEP and Student was placed in a support group to learn and role-play methods of dealing with such situations. Although Student

- initially participated productively in the group, Student's participation had stopped by the end of the school year. (N.T. pp. 278--280; S-5)
12. Student's case manager/emotional support teacher also initiated a "token economy" reward system in the third quarter of Student's 8<sup>th</sup> grade year (2006/2007) to help Student achieve success in controlling Student's problem behaviors and improve Student's school performance. Student could earn "money" to purchase privileges and preferred activities by obtaining the signatures of Student's teachers for good behavior in classes throughout the school day. Although this strategy was initially successful, Student eventually stopped participating. (N.T. pp. 293, 323, 324)
  13. The District obtained Parent's permission for a reevaluation of Student in March 2007, for which a report was completed in August 2007. The consensus of the teacher input to the evaluation was that Student's academic difficulties arose from Student's absences and failure to complete class work and homework. (N.T. pp. 192, 291, 292; P-32, P-43, P-49)
  14. Student's IEP team met again at the beginning of the 2007/2008 school year, after completion of the evaluation report, to develop a new IEP for Student's move to the District high school as a 9<sup>th</sup> grade student. Student's IEP was revised in November 2007 to provide for computer-based instruction in English and Algebra in the regular education setting. (N.T. pp. 212—216, 221, 341—343, 350, 351, 370; P-36, P-39)
  15. In April 2008, Student's IEP was further adjusted to provide Student with computerized instruction in science using the Plato program, since Student's poor attendance was again adversely affecting Student's grades. The Plato instruction in math, science and English permitted Student to progress at Student's own pace, thereby diminishing the adverse effects of Student's largely unexcused absences on Student's academic progress (N.T. pp. 128, 129, 218—220, 223, 353, 354, 370, 371; P-36, S-10)
  16. During the 2007/2008 school year, Student's Mother continued to believe that Student's behaviors and academic performance were better in regular education classes. She opposed a one to one aide due to Student's feeling that being accompanied by an aide would increase Student's difficulties in school by singling Student out and calling attention to Student's problems. Although Student's attendance continued to be a problem, Student exhibited few disruptive behaviors when Student attended school during Student's 9<sup>th</sup> grade year. (N.T. pp. 222—224, 344, 345, 347, 348, 354, 368)
  17. Student's Mother believed that designating a trusted "go to" person was an appropriate means of helping Student deal with the stress of the school day, improve Student's attendance and other behaviors such as leaving the school building.

(N.T. pp. 224, 348, 349)

18. In February 2008, the District filed truancy charges against Student for excessive unexcused absences. Student's Mother did not write excuses for many of Student's absences from school because she believed that Student needed to follow the rules, take responsibility for Student's decisions to skip school and learn that there were consequences to Student's actions. (N.T. pp. 165, 166, 237; P-46, P-47, P-48, P-49)

## **DISCUSSION AND CONCLUSIONS OF LAW**

### **A. Introduction/Legal Standards**

The record in this matter establishes that Student is a young person with a long and troubled history of behavior problems and mental health issues which were addressed in out of District, primarily therapeutic, settings during most of the time Student has resided in the District. (F.F. 4, 5, 6, 7) During the two school years when Student was most recently enrolled in the District, Student demonstrated, albeit briefly, the ability to be an academically successful student in both Student's regular and special education classes. (F.F.8; S-4) Much more prominently, however, Student exhibited a strong and persistent proclivity for skipping school and avoiding academic work during most of the 2006/2007 and 2007/2008 school years, ultimately resisting every strategy developed and implemented by Student's IEP team to address Student's academic and behavioral needs. (F.F. 9, 11, 12, 14, 15, 17)

Student's Mother is understandably frustrated and deeply upset by the failure of all efforts to achieve anything more than fleeting success in extinguishing Student's difficult behaviors and motivating Student to become engaged in learning. She has not, however, succeeded in proving the essence of her claims in this matter, *i.e.*, that the District should be held accountable for the indisputable fact that it has achieved no

greater success in finding a remedy Student's longstanding, intractable problems than any other public or private agency—or Student's Mother herself. The legal standards applicable to this matter do not require the District to guarantee the success of the program, services and supports it provides to an eligible student.

Under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400, *et seq.*, and in accordance with 22 Pa. Code §14 and 34 C.F.R. §300.300, an eligible student is entitled to receive a free appropriate public education (FAPE) from Student's school district of residence. FAPE is defined as “special education and related services” that: 1) Are provided under public supervision and at public expense; 2) are provided in accordance with state and federal regulatory standards; 3) include preschool, elementary and secondary education appropriate under state standards; (4) are provided in conformity with an Individualized Education Plan (IEP). 34 C.F.R. §300.17.

To assure that an eligible child receives FAPE, an IEP must be “reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress.” *Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982). “Meaningful benefit” means that an eligible student's program affords him or her the opportunity for “significant learning.” *Ridgewood Board of Education v. N.E.*, 172 F.3d 238 (3<sup>RD</sup> Cir. 1999). More specifically, an eligible student's IEP must specify educational instruction designed to meet the unique needs of the child and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. *Rowley; Oberti v. Board of Education*, 995 F.2d 1204 (3<sup>rd</sup> Cir. 1993).

To meet the legal standards of FAPE in this case, therefore, the District was required to provide services to Student that were reasonably calculated to assure that

Student would receive a meaningful benefit from Student's educational program. The District was not required to guarantee that Student would actually derive the expected benefit from Student's educational program, since that would be an impossible standard to meet, particularly in a case such as this, where the eligible Student has strenuously resisted attending school and accepting the assistance available through Student's various IEPs. (F.F. 9, 11, 12, 13, 14, 16)

B. Parent's Denial of FAPE Contentions

Student's Mother argued, generally, that the District failed to provide Student with sufficient supplementary aids and services and/or modifications to the general education curriculum to accommodate Student's disabilities and permit Student to be educated in the regular education environment to the maximum extent possible. She was notably vague, however, with respect to specifically identifying the aids, supplementary services and/or modifications which should have been included in Student's IEP but were not. Rather, Parent suggested a number of purported lapses by the District, but failed to establish by reference to either the evidence or to relevant and controlling legal authority that the District's conduct fell short of its obligation to provide Student with FAPE. A review of some of Parent's contentions in light of the facts established by the record and the applicable law illustrate Parent's failure to prove any denial of FAPE arising from the District's actions during the 2006/2007 and 2007/2008 school years.

1. Parent suggested that adopting the [second residential facility's] IEP and implementing it for several months after Student re-enrolled in the District denied Student FAPE. That argument fails on both the law and the facts. [Second residential facility] was the out of District—and out of county—provider of educational services for



Student for the entire 2005/2006 school year. Although Student's Mother voluntarily placed Student there, she understood that a public agency, Schuylkill County Children and Youth Services, would have forced that placement had she declined it. (N.T. p. 184, l. 2—7) Since Student's placement at [second residential facility] could have been mandated by a state agency, and since [second residential facility] is obviously authorized to provide special education services to IDEA eligible students under state law, including issuing a NOREP, (P-23), [second residential facility] served as the local educational agency (LEA) designated to provide Student with FAPE during Student's stay. In accordance with the IDEA regulations, therefore, [second residential facility] can be considered a "public agency." 34 C.F.R. §300.33. The IDEA regulations explicitly provide that where an eligible student transfers from one public agency to another within the same state, the transferee agency may adopt the transferring agency's IEP for the student. 34 C.F.R. §300.323(e). The District, therefore, was permitted by law to adopt and implement Student's [second residential facility] IEP when Student re-enrolled in the District in August 2006.

Moreover, the [second residential facility's] IEP was obviously appropriate for Student during the first half of the 2006/2007 school year, since Student received good grades and was not exhibiting significant behavior problems. (F.F. 8) When Student's problem behaviors increased and Student's academic success diminished toward the middle of the school year, Student's IEP team met in December 2006 to develop a new IEP for Student. (F.F. 9; P-30) The District, therefore, responded promptly when the [second residential facility's] IEP was no longer appropriate for Student.

2. Parent suggested that the District acted improperly in calling the police regarding a cafeteria fight in which Student was involved. (N.T. pp. 197—199, 247, 250—252; P-41). A school district, however, is explicitly permitted to report a crime committed by an IDEA eligible student to law enforcement authorities. 34 C.F.R. §535(a). In addition, within days of that incident, Student’s IEP was revised to add a goal for problem-solving and to place Student in a group working on strategies for handling stressful situations (F.F. 11)

Although the District reacted to the cafeteria fight by treating Student the same as any other student involved in breaking the law, in accordance with the IDEA regulations, it also promptly identified and addressed Student’s need for finding better ways to handle issues arising from stressful situations.

3. Parent also suggested that prosecuting Student for excessive unexcused absences and not permitting Student to make up assignments and tests missed due to unexcused absences was a punitive response to disability-related behavior. Student’s Mother, testified, however, that she declined to write notes to excuse Student’s absences because she wanted to force Student to accept the consequences of Student’s frequent refusals to attend school. (F.F. 18) It was unclear whether Parent was initially unaware of the full extent of such consequences and later regretted her decision when she learned of them. Regardless, Student’s Mother cannot now hold the District responsible for her decision not to excuse Student’s absences.

Moreover, although the District did not make an exception to its general rule of permitting no make-up work for unexcused absences for Student, Student’s IEP team provided Student with the Plato computer-based instruction program for every academic

course for which it was available. (F.F. 14, 15) Addition of the Plato courses reduced the adverse effect of Student's unexcused absences on Student's academic progress because Plato instruction permitted Student to progress through the courses at Student's own pace. Consequently, Student missed no work in the Plato-based courses when Student was absent.

4. In closing arguments, Parent's attorney suggested that a one to one aide was a support that could have been added to Student's IEP to address Student's academic and behavior needs. Such argument, however, must be rejected in light of Parent's testimony that an aide would not have worked for Student. (F.F. 16) In addition, the District did provide opportunities for Student to seek one to one academic assistance and assistance from a trusted teacher for stressful situations. (F.F. 9, 17) The suggestion that an aide would have made a significant, or even slightly positive, impact on Student's progress is completely speculative at best, and actually contrary to Parent's own testimony.

Contrary to Parent's contention that the District did not seriously attempt to address Student's significant needs, the record in this case establishes that the District carefully considered every aid, service and modification that Student's Mother requested, and developed and implemented its own strategies, during the two school years when Student was most recently enrolled in the District. The District expended considerable effort to assure that Student's IEPs met Student's needs and were appropriately implemented.

### C. ESY

Student's Mother argued that Student should have been provided with ESY services during the summers of 2007 and 2008, but again cited neither factual nor legal support for such contention.

Under the federal IDEA regulations, ESY services are to be provided to an eligible student if necessary to assure that Student receives a free, appropriate public education (FAPE). 34 C.F.R. §300.106(a)(2). Pennsylvania regulations provide additional guidance for determining ESY eligibility, requiring that the factors listed in 22 Pa. Code §14.132 (a)(2) (i)—(vii) be taken into account. Those factors are:

(i) Whether the student reverts to a lower level of functioning as evidenced by a measurable decrease in skills or behaviors which occurs as a result of an interruption in educational programming (Regression).

(ii) Whether the student has the capacity to recover the skills or behavior patterns in which regression occurred to a level demonstrated prior to the interruption of educational programming (Recoupment).

(iii) Whether the student's difficulties with regression and recoupment make it unlikely that the student will maintain the skills and behaviors relevant to IEP goals and objectives.

(iv) The extent to which the student has mastered and consolidated an important skill or behavior at the point when educational programming would be interrupted.

(v) The extent to which a skill or behavior is particularly crucial for the student to meet the IEP goals of self-sufficiency and independence from caretakers.

(vi) The extent to which successive interruptions in educational programming result in a student's withdrawal from the learning process.

(vii) Whether the student's disability is severe, such as autism/pervasive developmental disorder, serious emotional disturbance, severe mental retardation, degenerative impairments with mental involvement and severe multiple disabilities.

Parent did not even attempt to adduce evidence that Student met any of the ESY criteria. There is no evidence that Student's Mother requested ESY services or any other summer programming for 2007. Her testimony with respect to the summer of 2008 did not establish that she was actually requesting ESY services. Parent testified that her

request to the District Special Education Director in the late spring of 2008 was for “tutoring in the home” either “over the summer” or “the next year.” (N.T. p. 225, l. 9, 14) There is, in short, no real evidence that Parent ever sought ESY services for Student and no evidence that consideration of any of the ESY factors support a need for such services.

#### D. IEE

The IDEA regulations are quite clear with respect to reimbursement for independent evaluations, providing that parents have the right to a private evaluation at public expense only when the parent disagrees with the school district’s evaluation. 34 C.F.R. §300.502(b)(1). Here, Parent testified that she disagreed with the District evaluation, but identified no specific fault or area of disagreement, simply stating “I didn’t agree with [the District’s evaluation]” (N.T. p. 193) Such testimony does not convincingly establish that Parent had a true disagreement with the District’s evaluation, and is certainly not sufficient to support an entitlement to an independent evaluation at public expense.

Parent’s request for a neuro-psychological evaluation is nothing more than grasping at the remote possibility that such an evaluation might provide an insight into Student’s refusal to engage in the educational process. There was also no evidence, including no testimony from Student’s Mother, that a neuro-psychological evaluation is needed for this child, no evidence as to how or why such an evaluation would provide new or additional helpful information to determine and address Student’s needs. There is no basis in the evidence or the law for ordering an independent neuro-psychological evaluation in this case.

## **CONCLUSION**

Parent in this case did not bear her burden of proving that District failed to provide Student with FAPE during any part of the 2006/2007 and 2007/2008 school years. Consequently, her claim for compensatory education will be entirely denied.

Parent's claim for compensatory education for denial of ESY services will also be denied. Parent did not even attempt to establish that Student met any of the criteria for obtaining an extended school year program under federal or Pennsylvania regulations.

Finally, Parent did not meet the standards for obtaining an IEE at public expense, since she provided no convincing evidence that she disagreed with the District's latest evaluation, no evidence of any deficiencies in the District evaluation and no evidence that a neuro-psychological evaluation would provide any new or helpful information, much less that such an evaluation is necessary for Student to receive FAPE.

## **ORDER**

In accordance with the foregoing findings of fact and conclusions of law, is hereby **ORDERED** that Parent's claims are denied in their entirety and the Pottsville Area School District need take no action with respect to the claims and issues raised in this due process complaint.

*Anne L. Carroll*

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Anne L. Carroll, Esq.  
HEARING OFFICER

November 19, 2008