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# Pennsylvania Special Education Hearing Officer

## DECISION

Child's Name: CD  
Date of Birth: xx/xx/xx

Dates of Hearing:  
8-8-07, 9-11-07, 9-27-07, 10-18-07, 10-23-07, 10-30-07, 11-02-07

CLOSED HEARING  
ODR #7801/06-07 AS

Parties to the Hearing:

Representative:

Ms.

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Date Record Closed:

November 7, 2007

Date of Decision:

November 25, 2007

Hearing Officer:

William F. Culleton, Jr.,  
Esquire

## **INTRODUCTION**

Student is a xx year old resident of the Great Valley School District, enrolled at the [redacted] Middle School. She is diagnosed with neurological disorder and seizure disorder, and is classified educationally with Autism. Her Parents, request an order that the District provide the Student with educational services, including inclusion with typical students of the Student's age, in a District school location. They also request compensatory education for the District's alleged failure to provide adequate services and inclusion in the two years prior to filing as well as the time since filing their request for due process.

The District offers educational services in an autistic support class in a separate building for children with disabilities operated by the [redacted] Intermediate Unit. It asserts that this offers the Student a reasonable opportunity for educational benefit. There is no autistic support class in the District's buildings, and none could be obtained outside the District. The District asserts that it is not obligated to create a separate class just for the Student, that it can provide adequate medical services at the IU location, and that the Parents obstructed the provision of services, precluding compensatory relief.

## **ISSUES**

1. Did the District deprive the Student of FAPE by declining to provide nursing services to her while she was a student in the autistic support classroom in the [redacted] elementary school during the 2005 to 2006 school year?
2. Did the District provide meaningful educational benefit to the Student in the least restrictive setting during the 2006 to 2007 school year, through its placement of the Student in the learning support classroom of [redacted] middle school?
3. Was the District's offer of an autistic support class in a special education school without inclusion opportunities, during the 2007-2008 school year, reasonably calculated to provide meaningful educational benefit to the Student in the least restrictive setting?

4. Has the District failed to provide meaningful educational benefit to the Student during the 2007-2008 school year?
5. Should compensatory education be awarded for the District's failure to provide the Student with educational services reasonably calculated to provide meaningful educational benefit in the least restrictive setting during the 2005 to 2006, 2006 to 2007 and 2007-2008 school years?

#### **PROCEDURAL HISTORY**

In December 2006, the District reevaluated the Student. (P-23.) IEP meetings were scheduled in January 2007, February 2007, March 2007, and May 2007; an IEP was offered in June 2007, which the Parents rejected. (P-42.) Further revisions were offered after a resolution meeting in July 2007. (P-56.) The Parents requested due process by letter dated June 4, 2007. (P-47.) In August 2007, the Parents filed a supplementary request for due process seeking ongoing compensatory education. (NT 382-6 to 384-25; P-65.) The supplementary due process request was not opened as a separate matter. (NT 382-6 to 384-25.) Seven hearing sessions were held between August 8, 2007 and November 2, 2007.

#### **FINDINGS OF FACT**

##### **DISABILITIES**

1. The Student is diagnosed with neurological disorder that presents like autism, and seizure disorder. She is identified with Autism. (P-23.)
2. The Student experiences repeated and frequent seizures, including status epilepticus, a condition that can be life threatening and requires emergency medical intervention. (NT 555-13 to 557-8, 586-2 to 587-3; P-2 p. 4, P-10.)
3. The Student's functioning is significantly impaired in all domains both at home and at school. (P-23.)

## SEIZURE DISORDER

4. The Student's seizure disorder is severe and unusual. It is characterized by several different kinds of seizure and by frequent seizures. The Student's disorder is progressing unpredictably and can lead to status epilepticus. (NT 555-13 to 557-8; P-2 p. 4, P-10, P-23, P-33.)
5. Status epilepticus is a seizure state in which the patient experiences multiple seizures in rapid succession without interruption. (NT 558-20 to 559-561-19, 584-17 to 585-2; P-10.)
6. The Student's seizure disorder interferes with the Student's availability for learning. She often experiences multiple seizures in one day. (NT 86-25 to 87-25, 100-2 to 103-10.)
7. The Student's seizure disorder is being treated by a specialist in pediatric neurology and epilepsy at the [redacted] Hospital. (NT 553-8 to 21; P-10, P-33.)
8. The specialist manages the disorder by a combination of medications, including one medication that is administered daily and emergency medications that are administered when the Student's seizures threaten to develop into status epilepticus. (NT 561-20 to 564-25; P-10, P-33.)
9. Under the specialist's direction, the Parents administer the medications to the Student. (NT 562-1 to 564-25; P-10.)
10. When the Student experiences two or more seizures in a day, and depending on the nature and frequency of the seizures, school staff and the Parents are authorized to increase the dose of the daily medication. (NT 562-1 to 564-25; P-10, P-33.)
11. When the Parents assess the Student and find that the Student is experiencing certain kinds of

seizures, or the frequency of seizures is in danger of developing into status epilepticus, a different medication is administered for the purpose of reducing the seizure activity. (NT 562-1 to 564-25; P-10, P-33.)

12. The Student's mother is especially adept at assessing the Student's physical condition and titrating the medications to prevent status epilepticus and at the same time avoid over-medication, which sedates the Student and makes her unavailable for education. (NT 569-15 to 573-9.)
13. It is important medically for the Mother to be in close proximity to the Student's placement because she is essential to effective intervention when the Student's seizures threaten to spiral out of control. (NT 570-25 to 571-21.)
14. While medical personnel can learn to effectively titrate the Student's medication, it would be difficult to train them to the level of ability presently exhibited by the Mother. (NT 615-3 to 616-1; 618-19 to 621-24.)
15. A placement that is forty minutes away from home is not in the Student's medical best interest due to the need for her Mother to be able to intervene sooner. (NT P-29; P-28.)

#### EDUCATIONAL NEEDS

16. The Student requires significant intervention to perform personal care activities, including toileting. (P-5 p. 8-11, P-23.)
17. The Student's level of communication is pre-linguistic and her communication needs are great. She communicates through gestures, signs, facial expressions and vocalizations. She is learning to communicate her needs through the PECS system. She is able to follow basic one step directions. She has made progress in the PECS system and is capable of further progress in learning to express herself. (NT 1173-22 to 1185-12; P-5 p. 1-6, P-17, P-23.)

18. The student has progressed in the PECS system from Phase 1 to Phase 3A. (NT 115-1, 1006-12 to 13.)
19. The Student is able to remain with other children and appears to enjoy being with them. She greets them, responds by smiling at them and engages in one step interactions such as giving a "high five." She can respond independently and appropriately to a request from a peer. She shows emotions and affection spontaneously to adults. (NT 174-7 to 23, 1179-22 to 1181-17; P-5 p. 4, P-7 p. 7, P-23, P-45.)
20. The Student can benefit from social interaction in general education classes. (NT 1051-18 to 1052-7.)
21. The Student exhibits behaviors in classroom settings, including leaving her seat and walking around the room, extending her arms and rocking, and rubbing her face. The Student also engages in disruptive behaviors such as pushing things off the desk, throwing things, grabbing things belonging to others, and occasional aggressive behaviors, such as hitting and pinching. The Student does participate in some activities in special classes. (P-23, P-45, P-54.)
22. The Student engages in interactive computer activities. (P-45.)
23. Due to the changeable nature of the Student's seizure disorder, she is at risk for falling when standing or walking. She wears a helmet at school and is attended by an aide who holds her by a gait belt she wears, to break her fall and prevent injury. (NT 92-21 to 93-20; P-2 p. 3, P-23 p. 10.)

PROXIMITY TO HOME

24. The Student's physician recommended that one of the Parents remain less than forty minutes' distance from the Student's schools or other placements at all times. (P-15 p. 28.)
25. The Parents needed to travel to the Student's school on numerous occasions to address the Student's medication needs. (P-15 p. 28.)

BACKGROUND IN THE SCHOOL DISTRICT

26. The Student enrolled in the District in 2004, after moving to the District from [redacted] State. (P-2 p. 2.)
27. The Student had an IEP and the District initially referred her to the [redacted] Center, a separate school exclusively attended by children with disabilities, and operated by the [redacted] Intermediate Unit. (NT 503-8 to 16; P-2)
28. The Parents did not accept this offer, and the Student's various placements have included the home, a neighboring school district for autistic support, and the District's [redacted] Elementary School for the 2004-2005 and 2005-2006 school years. (NT 503-8 to 504-1; P-23 p.1.)
29. Because of the Student's seizure disorder, the District hired licensed practical nurses to serve as the Student's 1:1 aide. (NT 302-17 to 304-19.)
30. In 2005, an incident occurred as a result of which the Parents filed a formal administrative complaint alleging that the assigned school nurse had failed to identify the type of seizures the Student was experiencing and had failed to administer an adequate dose of anti-seizure medication as prescribed by the Student's physician. (NT 637-9 to 638-5.)

PROVISION OF MEANINGFUL EDUCATIONAL BENEFIT DURING THE  
2005-2006 SCHOOL YEAR IN THE AUTISM SUPPORT CLASSROOM

31. The Student was placed in an autism support classroom in the District's [redacted] Elementary School. (P-6, S-4.)
32. The Student was 11 years old at the time and the other students ranged in age from 7 to 9. (NT 289-13 to 290-13.)
33. The Student's IEP provided goals and objectives in communication, social skills, following classroom routines, personal skills in eating, hygiene and dressing, reading her name, gross motor and fine motor skills. Program modifications and specially designed instruction included the use of the PECS communication system. (P-7, S-4.)
34. The IEP included training for the Middle School learning support classroom teacher. (P-7.)
35. The IEP provided inclusion in lunch periods, one special class and the last period of the day. (P-7.)
36. The Student participated in a social skills program with typical children called Super Friends. (NT 705-6 to 11.)
37. In the Spring of 2005, after the Parents filed the complaint against the school nurse, the District decided to speak with the Student's physician to clarify their responsibilities in administering medication to the Student for seizure activity. At the Parents' request, written questions were forwarded to the physician and he responded by letter dated July 12, 2007. (NT 661-6 to 663-20; S-57, S-62.)
38. In September 2005, at the District's request, the Parents made arrangements for a telephone conference call with the physician, requesting that the District provide written questions for the physician, which he would



answer during a telephone conference to be scheduled upon receipt of the questions. (NT 1755-10 to 1761-18; S-69.)

39. The telephone conference occurred on September 29. (NT 1755-10 to 1760-25.)
40. From the first day of school in September 2005 to October 6, 2006, the District excluded the Student from school, pending clarification of its nursing care responsibilities by the Student's physician. (NT 674-6 to 677-17, 1760-22 to 25, 849-16 to 854-12; P-6.)
41. The Student could not safely attend school without the availability of nursing services. (P-10, P-33.)
42. During this period, the Mother offered to attend the Student during the full school day for the purpose of administering medication to the Student as needed. (NT 852-9 to 17.)
43. The elementary school administration refused to allow the Mother to attend for more than one hour per day, citing a policy limiting parental visits to the school. (NT 851-17 to 852-22; P-6, P-8.)
44. The policy provided for an exception in unusual cases, and that exception could have been applied to allow the Mother to attend the Student for the full school day, but the school declined to make any further exception for the Student. (NT 754-3 to 755-10, 777-18 to 778-20, 854-3 to 7.)
45. As a result, the Student attended school no more than one hour per day from the first day of school, 2005 to October 6, 2005. (NT 851-17 to 853-1; P-6.)

PROVISION OF MEANINGFUL EDUCATIONAL BENEFIT DURING THE  
2006-2007 SCHOOL YEAR IN THE LEARNING SUPPORT CLASSROOM

46. During the 2006 to 2007 school year, the Student was placed in a learning support classroom in the [redacted] middle school. There were six students in the class, none of whom were identified as autistic. (NT 308-14 to 309-10.)
47. The Student was attended by an educational aide and a Therapeutic Support (TSS) worker. Aides were not professional educators and were chosen for their nursing experience or experience with seizure disorder. (NT 75-11 to 76-6, 88-6 to 90-5, 435-8 to 438-14; P-15 p. 17.)
48. The aides were not adequately trained in educational techniques for autistic children, adapting general education curricula or inclusion. There was considerable turnover in staff and training was not replicated for all new aides. (NT 89-19 to 92-10, 116-2 to 8, 305-17 to 306-1, 318-15 to 324-8.)
49. The aides had substantial responsibility for direct educational activities with the Student when the Student was in the classroom, providing the bulk of educational services received by the Student in school. Many of the strategies used with the Student day to day were at the suggestion of these aides. (NT 76-24 to 86-24, 206-1 to 2, 187-19 to 198-4; P-13.)
50. The teacher worked individually with the Student for part of a 45 minute period, on five days out of a six day cycle. (NT 83-12 to 85-2; P-13.)
51. The Student's IEP for the 2006 to 2007 school year, dated July 19, 2006, established goals for communication, self care skills and social interaction. (P-12.)
52. The Student's July 2006 IEP provided for specially designed instruction including one-on-one instruction, abbreviated learning tasks,

frequent breaks, sensorimotor activities, errorless teaching and prompt fading. (P-12.)

53. The Student's July 2006 IEP provided for inclusion in some regular education special classes. (P-12.)
54. The IEP did not explain why full inclusion was not being offered in the section for educational placement, contrary to Pennsylvania standards for IEPs. (NT 148-3 to 21; P-41 p. 25.)
55. The learning resource teacher was not trained adequately to deliver educational services to a child with autism. The teacher's training was limited to an unstated number of courses several years in the past, experience in a non-integrated setting, and one class concerning inclusion several years in the past. (NT 47-6 to 56-23, 55-4 to 7, 50-7 to 17, 137-19 to 22, NT 983-1 to 987-7; P-15 p. 19 - 24.)
56. The District did not provide sufficient training for staff in the learning support resource room and regular education classes to enable them to implement the inclusion opportunities provided in the Student's IEP. (NT 50-18 to 52-1, 55-8 to 56-4, 152-12 to 153-9, 462-13 to 18, 470-11 to 480-1, 978-3 to 982-13, 989-7 to 991-20, 1222-23 to 1231-20.)
57. While the teacher had had PECS training some years in the past, she did not use the system "formally." (NT 56-5 to 21, 58-12 to 59-16.)
58. The teacher failed to watch a videotape provided to her showing the PECS system being used with the Student. (NT 254-6 to 256-1.)
59. The regular education curricula were not adapted for the Student; the learning support teacher was not qualified to do so. (NT 48-20 to 49-4, 49-15 to 14, 52-19 to 55-3, 138-9 to 140-6, 244-3 to 251-8, 1296-2 to 6; P-45, P-54.)

60. The learning support teacher did not coordinate her program, including use of the PECS system, with the system being used at home by the therapists assigned from [behavioral health provider]. Such coordination is essential. (NT 57-2 to 60-24, 1145-9 to 1146-16; P-15 p. 11, 13, P-45, P-54.)
61. The Student was the first she had ever had to include in a regular education setting. (NT 47-6 to 49-14.)
62. Neither the teacher nor her trainers from the intermediate Unit observed the Student in a regular education setting. (NT 52-2 to 52-18, 99-8 to 25.)
63. The Parents offered to provide training to staff of the learning support classroom on the services that the Student would need to be able to derive meaningful educational benefit in the learning support environment. Training was to be given by experts in inclusion at no cost to the District. (NT 93-22 to 95-12, 722-14 to 723-25; P-15 p. 19.)
64. Initially, these services would have taken approximately one week of staff time for the teacher and the aide in that class. Ongoing training would have been necessary. (NT 1339-23 to 1347-17.)
65. The District failed to provide adequate training services. (NT 133-8 to 134-6, 182-2 to 184-18, 252-7 to 254 -4, 1788-17 to 1789-20; P-15 p. 19, 36.)
66. The Student began to exhibit problematic behaviors, such as self-stimulatory activity, but the classroom teacher did not adopt a behavioral strategy to deal with the behaviors. Instead, the Student was frequently dismissed from the classroom and spent large blocks of time in the school hallways with nothing to do. (NT 69-2 to 71-18, 107-17 to 108-19, 109-16 to 17; P-15 p. 6-8, 15.)

67. At these times the Student was supervised by the educational aide who was not a professional educator; the Student's teacher was not able to supervise the aide when the Student was out of the classroom. (NT 76-7 to 23.)
68. In school, the Student did not have a way of communicating when she needed a break from instruction through the PECS cards, although such a system was utilized at home. (NT 60-19 to 24; P-17.)
69. The Learning Support teacher or other staff assigned to the Student were collecting data on the Student's behaviors and sending it home to the Parents during the 2006-2007 school year. (NT 262-9 to 264-25.)
70. In March 2007, after the Parents complained that the Student was spending excessive amounts of time in the hallways, the learning support teacher restricted communication between the aide and TSS worker and the Parents by discontinuing data reporting. (NT 123-22 to 125-8, 630-3 to 631-3, 886-2 to 893-19; P-15 p. 17-18.)
71. In May 2007, after the Parents complained that the teacher was not responding properly to the Student's self stimulatory behaviors, the Director of Special Education discontinued data gathering regarding these behaviors. (P-15 p. 37.)
72. The Student had a number of falls in which she sustained bruises to her face and body, and the Parents had concerns about the assigned nurse's physical ability to break the Student's fall when she began to have a seizure while walking or standing. (NT 866-5 to 872-2; P-15 p. 14, P-21.)
73. The Parents asked the District to provide a stronger nurse to serve as the one-to-one aide for the Student. (NT 870-3 to 17.)
74. From February 20, 2007 to March 13 2007, the District attempted to find and retain a male

nurse to serve as the one - to - one aide for the Student, but was unable to retain one. The District did not provide a male aid during this period. (NT 678-1 to 680-4, 870-2 to 872; S-67.)

75. The Student did not attend school during this period due to this unavailability of an aide for one to one attendance, needed for safety and educational purposes. (NT 870-2 to 872; S-67.)

76. The District did not offer to provide a substitute or additional staff to protect the Student's safety while a stronger aide was being sought for hiring. (NT 755-11 to 757-18.)

77. Throughout the year, the Student had substantial numbers of absences, was late often, and left early often. Beginning in March 2007, the Student began attending school on a shortened schedule, pursuant to her doctor's order, due to fatigue caused by her seizure disorder. (NT 69-14 to 20, 177-19 to 180-10.)

78. The Student did not make progress or receive meaningful educational benefit during the 2006-2007 school year. (NT 58-5 to 66-20, 95-25 to 96-7, 459-10 to 461-19, 463-19 to 25; P-12, P-15 p. 27, P-19.)

79. The Student's behavior was controlled substantially better in the home setting. (NT 110-22 to 111-20.)

OFFER AND PROVISION OF SERVICES THROUGH THE 2007 IEP FOR THE 2007-2008 SCHOOL YEAR

80. The District reevaluated the Student in December 2006. (S-10.)

81. The District scheduled an IEP meeting for January 2007 to make changes in the Student's placement and services. (NT 135-2 to 5; P- 42.)

82. The IEP meeting originally scheduled for January 2007 was delayed until March 2007 due to

the Parents' unavailability because the Student was hospitalized, as well as the desire of the Parents to have new counsel attend the meeting. (NT 532-1 to 543-24.)

83. The District offered an IEP in May 2007 that called for goals that were similar to those provided in the previous IEPs, except that the placement was to be in an autistic support class in the Center, a school exclusively for special education students. (NT 143-25 to 144-2, 160-1 to 168-1; P-42, 56, S-42, S-66.)
84. The offered placement provided no inclusion opportunity for the Student. (NT 439-20 to 441-14.)
85. The Center serves from 500 to 600 disabled students in a single building, dealing with a variety of disabilities. (NT 442-5 to 15.)
86. The IEP did not address the need for inclusion in the section for educational placement, contrary to Pennsylvania standards for IEPs. (NT 374-1 to 376-5; P-42, S-42, S-66.)
87. The District's Director of Special Education, who proposed the placement at Center, did not observe it with regard to the Student's needs, did not know the teacher's qualifications and did not know anything about its curriculum. (NT 442-22 to 449-7.)
88. The Director did not know how far the Center is from the Parents' home. (NT 446-10 to 14.)
89. The Center has three full time nurses, two of whom are Registered Nurses, although one of the Registered Nurses functions as an LPN. All are experienced in administering medications similar to the medications being administered to the Student for her seizure disorder. (NT 388-1 to 392-5, 449-8 to 9, 1315-15 to 1317-21.)
90. The District, pursuant to the offered IEP, sent applications to several non-District schools for special education students, including the

Center, a special education school operated by the Intermediate Unit, and a neighboring school district. Only the Center accepted the Student. (NT; S-42, S-66.)

91. There are no girls in the proposed class. (NT 1348-5 to 7.)
92. The class serves some non-verbal students and some verbal students. (NT 1348-8 to 23.)
93. The proposed IEP contains no communication goal based upon the PECS system. (NT 744- 746; S-56.)
94. The proposed IEP contains a goal for behavior which is not measurable and is considered a draft in need of base lines. (NT 747-13 too 748-2.)
95. The proposed IEP has a behavior plan that provides for ongoing collaborative planning through four one hour meetings between the IEP team and the home based behavior training team. (NT 410-2 to 411-22; S-59, P-54.)
96. The proposed IEP contains a behavior support plan, but that document is not complete and was not fully agreed upon. It departed in material respect from a behavior support plan provided by the consultant for the District. (NT 402-12 to 428-11; S-59.)
97. The proposed IEP does not provide for a plan to address negatively reinforced behavior. (NT 411-23 to 415-19; S-59.)
98. The proposed IEP does not provide for an adequate method for adapting general education curricula. (NT 430-18 to 432-9; S-59.)
99. The Student is placed presently in a Life Skills Support classroom with a new teacher who has no experience in providing educational services to autistic students. (NT 478-7 to 480-1.)



100. Since the beginning of the 2007-2008 school year, the District has failed to provide an educational aide as required by the Student's pendent IEP on some school days. As a result, the Student has not been able to attend school on those days. (NT 382-11 to 384-25, 1695-7 to 1696-3, 1838-12 to 19, 1845-17 to 1846-19, 1535-23 to 1539-15.)

#### CONTINUUM OF PLACEMENT OPPORTUNITIES AVAILABLE

101. The District provides an autistic support class in its elementary school, but has no such class in its middle or high schools. (NT 283-2 to 20, 341-1 to 344-18.)

102. The District refers children in need of an autistic support class to another school district or to the Center, a separate school exclusively attended by children with disabilities, and operated by the Intermediate Unit. (NT 441-15 to 442-15, 1333-12 to 1334-6; P-2.)

103. The Center is more than thirty minutes driving time from the Parents' home. (NT 1494-2 to 1495-15; P-63.)

104. The District has ten special education classes in [redacted] middle school; six of these are resource level learning support classes, two are part time learning support, one is part time emotional support and one is part time life skills. (NT 282-23 to 283-15.)

105. The high school has specialized teachers, six of whom are identified as resource level learning support staff; two are itinerant learning support teachers. There is a resource level emotional support program and a part time life skills support class. (NT 341-1 to 23.)

106. The high school special education program does not serve any non verbal students or students with autism. (NT 344-7 to 345-15)

107. The Student's pendent placement is the part time life skills class in middle school, but the Student's programming is the same as the programming for the 2006-2007 school year. (NT 330-4 to 331-6.)

#### COMPENSATORY EDUCATION

108. The Student left school at 2:00 P.M. once per week for horse therapy. (NT 635-24 to 636-6; S-34.)

#### DISCUSSION AND CONCLUSIONS OF LAW

The District was and is obligated to provide the Student with a free and appropriate public education ("FAPE"), in accordance with an Individualized Education Plan reasonably calculated to enable the child to receive meaningful educational benefit. Bd. of Educ. v. Rowley, 458 U.S. 176, 206 (1982). "The education provided must be sufficient to confer some educational benefit upon the handicapped child." L. E. v. Ramsey Bd. of Educ., 435 F.3d 384, 390 (3d Cir. 2006). Since the Parents here are challenging the provision of FAPE, they are the moving party and they bear the burden of persuasion in the administrative hearing. Schaffer v. Weast, 546 U.S. 49, 62 (2005).

Compensatory education is an appropriate remedy where a district has failed to provide a student with FAPE under the IDEA. M.C. v. Central Regional School District, 81 F.3d 389 (3<sup>rd</sup> Cir. 1996); Lester H. v. Gilhool, 916 F.2d 865 (3<sup>rd</sup> Cir. 1990), cert. denied, 488 U.S. 923 (1991). Where an IEP confers only trivial or de minimis educational benefit, the student has been denied FAPE and is entitled to compensatory education. M.C., supra. The period of compensatory education is equal to the period of deprivation, and accrues when the District knows, or has reason to know, that the student is not receiving an appropriate education. Ridgewood Board of Education v. N.E., 172 F.3d 238 (3<sup>rd</sup> Cir. 1999).

PROVISION OF MEANINGFUL EDUCATIONAL BENEFIT DURING THE  
2005-2006 SCHOOL YEAR IN THE AUTISM SUPPORT CLASSROOM

The hearing officer finds that the Student was deprived of FAPE during the 2005-2006 school year from the first day of school until October 6, 2005. During that period of time, the District excluded the Student for most of the school day because the required annual update of the Nursing Action Plan was not completed, due to the District's desire to clarify the plan by talking with the Student's physician. (FF 40.)

As the record shows, the Student's need for nursing services was due to her need for medication adjustments, sometimes on an emergent basis, during the school day. (FF 4-10.) The Mother was the primary person making these adjustments - and the only person who could do so reliably at that point in time. (FF 9-14.) Her presence would have obviated the need for school nursing services during the period in which the parties were seeking clarification of the nursing protocols for the Student. The Mother offered to attend her child for this purpose, but the District refused to allow it, based on its parental visiting policy, and refused to allow a temporary exception to the rule. (FF 42,43.)

The District's [witness' position redacted] testified as to the elementary school's policies limiting parental visiting, and his demeanor communicated both hostility and rigidity, an indication of one of the reasons the District allowed the school's policy to take precedence over the disabled child's right to be in school according to her IEP. The hearing officer concludes that the school failed to balance these competing needs appropriately, excluding the Mother and the Student from school while nursing services were being denied by the District. Compensatory education will be awarded for this period of deprivation, less one hour per day during which the Student was allowed to be in school.

The District argues that the hearing officer should deny or limit relief on equitable grounds, asserting that the period of deprivation was extended unduly by the Parents' failure to facilitate a conversation with the Student's physician. However, it is not necessary to parse out the details of the parties' communications in the Spring of 2005, or to determine who was at fault for the

delay. Based on the equitable doctrine of "clean hands", the hearing officer declines to adjust the compensatory education award equitably as the District suggests. One who seeks equity must do equity, and in this case, the District was at least equally at fault because it failed unreasonably to cooperate with the Parents' proposed solution to the situation: the Mother's attendance for the full school day.

However, the award will be reduced in two ways. First, the hearing officer will accord the District one week of time on the equitable principle that compensatory education should be reduced for a reasonable period during which the district should have discovered the denial of FAPE and remedied it. Since the District was excluding the child, it knew of the denial on the first day of school. While there was a policy requiring review of the NAP, this did not require the District to exclude the child, nor did it preclude a temporary arrangement to allow the child to return.

Second, the parties have agreed to compensatory education services for some days during the period in question. (P-8.) The record is unclear as to exactly how many days are covered by the agreement. Therefore, the award will be reduced by the number of days covered by any settlement.

#### PROVISION OF MEANINGFUL EDUCATIONAL BENEFIT DURING THE 2006-2007 SCHOOL YEAR IN THE LEARNING SUPPORT CLASSROOM

The Parents and the District's Director of Special Education agree that the Student did not derive meaningful educational benefit from her placement in the District's middle school learning support class during the entire 2006-2007 school year. (FF 78.) The Parents assert that the District failed to implement the Student's IEP appropriately.

The hearing officer agrees. The Student's program failed because it relied upon unqualified staff and because it was not organized or supported to succeed, even minimally. (FF 46-79.) The Student's program, necessarily, was superimposed upon a learning support class and general education classes. Yet the District did not make sure that direct service staff were adequately

trained, were coordinating adequately with the home program and the general education teachers, or were providing the basic educational services necessary to make inclusion meaningful for the Student.

The Student's learning support classroom teacher revealed inadequate skills for the purpose of the Student's placement in her classroom. Her background included some training and experience implementing the PECS system, but her experience was distant in time. (FF 55-58, 63, 65.) The teacher was quite frank in describing the limits of her expertise and the hearing officer finds her credible. The teacher described minimal training and virtually no experience implementing her training. Her own answers to questions about curriculum modification in general education classes also revealed limited knowledge. (FF 59-62.)

Given her lack of knowledge and experience in educating and including autistic children, the District provided her inadequate training. (FF 65.) This consisted of two to four hours in the middle of the school year, purporting to cover everything from behavioral intervention to curriculum modification to PECS. (FF 56.) This coverage could not have been deep enough in any of these areas to prepare the teacher to implement the program required for this Student.

The teacher testified that she had no other autistic students in her classroom. (FF 46.) The teacher spent only five periods working with the Student in each six day cycle. (FF 50.) During the rest of her schedule, the Student was either supervised by the aide or in general education classrooms without the attendance or supervision of the teacher. (FF 49, 67.) The aides were not experienced or adequately trained in educational techniques. (FF 47-49.) The teacher did not utilize PECS "formally" in the classroom for the Student. (FF 57.)

Although she did consult with other assigned teachers briefly at the beginning of each semester, the teacher never observed the Student in regular education classrooms. (FF 62.) The teacher left it to regular education teachers to adapt the curriculum, and the curriculum was never in fact adapted. (FF 59, 61.) The Director of Special Education did not observe the Student in regular education either. (FF 59, 62.) Thus, the learning support and

general education portions of the Student's education were not adequately coordinated.

Similarly, the record reveals little communication between the school and home programs. (FF 60.) The special education teacher seemed to think that such communication was not her responsibility. The home program providers were limited in the number of hours they could spend with school staff - even though they were willing to provide many services free of charge to the District. (FF 65.) Record keeping systems - used for communication between home and school - were discontinued without discussion. (FF 69-71.) The Student was expected to adapt her own communications to two different communication systems, because the school program did not use the PECS system that prevailed at home. Thus, the two programs, rather complementing each other to reinforce and accelerate the Student's learning, worked in some respects at cross purposes, and ultimately the Student did not learn at school.

When the Student's behavior became problematic after a few weeks in this new but inadequate program, the response of the teacher was to allow the Student to leave the classroom and wander the halls of the school with her aide. (FF 66-68, 71.) At some point, the Student's Mother discovered this, and also discovered that the Student was at risk for injury because the aide attending her was not strong enough to break her fall when, while walking, the Student suffered a tonic seizure and fell to the floor. (FF 72-76.) Thus the Student's hours spent in the halls of the building did not address her behaviors in a meaningful way, provided little educational benefit in and of themselves, and compromised her safety.

In listening to the teacher, the hearing officer noted a demeanor that seemed understated, and at times, the impression left was that the Student was seen as inappropriately placed and therefore an inappropriate assignment. This was in marked contrast to the demeanor of the Student's home training team, who demonstrated commitment, purpose and a sense of efficacy and motivation.

The demeanor of the Director of Special Education was similar to that of her teacher. While at times understandably defensive, and while not all of her explanations of the deficiencies of the 2006-2007 program

were plausible, the Director was ultimately forthcoming about the deficiencies in the programming for the 2006-2007 school year and the failure of the District to provide FAPE. Yet her demeanor and her answers conveyed that she had long since given up any thought of inclusion for this Student, and that the Student should be with the over 500 students with profound functioning deficits at the Center. The Student did not "fit" the services available in the District. However, expecting the student to fit the organization of services is the antithesis of IDEA's legal mandate.

The hearing officer finds that the District did not provide a meaningful opportunity for this Student to benefit from educational services during the entire 2006-2007 school year. Compensatory education will be ordered, for each school day during the 2006-2007 school year on which the school was open, five hours per day. M.C. v. Central Regional School District, 81 F.3d 389 (3<sup>rd</sup> Cir. 1996); see 22 PA Code §11.3 (a).

In a gifted education case, the Commonwealth Court rejected the M.C. standard for compensatory education, holding that the student is entitled to an amount of compensatory education reasonably calculated to bring him to the position that he would have occupied but for the school district's failure to provide a FAPE. B.C. v. Penn Manor School District, 906 A.2d 642 (Pa. Cmwlth. 2006). Regardless of whether or not this gifted case applies in an IDEA setting, the hearing officer will not apply the B.C. standard here. The Student's progress in this case was linear; there is no indication that there was a critical mass of services or crucial basic service that, if provided, would have enabled the Student to derive any exponential benefit. Moreover, it is not possible on this record to determine what position Student would have occupied had she received FAPE when it was due her. Cf. In Re A.Z. and the Warwick School District, Special Education Opinion No. 1783 (2006) (compensatory education awards would be the same whether Appeals Panel used the M.C. analysis or the B.C. analysis). Therefore, the Student will be made whole with an order structured under the traditional test set forth in M.C. However, the total number of hours of compensatory education will be reduced equitably for several reasons.

REDUCTION OF COMPENSATORY EDUCATION AWARD - DISCOVERY AND REMEDIATION

Compensatory education will be reduced by the reasonable time necessary for the District to discover and correct the deficiencies in its program. The hearing officer finds that sixty calendar days from the first day of school would have been sufficient for the District to recognize those deficiencies and correct them.

The District argues that it made a good faith effort to correct any deficiencies by reevaluating the Student in December 2006 and initiating an IEP revision process that took five months to complete. The hearing officer disagrees with this argument. The District exercised almost no oversight of the Student's educational program in the first half of the 2006-2007 year, despite the fact that this was an unusual program for the District, was superimposed on a learning support classroom, required coordination with both general education classrooms and a home program, and involved special educational techniques and technologies for autistic children. Rather than closely supervise and support this program, the District left virtually all day to day decisions to a teacher who was known to be inadequately trained in inclusion and autistic support services. In these circumstances, the hearing officer finds that sixty days is sufficient time within which the District should have discovered the program's inadequacy and corrected it.

The District argues that compensatory education should not be awarded for the period of January 2007 until May 2007 because Parents obstructed the provision of FAPE by insisting on having a new lawyer present at the IEP meeting, and failing to provide information requested by the District, and failing to respond to requests to reschedule. The hearing officer finds that neither of these circumstances merits equitable offsetting of compensatory education. The child's right to compensatory education does not depend on the vigilance of the parents. Once the District was on notice that their program implementation was deficient, it should have acted without delay to bring its services up to a minimum level required for success. The fact that it was required to negotiate with the Parents over the prospective change of placement and details of the program does not diminish its duty to educate the child.



The District seeks to call the Parents' credibility into question by asserting that there are discrepancies between the physician's reported history (derived from the Parents) and the District's attendance logs. The District also argues that the Parents raised the issue of distance as an objection to the District's placement plan for the first time in May 2007, thus implying that their objection was not genuine.

The hearing officer finds the Parents to be credible witnesses. This is based on careful consideration of their demeanor in testifying and of the content of their answers. The Student's Mother testified extensively, and her answers revealed a reasonable degree of balance. She answered in a matter of fact way, without any evidence of trying to "sell" her position through exaggeration or embellishment. She frequently conceded points that were obviously not in her favor. She was able to make eye contact in a natural way with the hearing officer as well as with others in the room. She was careful to limit her answers to matters she knew, and frequently volunteered the limits of her recollection. On cross examination, her demeanor remained much the same, and she only rarely lapsed into arguing with the examiner. The Father similarly exhibited a truthful demeanor. This view of the Parents' credibility is corroborated by evaluation reports showing that the Parents' observations of the Student at home were congruent with school observations.

The issue of proximity arose only in response to the District's changing of the recommended placement, which happened in the course of the meetings for the new IEP. There is no doubt that it was a legitimate safety concern. This does not call the Parents' credibility into question.

#### REDUCTION OF COMPENSATORY EDUCATION AWARD - ABSENCE

Compensatory education will be reduced also by the number of hours in which the Student was not physically present in school. These were numerous. (FF 77.) The Student was frequently late, and often left early. There were many absences. Many of these absences were due to the Student's seizure disorder, fatigue, or to other therapeutic modalities she was provided, including "horse therapy." Regardless of the cause, the District will not

be required to make up for these absences, which were not due to deficiencies in their educational services.

The Parents argue that the District was obligated to provide alternate times of education for the Student, to make up for the time she has missed due to her seizures and the times in which she has been physically unavailable for education. They claim this as a matter of accommodation for the Student's seizure disorder itself. They rely upon Marple Newtown School District v. Raphael N., Slip Op., C.A. No. 07-0558, 2007-0563 (E.D. Pa. 2007, 8/23/07), in which the District Court held that a school district was obligated to provide additional hours of instruction to a student whose seizure disorder rendered him unavailable for education during the school day, and ordered compensatory education as a result.

Thus, the Parents, in addition to the issues presented regarding specific defaults of the District regarding provision of nursing and attendance services, and inadequacies of the 2006-2007 implementation of the IEP, are also requesting compensatory education for times when the Student was out of school due solely to her seizure disorder. This request was raised for the first time in the Parents' closing statement and therefore is outside the scope of this hearing. This request was not raised in the Parents' pro se Complaint Notice, and this request was not raised in the Parents' opening statement. Nor was it identified in the issues to be decided. There was no response from the District. Therefore, the hearing officer will not reach this issue.

#### REDUCTION OF COMPENSATORY EDUCATION AWARD - FAILURE TO PROVIDE AN EDUCATIONAL AIDE

The Parents also argue that the District failed to provide a FAPE when it failed to provide sufficient attendant services to adjust for the physical inability of the assigned aide to keep the Student from falling and sustaining bruises due to her seizures. (FF 74-77.) The District responds that it is entitled to a reasonable period of time within which to rectify the problem after it is identified.

This claim overlaps with the denial of FAPE claim, since both denials of service occurred during the 2006-2007

school year. Duplicative compensatory education cannot be awarded for this period of overlap. However, the equitable offset for absences will be modified to account for a defined period during which there was not an educational aide, and should have been - from February 20, 2007 to March 13, 2007. Compensatory education hours will not be reduced during this period for days on which the Student was absent.

This defined period allows one week for discovery and correction of the deficiency. The hearing officer finds that neither the Parents nor the District had expressed dissatisfaction with the assigned aide's ability to keep the Student safe until the Parents discovered her physical inability to break the student's falls. (FF 72,73.) Thus, the District was not at fault in being caught unawares on this issue; the Parents were similarly surprised.

The hearing officer finds that one week is an adequate time within which the District should have remedied this safety - related absence of services. The District could have assigned an extra staff person to attend the Student on an interim basis, or provided additional services at home while the Student was out of school.

#### OFFER AND PROVISION OF SERVICES THROUGH THE 2007 IEP FOR THE 2007-2008 SCHOOL YEAR

The Parents have challenged the placement as failing to provide the IDEA mandated least restrictive environment. They also challenge various aspects of the proposed IEP, as revised in July 2007.

#### OFFER OF SERVICES - PLACEMENT

The IDEA requires the states to educate children with disabilities "with children who are not disabled" and this must be done "to the maximum extent appropriate ... ." 20 U.S.C. §1412(a)(5)(A). The intent of Congress was to "ensure, to the maximum extent possible, that children with disabilities are educated with children who are not disabled." Jonathan G. v. Lower Merion School District, 955 Fed. Supp. 413 (E.D. Pa. 1997). Each disabled child must be placed in the least restrictive environment that will provide him or her with meaningful educational

benefit. T.R. v. Kingwood Twp. Board of Education, 205 F.3d 572 (3d Cir. 2000)

Districts must not "remov[e]" children to "special classes [or] separate schooling" unless:

the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

Ibid. A district's failure to provide special education classes in district schools, thus necessitating placements in segregated facilities, violates the IDEA. Hendricks v. Gilhool, 709 F. Supp 1362, 1371-72 (M.D. Pa. 1989).

The statute makes clear that these requirements must be carried out in light of the unique needs of each child. Id. at §1412(a)(5)(B); 34 C.F.R. 300.114(b)(1)(ii). The regulations reiterate these requirements. 34 C.F.R. §300.114(a). See generally, Basic Education Circular, Least Restrictive Environment (LRE) and Placement of Students with Individualized Education Programs (IEPs), October 1, 2006.

The IDEA requires each educational agency to maintain a "continuum of alternative placements" in order to "meet the needs of children with disabilities ... ." 34 C.F.R. §300.115(a). Thus it is not sufficient for a school district to provide "an all or nothing educational system in which handicapped children attend either regular or special education." Oberti, 995 F.2d at 1218. Rather, each public agency must provide supplementary aids and services to the extent necessary to permit inclusive education if that can be achieved satisfactorily. 34 C.F.R. §300.114(a)(2)(ii). The continuum must be such that the student is included in regular programming "to the maximum extent appropriate." Oberti, 995 F.2d at 1218; In re Educational Assignment of A.M., Spec. Educ. Op. 1248 at 3 (May 24, 2002). The local school district bears primary responsibility for providing classes for its exceptional children. Basic Education Circular, Placement Options for Special Education, July 1, 2001.

Districts must include disabled students in regular education classrooms even if the curriculum must be modified to permit such placement. 34 C.F.R. §300.116(e).

The IDEA recognizes that a child with a disability may benefit differently from the general educational setting than non-disabled children. Oberti v. Board of Educ. of Borough of Clementon Sch. Dist., 995 F.2d 1204, 1217 (3d Cir. 1993) Even if the child receives less academic benefit in an inclusive setting, such setting may be warranted if the benefit of social modeling, language development and social skills development outweighs the potential academic benefit of a segregated setting. Ibid; Girty v. School District of Valley Grove, 163 F. Supp. 2d 527 at 536 (W.D. Pa. 2001), aff'd 60 Fed. Appx 889 (3<sup>rd</sup> Cir 2002). The relevant focus is whether a student can progress on his or her IEP goals in a regular education classroom with supplementary aids and services, not whether he or she can progress at a level near to that of his or her non-disabled peers. Ibid. Thus, the gap between a student's abilities and the demands of the general curriculum is not determinative. Ibid.

Similarly, school districts must enable children with disabilities to participate in extracurricular and nonacademic activities, with supplementary aids and services "to the maximum extent appropriate to the needs of the child." 34 C.F.R. §300.117. Children with disabilities must be given an equal opportunity to participate in extracurricular and nonacademic school activities, including counseling, athletics, health services, recreational activities, special interest groups, clubs and employment opportunities. 34 C.F.R. §300.107(b). Districts must train their teachers to implement inclusion. 34 C.F.R. §300.119.

Nevertheless, there is substantial authority that a district is not required to dispense with or modify its curriculum beyond recognition in order to include a disabled child. Brillon v. Klein Indep. S.D., 2004 U.S. App. LEXIS 11235 (June 8, 2004). This is based on the premise that such a degree of change to the curriculum would constitute an undue burden and is not required by the IDEA. Ibid. See also, In re Educational Assignment of G., Spec. Educ. Op. 1756 at note 94 (August 10, 2006).

To determine whether or not a district has complied with the inclusion mandate in the IDEA, the Court in Oberti v. Board of Educ. of Borough of Clementon Sch. Dist., 995 F.2d 1204, 1215 (3d Cir. 1993), set forth a two step analysis. First, a court must determine whether or not

education in the regular classroom "can be achieved satisfactorily." Ibid. Second, if separate education is deemed necessary, the court should determine whether or not the educational agency has "made efforts to include the child in school programs with nondisabled children whenever possible." Ibid.

It is undisputed, (NT 18-13 to 22, 1871-10 to 1874-19), and the record in this matter is more than preponderant that the Student cannot derive meaningful educational benefit from full time inclusion in a regular education setting. There is no real issue that the Student would not derive meaningful benefit in the regular classroom on a full time basis, due to the profound nature of her cognitive deficits, the need for almost exclusively one on one instruction and interaction, and her markedly slow rate of acquisition. (FF 1-3.) Therefore, it is not necessary to analyze the District's obligations to the Student under the first step of the Oberti analysis. Rather, the hearing officer turns to the second step of the analysis.

The second step of the Oberti analysis calls for an assessment of the district's provision of a continuum of alternative placements. Id. at 1218. This must include "intermediate steps" including "placing the child in regular education for some academic classes and in special education for others, mainstreaming the child for nonacademic classes only, or providing interaction with nonhandicapped children during lunch and recess." Ibid; see. e.g., In re Educational Assignment of G., Spec. Educ. Op. 1756 at note 98 (August 10, 2006). A district's service system is inconsistent with the IDEA "if disabled youngsters are shunted off to separate facilities, or unnecessarily segregated in isolated classrooms in regular schools, solely because the local school districts refuse to provide adequate classroom space ... ." Hendricks, 709 F. Supp at 1371.

If a district has given no serious consideration to intermediate steps, "it has most likely violated the Act's mainstreaming directive." Ibid; Blount v. Lancaster-Lebanon Intermediate Unit, 2003 U.S. Dist. LEXIS 21639 (November 25, 2003)(a school must not ignore the possibility of mainstreaming, regardless of the severity of the child's disabilities, including the use of

supplementary aids or services and intermediate steps to maximize appropriate inclusion).

In the present matter, the District has failed to give "serious consideration" to the IDEA's preference for inclusive special education at the high school level. The District has provided no alternative to educate the Student inclusively. (FF 101-107.) The only options provided are the completely segregated school for children with disabilities operated by the Intermediate Unit and transfer to another district or a private facility. Yet the record reveals little serious effort to obtain an inclusive placement outside the District, and no such placement became available. (FF 83.)

As discussed above, in the 2006-2007 school year, the District placed the Student in a learning support classroom with inclusion in some general education classes. (FF 46, 53.) However, it did not provide the skills and programmatic supports necessary to make such a placement work. The Student's failure to learn in that setting became a self - fulfilling prophecy. The hearing officer finds that this effort did not accord with the "serious effort" that Oberti requires. In the absence of a genuine effort to teach the student inclusively, the hearing officer finds that the assignment of the Student to a segregated school for disabled children is contrary to the IDEA. Compare, In re Educational Assignment of A. G., Spec. Educ. Op. 1455 at note 98 (February 23, 2004)(ordering amended IEP to include the student in lunch, recess, PE, and homeroom but also music, art, and at least one academic class with appropriate supplementary aids and services.)

The District argues that, no matter what the Student's individual needs for inclusive education, it has no obligation to provide a class for one student. It relies upon M.A. v. Voorhees Township B. of E., 202 F.Supp.2d 345 (D.N.J. 2002), in which the District Judge held that there was no obligation to create a class for the student staffed only for him, id. at 364.

M.A. is distinguishable. There, the record showed that the district had made extensive efforts to provide inclusion in the regular classroom, as well as providing a separate class just for the student, and had shown that the student was not able to derive meaningful benefit in that

setting. Id. at 364-65. As an alternative, the district had offered instruction in a special school for autistic students with opportunities for inclusion in regular education settings at his home school, including lunch, assemblies, and even two special classes, including art. Ibid. In the present matter, neither of these options has been offered in a manner calculated to provide meaningful educational benefit.

In M.A., the first Oberti factor - district effort - showed that a less restrictive setting would not provide meaningful benefit; in the present matter, the record does not support such a conclusion, because of the deficiencies of the District's 2006-2007 program. See also, Brillon v. Klein Indep. S.D., 2004 U.S. App. LEXIS 11235 (June 8, 2004)(record showed lack of meaningful educational benefit from full mainstreaming and district offered intermediate level of mainstreaming as an alternative); Cheltenham School District v. Joel P., 949 F. Supp. 346 (E.D. Pa. 1996)(out of district placement would have provided adequate mainstreaming opportunities, equivalent or better than those available in home school district). Moreover, the Parents' expert witnesses, whom the hearing officer finds credible and reliable, testified that the Student could derive meaningful educational benefit in a carefully selected part-time general education setting. (FF 20; NT 1094-13 to 1100-22, 1290-15 to 1293-24.)

Moreover, in this matter, the hearing officer is not convinced as a matter of fact that it would be unreasonably burdensome to require the District to provide the necessary expertise and techniques in its life skills support classroom, either in the middle school or the high school. The District has modified its learning support class already. The witnesses testified that the nature and purpose of that classroom changed from learning support to life skills support. The student population is small. The curriculum has the same purpose as a curriculum for the Student would have - teaching functional skills for survival and independence.

The above authorities also address the District's other legal argument, that there is no authority for requiring a district to modify a special education classroom to accommodate a student whose exceptionalities differ from those for whom the classroom is specially designed. In the above cases, the school districts



attempted to provide the full continuum of settings for inclusion purposes, and the student failed to benefit from partially included services. In the present matter, the attempt was so deficient as to distinguish this matter from the District's cited authorities.

#### OFFER OF SERVICES - PROXIMITY TO HOME

Each public agency must ensure that a child's placement "is as close as possible to the child's home." 34 C.F.R. §300.116(b)(3), (c); Hendricks, 709 F. Supp. at 1370. Moreover, a child with a disability must be "educated in the school that he or she would attend if nondisabled." 34 C.F.R. §300.116(c). However, there is not an absolute right to placement in the closest proximity to home. Hendricks, 709 F. Supp. at 1370; In re Educational Assignment of A. G., Spec. Educ. Op. 1455 at 7 - 8 (February 23, 2004). The agency must consider any harmful effects of such a setting, 34 C.F.R. §300.116(d).

In the matter at hand, the hearing officer finds that the Student's safety requires a placement closer to the Parents' home than the settings offered. This is because of the unique nature of the Student's seizure disorder, and the overriding need to make sure that medication can be administered safely and effectively at any time during the school day. (FF 4-15.)

The Student's physician, a specialist in managing seizure disorders in children, testified credibly that the Student's disorder was one of the most difficult he was treating. It causes frequent unpredictable episodes and can rapidly devolve into status epilepticus, which can be life threatening.

The physician testified that he had devised and ordered the complex medication regime that the Parents administer to the Student, and that the Parents are uniquely qualified to administer it. (FF 9-13.) They are called upon to assess seizure activity when it recurs in a day, and they make a judgment as to the amount of medication to administer, above and beyond the daily dose, as well as switching to emergency medication when needed.

No doubt, it is part of a school nurse's profession to administer medication, but that training cannot replace the Parents' knowledge of their child. (FF 12-14.) It is

clear that at some point in the perhaps near future, the Parents will have to trust a medical professional or lay person to make the judgments needed, but the hearing officer deems it imprudent to delegate that responsibility abruptly to a school nurse with a potential caseload of 500 disabled students, and with whom the Parents are not familiar.

In sum, at the present time, it is not possible to accommodate or meet the Student's needs safely or effectively without providing for the participation of the Parents in the Student's medication management for the near future. The Center's location is too far from the Parents' home to allow them to provide effective medication management at the present time. (FF 15, 88, 103.) Thus, the District's offer of the Center placement fails to provide an offer reasonably calculated to provide meaningful educational benefit, because it does not address the overarching and unique need of the Student for individualized medication management.

#### OFFER OF SERVICES - IEP

The Parents challenged the particulars of the IEP offered to them for the 2007-2008 school year, in the areas of present levels of performance, behavior plan, social skills training, specially designed instruction, record keeping and reporting and supports for school personnel. The hearing officer finds that some of these challenges revealed deficits that would render the IEP not reasonably calculated to provide meaningful educational benefit; some the hearing officer will leave to the IEP team meeting that is ordered below.

The District sought and received a draft Behavior Support Plan from a consultant who was also intimately involved in the Student's home program. (FF-94, 96.) However, in offering a behavior support plan to the Parents as an addendum to the draft IEP for 2007-2008, the District made substantive changes to the consultant's draft. (FF-94, 96, 97.) In particular, it does not address negatively reinforced behavior. (FF-97.) The Director of Special Education could not explain why this paragraph had been removed. The draft IEP's behavior goals are not measurable and are not complete, due to the District's desire to collect its own data for baseline. Because the hearing officer finds that the need for consistency in behavioral

management is essential to the provision of FAPE, the team will be directed to revisit this issue.

The Parents requested that the IEP contain a communication goal based upon the PECS system. (NT 744-746.) The offered IEP did not formulate its communication goal to provide further communication services through the PECS system. (FF-93.) While the District must be given deference in the selection of educational programming, program effectiveness depends in large part upon coordination with the home program that the Student has received for several years. Therefore the hearing officer will direct the IEP team to consider the IEP's communication goal in light of its relationship to and impact upon the Student's home program.

The proposed IEP did not provide for an adequate method for adapting general education curricula. (FF-98.) This was one of the principal deficiencies in the 2006-2007 program that has been found to have denied FAPE. The IEP team will be directed to address this issue.

The Plan provided by the consultant called for additional coordination and collaboration between the IEP team and the home services team. The proposed IEP called for four one-hour meetings throughout the year, a system that had been shown to be inadequate in the 2006-2007 school year (although the amount of scheduled time increased from ½ hour to 1 hour). (FF 95.) The hearing officer finds that it is essential to address coordination issues in the IEP, but the means selected for this coordination is within the IEP team's discretion. The IEP team will be directed to address this issue.

The consultant's Plan called for generalization of functional activities to other physical settings in the school building. This was not incorporated into the functional activities goal of the IEP. Again, this issue is within the IEP team's discretion and the hearing officer will not address it further.

The Parents requested that the IEP provide present levels of performance that would track the goals of the IEP, and that it provide extensive details of data collection systems based upon the home program. They also criticized the IEP regarding the specially designed instruction and supports for teachers. Aside from the

orders discussed above, the hearing officer finds that the District has addressed these issues within its discretion, and that further orders would amount to inappropriate micromanagement of the IEP team.

PROVISION OF SERVICES THROUGH THE 2007 IEP FOR THE 2007-2008 SCHOOL YEAR

During the hearing, the Parents raised the issue of compensatory education for the District's failure to provide an aide on certain days during the 2007-2008 school year. The District objected that the issue had not been raised in the pleadings as required by the 2006 IDEIA revisions of the IDEA. Yet, the Parents had raised the issue on the record at the outset of this hearing and the District did not object to its being considered. (NT 382-6 to 384-6.) The District appeared to stipulate that this issue would be encompassed here, without conceding the issue on the merits. Ibid. Both parties presented evidence on the issue. (FF 100.) Thus, the hearing officer finds, based upon his observation of these exchanges and the overall "feel of the case", that the District acquiesced in this issue being heard. Because the hearing officer finds that failure to provide a needed educational aide for this Student is a denial of FAPE, an order will be entered requiring compensatory education for the days the Student has missed during the present school year due to that failure.

## CONCLUSION

The parties will have to find a way to work collaboratively for the benefit of the Student. This may require relaxation of some prevailing approaches that the hearings revealed. The Parents may need to give greater recognition to the expertise of District personnel in the field of education and rely upon their educational judgment to a much greater extent, especially in the details of implementation. The District will need to embrace the principles of inclusion, and may need to relax the sense that communication with the Student's home professional team must be restricted for the sake of time management. The hearing officer hopes that the parties will be successful in formulating a new IEP as soon as possible so that the Student can receive a meaningful education from the District.

## ORDER

1. The District shall provide compensatory education for all school days from the first day of school in the 2005-2006 school year until October 6, 2005, minus five school days. The number of hours awarded shall be calculated on the basis of five hours for each school day, minus one hour for the daily attendance already permitted by the District. This award shall be reduced according to any pre-existing agreements between the parties regarding compensatory education for this period, including any settlement agreements.
2. The District shall provide compensatory education for all school days in the 2006-2007 school year on which the middle school was open in whole or in part, minus sixty days. The number of hours awarded shall be calculated on the basis of five hours for each school day. Except for the period from February 20, 2007 to March 13, 2007, this award shall be reduced for any days or hours in which the Student was not physically present in the school, including days on which she was absent for any reason, hours late for school, and hours on which the Student left the school early for any reason.

3. The District shall provide compensatory education for all school days in the 2007-2008 school year, from the first day of school until the date of this Order, on which: 1) the middle school was open; 2) the Student was absent for the full school day; and 3) an educational aide capable of keeping the Student safe was not available. The number of hours awarded shall be calculated on the basis of five hours for each school day.
4. The compensatory education ordered above shall not be used in place of services that are offered in the current IEP or any future IEP. The form of the services shall be decided by the Parent, and may include any appropriate developmental, remedial, or enriching instruction that furthers the goals of the student's current or future IEP. The services may be used after school, on weekends, or during the summer, and may be used after the Student reaches 21 years of age. The services may be used hourly or in blocks of hours. The hourly cost to the District shall not exceed the reasonable and customary average cost of one hour's salary for a special education teacher hired by the District. The District has the right to challenge the reasonableness of the hourly cost of the services.
5. The District will convene an IEP team meeting within 15 days to plan an educational program and IEP for the Student that is located in a regular education school building, operated either by the District or by a neighboring school district, or in the home setting with inclusion opportunities at an age - appropriate regular education school operated by the District. Such setting for the 2007-2008 school year shall not be farther away from the Parents' home than thirty minutes' driving time under normal conditions of traffic.
6. The IEP shall provide accessible autism support and life skills support as needed, and inclusion opportunities in appropriate general education classes with appropriately modified curriculum in those classes, and appropriately trained staff in attendance on a 1:1 basis.

7. The IEP shall include an appropriate behavior support plan and measurable behavior goals.
8. The IEP shall address communication training for the Student, and shall contain a communication goal that is appropriately coordinated with the Student's home communications training program based upon the PECS system.
9. The IEP shall address appropriate modification of general education curricula.
10. The IEP will provide coordination and continuity between the Student's home based program and the school based program.

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

November 25, 2007