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HEARING OFFICER DECISION/ORDER

CHILD'S NAME: D. H.

KISKI AREA SCHOOL DISTRICT (FILE 5701/05-06 LS)

Date of Birth: xx/xx/xx

Type of Hearing: CLOSED

Dates of Hearing: August 24, 2005; September 2, 2005; September 14, 2005; September 21, 2005;
October 5, 2005; October 7, 2005

I. PARTIES TO THE HEARING

PARENTS:

DATE TRANSCRIPT RECEIVED:

October 13, 2005

PARENT REPRESENTATIVE:

PAMELA BERGER, ESQUIRE
312 BLVD. OF THE ALLIES
SUITE 600
PITTSBURGH, PA 15222

HEARING OFFICER:

Dorothy J. O'Shea, Ph.D.

Signature: **Hearing Officer**

DISTRICT CONTACT:

KISKI AREA SCHOOL DISTRICT
200 POPLAR STREET
VANDERGRIFT PA 15690-1466

October 18, 2005

Date of Decision/Order

DISTRICT REPRESENTATIVE:

CHRISTINA LANE, ESQUIRE
ANDREWS & PRICE
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Student
KISKI AREA SCHOOL DISTRICT (FILE 5701/05-06 LS)

II. BACKGROUND INFORMATION

Student, a resident of the Kiski Area School District (i.e., the District), was born xx/xx/xx. Student, a fifth grader during the 2005-2006 school year, is an eligible student under 22 Pennsylvania Code at Chapter 14. On November 30, 2004, the District added an Addendum to Student's evaluation report finding that Student's eligibility falls under the "Other Health Impairment" (OHI) category on the basis of Student's Attention Deficit Hyperactivity Disorder (ADHD) and a Motor Tic Disorder, associated with a Tourette's Syndrome diagnosis. Student's Parent requested due process by letter dated July 20, 2005 (Hearing Officer Exhibit 2: HO 2; School District 8: SD 8).

III. FINDINGS OF FACT

- 1) Student, a resident of the District, was born xx/xx/xx(SD 14).
- 2) On September 13, 2000, Student initially received a referral to the District's Instructional Support Team (IST) "due to not following rules, shouting, talking out, getting out of Student's seat, distracting others, an inability to sit still, and violating other students' personal boundaries" (SD 14.2).
- 3) Student received IST interventions in kindergarten and Student's first and second grade years. Additionally, Student received summer school for reading in first grade (SD 15.2).
- 4) By Fall 2001, the District was aware of Student's medical history including Student's consistent history of hyperactivity, significant impulsivity, and inattention (SD 15.3).
- 5) On October 3, 2001, the District provided Student's initial Evaluation Report (ER) (SD 14).
- 6) On October 3, 2001, Student's teachers reported significant amounts of oppositional and hyperactive tendencies within the regular education milieu (SD 14.5-14.6).
- 7) Student's October 3, 2001 ER concluded, "No disability, does not need specially designed instruction" (SD 14.7).
- 8) During January 2001, Student's behavior deteriorated "dramatically" (SD 14.2).
- 9) Student's October 3, 2001 ER noted Student's "high rates of interruptive behaviors within the regular education environment" (SD 14.7).
- 10) On April 24, 2002, during an educational team meeting, the District noted it was aware that Student began to experience verbal and motor tics (SD 15.3).
- 11) On January 27, 2003 Student received another ER. Student's performance to date for the 2002-2003 school year indicated Student's failing grades in reading and a below average grade in math (SD 15.2; Parent's Exhibit 11; P11).
- 12) Student did not receive additional testing of Student's cognitive ability and achievement functioning for Student's January 27, 2003 ER. However, Student' ER concluded Student did not meet "criteria as a child in need of specially designed instruction" (SD 15.5-15.6).
- 13) On April 11, 2003, the District offered Student an "Educational Action Plan" to address seating arrangements, chunking needs, and incentives (SD 9).
- 14) On May 14, 2003, Student received a DSM IV diagnosis of "ADHD Combined Type, Tic Disorder." Common symptoms associated with Tourette Syndrome accompanied his report (P10).

- 15) On May 19, 2003, Student received an evaluation from Children's Hospital of Pittsburgh, reporting on Student's "tics" that were increasing in severity. The report identified Student's learning difficulties and recognized the large discrepancy between Student's performance IQ and verbal IQ. The report recognized Student's poor performance in school, inattention, and hyperactive impulsive ADHD (P10, SD 21).
- 16) On May 28, 2003, Student received a Section 504 Service plan (P12, SD 10).
- 17) On September 23, 2003, Student received another ER, noting Student's diagnosis of ADHD, academic difficulties, and Section 504 Service Agreement. His reason for referral was "for specially designed instruction and eligibility status for special education (speech/language) programming" (P13).
- 18) On Student's September 23, 2003 ER, Student received testing only in the area of articulation (P13.1-P13.2).
- 19) Student's September 25, 2003 ER found that Student required specially designed instruction under the disability category "Speech/Language Impaired" (P13.2).
- 20) On December 8, 2003 Student received "D" and "E" grades in reading, science, health, language, and math (P15, P17).
- 21) On December 11, 2003, Student's Parent provided permission to evaluate Student again (P1).
- 22) On January 24, 2004, Student received many "below basic" reading skills notations on a reading checklist (P9).
- 23) On February 2, 2004, Student's Parent provided further permission for Student's testing due to continuing difficulties within the academic milieu (P18).
- 24) On February 12, 2004, Student's Parent completed a Parent Questionnaire, noting her concerns with Student's skills in math, reading, self-esteem, and attention (P18).
- 25) On April 28, 2004, the District informed the Parent of Student's "D" grades in reading and language (P19).
- 26) On May 10, 2004, Student received another ER that stated, "Student is not a child with a disability, or is a child with a disability but does not need specially designed instruction" (SD 16.14).
- 27) On June 2, 2004, Student's IEP team reconvened to update Student's IEP (SD 11).
- 28) On June 7, 2004, Student's mother did not approve Student's IEP for speech only (P14).
- 29) In September 2004, Student's District Reading Specialist found that Student did not perform well on Student's metacognitive reading strategies assessment. Student was found to "not apply the learned reading strategies when working independently." Student was found to read only at 65 words per minute. The District Reading Specialist noted a concern because the rate of Student's reading would inhibit reading comprehension. Student displayed weaknesses in writing (P6, SD 20.4; NT 377, 433-434, 436-444).
- 30) On September 8, 2004, Student's IEP team convened to update Student's IEP (SD 12).
- 31) On November 30, 2004, the District added an Addendum to Student's ER (SD 16, November 30, 2004 Addendum, page 1).
- 32) On December 2, 2004, Student's IEP team reconvened to offer Student an IEP (SD 6).
- 33) On December 2, 2004, the District offered a Notice of Recommended Educational Placement (NOREP) proposing that Student begin to receive emotional support services. The NOREP did not name evaluation procedure(s), test(s), record(s) or

report(s) used as a basis for the proposed action or action refused. The NOREP did not name factors relevant to the proposal or refusal (SD 17).

- 34) On December 2, 2004, the District proposed to change Student's educational placement to a more restrictive setting (SD 17).
- 35) On February 8, 2005, the parties entered into an agreement to conduct an independent neuropsychological evaluation at the District's expense (SD 10).
- 36) On February 18, 2005, Student received Student's Intermediate Unit Behavioral Report containing Student's initial Functional Behavioral Assessment (FBA) (SD 5).
- 37) On March 9, 2005, Dr. S., a Developmental Neuropsychologist, provided Student's independent neuropsychological evaluation at the *Western Psychiatric Institute and University of Pittsburgh's Medical Center* (SD 2).
- 38) On March 25, 2005 the Pennsylvania Department of Education issued a CR based on the Parent's complaint (P23).
- 39) On May 16, 2005, Student received an ER containing Dr. S.'s March 9, 2005 Independent Educational Evaluation (IEE) as part of a due process agreement. Student's May 16, 2005 ER recommended that Student is a child with an "Other Health Impairment...Student continues to demonstrate a need for Speech and Language support" (SD 3.14).
- 40) On May 20, 2005 the District faxed parts of Student's ER to Dr. S. (SD 4).
- 41) On June 13, 2005, Student's IEP team reconvened to update Student's IEP at the [Redacted] Elementary School. Student's Parent was not in attendance at this IEP meeting (SD 7).
- 42) Student received the *IOWA Test of Basic Skills* and other group tests (SD 13).
- 43) Student received District reading fluency and other achievement measures (SD 19, P3, P4, P20).
- 44) Student's Parent provided samples of Student's work (P2, P21, P22).
- 45) On July 20, 2005, Student's Parent filed for due process (Hearing Officer Exhibit 2, SD 8).
- 46) On July 25, 2005 the Office for Dispute Resolution assigned the Hearing Officer (HO1).

- 47) On August 1, 2005, the District planned a Resolution Meeting with the Parent (HO 30).
- 48) On August 10, 2005, the Hearing Officer granted a continuance to August 24, 2005 at the Parent's request (HO 10).
- 49) On August 17, 2005, the District summarized the Resolution Meeting that did not result in an agreement between the parties (HO 4).
- 50) On September 2, 2005, the Hearing Officer granted continuances to September 14, 2005 and September 21, 2005 at the parties' request (HO 5).
- 51) On September 26, 2005, the Hearing Officer issued subpoenas at the Parent's request directing the appearance and testimony of the Parent's advocates during Student's due process hearing (HO 6).
- 52) On September 21, 2005, the Hearing Officer granted a continuance to October 5, 2005 at the parties' request (HO 7).

IV. ISSUES

The parties agreed to the hearing issues on the record (NT 19-20). The agreed upon hearing issues were based on the following questions:

- Did the District fulfill its "*Child Find*" obligations as required by the *Individuals With Disabilities Education Act*?
- Are Student's IEPs appropriate?
- Did the District provide sufficient notice to the Parent of an IEP meeting scheduled for June 13, 2005?
- Should Student have been provided with ESY during the Summer 2005?
- Was Student offered a Free Appropriate Public Education in his least restrictive environment as of the 2003-2004 school year?
- Is Student entitled to compensatory education as of the first day of the 2003-2004 school year?

V. DISCUSSION AND CONCLUSIONS OF LAW

Did The District Fulfill Its "Child Find" Obligations As Required By the IDEA?

The District has an affirmative obligation to locate, identify, and evaluate all children thought to be disabled who reside in the District. 22 Pa Code. 14. 121 (a). *Justin G.*, Opinion No. 1292 (SEA PA 2002). Child Find provisions under the IDEA and 22 Pennsylvania Code Chapter 14 require that the state must assure:

"... All children with disabilities residing in the state, including children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services." 20 U.S.C. 1412(a)(3). See also 34 CFR § 300.125. 22 Pennsylvania Code §14.121 (b), (c).

In Student's special education due process hearing, a review of the record reveals that the District did not meet its Child Find obligations, pursuant to 20 U.S.C. 1412(a) (3); 34 CFR § 300.125; and 22 Pennsylvania Code §14.121 (b), (c). The following points are noteworthy to Student's case:

Student's Problem Behaviors and Effects on School Progress: Student is a fifth grade student in the District during the 2005-2006 school year. However, Student received a referral to the Instructional Support Team (IS 1) as early as kindergarten. Student had difficulties with organization and behavior throughout his elementary years. The District was aware of Student's problem behaviors (SD 14.2) and need for IST services as early as kindergarten, as well as Student's need for summer school for reading in first grade (SD 15.2). However, the District did not act on the knowledge that Student required help and that Student's behavior had an impact on Student's academic skills. By the Fall 2001, the District was aware of Student's behavioral history including Student's consistent history of hyperactivity, significant impulsivity, and inattention. It was noted that such symptoms were observed in both home and school environments, and were reportedly interfering with Student's adjustment to first grade. At this time, Student received a medical diagnosis of Attention Deficit Hyperactivity Disorder-Combined Type (SD 15.3). Importantly, Student's behaviors affected Student's school progress, in as much as in the Fall 2001, Student's teachers reported significant amounts of oppositional and hyperactive tendencies within the regular education milieu (SD 14.5-14.6). However, Student's October 3, 2001 ER concluded, "No disability; does not need specially designed instruction" (SD 14.7).

During January 2001, the District's own ER reported that Student's behavior deteriorated "dramatically." Student displayed impulsive behaviors, such as "talking out, running sliding on

his knees, and touching other children" (SD 14.2). Student's performance during the 2002-2003 school year indicated that Student was receiving failing grades in reading and a below average grade in math (SD 15.2). Student did not receive additional testing of Student's cognitive ability and achievement functioning for Student's January 27, 2003 ER. However, Student's ER concluded Student did not meet "criteria as a child in need of specially designed instruction" (SD 15.5-15.6). Despite Student's diagnosis of ADHD and observations by Student's teachers that Student displayed multiple problem behaviors, required IST services, and was receiving poor grades, Student did not receive a recommendation for special education service consideration.

Student's Special Education Evaluation: Even when Student was evaluated for special education consideration, as per his September 25, 2003 ER, the reason for Student's referral limited the scope of Student's evaluation to determine "need for specially designed instruction and eligibility status for special education (speech/language) programming" (P13). Student's September 25, 2003 ER underscored a limited evaluation and considered only Student's speech needs. (Student received testing only in the area of articulation. Student did not receive a language assessment) (P13.1-P13.2). Again, Student did not receive additional testing of Student's behavioral needs, cognitive ability, and achievement functioning. Student's September 25, 2003 ER found that Student was in need of specially designed instruction only under the disability category of "Speech/Language Impairment" (P13.2). The District did not provide a complete and comprehensive evaluation to identify all of Student's special education and related services needs. As such, the District violated 34 C.F.R. 300.532 (h).

Student's 504 Plan: Student received a Section 504 Service plan on May 28, 2003 (SD 10). It was not clear what the basis for Student's Section 504 Service plan entailed, what defined Student's Section 504 impairment, and what major life activity was impacted by Student's status as a protected handicapped student under 22 Pennsylvania Code, Chapter 15. (1973 Rehabilitation Act, Section 504, 29 U.S.C. § 794.)

Student was known to have ADHD and had been passed to third grade with Student's Section 504 Service plan attached to Student's IEP that addressed Speech and Language only. Student received eligibility status as a student requiring Speech and Language, but the District did not view Speech and Language services as special education. Throughout Student's third grade year, Student's ERs concluded Student was ineligible for special education. The District did not present convincing evidence that Student received an appropriate classification for Student's sole 504 status and Service plan as a protected handicapped student under 22 Pennsylvania Code, Chapter 15 (without full eligibility consideration under Chapter 14).

Student's May 10, 2004 ER Student's May 10, 2004 ER found that Student demonstrated "no significant discrepancy between ability and achievement that would indicate a learning disability....Nevertheless, Student's May 10, 2004 ER stated, "Student is not a child with a disability; or is a child with a disability but does not need specially designed instruction" (SD 16.14). The evidence was convincing that the District did not provide an appropriate evaluation to determine Student's status as an eligible student under the IDEA and 22 Pennsylvania Code, Chapter 14. Student's behavioral and health needs were ignored. The District only concentrated on whether Student demonstrated a learning disability. Because Student did not receive a full and complete evaluation to determine whether Student is a "child with a disability" and to determine Student's educational needs, the District violated Student's right to a full and comprehensive evaluation. 34 C.F.R. §300.320.

Student's November 30, 2004 Addendum to Student's ER Student received an IEP for Speech and Language, as well as his Section 504 Service Agreement Plan when Student entered the 2004-2005 school year (SD 10; SD 33). Student's September 8, 2004 IEP stated, "Student has received Speech/Language support since 10/8/03" (SD 33, page 2). (The District did not submit an IEP for the 10/8/03 Speech and Language services, despite the Hearing Officer's directive to provide all of Student's IEPs for introduction into evidence. Either the District did not provide an IEP beginning 10/8/03, or the District did not comply with the Hearing Officer's directive.)

On November 30, 2004, the District added an Addendum to Student's evaluation report finding that Student's eligibility category fell under the OHI category on the basis of his ADHD and a Tourette's Syndrome diagnosis (SD 28). Although Student carried the same diagnosis in previous school years, the District argued that the degree of difficulty and need Student demonstrated, presently far exceeded that which Student demonstrated in previous academic school years. The District called for a reconvening of the IEP team meeting to determine Student's educational placement (SD 16, November 30, 2004 Addendum, page 1). It was totally unclear to this Hearing Officer how the District determined that Student began to display greater difficulty and needs without evaluating Student comprehensively.

Although Student was known to have ADHD and, by then, known to display a Motor Tic disorder, Student was not given an FBA until after Student's educational placement change. Because Student's ER addendum stated that Student qualified for special education on the basis of OHI and required a more restrictive setting, Student's IEP team wrote an IEP specifically for an emotional support classroom. Student was moved to the emotional support classroom at [Redacted] Elementary, not Student's home school. Student never received from the District a full and complete evaluation to determine Student's educational needs, yet the District made a change to a more restrictive educational placement. Again, the District violated Student's right to a full and comprehensive evaluation. 34 C.F.R. §300.320.

On May 16, 2005, Student received a reevaluation as part of a due process agreement. Student's May 16, 2005 ER recommended that Student is a child with an "OHI... Student continues to demonstrate a need for Speech and Language support" (SD 3.14).

Summary of Child Find Claim

The District did not fulfill its "Child Find" Obligations to Student as required by the IDEA. The District was on notice of Student's behavioral issues and the impact these issues had on Student's educational needs that either indicated a qualifying disability, or would cause District personnel to suspect a qualifying disability. While District witnesses testified it was the beginning of the 2004-2005 school year where Student began to decline both academically and behaviorally without responding to previous interventions (NT 242-244), however, District personnel failed to locate and identify Student for a special education screening and evaluation within a reasonable time after receiving much earlier notice of Student's problems. That notice came to the District as early as Student's early elementary years. The District was aware of Student's behavioral history including a consistent history of hyperactivity, significant impulsivity and inattention. It was noted that such symptoms were observed in both home and school environments, and were reportedly interfering with Student's adjustment to first grade (SD 15.3). Student had failing grades in December 2003 and District testing revealed Student's "below basic" reading skill obtainment (P9, P15, P17). The District did not identify Student in a timely manner and thus violated its Child Find obligations under the IDEA.

Are Student's IEPs Appropriate?

Each child identified as eligible for special education must have a written Individualized Educational Program ("IEP"). 34 C.F.R. §300.342(a) and 22 Pa. Code § 14.131. IEPs have to be reasonably calculated to provide meaningful educational benefit. The annual goals, benchmarks, and short-term objectives must be reasonable. In developing the child's IEP, the Team must consider the child's strengths, parental concerns, and the results of the evaluations of the child. 20 U.S. C. §1414(d)(3).

The Hearing Officer accepted Student's IEPs, marked and entered as evidence into Student's record. These IEPs, provided in chronological order included Student's IEP of June 2, 2004 (SD 31); Student's IEP of September 8, 2004 (SD 33); Student's IEP of October 27, 2004 (SD 35); Student's IEP of December 2, 2004 (SD 37); and Student's IEP of June 13, 2005 (SD 38).

The District bears the burden of establishing that the evaluations are appropriate and sufficient in scope and in depth to have fully investigated the child's disability. 22 Pa. Code §14.125. Appropriate test and evaluation tools must be administered so that evaluation results accurately reflect the child's needs. 22 Pa. Code §14.125. Student never received an appropriate evaluation by the District. When it did evaluate

Student, the District's evaluations and resulting IEPs denied Student a FAPE based on inadequate ERs and flawed IEPs. 34 C.F.R. 300.531, 300.536 and 22 Pa Code 123 and 124. A finding that an IEP failed to comply with Pennsylvania standards precludes a ruling that a student was offered a FAPE. *Rose by Rose u Chester County Intermediate Unit*, 24 IDELR 61 (E.D. Pa. 1996); *aff'd* 114 F.3d 1173 (3rd Cir. 1997) 24 IDELR 61.

None of Student's IEPs addressed all of Student's needs. The pendent IEP, written December 2, 2004 (SD 36, SD 37), was continued until the 2005-06 school year at Student's IEP meeting on June 13, 2005 (SD 38). Dr. S. evaluated Student on March 9, 2005 (SD 2). Dr. S.'s report was available on June 13, 2005. The information from Dr. S.'s IEE should have been used as a basis for Student's IEP programming. This Hearing Officer agreed with the Parent that the June 13, 2005 IEP meeting was scheduled without an appropriate invitation to the Parent and without inclusion of Dr. S. Such a procedural flaw denied Student an IEP that included data from Dr. S.'s IEE. Dr. S.'s IEE contributed a great deal to an understanding of Student and Student's needs. Dr. S.'s IEE was not properly integrated into an ER. Instead, as the Parents argued, Dr. S.'s IEE was stapled to an earlier Addendum that placed Student into Special Education (naming Student's eligibility as a student with OHI). Student's May 2005 ER did not have sufficient data to recommend Student's appropriate special education service considerations (SD 16 with November 30, 2004 Addendum; SD 29).

Because Student's May 2005 ER did not have sufficient data to recommend Student's appropriate service considerations (SD 16 with November 30, 2004 Addendum; SD 29) and was focused on behavior, this May 2005 ER was not adequate to support Student's IEP and Student's needs for specially designed instruction. The District's own testing, especially that done by the District's Reading Specialist, indicated that Student had not made appropriate progress in reading comprehension. Student displayed particular difficulty with metacognitive strategies in reading comprehension, difficulty that is related to Student's problems with executive functioning (SD 20; NT 436, 438).

This Hearing Officer agreed with the Parent in that Student cannot apply organizational strategies, such as previewing and planning independently, as is confirmed in teacher comments consistently over a several year period. Such a lack of executive functioning to previewing and planning interfered with Student's reading comprehension skills, as reported by the District's Reading Specialist. In September 2004, Student's District Reading Specialist found that Student did not perform well on Student's metacognitive reading strategies assessment. Student was found to not apply the learned reading strategies when working independently. Student was found to read only at 65 words per minute. The District Reading Specialist noted a concern with Student's fluency because the rate of Student's reading inhibited reading comprehension. Student was found to display weaknesses in writing (P6, SD 20.4; NT 377, 433-434, 436-444). Further, Student's *IOWA of Basic Skills* went down in Reading from a National Percentile Rank of 87 in April 2003 to a National Percentile Rank of 47 in April 2004 (SD 13.3-13.4).

IEP goals must be measurable and present levels must be interpretable so as to address specific areas of need. *Lascari v. BOE Ramapo Indian Hills Reynolds High School*, 116 N.J. 30, 48-49 (1989) (absent present levels IEP denied FAPE). Student's December 2, 2004 IEP was lacking in identifying appropriate reading comprehension needs. In fact, Student's reading comprehension skills were noted as strengths on Student's December 2, 2004 IEP, when in fact, the District's Reading Specialist confirmed that Student had not made reading comprehension gains, had fluency and writing difficulties, and displayed weaknesses applying comprehension strategies (SD 36 page 3; P6, SD 20.4).

Student's December 2, 2004 IEP had a number of annual goals and short-term objectives but Student's IEP did not address Student's needs adequately (P6, SD 20.4). Student demonstrated organizational and planning deficiencies. However, Student's IEP had only one goal addressed to organizational needs, relating to Student's maintenance of an assignment book and folder. Student's December 2, 2004 IEP did not address appropriately Student's needs (SD 36).

Further, the defects in Student's specially designed instruction ("SDI") were substantial. Student's December 2, 2004 IEP SDI was not appropriate to provide for accountability, structure, predictability, guidance and organization leading to increases in Student's reading comprehension,

writing, math, and language skills. 34 C.F.R. 300.346 et seq. In *Catlin C.*, Special Education Opinion No. 885 (SEA Pa. 1999), the Panel held that when an IEP does not include a specific statement of specially designed instruction to address unique needs, the failure is a denial of FAPE.

Summary of Student's IEPs

Student's IEPs did not address all of Student's needs. Student's IEP of June 2, 2004 (SD 31); Student's IEP of September 8, 2004 (SD 33); and Student's IEP of October 27, 2004 (SD 35) were seriously flawed in that they were tied to inappropriate ERs that did not provide comprehensive assessment of Student's needs. Additionally, Student's IEP of December 2, 2004 (SD 36); and Student's IEP review of June 13, 2005 (SD 38) did not address Student's reading comprehension, writing, mathematics, planning, previewing, and organizational needs appropriately (SD 36 page 3; P6, SD 20.4). As such, the District's offering and implementation of all of Student's IEPs denied Student a FAPE.

Did The District Provide Sufficient Notice To The Parent Of An IEP Meeting Scheduled For June 13, 2005?

This issue raised by the Parents concerning whether they had ample notice to attend an IEP meeting is a procedural issue. IDEA 2004 restricts a hearing officer for finding a violation of FAPE on a procedural irregularity unless the procedural inadequacy impeded the child's right to a FAPE; significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the parents' child or caused a deprivation of educational benefit. This standard is not new. The 3rd Circuit held that prejudice resulting from procedural errors could be found where a school district "flagrantly fails" or "grossly disregards" a student's educational program. *Carlisle Area School District v Scott P.* 62 F.3d 520 (3d Cir. 1995).

In Student's case, this Hearing Officer found that the District did not provide sufficient notice to the Parent of an IEP meeting scheduled for June 13, 2005. Student's mother requested the District to include Dr. S. in an IEP meeting in the Spring 2005. She offered several dates. The District planned a meeting for June 13, 2005 and sent a notice to Student's mother in Student's backpack on June 9, 2005, the last day of school. Student's mother unpacked the backpack on June 10 because June 9 was the last day of school, and there was thus no homework (NT 484-486). Student's IEP team convened without her and continued the December 2, 2004 IEP (SD 6). Student's IEP team labeled Student's June 13, 2005 IEP an IEP Review (SD 38).

Summary of Notice of IEP Meeting Claim

This Hearing Officer did not find the District's explanation credible. The District violated 34 C.F.R. 300.345 in failing to provide notice to Student's mother sufficiently in advance of the IEP meeting on June 13, 2005. As such, this Hearing Officer determined that the District significantly impeded Student's Parent the opportunity to participate in the IEP decision-making process regarding the provision of a FAPE to Student.

Should Student Have Been Provided With ESY During The Summer Of 2005?

According to 22 Pa. Code § 14.34 (e), consideration of the need for Extended School Year (ESY) services shall occur at the IEP team meeting to be convened at least annually or more frequently if conditions warrant consistent with 22 Pa. Code § 14.32 (I) (3) (relating to IEP). Consideration means that ESY services are raised and discussed at the IEP team meeting.

Federal regulations state that ESY services have to be related to the student's IEP. Thus, 34 C.F.R. §300.309 (b) stated that ESY services mean special education and related services that are provided in accordance with the student's IEP. Therefore, Student's ESY has to relate to Student's IEP goals and objection in place during the school year. Pennsylvania code specifies that an eligible student is entitled to ESY services if regression caused by interruption in educational programming and limited recoupment capacity, or other factors, makes it unlikely that the student will attain or maintain skills and behavior relevant to established IEP goals and objectives. 22 Pa. Code § 14.34 (b).

Examples of other factors in addition to regression and recoupment include:

1. The extent to which the student has mastered and consolidated an important skill or behavior at the point where educational programming would be interrupted.
2. The extent to which a skill or behavior is particularly crucial to reaching the goals of self-sufficiency and independence from caretakers.
3. The extent to which successive interruptions in educational programming reduce a student's motivation and trust and may lead to an irreversible withdrawal from the learning process.
- 4.

The record demonstrates that Student's IEP team did not meet to consider Student's ESY in February 2005. However, this Hearing Officer found that neither side presented convincing data in their deliberations as to whether or not regression caused by interruption in Student's educational programming and limited recoupment capacity, or other factors, would make it unlikely that Student would attain or maintain skills and behavior relevant to his established IEP goals and objectives.

Summary of ESY Claim

It cannot be determined from the record whether or not Student should have been provided with ESY during the Summer 2005. Both sides presented insufficient data on the claim.

Was Student Offered A Free Appropriate Public Education In Student's Least Restrictive Environment As Of The 2003-2004 School Year?

As an eligible student, Student's education must be provided in the Least Restrictive Environment (LRE). LRE is defined statutorily as follows:

"To the maximum extent appropriate, children with disabilities, including children in public or private institutions, or other care facilities, are educated with children who are not disabled and special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular education classes with the use of supplementary aids and services cannot be achieved satisfactorily." See 34 C.F.R. § 300.550.

The Third Circuit formulated its test for LRE in a 1993 decision: *Oberti v. Bd. Educ.*, 995 F.2d 1204 (3d Cir. 1993). First, a determination must be made as to whether education in the regular classroom, with the use of supplementary aids and services, can be satisfactorily achieved. *Id.* at 1048. Relevant determinations must be made as to whether the District took steps to include Student in a regular class and whether the District considered the whole range of supplemental aids and services which enable Student to progress. If a placement to a more restrictive environment is necessary for Student to benefit educationally, a determination must be made as to whether the District placed Student with non-disabled students when possible. *Id.* at 1215.

In Student's case, the District changed Student's placement to an emotional support classroom at [Redacted] Elementary in December 2004 after Student's ER was amended to include OHI as a basis of eligibility. Student's parent consistently asked for evaluation data and progress information on Student's needs. 34 CFR § 300.540(b); 34 CFR 300.344(a) (1). The District did not provide convincing evidence that it offered Student a FAPE in the LRE of the regular school that Student had attended. Student received no appropriate behavioral or academic supports in Student's LRE. The District violated 34 C.F.R. 300.550 (b) in failing to provide aids and supports to Student in Student's LRE at [Redacted] Elementary. The District offered an IEP only in conjunction with Student's placement in the emotional support classroom at [Redacted] Elementary School.

During Student's hearing, District witnesses testified that [Redacted] Elementary would better meet Student's needs. However, the District did not provide convincing data that [Redacted] Elementary would better meet Student's needs and that the District's program at [Redacted] Elementary would benefit Student educationally. The District did not provide sufficient data of the educational benefits available to Student in Student's [Redacted] School environment, as compared

to the benefits provided in the LRE of the regular school that Student had attended at [Redacted] Elementary.

Student was moved into the emotional support classroom at [Redacted] Elementary without having an FBA completed. In fact, no testing was done. The amended ER contained no signatures and it was entirely unclear to this Hearing Officer how Student made such educational and behavioral gains one moment, required a move to a more restrictive environment at [Redacted] Elementary without testing the next moment, and then demonstrated enormous behavioral gains in [Redacted] Elementary's emotional support program. This Hearing Officer found that District data are flawed, misleading, and hold no credibility. District data provided have done a tremendous disservice to Student. Student was not offered a FAPE in his LRE.

District data clearly support the position that the Addendum and the IEP were written for Student's placement at [Redacted] Elementary. The ER Addendum (SD 28), dated November 30, 2004, was more than one month after the meeting in which the emotional support classroom was proposed. Student's November 30, 2004 ER Addendum was merely a review of information since Student's last evaluation. However, it recommended a more restrictive educational placement. Student's ER Addendum included observational information only and was not a comprehensive evaluation or reevaluation of Student's needs. Student's IEP team convened to update Student's IEP, on December 2, 2004 (SD 6). The IEP team based IEP recommendations on a flawed ER. The District knew its ER was flawed because the December 2, 2004 NOREP, proposing that Student begin to receive emotional support services, did not name evaluation procedure(s), test(s), record(s) or report(s) used as a basis for the proposed action or action refused. The NOREP did not name factors relevant to the proposal or refusal (SD 17).

The District argued that that transcript reflected the time period as 2003-2004 yet the placement disputed was the change to emotional support that occurred in December 2004 during the 2004-2005 school year. The District stated in its closing statement that the time frame posed in the issue was incorrect (NT 19). Nonetheless, this Hearing Officer has found that the District did not provide Student a FAPE during his 2003-2004 school year. Further, the District did not provide Student a FAPE in Student's LRE during Student's 2004-2005 school year.

Summary of FAPE in LRE claim

The record establishes clearly that the District did not include Student in a program with nondisabled students to the maximum extent appropriate. The District did not offer convincing data that Student's change to a more restrictive environment in December 2004 is appropriate. See *Daniel RR.*, 874 F.2d at 1048, 1050.

Is Student Entitled To Compensatory Education As Of The First Day Of The 2003-2004 School Year?

If a district does not complete a multidisciplinary evaluation, and fails to take action promptly and involve parents and teachers in the development of an IEP, compensatory education is an appropriateremedy. *Punxsutawney Area School District v Dean* 633 A.2d 831 (P.A. Commonwealth 1995) 23 IDELR 73.

The District's denial of Student's Child Find identification in a timely manner, and the denial of Student's FAPE are the threshold bases for awarding compensatory education. The District identified and evaluated Student inappropriately. The District changed Student's placement to a more restrictive environment. The District offered and implemented flawed IEPs. Where the IEP is flawed procedurally or substantively, a student is denied a FAPE. The remedy for denial of a FAPE is compensatory education. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999).

Summary Of Compensatory Education Claim

The District denied Student a FAPE, as of the first day of the 2003-2004 school year school. This Hearing Officer is awarding compensatory education for Student's full school day hours, as of the first

day of the 2003-2004 school year school.

CONCLUSIONS OF LAW

As based on the substantial weight of the evidence, including the oral testimony on the record and most of the exhibits, this Hearing Officer was able to conclude the following:

- The District failed in its Child Find obligations, pursuant to 20 U.S.C. 1412(a)(3) and 34 CFR § 300.125.
- Student's IEPs were inappropriate.
- The District did not provide sufficient notice to the Parent of an IEP meeting scheduled for June 13, 2005.
- There were not enough data in the record to determine whether Student should have been provided with ESY during the Summer 2005.
- Student was not offered a FAPE as of the 2003-2004 school year. Also, Student was not offered a FAPE in his LRE when Student's educational placement was changed to a more restrictive placement in December 2004.
- Student is entitled to compensatory education as of the first day of the 2003-2004 school year.

**HEARING OFFICER DECISION/ORDER
RE: DUE PROCESS HEARING FOR STUDENT
ODR NUMBER 5701/05-06 LS**

AND NOW, this 18th day of October 2005, the [Redacted] School District is ordered to take the following action:

1. Within 30 school days of the receipt of this Order, the District must perform, at District expense, a comprehensive and in-depth evaluation relative to Student in terms of Student's assistive technology, reading, mathematics, handwriting, speech and language, gross motor, fine motor, and functional behavioral needs.
2. Within 10 school days of the receipt of the evaluations, the District must revise Student's ER. The ER must consider results of the evaluations (i.e., evaluations of No. 1 above, as well as results of Dr. S.'s March 9, 2005 evaluation), relative to Student's disability determination and needs for special education and related services.
3. Within 15 school days of the receipt of the evaluations in No. 1 above, Student's IEP team must reconvene for the purpose of developing Student's diagnosis, program, and placement. The IEP team must consider all information available to it in making determinations.

Because the District did not fulfill its Child Find obligations, and because the District denied a FAPE to Student, the District must provide compensatory education. Student is entitled to compensatory education for Student's full school day hours, as of the first day of the 2003-2004 school year. Student's Parents shall decide how the compensatory education hours should be spent so long as they take the form of appropriate developmental, remedial or enriching instruction that furthers Student's needs and furthers the goals of Student's present or future IEPs. These services may occur during the weekday, on weekends and during the summer months, when convenient for Student and Student's Parents. The compensatory education award shall continue until such time as the District designs and offers an appropriate IEP and FAPE.

Dorothy J. O'Shea, Ph.D.

DECISION DATE: _____