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Due Process Hearing

JB (#8225/07-08 AS)  
Date of Birth: xx/xx/xx  
Dates of Hearing: December 6, 2007,  
January 25, 26, February 14, 2008.  
Closed Hearing

Parties to the Hearing

<u>Parent</u>	<u>Representative</u>	<u>Transcript Completed</u>
Mr. and Mrs.	Pamela E. Berger, Esq.	February 19, 2008
		Date of Decision February 27, 2008
<u>School District</u>	<u>Representative</u>	Hearing Officer
Chartiers-Houston	Barbara A. Rizzo, Esq.	David Y. K. Lee

## **II. BACKGROUND**

Student is a xx-year-old student in the Chartiers-Houston School District (hereafter District). He began receiving special education services as a student with Specific Learning Disabilities as a second grade student. Sometime during the seventh grade, Student was given the diagnosis of Asperger's Disorder. Student continued to receive special education services in a Learning Support (hereafter LS) classroom. The parents were dissatisfied with his Individualized Education Program (hereafter IEP) and requested a due process hearing. The parents were also concerned that Student has been a victim of bullying by his peers.

## **III. FINDINGS OF FACT**

1. Student, date of birth xx/xx/xx, is a student in the District. (P. #22 @ 1.)
2. Student initially received LS in Written Expression and Math when he was in the second grade. (N.T. 25-27.)
3. A re-evaluation when Student was in the sixth grade continued to identify him as a student with a specific learning disability. (P. #28 @ 4.)
4. In November (2005) of Student's seventh grade year, he was diagnosed with Asperger's Disorder at the [redacted] Institute. (P. #5 @ 1, #19 @ 34.)
5. Following the IEP review meeting on November 14, 2006, when Student was in the eighth grade, Mrs. requested a re-evaluation and signed the Permission to Re-evaluate on November 15, 2006. (N.T. 117-118. P. #1 & #4.)

6. Student's IEP, dated October 29, 2006, indicated LS for English, Math, and Social Studies. (N.T. 452-453. S.D. #2. P. #2 @ 9, #28 @ 4.)

7. The "present academic levels" section of the IEP noted Student was "...receiving average grades but tends to fall below average at times..." and "...has increased his writing skills over the past year..." (P. #2 @ 3.)

8. Four references to PSSA standards were listed as measurable annual goals. (N.T. 453-454. P. #2 @ 7.)

9. A consent for a psychiatric evaluation was also signed by Mrs. on January 3, 2007. (P. #3.)

10. The psychiatric evaluation did not differ in the diagnosis of Asperger's Disorder. (P. #29 @ 2.)

11. The Re-evaluation Report (hereafter RR), dated March 5, 2007, concluded that Student was an eligible student with the disability category of Autism. (P. #7 @ 9.)

12. At the IEP review meetings of March 15, and 22, 2007, Student's IEP was modified in the area of annual goals. (N.T. 347-351. P. #9 @ 9-11.)

13. Under "educational placement", Autistic Support was indicated. (P. #9 @ 14.)

14. Social Work Services were specifically added to Student's IEP. (N.T. 274-278, 281-286, 294-296, 303-307. P. #9 @ 12.)

15. On April 5, 2007, Mrs. rescinded her approval of the Notice of Recommended Educational Placement (hereafter NOREP) which was signed on April 3, 2007. (N.T. 89-90. P. #11 & #12.)

16. In the course of a meeting with an IEP facilitator on May 30, 2007, further evaluations were requested by the parents. (N.T. 80-81, 226-227, 361, 491. P. #14.)

17. At the end of eighth grade, Student's final grades in the major subjects were LS Math - C, LS English - B, LS Civics/PA - B, Science - D. (S.D. #2.)

18. A RR, dated September 7, 2007, and revised and finalized on October 10, 2007, with attachments of all reports referenced, concluded that Student was an eligible student with the disability category of Autism. (N.T. 215. P. #19.)

19. The proposed IEP, dated October 10, 2007, contained four social goals and one goal in written expression. (N.T. 275. P. #24 @ 9-13.)

20. Although "Educational Placement" was identified as Autistic Support, Student's educational placement continued in LS English and LS Pre-Algebra. (N.T. 401. P. #24 @ 17. H.O. #1.)

21. The NOREP, dated October 10, 2007, indicating LS placement was disapproved by Mrs. on October 17, 2007, and a due process hearing was requested. (N.T. 108-109, 385-386. P. #25.)

22. Due process hearing sessions were held on December 6, 2007, January 24, 25, and February 14, 2008.<sup>1</sup>

#### **IV. ISSUES**

1. Were the IEPs for eighth and ninth grades appropriate? (N.T. 5, 7.)
2. Is Student entitled to compensatory education award? (N.T. 10.)
3. Was Student subjected to harassment (bullying) due to his disability? (N.T. 5.)

#### **V. DISCUSSION AND CONCLUSIONS OF LAW**

##### 2006-2007 IEP

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<sup>1</sup> It was agreed that Closing Statements would be submitted in writing. (N.T. 645.)

An IEP meeting was scheduled for October 27, 2006, to review and revise Student's IEP for eighth grade. (P. #1.) The meeting was subsequently changed to November 14, 2006, upon parent request. (N.T. 117.) The resulting IEP was apparently drafted previously by the District in preparation for the original October date, showed "Type of Support" as LS in Math, Civics, and English. (N.T. 451-453. P. #2 @ 1, 3, 9. S.D. #2.)

The IEP which the District asserted as the eighth grade IEP for Student has a number of significant deficiencies. The IEP described Student as receiving average grades and having improved in his writing skills. (F.F. #7.) Under "present levels of functional performance", the IEP noted "Student is struggling in the area of health, science, and technology on his rotation". (P. #2 @ 3.) Such statements cannot in anyway be construed to provide baselines of academic functioning from which appropriate instructional levels could be determined. 34 CFR §300.320(1) states that an IEP must include "a statement of the child's present levels of academic achievement and functional performance...". General descriptors such as "struggling" and "improving" have little, if any, meaning in making operational instructional decisions. It is not surprising that any connection between the "present level" descriptions and the "needs" listed on the following page of the IEP would be tenuous and vague. (P. #2 @ 4.)

Without operational baselines from which to identify instructional levels, the annual goals could not have been clearly stated and therefore measured. Statements such as “Student will increase his skills to read critically in all content areas” or “Student will focus on and increase his mathematical reasoning and communication” could not be measured against non-existent baselines. (P. #2 @ 7.) Any child, with or without learning difficulties, is expected to have some increase in skills at any grade level. Although the District asserted that reports (regarding homework, missing work, grades) of Student’s progress were communicated to the parents on a regular basis (N.T. 506), there was no periodic progress documented to assess whether or not Student was making meaningful progress toward his IEP goals. (N.T. 49, 517-6518. P. #2 @ 7.) It would have, indeed, been difficult to do so in the absence of identifiable benchmarks. 34 CFR §300.320(2)(l) states the IEP must include “a statement of measurable annual goals, including academic and functional goals designed to-(A) meet the child’s needs that result from the child’s disability to enable the child to be involved in and make progress in the general education curriculum...”.

At the IEP meeting on November 14, 2006, the parents requested re-evaluations. (F.F. #5.) The subsequent RR, dated March 5, 2007, concluded that Student continued to be an eligible student with the disability category of Autism. (F.F. #10 & #11.) The RR states that “Student does not meet the eligibility criteria as a student with a specific learning disability”. (P. #7 @ 6.) This Hearing Officer notes that the disability category was thus changed from Learning Disability to Autism.

The chronology of events and perception of what actually transpired became somewhat confusing<sup>2</sup> following the issuance of the RR, and the IEP team meeting invitation of March 7, 2007. (P. #8.) The parents had concerns about the RR, as to whether an IEP was actually developed, and as to whether or not goals were agreed upon. (N.T. 72-74, 120-126, 348-357, 478-480, 602-605.) The essential outcome was some revisions to the IEP of October, 2006. In addition to some more descriptive language in the academic annual goals, three social goals were added, and the School Social Worker began working with Student individually. (F.F. #14. P. #9 @ 10-11.) The "Type of Support" for Student was also changed from LS to Autistic Support. (F.F. #13.) Student's educational placement, however, did not change. It remained "Student will take his courses of civics, English, and math in the L/S curriculum and not in the general education curriculum in the 8<sup>th</sup> grade". (P. #9 @ 14, #11.) It is unclear how Student's program became different by changing the term LS to Autistic Support other than the addition of Social Work Services. (N.T. 76-77.) It appears that the District was changing the term based on the disability category of Autism (from the diagnosis of Asperger's Disorder) instead of the identification of specific educational needs. (N.T. 358, 384-385, 397, 399-400.)

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<sup>2</sup> In this instance, a brief written summary of each meeting (contact, IEP meeting or otherwise) placed in Student's records would have been most beneficial.



In the meantime, even though Mrs. opined that she did not agree with the IEP which included the addition of Social Work Services, there is no evidence before this Hearing Officer that the parent prevented the School Social Worker from working with Student. (N.T. 79-80, 113-114. F.F. #15.) The discussion between the parties subsequently continued into the summer of 2007 with the parents again requesting further evaluations. (F.F. #16.) Student received passing grades in the major subjects in eighth grade. (F.F. #17.)

2007-2008 IEP

A number of evaluations were completed during the summer of 2007, and a RR, dated September 7, 2007, was compiled. (N.T. 363. P. #17.) The parties did not proceed to the development of an IEP as the parents had a number of concerns regarding the RR. (N.T. 365-367. P. #18.) Upon review of the comments marked on the pages, this Hearing Officer notes that the parents often objected to the form of the report, and had questions regarding some of the impressions and wordings used by the various evaluators. (P. #17.) In the final analysis, the process of an IEP development was delayed as the District attempted to comply with the parents' wishes for the RR to be in a form that was finally acceptable and signed on October 1, 2007.<sup>3</sup> (N.T. 215, 362-367. P. #19 & #21.)

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<sup>3</sup> The RR eventually *accepted* by the parent is a document of 102 pages. The attachments of various evaluations requested by the parents, such as Physical Therapy, Occupational Therapy, etc., made up the majority of the pages. The RR itself (P. #19 @ 3-24.) did not differ substantively from the RR of September 7, 2007 (P. #17.). Much time was spent by all in meetings and compilation of information which was already available in Student's records. This Hearing Officer is compelled to note the amount of public resources expended in the endeavor did not produce a comparable return. To expedite the procedure in the future, it will serve the same purpose for specific items of disagreement by any member of the team to be in writing and attached to the RR as an Addendum or Dissenting Opinion. The IEP team then can review the RR together with any of the original reports referenced in the RR.

As it was in the previous school year, the record is less than clear in the sequence of events between the various evaluations over the summer months and the development of Student's ninth grade IEP. An attempt to draft an IEP was apparently made on August 31, 2007. (N.T. 485-490. P. #19 @ 2, #40.) Subsequently in October, further meetings were held to develop an IEP following the completion of the RR. (P. #21-#24.) The last proposed IEP on record was dated October 10, 2007, with the accompanying NOREP. (P. #24. F.F. #21.) Mrs. signed the NOREP on October 17, 2007, disapproving LS services, giving the reason for disapproval as "we want an appropriate program and services and a legally sufficient IEP." (P. #25.) Although it was not "approved" by the parents, Student is receiving the services contained therein. (N.T. 93-95, 216, 275. H.O. #1.)

The proposed IEP for ninth grade has similar deficiencies as the eighth grade IEP discussed above. The IEP of October 10, 2007, does not provide operational baselines in Student's academic functioning from which meaningful annual goals can be written, and progress can be measured. Statements such as "...Student fell within the low average range for grammar skills, an area that should be addressed in his goals for the current school year...showed growth from the previous PSSA testing in the area of Math" do not identify any meaningful instructional levels or indicate any specific deficits in grammar skills and Math. (P. #24 @ 4.) It is not surprising that the ensuing annual goal contains only an umbrella of skills listed as PSSA standards. (N.T. 453-454.) It is difficult, if not impossible, to identify where Student was functioning in his "grammar skills through written expression" (P. #24 @ 13.) and how his functioning was differentiated from that of a student at a different chronological age and grade placement. (N.T. 454-455.)

The IEP also does not contain goals in Pre-algebra although Student is receiving LS in the subject. The LS teacher opined that Student was in LS Pre-algebra because of his difficulties in written expression.<sup>4</sup> (N.T. 417-418.) This is a rather curious perception. Additionally, the IEP coordinator testified that Student is in LS Pre-algebra because of parent request as it is felt that the slower pace instruction will be beneficial to Student. (N.T. 458, 489, 515.) Even if Student was somehow identified as in need of instruction presented at a slower pace, it is not the purpose of a LS program, or a special education program in general, to provide slower pace instruction in the general curriculum. This Hearing Officer notes, however, that Student scored at the 5<sup>th</sup> percentile in Addition and Subtraction on the KeyMath which was administered on October 29, 2007. (N.T. 402-404. P. #41.) In the absence of curriculum based data, the correlation between his needs and his placement in LS Pre-algebra can only be speculative.

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<sup>4</sup> Ninth grade Social Studies (American cultures) is in an inclusion classroom. (N.T. 421, 428, 437.)

The School Social Worker continues to work with Student in the area of interpersonal skills directly for one class period per week. (N.T. 276. P. #24 @ 9-11, 20.) The IEP does not provide report of progress in the social goals. As in his eighth grade IEP discussed above, if there are documented measures of Student's progress toward his social goals, they are not in evidence. (N.T. 284-285.) Such data, quantifying the anecdotal information collected by the School Social Worker, will provide the needed clarity in understanding as to whether or not Student is progressing toward goals such as "...will further develop his friendships through...activities...4 out of 5 sessions", "...will express his emotions accurately...using techniques taught...4 out of 5 times", "...will enhance his conversational skills monitored once weekly...". (P. #24 @ 9-11.) It appears that the School Social Worker has only recently started to use a social skills curriculum systematically. (N.T. 281-283.) There is also an absence of data regarding the observation of Student for "4 times every month for 42 minutes/session".<sup>5</sup> (P. #24 @ 20.) It is uncertain how such data, if any, are being used by Student's teachers in implementing the IEP goals.

As in the eighth grade IEP, the ninth grade IEP also identifies the "Type of Support" as Autistic Support while Student continues to be in LS for Pre-algebra and English, and inclusion Social Studies. (P. #24 @ 20.)

#### Compensatory education

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<sup>5</sup> This is the same amount of time Student is seen individually per month. (N.T. 516.)

The IDEA requires that states receiving federal funds for education must provide every disabled child with a free appropriate public education (FAPE). This entitlement is delivered by way of an IEP. Carlisle Sch. Dist. v. Scott P., 62 F.3d 520, 533 (3d Cir. 1995). An IEP is one that meets the procedural and substantive regulatory requirements and one that is designed to provide meaningful educational benefit to the child. Board of Education v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982).

The parents opined that the District committed procedural violations in the IEP process. (N.T. 602.) The parties had 15 meetings over a year's time for the purpose of achieving closure on programming for Student. (N.T. 511.) Although not every meeting was documented, it is clear to this Hearing Officer in reviewing the whole record that many of the meetings were continuations due to lengthy discussions. Timely Invitations to Participate were sent to the parents in accordance with 34 CFR §300.322(a)(b)©. (P. #1, #8, #20, #23.) It would be redundant to expect another Invitation for a continuing subsequent session. (N.T. 347.) Also, there is no mandate under the IDEA that an IEP must be completed or started from scratch at an IEP meeting. Due to practical circumstances and depending on the number of items to be discussed, it is reasonable to have a "draft" from which to work and a completed copy compiled after the actual meeting and presented to the parties. (N.T. 492, 605.) The IDEA recognizes the necessity and practicality of reducing paperwork and conservation of time.<sup>6</sup> An IEP is to be reviewed annually or

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<sup>6</sup> See 34 CFR §300.324(a)(4)(5)(6).

sooner if necessary.<sup>7</sup> It is therefore not a static document. It is a “work in progress”, to use Mrs.’s term (N.T. 163.), depending on new information and the student’s progress. Student was not denied a FAPE on procedural grounds.

Due to the significant deficiencies in crafting the eighth and ninth grade IEPs discussed above, it is determined that Student was denied a FAPE on substantive grounds. An eligible student may derive some meaningful benefit from a program or from some parts of a program and still be denied FAPE. The program must also meet the regulatory requirements. Rose by Rose v. Chester County Intermediate Unit, 24 IDELR 61 (E.D. Pa. 1996). Compensatory education is an in-kind remedy. By providing additional future educational services, a student can be compensated for past denial of due process rights or educational programming that he should have received. M.C. ex re. J.C. v. Central Regional School District, 81 F.3d 389, 108 (3d Cir. 1996). Compensatory education is an equitable

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<sup>7</sup> See 34 CFR §300.324(b).



remedy for FAPE violations. Lester H. v. Gilhool, 916 F.2d 865 (3d Cir.1990), cert denied, 499 U.S. 923, 111 S.Ct. 317 (1991). In the instant case, the parents contributed to the prolonged process of IEP development by disagreeing or contesting on matters that were not necessarily germane to Student's educational goals. (P. #17 & #18.) The large number of meetings, and continuation of meetings, became sometimes counter-productive. (N.T. 369, 379.) It is the determination of this Hearing Officer that the equitable amount<sup>8</sup> of compensatory education owed to Student is 1 hour of intervention in the area of social skills per week of school and 1 hour of instruction in academics per week of school. There are  $(180/5 = 36)$  weeks of school in a school year. The total amount of compensatory education hours owed is therefore calculated to be  $(36 \times 2 = 72)$  hours for eighth grade and two hours per week of school from the beginning of ninth grade until the time when an appropriate IEP is crafted. The compensatory hours may be used for services and activities after school hours, on weekends, and during school breaks to further Student's social skills and/or academic development. The total amount may be translated into a monetary amount (average salary plus benefits of a special education teacher in the District for the number of hours) to be applied to academic tutoring and/or social skills development services/activities purchased by the family.

Given the apparent focus on Student's pragmatic interpersonal skills deficits pursuant to the diagnosis of Asperger's Disorder, the District may wish to enlist the assistance of the Autism Team/Consultant

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<sup>8</sup> 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, 906 A.2d 642, 651 (Pa. Commonw. 2006).

from the Intermediate Unit (N.T. 277-278) and/or elsewhere to assist in developing goals relative to pragmatic interpersonal skills intervention/instruction in the school environment.

### Harassment

The parents opined that Student has been unduly bullied in school by relating various incidents that happened. (N.T. 29, 31-42.) There was no dispute that incidents did happen in eighth grade that resulted in disciplinary actions. (N.T. 176-177, 565-575. P. #30-#33, #37, #39.) Evidence is not unequivocal, however, that Student has been consistently harassed or bullied over the two years in question. (N.T. 58, 306-308, 387-392, 415-416, 432-433, 470-472, 503-505, 510.) Mrs. had not gone to school specifically to observe Student, and no information was presented to indicate that Student's overall functioning and adjustment are results of being bullied in school. (N.T. 157, 214-215.) The United States Supreme Court has held that the burden of proof in an administrative hearing challenging an IEP is upon the party seeking relief, whether that is the disabled child or the school district. Schaffer v. Weast, 126 S.Ct. 528 (2005). The claim under 22 PA Code §15.10 that Student has been denied "access, equal treatment or discrimination based on handicap" therefore cannot be sustained.<sup>9</sup>

Accordingly, it is hereby ordered:

### **VI. ORDER**

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<sup>9</sup> It is reasonable to expect that the District is and will be vigilant in monitoring the interactions between those with whom Student seems to have frequent contact and document accordingly. (N.T. 513-514, 567-574, 590.)

The LEA is ordered to take the following action:

1. Consistent with the Discussion above, the District is to provide Student with compensatory education in the amount of 72 hours plus two (2) hours per week for the number of weeks from the beginning of the 2007-2008 school year until an IEP is crafted.

2. The IEP team is to convene no more than 15 school days from the receipt of this Decision to develop an IEP. The IEP is to be finalized within the same time-frame.

February 27, 2008

Date

David Y. K. Lee

David Y. K. Lee  
Hearing Officer