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Pennsylvania

## Special Education Hearing Officer

### DECISION

Child's Name: T.K.

Date of Birth: [redacted]

ODR No. 00501-0910 KE

### CLOSED HEARING

Parties to the Hearing:

Parent[s]

Representative:

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Dates of Hearing:

February 23, 2010, April 21, 2010,  
June 17, 2010

Record Closed:

July 6, 2010

Date of Decision:

July 21, 2010

Hearing Officer:

William F. Culleton, Jr., Esquire

## **INTRODUCTION AND PROCEDURAL HISTORY**

Student is a preteen-aged eligible resident of the Delaware Valley School District (District). (NT 8-21 to 9-24.) The Student is identified with Serious Emotional Disturbance and Specific Learning Disability. (NT 10-1 to 11-9.) Parents brought this request for due process, seeking compensatory education for failure to provide appropriate evaluation, program and placement, including extended school year services (ESY), with regard to the Student's academic, behavioral, social and emotional needs. They base these claims upon the Individuals with Disabilities Education Act, 20 U.S.C. §1401 *et seq.* (IDEA), and the Rehabilitation Act of 1973, section 504, 29 U.S.C. §794 (section 504).

The Parents filed their Complaint Notice by letter dated November 24, 2009. (S-1.) The District moved to limit all claims to the two year period allowed by the IDEA in its Answer dated December 16, 2009. (S-2.) The Parents responded to that motion, (S-3), and I granted the motion in a ruling on the law, (HO-1) and a ruling on the record after hearing evidence on the first hearing date, (NT 87-4 to 128-4). The hearing was held in three sessions from February 23, 2010, to June 17, 2010. The record closed upon receipt of written summations.

### **ISSUES**

1. During the relevant period from November 24, 2007 through February 23, 2010, did the District appropriately evaluate the Student with regard to academic, behavioral, social and emotional needs?
2. During the relevant period from November 24, 2007 through February 23, 2010, did the District provide an appropriate educational program and

placement that appropriately addressed all of the Student's educational needs?

3. Should the hearing officer order an independent educational evaluation at public expense?
4. Should the hearing officer award compensatory education for the relevant period from November 24, 2007 through February 23, 2010?
5. Should the hearing officer award prospective relief?

### FINDINGS OF FACT

#### EVALUATION OF STUDENT'S NEEDS

1. The District re-evaluated the Student and issued a report dated November 3, 2009. (S-4.)
2. The report was prepared solely to justify the IEP team's decision to change the Student's placement from learning support to emotional support. (NT 311-5 to 312-22, 485-14 to 486-1.)
3. The District School Psychologist did not participate in the re-evaluation. The report was prepared by a learning support teacher. (NT 310-4 to 311-4, 485-11 to 486-4, 250-25 to 251-2, 525-7 to 525-23; S-4.)
4. The learning support teacher erroneously identified the Student with Specific Learning Disability because Student had been in learning support. (NT 251-3 to 9, 487-25 to 489-5.)
5. The re-evaluation did not include cognitive or standardized achievement testing. It was based solely upon a review of records. (NT 250-22 to 24, 257-4 to 15, 525-15 to 17; S-4.)
6. The 2009 re-evaluation report relied upon cognitive data in past District evaluation and re-evaluation reports in 2003 and 2007; these data were supplemented by behavioral data, a District Functional Behavioral Analysis, fifth grade PSSA scores, sixth grade benchmark scores in reading and mathematics, grades, teacher reports of academic performance, and the parent scales on the Behavior Assessment System for Children (BASC). (S-4.)
7. The re-evaluation report identified the Student with Serious Emotional Disturbance and Specific Learning Disability. (S-4.)

8. The report revealed low or minimal scores on PSSA and curriculum based assessments, representing lower scores from the previous year's assessments. (NT 251-10 to 257-3.)
9. The report inappropriately failed to make any recommendations or findings regarding the Student's social interaction difficulties, although the District's school psychologist recognized that the Student has such difficulties, and one of the behaviors identified for functional behavioral analysis was touching others and becoming aggressive with them. In addition, the District was on notice that the Youth Advocate Program had diagnosed the Student with substantial social problems with adults and peers. (NT 215-10 to 12, 316-3 to 319-8; P-20 p. 40 to 95, S-4, S-13 p. 18, S-38.)
10. The report concluded that additional data was not needed. (S-4.)
11. The report recommended that the Student's placement be changed from Supplemental Learning Support to Supplemental Emotional Support. It made no other recommendation. (S-4.)
12. The re-evaluation report relied upon testing done by the District's school psychologist in 2007, when there was no question or suspicion that the Student had a specific learning disability. (NT 183-1 to 14, 232-22.)

#### PROGRAM AND PLACEMENT DURING RELEVANT PERIOD

13. The program offered by the District did not address social skills needs beyond the revision in 2009 that added inability to express needs to the functional behavioral analysis, and the offer of a social skills group conducted by the school counselor, which was not reflected in the Student's IEPs. (S-9 through S-17.)
14. The District encouraged the Parent to obtain the services of a Therapeutic Support Staff aide to attend the Student for 20 to 30 hours per week in school, and the Parent obtained these services. TSS services were in place during much of the relevant period. Hours were reduced to 12 per week from March 2009 to June 2009. The TSS aide was not provided for the first half of the Student's sixth grade year. (NT 84-1 to 6, 226-2 to 17, 316-3 to 319-8, 440-1 to 9; P-20 p. 86 to 95.)
15. The District's IEPs during the relevant period did not list the TSS worker as part of the Student's program, did not provide for a substitute in the event that the TSS services would not be available, did not address the educational needs that the TSS aide would address, did not specify the TSS aide's role in implementing the IEP, and did not describe how District staff would coordinate with the TSS aide. (S-9 through 17.)

16. There was little coordination between the District personnel and the TSS aide in planning the Student's program. (NT 317-6 to 319-10, 359-4 to 23, 523-12 to 525-6.)
17. In educational planning during the relevant period, there was no consideration given to providing or making changes to supplementary aids and services or related services to support the Student in the regular education environment, as an alternative to changing the Student's placement to a more restrictive placement. (NT 310-13 to 319-16 to 321-25, 463- 6 to 471-15, 475-19 to 476-3, 483-19 to 485-7; S-9 through 17.)

November 24, 2007 to May 2008

18. The May 2007 IEP recognized that the Student exhibits behaviors that impede learning. (S-17.)
19. Student had a history of physical and verbal aggression in school; behaviors had decreased in the previous IEP period. (S-17.)
20. The Student was supported in regular education classes by a Therapeutic Staff Support aide (TSS). (S-17.)
21. The IEP noted that the Student "is more responsive to response cost." (S-17.)
22. The Student's baseline of academic achievement was within the average range in mathematics and reading when this IEP was produced. (NT 229-3 to 25; S-5, S-17 p. 7.)
23. The Student evidenced difficulties in writing, with frustration that could trigger acting out. (S-17.)
24. The May 2007 IEP placed Student in Itinerant Learning Support for writing, with all of Student's subjects in regular education. (S-17.)
25. TSS support was retained. (S-17.)
26. The May 2007 IEP offered one goal in writing. Although it did not state the grade level on which it would be measured, it was understood by school personnel that the Student's goal would be implemented with grade level rubrics. (NT 403-5 to 6, 420-1 to 19; S-11 p. 19, S-17.)
27. The May 2007 IEP offered no goals in behavior control or social skills. (S-17.)
28. Specially designed instruction included small group instruction for writing, breaks in the day, shortened assignments, and altered response formats. (S-17.)

29. State PSSA testing was accommodated through extended time, chunking over multiple days and separate location. (NT 518-13 to 519-12; S-17.)
30. Local assessments were accommodated through extended time and separate location. (S-17.)
31. The May 2007 IEP was revised in May 2008 to add accommodations for state PSSA testing in science to include testing over several days and additional breaks. (S-16.)

#### May 2008 to February 2009

32. The May 2008 IEP subjectively reported improved behavior through utilization of two strategies: taking breaks and being reminded of choices and consequences. Academic achievement was reported as “on level.” In writing the Student was described as “more willing to correct and expand [Student’s] writing.” (S-15.)
33. The May 2008 IEP continued the program elements of the May 2007 IEP, with additional accommodations, goal, SDI and resource room utilization. (S-15.)
34. The May 2008 IEP added a scribe as an accommodation for state and local testing and retained the previous accommodations. (S-15.)
35. The May 2008 IEP added a goal for compliance with direction to self edit and correct assignments. (S-15.)
36. The May 2008 IEP added SDI to include transition time to make choices, and providing choices of appropriate and inappropriate behavior with outcomes. (S-15.)
37. The May 2008 IEP provided for resource room utilization to get behaviors under control. (S-15.)

#### February 2009 to October 2009

38. The February 2009 IEP continued the program elements of the May 2008 IEP while adding an “informal” Functional Behavioral Analysis, new present levels data, and goals and SDI aimed at providing positive behavioral support. These elements were added in response to an increase in the Student’s oppositional and defiant behaviors toward adults in authority. (NT 408-2 to 412-5, 415-5 to 12, 416-14 to 19; S-14.)
39. The “informal” functional behavioral analysis does not require the systematic collection of behavior data before formulating the functions of behavior. (NT 415-13 to 416-5; S-14 p. 8.)

40. Present levels included fourth grade PSSA scores that showed average or above average achievement in mathematics, except for measurement, and reading. (S-14.)
41. The February 2009 IEP retained the previous writing goal and changed the second goal to accepting redirection. (S-14.)
42. The February 2009 IEP added SDI to include directed study, graphic organizers, tape recorder, agenda checked by an adult, and an additional set of books. (S-14.)
43. The February 2009 IEP was revised in April 2009 to add a behavior intervention plan, a crisis plan, rewards for appropriate choices, and a prearranged signal for breaks. This was in response to serious behavior incidents involving aggression and dangerous, assaultive behavior. (NT 421-8 to 431-2, 436-7 to 13; S-13.)
44. The functional behavioral analysis and behavior intervention plan were produced by the Student's case manager, a learning support teacher. They were subjective and not based upon statistical data. (NT 421-8 to 431-2; S-13.)
45. The behavior intervention plan included a new goal and new SDI for the IEP. It included a list of consequences, such as detention, loss of preferred activities and loss of field excursions, and a list of rewards. It included two interventions aimed at reducing anxiety triggered by transitions: transition cues and directives and scripting. Also included were use of a time out area and a crisis plan. The plan also called for progress monitoring based upon charting, but the definitions of recorded behavior were not in written form. (NT 434-13 to 437-15; P-10, S-13.)

#### October 2009 to November 2009

46. The February 2009 IEP was revised on October 14, 2009 to change the Student's placement and to add SDI. This was in response to several behavioral incidents, including assaultive behavior and escaping from the school building. (NT 444-8 to 463-2; S-11.)
47. The IEP indicated that the change in placement was due to increased anxiety about writing tasks, because a demand to write had precipitated the most dangerous incident. (NT 457-11 to 463-2; S-11.)
48. Placement was changed from itinerant to supplemental learning support. Utilization of resource room was expanded to include "intensive instruction and modified pacing" in reading and language arts, utilizing the grade level curriculum. (S-11.)
49. New SDI included class notes for home use. (S-11.)

50. The October 14, 2009 revision revised the functional behavioral analysis and behavior intervention plan to add details to the description of the behavior, but not to change the identified functions. Interventions were expanded to include verbal reminders of option to take a break or obtain clarification of assignment, tangible reinforcement. Consequences were expanded to include removal to resource room after two redirections. Crisis plan support personnel were changed and staff of the Emotional Support room were added. (S-11.)
51. The February 2009 IEP was revised again on October 23, 2009 to change the Student's placement by changing the location of crisis intervention and time out periods pursuant to the behavior plan. The IEP specified that the Student would utilize the Emotional Support resource room and its contiguous time out room to regain behavioral control when Student's behavior could not be maintained in the general education classroom. This change was in response to another serious behavior incident. (NT 463-6 to 464-14; S-10.)
52. The time out room was a modified closet without a door. Staff once placed the Student in the room and stood in such a way as to prevent Student from leaving. (NT 312-25 to 314-17, 453-23 to 25, 454-8 to 25.)
53. The October 23, 2009 IEP revision also added an "indirect" functional behavioral analysis, which is considered the second step in a three step hierarchy of behavior analytic procedures, and which does not require data gathering. This analysis did include an initial line of inquiry. Two behaviors were added to the analysis – difficulty recognizing need for a break and difficulty voicing needs. Functions remained the same. Interventions were amended to include the direction to staff to use consistent wording when reminding or prompting. Special education interventions were added: positive time spent in resource rooms. The reminder script for staff was amended regarding consequences. (NT 463- 6 to 471-15, 455-16 to 25; S-10 p. 5.)
54. The October 23, 2009 IEP revision included a Positive Behavior Support Plan, which restated two of the interventions set forth in previous behavior intervention plans. (S-10.)
55. The revision also added a study period in the last period of the school day. (S-10.)
56. The revision added weekly data charting. (S-10.)

#### November 2009 to February 2010

57. The February 2009 IEP was revised in November, 2009 to change the Student's placement to Supplemental Emotional Support. (NT 319-16 to 321-25; S-9.)



58. The Student was placed in the Emotional Support classroom for social studies and directed study, along with behavioral control needs. Extent of inclusion for social studies was unclear. Learning Support resource room continued for reading and language arts. (S-9.)
59. The change in placement was made in response to two serious incidents in which the Student acted dangerously, destroyed property and tried to elope. (NT 319-13 to 322-25, 476- 10 to 485-10.)

### Progress

60. The Student's marks show progress made in all subjects during the relevant period. All marks were subject to accommodations required by the IEP. (NT 509-19 to 511-4; S-36.)
61. The Student failed during the relevant period to meet the IEP goal of writing a two paragraph essay with proper conventions. (NT 295-2 to 304-17; S-35.)
62. Progress monitoring data on behavior indicate serious weaknesses in the District's behavior modification program in that the Student's achievement is highly variable. (S-35.)

## DISCUSSION AND CONCLUSIONS OF LAW

### BURDEN OF PROOF

The burden of proof is composed of two considerations, the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact.<sup>1</sup> The United States Supreme Court has addressed this issue in the case of an administrative hearing challenging a special education IEP. Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005).

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<sup>1</sup> The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact (which in this matter is the hearing officer).

There, the Court held that the IDEA does not alter the traditional rule that allocates the burden of persuasion to the party that requests relief from the tribunal.

The Court noted that the burden of persuasion determines the outcome only where the evidence is closely balanced, which the Court termed “equipoise” – that is, where neither party has introduced a preponderance of evidence<sup>2</sup> to support its contentions. In such unusual circumstances, the burden of persuasion provides the rule for decision, and the party with the burden of persuasion will lose. On the other hand, whenever the evidence is clearly preponderant in favor of one party, that party will prevail. Schaffer, above. Therefore, the burden of proof, and more specifically the burden of persuasion, in this case rests upon Student’s Parents, who initiated the due process proceeding. I allocate this burden of persuasion on Parents with regard to all issues, including the question of adequate evaluation and the request for Independent Educational Evaluation, because the Parent chose to raise this issue by filing a request for due process requesting me to find that District evaluations were inappropriate. Thus, regarding all issues in this matter, if the evidence is in “equipoise”, the Parent will not prevail.

## EVALUATION

The IDEA obligates a local educational agency to conduct a “full and individual initial evaluation ... .” 20 U.S.C §1414(a)(1)(A). The evaluation, re-evaluation and any determination regarding eligibility must be conducted by a team of qualified

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<sup>2</sup> A “preponderance” of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. Dispute Resolution Manual §810.

professionals and the parent of the child. 20 U.S.C §1414(b)(4)(A), 34 C.F.R. §300.305(a), (d)(1). When re-evaluating a child for emotional disturbance, specific learning disability or other health impairment, the evaluation team must include a certified school psychologist. 22 Pa. Code §14.

The purpose of the IDEA evaluation is to obtain “accurate information on what the child knows and can do academically, developmentally and functionally ... .” 20 U.S.C. §1414(b)(3)(A)(ii); to determine whether or not the child is eligible for special education services, 20 U.S.C §1414(a)(1)(C)(i), 34 C.F.R. §300.304(b)(1)(i); and to identify all of the child’s educational needs, 20 U.S.C §1414(a)(1)(C)(ii), 34 C.F.R. §300.304(b)(ii). The child must be “assessed in all areas of suspected disability.” 20 U.S.C. §1414(b)(3)(B). The regulation implementing this statutory requirement adds that this includes “social and emotional status ... .” 34 C.F.R. §300.304(c)(4). Assessments and other evaluation materials must “include those tailored to assess specific areas of educational need ... .” 34 C.F.R. §300.304(c)(2).

The IDEA requires the use of “a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information ... .” 20 U.S.C. §1414(b)(2)(A); 34 C.F.R. §300.304(b). The evaluation must be “sufficiently comprehensive to identify all of the child’s special education and related services needs ... .” 34 C.F.R. §300.304(c)(6). The evaluation must be “sufficient to develop an appropriate IEP ... .” *Brett S. v. West Chester Area School District*, No. 04-5598, at 25 (E.D. Pa., March 13, 2006).

The agency must utilize information provided by the parent that may assist in the evaluation. *Ibid.* This must include evaluations or other

information provided by the parents. 20 U.S.C. §1414(c)(1)(A)(i); 34 C.F.R.

§300.305(a)(1)(i). Part of any evaluation must be a review of relevant

records provided by the parents. 34 C.F.R. §300.533(a)(1)(i).

As part of any re-evaluation, the IEP team and appropriate professionals, with “input from the child’s parents,” must “identify what additional data, if any, are needed to determine ... [t]he present levels of academic achievement and related developmental needs of the child ... .” 20 U.S.C. §1414(c)(1)(B)(ii); 34 C.F.R. §300.305(a)(2). If the team decides that additional data are not required, it need not seek additional data unless requested to do so by the child’s parent. 20 U.S.C. §1414(c)(4)(B); 34 C.F.R. §300.305(d)(2).

The District’s November 2009<sup>3</sup> re-evaluation failed to meet these standards. It assessed and in fact identified the Student with both Serious Emotional Disorder and Specific Learning Disability, (FF 7); yet, these labels were applied by a learning support teacher without the participation of a certified school psychologist, (FF 3), contrary to law. 22 Pa. Code §14. The teacher testified that she prepared the report after the fact, solely for the purpose of justifying the IEP team’s previous decision to change the Student’s placement from learning support to emotional support. (FF 1, 2, 11.) Thus, rather than providing a comprehensive evaluation to drive the IEP process, the re-evaluation report was driven by the IEP team’s decision to change the placement.

The report was not based upon a variety of strategies for obtaining relevant data; it relied solely upon record review. (FF 5.) No testing was done, and no detail was

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<sup>3</sup> The Parents invited me to pass judgment on the May 2007 re-evaluation report that preceded the 2009 report. However, this report was provided more than two years before the date on which the Parents filed for due process; thus, it is outside the scope of this matter, (NT 136-4 to 5; S-5 p. 8), except to the extent that it and the facts surrounding its preparation have evidentiary relevance to the 2009 re-evaluation or to the provision of a FAPE during the relevant period.

obtained on the Student's cognitive functioning, even though the report notes some manifestations of concern in the Student's academic performance. (FF 5, 6, 8.) Despite indications of social functioning difficulties, there is no data or recommendation about this realm of educational need. (FF 9.)

The report notes a below basic score in mathematics, and several basic scores on the PSSA given in the previous year. (FF 8.) These scores were lower than previous PSSA scores for this Student. Ibid. Moreover, the IEP team had increased the Student's time in a resource room due to the Student's emerging "need for adapted pacing and intensive instruction" in reading and language arts. (FF 48.)

Given the concerns about academics described above, I find that the cursory review of cognitive data in the re-evaluation report was not "sufficiently comprehensive to identify all of the child's special education and related services needs . . . ." 34 C.F.R. §300.304(c)(6). These concerns should have led to a more thorough analysis of cognitive functioning. Though the District, based upon two year old data, viewed these apparent learning gaps and academic needs as a function of the Student's emotional disturbance, these recent data should have alerted the District to at least explore whether cognitive functioning deficits were contributing to the Student's difficulties.

The teacher simply relied upon sparse data on cognition that was compiled at a time when the previous evaluator did not see any issue as to specific learning disability or other health impairment, because no one had raised the question to his knowledge. (FF 6, 12.) Thus, the cognitive data reviewed for the re-evaluation report was not a comprehensive and detailed evaluation of cognitive functioning. The report nevertheless recommended that no further data were necessary, without any sound basis in data or

expertise. (FF 3, 10.) In addition, it erroneously identified the Student with Specific Learning Disability. (FF 4.)

The re-evaluation was neither comprehensive nor detailed, and it was not reasonably calculated to reveal all of the Student's educational needs. It made no recommendations for addressing the previously addressed weaknesses in writing and recent poor performance on the PSSA. (FF 2, 9.) It was not the basis for the IEP; rather it was based upon the IEP.

I find that the District's school psychologist and learning support teacher credibly admitted these flaws. Although the psychologist was defensive and combative at times, I noted that his answers were direct and precise on the whole, with attention to the limits of his memory in most instances. The teacher was even more forthcoming. I find no reason to disbelieve her when she said that the re-evaluation was driven by the IEP, and not the other way around.

#### APPROPRIATENESS OF THE PROGRAM AND PLACEMENT

The IDEA requires that a state receiving federal education funding provide a "free appropriate public education" (FAPE) to disabled children. 20 U.S.C. §1412(a)(1), 20 U.S.C. §1401(9). School districts provide a FAPE by designing and administering a program of individualized instruction that is set forth in an Individualized Education Plan ("IEP"). 20 U.S.C. § 1414(d). The IEP must be "reasonably calculated" to enable the child to receive "meaningful educational benefits" in light of the student's "intellectual potential." Shore Reg'l High Sch. Bd. of Ed. v. P.S., 381 F.3d 194, 198 (3d Cir. 2004) (quoting Polk v. Cent. Susquehanna Intermediate Unit 16,)); Mary Courtney T. v. School

District of Philadelphia, 575 F.3d 235, 240 (3<sup>rd</sup> Cir. 2009), see Souderton Area School Dist. v. J.H., Slip. Op. No. 09-1759, 2009 WL 3683786 (3d Cir. 2009).

“Meaningful benefit” means that an eligible child’s program affords him or her the opportunity for “significant learning.” Ridgewood Board of Education v. N.E., 172 F.3d 238, 247 (3d Cir. 1999). In order to properly provide FAPE, the child’s IEP must specify educational instruction designed to meet his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. Board of Education v. Rowley, 458 U.S. 176, 181-82, 102 S.Ct. 3034, 1038, 73 L.Ed.2d 690 (1982); Oberti v. Board of Education, 995 F.2d 1204, 1213 (3d Cir. 1993). An eligible student is denied FAPE if his program is not likely to produce progress, or if the program affords the child only a “trivial” or “de minimis” educational benefit. M.C. v. Central Regional School District, 81 F.3d 389, 396 (3<sup>rd</sup> Cir. 1996); Polk v. Central Susquehanna Intermediate Unit 16, 853 F. 2d 171 (3<sup>rd</sup> Cir. 1988).

Under the Supreme Court’s interpretation of the IDEA in Rowley and other relevant cases, however, a school district is not necessarily required to provide the best possible program to a student, or to maximize the student’s potential. Rather, an IEP must provide a “basic floor of opportunity” – it is not required to provide the “optimal level of services.” Mary Courtney T. v. School District of Philadelphia, 575 F.3d at 251; Carlisle Area School District v. Scott P., 62 F.3d 520, 532 (3d Cir. 1995).

I find that the District’s program and placements for the Student were inappropriate during the relevant period, with regard to behavior, social skills and writing. The District’s program for the Student’s behavior problems lacked coordination, planning and focus. (FF 15, 16, 17, 26, 32, 33, 35, 36, 37, 38, 43, 44, 45, 46, 48, 51, 53,

59.) The District failed to provide any teaching of social skills. (FF 13.) Its program for writing failed to change when it became clear that the Student was losing ground. (FF 24, 26, 33, 41, 58, 61.) Because the District's program thus failed to address appropriately all of the Student's educational needs, it was inappropriate and a denial of a FAPE during the relevant period.

As to behavior, the District provided no supplementary aids and services to support inclusion when the Student's behavior began to become unacceptable in the general education setting. (FF 14, 15, 17.) The District provided no functional behavioral analysis or positive behavior support plan until April 2009, even though the Student exhibited behaviors that interfered with Student's learning and that of others. (FF 18 through 43.) Though the Student had services from Youth Advocacy Project, a behavioral health service, including TSS services in school, there was little planning or coordination regarding how to utilize such services. (FF 14 through 16.)

The Student's behavior deteriorated seriously during the relevant period. (FF 19, 38, 43, 46, 51, 59.) The District's response was to engage in successive revisions of the IEP, each of which removed the Student from more time in regular education. (FF 17, 24, 33, 37, 46, 47, 51, 58.) As the Student's acting out behaviors became more intense and dangerous, physical restraints were authorized in the IEP revisions and utilized, including confinement in a small closet-like room. (FF 52.)

The District's functional behavior analysis, when finally conducted, was devoid of data and was not consistent with scientific principles. (FF 38, 39, 44, 45, 50, 51, 53, 54, 56, 62.) The District explained that its policy is to start with an analysis that is not even structured according to such principles. (FF 39.) A second stage calls for formal



discussion and analysis of behavior, as well as formulation of hypotheses on the function and consequences, but without taking data. (FF 53.) In the instant matter, the District never arrived at the stage where it would take data. Yet, the Student's behavior escalated out of control while the District's analysis was still subjective and thus unreliable. I find it hard to understand at what point of behavioral escalation and dyscontrol the District would find it appropriate under its policy to take and compile data. In short, I find that the reasonable and prudent point for taking data had long since passed before the District even considered doing so.

Although the Student exhibited serious difficulties with social skills, the educational program did not address that need. (FF 9, 13.) IEPs during the entire period provided only two goals, one for writing and one for behavioral control. (FF 26, 33, 38, 46, 50, 51, 57.) Although the District did note in its IEP that the Student had trouble expressing needs, there was no goal. (FF 9, 13.) Although the District makes much of the Parent's refusal to enroll her child in a social skills class that was offered in 2008, I find that this one mistaken judgment, easily admitted by the Parent, does not amount to obstruction. Nor did the District's offer constitute an appropriate social skills program for this Student. The District had an obligation to address this educational need systematically in its IEPs, and not to merely refer the Parent to a single counseling class, seemingly as an afterthought.

The District acknowledged that the Student had weaknesses in writing that required specially designed instruction. (FF 23.) There was a single goal for writing that required a two paragraph essay. (FF 26.) This goal remained the same for the entire relevant period, except for utilizing grade level rubrics each year. (FF 26, 33, 38, 46, 50,

51, 57.) Meanwhile, the Student – admittedly a bright child - was failing to meet that goal over a period of years. (FF 62.) This should have been a red flag to the District that its approach to the Student needed to be revisited if not revised. Yet nothing was done – nothing was changed.

The District argues that its program is working because the Student has had no serious behavioral incidents since the placement was changed to emotional support. While this is encouraging experience, the Student’s emotional disturbance is ongoing and Student’s behavioral symptoms have shown themselves to be irregular. Although Student was oppositional and defiant, serious and dangerous behavior was not reported during most of the 2006-2007 and 2007-2008 school years. Yet, without an adequate program in place to educate this disturbed child, Student’s behavior erupted to the extreme in 2008-2009 and 2009-2010. Thus, I cannot give determinative weight to this recent history; it does not prove by a preponderance that the District is providing a FAPE in this realm of need, in the absence of a coherent, well planned, data driven and scientifically based behavior program.

The District also points out that the Parent failed to ever disagree with the District’s evaluations and IEP documents, until she filed her request for due process. I do not find that persuasive regarding the appropriateness of the District’s program for this Student. Any inaction by this Parent does not absolve the District from providing appropriate services. The District was the expert here, not the Parent. The fact that the Parent relied upon the District to exercise its expertise does not prove that its expertise was exercised. The weight of the record here is to the contrary.

Based upon her calm, intellectually generous demeanor during the hearing, and the way she answered questions carefully and without allowing herself to be led beyond her own internal sense of the truth, I found the Parent to be quite credible, and I gave her testimony great weight. There was one issue on which the Parent's memory of events was steadfastly denied by District witnesses, whom I found to be credible also, by and large. This had to do with the District refusing to accept reports from [redacted]. In this conflict, which was not central to my findings, I am inclined to consider this a misunderstanding on both sides, rather than any deliberate falsehood. On the record as a whole, it is more likely that these otherwise very credible witnesses were in honest error about this event, rather than willfully or recklessly embellishing, for either side.

### ESY

The parties offered no evidence concerning the ESY issue; therefore, I find no support in the record for a compensatory education award regarding ESY. I therefore dismiss that allegation.

### SECTION 504 CLAIMS

My conclusions do not vary based upon a section 504 analysis. Therefore, there will be no separate findings or relief awarded.

### COMPENSATORY EDUCATION

I will order the District to provide compensatory education to the Student. However, compensatory education is an equitable remedy, and I must balance the equities in determining the amount of relief. In addition, I must consider what relief would be appropriate to restore the Student to the level of attainment that Student would

have reached if the District had implemented an appropriate educational program from September 2008 to April 2009. See, B.C. v. Penn Manor School District, 906 A.2d 642 (Pa. Cmwlth. 2006) .

Compensatory education is an appropriate remedy where a school district knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only trivial educational benefit, and the district fails to remedy the problem. B.C., 906 A.2d at 648; M.C. v. Central Regional School District, 81 F.3d 389 (3d Cir. 1996). Such an award compensates the child for the period of time of deprivation of special education services, excluding the time reasonably required for a school district to correct the deficiency. Id. Compensatory education is an equitable remedy. Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990). Thus, in fashioning an award, I have taken into consideration the complexity of the behavioral problem with which the District was faced. B.C., 906 A.2d at 650.

I find that the record is very sparse regarding what would be an appropriate award of compensatory education. On balance, it supports an award based upon an hour-for-hour deprivation of educational services, M.C., 81 F.3d supra., and does not support a finding as to the position the Student would have been in if provided with a full year of FAPE, B.C., 906 A.2d supra.

I decline to award compensatory education on a full day basis. There is not a preponderance of evidence supporting such an award. While the District provided evidence of some academic attainment, its data were not conclusive due to the lack of objective, standardized measurements. Nevertheless, the Student did show achievement through Student's grades, and the Parents did not introduce any evidence that the Student

did not succeed in Student's subjects, with the exception of writing, in which clearly Student did not make progress toward meeting the IEP goals.

Rather, for the relevant period, I award compensatory education on the basis of one hour per school day for inappropriate behavior programming, one hour per school day for language arts to compensate for lack of progress in writing, and one hour per week for social skills training that was not provided.

### CONCLUSION

For the reasons set forth above, I find that the District, during the relevant period, failed to evaluate the Student appropriately; failed to provide an appropriate educational placement and program to the Student; and therefore failed to provide a free and appropriate public education to the Student. Any claim by the parties not addressed in this decision and order is denied.

## ORDER

1. During the relevant period from November 24, 2007 through February 23, 2010, the District failed to evaluate the Student appropriately with regard to academic, behavioral, social and emotional needs.
2. During the relevant period from November 24, 2007 through February 23, 2010, the District failed to provide an appropriate educational program and placement to the Student with regard to behavior, writing and social skills, thus denying the Student a free appropriate public education.
3. The District is hereby ordered to provide to the Student an independent educational evaluation at public expense. The evaluation shall be comprehensive and address all of the Student's suspected educational needs with regard to academic achievement, behavioral control, social skills and emotional self regulation. The evaluator may be selected by the Parent but the District will be required to pay only the reasonable cost of the ordered evaluation at its established rate as provided by law, and the selected evaluator must be qualified according to the standards maintained by the District for all evaluators with whom it contracts for comprehensive educational evaluations.
4. The District is hereby ordered to pay compensatory education to the Student in the amount of two hours per school day plus one hour per school week for the relevant period, November 24, 2007 through February 23, 2010, only while school was in session during that period. These hours shall take the form of appropriate developmental, remedial or enriching instruction or services that further the Student's attainment of appropriate behavior control, writing at grade level and/or appropriate social skills. These hours must be in addition to the then-current IEP and may not be used to supplant the IEP. These hours may occur after school, on weekends and/or during the summer months, when convenient for the student and the family, and may be utilized after the Student attains 21 years of age. The cost for these hours shall not exceed the hourly cost of salaries and fringe benefits for qualified professionals providing similar services at the rates commonly paid by the District.
5. Upon receipt of the report of the independent educational evaluation ordered above, the District is hereby ordered to convene a meeting of a properly constituted IEP team, for the purpose of developing an IEP that addresses all of the Student's educational needs, consistent with law.

*William F. Culleton, Jr. Esq.*

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

Dated: July 21, 2010