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PENNSYLVANIA

SPECIAL EDUCATION HEARING OFFICER

DECISION
DUE PROCESS HEARING

Name of Child: V. D.
ODR #6357/05-06 KE

Date of Birth:
Xx/xx/xx

Date of Hearing:
April 24, 2006

OPEN HEARING

Parties to the Hearing:
Parents

Representative:
Pro Se

Director of Special Education
Pittston Area School District
5 Stout Street
Pittston, Pennsylvania 18640

Gina DePietro, Esquire
Sweet, Stevens, Tucker & Katz
331 Butler Avenue, P.O. Box 5069
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Date Transcript Received:

April 29, 2006

Date of Decision:

May 8, 2006

Hearing Officer:

Linda M. Valentini, Psy.D.

Background

Student is a [teenaged] student who resides in the Pittston Area School District (hereinafter District). Parent¹ originally filed for this hearing because they believed that Student's pendent IEP did not afford him a free appropriate public education (FAPE) and/or was not being implemented. However, as the District sought to challenge Student's eligibility, the hearing officer determined that this was the threshold issue, and over the Parent's initial objection added that issue to the matters to be addressed at the hearing.

Issues

1. Is Student a student who is eligible for special education?
2. If Student is a student who is eligible for special education, is his IEP² appropriate and/or being implemented?
3. If Student is a student who is eligible for special education and his IEP is not appropriate and/or not being implemented is he entitled to compensatory education and in what amount during the period from the conclusion of the previous hearing until the date of this decision³?
4. If Student is not currently a student who is eligible for special education, is he due compensatory education for any failure of the District to offer FAPE or to implement his pendent IEP during the period from the conclusion of the previous hearing until the date of this decision?

¹ The term "Parent" is used as the mother acted alone in these proceedings.

² There was some confusion in the record as to which IEP should be implemented. Hearing Officer Myers, on September 2, 2005 in a conference call regarding pendency, ordered that an IEP from the Charter School Student previously attended be implemented. However, in June 2005 at a facilitated IEP meeting the District had produced an IEP that was sent to the Parent in July 2005 without an accompanying NOREP. This IEP was not approved by the Parent at the time. In November 2005 the Parent and the District amended the June 2005 IEP and the Parent then approved the June 2005 IEP and its amendments on November 8, 2005. In his January 26, 2006 decision Hearing Officer Myers determined that he would "not disturb the program and placement determined at the June 2005 facilitated IEP meeting". On the record in the current hearing, the parties agreed that the pendent IEP is found at P-1 combined with S-31 and is the June 2005 IEP with the November 2005 revisions. (NT 66-68; S-35)

³ January 6, 2006 to May 8, 2006, a period of seventeen weeks.

Findings of Fact⁴

1. Student is a [teenaged] 10th grade student residing in the School District. (NT 26)
2. Student received special education services in the District during part of his 8th grade and all of his 9th grade school year. (NT 27)
3. At a June 2005 facilitated IEP meeting an IEP was created. (NT 66-67; P-1⁵)
4. Student's June 2005 IEP provides that "Student will be included in the regular education tenth grade curriculum for all academic areas. Because of his mild disability he will receive modified instruction in the regular classroom with the help of the educational assistants." (P-1)
5. Student's June 2005 IEP provides that "Using The Language Arts textbook, Novels, Prompt and Choice bank" Student will, "define and use vocabulary words, answer factual and inferential questions, sequence events, draw conclusions, write short paragraphs, from the prompt bank moving to longer choice assignments". (P-1)
6. Student's June 2005 IEP provides that he will be prepared to work at the start of class, will prioritize and complete assignments with the special education teacher and the educational aide, will organize each class in tablets and folders, will turn in assignments on time, and will write down assignments in notebooks or organizers. (P-1)
7. The June 2005 IEP provides the following program modifications: modified testing when deemed appropriate (i.e. alternate testing, modified testing, extended time for testing); presenting class work in shorter segments for better understanding; preferential seating near the teacher during instruction; explicit directions, clear and concise; written assignments done with the assistance of the teacher and the educational aide; use of the school's on campus computers for help with assignments; illustrations, charts, or other visual cues as much as possible; give frequent feedback and reassurance. (P-1)

⁴ This is the third due process hearing involving Student who was not always a student in the District. It is instructive, although not determinative for this decision, that Student was found ineligible for special education in 1st grade, and again in 5th grade. Following involvement of an attorney retained by the Parents and an IEE at Parents' expense Student was found eligible in 6th grade. By 7th grade the IEP team determined that he was no longer eligible for special education. The Parents requested a due process hearing, and after another IEE Hearing Officer Lee concluded that Student was not eligible and an appeals panel affirmed that decision. Student was enrolled in the District in 8th grade and the Parents requested an evaluation, along with presenting previous IEE's, without informing the District of the hearing decision or the appeals panel decision. The District provided special education. The Parents disenrolled Student from the District for one semester, placing him in a Charter School, but re-enrolled him in January 2005 following an IEE arranged by the Charter School. The District placed Student in special education. (S-35)

⁵ For the most part the exhibit numbers used in the hearing are referenced, even if both District and Parents had the same document in their exhibit books.

8. The level of placement specified in the June 2005 IEP is “itinerant/learning support”. (P-1)
9. The June 2005 IEP addresses transition broadly, offering the weekly support of the guidance counselor to contact several colleges and/or technical schools for course catalogues and needed information, and offering through the transition specialist the opportunity to explore a variety of employment possibilities through visitation and instructional films shown in the classroom. (P-1)
10. The District was under the impression that the provisions of the IEP were agreed to by the participants in the facilitated IEP meeting in June 2005⁶. (NT 27-28)
11. The Parent did not, however, at the time agree to the IEP as revised in June 2005. (NT 76-77)
12. The District did not issue either an exit Notice of Recommended Educational Placement (NOREP) or a NOREP recommending special education pursuant to the June 2005 IEP meeting. (NT 59-60)
13. During his 10th grade school year (2005-2006) Student was placed in all regular education classes and received no direct specially designed instruction from a special education teacher. (NT 27)
14. As Student was not listed on the PennData form as a student receiving special education, but an exit NOREP could not be located, the District’s new special education director determined that Student should receive an evaluation to see if he was still eligible for special education and issued a Permission to Evaluate form to the Parent. (NT 28-29, 58, 60-65)
15. The Parent initially declined permission for the evaluation, but at a November 8, 2005 Resolution Meeting⁷ where she were represented by counsel the Parent granted permission to evaluate Student. (NT 29-30, 35)
16. On October 24, 2005 District counsel wrote to the Parent’s counsel at the time stating that the District did not believe the June 2005 IEP was appropriate as it “calls for placement in all special education classes” and Student was “currently attending regular education classes and doing well”. This clearly represents confusion as the June 2005 IEP calls for Student to be attending all regular education classes. (S-31)
17. The October 24, 2005 correspondence further states that “the District has offered to implement the supports in the IEP in his regular education classes” and “(i)n

⁶ The District’s current director of special education was an ‘about to be hired employee’ at that time and happened to attend the facilitated IEP meeting. (NT 26)

⁷ The Resolution Meeting was being held prior to the start of a Due Process hearing that preceded the current matter.

- addition, the District would provide Student with additional support in written expression during one of the study hall periods”. The District offered an IEP meeting to discuss these arrangements, which it believed were “acceptable to the Parent”. (S-31)
18. At a November 8, 2005 Resolution Meeting/IEP meeting the IEP team created three measurable annual goals: 1) increase writing fluency from 45 words written per three minutes to 65 words written per three minutes, as measured by probes every two weeks, with a PSSA writing prompt; 2) given a writing prompt or specific topic, use a graphic organizer to develop a topic sentence, supporting details, a transition sentence and concluding sentence, following which write an essay independently; increase to writing five paragraphs with six sentences per paragraph; 3) increase se of correct conventions in a five paragraph essay, by sequencing three events and using a variety of sentence starters, independently. (NT 36; S-31)
 19. At the November 8th Resolution Meeting the parties also agreed that during study hall Student would be provided additional support in written expression by the head of the English Department, who also is responsible for the gifted program, as in the estimation of the District’s special education director he held “thought to be eligible” status and was therefore entitled to services. (NT 33)
 20. At the November 8, 2005 IEP team meeting the Parent approved the June 2005 IEP and the November 8, 2005 revision. (NT 66, 76-77; S-31)
 21. On the record in the current hearing, the parties agreed that the pendent IEP is found at exhibit P-1 combined with S-31 and is the June 2005 IEP with the November 2005 revisions. (NT 66-68; S-35)
 22. The evaluation that the District conducted in November/December 2005 pursuant to the Resolution Meeting included information from a September 2004 independent evaluation by Dr. K who opined that although at that time Student’s test results suggested the presence of a discrepancy between ability and achievement in written expression, there was no reason why Student could not be completely mainstreamed in regular education college preparatory classes.⁸ (NT 51; P-30)
 23. A due process hearing was held and a decision rendered on January 26, 2006. (NT 37-38; S-35)
 24. Although he declined to determine whether or not Student was eligible for special education services, in his January 26, 2006 decision Hearing Officer Myers found as fact that based on the District’s most recent evaluation: a) in class Student was proficient in reading and writing...has good communication skills, works

⁸ Dr. K opined that Student could be classified as a student with an “Other Health Impairment” but did not find that he required specially designed instruction. (NT 51-52)

- independently, is punctual...his work is complete, he exhibits self-control, and he has good peer relationships; b) WISC-IV results indicate high average cognitive abilities, high average verbal comprehension, superior perceptual reasoning, and average working memory and processing speed;⁹ c) WIAT results indicate high average performance in reading, average in written language, and superior in listening comprehension. Some discrepancies between ability and achievement were observed in spelling, written expression and written language, but results were still in the average range. (S-35)
25. On the Test of Written Language, Third Edition (TOWL-3), an instrument expressly designed to assess written language through contrived writing formats and spontaneous writing formats, Student achieved a contrived writing standard score of 100 and a spontaneous writing standard score of 104. His overall writing quotient was 102. All these scores are in the middle of the Average Range. (S-30)
 26. The TOWL-3 assesses the areas of vocabulary, spelling, style, logical sentences, sentence combining, contextual conventions, contextual language, and story construction. (S-30)
 27. The evaluation that the District conducted pursuant to the Resolution Meeting resulted in the conclusion that Student was not eligible for special education services. (NT 37; S-30)
 28. Following the issuance of the Appeals Panel decision, the District held an MDT/IEP team meeting on March 22, 2006 to review Student's progress on the goals that were established during the November 2005 Resolution Meeting. (NT 35-36; S-36)
 29. The Parent was invited to the meeting. The Parent initially said that she required transportation to the meeting. However, she did not attend the meeting although the District arranged for transportation for her, reportedly because she was trying to retain an attorney. (NT 36, 47, 73; P-12)
 30. At the March 22nd meeting the District-based members of the MDT/IEP team determined that Student had met or exceeded all his written expression goals, that no further needs existed for which goals should be set, and that he did not require further special education to make educational progress. (NT 36-37, 49, 69)
 31. At the March 22nd meeting the District considered whether Student's organizational skills were significantly below those of his peers and determined

⁹ In a not uncommon variance, WISC-III scores from June 2001 reflected high average cognitive ability with superior verbal comprehension and high average perceptual organization. On a WISC-IV from January 2004 scores reflected average cognitive ability, high average verbal comprehension and average perceptual reasoning. (S-3, S-8)

- that Student's organizational skills were not at a level requiring specially designed instruction or intervention.¹⁰ (NT 53-55, 69)
32. Pursuant to the March 22nd MDT/IEP meeting, based upon the District's latest evaluation and upon the accumulated progress reports of Student's current teachers, the District issued a Notice of Recommended Educational Placement (NOREP), proposing to exit Student from special education. (NT 36, 72; S-37, S-41, P-10)
 33. The Parent disapproved the NOREP. (NT 37)
 34. Student's grades in the first three quarters of 10th grade are as follows: English II A/A/B, Spanish I C/D/D, World Culture A/A/B, Algebra I B/D/C, Biology B/B/B, Art I A/A/A, Physical Education A/A/A, Health Education A/A/A. The classes are all regular education classes for which Student received no special education instruction and there was no consultation from a special education teacher to the regular education teachers. (P-6)
 35. Student's attendance is down and in some classes his effort seems to be down since the end of the last due process hearing/appeal. (NT 126, 128-129, 153, 172)
 36. During the period in question, pursuant to the Resolution Meeting Student received additional individual instruction in written expression from the head of the English department. He was absent for about half of the scheduled sessions, missing school on seven of the days (seven Mondays) when the service was scheduled. (NT 56, 96, 172-174, 180-181, 186; S-40)
 37. Despite his not receiving all the support in written instruction to which the parties agreed Student's essays demonstrated good skills in thoroughness, sequencing, sentence starters, transition sentences, main idea and supporting details. (NT 56)
 38. In the estimation of the head of the English Department who also serves as the director of Gifted Education, the individual who provided Student with individual instruction in written expression, Student does an "outstanding job" in writing compared to other 10th grade students. (NT 174-175)
 39. The individual writing instructor, individually and in consultation with the regular education English teacher, does not believe that Student requires specially designed instruction in the area of written language. (NT 175)
 40. In the regular education classroom Student performs at an average or better level as compared to his peers without specially designed instruction. (NT 39, 53, 55)

¹⁰ At a Resolution Meeting prior to the instant matter the Parent opined that Student's organizational skills were a barrier to his education. The school-based team members believed otherwise. (NT 55)

41. Student's teachers find that he does not need extra cuing or special directions. They do not find that his organizational skills¹¹ are significantly below those of his same aged peers. They do not believe that he requires specially designed instruction. (NT 39, 54-55)
42. In Spanish class, despite some missing assignments, Student is "very on the ball as far as knowing what's going on in the class". He is very attentive, and asked on one occasion to have his seat moved as he was being distracted by some other students. He grasps Spanish very well. He is sociable and gets along well with the other students. He is articulate and has a good relationship with the teacher. (NT 120-121)
43. The Spanish teacher does not believe Student needs any extra help in order to succeed in the regular education curriculum. (NT 121)
44. In social studies Student is one of the best students in the class. He comes in well prepared and produces better quality work than most students in his class. His critical thinking and analytical skills are above those of most of the other 10th graders. He interacts well with the other students and interacts well with the teacher. He leads the class in class participation. (NT 125, 127)
45. Although he had been completing all his social studies assignments earlier in the year, since the end of the last hearing he has been slacking off and for the first time in a year failed to hand in a report on time. His attendance has slacked off as well, as have his test grades. (NT 126-127)
46. Student's writing in social studies shows "no problem". (NT 128)
47. The social studies teacher reviewed Student's IEP early in the school year. (NT 146)
48. The social studies teacher does not believe that Student requires specially designed instruction. (NT 129, 142-143)
49. In social studies Student does not demonstrate any behavior consistent with ADHD. (NT 130)
50. In English class, which has only sixteen students, Student is talkative (participatory) and always has his hand raised. He does his work, has great ideas and is an analytical thinker. He is a pleasure to have in class. He grasps the concepts in the class. (NT 149)
51. In English class Student's written expression skills are average to above-average. (NT 150)

¹¹ The Spanish teacher noted that Student was not writing down his homework assignments as he had lost his planner and was not getting his homework in. (NT 108-111)

52. There is no problem with homework completion in English class. (NY 152)
53. Student comes prepared to English class. (NT 153)
54. In English class Student's social skills are fine. He has friends in the class. As a partner or in a group project other students are eager to work with Student. (NT 153)
55. The English teacher does not believe that Student requires specially designed instruction. (NT 154, 156)
56. Although Student was previously diagnosed with ADHD he is not exhibiting behaviors consistent with this diagnosis in school and attentional issues are not having a negative impact on his school functioning. (NT 229)
57. Student is not prescribed any medication to treat an ADHD condition. (S-30)
58. Teacher report via BASC-II scores indicates that Student is Average as compared to his peers in the area of Hyperactivity and the area of Attention Problems. (S-30)
59. Parent report via BASC-II scores indicates that Student is Average as compared to his peers in the area of Hyperactivity and At-Risk in the area of Attention Problems. (S-30)
60. During the period in question, no special education teacher was working directly with Student. (NT 95-96)
61. During the period in question, although the regular education teachers were implementing the specially designed instruction they were not doing so under the direction or with the collaboration of a special education teacher. (NT 96)
62. During the period in question, although the head of the English Department was providing Student with individual instruction in written expression, there was no input from a teacher certified in special education. (NT 185)
63. During the period in question the Spanish teacher was not aware that Student had an IEP.¹² (NT 106, 112)

¹² The Spanish teacher does not know what is meant by specially designed instruction and has not received any training from the District in this regard. (NT 116-117)

Discussion and Conclusions of Law

Legal Parameters

Special education programming and placement issues are currently governed by the Individuals with Disabilities Education Improvement Act of 2004 (“IDEIA”), which took effect on July 1, 2005, and amends the Individuals with Disabilities Education Act (“IDEA”). 20 U.S.C. § 1400 *et seq.* (as amended, 2004). The events in the instant matter occurred during a time period spanning the IDEIA and the previous statute, IDEA 1997. There are no substantive differences between the IDEIA and the IDEA in the relevant provisions governing this matter.

In November 2005 the U.S. Supreme Court held that, in an administrative hearing, the burden of persuasion regarding the appropriateness of an offered IEP and program is properly placed upon the party seeking relief. Schaffer v. Weast, 126 S. Ct. 528, 537 (2005). The Third Circuit addressed this matter as well more recently. L.E. v. Ramsey Board of Education, 435 F.3d. 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006). The party bearing the burden of persuasion must prove its case by a preponderance of the evidence. *See* 20 U.S.C. § 1415(i)(2)(C)(iii). In this hearing, although the Parent filed the original hearing request pertaining to appropriateness and implementation of a pendent IEP, the District requested and was permitted to add the threshold issue of eligibility. Thus the District, seeking to change Student’s status from eligible to non-eligible, bore the first burden of persuasion and had to prove by a preponderance of the evidence that Student is not eligible for special education. The Parent, on the other hand, bore the burden of proving that the pendent IEP was inappropriate and/or not being implemented.

With this legal basis in mind, an examination of the issues follows. This hearing officer notes that she found each of the witnesses who testified in this matter to be credible.

Is Student a student who is eligible for special education?

In the hope of forestalling additional future litigation, even though the Parent acting pro se did not raise a Section 504 claim, this hearing officer has decided to examine Student’s eligibility under the IDEIA/PA Chapter 14 and Section 504 of the Rehabilitation Act/PA Chapter 15.

The IDEA/IDEIA and PA Chapter 14

The implementing regulations of the Individuals with Disabilities Education Act (IDEA 1997)¹³ which are found at 34 C.F.R. §300.7 provide the following definitions:

Child with a Disability means a child evaluated in accordance with §§300.530-300.536 as having mental retardation, a hearing impairment including deafness, a speech or language impairment, a visual impairment including blindness, serious emotional disturbance (hereafter referred to as emotional disturbance), an orthopedic impairment, autism, traumatic brain injury, an other health

¹³ The regulations for IDEIA (IDEA 2004) are not yet published.

impairment, a specific learning disability, deaf-blindness, or multiple disabilities, **and who, by reason thereof, needs special education and related services.**
(Emphasis added)

Special Education is defined as specially designed instruction...to meet the unique needs of a child with a disability. **Specially designed instruction means adapting, as appropriate to the needs of an eligible child ...the content, methodology, or delivery of instruction to meet the unique needs of the child that result from the child's disability and to ensure access of the child to the general curriculum so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children.** C.F.R. §300.26 (Emphasis added)

For a child to be identified as a child with a disability, there must be both a disability **and** a need for special education and related services.

This hearing officer finds that the District has met its burden of proving by a preponderance of the evidence that Student is not eligible for special education. The record supports neither a disability nor the need for specially designed instruction. Although on a particular set of test instruments Student showed a discrepancy between ability and achievement in the area of written expression, his achievement in this academic area is nevertheless in the average range as assessed by the standardized instruments. More importantly he has consistently across classes shown the ability to make meaningful educational progress without specially designed instruction in this academic area, and it is noted that the skill of written expression crosses over into nearly all subjects in the curriculum, math being the possible exception. This hearing officer, taking into account the premise that a child's achievement should be gauged in relation to his potential, still does not find that Student has a disability in written expression.¹⁴ Any *relatively* lower, but still average range, standardized test scores he may have obtained in this area during an evaluation¹⁵ are far less probative than his long term, day to day, achievements within the general education curriculum as evaluated by his regular education teachers.

Even if, for the sake of argument, a higher reviewing authority should disagree and find that Student has a disability in written expression, he clearly does not meet the second prong of eligibility for special education; he does not require specially designed instruction.

¹⁴ This hearing officer has read Hearing Officer Lee's August 27, 2003 decision and the subsequent Special Education Appeal No. 1413. Hearing Officer Lee did not resolve the issue of eligibility based on a disability category, but considered "substantial evidence" on the "second element", that is on the need for specially designed instruction. The Appeals Panel "agree(d) with the hearing officer that a definitive determination of whether Student was SLD or OHI (was) not necessary to resolve this issue". (S-1)

¹⁵ The evaluation done by Dr. K in December 2004, frequently referenced by the Parent in her examination of witnesses, suggests that Student possibly may be influenced by a desire to present in a manner that is congruent with the Parent's perceptions.

Section 504 of the Rehabilitation Act and PA Chapter 15

The relevant provision of Section 504 states that:

No otherwise qualified individual with a disability in the United States...shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance...

29 U.S.C. §794(a). An individual with a disability is defined as any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment. 29 U.S.C. § 706(8)(B)(i)-(iii); 34 C.F.R. § 104.3(j)(1). Major life activities include functions such as learning, walking, seeing, hearing, speaking, breathing, and caring for one's self.

Chapter 15 regulations, found at 22 Pa. Code § 15.1 et seq., set out the procedures for implementation of Section 504 in Pennsylvania. Chapter 15 uses the nomenclature "protected handicapped student" instead of individual with a disability.

A school district shall provide each protected handicapped student enrolled in the district, without cost to the student or family, those related aids, services or accommodations which are needed to afford that student equal opportunity to participate in and obtain the benefits of the school program and extracurricular activities without discrimination and to the maximum extent appropriate to the student's abilities.

Section 504/Chapter 15 does not require that a student be in need of specially designed instruction in order to be eligible for protection. Any student with an identified physical or mental disability which substantially limits a major life activity is entitled to protection under Section 504/Chapter 15.

Although the Parent maintains that Student has organizational difficulties, only one teacher noted these. The extent of difficulty that the teacher noted was so minimal (consisting of missing some assignments) as to likely be true of many if not most [teenaged] males. Not having performed a clinical evaluation, this hearing officer cannot definitively rule out a medical disability of a physical or psychiatric nature, but the record fails to support the current presence of any condition that impairs Student's major life activities. Therefore, even if, for the sake of argument, Student has an Other Health Impairment such as ADHD that would qualify him as having a "disability" such condition(s) do(es) not limit the substantial life activity of learning,

Therefore, this hearing officer concludes Student is neither an eligible student under the IDEIA and PA Chapter 14 nor a protected handicapped student under Section 504 and PA Chapter 15 with a disability that substantially limits a major life activity.

If Student is a student who is eligible for special education, is his IEP appropriate and/or being implemented?

As Student is not an eligible student, this issue need not be examined.

If Student is a student who is eligible for special education and his IEP is not appropriate and/or not being implemented is he entitled to compensatory education and in what amount during the period from the conclusion of the previous hearing until the date of this decision?

As Student is not an eligible student, this issue need not be examined.

If Student is not currently a student who is eligible for special education, is he due compensatory education for any failure of the District to offer FAPE or to implement his pendent IEP during the period from the conclusion of the previous hearing until the date of this decision?

Failure to deliver the services contained in an IEP, a document creating a legal entitlement, deprives a student of educational benefit. Deprivation of educational benefit is remediable by the issuance of an order for compensatory education services.

Compensatory education is a remedy designed to provide a student with the services he should have received pursuant to a free appropriate public education (FAPE). When a student has been denied the due process rights or an appropriate educational program that he should have received, compensatory education is an in-kind remedy. [Lester H. v. Gilhool, 916 F. 2d 865 (3d Cir. 1990), cert. denied 499 U.S. 923, 111 S.Ct. 317 (1991)] A child is entitled to compensatory education services if the child is exceptional and in need of services and/or accommodations and if through some action or inaction of the District the child was denied FAPE.

While IEPs are not to be viewed as documents guaranteeing a specific educational outcome, they are documents that guarantee specific services to be provided a student. There is no dispensation to a district of this accountability and responsibility.

Not having been duly exited from special education by virtue of an approved NOREP or a hearing officer decision/appeals panel order, Student maintained his eligibility status during the period in question, that is from January 6, 2006 to May 7, 2006, a period of seventeen weeks. Although this hearing officer has determined that Student is not eligible for special education or for a 504 service plan as of May 7, 2006, the District nevertheless was obligated to implement his pendent IEP until his eligibility terminated.

The record is clear that Student did not receive itinerant special education learning support in the regular education curriculum, either directly from a learning support teacher or educational aide or in the form of input from a special education teacher to the regular education teachers. At least one of the regular education teachers did not know that Student had an IEP. The teacher providing extra support in written expression, although a highly qualified regular education English teacher, did not have the benefit of consultation from a special education teacher. Although the District did monitor Student on his written expression and his organizational goals and objectives, he did not receive special education support to achieve these goals. The fact that Student achieved his goals without direct or indirect special education support contributes to the finding that he does not require special education. Nevertheless, an IEP is an enforceable contract for the provision of services and during the time when Student still held the status of an eligible student the District was obligated to fulfill the contract.

The provision of one to one support in written expression from the head of the English Department who was also the head of Gifted Education was an excellent way of fulfilling the District's obligation to provide support in written expression, although the District failed by not having a special education teacher provide input to the otherwise highly qualified instructor. Although this hearing officer is loath to elevate form over substance, she finds that the District did not fulfill the requirements of the law and will award a small amount of compensatory education. The compensatory education will take the form of six one-hour sessions of individual instruction in written expression for the remainder of this school year. As Student is not a special education eligible student, the instruction should now continue with the teacher who provided the instruction to Student previously, that is the English Department head. Although this hearing officer will not dictate specific content, it would be a functional service to Student if these sessions covered writing college admission essays and elements of the writing portion of the SAT. The District is not required to make up any scheduled sessions Student misses because of his absence from school, although any absence of the teacher must be made up.

The record does not reflect Student's receiving any form of special education support in the area of organization or in the area of transition. Again, during the time that he was still considered eligible, Student was entitled to these services as they were contained in his IEP. This hearing officer estimates that one half-hour per week should have been spent with Student addressing organizational, assignment planning and completion, and effective homework skills. This hearing officer also estimates that approximately one half-hour per week should have been spent on addressing the two areas covered by the transition plan. Accordingly this hearing officer will award seventeen (17) hours of compensatory education to Student. Student appears to have adequate organizational skills. However, as any other high school student he will need to transition to post-secondary education or employment. The hours therefore must be used for endeavors contributing to exploration of future education or employment opportunities. Student has expressed the idea that he would like to write programs for computer games. (NT 122) The hours may be used for such things as the services of a professional college identification/ college admissions consultant, a summer or after school course in computer programming or other area in which Student may have a vocational interest, an

SAT Prep course, etc. These seventeen (17) hours are in addition to the thirty-two (32) hours previously awarded Student to be used for family counseling.

Dicta

The long-standing good intentions and consistently supportive stance of the Parent toward Student are noted and respected. Unlike in other instances of record, this hearing officer did not find the Parent difficult to communicate with, although her anxiety in appearing at the hearing in a pro se capacity was palpable. She was wise to enlist the assistance of two lay advocates and their services are acknowledged and appreciated. It is specifically noted that the Parent more than adequately presented her case during the hearing, and at times engaged in excellent cross examination. Not prevailing on all issues in this matter does not reflect any inadequacy on the Parent's part and the participation of a parent attorney in all likelihood would not have changed the outcome of this decision.

This hearing officer would be remiss if she did not encourage the Parent at this point in Student's educational career to allow the teachers to do their jobs, and to provide Student the space he needs to carry out his duties as a student in regular education. Any condition(s) that he may have had previously or that he may even continue to have is/are not adversely affecting his educational performance. When students require special education they must receive it. Student does not require special education. He should be allowed to enjoy the rest of his high school years as a regular education student, with all the attendant responsibilities to achieve as well as he can, and all the attendant possibilities of occasionally not doing as well as he could have, given that he is an adolescent boy.

The Parent and Student's teachers appeared to have positive regard for each other during the hearing. Clearly, the teachers individually seemed to like and appreciate Student. The Parent communicated to several teachers that Student likes them. (NT 120-121, 145, 187) It would truly be in Student's best interests for the parties to discontinue further litigation and build on the existing positive aspects of the relationships that matter most right now – those between Student and the teachers who are his educators and his role models. It is highly advisable for the sake of Student's continued positive growth and development that he not be subjected to further evaluations, or to the presence of a cloud of ongoing litigation between his school and his Parent. This hearing officer is mindful of the expenditure of time and energy that the Parent has made regarding Student's education to date, and believes that the Parent would do well to allow herself to be freed from the paperwork, computer work, and emotional expense of further litigation. Being an adolescent, Student requires the benign, 'appropriately-close-yet-distanced' oversight of concerned and loving parents. Taking advantage of the previous appeal panel's award of compensatory education in the form of family counseling services may help Student and his Parent function in a manner conducive to his future success and independence.

ORDER

It is hereby ORDERED that:

1. Student is not a student who is eligible for special education under the IDEIA and PA Chapter 14 or for a service agreement under Section 504 and PA Chapter 15.
2. Although Student is not currently a student who is eligible for special education or a 504 service agreement, he is due compensatory education for the failure of the District to implement his pendent IEP during the period from the conclusion of the previous hearing until the date of this decision. The compensatory education will be as follows:
 - a) Six (6) one-hour sessions of individual instruction in written expression for the remainder of this school year. As Student is not a special education eligible student, the instruction may now continue with the teacher who provided the instruction to Student previously, that is the English Department head. The District is not required to make up any scheduled sessions Student misses because of his absence from school, although any absence of the teacher must be made up.
 - b) Seventeen (17) hours that must be used for endeavors contributing to exploration of future education or employment opportunities. The hours may be used for such things as the services of a professional college identification/ college admissions consultant, a summer or after school course in computer programming or other area in which Student may have a vocational interest, an SAT Prep course, etc. These hours are in addition to the thirty-two (32) hours previously awarded Student to be used for family counseling. The Parent is to locate and engage the resource(s) and the District is to pay the invoice(s).

May 8, 2006

Date

Linda M. Valentini, Psy.D.

Linda M. Valentini, Psy.D.

Hearing Officer