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Due Process Hearing

BH (#7600/06-07 AS)  
Date of Birth: xx/xx/xx  
Date of Hearing: June 6 & 7, July 24, 2007  
Closed Hearing

Parties to the Hearing

Transcript  
Completed

Mr. and Mrs.

Parent  
Representative  
Pamela E. Berger, Esq.

July 31, 2007

School District  
Burgettstown Area

Representative  
Barbara A. Rizzo, Esq.

Date of Decision  
August 6, 2007

Hearing Officer  
David Y. K. Lee

## II. BACKGROUND

Student is a xx-years-xx-months old student in the Burgettstown Area School District (hereafter District). Student was evaluated when he was in third grade and subsequently received Speech and Language Support (hereafter S/L). Student was further evaluated at the end of his third grade year due to concerns regarding his academic progress and social adjustment. Learning Support services (hereafter LS) were added to Student's Individualized Education Plan (hereafter IEP) early in his current 2006-2007 fourth grade year. A Behavior Intervention Plan (hereafter BIP) was implemented in late November, 2006. The parents were not satisfied with Student's continuing academic and social difficulties and requested a due process hearing.

## III. FINDINGS OF FACT

1. Student, date of birth xx/xx/xx, is a student in the District. (J. #8 @ 1.)
2. Student was evaluated due to concerns regarding his language processing during the latter part of third grade. (N.T. 147-148. J. #1 & #3.)
3. Student was found to be eligible for S/L in expressive and receptive language, and began receiving direct S/L on April 10, 2006, for 30 minutes two times a week. (N.T. 156-159. J. #4 & J. #5.)
4. An evaluation report (hereafter ER), dated June 13, 2006, did not indicate eligibility<sup>1</sup> but referred to a need for "appropriate classroom accommodations". (J. #6 @ 7.)

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<sup>1</sup> The language of the ER recommendations was vague with regard to eligibility although Student was already receiving S/L. (N.T. 278-279.)

5. The District did not follow-up on the ER recommendations with respect to a service agreement or behavior plan. (N.T. 177-178.)

6. The District received a prescription, dated September 19, 2006, from a physician with the diagnosis of Attention Deficit Hyperactivity Disorder (hereafter ADHD) as well as for “an IEP and Learning Support classes”. (N.T. 180. J. #9.)

7. Although the Multi-disciplinary Team (hereafter MDT) did not reconvene, an IEP, dated September 22, 2006, showed Learning Support (hereafter LS) with annual goals in Reading, Language Arts, and Math for 360 minutes or six hours per week. (N.T. 181. J. #8 @ 13-15, 20.)

8. The existing IEP goals for S/L were attached.<sup>2</sup> (N.T. 168-169. J #8 @ 22-25.)

9. The Notice of Recommended Educational Placement (hereafter NOREP) was approved by signature of the parent dated October 27, 2006.<sup>3</sup> (N.T. 209-210. J. #10.)

10. Mrs. had numerous contacts with the District regarding peer interaction issues and disciplinary incidents. (N.T. 36-59, 95-98. P. #1 - #4.)

11. A due process hearing was requested and assigned to this Hearing Officer on April 25, 2007. (ODR file.)

12. Hearing sessions were held on June 6 and 7, and July 24, 2007.<sup>4</sup>

#### **IV. ISSUES**

1. Did the District fail in its Child Find duties? (N.T. 6.)

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<sup>2</sup> The identification and provision of S/L is not an issue before this Hearing Officer.

<sup>3</sup> It is unclear as to why there was a gap between the IEP and the NOREP.

<sup>4</sup> The due process hearing was initially scheduled for May 30, 2007. It was continued due to scheduling conflict as well as allowing the parties to convene a resolution session on April 27, 2007.

2. Did Student have an appropriate IEP? (N.T. 9.)
3. Was Student subjected to undue harassment? (N.T. 9)

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

### Child Find

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Closing statements were to be submitted in writing by July 31, 2007. (N.T. 508.)

Student attended a “developmental Kindergarten” following his first year in Kindergarten. He was described by the parent as being behind in his development relative to peer interactions. (N.T. 23-25.) Academically, Student’s grades from first grade through fourth grade were consistently in the C range. (S.D. #6.) 34 CFR §300.301(b) states that “...either a parent of a child or a public agency may initiate a request for an initial evaluation to determine if the child is a child with a disability”. There is no documentation before this Hearing Officer of a written request by the parent, for an evaluation of a suspected disability prior to third grade. (N.T. 233-234.) If there was a refusal by the District to evaluate, the parent did not file a due process complaint.<sup>5</sup> During the middle of third grade, consent was given for an evaluation due to concerns in the area of language processing. (N.T. 27. J. #1.) Subsequently toward the end of third grade, Student was further evaluated due to concerns regarding his academic progress. The ER concluded that “...Academically, he is maintaining average grades in the classroom. On formal testing, in a quiet one on one setting, he shows adequate ability with the exception of math reasoning. All other areas, reading decoding and comprehension and math computation are within normal limits...”. (J. #6 @ 6.) The report did not recommend any additional eligibility other than the existing S/L. It did, however, recommend a service agreement due to Student’s attention characteristics. (J. #6 @ 7.) The parent provided signatures to both ERs without any dissenting remarks.

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<sup>5</sup> A parent...may file a due process complaint...relating to the identification, evaluation or educational placement of a child...) 34 CFR §300.507(a)(1).

There is no substantial evidence on record to support the claim of negligence in Child Find duties by the District. The claim is dismissed.

Appropriateness of IEP

The District opined that even though the MDT did not convene as it should have, Student was provided with an appropriate IEP. Therefore, no harm was done and form should not be placed over substance. (N.T. 16. S.D. closing statement @ 4.) This Hearing Officer notes that the District did not act on the recommendations of the ER, dated June 13, 2006, which recommended the provision of services by means of a service agreement as well as a behavior plan. (J. #6 @ 7. F.F. #5.) It is also unclear as to when and if the ER was reviewed, and how it related to the IEP in question. (N.T. 176-178, 288, 300-301.)

The District was provided with a prescription written by [Dr M], M.D., dated September 19, 2006, which includes “Attention Deficit Hyperactivity Disorder, Learning Disability NOS, Borderline Intelligence, and please provide an IEP and Learning Support classes for Student”. (N.T. 179. J. #9.) In response to the prescription, the District added goals in Reading, Language Arts, and Math to Student’s IEP on September 22, 2006. (N.T. 218.) There was no evidence presented to indicate how it was determined that LS was needed in those three areas without specific data to identify learning difficulties. The LS teacher could not have more than two or three days to do so when given the task of writing the IEP. (N.T. 475, 477, 495.) The IEP of September 22, 2006 was therefore created rather hurriedly without the MDT convening to consider how the physician’s prescription would translate into meaningful IEP goals. The District equated the diagnosis of ADHD with the eligibility category of Other Health Impaired (hereafter OHI) and listed generically some modifications mostly in the area of test taking. (N.T. 191, 255, 479-481. J. #8 @ 16.) Baselines regarding off-task behavior were not in evidence in the determination of need and, therefore, in the measure of progress. Student was in the regular fourth grade classroom for all academic subjects, and the regular fourth grade classroom teacher was implementing the IEP goals of 80% accuracy in Reading, Language Arts, and Math. (N.T. 205, 412, 415.) If 80% accuracy is in the B range, then the goals were not reached in the final C grades for fourth grade. (S.D. #6.) It was not disputed that the classroom teacher had good rapport with Student and had an overall system of classroom management. (N.T. 435-440.) It was uncertain, however, if there was a similar degree of familiarity regarding Student’s specific academic skills deficits that needed to be addressed. (N.T.

457-461.) Aside from having tests read and perhaps shortened, Student was instructed as a regular fourth grade student in the regular fourth grade curriculum. (N.T. 413, 492-494.) He did not have any direct instruction on specific academic skills by the special education teacher. (N.T. 491-492.) The ER, dated June 13, 2006, was purportedly referenced when the Reading and Language Arts goals were written. (N.T. 475.) The ER, however, showed standard scores of 99 and 104 respectively for Word Reading and Reading Comprehension. (J. #6 @ 4.) The special education teacher who was given the task of writing an IEP used the indicated performance level of “Basic” on the PSSA as the basis for including Reading and Language Arts. (N.T. 495. J. #8 @ 7.) It is uncertain how a “Basic” level would translate into specific measurable instructional goals.

A. ...I hadn't done the curriculum based assessment on him, but at that time, you could see that he had lower scores in reading. That might be a testing issue, but from what I had at that point, that is where that goal goal came from. (N.T. 495.)

Under present levels of academic achievement, the Grade 4 Math Inventory identified some areas of weakness in math skills. (J. #8 @ 7-8.) The Math goal of “80% accuracy” was identical to that of Reading and Language Arts. (J. #8 @ 15.) Specific goals were not in evidence to address weak areas in Math in order for Student to progress to the next hierarchical level. The Inventory showed that Student was having difficulties, for example, with subtraction with regrouping and across middle zero. The fourth grade Math curriculum, however, was going into multiplication, division, and fractions. (N.T. 422.) The special education teacher, aside from writing the general goal of 80% accuracy, did not participate in Student's Math instruction. (N.T. 494, 496.)

A properly crafted IEP needs to be responsive to the identified needs of the child, to include meaningful and measurable goals, and to indicate how appropriate progress toward the annual goals will be measured.<sup>6</sup> 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.<sup>7</sup> Student's IEP was developed in response to a physician's diagnosis of ADHD without further consideration by the MDT of any data linking his performance to attention variables as well as any further analyses of specific areas of learning difficulties. (N.T. 298-299, 495.) Student's IEP of September 22, 2006, is therefore determined to be inappropriate.

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<sup>6</sup> 34 CFR §300.320. See also Kruelle v. New Castle County School District, 642 F.2d 687 (3d Cir. 1981).

<sup>7</sup> Board of Education v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982). See also Rose v. Chester County Intermediate Unit, 24 IDELR 61 (E.D. Pa. 1996.)

## Behavior Plan and Harassment

The parent claims that Student was harassed by his peers in school. The term “bullied” was used although documented references did not indicate physical bullying or harassment of Student due to his disability. Student, however, apparently was the subject of some teasing by his peers especially in unstructured settings. (N.T. 44-46, 55, 114-117, 315-316, 347-348, 437-439. J. #13.) This Hearing Officer notes that the parent had not observed Student in the school setting during the past two school years.

The parent also did not observe anything unusual when Student was picked up or dropped off at school. (N.T. 133-134.) Although the parent indicated that she would welcome assistance in the home setting from a wrap around program through a community agency, she only mentioned the need for Student to work on his organization skills. (N.T. 136-137.)

In response to the parent's concerns, the District developed a BIP on November 28, 2006, which was revised a few days later on December 1. (N.T. 331-332. J. #12.) The BIP was apparently a product of a meeting during which the parent expressed concerns regarding the incidents in the bathroom and on the play ground. (N.T. 138. P. #1.) The BIP was not developed by the IEP team and did not consider if and how Student's behavior impeded his learning.<sup>8</sup> The BIP was not presented as a revision of the IEP. Furthermore, under the Special Considerations section of the IEP, the notation that behaviors impeded Student's learning was not checked. (J. #8 @ 6.) It is, therefore, also questionable that the BIP was viewed as part of Student's IEP. In any event, a functional behavioral assessment was not performed to ascertain specific antecedents in academic tasks and in the school setting leading to behavioral manifestations. The classroom teacher who had Student for all five academic subjects never found him to break any classroom rules or not follow instructions. (N.T. 435.) The LS teacher also found Student to be cooperative in the small group setting. (N.T. 484.) The meeting leading up to the development of the BIP was described as driven by the parent. (N.T. 331.) The BIP was thus developed without teacher input nor was the school psychologist present. (J. #12 @ 1.) Academic frustration, for example, was noted as an antecedent. It is uncertain as to who it would be ameliorated without information on the specific precipitating academic tasks or skills. (J. #12 @ 2-3.)

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<sup>8</sup> See 34 CFR §300.324(a)(2)(i).

It is the determination of this Hearing Officer that the BIP was not properly developed and was inappropriate. The playground and bathroom issues seem to involve other students in overall school management. (N.T. 196-200, 443-445. J. #12 @ 5-6 & J. 13.) It is not unequivocal that Student was only at the receiving end of negative peer interactions. The letter signed by Student's medical providers alluding to Student being bullied in school was in fact written by the parent. (N.T. 400, 406-407. P. #7.) The allegation that Student was harassed in violation of Sec. 504 of the Rehabilitation Act of 1973 and 22 PA Code §15 is not substantiated and is, thus, dismissed.

#### Compensatory Education

The IDEA requires the states to provide a “free appropriate public education” to all students who qualify for special education services. The FAPE requirement is satisfied when a district provides a child with personalized services to permit the child to benefit from his instruction. A school district’s failure to offer an IEP reasonably calculated to enable the child to receive meaningful educational benefit will be deemed a denial of FAPE.<sup>9</sup> Compensatory education is an equitable and in-kind remedy when there is a denial of FAPE as the result of an inappropriate IEP. The amount of compensatory education owed is to equal to the period of deprivation minus the time reasonably required for the District to rectify the problem.<sup>10</sup> There were 180 school days during 2006-2007 school year.<sup>11</sup> The amount of special instruction was 300 minutes per week or 60 minutes (1 hr.) per day.<sup>12</sup> In accordance with 34 CFR §300.302(c)(1)(i) and §300.323(c)(1), the District has 60 calendar days to complete an ER and 30 calendar days subsequently to implement an IEP. The number of days that Student was denied FAPE is therefore 180 minus the number of school days during the first 90 calendar days (the reasonable time the District would have had to rectify the problem) on the 2006-2007 school calendar. At one hour per day, the total compensatory education time owed is therefore approximated to be  $(180 - 64) = 116$

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<sup>9</sup> Board of Education v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982).

<sup>10</sup> Lester H. v. Gilhool, 916 F. 2d 865 (3d Cir. 1990), cert. denied, 499 U.S. 923, 111 S. Ct. 317 (1991). See also M.C. ex rel. J.C. v. Central Regional School District, 81 F.3d 389, 108 (3d Cir. 1996).

<sup>11</sup> The District had the information of the ER to provide services, such as a service agreement and/or BIP, at the beginning of the school year.

<sup>12</sup> According to the IEP, Student was receiving LS for 300 minutes per week (360 total minutes per week minus 60 minutes for S/L). (J. #8 @ 20.)

hours.<sup>13</sup> The exact number of compensatory education hours, at one hour per school day, is to be calculated by the parties using the 2006-2007 school calendar. The compensatory education hours are to be in addition to Student's school day and may not be used to replace needed services in school. The parent may select the form of the compensatory education as long as it provides for the further development of Student's academic and/or social skills. The costs to the District in the provision of the compensatory education may not exceed a special education teacher's salary (including fringe benefits) for the same period in which Student was denied FAPE.

In dicta, the MDT-IEP process should proceed without delay in order for Student to start the 2007-2008 school year with a properly crafted IEP. The MDT should have new data available to determine Student's eligibility and special education needs. Should the MDT find that further assessment or data gathering, such as Occupational Therapy evaluation, behavioral or curriculum based assessment data, are needed, the IEP should proceed with as much known data as possible, and the IEP can be revised at a later date.

Therefore, it is hereby ordered:

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<sup>13</sup> During the first 90 calendar days of the 2006-2007 school year, it is roughly estimated that there were 64 school days after subtracting weekends but not considering holidays.

## VI. ORDER

The LEA is ordered to take the following action:

1. The District is to provide Student with compensatory education services of approximately 116 hours. The exact amount is to be determined by the parties using the 2006-2007 school calendar, and the parents may select the form of compensatory education consistent with the discussion above.

August 6, 2007

Date

David Y. K. Lee

David Y. K. Lee  
Hearing Office