This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

PENNSYLVANIA

SPECIAL EDUCATION HEARING OFFICER

DECISION

Student:	J.C.
Date of Birth:	[redacted]
Hearing Dates:	February 2, 2010, March 16, 2010, and April 19, 2010
ODR File No.:	00387-0910AS
School District:	Lakeland Area School District

CLOSED HEARING

Parties:	Representatives:
Lakeland School District	Jane M. Williams, Esquire Sweet, Stevens, Katz & Williams LLP 331 E. Butler Avenue New Britain, PA 18901
Parent[s]	Drew Christian, Esquire Attorney at Law 801 Monroe Avenue Scranton, PA 18510

Date Record Closed:	May 15, 2010
Decision Date:	May 28, 2010
Hearing Officer:	Gloria M. Satriale, Esquire

INTRODUCTION AND PROCEDURAL HISTORY

This case concerns the provision of a Free Appropriate Public Education (hereinafter "FAPE") for Student, an eligible elementary school-aged student, who resides with the mother in the Lakeland School District (hereinafter "District") and who has been identified as being emotionally disturbed. In the Complaint, the claims asserted against the District were premised upon alleged violations by the District of the Individuals with Disabilities Education Act (hereinafter "IDEA"), 20 U.S.C. §§ 1400 *et seq.,* and Section 504 of the Rehabilitation Act (hereinafter "Section 504"), 29 U.S.C. § 794 asserting that the District violated the provisions of IDEA ensuring that a child be educated in the Least Restrictive Environment possible (hereinafter "LRE") as well as in failing to ensure meaningful educational progress through the development and implementation of an appropriate Individualized Educational Plan (hereinafter "IEP") and program. For these violations the parent requests compensatory education from the period from October 22, 2007 through September 16, 2009.[1]

The District initially took the position that it conferred its status as the Local Education Agency (hereinafter "LEA") and the commensurate responsibility of a FAPE to the [local] Intermediate Unit (hereinafter "IU"). The IU contracted with [a private residential rehabilitative institution, hereinafter PRRI] . The IU administered and funded PRRI in which the Student was placed by the District for Student's educational program for the period in question by the District. Upon oral Motion of the Parent for a determination that the District was, in fact the responsible LEA in the matter, it was

[1] The parties stipulated that during the period from August 20, 2008 – October 21, 2008, the Student did not reside within the District and therefore this period of time is excluded from the relief sought. (NT483).

determined that the District was the LEA responsible to ensure [NT239-261] the provision of a FAPE.[2]

Alternatively and under the circumstances of the determination by this Hearing Officer that the school district is LEA responsible for the provision of a FAPE, the District takes the further position that the placement in which the program was developed and ultimately delivered to the student was in a private therapeutic mental health facility over which the District exercised no control, ownership, involvement or decision-making abilities; and; furthermore, the partial hospitalization program in which the Student received Student's education for the 2007-2008 and 2008-2009 school years (PRRI) is akin to medical facility and medical placement, for which neither a tuition reimbursement nor compensatory education award should be entered. The District also asserts at no time prior to the commencement of the instant action did the District "know or should have known" that the program crafted and ultimately delivered to the Student was, if so found to be, inappropriate.

Due process concerning the current matter was filed with the Office for Dispute Resolution on October 22, 2009. The resolution meeting was held on October 27, 2009. A due process hearing was conducted in this matter on February 2, 2010, March 16, 2010, and April 19, 2010.

a. Exhibits were submitted and accepted on behalf of the Hearing Officer as follows:

   HO-1, HO-2

b. Exhibits were submitted and accepted on behalf of the Parent as follows:

[2] Following arguments by counsel on the record outlining their position relative to a LEA's responsibility for provision of a FAPE and that this responsibility may/may not be delegated or contracted and supporting legal authority being submitted in writing, for the reasons more fully set forth herein, the parties were notified on April 15, 2010 that the School District was determined to be the LEA responsible to ensure the provision of a FAPE. The District's objection to this ruling is noted.

P-2, P-4, P-5, P-6, P-7, P-8, P-10, P-12, P-14

c. Exhibits were submitted and accepted on behalf of the District as follows:

SD-1, SD-2, SD-3, SD-4, SD-5, SD-6, SD-7, SD-8, SD-9, SD-10, SD-11, SD-12, SD-13, SD-14, SD-15, SD-16, SD-17, SD-18, SD-23, SD-25, S-26,

d. Exhibits were submitted and accepted jointly on behalf of both parties as follows:

J-1

For the reasons that follow, the Parent's claim for compensatory education for the period from October 22, 2007 through September 16, 2009, excluding the period between August 20, 2008 through October 21, 2008, and less a reasonable period that the District could have rectified the situation, for each day school was in session is **GRANTED**. The Parent claims under Section 504 are **DENIED**.

ISSUES

The issues presented at this hearing included the following:

1. Whether the Student is entitled to compensatory education for the District's failure to provide an appropriate educational program which was reasonably calculated to confer meaningful educational benefit.

2. Whether the District violated the Student's protections under Section 504 of the Rehabilitation Act.

FINDINGS OF FACT

1. The Student was born on [redacted] and has, at all relative times here to a school aged resident within the District with the exception of August 20, 2008 through October 21, 2008, during which Student resided with the father within another school district. [NT 483].

2. The student enrolled to attend kindergarten on August 29, 2007, at which time the Parent requested the District perform a multidisciplinary evaluation. [NT 373].

3. The District issued Permission to Evaluate on August 29, 2007 which was signed by the Parent. [S-1]

4. On September 26, 2007 an initial Evaluation Report was issued by the District determining the Student to be eligible under the category of Emotionally Disturbed and recommending a referral to an outside agency. [S-3]

5. The District referred the Student to PRRI. [NT46, 68, 181 P-2, P-7]

6. PRRI is a mental health agency, designated by the Commonwealth of Pennsylvania a PRRI, which offers many types of services including, a residential program and a day partial hospitalization program. [NT 41] The partial hospitalization program is in a standalone facility. [NT 106].

7. In connection with its day partial hospitalization treatment program, PRRI provides educational services in accordance with state and federal laws as well as clinical therapeutic activities as deemed appropriate by a multidisciplinary team. [SD-25, SD-26]

8. For the 2007-2008 and 2008-2009 school years, the IU contracted with PRRI to provide educational programming and therapeutic services for students who are committed to and served by PRRI's receipt of state education funds as PRRI, in such a manner as will best serve the individual needs of said students through creation of a binding contractual relationship between the parties to this agreement. [SD-25].

9. The Student is not a student who has been placed in PRRI pursuant to a proceeding under 42 Pa.C.S Ch. 63. [NT46, 68, 181 P-2, P-7]

10. During the 2007-2008 and 2008-2009 school years, day students within the PRRI partial hospitalization day program, were administered by and funded through the IU in accordance with PRRI status regardless of their status as day students, district residents, or committed individuals in accordance with 24 P.S. § 9-964.1. [NT 321, SD-25, SD- 26].

11. Responsibility for payment for students placed in PRRI by school districts lies with the school district and not intermediate unit pursuant to the contract between PRRI and the intermediate unit. [NT347-353, SD-25, SD-26]

12. The District does not have a contract with PRRI for the provision of services. [NT 345-351]

13. The District did not fund the provision of services to the Student. [NT345-351]

14. PRRI improperly received payment for the cost of the Student's programming from the IU rather than the District. [NT324]

15. The Parent was assisted and accompanied by District school psychologist and special education coordinator in the transportation to the PRRI. [NT46, 47]

16. The School District provided information and input to the intake and referral process initiated by PRRI. [NT48,181, 391]

17. The Parent did not have money to pay for gas, nor car for transportation in order to attend the intake at PRRI. [NT. 426]

18. [Redacted name], intake specialist in the admissions department of PRRI from June of 1997 until November of 2009 [NT 170-171], conducted the initial intake and after completing that process, to include the bio-psychosocial report and skeleton framework for the comprehensive treatment plan, presented the child and family to the psychiatrist for a determination as to whether the student qualified for any program needs or admittance to a program offered by PRRI. [NT171]

19. Following the intake, the Student was evaluated by the psychiatrist of PRRI, and that psychiatrist recommended for that Student be admitted and received into the day partial hospitalization program with emotional support services within the PRRI educational program. [NT. 394]

20. The Parent must provide agreement to and consent for the student to be admitted into PRRI. [NT 394]

21. The District placed the Student in PRRI. A Notice of Recommended Educational Placement (hereinafter "NOREP") was issued on November 20, 2007. [NT 50, P-5]

22. The District placed the Student in PRRI. NOREP was issued on November 13, 2008. [NT 68, P-7]

23. The Student attended school and was enrolled in PRRI during the 2007-2008 and 2008-2009 school years. [NT 68, 123, 329, S-7, P-7]

24. The District did not convene nor participate in an IEP at anytime during the 2007-2008 and 2008-2009 school years. [NT 66]

25. The District did not convene nor participate in an interagency team meeting at anytime during the 2007-2008 and 2008-2009 school years [NT 56].

26. It is typical practice for PRRI to invite local school districts to attend IEP meetings for students at PRRI. [NT330]

27. PRRI convened an IEP meeting on November 20, 2007. [P-5]

28. IEP's developed by PRRI did not contain baseline information, and were not objective or measurable for either academic, social or behavioral goals [NT 62, 70-79, 331, 368, P-5, P-10, P-12]

29. IEP's developed by PRRI did not make provisions for integration with non-disabled peers. [NT 335]

30. IEP's developed by PRRI for the 2007-2008 school year did not contain any academic goals. [NT 62, 365, 366, P-5]

31. PRRI did not collect data. [NT370]

32. PRRI did not conduct Functional Behavior Assessments during the 2007-2008 school year. [NT 368-369, P-9]

33. The Student did not make meaningful educational progress. [NT 363, 364, 366-369, 444, 448, 449, S-8, P-7, P-9, P-10, P-11, P-12, S-21]

34. Only the parent or legal guardian has the ability to remove a child from one of the therapeutic programs at PRRI, and may do so outside of, or against, the advice of the clinical team or doctor. [NT 188, 319]

35. A school district cannot remove a child from a PRRI program. [NT 319]

36. The Parent against medical advice removed the Student from the PRRI on June 18, 2008, [NT 188], readmitted Student into the PRRI on or about November, 2008, and thereafter removed Student from the PRRI against medical advice on September 10, 2009. [J-1, SD-18, NT 188]

37. The student was returned to the District following withdraw from PRRI and has demonstrated improvement in academic and behavioral domains, but remains in need of positive behavior supports and academic remediation.

DISCUSSION AND CONCLUSION OF LAW

School District as Responsible Party

IDEA requires that a state receiving federal education funding provide a FAPE to disabled children. 20 U.S.C. § 1412(a)(1). In Pennsylvania, the Commonwealth has delegated the responsibility for the provision of a FAPE to its local school districts.

School districts provide a FAPE by designing and administering a program of individualized instruction that is set forth in an IEP. 20 U.S.C. § 1414(d).

Both Federal 34 C.F.R§ 300.28 and State Law 22 Pa Code Chapter 15.1, 15.3 and 15.7 irrefutably place the responsibility to provide and to ensure the provision of a FAPE with respect to a student's educational program upon a school district. This obligation cannot be delegated or contracted away. The District crafts two arguments in support of its position that once the student was enrolled in PRRI, the District is absolved from its responsibilities under IDEA

1. The IU is the responsible entity pursuant to 24 P.S§9-964.1
2. PRRI is primarily a therapeutic mental health treatment facility.

Central to the analysis and disposition of both of the above arguments offered by the School District in support of its proposition that the District is not the responsible party to provide and ensure a FAPE to this student is the finding of fact that the District itself placed the Student at PRRI. Notwithstanding the Districts lack of participation in the IEP process or its assertions during testimony of their belief that the IU, under its contractual relationship with PRRI was the responsible party, the District first told the family of PRRI, the District physically accompanied the family to the intake and, most importantly the District issued and signed a NOREP regarding placement. Notwithstanding the Districts continual assertions that the District had no information regarding the student from the time of referral, initial documents all referenced the School District and testimony from PRRI witnesses established usual practices and procedures were to involve the referring Districts in the educational programming of students placed in their program. It is notable that the IU did not attend meetings on behalf of this student either. Neither entity seemed to exercise any supervisory role regarding this student whatsoever.

While the facts do not support the Districts position, neither does the law. The District relies on 24 P.S§9-964 to delegate its responsibility of a FAPE to the IU. This statute states that:

> (a) Intermediate units and local school districts shall have the power to contract with private residential rehabilitative institutions for educational

> services to be provided to children as part of any rehabilitative program required in conjunction with the placement of a child in any such institution or in a day treatment program of that institution pursuant to a proceeding under 42 Pa.C.S. Ch. 63 (relating to juvenile matters)

24 P.S. §9-964.1.

As this rule is parsed, none of the elements specific to the statute are met. The Student did not attend the PRRI on a "residential basis." Additionally, the student was not ordered to attend the private program in question "pursuant to a proceeding under 42 Pa.C.S. Ch 63," (also known as "the Juvenile Act."). The District based their analysis in applying the statute that, during the time the Student was at PRRI, PRRI, as a PRRI, billed for and administered their day students in the same fashion, under the statute as they handled their residential students who were properly covered by the statute. As such, this statute is irrelevant to the School District's obligation to provide FAPE. Because the Student was improperly characterized under the PRRI system does not extinguish the Districts responsibility. Because the District operated under the assumption and understanding that the IU would take supervisory and programmatic responsibility for this Student does not absolve them of liability for their mistake.

A more analogues situation may be in instances where an ("IU"), can be responsible for the provision of FAPE as a contracted provider for a school district. In situations where school districts hire intermediate units provide services, courts have held that:

> The law in Pennsylvania provides that the primary responsibility for identifying exceptional children and developing appropriate **educational** programs to meet their needs lies with the **local school district**. 22 Pa. Code § 13.11(b). *When, however, the **school district** cannot provide an appropriate program effectively and efficiently, it uses the services of the intermediate unit.* Intermediate units such as Defendant CIU20 are charged with the duty to "provide for the proper education and training for all exceptional children who are not enrolled in classes or **schools** maintained and operated by **school district** or who are not otherwise provided for." 24 P.S. § 13-1372(4)….(Emphasis added).

> Accordingly, the **school district** and the U can be jointly **responsible** for the FAPE of Plaintiff, and the settlement agreement does not preclude the instant action. Therefore, IU's objection with regard to these issues will be overruled.
>
> B[redacted].C[redacted]. v. Colonial Intermediate Unit 20, 443 F. Supp. 2d 659; 2006 U.S. Dist. LEXIS 54273 (MDPA, 2006).

In the present matter, the school district did not offer evidence that the District could not provide for the Student. The closest evidence presented was the testimony that it was highly unusual to have a request to evaluate on the very first day of school and testimony that the Student was "completely" out of control. This testimony does not rise to the conclusion that the district could not efficiently provide for the Student or that this somehow caused the District to use the "services of the intermediate unit." Even where there is evidence that the District could not provide for its own student, in B.C., where the school district used the IU to provide services in C, both were found "jointly responsible for FAPE." Therefore, at most, liability would be jointly between both entities as opposed to being the sole responsibility of the IU. Again, the District's argument does not result in absolving the District of its responsibility for providing a FAPE.

Finally, the District asserts that the consideration of the provision of a FAPE is compromised here because of the medical placement of this student within a facility over which this District has no ownership, control, management, oversight. In support of this proposition, the District cites *Mary T. v. School District, 575 F.3d 235 (3d. Cir. 2009)* Mary T is distinguishable on several grounds. First and foremost, this decision finds that the District placed this Student in PRRI. Once the District has entrusted one of its own into the hands of others, the law is clear and well settled that the District remains responsible for the provision of a FAPE. Secondly, Mary T sought reimbursement of tuition paid. The requisite analysis differs from that where compensatory education is the remedy. The result in *Mary T* is not controlling here on either a factual or precedential basis.

Burden of Proof and the Right to a Free Appropriate Public Education

As the moving party, the student bears the burden of proof in this proceeding. The United States Supreme Court has held that the burden of proof in an administrative hearing challenging a special education provision of a FAPE is upon the party seeking relief, whether that party is the disabled child or the school district. *Schaffer v.Weast_U.S, 126 S. Ct.528, 163L. Ed.2d 387 (2005). In Re J.L and the Ambridge Area School District, Special Education Opinion No. 1763 (2006)*.

Because a student's parents seek relief in this administrative hearing, they bear the burden of proof in this matter, i.e., they must ensure that the evidence in the record proves each of the elements of their case. The United States Supreme Court has also indicated that, if the evidence produced by the parties is completely balanced, or in equipoise, then the party seeking relief (i.e., student's parents) must lose because the party seeking relief bears the burden of persuasion. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005); *L.E. v Ramsey Board of Education, 435 F. 2d 384 (3d Cir.2006).* Of course, where the evidence is not in equipoise, one party has produced more persuasive evidence than the other party.

Having been found eligible for special education, the student is entitled by federal law, the Individuals with Disabilities Education Act (IDEA) as reauthorized by Congress December 2004, 20 U.S.C. *Section 600 et seq.* and Pennsylvania Special Education Regulations at 22 PA Code § 14 *et seq.* to receive a Free Appropriate Public Education (FAPE). FAPE is defined in part as: individualized to meet the educational or early intervention needs of the student; reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress; provided in conformity with an Individualized Educational Program (IEP).

As previously noted, a student's special education program must be reasonably calculated to enable the child to receive meaningful educational benefit at the time that it was developed. *Board of Education v. Rowley, 458 U.S. 176, 102 S. Ct. 3034 (1982); Rose by Rose v. Chester County Intermediate Unit, 24 IDELR 61 (E.D. PA. 1996)*. The IEP must be likely to produce progress, not regression or trivial educational advancement *Board of Educ. v. Diamond, 808 F.2d 987 (3d Cir. 1986].*

Polk v. Central Susquehanna IU #16, 853 F.2d 171, 183 (3rd Cir. 1988), cert. denied, 488 U.S. 1030 (1989), citing *Board of Education v. Diamond, 808 F.2d 987 (3rd Cir. 1986)* held that "*Rowley* makes it perfectly clear that the Act requires a plan of instruction under which educational *progress* is likely." (Emphasis in the original). The IEP must afford the child with special needs an education that would confer meaningful benefit. The court in *Polk* held that educational benefit "must be gauged in relation to the child's potential." This was reiterated in later decisions that held that meaningful educational benefit must relate to the child's potential. *See T.R. v. Kingwood Township Board of Education, 205 F.3d 572 (3rd Cir. 2000); Ridgewood Bd. of Education v. N.E., 172 F.3d 238 (3rd Cir. 1999); S.H. v. Newark, 336 F.3d 260 (3rd Cir. 2003.)* (District must show that its proposed IEP will provide a child with meaningful educational benefit). The appropriateness of an IEP must be based upon information available at the time a district offers it; subsequently obtained information cannot be considered in judging whether an IEP is appropriate. *Delaware County Intermediate Unit v. Martin K., 831 F. Supp. 1206 (E.D. Pa. 1993); Adams v. State of Oregon, 195 F.3d 1141 (9th Cir. 1999); Rose supra.*

The IEP for each child with a disability must include a statement of the child's present levels of educational performance; a statement of measurable annual goals, including benchmarks or short-term objectives, related to meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum and meeting the child's other educational needs that result from the child's disability; a statement of the special education and related services and supplementary aids and services to be provided to the child...and a statement of the program modifications or supports for school personnel that will be provided for the child to advance appropriately toward attaining the annual goals (and) to be involved and progress in the general curriculum...and to be educated and participate with other children with disabilities and nondisabled children; an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class... CFR §300.347(a)(1) through (4)

A parent who believes that a school has failed to provide a FAPE may request a hearing, commonly known as a due process hearing, to seek relief from the school

district for its failure to provide a FAPE. 34 C.F.R. § 300.507. In Pennsylvania, the hearing is conducted by a Hearing Officer. *Carlisle Area Sch. v. Scott P.,* 62 F.3d 520, 527 (3d Cir.1995).

The Parent cites Office for Dispute Resolution, Spec. Ed. Hearing Officer Decision 9044, December 9, 2008, wherein it was held:

> *I further find that Student's 2007-2008 partial hospitalization IEP was inappropriate. It contains only two goals that were never modified or even revisited during the entire school year. Further, although the partial hospitalization program is intended to blend the educational and therapeutic components of Student's school day. Student's IEP and mental health treatment plans were so separate and distinct that Student's IU teacher did not even know what were Student's mental health treatment goals. Finally, despite the fact that this is an emotional support IEP, it lacks objective, direct measures or data-based reports of the frequencies, duration, location or other dimensional reporting of Student's problematic behaviors. 20 U.S.C. §1414(d)(1)(A); Pardini v. Allegheny Intermediate Unit, 420 F.3d 181 (3d Cir. 2005); Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171 (3d Cir. 1988) Thus I find that the 2007-2008 IEP is a denial of FAPE because it was not reasonably calculated to provide the Student with a meaningful opportunity to receive educational benefit. It's goals were inappropriate, it was not coordinated with other aspects of Student's partial hospitalization program, and it lacks appropriate baseline data.*
>
> *I further find FAPE denial in the implementation of Student's IEP. There are no data-based analyses of rule infractions, nor is there evidence of systematic analyses of the effectiveness of the behavior plan that was implemented. M.G. v Abington School District, Special Education Opinion No. 1913 (2008). There were no FBAs analyzing Student's behaviors during that school year. And whether it was out of nonchalance or hopelessness, Student eventually stopped expressing a desire to attend the more inclusive specials classes as Student's partial hospitalization program became progressively more restrictive with greater supervision and increased therapy. In any event, Student was never included in any activities with non-disabled peers. For these reasons, I conclude that the educational services provided to Student during the 2007-2008 school year were inappropriate and a denial of FAPE. [Citations to due process hearing notes of testimony and exhibits omitted].*
>
> Office for Dispute Resolution, Spec. Ed. Hearing Officer Decision 9044, December 9, 2008.

The substantive and procedural violations in Decision 9044 are directly on point to the circumstances faced here.

Compensatory Education as a Remedy

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 the student is receiving only trivial educational benefit, and the district fails to remedy the problem.

The period of compensatory education granted should be equal to the period of deprivation, excluding the period of time reasonably required for the district to act accordingly. *Ridgewood Board of Education v. M.E. ex.rel. M.E., 172 F.3d 238 (3d Cir.1999); M.C. v. Central Regional School District, 81 F. 3d 389 (3rd Cir. 1996).*

However a technical violation alone does not entitle a student to compensatory education. A mere procedural glitch or technical violation of the IEP is insufficient. A violation must amount to a substantive effect on the child's ability to receive FAPE in order to hold the district responsible for any procedural glitches--such as the instant issue, outlined above, regarding the wholly inadequate drafting and implementation of the IEP. The numerous violations here in, not one but several, IEP's in all domain areas: social, academic and behavioral impeded the provision of a FAPE and caused a depravation of educational benefit.

20 U.S.C. 1415(f)(3)(E)(ii), 34 C.F.R. 300.513(2) provides:

> (2) In matters alleging a procedural violation, a Hearing Officer may find that a
>
> child did not receive FAPE only if the procedural inadequacies —
>
> (i) Impeded the child's right to a FAPE;
>
> (ii) (ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or
>
> (iii) Caused a deprivation of educational benefit.

The violations in the instant case are qualitative and quantities. The numerous technical violations – failure to include *any* academic goals at all in the IEP initially, goals that were included in the IEP were not objective or measurable; behavior goals for which no data was collected or analyzed, a complete absence of progress monitoring - amount to a wholesale failure of the IEP. The documents themselves were the best evidence of the wholly inappropriate IEP and program; however this evidence was further supported by the Students complete stagnation and failure to

improve from the levels of performance Student entered PRRI with[3]. Additionally, PRRI witnesses admitted a lack of clinical and academic competency during the time the Student attended their program. The evidence regarding the inability of PRRI to appropriately program for this student is uncontroverted in the record.

The District asserts however that even if liability for failure of a FAPE is found, relief in the form of compensatory education is equitable in nature and therefore cannot be granted in that the student made adequate educational progress and that there exists no deprivation requiring remediation. I disagree. At the time of the filing of this compliant and the student's re-entry into the home school and district Student was entering the second grade. Student's current levels of academic performance, however, remained at the kindergarten level. Student struggles with both vowel and consonant sounds and still does not recognize all letters on the alphabet nor can Student count independently past the number five. (S-21) Likewise behaviorally, Student continues to require 1:1 support throughout the school day in order to successfully participate academically and socially in the educational program. Disruptive behavior including injury to self or others continues to be a concern. (S-21)

Accordingly, I will follow *M.C. Supra* to calculate an award of compensatory education based upon the amount of service that should have been provided less a deduction for the time it reasonably should have taken the District to remedy the depravation. The District signed a NOREP placing the Student at PRRI on December 5, 2007. On January 24, 2008 the District received records from PRRI including the IEP, a modifications and specialty instructing page. [NT105, SD-10] From receipt of these records, the District should have been aware of the inadequacies of the program being given to its Student and of the noncompliant IEP. Thirty days would constitute a reasonable period for the District to effectuate rectification of the program, bringing the operative date to February 24, 2008[4].

[3] Present levels of performance noted on the initial IEP entering Kindergarten at PRRI and the IEP for second grade upon the Students re-entry into the District are not clinically significant.

[4] It is noted that argument regarding the operative dates for the commencement of any award of compensatory education were not made. It is further noted that the date of the signature of the Superintendent of the District on the NOREP could equally be used, however in light of the circumstances/equities, the date on which the District was in actual receipt of the paperwork detailing the program in issue has been used.

Compensatory Education is awarded up to a maximum of 423 school days[5]: the period from February 24, 2008 through September 16, 2009 which equals 497 school days less the stipulated exclusion period of August 20, 2008 through October 21, 2008 of 44 school days and less 30 days allotted to allow the District to rectify inadequacies.

However specific areas of remediation necessary services/interventions and anticipated length of service to be employed in order to remedy the Student's current significant delays and social and behavioral challenges should be evaluated and determined by the current team taking into account progress to date. Whatever the determination of the team, the amount of compensatory education to be applied would not exceed the 423 school days as determined above.

Since it is determined that the educational program provided by PRRI violated the Student's right to a FAPE the District is responsible to provide compensatory education to remedy the consequent deprivation of education.

CREDIBITLTY OF WITNESSES

Hearing Officers are empowered to judge the credibility of witnesses, weigh evidence and, accordingly, render a decision incorporating findings of fact, discussion and conclusions of law. The decision should be based solely upon the substantial evidence presented at the hearing. Spec. Educ. Op. No. 1528 (11/1/04), quoting 22 PA Code, Sec. 14.162(f). See also, *Carlisle Area School District v. Scott P., 62 F.3d 520, 524 (3rd Cir. 1995), cert. denied, 517 U.S. 1135 (1996).* Quite often, testimony or documentary evidence conflicts; which is to be expected as, had the parties been in full accord, there would have been no need for a hearing. Thus, part of the responsibility of the Hearing Officer is to assign weight to the testimony and documentary evidence concerning a child's special education experience.

Hearing Officers have the plenary responsibility to make "express qualitative determinations regarding the relative credibility and persuasiveness of the witness". *Blount v. Lancaster-Lebanon Intermediate Unit, 2003 LEXIZ 21639 at *28 (2003).* This

[5] The exact calculation of the number of days awarded may need to be reduced in order to account for days on which the District was not in session due to scheduled holidays or unexpected closures.

is a particularly important function, as in many cases the Hearing Officer level is the only forum in which the witness will be appearing in person.

Documentary evidence corroborated the testimony of the witnesses from PRRI tending to add to the genuine and sincere delivery of the testimony given and ultimately bolstering the credibility of the statements made. School District witnesses found themselves in the unenviable position of attempting to support a position that revealed itself as series of misunderstandings. Notwithstanding clear indications to the contrary, District witnesses held fast to their position. Documentary evidence tended to contradict testimony by the District.

CONCLUSION

As the Student was not committed to a residential treatment facility under 42 Pa. C.S Ch. 63, but was placed in a partial hospitalization program specially designed to address both academic and behavioral needs, the District remained responsible for the provision of a FAPE to the student notwithstanding its misunderstanding that the responsibility for educational programming would be borne by the IU. Further, the program developed and implemented by PRRI violated the Students right to a FAPE in that the IEP lacked objective and measurable goals in wither behavioral, social or academic domains, lacked sufficient progress monitoring, was not reasonably calculated to confer meaningful benefit and in fact failed to result in meaningful progress for the Student. The Student was denied a FAPE and is entitled to compensatory education in a form and intensity, as formulated by the IEP team, to accommodate the depravation. The record lacked sufficient facts to substantiate a finding of a violation under Section 504.

ORDER

1. The Student was denied a FAPE from October 22, 2007 through September 16, 2009 less August 20, 2008 through October 21, 2008.
2. The Student is awarded compensatory education not to exceed 423 days.
3. The IEP team is directed to convene, within 10 days, of this order to determine a plan of remediation and the consequent appropriate application of the award of compensatory education in all academic, social and behavioral domains.

4. The Students rights under Section 504 of the Rehabilitation Act were not violated.

Dated: May 30, 2010

Gloria M. Satriale

Gloria M. Satriale, Esq.,
Special Education Hearing Officer