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Pennsylvania Special Education Hearing Officer

DECISION

Child's Name: NB

Date of Birth: XX/XX/XX

Dates of Hearing: October 6, October 27, November 17, 2008

CLOSED HEARING

ODR No. 9044/08-09 AS

Parties to the Hearing:

Sam Sica, Director of Special Services
Abington Heights School District
200 East Grove Street
Clarks Summit, PA 18411-1776

Drew Christian, Esq.
Attorney-at-Law
801 Monroe Avenue
Scranton, PA 18510

Sarah Davis, Esq.
Sweet, Stevens, Katz & Williams
P.O. Box 5069
331 Butler Avenue
New Britain, PA 18901

Representative:

Date Record Closed:

November 26, 2008

Date of Decision:

December 9, 2008

Hearing Officer:

Daniel J. Myers

INTRODUCTION AND PROCEDURAL HISTORY

Student (Student) ¹ is an early elementary school age child with severe behavioral problems. After providing instructional support team services in kindergarten, and relying upon mental health agency TSS services in a transitional first grade (T-1) class, the Abington Heights School District (School District) evaluated Student at the end of the transitional first grade class and recommended that Student spend first grade in a partial hospitalization program. When the partial hospitalization program determined that Student could not return for the following school year, the School District recommended that Student attend an approved private school. Student's parent unilaterally chose, instead, to enroll Student into a private school and filed for due process. For the reasons described below, I conclude that the School District violated its child find obligations, issued an inappropriate evaluation report (ER) and individualized education program (IEP), and owes compensatory education to Student for the 2006-2007 and 2007-2008 school years.

ISSUES

- Should the School District have identified Student as a child with a disability and provided FAPE to Student during the 2006-2007 school year?
- Did the School District provide FAPE to Student during the 2007-2008 school year?

¹ All future references to Student will be generic and gender-neutral. These impersonal references to Student are not intended to be disrespectful but rather to respect his/her privacy.

- Where Student's parent unilaterally placed Student in a private school for the 2008-2009 school year and does not claim tuition reimbursement, may Student nevertheless claim compensatory education for alleged 2008-2009 FAPE denial?

FINDINGS OF FACT

1. Student, who lives within the School District and whose date of birth is XX/XX/XX is an early elementary school age child with average intellectual ability, average academic achievement, and severe behavioral problems. (N.T. Vol.II, p.85; P3) ²
2. Student's behaviors in school and daycare, both in class and on the playground, historically include lack of attention and focus, disruptiveness, unwelcome touching and poking of peers, defiance, tantrums and aggression. (N.T. Vol.I, p. 100-102, 133, 163, 178; N.T. Vol.II, p.25, 43, 55, 81; P2, p.4) Student's teachers have found that Student responds positively to praise, positive attention, and special jobs offered for good behavior. (N.T. Vol.I, p.181-182, 196; N.T. Vol.III, p.217) Student's behaviors are not as severe at home as at school. (N.T. Vol.II, p.14, 25, 81-82) Typically, Student's problematic behaviors in school are milder in the fall and deteriorate progressively through the school year. (N.T. Vol.I, p.177, 183, 196, 200; N.T. Vol.II, p.41-42)
3. On October 31, 2005, Student's kindergarten teacher requested assistance from the school's instructional support team (IST) in dealing with Student's behaviors. (N.T. Vol.I, p.30, 32, 158; P2; SD3; SD4) The IST team recommended

² References to "P", "S" and "HO" are to the Parent, School District and Hearing Officer Exhibits, respectively. References to "N.T. Vol. #, p.#" are to the volume and page number of the transcripts of the three hearing sessions conducted in this case.

- behavioral interventions, parent-teacher communications, and a social skills group session. Although these interventions reduced Student's disruptive behaviors initially, Student's behaviors regressed after the 30 day IST assistance ended. (N.T. Vol.I, p.32, 158-165, 173; N.T. Vol.II, p.91-92, 98; P2, p.4; SD4)
4. During Student's 2005-2006 kindergarten school year, as well as during most of Student's 2006-2007 T-1 school year, School District officials did not recommend a special education evaluation because they did not see sufficient patterns of poor behavior to warrant such an evaluation. (N.T. Vol.II, p.85-86, 98) In April 2006 of Student's kindergarten school year, however, a local mental health agency did see sufficient aggressive, disrespectful and defiant behaviors to warrant therapeutic support services (TSS) for both school and daycare, and mobile therapy and behavior specialist consultation for home. (P3,p.1; N.T. Vol.II, p.9-10, 34) Although Student's TSS and teachers met together with Student's parent in quarterly progress meetings, the TSS did not share the treatment plan and goals with School District personnel. (N.T. Vol.I, p.188; N.T. Vol.II, p.69, 97)
 5. Upon completion of kindergarten, the parties agreed to place Student in a transitional first grade (T-1) class, rather than a typical first grade class. (N.T. Vol.I, p.29, 87, 169; N.T. Vol.II, p.33; SD5; SD6) The T-1 class serves as a bridge to all-day school for children of at least average intelligence whose immaturity suggests they are not yet ready for first grade. (N.T. Vol.II, p. 86-87) The T-1 class size is smaller than regular first grade, with only 16 children, it has more staff (a teacher and an aide), and the pace of instruction is slower and more

- relaxed than a typical first grade. (N.T. Vol.I, p.195, 200; N.T. Vol.II, p. 87, 91)
- No children in Student's T-1 class had IEPs. (N.T. Vol.I, p.185)
6. Student's T-1 experience was similar to kindergarten. (N.T. Vol.I, p.169; N.T. Vol. II, p.96) Because School District policy does not permit formal IST assistance to any student more than once in an academic career, Student's T-1 teacher relied upon Student's TSS to provide extra structure and to keep Student focused and on task. (N.T. Vol.I, p.170-172, 192; N.T. Vol.II, p.93, 97; P4, p2-3; SD8,p.2-3) By February or March 2007, however, Student's teacher saw the other children in the T-1 class beginning to settle down and get used to the routine, whereas Student's behavioral problems escalated. (N.T. Vol.I, p. 196-198, 200, 204;N.T. Vol.II, p.97)
7. In spring 2007, both the School District and the local mental health agency conducted separate evaluations of Student. (N.T. Vol.I, p.88; P3; P5; P6; SD7)
- a. The mental health agency's psychologist diagnosed ADHD, reactive attachment disorder, and a rule-out obsessive compulsive disorder. (P3,p.7; SD7,p.7) He recommended continued TSS services at school and behavioral support consultation and mobile therapy services for home. The focus at home was to be on anger, frustration tolerance and impulse control, while the school-based focus was to limit impulsive behaviors, improve on-task behavior and general compliance in the classroom setting, limit rough play with peers, reduce aggressiveness, and work on appropriate space boundaries with peers. (P3, p.8; SD7,p8) The evaluator

also referred Student for consideration of stimulant medication to help with ADHD symptoms. (P3, p.8; SD7,p.8)

- b. The School District evaluation consisted of a functional behavioral assessment (FBA) in May 2007 and a psychological evaluation report (ER) in June 2007. The FBA hypothesized that Student's behaviors may serve the functions of: escape to avoid unpleasant or challenging tasks or demands; acquisition of tangible objects; and/or attention from peers and adults. (P5, p.3; SD9, p.3; P7; SD12; N.T. Vol.III, p.204) The ER found no learning disability, but very serious externalized and internalized problem behaviors indicative of a serious emotional disturbance. The externalized behaviors (conduct difficulties, aggression and poor social interaction) were consistent with a conduct disorder and ADHD, and the internalized problem behaviors suggested depression and anxiety. (P7, p.11; SD14,p.14; N.T. Vol.III, p.209) The ER concluded that Student was in need of an emotional support program and recommended placement in a partial hospitalization special education program. (P7, p.11; SD14,p.16)
8. The School District's psychologist hoped that the partial hospitalization program would conduct psychiatric and medical evaluations as well as treat Student's internalized anxiety and depression. (N.T. Vol.III, p. 225-230) She also believed that Student would benefit from the family therapy that a partial hospitalization program would offer. (N.T. Vol.III, p.218) School District personnel believed that, because Student's behaviors were so severe, even with the supplementary services provided in kindergarten and T-1, the therapeutic component of a partial

hospitalization program might be beneficial. (N.T. Vol.I, p.66-67) The School District does not have an emotional support program for its elementary school students, and it does not offer any elementary-age emotional support services other than a partial hospitalization program. (N.T. Vol.I, p.54, 89; N.T. Vol.II, p.12, 108-109)

9. For Student's 2007-2008 1st grade school year, the parties agreed that Student would attend a partial hospitalization program (Program) operated by a local, tri-county mental health agency in a public school building in a different school district. (P12; SD17; N.T. Vol.I, p.30, 31,92, 95, 97-98, 124, 135-136, 150; N.T. Vol.III, p.124-126) The Program provides daily mental health treatment to children with moderate to serious emotional difficulties, including individual, group and family therapy, with regular supervision by a psychiatrist. (N.T. Vol.I, p.72; N.T. Vol.III, p.137, 242) The 10-12 children in the Program also receive daily special education instruction from an Intermediate Unit (IU) teacher and teaching assistant. (N.T. Vol.I, p.124)
10. Upon admission, the Program's supervising psychiatrist diagnosed disruptive behavior disorder, with a rule out ADHD diagnosis that was eventually ruled in. (N.T. Vol.III, p.240) The treatment plan implemented by the Program's mental health agency was not placed into the record by the parties. (N.T. Vol.III, p.154) The IU teacher did not know what were Student's mental health treatment goals. (N.T. Vol.I, p.104) Program personnel testified, however, that the mental health treatment plan contained two goals - to address impulsivity and anger management. (N.T. Vol.III, p.152, 155-156, 166, 193-194) The impulsivity goal

was to get Student to follow directions on the first prompt 3 out of 5 times. (N.T. Vol.III, p.155, 180-183) The Program's mental health personnel met every 15 work days to review Student's progress toward treatment plan goals; Student's teacher did not attend those 15 day meetings. Student's teacher did meet with Program personnel weekly for general discussions regarding all of the children in the classroom, and at the end of each day to debrief regarding what worked and did not work that day. (N.T. Vol.I, p.124; N.T. Vol.III, p. 136, 139, 156, 164-165) Because Student never mastered the first impulsivity goal, Student's treatment plan was never modified during the entire school year. (N.T. Vol.I, p.123; N.T. Vol.III, p.155, 184-186)

11. The IU teacher implemented an IEP that was separate and distinct from Student's mental health treatment plan. (P9; SD16; N.T. Vol.I, p.98; N.T. Vol.III, p.166) The IEP had two goals -- to remain on task and to keep hands and feet to self. (N.T. Vol.I, p.98-99; N.T. Vol.III, p.151; P9,p.7; P11,p.7-8; SD16,p.6,11) In addition, the IU teacher daily implemented the Program's 18-goal classroom-wide behavior plan. (N.T. Vol.I, p.103, 141; P10; P11,p.13-16,18-22; SD16,p.12-21; SD18) The IU teacher did not take baseline information regarding Student's behavior, regulation of emotion, or peer interaction. (N.T. Vol.I, p.128) The IEP goals were never changed during the school year. (N.T. Vol.I, p.125, 140)
12. The IU teacher and Program personnel attempted numerous behavioral interventions with Student over the school year, some of which were temporarily effective, but none of which resulted in sustained improved behaviors. (N.T. Vol.III, p. 135, 161, 172) Strategies included both overt and covert verbal

redirection (N.T. Vol.III, p.138), rearranging Student's seating (N.T. Vol.III, p.138), placing a carrel around Student's desk to reduce distractions (N.T. Vol.III, p. 138), anger management through counting and orange squeezing (N.T. Vol.III, p.138), increasing Student's mental health therapy time, and asking for the support of Student's parent for home strategies. (N.T. Vol.I, p.142-143; N.T. Vol.III, p. 138-139) There is no record in this case of the success/failure rates of any of the particular interventions attempted. (N.T. Vol.I, p.112; N.T. Vol.III, p.175-176)

13. The Program is located in a public school building in order to facilitate inclusion opportunities, and the IU teacher believes Student would have liked to have gone to inclusive specials classes. (N.T. Vol.I, p.151) Student was never included in any activities with non-disabled peers. (N.T. Vol.I, p.129-130) This is because Program personnel believed that, until Student mastered at least the first treatment plan goal and demonstrated more appropriate behavior in the structured partial hospitalization classroom setting, inclusion in less structured settings would be premature and would set Student up for failure. (P17,p.3; SD25,p.3; N.T. Vol.III, p.158) In fact, because Student's behavior deteriorated, rather than improved, over the school year, Student's partial hospitalization classroom became progressively more restrictive for Student, with greater supervision and increased therapy. (N.T. Vol.III, p.157, 160, 162) Eventually, Student stopped expressing a desire to attend the more inclusive specials classes. (N.T. Vol.I, p.151-152) By the end of the school year, Student's IU teacher reported that Student did not appear to be making progress in the program. (P17; SD24)

14. While the School District's psychologist had hoped originally that the partial hospitalization program would treat Student's internalized anxiety and depression. (N.T. Vol.III, p. 225-230) the Program's psychiatrist did not diagnose depression, and therefore the Program did not treat Student for depression. (N.T. Vol.III, p.233, 256-257) Although the Program psychiatrist never knew of the School District psychologist's concerns regarding anxiety and depression, the psychiatrist testified at the due process hearing that, because depression and anxiety are symptoms of untreated ADHD anyway, he would have required that the ADHD be treated with medication first before any other treatments would be considered for depression or anxiety. (N.T. Vol.III, p. 276-277) The Program's psychiatrist was aware of the earlier mental health agency's diagnosis of reactive attachment disorder (RAD), but the psychiatrist did not accept this diagnosis because, although RAD can exhibit symptoms such as Student's lack of empathy and annoying "in your face" behaviors, the cause of RAD is neglect, abuse or abandonment, and these were not noted in Student's history. (N.T. Vol.III, p.258)
15. By mid-April 2008, Student was not responding to program interventions, the Program's psychiatrist concluded that Student's behaviors could not be addressed successfully until Student's ADHD symptoms were treated with medication, and Student's parent would not consent to medication. (N.T. Vol.III, p.139-140, 245, 260, 262, 264, 268) Thus, the Program concluded that Student could no longer remain at the Program because Student had not benefited from any of the Program's strategies short of medication. (N.T. Vol.I, p.82; N.T. Vol.III, p.135,

250; P17,p.3-4; SD25,p.3) The Program recommended a more restrictive program and placement. (N.T. Vol.I, p.60)

16. The Program does not perform FBAs, and the IU teacher did not consider requesting an FBA. (N.T. Vol.I, p.107; N.T. Vol.III, p. 195, 201)
17. At the end of the 2007-2008 school year, the School District offered to send Student to an approved private school (APS) for the upcoming 2008-2009 school year. APS provides a center-based partial hospitalization program (as opposed to the school-based Program). (N.T. Vol.I, p.62-63, 83, 86; N.T. Vol.II, p.21)
18. On July 2, 2008, Student’s parent rejected this offer, requested a due process hearing, and unilaterally enrolled Student into 2nd grade at a private school. (N.T. Vol.I, p.29, 83-85; N.T. Vol.II, p.22)
19. A proposed September 19, 2008 IEP meeting was eventually conducted in October 2008, at which meeting the School District offered an IEP to be implemented at the APS. (N.T. Vol.I, p.85; N.T. Vol.II, p.23; SD32)
20. On October 6, October 27, November 17, 2008, I conducted a due process hearing in this matter. During that hearing, Student’s parent withdrew her claim for tuition reimbursement for the 2008-2009 school year, claiming that Student is entitled to compensatory education for the 2008-2009 school year. (Vol.I,p.153-156) In addition to the admission of Hearing Officer Exhibit 1, the following exhibits were introduced and either admitted or not admitted into the record as follows (N.T. Vol.III, p. 282, 284):

Ex. #	Not Submitted	Admitted Without Objection	Withdrawn	Ex. #	Not Submitted	Admitted Without Objection	Withdrawn
P1	✓			SD1	✓		
P2		✓		SD2		✓	
P3		✓		SD3		✓	
P4		✓		SD4		✓	

Ex. #	Not Submitted	Admitted Without Objection	Withdrawn	Ex. #	Not Submitted	Admitted Without Objection	Withdrawn
P5		✓		SD5		✓	
P6		✓		SD6		✓	
P7			✓	SD7		✓	
P8			✓	SD8		✓	
P9		✓		SD9		✓	
P10		✓		SD10		✓	
P11		✓		SD11		✓	
P12		✓		SD12		✓	
P13	✓			SD13		✓	
P14	✓			SD14		✓	
P15	✓			SD15		✓	
P16	✓			SD16		✓	
P17		✓		SD17		✓	
				SD18		✓	
				SD19		✓	
				SD20		✓	
				SD21		✓	
				SD22		✓	
				SD21		✓	
				SD22		✓	
				SD23	✓		
				SD24		✓	
				SD25		✓	
				SD26		✓	
				SD27		✓	
				SD28		✓	
				SD29		✓	
				SD30		✓	
				SD31		✓	
				SD32		✓	

DISCUSSION AND CONCLUSIONS OF LAW

The core of the Individuals with Disabilities Education Improvement Act (IDEIA) is that a FAPE must be made available to all children with disabilities. 20 U.S.C. §1412(a)(1)(A); Board of Education v. Rowley, 458 U.S. 176 (1982) This begins with an affirmative school district duty to identify, locate and evaluate all children residing within its boundaries who are in need of special education and related services. 20 U.S.C. § 1412(a)(3); 34 C.F.R. §300.111 Behavioral concerns do not automatically trigger a school district’s Child Find obligation for a special education evaluation, particularly in light of the broad range of maturation and expectations for children in the early years of education. D.K. v. Abington School District, Special Education Opinion No. 1900 (2008) School districts are obligated, however, to evaluate disabled children

within a reasonable time after school officials are on notice of behavior that is likely to indicate a disability. W.B. v. Matula, 67 F.3d 484 (3d Cir. 1995); O.F. ex rel. N.S. v. Chester Upland School District, 246 F.Supp. 409 (E.D. Pa. 2002)

Commonwealth of Pennsylvania regulations have always required school districts to screen for children with disabilities. 22 Pa. Code §§14.121, 14.122³ For students with behavioral concerns the regulations also have always required that school districts' early intervening services include a systematic observation of the student's behavior in the classroom or area in which the student is displaying difficulty. 22 Pa. Code §14.122(c)(2) Prior to June 28, 2008, state regulations provided that, if screening activities produced little or no improvement within 60 school days after initiation, the student must be referred for evaluation. 22 Pa. Code §14.122(d)

In conducting the evaluation, the school district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child that may assist in determining not only whether the child is a child with a disability, but also the content of the child's IEP, including information related to enabling the child to be involved in and progress in the general education curriculum. 34 CFR §300.304(b) The evaluation also must be sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified. 34 CFR §300.304(b)(c)(6)

After evaluation, a student's IEP becomes the main vehicle for the provision of a FAPE. Honig v. Doe, 484 U.S. 305 (1988); S.H. v. State-Operated Sch. Dist. of Newark,

³ Chapter 14 of the state regulations was revised on June 28, 2008. (38 Pa.B. 3573)

336 F.3d 260 (3d Cir. 2003); Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520 (3d Cir. 1995) The IEP must point toward the child's actual educational needs by including summaries of the child's abilities and present levels of educational performance, outlines of measurable educational goals, specifications for educational services to be provided, and appropriate evaluation procedures and schedules for determining whether instructional objectives are being achieved. 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) For an IEP to be appropriate, it must offer a child progress in all relevant domains, including behavioral, social and emotional. M.C. v. Central Reg'1 Sch. Dist., 81 F.3d 389 (3d Cir. 1996) A school district's failure to meet these requirements may constitute a denial of a FAPE.

The burden of proof in an administrative hearing alleging a FAPE denial is upon the party seeking relief. Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005); L.E. v. Ramsey Bd. Of Educ., 435 F.3d 384 (3d Cir. 2006); In Re a Student in the Ambridge Area School District, Special Education Opinion No. 1763 (2006) In this case, Student bears the burden of proof because Student alleges that the School District failed to identify Student as a child with a disability during the 2006-2007 T-1 school year, and denied FAPE for both the 2007-2008 partial hospitalization school year as well as for the current 2008-2009 school year.

With regard to child find, Student's kindergarten teacher requested, on October 31, 2005, IST assistance in dealing with Student's behaviors. (N.T. Vol.I, p.30, 32, 158; P2; SD3; SD4) Although these interventions reduced Student's disruptive behaviors initially, Student's behaviors regressed after the 30 day IST assistance ended. (N.T. Vol.I,

p.32, 158-165, 173; N.T. Vol.II, p.91-92, 98; P2, p.4; SD4) As noted above, state regulations in effect at the time required that, under these circumstances, the student be referred for evaluation within 60 school days after screening activities produce little or no improvement. 22 Pa. Code §14.122(d) I conclude that the 60 school days within which the School District should have referred Student for evaluation would have concluded by March 31, 2006. I base this conclusion upon the facts that IST began on or about October 31, 2005, and produced little or no improvement after they ended on or about November 31, 2005. Indeed, in April 2006 of Student's kindergarten school year, a local mental health agency did see sufficient aggressive, disrespectful and defiant behaviors to warrant TSS services for school, and the T-1 teacher subsequently relied upon Student's TSS to provide extra structure and to keep Student focused and on task. (N.T. Vol.I, p.170-172, 192; N.T. Vol.II, p.93, 97; P4, p2-3; SD8,p.2-3) From these facts I conclude that the School District violated its child find obligation by failing to have referred Student for evaluation by March 31, 2006 (60 school days after the IST screening activities produced little or no improvement.)

In fact, the School District waited another year after March 31, 2006 before evaluating Student, which may explain why Student's T-1 experience was similar to kindergarten. (N.T. Vol.I, p.169; N.T. Vol. II, p.96) The School District argues that it reasonably attributed Student's behaviors to immaturity and it reasonably believed that Student's behaviors would improve as Student got older. (N.T. Vol.II, p.85-86, 98) Admittedly, behavioral concerns do not automatically trigger a school district's Child Find obligation, particularly in light of the broad range of maturation and expectations for children in the early years of education. D.K. v. Abington School District, Special

Education Opinion No. 1900 (2008) In this case, however, Student's T-1 teacher relied upon Student's TSS to provide extra structure and to keep Student focused and on task; and this was because, at least in part, School District policy did not permit formal IST assistance to any student more than once in an academic career. (N.T. Vol.I, p.170-172, 192; N.T. Vol.II, p.93, 97; P4; SD8) When I view the evidence in the record as a whole, including the facts that the TI teacher relied upon the outside TSS services throughout 2006-2007, as well as the fact that School District behavior was motivated not solely by programmatic considerations but also by administrative policy considerations, I conclude that the record does not support the District's argument that it was justified in waiting until spring 2007 before evaluating Student.

Once the referral for evaluation was made, the School District conducted its FBA in May 2007 and issued its ER in June 2007. (P5, p.3; SD9, p.3; P7; SD12; N.T. Vol.III, p.204) I find, however, that the June 2007 evaluation failed to evaluate the Student in all areas of suspected disability, as required by the IDEA. 34 C.F.R. §300.304(b), (c) The ER appropriately noted both externalized behaviors (conduct difficulties, aggression and poor social interaction), as well as internalized problem behaviors suggesting depression and anxiety. (P7, p.11; SD14,p.14; N.T. Vol.III, p.209) Rather than perform further follow-up assessments, however, the School District's psychologist hoped that a partial hospitalization program would conduct the hoped-for evaluations as well as treat Student's internalized problems. (N.T. Vol.III, p. 225-230) As it turns out, the Program's psychiatrist was unaware of the School District psychologist's concerns regarding anxiety and depression, and he may not have authorized treatment for them anyway. (N.T. Vol.III, p.233, 256-257, 276-277) I conclude that, by hoping that the Program would

assess Student's suspected internalized problem behaviors rather than assessing these behaviors itself, the School District's ER was not sufficiently comprehensive to identify all of Student's special education and related services needs. 34 CFR §300.304(b)(c)(6)

I also note that there was no genuine assessment of Student's ability to be involved in and progress in the general education curriculum. 34 CFR §300.304(b) This may have been because the School District does not have an emotional support program for its elementary school students, and it does not offer any elementary-age emotional support services other than a partial hospitalization program. (N.T. Vol.I, p.54, 66-67, 89; N.T. Vol.II, p.12, 108-109) The ER's recommendation of a partial hospitalization program appears to have been influenced more by the School District's limited emotional support options than by any actual assessment of Student's ability to participate in a less restrictive educational environment with appropriate supports and services,. (N.T. Vol.I, p.66-67) Thus, I conclude that the ER fails to meet regulatory requirements because it does not appropriately evaluate Student's capacity to be involved in and progress in a general education curriculum.

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. (N.T. Vol.I, p.98-99, 125, 140; N.T. Vol.III, p.151; P9,p.7; P11,p.7-8; SD16,p.6,11) Further, although the partial hospitalization program is intended to blend the educational and therapeutic components of Student's school day (N.T. Vol.I, p.66-67), Student's IEP and mental health treatment plans were so separate and distinct (P9; SD16; N.T. Vol.I, p.98; N.T. Vol.III, p.166) that Student's IU teacher did not even know what were Student's mental health treatment goals. (N.T. Vol.I, p.104) 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, (what rules, and under what circumstances were rules violated), 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. (N.T. Vol.I, p.107; N.T. Vol.III, p. 195, 201) 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. (N.T. Vol.I, p.151-152; N.T. Vol.III, p.157, 160, 162) In any event, Student was never included in any activities with non-disabled peers. (N.T. Vol.I, p.129-130) 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.

Compensatory education may be awarded for the period of time that a school district deprives an eligible student of FAPE, with an offset for the period of time reasonably needed to discover and remedy the deficiencies in the school district's services to the student. 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); R.M. v. Pocono Mountain School District, Special Education Opinion 1714 (2006); F.M. v. North Penn School District, Special Education Opinion 1503A (2006)

In this case, Student entered the T-1 classroom with a TSS and having already received IST services the year before. At that point, i.e., the beginning of the 2006-2007 T-1 school year, Student was denied FAPE because Student already should have been identified as a child with a disability. I will award compensatory education beginning with the first day of the 2006-2007 T-1 school year. As described above, even after Student was evaluated, the ER, IEP and subsequent school year were inappropriate denials of FAPE. Thus, Student's compensatory education award will also include the entire 2007-2008 partial hospitalization school year. Because it is clear from the record that Student's unidentified problem behaviors affected Student's entire educational day, I will award full school days (five hours per day) of compensatory education. See D.H. v. Kiski School District, Special Education Opinion 1672 (2005) I will reduce that award with an offset of the sixty school day evaluation period that existed in the regulations at that time.

Student also claims that children with disabilities are entitled to compensatory education even if their parents withdraw their request for tuition reimbursement, citing the following footnote in Sinan L. v. School District of Philadelphia, 2007 U.S. District

Lexis 47665 (E.D. Pa, July 2, 2007), aff'd Sinan L. v. School District of Philadelphia,
Docket No. 07-3258 (3rd Cir., 9/24/2008):

The Plaintiffs also ask the Court to award compensatory education in the event it determines tuition reimbursement to be an inappropriate remedy. Compensatory education is an appropriate remedy when a school district has failed to provide a FAPE to a student under the first prong of the Burlington-Carter test in order to replace lost educational services to the student resulting from the district's failure. See P.G. v. S. York County Sch. Dist., No. 04-2221, 2006 WL 3042966, at *2 n.5 (M.D. Pa. Oct. 24, 2006). Because the Court determines that the District provided Sinan with a FAPE, compensatory education would not be an appropriate remedy here.

Student cites this footnote 11 for the proposition that, where a student has been denied FAPE and cannot recover tuition reimbursement because the unilateral private placement also is not appropriate, that student still may receive compensatory education for the school district's FAPE denial. I note, however, that the student in Sinan L was provided FAPE in the first place and this is such a significant factor that I believe it warrants a different interpretation of footnote 11. Rather than rendering a legal conclusion on a particular issue of law, as Student's counsel suggests, I believe footnote 11 was merely explaining why, in that particular case, the Court did not even have to rule on Student's compensatory education claim in the first place. The Court was not saying that compensatory education is an appropriate alternative remedy to tuition reimbursement, but rather that the school district's provision of FAPE precludes any remedy, whether compensatory education or tuition reimbursement.

On the same issue, the School District refers to Marissa F. v. William Penn School District, 2005 WL 230738 (E.D.Pa., Sept. 20, 2005), which concluded that it would be inequitable to award compensatory education to that student because she was simply rephrasing her parent's unsuccessful tuition reimbursement claim. The Third

Circuit affirmed the district court's denial of the compensatory education claim, noting that cases awarding compensatory education involve "egregious circumstances or flagrant failure to comply with IDEA," and this was not such a case. F. v. William Penn, Docket No. 05-4490 (3rd Cir., 9/27/2006) Neither the district court nor the Third Circuit appear to be addressing squarely the question of whether a student is entitled to compensatory education when that student's parent withdraws her request for tuition reimbursement.

I believe the Appeals Panels have addressed this issue squarely, however, and they have held that only tuition reimbursement, and not compensatory education is available as a remedy for FAPE denial when a student is unilaterally enrolled in a private school. L.V. v. Colonial School District, Special Education Opinion No. 1786 (2006); J. D. v. Colonial School District, Special Education Opinion No. 1120 (2001) Accordingly, I will not award compensatory education for the current 2008-2008 school year because Student is unilaterally enrolled in a private school.

CONCLUSION

The School District violated its child find obligation by failing to have referred Student for evaluation by March 31, 2006. Thus, the School District denied FAPE to Student during the subsequent 2006-2007 school year while Student remained unidentified and inappropriately served without an IEP. Once Student was evaluated, the ER was not sufficiently comprehensive to identify all of Student's special education and related services needs because it failed to ensure assessment of suspected internalized problem behaviors, and it failed to evaluate Student's capacity to be involved in and progress in a general education curriculum if the School District were to make available a range of supplementary supports and services. The 2007-2008 IEP is a denial of FAPE

because its goals were inappropriate, it was not coordinated with other aspects of Student's partial hospitalization program, and it lacks appropriate base line data. Implementation of Student's program also denied FAPE because there were no data-based analyses of rule infractions, there were no systematic analyses of the effectiveness of the behavior plan, there were no FBAs analyzing Student's behaviors during that school year, and Student was never included in any activities with non-disabled peers. For these reasons, I award compensatory education beginning with the first day of the 2006-2007 T-1 school year through the 2007-2008 1st grade partial hospitalization school year. I will reduce that award with an offset of the regulatory sixty school day evaluation period. The hours of compensatory education will be full school days, five hours per day. No compensatory education will be awarded for the 2008-2009 school year.

ORDER

- The School District denied Student FAPE for the 2006-2007 school year by failing to have timely and comprehensively evaluated and programmed for Student's educational needs. The School District shall provide to Student 120 school days (5 hours per day) of compensatory education for the 2006-2007 school year.

- The School District denied Student FAPE for the 2007-2008 school year by issuing an inappropriate IEP and providing inappropriate educational programming. The School District shall provide to Student 180 school days (5 hours per day) of compensatory education for the 2007-2008 school year.

Daniel J. Myers

HEARING OFFICER

December 9, 2008