

Pennsylvania  
Special Education Hearing Officer

**DECISION**

Child's Name: [REDACTED]

Date of Birth: [REDACTED]

Dates of Hearing: July 26, August 11, 12, 13, 2010

**CLOSED HEARING**

**ODR No. 1270-09-10 KE**

**Parties to the Hearing:**

**Parents**

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

**School District**

Dr. Dion Betts, Superintendent  
Boyertown Area School District  
120 N. Monroe Street  
Boyertown, PA 19512  
[dbetts@boyertownasd.org](mailto:dbetts@boyertownasd.org)

**Date Record Closed:**

**Date of Decision:**

**Hearing Officer:**

**Representative**

**Parent Attorney**

Mark W. Voigt, Esquire  
Plymouth Meeting Executive Campus  
600 W. Germantown Pike, Suite 400  
Plymouth Meeting, PA 19462  
[mwvoigt@aol.com](mailto:mwvoigt@aol.com)

**School District Attorney**

Ms. Sharon Montanye, Esquire  
Sweet Stevens Katz & Williams  
331 Butler Avenue, PO Box 5069  
New Britain, PA 18901  
[smontanye@sweetstevens.com](mailto:smontanye@sweetstevens.com)

**August 23, 2010**

**September 7, 2010**

**Rosemary E. Mullaly, Esquire**

## INTRODUCTION AND PROCEDURAL HISTORY

██████████ ("the Student") is a ██████████ year old (DOB ██████████) resident of the Boyertown Area School District ("the District"). He has been identified as a "child with a disability" with the classification of "emotional disturbance." The hearing in this matter was initiated by the Parents on June 18, 2010. The parties engaged in an unsuccessful resolution meeting on July 1, 2010. This hearing took place in four sessions on July 26 and August 11, 12 and 13, 2010.

To the extent that evidence was placed in the record that constituted hearsay and was objected to by opposing counsel, it was not used to support a finding of fact and was excluded from the administrative record.

The Parents, through counsel, assert that the Student was deprived of a free appropriate public education because he did not make appropriate educational progress. Moreover, they assert the District's failed to protect the Student from bullying on the bus and at school, and it failed to act to discipline individuals who were involved in the bullying of the Student. The District asserts that it investigated every reported incident reported by the Parent and took action when sufficient evidence was obtained.

The Parents further assert that the Student cannot return to his prior educational setting due to the impact of the bullying. The Parents assert that the District's proposed placement is inappropriate. The relief being sought by the Parents is 1080 hours of compensatory education, tuition reimbursement for New Hope Academy – private school which has accepted the student for the 2010-2011 school year.

Finally, the Parents originally requested reimbursement for an independent educational evaluation performed by Dr. Margaret Kay. By means of stipulation at the hearing, the District has agreed to reimburse the Parent for the costs that they incurred for Dr. Kay's evaluation at the hearing, so the parties no longer require a factual and legal determination by the hearing officer on this issue. An order is contained within this decision compelling the District to comply with its stipulation regarding the evaluation.

## ISSUES

1. Whether the Student's Parents are entitled to compensatory education for the time period from June 18, 2008 until the present for the District's failure to provide a free appropriate public education and appropriate extended school year services for the summer of 2008, 2009, and 2010?
2. Whether the Parents are entitled to tuition reimbursement for the 2010-2011 school year for the Student's education at the New Hope Academy's Doylestown, Pennsylvania location?

### **FINDINGS OF FACT**

1. The Student was first identified as a child with a disability in November 2004 when he was in 3<sup>rd</sup> grade. The Parents provided the District with a copy of the 10/27/04 psychiatric report by Dr. Douglas Berne which indicated that the Student's symptoms were consistent with an untreated Attention Deficit/Hyperactivity Disorder, Conduct Disorder, and other more serious levels of psychological disturbance. The District was aware that the Student was seen by a neurologist through Children's Hospital of Philadelphia and was taking Adderall, and Adderall XR as well as Depakote. (P-2, at 4-5; P-3, at 2).
2. In the District's November 18, 2004 initial evaluation of the Student, when he was in third grade, it administered a variety of assessments. The Evaluation Report noted that the lowest score that the Student received on *WISC-IV* ability testing was in practical judgment and social reasoning abilities. On the *Child Symptom Inventory*, it noted that the Student had numerous elevations of the Asperger's Syndrome and Autism Spectrum scales. In particular, he had elevated problems with peers and social relations and distress over changes in routines and is unable to get along with the other children. The next time the District reports functional levels from administered assessments related to the Students language and social functioning was in December 2008. (P-3, at 3, 4, 6S-8, at 4).
3. In November, 2004, the Student was identified as a child with a disability with a classification of emotional disturbance and was placed in learning support. In the January 2005 IEP, the only program modifications contained, specially designed instruction and support for school personnel provided were a behavior plan and "District itinerant/consultant" "as needed." (P-3, at 10; P-4, 1, 7).
4. The only issues of concern addressed by the Behavior Support Plan referenced in the 1/4/05 IEP were "unprovoked anger outbreaks, defiance of authority when directed to complete work, loud noises, disruptive behavior and inability to stay in seat. (P-4, 9).
5. In the District's Occupational Therapy Evaluation of May 2, 2005, the OT noted that the Student engaged in a variety of sensory seeking behaviors. As a result, the District included occupational therapy services to the Student's IEP. (P-9, at 2; P-11, at 1-2).
6. The Student's February 24, 2006 IEP called for an educational placement in "Learning Support" and contained the following specially designed instruction: "See behavior plan, Allow for breaks to be built into his schedule, Positive Reinforcement." The related services provided for a 1:1 aide for 6.5 hours daily in the general classroom and/or LS room. The supports for school personnel were: "Teacher consultation/LS checklists" in "GES" weekly; and Special Ed. Itinerant consultants in "GES" as needed. The Student did not receive any instruction in the LS classroom; it was one of three alternative locations for breaks in his schedule or for receipt of positive reinforcement. (P-13, at 8, 12).
7. The only issues of concern addressed by the Behavior Support Plan referenced in the 2/24/06 IEP were "unprovoked anger outbreaks, work incompleteness, defiance of authority when directed to complete work, loud noises, disruptive behavior and inability to stay in seat. (P-14, 1).

8. Prior to the District's November 6, 2007 Reevaluation Report, the Parents' notified the District that the Student had been diagnosed with Asperger's Disorder, was medicated to address the issues related to this disorder and was seeing a psychiatrist on a regular basis. (P-22, at 1, 4).
9. Each of the Student's IEPs from January 5, 2005 to the present contained Behavior Intervention Plans. (P-4, at 9; P-7, at 8; P-13, at 8 and P-14, at 1-2; P-19, at 11; P-24, at 1-2; P-28, at 3 and 10; P-30, at 1; P-35, at 24-25; P-38, at 6; P-39; P-43 and P-44, P-47, at 6).
10. None of the Student's IEPs from January 5, 2005 to the present contained direct instruction by a special education teacher (P-4, at 7; P-7, at 6; P-13, at 10; P-19, at 8; P-23, at 8; P-28, at 11; P-29, at 12-13; P-35, at 19-20; P-38, at 21-22; P-39, at 6-7; P-47, at 25).
11. The Student's inappropriate social functioning and peer interaction were noted in the 2004 Evaluation Report (P-3, at 6) and subsequent Reevaluation Reports (P-22, at 6; P-26, at 2, 5; P-27, at 4, 9),
12. None of the Behavior Support Plans noted the Student's inappropriate social functioning and peer interaction as significant concerns. (P-4, at 9; P-7, at 8; P-13, at 8 and P-14, at 1-2; P-19, at 11; P-24, at 1-2; P-28, at 3 and 10; P-30, at 1; P-35, at 24-25; P-38, at 6; P-39; P-43 and P-44, P-47, at 6).
13. While speech goals were added to the Student's IEP in May 2009, neither the IEPs nor Behavior Support Plans contained levels of functioning in peer relationship skills or annual goals or intervention to improve these skills with traditionally developing students until October, 2009. (P-3, P-4, P-7, P-13, P-14, P-16, P-19, P-23, P-24, P-26, P-28, P-29, P-30, P-33; P-34, at 2, 3-7 compar P-35 at 8-9, 17-18).
14. Until October 2009 when the Student's IEP was revised increasing speech therapy to 60 minutes a week, the Student received 30 minutes of speech therapy and the only goal addressing peer relationship skills was implemented within the therapy session with other students in need of speech language therapy. (P-34, at 5; compare S-20, at 24-25).
15. In October 2009, the IEP noted that there were 3-4 incidents wherein the Student was injured in or on the way to school and the Parents were concerned with how this will affect the Student's emotional state, his behavior, and his ability to learn, nothing was placed in the Behavior Support Plan. (P-35, at 10).
16. The District proposed to conduct a Functional Behavior Assessment to receive new data, but the Parents requested that it be postponed for 6-8 weeks. The District agreed to their request. (S-20, 4-5).
17. In October 2009, the District recommended that the Student receive school-based counseling through Creative Health Services. The Parents did not complete the paperwork necessary to initiate this service. (S-16, S-20, at 28, S-5; S-23; N.T.676-679).
18. The teachers at the Student's school received Functional Positive Behavior Support Training on April 12, 2010 to assist in the implementation of the Student BIP. (S-21)
19. During the period between May 26, 2006 and October 22, 2009 (May 26, 2006, August 17, 2006, October 22, 2009), the Student was hospitalized at KidsPeace. (P-62, P-63, P-64 at 11).

20. The Student has had a history of threatening behavior at home that has resulted in various hospitalizations. The District was not aware of the issues at home or hospitalizations related to the Student's level of mental health involvement. (N.T. 186, 194, 196).
21. The District's Behavior Support Plans targeted the Student's negative behaviors but did not contain a component to address replacement behaviors. (P-4, at 9; P-7, at 8; P-13, at 8 and P-14, at 1-2; P-19, at 11; P-24, at 1-2; P-28, at 3 and 10; P-30, at 1; P-35, at 24-25; P-38, at 6; P-39; P-43 and P-44, P-47, at 6; N.T. 830-832).
22. Several incidents occurred on the bus and at school involving other students that significantly impacted the Student's ability to engage in the educational process. The Student's own behaviors contributed to the inappropriate reactions he engendered in other students. (P-50, at 38; N.T. 837; S-43, at 1-2).
23. The District offered to provide alternative arrangements for transportation, but the Parents rejected them and kept the Student on the bus in which he had reported that he was being hit. (P-70, at 17; N.T. 399).
24. The District was notified that Pathway School, an approved private school, did not accept the Student for the 2010-2011 school year. The reason provided in the letter for denying admission was the clinical staff felt that he needed more clinical and behavioral support than it could offer. (P-89).
25. The District considered the Student's need for Extended School Year services for the Summers of 2008 and 2009 and found that either "Student not eligible for ESY based on criteria for ESY," or "Based on the seven factors outlined in chapter 15 (sic) [the Student] is currently not eligible for Extended School Year Services, however, data will be collected throughout the year, and if services are warranted a meeting will be held prior to March 1<sup>st</sup> to determine a program." (S-2, at 8; S-4, at 11, S-7, at 14).
26. For its determination for the Summer of 2008, the District looked to the goals on the Students then current IEP which did not contain social skills or language levels of functioning or annual goals until October 2009. (S-3, S-4; compare S-13, at 7-8, 14-16, S-37).
27. When the Student returned to School in September 2009, he has more frequent issues related to inappropriate behaviors than he had prior to the end of the 2008-2009 school year. (S-14, S-15, S-37).
28. The District found the Student eligible for ESY for the Summer of 2010. (S-23, at ; S-31, at 7). The Parents rejected ESY indicating that they would be away for the Summer (S-29, at 1; S-31, at 7).
29. The District proposed to reevaluate the Student on March 24, 2010. (S-24)
30. New Hope Academy is a private school with two locations, one in Newtown and another in Doylestown, PA. There are no social workers or psychiatrists regularly at the school. There is no medical management available there. Currently, there are no students at the Doylestown location who have a behavior support plan. (N.T. 364-365).
31. KidsPeace is a program in Reading, PA that has both a therapeutic component and academic component. There is a full time psychiatrist who sees Students on a daily basis. The therapeutic component is broken down into acute, sub-acute and school

based levels providing students with step downs of mental health supports as appropriate. (N.T. 693-94).

32. On June 1, 2010, the parent agreed to place the Student in KidsPeace for the 2010-2011 school year. (S-31, at 10-13; N.T. 215).
33. The Parents' testimony regarding incidents of violence against the Student were not based upon his actual witness of accounts and no documentation or other non-hearsay evidence was presented to support the assertions that he made on the record to establish that a teacher slammed the Student's head on the desk or the Student was subject to thirty days of head banging. In certain cases, contrary evidence exists to support that what the Parent testified to did not occur. (N.T.475).
34. The District did not receive information that the Student's head was hit on the bus every day for thirty days. (N.T. 401, 476-477).
35. The District put in place certain supports to investigate and address reported violence against the Student. (S-14; N.T. 459, 477, 494).
36. During the time period between October 22, 2008 and May 4, 2010, the District documents that the Student was involved with nine separate altercations wherein the Student either demonstrated or was the victim of inappropriate physical behaviors. The District's investigation indicated that the Student's behaviors contributed to these altercations. (S-15; S-37).
37. The District documented multiple reports that the Student made inappropriate comments to peers and adults. (S-43, 1-2).
38. At the time that the physical incidents were occurring in the Fall of 2009, the District proposed to conduct a functional behavioral assessment. The Parents requested that the District delay completing the assessment for 6-8 weeks and then caused the meeting to implement the positive behavior support plan by cancelling the March, 2010 IEP meeting. (S-13 at 5, N.T. 620).
39. The District collected data on only the goals indicated in the IEPs. Peer relationship skills were not addressed on the Student's IEPs nor was data collected on the Student's level of functioning until June 2009. ((S-3, S-4; compare S-13, at 7-8, 14-16, S-25 at 13 ).
40. The Student's 7<sup>th</sup> grade final marks were four "B"s, one "B+", four "A-", and two "A". The grades were based upon achievement within the District's curriculum with adaptations and accommodations. (S-2, at 8; S-4 at 10; S-7, at 12; S-26, at 1).
41. The Student's achievement test scores for the 2008-2009 school year for Math were below basic in 6 areas and proficient in four areas; for Reading and Writing were below basic in all six areas tested. (S-38, at 1-2),
42. The Student's 8<sup>th</sup> grade final marks were one "B-", three "B", three "B+", one "A-", and four "A"s. The grades were based upon achievement within the District's curriculum with adaptations and accommodations. (S-13, at 12; S-20 at 26-27; S-23, at 25-26; S-26, at 2; N.T. 212-213).
43. The Student's achievement test scores for the 2009-2010 school year for Math were below basic in one area; basic in one area; proficient in two area; and advanced in four areas; for Reading and Writing were proficient in all areas. (S-38, 4-7).

44. Weekly reports indicate that the Student was not independently and appropriately making progress in all aspects of his functioning – just those areas that the District was collecting data on. (P-75, S-12).
45. The results of Dr. Kay's May 10, 2010 evaluation are of limited assistance in planning for the Student's educational programming because the assessments were administered at a time when the student was hospitalized for psychiatric issues and his medications were being adjusted their validity was compromised. Because at the time of her testing, the Student's function was impaired by changes in medication and by other stressors related to his hospitalization, the recommendations in Dr. Kay's report are not reliable for purpose of long term educational programming for the Student. (P-50; N.T. 797, 798, 801-803).
46. Dr. Kay's test results suggest that testing was compromised by the Student's hostile feelings. (N.T. 799; P-50, at 16).
47. After evaluating the Student, Dr. Kay recommended an approved private school placement because the Student needed psychiatric intervention, medical management, emotional and behavioral support, strong academic program and social skills training. (P-50, at 38; N.T. 808).
48. Dr. Kay did not visit the KidsPeace program the District recommended for the Student for the Summer of 2010 as well as for the 2010-2011 school year and her testimony regarding the KidsPeace program proposed by the District was based upon her general understanding of what KidsPeace does without an attempt to differentiate between the various KidsPeace programs. (N.T. 828).

## **DISCUSSION AND CONCLUSIONS OF LAW**

### **1. Burden and Standard of Review**

The IDEA requires that a court reviewing a hearing decision must base its decision on the preponderance of the evidence. *See* 34 C.F.R. 300.516(c)(3); *L.E. v. Board of Education*, 435 F. 3d 384, 389 (2006). At administrative hearings challenging an IEP, the burden of proof rests with the party seeking relief. *Schaffer ex rel. v. Weast*, 546 U.S. 49, \_\_\_, 126 S.Ct. 528, 537 (2005). In the instant matter, because they seek the equitable remedies of compensatory education and tuition reimbursement from the District, the Parents bear the burden of proof.

### **2. Legal Discussion**

#### **a. Free Appropriate Public Education**

The IDEA requires the states to provide a "free appropriate public education" (FAPE) to all students who qualify for special education services. *See* 20 U.S.C. §1412. The U.S. Supreme Court determined that this requirement is met by providing personalized instruction and support services that permit the child to benefit educationally from the instruction and following the procedures set forth in the Act. *See Bd. of Educ. of Hendrick Hudson Central*

*School District v. Rowley*, 458 U.S. 176 (1982). Procedural violations may support a claim for relief only if those violations impeded a child's right to receive FAPE, or they significantly impeded the parents' opportunity to participate in the decision-making process concerning provision of FAPE to the child, or caused a deprivation of educational benefit. 20 U.S.C. §1415(f)(3)(E)(ii); 34 C.F.R. §300.513(a)(2). The IDEA requirement and the *Rowley* standard therefore are met when a child's program provides more than a trivial or *de minimis* educational benefit. See *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3d Cir. 1988). The Third Circuit has interpreted the phrase "free appropriate public education" to require "significant learning" and "meaningful benefit" under the IDEA. See *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999).

The IDEA and its implementing regulations require regarding identification of children with disabilities that

1. In evaluating each child with a disability under §§ 300.304 through 300.306, the evaluation is 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.
2. Assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided.

See 34 C.F.R. § 300.304 (c) (6)-(7). See also 1412(a)(6) and 1414(b)(1)-(3)

The IDEA and its implementing regulations require regarding educationally programming that an IEP for a child with a disability be responsive to the child's identified educational needs and must include present levels of educational performance, measurable annual goals, a statement of how the child's progress toward those goals will be measured, and the specially designed instruction and supplementary aids and services which will be provided, as well as an explanation of the extent, if any, to which the child will not participate with non-disabled children in the regular classroom. 20 U.S.C. § 1414(d); 34 C.F.R. §300.320(a) and 34 C.F.R. §300.324.

#### **b. Extended School Year Services**

Regarding ESY, the Pennsylvania State Special Education regulations provide at 22 Pa. Code§ 14.132

(a) In addition to the requirements incorporated by reference in 34 CFR 300.106 (relating to extended school year services), school entities shall use the following standards for determining whether a student with disabilities requires ESY as part of the student's program:

(1) At each IEP meeting for a student with disabilities, the school entity shall determine whether the student is eligible for ESY services and, if so, make subsequent determinations about the services to be provided.

(2) In considering whether a student is eligible for ESY services, the IEP team shall consider the following factors; however, no single factor will be considered determinative:

(i) Whether the student reverts to a lower level of functioning as evidenced by a measurable decrease in skills or behaviors which occurs as a result of an interruption in educational programming (Regression).

(ii) Whether the student has the capacity to recover the skills or behavior patterns in which regression occurred to a level demonstrated prior to the interruption of educational programming (Recoupment).

(iii) Whether the student's difficulties with regression and recoupment make it unlikely that the student will maintain the skills and behaviors relevant to IEP goals and objectives.

(iv) The extent to which the student has mastered and consolidated an important skill or behavior at the point when educational programming would be interrupted.

(v) The extent to which a skill or behavior is particularly crucial for the student to meet the IEP goals of self-sufficiency and independence from caretakers.

(vi) The extent to which successive interruptions in educational programming result in a student's withdrawal from the learning process.

(vii) Whether the student's disability is severe, such as autism/pervasive developmental disorder, serious emotional disturbance, severe mental retardation, degenerative impairments with mental involvement and severe multiple disabilities.

(b) Reliable sources of information regarding a student's educational needs, propensity to progress, recoupment potential and year-to-year progress may include the following:

(1) Progress on goals in consecutive IEPs.

(2) Progress reports maintained by educators, therapists and others having direct contact with the student before and after interruptions in the education program.

(3) Reports by parents of negative changes in adaptive behaviors or in other skill areas.

(4) Medical or other agency reports indicating degenerative-type difficulties, which become exacerbated during breaks in educational services.

(5) Observations and opinions by educators, parents and others.

(6) Results of tests, including criterion-referenced tests, curriculum-based assessments, ecological life skills assessments and other equivalent measures.

\* \* \*

(d) Students with severe disabilities such as autism/pervasive developmental disorder, serious emotional disturbance; severe mental retardation; degenerative impairments with mental involvement; and severe multiple disabilities require expeditious determinations of eligibility for ESY services to be provided as follows:

(1) Parents of students with severe disabilities shall be notified by the school entity of the annual review meeting to encourage their participation.

(2) The IEP review meeting must occur no later than February 28 of each school year for students with severe disabilities.

(3) The Notice of Recommended Educational Placement shall be issued to the parent no later than March 31 of the school year for students with severe disabilities.

(4) If a student with a severe disability transfers into a school entity after the dates in paragraphs (2) and (3), and the ESY eligibility decision has not been made, the eligibility and program content must be determined at the IEP meeting.

(e) School entities shall consider the eligibility for ESY services of all students with disabilities at the IEP meeting. ESY determinations for students other than those described in subsection (d) are not subject to the time lines in subsection (d). However, these determinations shall still be made in a timely manner. If the parents disagree with the school entity's recommendation on ESY, the parents will be afforded an expedited due process hearing.

### **3. Compensatory Education**

Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990). A disabled student's right to compensatory education accrues when the school knows or should know that the student is receiving an inappropriate education." *Ridgewood Bd. Of Educ. v. N.E.*, 172 F.3d at 250. Determination of an award of compensatory education, however, must take into consideration "the time reasonably required for the school to rectify the problem ... since a school district may not be able to act immediately to correct an inappropriate IEP; it may require some time to respond to a complex problem." *M.S. v. Central Regional Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. 1996).

In the event that a district is found responsible for the provision of compensatory education, certain statutory and regulatory limitations apply to the award. Specifically, the Individuals with Disabilities Education Act, ("IDEA") at 20 U.S.C. Sec. 1415(f)(3)(C)(2005) and Sec. 1415(b)(6)(B) provides that "A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for

requesting such a hearing., in such time as the State law allows.” 20 U.S.C. § 1415(f)(3)(C)(2005). See also 34 C.F.R. Section 300.511(e).

The IDEA implementing regulations as 34 C.F.R. Section 300.507(a)(2) reiterates this standard but also explains that the due process complaint must allege a violation that occurred not more than two years before the date the parent or public agency knew about the alleged action that forms the basis of the due process complaint, or, if the state has an explicit time limitation for filing a due process complaint under this part, in the time allowed by that State law, except that the exceptions to the timeline described in Section 300.511(f) apply to the timeline in this section. *Id.* Specifically, Section 300.511(f) provides that the timelines described in paragraph (e) of section 300.511(e) do not apply to a parent if the parent was prevented from filing a due process complaint due to – (1) specific misrepresentations by the LEA that it had resolved the problem forming the basis of the due process complaint; or (2) the LEA’s withholding of information from the parent that was required to be provided to the parent. See 34 C.F.R.. Section 300.511(f).

Because the relief requested in the instant matter includes compensatory education and tuition reimbursement, only evidence that addresses the years for which the hearing officer can offer relief and the time period immediately proceeding to determine whether the district was attempting to address the issues of non-FAPE will be considered in the calculation of relief. Therefore background information and other facts that predate June 18, 2008 will be excluded from the record except for

- a. what the district knew or should have known prior to July 18, 2008 related to the time reasonably required for it to rectify the alleged problem; and
- b. when the parent knew or should have known about the alleged action that formed the basis of the complaint.

The first issue is whether, during the time period related to the program in place from June 2008 to the present, the District conducted an appropriate and comprehensive evaluation of the child. The record reflects that between 2004 when the child was first identified as eligible for special education and the December 2008 the District had not administered valid assessments of any type of language or social functioning until a speech language assessment of December 22, 2008 which did not specifically address peer relationship skills.

The second issue must be whether the IEP resulted in meaningful progress.

In the instant matter, the record is replete with evidence that the Student’s behavior impeded his child’s learning and the learning of others. Therefore, the IEP Team must “consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.” 34 C.F.R. §300.324(a)(2)(i); see also 20 U.S.C. § 1414(d)(e)(B). Pennsylvania regulations further require that “[b]ehavior support programs and plans must be based on a

functional assessment of behavior and utilize positive behavior techniques.” 22 Pa. Code § 14.133(b).

The Pennsylvania State Special Education regulations provide that in addition to all of the requirements found in federal regulations, the IEP of each student with a disability must include a description of the type or types of support that the student will receive, the determination of which may not be based on the categories of the child’s disability alone. 22 Pa. Code Sec. 14.131(a)(1).

In this matter, the IEP team has not seriously considered all of the Students challenging behaviors until March of 2010. The last time that the District investigated through valid assessments the Students levels of functioning in the social and emotional domains was in 2004 when he was in third grade and attending elementary school. Even though there were reports of inappropriate social interactions throughout the time period applicable to this matter, no attempt was made to reassess the student. In the November 2004 evaluation report, it noted that the lowest WISC-IV scores were in the areas of practical judgment and social reasoning. Moreover, the Children’s Symptom Inventory noted numerous elevations on the Asperger’s Syndrome and Autism Spectrum Scales. None of the subsequent evaluations address these issues to determine the extent to which they were impacting upon the Student’s functioning.

The Student’s IEP were similarly lacking in addressing these presenting issues. None of the Behavior Support Plans noted the student’s social behavior or peer interactions as significant concerns. It was not until May of 2009 that these needs were addressed by the IEP and not until October of 2009 was the student given opportunities to practice social skills with neurotypical students in a structured or semistructured setting. It was not March of 2010 that the District developed an IEP with a Behavior Support Plan that was appropriate to meet the Student’s needs.

Having said that, the remedy of compensatory education is equitable in nature and its award may be limited. In the instant matter, the Parents did not share information with the District regarding the Student’s at home functioning or psychiatric hospitalizations; they would not complete the paperwork necessary to initiate school-based counseling, they requested that the District postpone the FBA for 6-8 weeks delaying the compilation of data to support a revised Behavior Support Plan, and they canceled an IEP meeting scheduled to discuss the Behavior Support Plan. While each of these actions were clearly acceptable decision to make, they did have consequences as it related to the District’s ability to timely address the Student’s needs and provide appropriate educational program. For that reason, they are significant to the calculation of compensatory education.

Because the record is replete with references to the District’s awareness of the Student’s lack of social cognition and its impact upon peer relationships, his sensory needs, his communication needs, the District knew or should have known that it should address these needs. Therefore, no time period post-dating the June 18, 2008 limitation period will be

excluded in the calculation of compensatory education. The District had ample information to know of this problem sufficiently before that date.

The District did, however, begin to address the Student's social needs in a meaningful way in its October 9, 2009 IEP. Most significantly, it included speech and language goals to the IEP to address pragmatic speech and peer relationships and to provide opportunities for the Student to practice these skills with neurotypical children. It also requested permission to conduct an FBA and to provide school based counseling for the Student. In both of those circumstances, the Parents' action derailed the District's forward momentum toward its appropriate IEP and Behavior Support Plan in March 2010. Therefore, the time period for which the District owes compensatory education is June 18, 2008 and October 8, 2009.

The equities support a conclusion that this award should also include compensatory education for ESY services for the Summer of 2009 only. The Parents offered no testimony or evidence to support a conclusion that the District failed or failure should be imputed to the District for the manner it address ESY for the Summer of 2008. Regarding the Summer of 2010, the Parents rejected the District's offer of ESY indicating that they would be out of away during the whole summer. There was a qualitative difference in the evidence presented by the Parents regarding the Summer of 2010 taken as a whole and in light of the equities of the case, suggested a remedy. First, while it is the Parents' burden of proof to articulate the District's obligation in this regard, the fact that the District never collected data to on the Student's social functioning precluded them from considering this in an ESY analysis. Moreover, at the end of the 2008-2009 school year, it had identified significant pragmatic and peer relationship issues with the Student and then stopped programming for them at the end of the year. When the Student returned to the District after the summer, the rate of his inappropriate socialization and showed a marked increase from the prior year suggesting a break in programming negatively impacted his level of functioning. Therefore, based upon each of these factors, the Parents have met their burden regarding the Summer of 2009, and the District owes the Student 50 hours of compensatory for its failure to address all of the Student's presenting issues in its consideration of the need for ESY services for the Summer of 2009.

All testimony regarding actions that constituted "bullying" that the Student suffered at the hand of other students was objected to hearsay, so it cannot form the basis of a finding. Further, what is not supported by the record is that all of the incidents actually occurred as the Parent testified or that the Student was not one of the bullying parties. Moreover, the record supports a conclusion that the District had in place supports to investigate and address the issues related to the Student's negative interactions with his peers. However, it is not necessary at this time to render a decision regarding whether bullying prevented the Student from receiving a free appropriate public education because other factors resulted in a deprivation of a free appropriate public education.

What is supported by the record is that the Student had extreme reactions to what was described by the Parents as bullying. The District has for some time recognized that the Student lacked social skills and was regularly engaging in behavior that would have singled him

out as different than the other students, yet it continued to rely extensively on the services of a paraprofessional to implement his IEP. This is the basis for the award of compensatory education.

## 2. Tuition Reimbursement

The Individuals with Disabilities Education Improvement Act of 2004 ("IDEA"), 20 U.S.C. Sec. 1400 et seq., and the implementing regulations codify the parental right to tuition reimbursement if a district does not make a timely offer of FAPE and the equities which can automatically weigh against the parents in their attempt to obtain tuition reimbursement, specifically

if the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the costs of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

See 20 U.S.C. Sec. 1412(a)(10)(C)(ii); 34 C.F.R. Sec. 300.148(c). It further provides that, in the part pertinent to the instant matter

[T]he cost of reimbursement may be reduced or denied if at the most recent IEP meeting that the parents attended prior to removal of the child from public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child including stating their concerns and their intent to enroll their child in a private school at public expense; or ten business days prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described [above]; if prior to the parents' removal of the child from the public school, the public agency informed the parents ... of its intent to evaluate the child (including a statement of the purpose of the evaluations that was appropriate and reasonable), but the parents did not make the child available for such evaluation; or upon judicial finding of unreasonableness with respect to actions taken by the parents.

20 U.S.C. Sec. 1412(a)(10)(C)(iii); 34 C.F.R. Sec. 300.148 (d)(1)-(3).

If the parents of a child with a disability are not satisfied with the particular program proposed by the school, the U.S. Supreme Court held that parents may enroll their child in a private school and seek reimbursement from the public school. See *Burlington School Committee v. Department of Education*, 471 U.S. 359, 105 S. Ct. 1996 (1985); *Florence County School District Four v. Carter*, 510 U.S. 7, 114 S. Ct. 361 (1993). The *Burlington* Court established a three-part test for approving reimbursement for unilateral private school placements. The parents prevail if they

show (a) that the placement proposed by the school did not comply with the IDEA's FAPE requirement, (b) that: their private placement was appropriate, and (c) that "equitable considerations" justify an award.

At the time that the District recommended the KidsPeace program, the student was either hospitalized or recently discharged from hospitalization due to significant psychiatric involvement. The KidsPeace program proposed by the District was appropriate this time for the student based upon the information the Student's level of functioning at the time of the IEP when the decision was made. Therefore the Parents have failed to establish that the placement proposed by the District did not comply with the IDEA's FAPE requirement.

While the Student's presenting needs may have stabilized at this time, the program and placement recommendations, the reasonableness of their proposal must be viewed at the time that they were offered. Significantly, Dr. Kay's independent evaluation report recommends a placement in an Approved Private school that includes such supports as psychiatric intervention, medical management, emotional and behavioral support, strong academic program and social skills training. She subsequently referred the Parents to investigate New Hope Academy ("NHA") for the Student which she admits she has limited knowledge actual program the Parents are seeking to put the child in. Upon review of the hearing testimony of the NHA representative, the supports that Dr. Kay deemed necessary for the student were not available there. To the contrary, KidsPeace did offer an environment with the therapeutic supports Dr. Kay recommended. It also offers the Student the opportunity to participate in the general curriculum of the Boyertown School District. The fact that the KidsPeace program cannot replicate all of the fine programs at New Hope Academy is not a fatal flaw to the District's offer of FAPE.

Because the District's proposed program is appropriate for the Student, it is not necessary to engage in an analysis of the New Hope Academy's program.

### *3. Reimbursement of Dr. Kay's Evaluation*

At the August 12, 2010 session of the hearing, the District stipulated that it would reimburse the Parents' for the costs that they incurred for Dr. Kay's report. Therefore, the hearing officer is no longer called upon to resolve this issue, and upon the appropriate documentation being presented by the Parents to the Director of Special Education, the payment will be processed by the District and payment will be sent to the Parents within sixty days of the date the necessary documentation was proffered by the Parents.

### **CONCLUSION**

The Parents have met their burden of proof to demonstrate that the District did not offer the Student a FAPE. Based upon the equitable quality of relief requested by the parents, the time period for which the District must provide compensatory education is between June 18, 2008 and October 8, 2009. The District shall provide 2 hours of compensatory education for each

school day during that time to make up for the lack of appropriate academic instruction and social skills training it did not provide to the Student during that period. It will also provide 50 hours to make up for the failure to provide the Student with ESY services for the Summer of 2009.

The Parents has not met their burden of proof to demonstrate that the District's proposed program and placement are inappropriate. Therefore, the District does not have to reimburse the Parents for the costs that they may incur as the result of the Student's attendance at New Hope Academy.

The District stipulated to reimburse the costs incurred by the Parents for the independent educational evaluation completed by Dr. Kay.

#### **ORDER**

AND NOW, this 1st day of September, 2010, it is hereby ordered that, for the reasons cited above,

1. The Boyertown School District must provide two hours of compensatory education to the Student as the result of failing to provide a free appropriate public education for each school day between June 18, 2008 until October 9, 2009. It must also provide 50 hours of compensatory education for failing to provide appropriate ESY programming for the Summer of 2009. The monetary value rate for each of these hours shall be provided to the Parents to be used to at the Parents' discretion for any educational or behavioral purpose on the Student's behalf including private tuition, including behavior support, psychological support as it relates to education, on-line educational or behavioral courses, summer school courses, academic field trips, and other services that would benefit the Student educationally at least until he reaches age 21 except services that are specifically prohibited by law.
2. The Parents' request for tuition reimbursement for New Hope Academy is denied because they have not met their burden to demonstrate that the District's proposed program and placement are not appropriate for the Student.
3. In light of its on-record stipulation, the District shall reimburse the Parents the costs they incurred for the independent educational evaluation of Dr. Kay within 60 days of their submission of the necessary documentation to the Boyertown Area School District.

All other relief requested by the Parents not addressed by this order is specifically denied.

*Rosemary E. Mullaly, Esquire*

SPECIAL EDUCATION HEARING OFFICER

Date of decision: September 7, 2010