

MISSISSIPPI DEPARTMENT OF EDUCATION

DUE PROCESS HEARING REQUEST BY _____ AND _____

I. INTRODUCTION

The Individuals with Disabilities Education Act¹ (the "IDEA" or the "Act") provides federal funds to help States educate children with disabilities. The IDEA "is designed to ensure that all children with disabilities have available to them a free appropriate public education" ("FAPE").² The FAPE requirements are delivered through the Individual Education Program ("IEP"), specifically designed to meet the child's unique needs.³ The "core of [the IDEA] is the cooperative process that it establishes between parents and schools," and the "central vehicle for this collaboration is the IEP process."⁴

_____ ("Student"), is a _____ grade student at _____ High School in the Alcorn County School District (the "School District"). Student is eligible for special education and related services under the IDEA and Mississippi law implementing the IDEA.⁵ According to Student's IEP, his "Eligibility Category" is _____, and _____⁶ An education advocate with the Mississippi Protection and Advocacy System ("MPAS") submitted a due process hearing request on behalf of Student and his parents, to the Mississippi Department of Education (MDE). The

¹ 20 U.S.C § 1400 *et seq.*

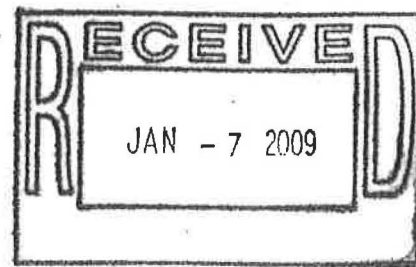
² 20 U.S.C. § 1400(d)(1)(A).

³ "IEP" is defined in 20 U.S.C. § 1414(d).

⁴ *Schaffer v. Weast*, 126 S.Ct. 528, 532 (2005).

⁵ "Related services means. . .developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes. . .counseling services." 34 CFR 300.34(a); *see* Miss. Code Ann. § 37-23-1 *et seq.*

⁶ (Exs. 2, 4).



request alleged the School District violated the IDEA (1) by failing to provide counseling services, a related services listed in the IEP and (2) by failing to list supplementary aids and services and program modifications or supports in Student's IEP which would enable him to participate in band, an extracurricular/non-academic activity.⁷ The due process hearing was conducted and testimony received on December 19-20, 2008.

Based on the applicable case law and the evidence presented at the hearing, the Parents carried their burden of proving that the School District's implementation of the IDEA denied Student a FAPE. The School District also failed to list modification(s)/accommodation(s), related services, and/or supports in the IEP relating to Student's participation in band, an extracurricular/non-academic activity, which provides significant educational benefits relating to Student's disability. Student is entitled to receive compensatory education and services as identified below.

II. PROCEDURAL BACKGROUND

Education Advocate, _____ ("Advocate"), submitted a due process hearing request on behalf Student's parents, _____ (sometimes collectively referred to as "Parents").⁸ The request, which was received on October 21, 2008, expressly invoked the "stay put" provision of the IDEA.⁹ Within this educational context, "stay put" required that Student be allowed to remain in band, which is conducted during third period of the regular school day. The School District responded to the Parents' position on October 27, 2008 and moved to dismiss the request,

⁷ "Supplementary aids and services means aids, services, and other supports that are provided in regular education classes, other education-related settings, and in extracurricular and nonacademic settings, to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate in accordance with Sec. 300.114 through 300.116." 34 CFR 300.42.

⁸ A copy of the Due Process Hearing Request is attached to the Appendix as Tab A

⁹ When a parent submits a request for a due process hearing, the IDEA provides that the student shall remain in the "then-current educational placement" unless the school and the parent agree otherwise. 20 U.C.S § 1415(j); Miss. Code Ann. § 37-23-11(4). The term "educational placement" means the child's educational program. *White v. Ascension Parish School Bd.*, 343 F.3d 373, 379 (5th Cir. 2003)

asserting that the hearing officer lacked jurisdiction to hear the request.¹⁰ The School District did not remove the child from band, which meets third period.

The parties' resolution session was unsuccessful. A pre-hearing teleconference was held on December 1, 2008, with each party represented by counsel.¹¹ During the pre-hearing conference, the Parents identified the issues for due process hearing as follows:

- Whether the school district failed to provide a FAPE resulting from the failure to provide the related services listed in IEP, counseling services; and,
- Whether the school district denied Student a FAPE by failing to provide a statement of supplementary aids and services and program modifications or supports in the IEP to enable _____ to participate in extracurricular and non-academic activities including band?

The School District reasserted its position regarding the lack of jurisdiction and then responded to the Parents' position as follows:

- Is Band an extracurricular activity [to which the School District contends IDEA does not apply] or a supporting service; and,
- Was student's conduct so disruptive to band members that removal was justified under 20 USCA 1415(k)(1)(a) or Miss. Code Ann. § 37-11-1?

The parties exchanged a list of potential witnesses and exhibits.

III. FACTS¹²

Student is in the _____ grade at _____ High School. Student's IEP lists the eligibility categories as, "OHI, ADD/ADHD, and Asperger's." (Exs. 2, 4) According to Student's fall report

¹⁰ A copy of the School District's response is attached to the Appendix as Tab B. Having reviewed the School District's position and considered the testimony and evidence, the Hearing Officer finds the exercise of jurisdiction is proper under the provisions of the IDEA. As a result, the motion to dismiss is denied.

¹¹ The Parents, the MPAS Advocate, the School District's Superintendent and Special Education Director, and Principal of the high school participated, with counsel in the conference.

¹² References to the Hearing Transcript are cited as (Tr. ____). References to Exhibits introduced at the Hearing are cited as (Ex. ____).

card, his grade schedule included class periods for English II, Keyboard, Com. Health, Band, World History, Tutorial, Algebra I, and Biology I. (Ex. 13, p. 2) While practices are held after school, Band is scheduled for third period during the regular school day. (Ex. 13) Student received a numerical grade on his report card for each subject, with the exception of Tutorial. The numerical grades at the end of the 2007-2008 school year ranged from the lowest grade 81 (World Geography) to the highest grade 100 (Band). For the second grading period this school year, his grades range from lowest 77 to the highest 90 (Band). (Ex. 13)

Two versions of Student's IEP for 2007-2008 and one version of an IEP for 2008-2009 were introduced at the hearing¹³. Ex. 2, 4, 5. Some of the Modification(s)/Accommodation(s) listed in the "Supplementary Aids and Services and Personnel Supports" section of Student's IEP include the following:

- "Clue student to stay on task"
- "Peer in class when needed"

See Ex. 2, 4, 5. The earlier version of the 2007-2008 IEP, Exhibit 5 listed "Peer during band camp" and the later version of the 2007-2008 IEP, Exhibit 4, listed copy of music will be given for memorized pieces if sight reading is not required. (Ex. 2, 4).

In the sections titled, "SUMMARY OF PRESENT LEVEL(S) OF PERFORMANCE," the three IEPs state, in part:

He will have a tutorial class one period a day with a special education instructor. He should be successful with tutorial assistance and the proper accommodations and modifications. He will participate in band . . . Currently, [Student] has behavioral issues in the classroom. He sees the behavioral specialist weekly, however, the visits don't seem to help. Most of the class time, [Student] works really hard. Other times, though, he talks out of turn, grunts, whines, and back talks the teacher. is very immature for his age. He would be an excellent student if his behavior could be

¹³ Father also testified concerning band issues addressed in an IEP prior to the 2006-2007 school year. (Tr. 242)

better controlled. (Ex. 5 - earlier version of the 2007-2008 IEP).

He has the ability to do well in all academic areas, however his disability affects classroom instruction for himself and others. _____'s most recent evaluation was in March 2006. At that time a re-evaluation was conducted. Based on the information reviewed, _____ continued to exhibit problems in behavior. The parents agreed for a comprehensive assessment to be conducted. _____'s strengths are his ability to be successful in his academic courses. _____'s parents want continued accommodations and modifications ... _____ will receive counseling [sic] once a week for 30 minutes. _____ is very immature and enjoys activities and tv programs unlike those of his peers. _____ lacks in social skills. (Ex. 4 - later version of the 2007-2008 IEP).

He has issues that are exhibited during times he is left unattended and is not working. He needs redirecting when he gets off task. These behaviors are part of his disability. His disability causes him to be socially immature. He needs guidance at all times during the day. _____ will participate in the _____ HS band and will perform as directed by band director. (Ex. 2 - 2008-2009 IEP)

Student has one tutorial period daily with a special education teacher. (Ex. 13) Ms. _____, one of the high school's special education teachers, serves as Student's primary tutorial (resource) teacher. (Tr. 142) Ms. _____ has worked with Student for two years. (Tr. 143) She meets with Student one period each day. When Ms. _____ is unavailable, Ms. _____, another special education teacher at the high school, serves in her place. (Tr. 81)

Both versions of the IEP for 2007-2008 contained accommodations relating to band. Specifically, the earliest version for 2007-2008, Exhibit 5 provided "Peer during band camp" and Exhibit 4 stated "copy of music will be given for memorized pieces if sight reading is not required." In the second version of the IEP for 2007-2008, the section titled **"Explanation of nonparticipation in general education services, including nonacademic and extracurricular activities,"** the IEP states:

Band goals & Expectations: 1) have the music memorized for the following: Christmas Parade: Corinth - Sat. Dec. 1, 07. 2) Basic level of marching skills including body alignment, posture, horn angle, horns up and horns down. etc... to be evaluated by the director. 3) all twelve major scales plus the chromatic scale must be memorized for chair tryouts in the concert band. 4) sightreading as well as tone,

technique & appearance will also be evaluated. 5) director approval will be required for participation by any band student in any event concerning the band. (Ex. 4 - later version of the 2007-2008 IEP)

A. Counseling Services

During the 2007-2008 school year, [REDACTED] served as the School District's functional behavior therapist, providing counseling services to Student. (Tr. 303) The "Related Services" section of the of 2007-2008 IEP (2nd version), provides: "Counseling Services w/ Ms. [REDACTED]" for the period 10/12/07 - 5/27/08 for 30-45min, weekly. (Ex. 4 p. 3) At the beginning of the 2008-2009 school year, Ms. [REDACTED] took another job, ending her employment with the School District. (Tr. 305)

Significantly, the "Related Services" section of the of 2008-2009 IEP, provides only: "Counseling Service, 08/08/08 - 5/26/09, 30/45min, weekly." The related services table in that IEP has a hand-written question mark (?) In the frequency column. (Ex. 2 p. 6). Dr. [REDACTED], the Special Education Director, was hired by the School District in July 2008. (Tr. 302) After interviewing six different candidates for the vacancy created by Ms. [REDACTED]'s departure, the School District hired [REDACTED], who will assume the position when classes resume in January 2009. (Tr. 306) Although uncertain about the exact scope of Ms. [REDACTED]'s knowledge, training or experience with Asberger's, Dr. [REDACTED] testified that Ms. [REDACTED] provided her with a certificate relating to Asperger's. (Tr. 321)

B. Band Activities

In 2004, Student started "beginner band" as a sixth grade student and has participated in band activities since that time. Student's mother received no reports of incidents involving Student's behavior in band from 2004 to January 2006. (Tr. 176) This testimony [re incident reports] was not disputed by the School District, although anecdotal evidence of distracting and inappropriate

behavior was offered by the Assistant Band Director, [REDACTED].¹⁴ (Tr. 335-36)

According to testimony, Student had significant problems in his attempts to participate with the marching band.¹⁵ Mr. [REDACTED], hired as the Band Director in 2006, testified that he had worked with Student for one and one-half years and that "in the marching band, he had a lot of trouble marching." (Tr. 264). Without providing specific examples, he stated, "we tried and tried and he still had, you know, a lot of trouble." (Tr. 265) Dr. [REDACTED] and Mr. [REDACTED], the principal, both observed Student on the marching field and his inability to march in step or in the required manner. (Tr. 288-89; 307) Mr. [REDACTED] testified that he gave him the opportunity to participate every day but that he quickly became distracted. (Tr. 268) Student's father and one of the special education teacher gave first hand accounts that Student was not allowed to practice with the marching band, but was required to sit alone in the bleachers or in the grass ("with his \$2000 trumpet") while the rest of the band practiced. (Tr. 259; 152-53)

Student's father, who is employed as a [REDACTED] at another [REDACTED] in the District, acknowledged that [REDACTED] had difficulty with learning to march, in part because of the lack of instruction and practice:

Marching and playing a band instrument takes a tremendous amount of brain power. It takes regular practice every day nonstop. You've got to do it every day or else it's going to be difficult...he was not getting good fundamental training on how to march.

(Tr. 254-55)

¹⁴ Ms. [REDACTED] testified that Student started screaming one day because someone sat on his imaginary friend, that sometimes Student would just cry and that on occasions Student would engage in repetitive behavior such as taking his horn apart and then putting it back together. She testified that behavior continued today. (Tr. 335-36).

¹⁵ The degree/level with which Student was instructed and the willingness toward providing that instruction directors is questionable. Student's father testified that one year when Student reported to band camp on the first day, Ms. [REDACTED] met him and his [REDACTED] when they arrived and, "she said, What's he doing here? At the top of the voice, you know...and, I told her, I said, you know that's what we planned out in the IEP the year before that [REDACTED] was going to come and have some part-time practicing with the band." (Tr. 242) The District did not offer any evidence to dispute this particular testimony.

The Band Director testified regarding Student's behavior and the impact of the behavior on other band members. He described that Student was "[t]ouching them, getting close to them, getting in their face," and stressed the behavior was a distraction to the students. (Tr. 263). While this behavior did not happen everyday, it happened most days. (Tr. 263). According to Mr. [REDACTED], the conduct "may have improved for a day", but it would return and be the same. (Tr. 264). Mr. [REDACTED] admitted that Student has not received any accommodations in band this semester to deal with behavioral problems. (Tr. 274-75)

Mr. [REDACTED] did acknowledge that Student had been mistreated by other band members. (Tr. 275-279) He also admitted that Student was left unsupervised with other band members during practices when they could not be present, or were not available. (Tr. 286) Both special education teachers recounted incidents where other band students saw Student coming through the band hall door and "shouted" at Student that he could not participate in band and to put his trumpet up. One of the special education teachers described her observation of reaction to alleged mistreatment of Student:

Q. [H]ave you heard of reports of other students in band mistreating [Student]?

A. I have heard that, yes.

Q. Can you describe what you've heard to - - for us?

A. [Student] has come in, you know, to the room, he would be upset, he'd be crying because, you know, the kids say that they don't need him there. He shouldn't be there. He's going to make them lose a competition. That he - - you know, making him feel like they do not want him there, you know, is basically how [REDACTED] would feel. And he was always visibly upset about it. You know, things that - - he'd say, "That hurts my feelings." He would actually use those words. And you know, that - - and like I said, I didn't observe that to give firsthand information. I can just tell you what I have heard, you know, through the course of conversation and hearing Student and seeing Student upset."

(Tr. 100-010)¹⁶

Student's behavioral problems were also observed in other school settings. Student sits at the lunch table with Ms. [REDACTED] and other faculty. In Ms. [REDACTED]'s opinion, the behaviors she observed - Student talking loud, Student standing or moving about when [REDACTED] is should be sitting down, Student talking too long and "bothering" other students - were manifestations of his disability. (Tr. 97-98) Ms. [REDACTED] has worked on redirecting Student in the lunchroom setting. Redirecting Student's attention has worked well for Ms. [REDACTED] in that setting, and she believes that, given her training and experience she could successfully redirect Student's behavior in settings other than the lunchroom. (Tr. 99-100)

Based on her experience as a Special Education Teacher, Ms. [REDACTED] said that Student needs counseling services and a functional behavior program to address his socialization skills and the behavior that results from his disability. (Tr. 142) Ms. [REDACTED] also stated that accommodations could help Student achieve success in band:

- Q. In your professional opinion, would accommodations in band, such as a one-on-one aide, enable Student to be successful?
- A. Yes, but only if it's someone that had knowledge, training with a child that has Asperger's.

(Tr. 159-60)

C. Functional Behavior Analysis.

A December 12, 2007 report regarding Student's Functional Behavior Analysis states:

His teachers express concerns regarding a possible social skills delay. Consistently his teachers report off task behaviors such as talking and inattentiveness during academic instruction.

¹⁶ While her description contains hearsay it nevertheless represents the Student's "perceived" reaction to conduct by fellow band members.

* * *

Based on an analysis of the anecdotal data collected it is believed that [redacted] is exhibiting behaviors consistent with a function of attention seeking behavior from work/peers. Because parents and school staff report a possible diagnosis of Aspergers it should be noted that these behaviors may have an increased intensity as a result of the social delay associated with Autism Spectrum Disorders, however it is believed that these behaviors could be modified effectively with appropriate interventions in all settings.

Ex. 3. A Behavior Intervention Plan was developed, but never implemented. (Ex. 14) The document was apparently discovered by Dr. [redacted] during the due process hearing in December 2008. The BIP notes the negative impact of his behavior in regular education class. (Ex. 14) It also notes Student's inappropriate actions, in band, as well as Student's being friendly and his expressing affection and hugging girls he knows at school. "Many of the girls also hug him." (Ex. 14) The latter version of Student's 2007-2008 IEP had a hand-written note that stated, "Follow FBA/BIP." The document was the result of a February 12, 2008 meeting attended by Ms. [redacted], the special education teacher, the Advocate, the Parents, a regular education teacher and by [redacted] ('agency representative." For the IEP action, a check-mark was placed by the word "Revise". (Ex. 4 p. 8). The IEP for the 2008-2009 has a hand-written note dated October 20, 2008, that states, "FBA requested." (Ex. 2)

D. IEP Meeting - May 12, 2008

On May 12, 2008, Student's mother, the Advocate, and an MPAS attorney attended the scheduled end-of-the-year IEP meeting. During that meeting, the parties were reviewing a draft IEP developed by Ms. [redacted]. (Tr. 11) The IEP contained the same language as the 2007-2008 IEP: "copy of music will be given for memorized pieces if sight reading is not required." However, the language on the IEP, Exhibit 2, has a line drawn through it. At the meeting, the Advocate asked why band was not addressed in the IEP. (Tr.11) The Principal excused himself from the meeting and

sought guidance on this issue from the District's Attorney. Upon his return, the Principal told the group that he had been advised by the School's Attorney that band should not be addressed in the IEP because it was an extra-curricular activity. (Tr. 11) Certain language on the IEP was deleted as a result. (Ex. 2).

D. Student's Removal from Band

On October 12, 2008, the High School Principal contacted Student's father and informed him that Student had been removed from band because of an incident that had occurred that day. (Tr. 211). The precipitating incident was described by Mr. [REDACTED]:

Q. What was the final event that - - well, first let me ask you - - well, what was the final event that ultimately led you to recommending to Mr. [REDACTED] that he be removed from band?

A. Reports that I had gotten from students and other staff people that he had been touching people inappropriately without their permission. And then, you know, when I would confront [Student] and, you know, tell him that he didn't need to touch people, you know, other students, he told me that he like touching people. I said, But you can't because this is high school band and this is high school and you can't touch the other people or get in their face if they don't want you to. And I said, and you're going to have to stop doing that. He said, I can't stop. I said, Well, you're going to have to. So I guess that's pretty much where that led to.

(Tr. 269). There was no credible testimony offered that the way Student was touching girls was sexual in nature. There was testimony that the touching incidents "was not" sexually inappropriate.

(Tr. 250) Mr. [REDACTED] answered, "yes" when asked if he had "any concerns about possible legal actions against the school if he continued to touch the girls inappropriately."¹⁷ (Tr. 291)

¹⁷ Mr. [REDACTED] testified that Student was removed from riding the band bus the previous year for "touching female students on the bus." (Tr. 291); Ms. [REDACTED] testified that, while she was riding the bus with the students on one band trip, she heard several female band members asked Student to stop touching them. A band parent was also on the bus. (Tr. 337) Ms. [REDACTED] eventually went back toward Student and told Student that the "girls" didn't want him touching them and that wasn't right. Ms. [REDACTED] stated that Student looked at her and said, "Mrs. [REDACTED], do you like puppies?" (Tr. 338) She then told him to sit down, be quiet and not touch the girls. This occurred toward the end of the trip and they were close to home. (Tr. 338)

IV. LAW

In *Schaffer vs. Weast*, 546 U.S. 49, 51-53 (2005), the Supreme Court provided an overview of the IDEA.

[IDEA] seeks to ensure that “all children with disabilities have available to them a free appropriate public education [FAPE].” §1400(d)(1)(A)). Under IDEA, school districts must create an “individualized education program” (IEP) for each disabled child. §1414(d). If parents believe their child’s IEP is inappropriate, they may request an “impartial due process hearing.” §1415(f).

* * *

[IDEA] “leaves to the States the primary responsibility for developing and executing educational programs for handicapped children, [but] imposes significant requirements to be followed in the discharge of that responsibility.” *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 183 (1982).

* * *

The core of the statute, however, is the cooperative process that it establishes between parents and schools. *Rowley, supra*, at 205-206 (“Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, . . . as it did upon the measurement of the resulting IEP against a substantive standard”). The central vehicle for this collaboration is the IEP process. State educational authorities must identify and evaluate disabled children, §§ 1414(a) - (c), develop an IEP for each one, §1414(d)(2), and review every IEP at least once a year, §1414(d)(4). Each IEP must include an assessment of the child’s current educational performance, must articulate measurable educational goals, and must specify the nature of the special services that the school will provide. §1414(d)(1)(A).

Here, the due process request alleges that the School District failed to implement Student’s IEP and in doing so denied him a FAPE. The Fifth Circuit Court of Appeals explained the contours of a FAPE in *Adam J. vs. Keller Indep. Sch. Dist.*, 328 F.3d 804, 808-09 (5th Cir. 2003):

Under [IDEA], the FAPE must be tailored to the child’s particular needs by means of an [IEP], which is a written statement prepared at a meeting attended by a qualified representative of the school district, a teacher, the child’s parents or guardians, and, when appropriate, the child himself. The free appropriate public education proffered in an IEP “need not be the best possible one, nor one that will maximize the child’s educational potential; rather, it need only be an education that is specifically designed to meet the child’s unique needs, supported by services that will permit him ‘to benefit’ from the instruction.” The IDEA “guarantees only a ‘basic floor of opportunity,’ consisting of ‘specialized instruction and related

services which are individually designed to provide educational benefit.” This educational benefit “cannot be a mere modicum or *de minimis*,” but “must be meaningful” and “likely to produce progress.”

The IEP is the “cornerstone” of the IDEA.¹⁸ The IDEA contains numerous, specific procedural requirements to ensure a disabled child receives a FAPE and an IEP “developed through the Act’s procedures [that is] reasonably calculated to enable the child to receive educational benefits.”¹⁹ “Each IEP must include an assessment of the child’s current educational performance, must articulate measurable educational goals, and must specify the nature of the special services that the school will provide.”²⁰ The team that produces an IEP includes the child’s parent(s) or guardian(s) and school officials knowledgeable about special education, as well as a regular education teacher.”²¹ An IEP must be reviewed annually and an IEP must be in place at the start of a new school year. A school district is responsible for initiating and conducting the annual IEP meeting,²² and it must take steps to ensure that the parent(s) or guardian(s) “are present at each IEP meeting” or “are afforded the opportunity to participate.”²³

The Fifth Circuit identified four factors “that serve as an indication of whether an IEP is reasonably calculated to provide a meaningful educational benefit under the IDEA. These factors are whether

¹⁸ *White*, 343 F.3d at 378; *see* 20 U.S.C. § 1414(d).

¹⁹ *White*, 343 F.3d at 378 (quoting *Board of Educ. v. Rowley*, 458 U.S. 176, 206-07 (1982)).

²⁰ *Id.*; *see* 20 U.S.C. § 1414(d)(1)(A).

²¹ *White*, 343 F.3d at 378 (citing 20 U.S.C. § 1414(d)(1)(B)).

²² 20 U.S.C. § 1414(d)(4)(a).

²³ 20 U.S.C. § 1414(d)(1)(B)(I); 34 C.F.R. § 300.345(a). Written prior notice shall be provided to the parents of the child . . . whenever the local educational agency - - (A) proposes to initiate or change; or (B) refuses to initiate or change the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to that child. 20 U.S.C. § 1415 (b)(3); *see also* Miss. Code Ann. § 37-23-137(3).

- (1) the program is individualized on the basis of the student's assessment and performance;
- (2) the program is administered in the least restrictive environment;
- (3) the services are provided in a coordinated and collaborative manner by the key 'stakeholders'; and
- (4) positive academic and non-academic benefits are demonstrated.”²⁴

Provision of Counseling Services via Student's IEP

Student's IEP required, as a related service, the provision of counseling services on a weekly basis for 30-45 minutes. (Ex. 4) The regulations implementing IDEA specifically identify counseling services as a related service. 34 C.F.R. § 300.34(a). Counseling services is defined as “services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel.” *Id.* § 300.34(c)(2). According to the IEP, Student's eligibility category for services under IDEA is “ADD/ADHD/Asperger's Disorder.” (Ex. 2, 4) The evidence is undisputed that these services were not provided during the first semester of the current school year because the School District's employee who would have provided them resigned shortly before the beginning of the school year. (Tr. 132, 158, 175 , 229) While testimony established that the School District actively looked for a replacement and even interviewed candidates, no evidence was presented that the School District attempted to have a counselor or behavioral specialist provide services on an interim basis.

The issue relating to counseling services concerns the implementation of his IEP. The Fifth Circuit set forth the standard by which this particular issue is reviewed in *Houston Indep. Sch. Dist. vs. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000):

[T]o prevail on a claim under the IDEA, a party challenging the

²⁴ *Bobby R.*, 200 F.3d at 347-48 (citing *Cypress-Fairbanks.*, 118 F.3d at 253).

implementation of an IEP must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP. This approach affords local agencies some flexibility in implementing IEP's, but it still holds those agencies accountable for material failures and for providing the disabled child a meaningful educational benefit.

The Ninth Circuit Court of Appeals, citing *Bobby R.*, adopted a similar standard: “[W]e hold that a *material* failure to implement an IEP violates the IDEA. A material failure occurs when the services a school provides to a disabled child fall significantly short of the services required by the child's IEP.” *Van Duyn vs. Baker Sch. Dist.*, 481 F.3d 770 (9th Cir. 2007); *see also Nesho R-V Sch. Dist. vs. Clark*, 315 F.3d 1022 (8th Cir. 2003) (IDEA is violated “if there is evidence that the school actually failed to implement an essential element of the IEP that was necessary for the child to receive an educational benefit.”). In other words, a technical deviation from an IEP will not result in a denial of a FAPE, but the failure to implement a significant element necessary for educational benefit can result in a denial of FAPE.

The evidence at the hearing established that the counseling services are a significant and material part of Student's IEP. Student's socialization and inappropriate social skills and behaviors, a result of his Asperger's, are directly related to his ability to receive an educational benefit. (Tr. 122). Without providing the counseling services required by the IEP, Student is “being set up for failure.” (Tr. 115). In short, “with the right intervention, [Student] could be very successful.” (Tr. 116) Success for an Asperger's student, can not be measured solely by academic success. The disorder and its impact on a Student's social interactions with fellow students permeate the school environment and educational setting. (Tr. 19, 21, 27) A student can not receive and absorb the educational benefits protected and ensured by the IDEA, when that educational environment (including regular education classes and extracurricular/non-academic activities) is thrown “topsy

turvy” on a consistent basis, as a result of inappropriate, behavioral manifestations of his disability. If the purpose of education is to enable a person to have a productive, meaningful and independent life, “then the social component of what makes up this environment and this capability is certainly a part of that.” (Tr. 122)

Dr. [REDACTED] is employed by an autism advocacy entity in Mississippi. He is a consultant on autism and on the adjunct faculty at the University of Southern Mississippi and William Carey University in Hattiesburg. He has worked in the field of autism for 20 years and has a specialty in special education and psychology. His experience includes working with individuals with Asperger’s syndrome. (Tr. 111) He credibly explained, in detail, the aspects of Student’s condition as well as the behaviors consistently seen with Asperger’s. (Tr. 111-13) Many of the typical Asperger’s behaviors are reflected in the complaints made about Student’s inappropriate conduct. (Tr. 263-64; 269; 335-38) Dr. [REDACTED] reviewed a memo drafted by the Band Director in which he gave the reasons Student was removed from band. (Tr. 117; Ex. 12) Dr. [REDACTED] found the behaviors described in the memo to be “stereotypic behaviors.” (Tr. 118) In stating his opinion that Student could participate successfully in band “with the right accommodations and right support,” he recommended that Student receive as an accommodation, “[a] trained person that can be there to productively redirect behaviors that are mentioned in [Exhibit 12].” Dr. [REDACTED] also suggest that the staff gain a better understanding of Asperger’s syndrome. (Tr. 122) The Advocate also stressed the Asperger’s behaviors she observed in Student and the effect the absence of counseling services on Student. (Tr. 19, 24)

In addition, Dr. [REDACTED] explained the effect of the School District’s failure to provide Student with counseling services and a functional behavior plan:

Without appropriate intervention by a person that’s trained to provide - - and

appropriate is the right word there. It's not just any intervention. Not just a warm body to be there to say, Don't do this. Don't do that. The right type of understanding of this - - of the disability to appropriately redirect - and make more productive on types of progress, then the - - what's happening is it's empowering those behaviors to continue to grow and not - - in a not positive direction.

In other words, those behaviors are sort of tend to them -left to their own to develop in a way that becomes more and more overt. So, not providing that intervention means that every aspect of his education is affected because he's not understanding the social expectations of what's expected of him in an academic setting.

(Tr. 105)

An appropriate remedy for the denial of a FAPE is an award of compensatory education that is reasonably calculated to place Student in the position he would have been in but for the failure of the School District to provide a FAPE. *See School Comm. vs. Department of Educ.*, 471 U.S. 359, 369 (1985); *Draper vs. Atlanta Indep. Sch. Sys.*, 518 F.3d 1275, 1285 (11th Cir. 2008); *Reid vs. District of Columbia*, 401 F.3d 516, 523-24 (D.C. Cir. 2005). The Parents, through their attorney, contend that Student should received two 45 minute counseling sessions each week as a related service, as well as one hour of counseling services each week as compensatory services. The District did not offer any testimony in response to the opinions proffered by Dr. [REDACTED] regarding the accommodations and services needed by Student. Based on the evidence presented at the hearing, and given the lack of any counseling services this school year, and further given the compounded effect the lack of behavior intervention has had on Student's behavior, the compensatory education will be the provision of additional counseling services two times a week for 45 minutes. (Tr. 106)

In addition, the School District is directed to ensure that the individual hired by School District to provide these counseling services has adequate training in understanding and working with the behavioral manifestations of Asperger's syndrome. The School District should inform the parents and their attorney of the training undertaken by the School District to comply with this decision.

The District has the responsibility of meeting the requirements of the IDEA; therefore, the District has a duty to ensure its faculty and staff have the appropriate knowledge relating to the *unique* needs of *each* special education student. Teachers who work with special needs students should be aware of the IEP for each student.

School employees who work with special needs children, treat those children with respect, as they should any child. From the evidence presented, it is clear that the High School's two special education teachers met this standard. Other evidence, however, revealed a lack of respect and understanding by other personnel. Evidence presented at the hearing established several examples of such inappropriate behavior.²⁵ Teenagers who are instructed and encounter disabled children in a school setting should be guided toward proper responses and understanding of the disability. School personnel should model appropriate behavior for students. Without an understanding of the disability and the accompanying behaviors, teachers can not address the unique needs of the student.

Participation in Band

Significant testimony addressed Student's participation in band, an extracurricular activity. The federal regulations implementing IDEA specifically recognize that a school district's IDEA obligations also exist in the context of non-academic settings:

In providing or arranging for the provision of nonacademic and extracurricular services and activities, . . . each public agency shall ensure that each child with a

²⁵ The Assistant Band Director, Ms. [REDACTED] openly expressed her disdain for Student to the special education teacher. In an effort "to protect" Student, one special education teacher offered to watch him during the lunch period. She has the student seated directly across from her, and upon seeing Student seated at the faculty table, Ms. [REDACTED] asked the teacher "why she had to look at him during her lunchtime." (Tr. 87) Additionally, when the Student "talks about being the drum major," in front of her, Ms. [REDACTED] "rolled her eyes." Ms. [REDACTED] also uses the name "[REDACTED]" to refer to Student. Although she does not call student [REDACTED] to his face, "she'll say, How's [REDACTED] today? [REDACTED] seems a little busy today." (Tr. 89) Mr. [REDACTED] did make attempts to understand and deal appropriately with the Student's disability. (Tr. 86-87, 90)

disability participates with nondisabled children in the extracurricular services and activities to the maximum extent appropriate to the needs of that child.”

34 C.F.R. 300.117; *see also Id.* §§ 300.42, 300.107. While the regulations do not expound on the provision of extracurricular services, it is clear that children with disabilities should not be prohibited from engaging in extracurricular and nonacademic activities because of conduct that is a behavioral manifestation of the disability.

Expert testimony and the testimony of the Advocate established the unique educational needs for this Asberger’s student. Testimony established the significant impact and educational benefit that could result from Student’s participation in band. This evidence was not specifically challenged or contradicted by the School District. There was no evidence provided by the School District of any other way it has addressed Student’s educational need for socialization.

The weight of the evidence indicates that behavioral issues related to Student’s participation in band should be addressed by the provision of counseling services as required by this decision. The School District is prohibited from denying Student the opportunity to participate in band based on his disability and the behavioral manifestations of this disability. However, the School District is within its authority to act accordingly if issues not directly related to Student’s disability preclude him from meeting the performance expectations associated band, especially in connection with competitive events. In this vein, Student would not be treated any differently than any other student, regardless of disability.

The School District relies on *Livingston vs. Desoto County Sch. Dist.*, 782 F. Supp. 1173, 1182 (N.D. Miss. 1992), in which the court rejected the parents’ challenge to an IEP as substantively inappropriate “in that it lacked provision for development of social skills, study skills, and failed to provide for Michael’s low self-esteem.” Similarly, the School District cites *White vs. Ascension*

Parish Sch. Bd., 343 F.3d 373, 378-79 (5th Cir. 2003), to emphasize that the focus in an IDEA case must be on academic achievement. These cases are not inconsistent with the holding that the Alcorn County School District's failure to provide services set forth in Student's IEP resulted in a violation of IDEA. As held above, the evidence showed that these counseling services were essential to Student receiving an educational benefit. Obviously, the School District included counseling services in Student's IEP because the IEP team correctly concluded they were necessary for him to receive an educational benefit.

Having heard the evidence, the frustration of the Band Director and other School District staff is understandable, but the record reveals the fundamental basis for this frustration is the School District's own failure to provide necessary services to Student, as well as the failure to educate its staff about Asperger's. Many of the key players in this special educational saga did not even work in their current jobs during the crucial time-frame (or, had been working for only a short period). The Parents' frustration is also understandable because the behavioral challenges associated with their child's disability impacts the socialization that is a part of every student's education, whether disabled or not.

Student may not be denied the opportunity to participate in band if the failure to understand and master the "fundamentals" of band is substantially related to the lack of appropriate services and supports. It is also true, however; that a student does not have a *right* to participate in band (including the marching band) solely because of his disability.

V. CONCLUSION

In conclusion, it is the ruling of the hearing officer that:

- School District shall conduct a functional behavioral assessment by a specialist is Asperger's syndrome and implement a behavioral intervention plan within 30 days;

- School District ensure that a positive behavioral specialist develop and implement a behavioral intervention plan, with the assistance of Student's special education teachers, that is designed to address the unique educational and socialization needs of Student;
- In addition to the one hour of counseling services set forth in Student's IEP, School District will provide, as compensatory education, Student with two (2) forty-five minute sessions of counseling services each week with a positive behavioral specialist, which should include the goal of providing compensatory services to increase Student's socialization and appropriate peer interaction and decreasing inappropriate behavior by Student that interferes with the education and extracurricular and non-academic activities of Student and the learning of others;
- As additional compensatory education, School District will provide a shadow or one-on-one aid by a special education teacher knowledgeable in Asperger's Disorder for band class and band events to begin at the beginning of Spring semester, and at band camp. The need for future one-on-one shadowing in band should be evaluated at the beginning of school in the fall of 2009.
- School District shall develop and implement a training/educational program, with the help of a specialist in Asperger's Syndrome and its behavioral manifestations, which is designed to educate the school personnel who currently teach or otherwise work with Student in the regular classroom and extra-curricular and non-academic settings, including Student's teachers, his band director, and his assistant band director.

If the time frames set forth are considered unworkable, the hearing officer will consider reasonable modification for good cause.

SO ORDERED, this the 7th day of January, 2009.


 JEANNIE HOGAN SANSING, MSB# 6463
 Hearing Officer