DECISION

DUE PROCESS HEARING

Docket No.: D11-010

PRELIMINARY MATTERS

The quality of legal representation for both parties in this case was consistently excellent throughout this proceeding. The hearing officer appreciates the professionalism and competence of the attorneys for both parties.

Subsequent to the hearing, both parties filed a written brief and proposed findings of fact. All proposed findings, conclusions and supporting arguments submitted by the parties, have been considered. To the extent that the proposed findings, conclusions and arguments advanced by the parties are in accordance with the findings, conclusions and views stated herein, they have been accepted, and to the extent that they are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the material issues as presented. To the extent that the

testimony of various witnesses is not in accord with the findings as stated herein, it is not credited.

ISSUES PRESENTED

The issues presented in this due process hearing, as identified by the parties in the prehearing conference, are as follows:

1. Does a local education agency, such as Respondent, owe a duty of FAPE to a student who is home-schooled?

2. Did Respondent deny the student's parents a meaningful opportunity to participate in the IEP process by predetermining the contents of the student's February 23, 2009 IEP?

3. Did Respondent deny FAPE to the student by developing an IEP on February 23, 2003 that provided a transition from homebound to a full schedule of regular classes on too rapid of a transition period thereby depriving the student of FAPE?

4. Did Respondent deny FAPE to the student by failing to provide adequate training to Respondent's personnel?

5. Did Respondent unlawfully alter the student's attendance records?

FINDINGS OF FACT

Based upon all of the evidence in the record, the hearing officers made the following findings of fact: prehearing memorandum, the hearing officer has made the following findings of fact:

1. The student's date of birth is July 16, 1996.

2. The student suffers from bipolar disorder and has attention deficit hyperactivity disorder and anxiety. Among the symptoms associated with the student's disabilities are mood swings and an increased risk of suicide. The student's handwriting is significantly delayed. His meltdowns, or outbursts, are the result of frustration and embarrassment that he fells with himself. The student's bipolar disorder is managed with medications for mood stabilization, antipsychotics and anti-anxiety. The maintenance treatment for the student includes stability in his environment, stable sleep schedules and reduction of as much stress in his environment as possible. When the student becomes frustrated, he tends to decompensate and his bipolar symptoms increase, including meltdowns/outbursts, and could possibly result in psychotic symptoms. The student's condition is fragile.

3. While attending one of Respondent's middle schools in 2008-2009 school year, the student became very ill. At Petitioner's request, the student was placed on homebound instruction. The doctor's note provided by the student's

parents to Respondent requested that when the student was able to attend school that the following accommodations be in place: resource room available all day; small class size; full-time aide. While he was on homebound instruction, the student's bipolar symptoms increased and he exhibited some psychotic behaviors.

4. The student began attending one class, science, at Respondent's middle school in the fall of 2008 pursuant to an amendment of his previous IEP.

5. The attendance records of Respondent for the student from November 2008 to January 2009 have a one day discrepancy, showing the student to be absent one day more than he actually was. The student was never in jeopardy of being in violation of Respondent's attendance policy.

6. An IEP team meeting for the student was scheduled for February 12, 2009 but was rescheduled to February 19, 2009 because of the unavailability of the parents. Because the parent had requested that members of Respondent's staff that deal with the student receive training on bipolar disorder, Respondent delayed the February 19, 2009 IEP team meeting until February 23, 2009 to permit some of Respondent's staff to be trained about bipolar disorder and the effects that it has upon the student's learning. The training materials used for the training on bipolar disorder included some but not all of the materials provided by the student's mother to the Respondent. Said training occurred on February 18, 2009. Present at said training were Respondent's nurse, a special education teacher, five general education

teachers, Respondent's speech therapist, Respondent's director of special education, and Respondent's counselor.

7. Respondent's supervisor of secondary special education prepared a draft IEP with the assistance of the student's teachers prior to the February 23, 2009 IEP team meeting.

8. On February 23, 2009, Respondent convened an IEP team meeting for the student. Present at the meeting were both parents, a regular education teacher, a special education teacher, the Respondent's school psychologist, Respondent's supervisor of secondary special education, Respondent's speech language pathologist, Respondent's occupational therapist, Respondent's school nurse, and Respondent's counselor. The IEP resulting from said meeting includes information concerning the student's present levels of performance and a discussion of benchmark and formative assessment data, and it includes narrative descriptions of his present levels in reading, math, homebound, handwriting, and behavior, and a healthcare plan. The IEP includes the written notes of the student's science teacher, who could not attend the IEP team meeting. On the goals portion of the IEP, there is a schedule for the student to return to a full-time class schedule from his homebound status. The schedule for adding classes is as follows: lunch and language added 2/24/09; math added 3/9/09; world regions added 3/16/09; related arts (PE and music) added 3/23/09; art/computers added 3/30/09. The stated intention was for the student to

attend a full day schedule of classes. The IEP also includes a number of behavioral, reading, speech therapy and occupational therapy goals for the student. The IEP includes a behavior support plan. The services page of the February 23, 2009 IEP provides that if the student has one or more outbursts per day in a two week period requiring removal from the room, there would be a delay by one to two weeks. This comment concerning delay referred to the adding of new classes for the student. Numerous services and accommodations are included in the IEP, including a one-on-one aide. The IEP provides that it would be implemented as general education full time, with approximately 85% of the student's time in the general education environment.

9. The transition schedule in the February 23, 2009 IEP for the student was too rapid. The timetable it proposes for going from taking one science class and otherwise being homebound to a full schedule of classes at Respondent's middle school was too accelerated. Without a slower transition period, the student risked an aggravation of his bipolar symptoms, which would likely affect his ability to learn and receive educational benefit. The parents objected to the transition timetable at the February 23, 2009 IEP team meeting.

10. The parents actively participated in the February 23, 2009 IEP team meeting process. The meeting was delayed to allow the staff of Respondent to be trained on bipolar disorders and how it would affect the student's education at the

request of the parents. During the two hour meeting, the parents actively participated. Many of the parents' suggestions and comments were incorporated into the final IEP document. Counseling was removed at the parents' request. The parents were allowed to bring up matters not contained on the draft IEP, as well as to suggest changes and incorporate information into the draft IEP.

11. On February 24, 2009, Respondent issued two prior written notices to the parents. The first involved a refusal to include in the IEP a specific alternate location for the student to calm himself down. The notice states that the request was refused because a number of alternate locations exist within the school and that given the least restrictive environment requirements, and availability requirements, more than one location would be used. The second prior written notice refused to provide a separate class with like peers and very low numbers of students, as well as an alternative curriculum for math, social studies and language. The reason for the refusal was that the student was currently taking general education classes in the least restrictive environment with appropriate supports, modifications and services in place. Said prior written notices indicate that Respondent considered proposals by the parents, although it did not necessarily agree with them.

12. Respondent did not issue a prior written notice refusing the parents' request made at the February 23, 2009 IEP team meeting to slow down the timetable

proposed by the IEP for going from taking one science class and otherwise being homebound to a full schedule of classes at Respondent's middle school.

13. The student only attended two or three days of classes under his February 23, 2009 IEP. Said IEP provides that the student had a one-on-one aide as recommended by the student's physician in the homebound request note. Due to apparent racial stereotyping, the student feared that the aide, who is of Jamaican ancestry, was practicing voodoo as she followed him around the school.

14. On March 24, 2009, the Respondent's school principal sent a letter to the parents revising the schedule for transitioning to additional classes.

15. On March 25, 2009, the parent disenrolled the student from Respondent's school system and gave notice that the student would be home schooled. The decision to home school the student was made primarily as a result of the student's anxiety concerning the proximity of his aide, whom he believed to be practicing voodoo.

16. Although still on home-schooled status, the student has begun taking classes at Respondent's middle school. He started with just one class. As of September 2010, he was taking three classes each day at the middle school. A fourth class was added at the change of semester in the 2010-2011 school year. The student has received good grades in the classes he has taken, and he is on the honor roll.

17. Respondent did not predetermine the results of the February 23, 2009 IEP for the student. The student's parents meaningfully participated in the IEP team process.

18. The February 23, 2009 IEP for the student is not reasonably calculated to confer educational benefit to the extent that it includes a transition to a full schedule of classes over too fast a period of time. The rapid transition in said IEP is likely to aggravate the student's bipolar symptoms and cause him harm thereby preventing the student from receiving educational benefit.

19. Respondent's staff are appropriately trained and certified.

20. The due process complaint in this matter was filed on February 22, 2011.

21. Five hours of counseling services or tutoring services designed to help the student with the transition to a full class schedule would appropriately remedy the educational harm suffered by the student as a result of the denial of FAPE herein.

CONCLUSIONS OF LAW

1. Student is a child with a disability for the purposes of the Individuals with Disabilities Education Act (hereafter sometimes referred to as "IDEA"), 20 U.S.C. Section 1400 et seq., and he is an exceptional child within the meaning of West Virginia Code Section 18-20-1 et seq., and Policy 2419, Regulations for the Education

of Students with Exceptionalities (West Virginia Department of Education – effective January, 2010)(hereafter sometimes referred to as "Policy 2419").

2. Student is entitled to a free appropriate public education (hereafter sometimes referred to as "FAPE") within the least restrictive environment under the meaning of IDEA, 34 C.F.R. Section 300.1 et seq., and Policy 2419.

3. Where a school district predetermines the result of an IEP prior to the IEP team meeting, it deprives the parents of a meaningful opportunity to participate in the IEP process. Deal v. Hamilton County Bd. of Educ., 392 F.3d 840, 42 IDELR 109 (6th Cir. 2004). The preparation of a draft IEP is not unlawful predetermination unless the IEP team has a closed mind with regard to receiving input from the parent and making any changes requested by the parent. J.D. v. Kanawha County Bd. Of Educ., 48 IDELR 159 (S.D.W.V. 2007). In the instant case, the parents were afforded the opportunity to meaningfully participate in the IEP process and they did meaningful participate in the IEP process for the student. The draft IEP developed by Respondent was not improper because the IEP team that met on February 23, 2009 had an open mind with regard to the parents' input.

4. The United States Supreme Court has established a two-part test for determining whether a school district has provided a free and appropriate public education to a student with a disability. There must be a determination as to whether the schools have complied with the procedural safeguards as set forth in The

Individuals with Disabilities Education Act, 20 U.S.C. §§1400 et seq. (hereafter sometimes referred to as "IDEA") and an analysis of whether the Individualized Educational Plan (hereafter sometimes referred to as "IEP") is reasonably calculated to enable a child to receive educational benefit. Bd. of Educ, etc. v. Rowley, 458 U.S. 178, 102 S. Ct. 3034, 553 IDELR 656 (1982); School Board of Henrico County v. Z.P., 399 F. 3d 298, 42 IDELR 299 (Fourth Cir. 2005); Strum v. Bd. of Educ. of Kanawha County, 51 IDELR 192 (W. Va. S. Ct. December 2, 2008).

5. IDEA provides that a duty of FAPE be required of a local education agency, such as Respondent, to the following groups of students: (a) Students enrolled in public schools; (b) students placed in private schools by public agencies; and (c)children unilaterally placed in private schools by their parents after denial of FAPE by a public agency. Hooks v. Clark County School District, 228 F.3d 1036, 33 IDELR 120 (9th Cir. September 21, 2000). It is a matter of state law whether students who are home schooled are considered private school students. Hooks v. Clark County School District, supra; Letter to Williams 18 IDELR 742 (1/22/1992).

6. Under West Virginia state law, home-schooled children are not considered to be private school students. The West Virginia state compulsory attendance law treats home schooled students differently than private school students and imposes requirements upon home-schooled children and their parents not applicable to private school students. W. Va. Code § 18-1-1, et seq. The obligation to

provide FAPE specified by Policy 2419 does not include home-schooled students. Policy 2419 Chapter 1, Section 2(A). By contrast, the child find obligation of a school district under Policy 2419 specifically includes the obligation to determine whether home-schooled children are students with disabilities as defined under federal and state law. Policy 2419, Chapter 2, Section 1. In Jones v. West Virginia Bd. of Educ., 218 W. Va. 52, 622 S.E. 2d 289 (W.Va. S. Ct. July 6, 2005), the West Virginia high court ruled that parents of home-schooled students have voluntarily chosen not to participate in the free public school system and that in making this choice, "these parents have also chosen to forego the privileges incidental to a public education." As a result, the court held that children who are home schooled may be excluded from interscholastic athletics. Accordingly, West Virginia law does not consider home-schooled children to be private school students. Under state law, therefore, a local education agency such as Respondent does not owe a duty of FAPE to students who are home schooled.

7. Under IDEA, a due process hearing may be convened only with regard to special education issues involving the identification, evaluation, placement, and provision of a free and appropriate education to a student with a disability. IDEA § 615(b)(6)(A); 34 C.F.R. § 300.507(a); Policy 2419, Chapter 11, § 3.

8. A due process hearing may not include issues that were not stated in the due process complaint or developed through the prehearing process. IDEA § 615(f)(3)(B); 34 C.F.R. § 300.511(d).

9. Unless one of the three statutory exceptions applies, a due process complaint must be filed within two years of the date of the incident complained of. IDEA § 615(b)(6)(B); § 615(f)(3)(C); 300.507(b); Policy 2419, Chapter 11, § 3(A).

10. A due process hearing officer has broad discretion to fashion an appropriate remedy when there has been a violation of IDEA or Policy 2419. School Committee Town of Burlington v. Department of Educ., 471 U.S. 358, 369, 105 S.Ct. 1996, 556 IDELR. 389 (1985); Garcia v. Bd. of Educ. of Albuquerque Public Schs, 530 F.3d 1116, 49 IDELR 241 (10th Cir. 3/25/2008); Reid ex rel Reid v. District of Columbia, 401 F.3d 516, 43 IDELR 32, (D.C. Cir. 3/25/2005); Los Angeles Unified Sch. Dist. v. D.L., 548 F. Supp.3d 815, 46 IDELR 252 (C. D. Calif. 3/10/8); Bishop v. Oakstone Academy, 47 I.D.E.L.R. 125 (S.D. Ohio 2007); Brockton Central Sch. Dist. 49 IDELR 24 (SEA N.Y 2007); In re Student With a Disability, 108 LRP 45824 (SEA WV 6/4/2008); Strum v. Bd of Educ of Kanawha County 51 IDELR 192 (W.Va. SCt 12/2/2008).

11. Compensatory education and other relief under IDEA should be flexible and quantitative in nature. Such relief should be designed to remedy the educational harm suffered as a result of a violation of the special education laws. Compensatory

education awards should be tailored to the specific facts and circumstances of a particular case, the nature, period and severity of the violation and the nature and severity of the student's disability. Reid ex rel Reid v. District of Columbia, 401 F.3d 516, 43 IDELR 32, (D.C. Cir. 3/25/2005).

DISCUSSION

Merits

Issue No. 1: Did the parents' decision to home school the student terminate the obligation of Respondent to provide FAPE?

Respondent asserts as an affirmative defense that from the point that the parent began home schooling the student, March 25, 2009, the Respondent's obligation to provide FAPE terminated. Both parties have extensively briefed this issue in their post-hearing briefs.

IDEA provides a right to for the following three categories of students:

1. Students enrolled in public schools;
2. Students placed in private schools by public agencies; and
3. Children unilaterally placed in private schools by their parents after a denial of FAPE.

Hooks v. Clark County School District, 228 F.3d 1036, 33 IDELR 120 (9th Cir. September 21, 2000); IDEA § 612(a); 34 C.F.R. § 300.148; Policy 2419, Chapter 8, § 2.

It is a matter of state law whether home-schooled students are considered private school students for purposes of unilateral placements under IDEA. Hooks v. Clark County School District, supra; Letter to Williams 18 IDELR 742 (1/22/1992).

Under West Virginia law, home-schooled students are not considered private school students. West Virginia Code § 18-8-1 imposes requirements on home-schooled students under the state compulsory attendance law that do not apply to private school students. In this sense, West Virginia law does not treat home-schooled students as private school students.

In addition, the school district obligation of FAPE as defined under Policy 2419 does not mention any duty to home-schooled students among the students enumerated to whom the duty is owed. Policy 2419, Chapter 1, § 2(A). This omission is in stark contrast to the child find provisions of Policy 2419 which include home-schooled students as those among those to whom a school district's child find obligation applies. Policy 2419, Chapter 2, § 1.

This conclusion is supported by a decision of the West Virginia Supreme Court of Appeals cited by Respondent in its brief. In Jones v. West Virginia Bd. of Educ., 218 W. Va. 52, 622 S.E. 2d 289 (W.Va. S.Ct. July 6, 2005), the West Virginia high court held that the parents of home-schooled children have voluntarily chosen not to participate in the free public school system in order to educate their children at home.

The Court stated as to the decision to home school the child that "[i]n making this choice, these parents have also chosen to forego the privileges incidental to a public education." Accordingly, the state Supreme Court concluded that home-schooled children are not entitled to participate in interscholastic athletics. Although this was not a special education opinion, it shows the reasoning of the Court with respect to the appropriate legal classification of home-schooled students.

Counsel for Petitioner supplied authorities regarding homebound students who are enrolled in public schools. Homebound students are not home schooled students. Policy 2419 §2 (J). This information was not useful to the issue as to the rights of home-schooled students under West Virginia law.

In view of the status of home-schooled students under West Virginia state law, it is concluded that home-schooled students are not private school students, and, therefore, are not eligible to receive FAPE or tuition reimbursement under the unilateral placement principles of IDEA.

Accordingly, Respondent's duty to provide FAPE to this student ended on March 25, 2009 when the student's parents disenrolled him from Respondent and classified him as a home-schooled student. The relevant timeline for the following discussion of the issues raised by this complaint ends, therefore, on March 25, 2009.

Issue No. 2: Did Respondent violate the student's parents' right to meaningful participate in the IEP process by predetermining the February 23, 2009 IEP for the student?

The parents contend that they were not afforded the opportunity to participate in the IEP process for the February 23, 2009 meeting. Respondent contends that the parent participated actively in the February 23, 2009 meeting and received a meaningful opportunity to participate. The parents contend that Respondent developed a draft IEP prior to the meeting without their participation. In addition, the student's mother testified that the parents were not able to add anything to the IEP but rather were only able to discuss matters that were contained on the IEP during the IEP team meeting. In contrast, Respondent's witnesses testified that the parents actively participated in the IEP team meeting process. To the extent that the testimony conflicts, the testimony of Respondent's witnesses is more credible and persuasive with respect to this issue. The testimony of Respondent's witnesses is also corroborated by the documentary evidence in this case.

The evidence in this case reveals that in fact the IEP team listened to and considered numerous suggestions by the student's parents. As the testimony of the supervisor for secondary special education revealed, numerous changes were made to the draft IEP based upon the parents' suggestions. In addition, the testimony of the

student's mother that she was not allowed to bring up anything new is refuted by the two prior written notices issued by Respondent showing that her input was considered, although Respondent did not necessarily agree with it. Also, the record evidence reveals that the February 23, 2009 IEP team meeting was delayed at the request of the parents in order to permit training of Respondent's staff IEP team members with materials supplied by the mother concerning the student's bipolar condition and how it affected his educational needs.

The fact that the district had prepared a draft IEP for discussion was not predetermination where the parents offered suggestions and changes many of which were adopted in the IEP. J.D. by Davis v. Kanawha County Bd. Of Educ., 48 IDELR 159 (S.D. Wva. 08/03/2007). In the instant case, it is clear that Respondent's representatives on the IEP team had an open mind with respect to the matters contained on the draft IEP. Indeed, numerous changes to the draft were made after the input of the parents was considered by the team. Accordingly, the evidence does not support a conclusion that Respondent predetermined the February 23, 2009 IEP. The evidence in the record reveals that the parents had a full and meaningful opportunity to participate in the IEP team process and that they did actively participate in the IEP process.

Issue No. 3: Did Respondent deny the student a FAPE by failing to permit sufficient flexibility in his schedule in terms of the transition to regular classes?

Petitioner contends that the transition from no classes as a home-schooled student to a number of classes under the February 23, 2010 IEP was too fast and was likely to cause the student to not receive academic benefit. Respondent contends that the transition to regular classes was not too fast. Respondent also contends that the issue is not presented by the complaint or the prehearing memorandum. The hearing officer ruled when this issue was raised near the end of the due process hearing that this issue was sufficiently within the second issue raised under the prehearing memorandum and was specified during the prehearing conference. Although another attorney represented the parents at the prehearing conference, the attorney was from the same firm and even though the communication between the attorneys firm may not have been smooth, the issue was properly raised by the complaint as clarified at the prehearing conference and evidence concerning this issue was permitted at the hearing.

The February 23, 2009 IEP for the student provided that he would transition from homebound to a full class schedule by adding the first class on February 24, 2009; the second class on March 9, 2009; the third class on March 16, 2009; the fourth class on March 23, 2009; and the final class on March 30, 2009. By March 30, 2009, it

was contemplated that the student would be attending school on a full day basis. The services portion of the February 23, 2009 IEP provided that the student would be monitored carefully for behaviors and that if he had one or more outbursts per day in a two week period, there would be a delay by one or two weeks for adding classes.

The student's parents objected to the transition as being too fast and requested more flexibility and a slower transition period for the student. The parents advised the IEP team committee that they feared that the rapid transition would be unsafe for the student's health.

Although Respondent's members of the student's IEP team rejected the parents' concern with regard to the rapidity of the transition, Petitioner called as a witness a psychiatrist who has treated the student. The psychiatrist testified that the transition period specified by the student's February 23, 2009 IEP is too fast. He testified further that the rapid transition in the February 23, 2009 IEP could increase his bipolar symptoms and possibly even lead to psychotic symptoms.

The testimony of the psychiatrist was credible and persuasive. Although the witness was confused about dates upon which he had seen the student as pointed out by Respondent in his post-hearing brief, the testimony was nonetheless credible and persuasive.

It should be pointed out that Respondent did not have a report or opinion from the psychiatrist available to it at the time of February 23, 2009 IEP team meeting. Accordingly, Respondent is not to be faulted for failing to consider the psychiatrist's opinion; this would have been a much more egregious violation. The testimony does, however, support the parents' contention that the February 23, 2009 IEP was not reasonably calculated to confer educational benefit upon the student because the transition from homebound to a full-time class schedule was too rapid and dangerous. The medical evidence buttresses the parents' contention in this regard.

In addition, Petitioner presented the testimony of the student's science teacher. The student's science teacher did not attend the February 23, 2009 IEP team meeting. This in itself is not a violation of IDEA because another regular education teacher did participate in the IEP team meeting. The science teacher testified, however, that in her opinion, the schedule of transitioning the student to a full load of classes as specified by the February 23, IEP was too rapid and too accelerated and that it would not be beneficial to the student. If the teacher had attended the February 23, 2009 IEP meeting, she likely would have discussed this matter with the team. The testimony of the science teacher is also credible and persuasive. This teacher was very familiar with the student and she was aware of how he reacted to stressful situations.

Respondent's witnesses do not provide an explanation as to why the transition to regular classes for the student was so rapid or why they resisted the parents' objections to the speed of the transition. Respondent's supervisor for secondary special education testified that the transition schedule was just in the IEP and that she did not remember discussion of it at the two hour February 23, 2009 IEP team meeting. Respondent's school psychologist remembered the February 23, 2009 meeting vaguely and that the parents actively participated in the meeting. He did not, however, remember specific details of the meeting due to the passage of time.

To the extent that the testimony of Respondent's witnesses may contest the testimony of Petitioner's witnesses with regard to this issue, the testimony of Petitioner's witnesses is more persuasive and credible than the testimony of Respondent's witnesses. The consistency between the testimony of Respondent's science teacher and Petitioner's witnesses is particularly persuasive. Accordingly, it is concluded that the February 23, 2009 IEP deprived the student of a FAPE because the transition plan was too rapid and therefore rendered the IEP not reasonably calculated to confer educational benefit.

Issue No. 4: Did Respondent deny FAPE to the student by providing insufficient training to Respondent's staff?

Petitioner contends that the Respondent denied FAPE to the student by failing to provide sufficient training to Respondent's staff. Petitioner's post-hearing brief does not clearly state how the alleged problem is a violation of the special education laws.

Moreover, the evidence reveals that the February 23, 2009 IEP team meeting was delayed for a short period of time specifically at the request of the parents so that the Respondent's staff members could receive training on the student's bipolar condition and how it impacts his educational needs. The training of the Respondent's staff concerning the student's bipolar condition and its impact on his educational needs was done utilizing materials provided by the student's mother. Respondent was very active in training its staff as to bipolar disorder and how it affected the student.

Petitioner's brief does allege that the Respondent did not use all of the materials supplied by the mother, however, there is no argument as to how this might constitute a violation of IDEA, the federal regulations or Policy 2419.

Indeed, there is also no allegation or contention by Petitioner that Respondent's staff is not sufficiently qualified and licensed to perform their jobs. Because Petitioner has failed to provide any argument that might bring this issue within the purview of the identification, evaluation, placement or FAPE for a student with a disability, the issue is beyond the scope of any issue that may be heard at a due

process hearing. IDEA § 615(b)(6)(A); 34 C.F.R. § 300. 507(a); Policy 2419, Chapter 11, § 3. No violation of IDEA or Policy 2419 has been established by Petitioner with regard to this issue.

In addition, the Petitioner raised a number of other issues at the due process hearing that were not in the complaint or in the statement of issues as clarified by the prehearing conference herein. Among these were whether the reports of a neuropsychologist and the student's psychiatrist were considered by the IEP team; criticisms of the student's behavioral intervention plan; and contentions regarding whether or not the student's category of disability was correct, which would only be relevant in a case involving an eligibility allegation. Such issues are beyond the scope of the instant complaint and were not considered herein. IDEA § 615(f)(3)(B); 34 C.F.R. § 300.511(d).

Issue No. 5: Did Respondent unlawfully alter the student's attendance records?

The Petitioner contends that Respondent unlawfully altered the student's records. Petitioner provides no argument in its post-hearing brief that would make this issue in any way relevant to special education. Although an IDEA hearing officer has broad authority to remedy violations of IDEA and Policy 2419, a due process hearing can only involve matters concerning the identification, evaluation, placement

or FAPE of a student with a disability. IDEA § 615(b)(6)(A); 34 C.F.R. § 300.507(a); Policy 2419, Chapter 11, § 3.

In addition, as Respondent points out in its post-hearing brief, the issue with regard to attendance records appears to be untimely. A due process complaint must be filed within two years of the event complained of unless one of the statutory exceptions applies. IDEA § 615(b)(6)(B); § 615(f)(3)(C); 34 C.F.R. § 300.507(b); Policy 2419, Chapter 11, § 3(A). The due process complaint in this matter was filed on February 22, 2011. In the instant case, the attendance records complained of involved the period prior to the February 23, 2009 IEP team meeting. Anything before February 22, 2009, is time barred, unless an exception is alleged and proven. Petitioner made no argument in his post-hearing brief or otherwise that the alleged alteration of attendance records occurred either within the relevant time period for purposes of the statute of limitations or that any of the three statutory exceptions applied. Accordingly, it is concluded that this argument is barred by the statute of limitations.

No violation of IDEA or Policy 2419 has been established by Petitioner with regard to this issue.

Relief

A due process hearing officer has broad powers to impose appropriate equitable relief upon the finding of a violation of IDEA. School Committee Town of Burlington v. Department of Education, 471 U.S. 359, 105 S. Ct. 1996, 103 LRP 37667 (U.S. April 29, 1985); Forest Grove School District vs. TA, 129 S. Ct. 2484, 52 IDELR 151 (U.S. June 22, 2009); Garcia v. Bd. of Educ. of Albuquerque Public Schs, 530 F.3d 1116, 49 IDELR 241 (10th Cir. 3/25/2008); Reid ex rel Reid v. District of Columbia, 401 F.3d 516, 43 IDELR 32, (D.C. Cir. 3/25/2005); Los Angeles Unified Sch. Dist. v. D.L., 548 F. Supp.3d 815, 46 IDELR 252 (C. D. Calif. 3/10/8); Bishop v. Oakstone Academy, 47 I.D.E.L.R. 125 (S.D. Ohio 2007); Brockton Central Sch. Dist. 49 IDELR 24 (SEA N.Y 2007); In re Student with a Disability, 108 LRP 45824 (SEA Wv. 06/04/2008); Strum v. Bd. of Educ. of Kanawha County, 51 IDELR 192 (W. Va. S. Ct. December 2, 2008).

In the instant case, Petitioner seeks reimbursement for the tuition for a tutoring program at a university center at which the student was attending after being removed from school. Because the student was home schooled during this period of time, this relief would be inappropriate. See discussion of Issue No. 1 above. Moreover, and more importantly, Petitioner has not prevailed on the bulk of the issues raised by the due process complaint. In addition, the period of denial of FAPE extends from

February 23, 2009 when the IEP was prepared until March 25, 2009 when the student began being home schooled. This period of time constitutes only one month. Moreover, the student did not actually begin attending school until approximately March 22, 2009. After two or three days of attending school under the February 23, 2009 IEP, the student's mother testified that he was spooked by an aide, whom he believed to be practicing voodoo. This prompted the parent to begin the homeschooling of the student. So, the actual denial of FAPE period was really only a couple of days. Because the student was denied FAPE, an award of compensatory education is appropriate.

Awards of compensatory education under IDEA should be flexible and tailored to the educational harm done by the denial of FAPE. Reid ex rel Reid v. District of Columbia, 401 F.3d 516, 43 IDELR 32, (D.C. Cir. 3/25/2005). In the instant case, given the short period of time of denial of FAPE, yet taking into account the relative severity of the student's disability, it is concluded that based upon the harm done by the denial of FAPE in this case, it would be appropriate to award five hours of counseling or tutoring services specifically designed to help the student with his transition to attending a full schedule of classes at school. Because compensatory education should be flexible, the parties have the option to alter the relief in any manner that both parties agree to alter it. The order portion of this decision shall so reflect.

ORDER

Based upon the foregoing, it is HEREBY ORDERED as follows:

1. Unless the parties agree otherwise, Respondent shall reimburse the parents for five hours of counseling services or tutoring services specifically designed to help ease the student's transition back to a full schedule of classes. Said counseling or tutoring services should be provided in the county that the Respondent is located and at the market rate for such services in the county where Respondent is located, unless the parties agree otherwise. Said counseling or tutoring services should be provided within the next one year after the entry of this decision;

2. All other relief requested by Petitioner herein is denied; and

3. Within 180 days of the date that this decision is issued, the Respondent shall submit a written report to Ghaski Browning at the West Virginia Department of Education, documenting all steps the school has taken to comply with Order.

APPEAL RIGHTS

Any party aggrieved by the findings and decisions made herein has a right to bring a civil action in any state court of competent jurisdiction within ninety (90) days from the date of the issuance of the hearing officer's decision, or in a district court of the United States. Policy 2419, Chapter 11, § 3(N).

ENTERED: May 31, 2011

James Gerl, CHO
Hearing Officer

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served the foregoing DECISION by placing a true and correct copy thereof in the United States mail, postage prepaid, addressed as follows:

G. Nicholas Casey, Esquire
Lewis, Glasser, Casey & Rollins
Post Office Box 1746
Charleston, WV 25326

Gregory W. Bailey, Esquire
Bowles, Rice, McDavid, Graff & Love
7000 Hampton Center
Morgantown, WV 26505

On this 31st day of May, 2011

James Gerl, CHO
Hearing Officer

SCOTTI & GERL
216 S. Jefferson Street
Lewisburg, WV 24901