

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

PENNSYLVANIA

SPECIAL EDUCATION HEARING OFFICER

DECISION

DUE PROCESS HEARING

Name of Child: LC
ODR #5713/05-06 KE
Date of Birth: xx/xx/xx

Dates of Hearing:
November 1, 2005
December 21, 2005

CLOSED HEARING

Parties to the Hearing:

Parent

School District of Philadelphia
440 N. Broad Street, 3rd Floor
Philadelphia, Pennsylvania 19130

Date Transcript Received and Record Closed:

Date of Decision:

Hearing Officer:

Representative:

Frederick Stanczak, Esquire
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Doylestown, Pennsylvania 18901

Kenneth Cooper, Esquire
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School District of Philadelphia
440 N. Broad Street 3rd Floor
Philadelphia, Pennsylvania 19130

December 28, 2005¹

January 15, 2006²

Linda M. Valentini, Psy.D.

¹ The hearing officer excluded Christmas Eve and Christmas Day from the 5-day period in which the transcript was due.

² Decision was due January 12th. The hearing officer requested of the parties and received additional time to complete decision because of personal illness.

Background

Student is a xx-year-old young woman who graduated from a School District of Philadelphia (hereinafter District) high school in June 2004. From kindergarten on Student has been identified as an eligible student with learning disabilities in need of learning support. Ms. [redacted] Student's mother (hereinafter Parent) asserts that Student has never been provided with a free appropriate public education (FAPE), specifically in the areas of reading and mathematics, during the entire time Student was a student in the District. The Parent also asserts that Student was not provided with an appropriate transition plan from the time Student turned 16 years old, and that this is a detriment to Student at the present time. The Parent requests compensatory education for the two-year period prior to her original filing for due process in April 2005, in accord with the Individuals with Disabilities Education Improvement Act (IDEIA).

The District asserts that it provided Student with special education programs designed to meet Student's needs and that Student made "steady progress although ...not substantial progress" (NT 13). The District also asserts that it provided Student with a vocational program in high school to aid Student's transition. Should the hearing officer find that compensatory education is due, the District asks that a one-year limitation period back from April 2005 be imposed given that the District and the Parent agreed to honor that filing date, and the recovery period at that time under Montour School District v. S. T., 805 A.2d 29, 40 (Commw. Ct. 2002) was one year absent mitigating circumstances.

Procedural History

The Parent originally notified the District that she was requesting a hearing on April 6, 2005 and the request was forwarded to ODR. A hearing was scheduled within the regulatory timelines in force prior to July 1, 2005. However, because the parties believed they might be able to come to an agreement the Parent withdrew the matter without prejudice and the District and Parent agreed to honor the original filing date in the event of the need to consider a limitations period in a future hearing if the case could not be settled. The parties were not successful in settling the matter. ODR received the current hearing request on July 25, 2005 and in accordance with new provisions of the IDEIA post-July 1st timelines the hearing was scheduled for September 21, 2005. The Parent's serious illness just before the scheduled session delayed the matter until November 1, 2005 (unavailability of parties caused an October 31st session unilaterally set by the hearing officer to be delayed by one day). Then, tentative settlement negotiations and parties' unavailability resulted in the second session being scheduled on December 21, 2005. Although not introduced as an exhibit, material relevant to these timelines is included with the case documents as Appendix I.

Scope of the Hearing

The District sought that, if compensatory education were to be awarded, the statute of limitations articulated in Montour School District v. S. T., 805 A.2d 29, 40 (Commw. Ct. 2002) be applied to this matter, as the parties had agreed to adhere to the original filing date of April 6, 2005 when the Parent withdrew her first hearing request.

Compensatory education is an appropriate remedy when a school district knows, or should have known, that a child's educational program is not appropriate or that he or she is receiving only minimal educational benefit, and the district does not remedy the problem. M.C. vs. Central Regional School District 81 F.3d 389, 393 (3d Cir. 1996). Although the period of compensatory education has traditionally been equal to the period of deprivation, excluding the time reasonably required for the district to remedy the situation, M.C. vs. Central Regional; see also Ridgewood Board of Education vs. N.E., 172 F.3d 238 (3d Cir. 1999), in Montour the Pennsylvania Court set forth a “statute of limitations”, actually a recovery period, for compensatory education. Although U. S. courts have specifically rejected the “statute of limitations” on compensatory education imposed by Montour (See Jonathan T. v. the Lackawanna Trail School District 2004 WL 384906 M.D. Pa. February 26, 2004; Jonathan H. v. Elizabeth Forward School District Civil Action No. 03-1996, March 4, 2004 and Amanda A. et. Al. v. Coatesville Area School District, Civil Action No. 04-4184, February 23, 2005) the fact remains that Pennsylvania Commonwealth Court is a court of competent jurisdiction to resolve disputes arising under the Individuals with Disabilities Education Act in this jurisdiction and *allocatur* was denied by the Pennsylvania Supreme Court in 2003, see Montour, 820 A.2d 163. It has been well established by the Pennsylvania state-level educational agency that Montour is controlling in the Commonwealth since the date that the Pennsylvania Supreme Court refused to review the case (grant *allocatur*), Montour School District v. S.T., 820 A.2d 163 (PA. 2003)³.

When the District and Parent agreed to honor the original filing date, April 6, 2005, the recovery period under Montour which was applicable at that time was one year absent mitigating circumstances, creating a potential recovery period from April 6, 2004 through the end of the school year in June 2005. Had the parties not agreed to honor the original filing date, under the IDEIA there would have been a potential recovery period looking back two years from July 25, 2005, that is to July 25, 2003. Nevertheless, when the parties gave their opening statements, the Parent was requesting that the IDEIA two-year look-back be imposed and the District asked that the one-year look-back under IDEA and Montour be imposed. Going strictly by the dates and in the manner that this matter unfolded this hearing officer determined that since the parties had established that the filing date of April 6, 2005 would be honored, the controlling Pennsylvania case law at

³ See *e.g.*, Spec. Ed. Op. No. 1262 (2002), No. 1273 (2002), No. 1270 (2002), No. 1301 (2002), No. 1353 (2003), No. 1360 (2003), No. 1365 (2003), No. 1372 (2003), No. 1373 (2003), No. 1376 (2003), No. 1388 (2003), No. 1400 (2003); No. 1547 (2004).

the time, Montour, would be used to establish a potential one-year recovery period.⁴ However, in order that a full record would be available if necessary for review at a higher level should the Parent decide to limit a challenge to the recovery period under IDEA vs. the recovery period under IDEIA, the hearing officer permitted the parties to present evidence going back two years from the April 6, 2005 filing date, rather than one year. The hearing officer did not permit evidence to be introduced going back to kindergarten.⁵ (NT 15-17) However, factual findings in this decision do extend beyond the potential recovery period in order to lay a foundation for the discussion and conclusions.

As Student graduated from high school in June 2004, the period of recovery this decision will address for any failure on the District's part to provide FAPE in reading and/or math and/or in transition planning is therefore limited to the period from April 6, 2004 through the end of the 2003-2004 school year in June 2004. This hearing officer calculates that this period represents about 45 school days, or 25% of the 180-day school year.

Issues

1. Did the District offer Student a free appropriate public education in the area of reading?
2. Did the District offer Student a free appropriate public education in the area of mathematics?
3. Did the District offer Student a free appropriate public education in the area of transition planning?
4. If the School District did not offer Student a free appropriate public education in any of the above areas, is Student entitled to compensatory education and in what amount?

⁴ This created risks and benefits for both sides should it turn out that compensatory education was due. Essentially for this decision the Parent lost the potential two-year look-back recovery period under IDEIA 2004 but gained the opportunity to appeal to the United States District Court for the Eastern District which has rejected the Montour limitation period under IDEA 1997. The District succeeded in limiting the look-back period to one year for this decision under IDEA 1997, but lost the opportunity to lock in a maximum two-year look-back exposure under the IDEIA 2004. In Robert R. v. Marple Newtown School District, Civil Action No. 05-1282, November 8, 2005 The Honorable Eduardo C. Robeno, Jr. wrote, "The existence of such a limitations period under the IDEA has been a subject of much litigation, and, effective July 2005, Congress amended the IDEA to address this issue by adding a new two-year limitation for parents to request a hearing under the IDEA for compensatory education. 20 U.S.C.A. § 1415(f)(2005). The only cases in which this issue will arise, therefore, are those brought before July 2005."

⁵ Note that counsel for the Parent stated for the record that, "given the issue as to whether or not the student, a minor in Pennsylvania, has the right to file any claim or that their right to file any claim is held until they turn 18, that we're not waiving for purposes of any future action a claim going back beyond the two years". (NT 17-18)

Findings of Fact

1. Student is a xx-year-old graduate of the District. (NT 237)
2. In the 2003-2004 school year Student was in 12th grade and graduated in June 2004 by accumulated credits. (NT 20, 209)
3. Student attended school in the District from kindergarten through Student's graduation after 12th grade. (NT 172)
4. Student repeated kindergarten and in March 1993, during Student's second time in kindergarten, Student was evaluated and found to have a learning disability. (NT 170; P-2)
5. In March 1993 Student was [redacted age]. (P-2)
6. Repeating kindergarten, Student could write and recognize Student's first name but could not identify any of the letters in Student's first name by March 1993. Student could not spell Student's first name. (NT 173; P-2)
7. Repeating kindergarten, Student could rote count only to 6 and identify numerals only up to 5 by March 1993. (P-2)
8. According to the Wechsler Intelligence Scale for Children – Third Edition (WISC-III) administered in March 1993 Student's IQ levels were as follows: Verbal IQ 94, Performance IQ 99, Full Scale IQ 99, all Average Range. (P-2)
9. The school psychologist noted in the Evaluation Report that WISC-III subtests revealed average to superior skills on tasks requiring vocabulary development, common sense reasoning and verbal abstraction.⁶ (P-2)
10. Around this time Student was also found to have Attention Deficit Hyperactivity Disorder (ADHD). (NT 171)
11. As Student moved through the years Student received Cs, Ds and Es on Student's report cards. (NT 175)
12. Student received reading tutoring from a family acquaintance, a former teacher, in the summer prior to Student entering 9th grade. The unpaid tutoring took place twice a week, for 75 minutes each session, over a four-week period. (NT 189-195; P-4)

⁶ This hearing officer notes that these skills are tapped by the Vocabulary, Comprehension and Similarities subtests respectively.

13. On September 5, 2000 the teacher/tutor wrote a letter addressed to the School Administrator reporting that given the Dolch list of basic words for beginning reading Student miscalled or refused 15% of these words. (P-4)
14. The teacher/tutor reported that Student needed “considerable” help with phonics. He noted, “[Student] must master the sounds of all consonants, vowels, digraphs, diphthongs, blends” and commented that this was “pretty basic stuff”. (P-4)
15. The teacher/tutor recommended that “any reading program Student receives at school should “provide instruction at [student’s] instructional level with no reservations” and noted that Student needed one-on-one help. (P-4)
16. The teacher/tutor described some reading instruction techniques that had been successful with Student, noted Student’s ability to memorize the Frost poem Stopping By Woods on a Snowy Evening to assist reading and noted Student’s “enormous” enjoyment of a high interest level version of Dickens’ novel Great Expectations. (P-4)
17. During her 9th grade year Student’s courses were delivered in the Mixed Categorical Program (MCP) wherein, although the students moved from class to class, they were with a Learning Support Teacher for all the major academic subjects. (NT 26; S-1, S-1a)
18. During 9th grade Student made more total academic progress in reading and math combined than Student would make in any of Student’s other high school years. Student progressed from a 2.1 reading level to a 4.1 reading level and from a 3.3 math level to a 3.9 math level. (S-6, S-7)
19. However, for Student’s 10th grade year Student was moved to a Functional Learning Support (FLS) program, sometimes called a minimal cycling class wherein the student is with one or two teachers all day instead of going around the building from class to class. Students are moved from MCP to FLS if the progress has been minimal for whatever reason or if the attendance has not been good. The program provides more support and fewer distractions. (NT 30-31; S1, S-1a)
20. In 11th grade Student was moved to the Learning Support Vocational Program (VOC), wherein Student spent half Student’s day at the high school attending classes and half Student’s day at a community work experience. Student remained in this track for 12th grade as well. (NT 33; S-1, S-1a)
21. According to the Special Education Coordinator/LEA Representative the high school IEP teams did not look at or address Student’s ADHD, as “the document that we looked at was from middle school and it was addressed in middle school”. (NT 135-136)

22. Student's 11-8-00 9th grade IEP contains pecially designed instruction as follows: peer tutoring, one-on-one teacher assistance, extended time to complete assignments and verbally state responses. (S-7)
23. Student's 12-11-01 10th grade IEP contains pecially designed instruction as follows: extended time, read questions aloud, use of calculator, simplified directions, repeated directions. (S-6)
24. Student's 12-18-02 11th grade IEP contains pecially designed instruction as follows: extended time, guided practice, read questions aloud, use of a calculator, simplified directions, repeated directions, note taking. (S-3)
25. Student's 12-4-03 12th grade IEP contains pecially designed instruction as follows: extended time, verbal testing, guided practice, read questions aloud, simplified directions, repeated directions, use of calculator, concrete materials. (S-2)
26. Student's 11-8-00 9th grade IEP contains a reading annual goal for Student to progress from reading level 2.1 to level 3.0. The Benchmark "Use word recognition skills" is paired with the objective of "Given a selection, Student will employ reading strategies such as context clues and linguistic cues, and making meaning using prefixes, suffixes, roots inflectional endings, etymologies". (S-7)
27. Student's 12-11-01 10th grade IEP contains a reading annual goal for Student to progress from reading level 4.1 to a 4.5/5.0 reading level⁷. The short-term objectives are to write paragraphs of 3 to 7 sentences using proper grammar and punctuation⁸, to answer open ended questions and logically and coherently demonstrate comprehension of the material read, and to develop a sight vocabulary and utilize phonics rules to assist with the decoding of words⁹. (S-6)
28. Student's 12-18-02 11th grade IEP contains a reading annual goal for Student to progress from reading level 4.1 to a 5.0 reading level¹⁰. The short-term objectives are to answer questions about a reading selection at Student's reading level, to write a paragraph using correct spelling, grammar and punctuation, and to make inferences, predict outcomes and draw conclusions from a selection at her reading level. (S-3)

⁷ Despite Student having made a two-year gain in reading by the end of the expiring IEP.

⁸ The MAST does not test written expression. The Special Education Coordinator/LEA Representative who testified believed that the teacher determined Student's baseline level. She was unaware whether or not a rubric was used for writing. (NT 99-100)

⁹ There is no differentiation in the present level of educational functioning in reading as to whether Student's phonics skills are at a different level than Student's sight word skills. (NT 102)

¹⁰ Note that this annual goal is at the same level as that in the previous year's IEP as Student made no progress.

29. Student's 12-4-03 12th grade IEP contains a reading¹¹ current level of 4.6, but the annual goal is simply for Student to "improve comprehension¹² across all academic and vocational curricula". The short-term objectives are to restate or summarize information given a selection at Student's reading level, to write a 4 to 6 sentence paragraph¹³ containing an opening sentence, supporting ideas, closing or summary statement, correct grammar, capitalization and punctuation. (S-2)
30. Student's 11-8-00 9th grade IEP contains a math annual goal for Student to progress from math level 3.3 to level 4.0. One Benchmark is "Use the properties of addition, subtraction, multiplication, division, equalities and finding roots in forming and working with algebraic equations". This is paired with objectives of solving subtraction problems involving regrouping, solving multiplication problems¹⁴, solving division problems¹⁵, using a calculator for problems "with basic operations". A second Benchmark involves "explain(ing) the structure of standard measurement systems, both metric and customary, including derived units, unit conversions and dimensional analysis", however the objectives simply require Student to set an oven at a stated temperature and to use a kitchen timer or clock. (S-7)
31. Student's 12-11-01 10th grade IEP contains a math annual goal for Student to progress from math level 3.9 to a 4.5/5.0 math level. The short term objectives are to correctly multiply problems using 1 and 2 digits, to correctly divide problems using 1 and 2 digits¹⁶, to correctly add and subtract fractions. (S-6)
32. Student's 12-18-02 11th grade IEP contains a math annual goal for Student to progress from math level 4.6 to a 5.0 math level. The short-term objectives are to multiply and divide fractions¹⁷, to correctly do problems "of open-ended questions and consumer math"¹⁸, and to correctly do "problems with money"¹⁹. (S-3)
33. Student's 12-4-03 12th grade IEP contains a math current level of 4.7, but the annual goal is simply for Student to "increase math skills to the next level"²⁰. The objectives are to multiply one and two digit numbers with regrouping²¹, to divide

¹¹ There is no differentiation between reading decoding and reading comprehension. There is no baseline therefore for comprehension. (NT 146)

¹² The meaning of "comprehension" is unclear. The District's witness testified that this referred to comprehension across content areas of science, social studies, English and language arts. (NT 145-146)

¹³ The 10th grade IEP specified sentences of three to seven sentences. The complexity of the sentences in either IEP is not noted and no baseline is given in the IEP to gauge progress. (NT148-150; S-3, S-6)

¹⁴ Type and difficulty level unspecified.

¹⁵ Type and difficulty level unspecified.

¹⁶ Whether the 1 or 2 digits are in the divisor or the dividend is not specified.

¹⁷ Not further specified.

¹⁸ Not further specified.

¹⁹ Not further specified.

²⁰ Not further specified. The District witness said that this meant to the 5th grade level, "around 5.2 or three". (NT 151)

²¹ Note that this appears to be the same objective as was contained in the 10th grade IEP two years earlier.

- a two digit number by a one digit integer²², ²³ and to compute one digit math problems and word problems with decimals and money sums²⁴. (S-2)
34. Student was not taught reading using an Orton-Gillingham approach. Student was not taught with the Wilson reading program. Student's IEP team did not consider using this kind of approach for Student although, per the Special Education Coordinator/LEA Representative, "at that time period there was a lot of discussion with the IEP teams of staff in the school being trained in Wilson". (NT 97-98)
35. Student was not taught math using a structured math program designed for students with learning disabilities in the area of math, such as the Saxon Math Program. The high school's Special Education Coordinator/LEA Representative who participated in Student's 12th grade IEP has not heard of the Saxon Math Program and could not recall the names of any other specific math programs for learning disabled students. (NT 85-86)
36. The manner in which Student was taught reading and math did not change from the 11th grade IEP to the 12th grade IEP. (NT 153)
37. Student's expected level of achievement of Student's 12th grade IEP objectives in English and Language Arts was 70%. Student's expected level of achievement in math was 65%. (S-2)
38. At the end of 11th grade and the beginning of 12th grade the Parent asked "if someone could work more with [Student] with [Student's] math because [Student's] math skills are real bad...[Student] doesn't even count change...that's exactly what I said. 'My [child] can't even count change to go to the supermarket'". (NT 183-184)
39. Although she attempted to help Student with Student's homework the Parent did not know how to assist Student. (NT 187-188)
40. Student's IEPs during Student's four years of high school record achievement levels in reading and in math as assessed by the MAST (Multi-level Academic Survey Test) as follows: (NT 49-53; S-2, S-3, S-6, S-7)

IEP Date/ Grade	Reading Present Level	Math Present Level
11-8-00 Grade 9	2.1	3.3
12-11-01 Grade 10	4.1	3.9
12-18-02 Grade 11	4.1	4.6
12-4-03 Grade 12	4.6	4.7

²² Note that this appears to be a lower level of division than in the 10th grade IEP two years earlier.

²³ Note that both the multiplication and division objectives appear to be at a lower level than those contained in the 11th grade IEP which called for multiplication and division of fractions.

²⁴ Not further specified. The District's witness did not know the level of the problems. (NT 152-153)

41. Student made no progress in reading between the middle of 10th grade and the middle of 11th grade.²⁵ (S-3, S-6)
42. The IEP written in the middle of 11th grade contains no goals or objectives addressing reading decoding. The word “decoding” is not checked under specially designed instruction. The Special Education Coordinator/LEA Representative testified that “Well [Student’s] reading levels had a deficit but I don’t know that that was a method being used. It didn’t appear that that method²⁶ was being used any longer to instruct [Student]”. (NT 110-112; S-3)
43. According to the Special Education Coordinator/LEA Representative, around the time Student’s 11th grade IEP was developed instruction in decoding stopped in the District in favor of a “word recognition” approach, or “whole word instruction”. (NT 113-114)
44. In the absence of decoding instruction, Student was likely to have been required to read high interest material that was written at a 5th grade level when Student’s reading level was at the beginning 4th grade. (NT 114-117)
45. The projection for progress in math during the tenure of the 11th grade IEP was unclear. In fact, Student went on to make only one month of progress in math between the middle of 11th grade and the middle of 12th grade. The Special Education Coordinator/LEA Representative concluded that this was meaningful progress for Student. (NT 118-121, 136-137; S-2, S-3)
46. Although Student made no reading progress from 10th to 11th grade the 11th grade IEP notes that Student had good attendance, contributed to discussions in class and was a good worker at Student’s assigned community service placement. Student was putting forth effort and had a good attitude. (NT 140-141; S-3)
47. Although according to the 12th grade IEP there seemed to be a change in Student’s attitude, attendance²⁷ and motivation the District did nothing to examine why this might be the case. (NT 141-145, 163)
48. The 11th grade IEP Transition Plan notes under Post Secondary Training that “course catalogues and materials are available at high school. OVR counselor will meet with Student to do intake”. There is no indication of how Student will be assisted to read the catalogues. Under Employment the plan notes that “Student will do community service to learn about the different types of employment. [Student] will develop and increase work skills and job getting skills”. There is no notation about how the District will help Student develop and increase skills and what these skills may be. Under Community Living the plan notes that

²⁵ The IEP notes that Student’s attendance was good that year. (NT 107; S-3)

²⁶ The “method” to which she was referring is unknown.

²⁷ Student’s attendance was poor throughout high school. (S-8)

- Student will increase Student's daily living skills but there is no indication of what skills Student needs to increase and how Student will be assisted. Under Community Participation Student is to "continue participation in the community service learning" and write and present Student's community service learning project. Even if Student could effectively write Student's project it is unclear how this would contribute towards Student's transition post high school. Under Recreation there is a notation that Student participates in some recreational activities and that an unspecified person (Student?) will "look into the [redacted] Center for further activities". (NT 124-134; S-3)
49. The Vocational goal in the 11th grade IEP was to follow a sequence of directions to complete projects or tasks and the objectives were to complete a three-part task with 90% accuracy and to interact appropriately with the assisted living residents 100% of the time. There is no indication of how the goal and the objectives were established. Specially designed instruction listed was guided practice, concrete materials, simplified directions and repeated directions. (S-3)
 50. There was no one person designated to see that the Transitional Services Plan was implemented. (NT 134-135)
 51. As part of Student's 11th grade vocational program Student worked in food services and in recreation at an assisted living facility. The teacher did some travel training with the students and the teacher or an assistant teacher accompanied the students as a liaison between the facility and the school. (NT 34)
 52. The 12-4-03 12th grade IEP contains a minimal Transition Plan that assigns exclusive responsibility to Student under all service descriptions. Under "Post Secondary Training" (trade school or technical training) the Plan notes "materials and information available at [the high school]". Under "Employment" (competitive) the Plan notes, "develop and increase academic and work skills". Under "Community Living" (residential) the Plan notes, "develop and increase daily living skills and habits". Under "Community Living" (participation) the Plan notes "give service/volunteer in community". Under "Community Living" (recreation) the Plan notes, "pursue activities of interest". (S-2)
 53. Although Student would love to be a veterinarian, or work as a veterinary assistant, or work in a pet shop or volunteer in an animal shelter Student cannot count money or give change and cannot fill out an application on Student's own. (NT 209, 238, 259)
 54. Student's spelling skills are so poor that Student does not instant message Student's friends on the computer or send text messages on the telephone.²⁸ (NT 254-255)

²⁸ These means of communication currently permeate teenage and young adult subcultures, becoming more typical among friends than talking on the telephone.

Credibility of Witnesses

Allowing some latitude for the common situation of a witness being nervous, this hearing officer nevertheless found the testimony of the District's one witness, the Special Education Coordinator/LEA Representative, disconcerting. Given her testimony that she schedules approximately four hundred IEPs, sits in on IEP meetings as the LEA representative and works with the teachers in developing the IEPs, her testimony reflected either a lack of understanding of basic educational concepts such as cognitive ability versus achievement or a learning disability versus low intelligence, or an inability to articulate what she knew despite having attained advanced degrees and special education certification. (NT 63-80) Although she testified earnestly, her testimony contributed very little if anything to support the District's case. (See entire testimony in transcript). Her testimony did support the Parent's case in helping to establish the inappropriateness of Student's IEPs.

Although she was exceptionally nervous (NT 190-191), the Parent testified credibly that she trusted the District when she brought up concerns and was told that Student was doing well or that the teachers would work with her. (NT 176, 182, 187-189, 197, 201, 203, 204-205, 216, 221, 223) Her testimony and demeanor suggest that this Parent simply lacked the resources she would have needed to muster to pursue private evaluations, a private placement, or to challenge the District in any effective manner through the years. (NT 186, 190-191, 199, 205, 213, 215, 216, 218-219, 220-221)²⁹

Discussion³⁰ and Conclusions of Law³¹

Legal Basis

When Student was enrolled in the District Student was an eligible handicapped student, and as such was entitled to the protections of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. Section 1412, and its implementing regulations (34 C.F.R. Part

²⁹ The Parent wants Student to work and not be on Social Security all Student's life and it was at the suggestion of Student's Social Security attorney that she consulted her special education attorney. (NT 212-213, 234-235)

³⁰ This matter began before and concluded after the United States Supreme Court issued its decision in Schaffer v. Weast, 1005 WL 3028015 (U.S. Nov. 14, 2005), ruling that the burden of persuasion rests with the party bringing the claim in special education cases. Although the evidence in this matter was not determined to be closely balanced, the hearing officer still weighed the evidence according to the burden being with either party when reaching this decision and came to the same conclusion.

³¹ The events in this case unfolded under the IDEA 1997, therefore all cites referenced that statute and/or its implementing regulations.

300), and Chapter 14 of the Pennsylvania Code. The IDEA requires that states provide all eligible students with a free appropriate public education (FAPE). FAPE is defined in part as: individualized to meet the educational or early intervention needs of the student; reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress; provided in conformity with an IEP.

An appropriate IEP is one that meets the procedural and substantive regulatory requirements and is designed to provide meaningful educational benefit to the child. (Board of Education v. Rowley, 458 U.S. 176, 102 S. Ct. 3034 (1982); Rose by Rose v. Chester County Intermediate Unit, 24 IDELR 61 (E.D. PA. 1996). The IEP must be likely to produce progress, not regression or trivial educational advancement [Board of Educ. v. Diamond, 808 F.2d 987 (3d Cir. 1986)]. Polk v. Central Susquehanna IU #16, 853 F.2d 171, 183 (3rd Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989), citing Board of Education v. Diamond, 808 F.2d 987 (3rd Cir. 1986) held that “Rowley makes it perfectly clear that the Act requires a plan of instruction under which educational *progress* is likely.” (Emphasis in the original). The IEP must afford the child with special needs an education that would confer meaningful benefit. Additionally, the court in Polk held that educational benefit “must be gauged in relation to the child’s potential.”

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

Regarding transition planning, the IDEA’s regulatory provision defining transition services states:

“(a) As used in this part, *transition services* means a coordinated set of activities for a student with a disability that –

- (1) Is **designed within an outcome-oriented process**, that promotes movement from school to post-school activities, including postsecondary education, vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation;

- (2) Is **based on the individual student's needs, taking into account the student's preferences and interests;** and
 - (3) Includes –
 - (i) **Instruction;**
 - (ii) Related services;
 - (iii) Community experiences;
 - (iv) The development of employment and other post-school adult living objectives; and
 - (v) If appropriate, acquisition of daily living skills and functional vocational evaluation.
- (b) Transition services for students with disabilities may be special education, if provided as specially designed instruction, or related services, if required to assist a student with a disability to benefit from special education.” 34 CFR § 300.29. (emphasis added)

As for the process of transition planning, the regulations further provide that:

- “(1) For each student with a disability beginning at age 14 (or younger, if determined appropriate by the IEP team), and updated annually, a statement of the transition service needs of the student under the applicable components of the student's IEP that focuses on the student's courses of study (such as participation in advanced-placement courses or a vocational education program); and
- (2) For each student beginning at age 16 (or younger, if determined appropriate by the IEP team), a statement of needed transition services for the student, including, if appropriate, a statement of the interagency responsibilities or any needed linkages.” 34 CFR § 300.347(b).

Discussion

As per Diamond and Polk, an IEP must be likely to produce progress, not regression or trivial educational advancement, and must afford the student with special needs an education that would confer meaningful benefit. This educational benefit “must be gauged in relation to the child’s potential.” As were Student’s previous high school IEPs, the 12th grade IEP the District offered to Student during the recovery time specific to this decision failed to confer meaningful educational benefit to Student in relation to Student’s potential. In truth, gauging from the testimony of the District’s Special Education Coordinator/LEA Representative the District had lost sight of Student’s cognitive potential, not surprising since there was no evidence that Student had ever received any follow-up cognitive testing from the District after Student’s kindergarten scores had been obtained. Student’s mother did not have Student tested privately (NT 178).³²

³² Under OVR Student received a neuropsychological evaluation in February 2004, just prior to Student graduation. This report was not considered in this decision, as the evaluator was not available to answer

An examination of the 12th grade IEP specifically reveals that present levels of educational functioning are too general to allow for meaningful goals and objectives to be written. Year after year the District used the MAST to reevaluate Student even though the MAST provides no differentiation among whole word reading, reading decoding and reading comprehension and no differentiation among math calculation, math concepts, and math applications. Even given the simplistic reading and math scores with which the IEP team worked, the goals and objectives do not begin to address Student's severe deficits in reading and math. Broadly establishing an annual reading goal to "improve comprehension across all academic and vocational curricula" does not address Student's reading word recognition and reading decoding deficits. The short-term objective to "restate or summarize information given a selection at Student's reading level" may be referencing reading comprehension, but does not provide direction regarding what elements (plot, character, setting, inferences, etc.) should be contained in Student's summarization. (FF 29) The objective of writing a 4 to 6 sentence (unspecified length and complexity) paragraph containing an opening sentence, supporting ideas, closing or summary statement, correct grammar, capitalization and punctuation appears to be an identical or slightly lower objective than that present in Student's 10th grade IEP. (FF 27) Furthermore there is no evidence that Student's written expression skills were ever tested to establish a baseline for any objectives in this area. As regards math the annual goal is simply for Student to "increase math skills to the next level", unspecified in the IEP. The objective to "multiply one and two digit numbers with regrouping" appears identical to a math objective in 10th grade and the objective to "divide a two digit number by a one digit integer" appears to be a lower level than in the 10th grade IEP, and both objectives appear to be at a lower level than the 11th grade IEP which called for multiplication and division of fractions. (FF 33) The objective to "compute one digit math problems and word problems with decimals and money sums" appears to assume that Student understands how to count money, which Student does not. (FF 53)

In addition to poorly established baselines and inadequate goals and objectives, the projections for progress for Student ("to the next level") are vague, useless, and not measurable, and even if they had been specific and useful and measurable the standard for achieving the objectives was unacceptably low (70% for reading and 65% for math) for a student of average intelligence. (FF 37) The District witness was not able to provide much insight into what "the next level" really means, and could not articulate the rationale the IEP team used to arrive at these expectations.

With regard to pecially designed instruction, the 12th grade IEP lacks provisions for structured programs in reading and math that are designed to teach these subjects to individuals with severe learning disabilities. It is certainly not a stretch to characterize Student's disability as "severe" given Student's average intelligence, Student's low level of achievement and Student's slow rate of progress. Although the District was discussing

questions the hearing officer has and, more importantly, the report was not available at the time the 12th grade IEP was produced. Insofar as the District may argue that the results indicate that Student has low average cognitive functioning, attention is drawn to strengths noted in the report. The report did nothing to detract from the hearing officer's conclusion from reading the records available and from listening to Student's testimony that she is a learning disabled individual with at least average intelligence. (P-5)

the Wilson but did not yet have trained Wilson providers, there was no attempt to procure this program for Student from a private provider. Although Student was familiar with, but could not recall the name of, math programs other than the Saxon specifically for learning disabled individuals, the District's witness testified that the IEP team upon which she sat did not recommend one for Student. Notably, this IEP did not address Student's ADHD with goals/objectives, or specially designed instruction to assist Student with organization and focus. (FF 21)

The District characterized Student's attendance as good at the time of the 11th grade IEP, but the cumulative attendance report suggests chronic attendance problems. (S-8) The District now attempts to put some of the responsibility for Student's slow progress on Student, but there is no evidence that the District, at any time in Student's high school career, ever offered Student counseling or referred her for outside assistance. Given Student average intelligence and Student's very low levels of reading and math it is to Student's credit that Student actively participated in class in late 10th grade and early 11th grade, according to Student's 11th grade IEP. (FF 46)

The Parent had no recollection of discussion of transition planning at the 12th grade IEP meeting. (NT 207) Given the minimal plan, the mother's recollection of there being no discussion is likely to be accurate. Regarding the transition plan, this hearing officer finds herself in complete agreement with the Parent's attorney who summed up the problem in his closing statement when he described the plans included in the IEPs as "haphazard, at best", seeming to be "based upon what was available and not upon Student's actual interests". There is no evidence that there was any attempt to determine Student's interest and aptitudes at any point after Student filled out an interest inventory in middle school. As Parent's counsel also points out, the transition plan does not address Student's actual needs and abilities and does not address the obstacles that would prevent Student from attaining Student's post-school objectives. Just as the work-related settings chosen for Student do not reflect any obvious attempt to match Student's area of interest, Student's unsuccessful experiences in two settings were not processed with Student in such a way as to assist Student to learn from Student's mistakes. (FF 51 and 52) After one poor community vocational experience Student was not given feedback on why Student did not do well. After another unsuccessful experience Student received minimal feedback. Student was not offered the opportunity to process Student being "fired" with a school guidance counselor or with a transition or vocational education supervisor. (NT 240-241, 244, 252-253) No one at the District was responsible for Student's 12th grade transition plan (FF 50), minimal as it was, and no appropriate transition took place.

Given the extent of the deprivation of FAPE, this hearing officer will award compensatory education to Student as follows: six hours per day for the entire forty-five days within the scope of this hearing, regardless of whether Student was present every day, for a total of 270 hours. These hours must be used for reading assessment and instruction, and math assessment and instruction, provided by individuals who are trained and certified in programs proven to be effective with adults who have average intelligence but who are learning disabled. Although part of the award is based on

deficits in transition planning, this hearing officer believes that an effective transition to post-secondary training and/or employment for Student can only be accomplished when Student is reading and is able to do math. Although the final selection of the provider(s) is Student's and her mother's choice, it is strongly recommended that Parent's counsel assist them in locating and the selecting provider(s). The total cost of the compensatory education may not exceed the total cost of the salaries, benefits and associated costs that the District would have expended in providing Student with an appropriate reading program, an appropriate math program and an appropriate transition program during the 45 days addressed by this decision.

ORDER

It is hereby ORDERED that:

1. The District did not offer Student a free appropriate public education in the area of reading.
2. The District did not offer Student a free appropriate public education in the area of mathematics.
3. The District did not offer Student a free appropriate public education in the area of transition planning.
4. As the District did not offer Student a free appropriate public education in reading, math or transition planning, Student is entitled to compensatory education as follows: six hours per day for the entire forty-five days within the scope of this hearing, regardless of whether Student was present every day, for a total of 270 hours. These hours must be used for reading assessment and instruction, and math assessment and instruction, provided by individuals who are trained and certified in programs proven to be effective with adults who have average intelligence but who are learning disabled. Although part of the award is based on deficits in transition planning, this hearing officer believes that an effective transition to post-secondary training and/or employment for Student can only be accomplished when Student is reading and is able to do math. Although the final selection of the provider(s) is Student's and her mother's choice, it is strongly recommended that Parent's counsel assist them in locating and selecting the provider(s). The total cost of the compensatory education may not exceed the total cost of the salaries, benefits and associated costs that the District would have expended in providing Student with an appropriate reading program, an appropriate math program and an appropriate transition program during the 45 days addressed by this decision.

January 15, 2006
Date

Linda M. Valentini, Psy.D.
Linda M. Valentini, Psy.D.
Hearing Officer