PENNSYLVANIA
SPECIAL EDUCATION HEARING OFFICER

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.

Student's Name: E.K.

Date of Birth: xx/xx/xx
O.D.R. #5779/05-06 AS

Dates of Hearing: October 4, 2005; December 5, 2005; December 12, 2005; January 9, 2006; January 10, 2006; January 11, 2006; January 24, 2006; January 31, 2006; February 7, 2006; February 16, 2006

Type of Hearing: Closed

Parties to the Hearing:

Mother Parent	Represented by: Angela Uliana-Murphy 507 William Street Pen Argyl, PA 18072	Date Final Transcript Rec: February 21, 2006
Father Parent	Represented by: Elizabeth Kapo 2123 Pinehurst Road Bethlehem, PA 18018	Date of Decision: March 23, 2006*
School District Easton Area S. D. 811 Northampton St. Easton, PA 18042	Represented by: Kristine Roddick One W. Broad St. Bethlehem, PA 18018	Hearing Officer: Linda J. Stengle

* Parties notified of need for extension via email. LJS

Background

The student's date of birth is xx/xx/xx, and she attends high school in the Easton Area School District. The parents are divorced and at the time of this writing, share legal custody of the student but do not make decisions jointly about her education. The father made the complaint that started the proceeding. Midway through the hearing, after the first session, the mother decided that she wanted to become a party to the hearing. She also opposed aspects of the district's proposed program for the student but had different views on the resolution. The result was a three party hearing, with several attorneys involved. Both the district and the mother changed attorneys through the hearing, and the district had co-counsel at almost every session. Details of all this are clearly explained in the transcripts.

The issues for the hearing were presented as compensatory education for the period from September 2003 through the date of the hearing and a question regarding appropriate program and placement for the current school year. The father and the district reached a pendency agreement in October, stopping the clock on the compensatory education issue. The mother, not then a party, was present and participated in conversations on the district side of the negotiations. Afterwards, the Supreme Court issued its ruling in *Schaffer v. Weast* (USSC, #04-698, 2005), which switched the burden of persuasion to the party requesting the hearing, a significant change in the way Third Circuit cases had been handled previously. The father initiated the hearing process, so I had his attorney present first and stated that the parents would have the burden of persuasion. The father disputes that ruling.

Again, in January, the parties, now three, had a dispute over how to move forward with a transition plan, specifically who should be hired to perform an independent evaluation of transition issues. That issue was resolved through an agreed upon process of the parties submitting resumes to me for review and selection of an appropriate candidate.

Near the end of the case, the parties made an agreement regarding compensatory education for the 2004-2005 school year, removing that issue from my consideration.

Findings of Fact

1. The student's date of birth is xx/xx/xx. She attends school in the [Redacted] School District, which is the local education agency responsible for her education.
2. The mother is employed by the school district [redacted]. (N.T. 1885)
3. In November 2000, the family obtained a private neuropsychological evaluation from [Redacted] Hospital. The student obtained a full scale IQ of 52. On the Woodcock Johnson Test of Achievement, the student obtained scores that ranged from 42 to 74. (SD 35)
4. During the 2000-2001 school year, the district brought an aide into the classroom to assist with the student's behaviors. Her behavior issues were creating a barrier to learning academics. (N.T. 1558)
5. To deal with her behaviors in the 2000-2001 school year, the teacher and aide instituted first a behavior sheet which did not work, then rule cards. The targeted behaviors were not listening, poking or prodding someone, yelling out, and speaking out of turn. Oppositional defiant behavior was present at the time. She reacted adversely to frustration. The student did not understand academics and did not know how to solve her academic problems. (N.T. 1558-1561)
6. Though the student was experiencing behavioral issues, the district did not conduct a formal Functional Behavior Assessment, nor did it put the behavior program in writing. (N.T. 1635-1636)
7. In December 2000, the district issued a Comprehensive Evaluation Report. The student continued to be eligible for special education supports and services, and the team stated that she "appears to continue to meet the criteria as other health impaired and speech and language impaired. The report stated that she needed to receive all academic programming delivered in special education. (P 9)
8. In the CER, the team reported that the student's full scale IQ was 54; her verbal IQ was 56, and her performance IQ was 60. The report also stated that in two years the student had increased her performance on the WIAT by 1.5 grade levels. (P 9)
9. In January 2003, the district convened an IEP team meeting, which resulted in an IEP. The father expressed concerns about the student's progress and her reading program. The district responded to these concerns in a letter on February 4, 2003, by saying that the student had shown progress and would

be re-evaluated shortly. (SD 4)

10. In June 2003, another Evaluation Report was issued by the district. On the WIAT II, the student obtained a 1.8 grade level equivalent in word reading (SS 43), a 2.8 grade level equivalent in numerical operations (SS 53), and a 2.1 grade level equivalent in spelling (SS 59).
11. Nationally normed tests do not tell how the student is progressing through the curriculum. To understand whether this particular student had made progress, one would have to look at progress reports on IEP goals and curriculum based assessments. (N.T. 1102-1103, 1110)
12. The local education agency representative noted that he was not a school psychologist and was unable to interpret test scores on the ER; in addition, no meeting was held with a school psychologist present to interpret scores for the team. (N.T. 201, 203, P 1)
13. The student was bullied in [one] class. The district's proposed remedy was to remove the student and place her in a [different] class. The father strenuously objected to this proposed remedy and referred to the action as "discriminatory." He reported that after a meeting and letters on the incident, the district simply acted as if the incident had not occurred. At that point, he began to distrust the district. (N.T. 1326-1328)
14. The father felt that the district discouraged changes to draft IEPs. He stated that his recommendations were not being met with enthusiasm. He began a practice of delaying input until after he had time to review a draft document and then putting that input into writing. (N.T. 1325-1326)
15. The father objected to aspects of the ER on June 12, 2003. He asked for extra reading instruction for the student, citing the best case scenario as one on one reading instruction five days a week for at least two hours a day. He also stated that he was opposed to her going to a vocational technical school or working for local vendors on school time. (P 1)
16. In the same letter, the father raised concerns about her placement, saying that special education classmates reinforced the student's inappropriate behavior and that she needed opportunities to observe "normal" behavior in some "seated" class room situations. (P 1)
17. The mother approved an IEP on June 23, 2003. (SD 9)
18. On June 24, 2003, the father again objected to the proposed IEP, noting several concerns about the IEP goals. He noted that the goals were not measurable, that they were vague, and that they did not include actual targets

for achievement. He requested an additional IEP meeting instead of mediation. (P 10)

19. On August 27, 2003, the district convened an IEP meeting, and the group developed an IEP for the student. (P 10)
20. The team made some modifications in the proposal, including the implementation of quarterly meetings. According to the district's notes and the testimony, no discussion was conducted regarding increasing the student's participation in regular education, nor was a full range of supplementary aids and supports discussed to enable her to participate more in regular education. (P 10, Entire Record)
21. To deal with the student's social issues, the team adopted a goal which called for the student to develop/maintain social skills in both academic and non-academic areas. An objective which called for the use of a social story notebook was abandoned early when it was found to be ineffective. She experienced problems with academic frustration during this school year, as she did in earlier years. No FBA was conducted, and the LEA could not explain why not when asked. (P 30; N.T. 209-210, 545, 597)
22. There was no IEP team meeting to determine if the student was eligible for Extended School Year services. There was no Notice of Recommended Educational Placement issued regarding ESY eligibility. No one on the team ever reported to the LEA representative whether or not data had been collected regarding the student's retention or recoupment of skills. No data was collected just prior to or subsequent to breaks in programming. (N.T. 236, 237, 239, 551
23. The student would regress in the summer, and it would take two or three months of school to make up the skills that she lost over the break. (N.T. 1337-1338)
24. Though the student was placed in "full time learning support," she was actually only in learning support for academic classes, like math, English, social studies, and science. (N.T. 587-588)
25. She had numerous study halls during the 2003-2004 school year. (N.T. 1331; P 10)
26. The district's progress reports had "shortcomings." There is no way to tell from the progress report whether the student made progress on her IEP goals or not. The reports are vague, and people cannot tell from looking at the reports how a student is progressing on IEP goals with any certainty. (N.T.

439, 1335-1337, P 30)

27. Report cards and progress monitoring are separate and do not necessarily reflect progress on IEP goals. (N.T. 633)
28. The student achieved two annual goals, one in science and one in history in the first quarter of the 03-04 school year. Despite having achieved these annual objectives, the goals were not changed for the rest of the school year. Of six annual goals, district's records fail to show that the student made progress in 4 of 6 annual goals (P 30, N.T. 437)
29. Of eighteen objectives for the IEP for the 03-04 school year, the district did not show data reflecting progress for three objectives. Data for nine objectives showed no progress was made. Three showed a decline, and three of 18, showed progress, with only one of those showing mastery. (P 30)
30. In June 2004, the district convened another IEP team meeting and presented a draft of an IEP. On July 21, 2004, the father again objected to the IEP, citing several reasons. (P 11)
31. In the 2004-2005 school year, there was another individual in the special education classroom who was making the student uncomfortable and engaged in bullying. The situation kept the student from communicating as openly as she does in the 2005-2006 school year. The district removed the individual from the classroom in March or April of 2005. (N.T. 1641-1642, 1653)
32. In December 2004, the student was removed from a regular education typing class because she could not keep up with her typical peers. The father argued that she should be allowed to progress at a slower rate and that changes could be made in the IEP to address the program, but she was removed from the class without these changes. (N.T. 1347-1349)
33. The district was resistant to having the student in regular education classes, and she didn't get much support. (N.T. 1348)
34. In the 2004-2005 school year, homework was very difficult for the student, and she could not read her textbooks. Her mother had to scribe her work. She ultimately just refused to do her homework. (N.T. 1838-1840)
35. The student did get basic information from her regular education classes. (N.T. 1840)
36. She had an aide but did not want to have anything to do with her. (N.T. 1842)
37. The regular education placement in the 2004-2005 school year was a ruse.

When the student was placed in regular education, the district removed her supports or provided her with ineffective supports. The student failed in the placement. (N.T. 1355-1357)

38. In December 2004, the district issued a permission to evaluate form for assessments it deemed necessary to the completion of an impending Evaluation Report. In an email exchange in early January, the father notified the district that he was waiting to hear what tests would be used by a privately obtained evaluator and did not want to duplicate testing of the student. In early February, the district forwarded detailed information on the anticipated assessments. (P 12)
39. In February 2005, the parents had the student evaluated by [an institute out of state]. The student was identified as having immature behavior and communication skills but a good candidate for intervention. The report stated that she did not appear to be making significant academic progress in her placement. (P 2)
40. In March 2005, the district conducted an occupational therapy evaluation on the student. The evaluator did not consider referring the student for an Assistive Technology evaluation and did not feel that such an evaluation would help the student at the time of the hearing. She never observed the student typing. (N.T. 1139-1140, 1148; P 2)
41. For slow typing speed, the student could be accommodated by being provided with extra time or by having a shorter assignment to type. (N.T. 1144)
42. In June 2005, the district issued another Evaluation Report, which included WIAT II scores. This time, the student scored 1.9 grade level equivalent in word reading (SS 40), a 2.2 grade level equivalent in numerical operations (SS 41), and 2.1 grade level equivalency in spelling (SS 54). (P 1, P 2)
43. The father commented upon and made additions to the ER on June 10, 2005. Among other concerns, he stated that the district had failed to complete a timely FBA. He also made several requests, e.g. for ESY, an AT evaluation, changes to specially designed instruction, etc.
44. The ER was again discussed in a team meeting on August 9, 2005. (P 2)
45. Comparing the WIAT II scores from 2003 to 2005, the student increased by .1 grade level in reading, regressed .6 grade level equivalency in numerical operations, and made no progress in spelling. (P 1, P 2))
46. The student made minimal or no growth in academics during the two year

period between test administrations. (N.T. 207)

47. It is appropriate for the student to make a year or two years of progress in one school year. (N.T. 433)
48. The student was exhibiting "problem behaviors" in the full time learning support classroom. The district had no explanation for why it did not conduct a functional behavior assessment or implement a behavior support plan. (N.T. 209-210, P 1)
49. In the two years between ERs, the student had regressed across the board academically, failing to make meaningful academic progress. (N.T. 210, P 1, P 2)
50. The psychologist who compiled the ER in 2005 did not know if there was a standard curriculum for the student and stated that the curriculum based assessment would just be up to the teachers. (N.T. 1133-1134)
51. In the 2005 ER, teachers reported on the student's behavior through the Achenbach behavior rating instrument. Several items, including oppositional defiance problems, aggressive behavior, and ADHD, were identified as being clinically significant by teachers. (P 2)
52. The father disagreed with the ER in a letter dated August 17, 2005. The mother had signed the form but did not indicate whether or not she agreed or disagreed with the document. The father noted a need for a timely functional behavior assessment, increased speech and language support, and concerns about academics. (P 2)
53. The student is not integrated with typical peers or the general public on her vocational program. She is not actually integrated into society. At lunch time, she sits with her special education classmates, and the vocational program students are identified because they were special tee shirts. (N.T. 1352-1354)
54. The father filed for due process on August 17, 2005. (P 3)
55. The mother approved the Notice of Recommended Educational Placement on September 16, 2005. (SD 40)
56. In the fall of 2005, the student participated in the [redacted] program, a community based vocational program. The data presented for the student was confusing and did not match her actual performance. (N.T. 815-817, P 32)
57. In November 2005, the father obtained a private education/vocational evaluation of the student from an expert in transition services. The

evaluation noted a “more restrictive view” of the student and her program opportunities in the district’s 2005 evaluation report when compared to the district’s 2003 evaluation report. (P 22)

58. The transition expert recommended a functional vocational assessment. He also recommended changes to the transition plan, changes to the academic goals of the IEP, and a need for assessment information that would identify a baseline of vocational skills of the student. The expert concluded that the student should explore her vocational options and that an ecologically based curriculum should be developed. (P 22)
59. The district completed a Functional Behavior Assessment on October 31, 2005. The FBA targeted enuresis, oppositional behavior, and limited socialization as areas for intervention. (P 25)
60. The district presented a Behavior Intervention Plan in the latest version of the IEP. Through some oversight of some sort, the behavior consultant’s notes were inappropriately attached to the IEP. Pages 24, 25, 26, 27 of the IEP should be removed. (N.T. 1806, P 54)
61. The father’s transition expert, who teaches a course in applied behavior analysis, reviewed the FBA and the behavior support plans. He said thought the FBA was fine and that the behavior support plan looked to be a very effective, functional plan. (N.T. 120-122, P 40)
62. In November, 2005, the mother changed her earlier position and opted to become a party to the hearing. (P 34)
63. Negotiations regarding the IEP continued throughout the hearing process resulting in numerous drafts and revisions. The district’s most recent proposal was presented in January 2006. (P 54)
64. On February 7, 2006, the parties entered into a stipulation removing the 2004-2005 school year from consideration as an issue for the due process hearing. (HO
65. On February 10, 2006, pursuant to an agreement made by the parties, the Hearing Officer issued an interim Order identifying an appropriate evaluator to conduct a transitional/vocational assessment of the student. (HO
66. On February 15, 2006, the district received an Assistive Technology Evaluation. [The] evaluator recommended several pieces of computer software that would be appropriate for the student. (SD 53)
67. The student could benefit from Assistive Technology during her school program. (N.T. 1347)

68.Extensive research supports the concept of inclusion. (N.T. 101-103, 170)

Issues

Is the student entitled to compensatory education for the 2003-2004 school year? If so, what is the appropriate amount and form of that compensatory education?

Is the student entitled to compensatory education from the start of the 2005-2006 school year to October 4, 2005?
If so, what is the appropriate amount and form of that compensatory education?

Is the program and placement offered by the district on 1/9/06 appropriate?

Credibility Assessments

I found the father, Parent to be very forthcoming, detailed, and conscientious in his testimony. Of all the witnesses involved, I felt that his testimony most accurately represented what could and could not be done on his daughter's behalf educationally. I found the mother, Parent, to be forthcoming in her testimony. Two factors caused me concern at times about the mother's testimony. First, I was concerned about the impact of her employment with the district upon the proceeding. I was not concerned that she was in any way coerced into her testimony; rather, I felt that she simply was indoctrinated in the district's standard way of implementing special education programs and that her sense of camaraderie with fellow staff may have clouded her view of the situation. Second, I was disturbed by her late arrival into the proceeding and was concerned that her claims against the district were more a mechanism to allow her to participate as a party and file an appeal if necessary than they were a litigation-worthy dispute. She had been offered party status at the outset, but rejected the opportunity and said her position was not adversarial to the district's. For reasons which are unclear to me, she changed this position. I found Mr. M to be reasonably forthcoming, as I did Ms. M, Ms. C, Mr. S, Ms. O, and Ms. D. I did not weigh heavily the testimony of either district psychologist, Ms. M and Ms. E, because they simply seemed to have little useful knowledge of the case and next to no contact with the student or her program. Ms. D's testimony was occasionally inconsistent, so much so that at some points, I felt I had to intervene to sort out the record just to gain some understanding of what occurred. Other than those situations, she was forthcoming

and helpful to the process. I found Mr. S and Mr. C to be accurate and forthcoming in their appearances.

Discussion

Burden of Proof

The parents, in this case, bear the burden of persuasion on most issues raised as they are the parties that requested the hearing. When the case started, the father was the moving party, and the mother was not opposing the district's offer. As a result, I had the father present his case first, and the father disputed that determination, as mentioned earlier.

In Pennsylvania, all special education due process proceedings are conducted in accordance with the due process hearing requirements identified in IDEA, so this case, which encompasses rulings under Section 504 of the Rehabilitation Act of 1973 and the IDEA, is affected by *Schaffer*. Arguably, placing the burden of persuasion on the parent has always been the intention in Pennsylvania. Explicit language in the PARC Consent Decree (1973) states that districts could very easily fulfill their burdens of production by presenting their reports (IEPs, ERs), and then outlines several parent-directed "rights," or opportunities, for the presentation of evidence.

> "Introduction by the school district or intermediate unit of the official report recommending a change in educational assignment, provided a copy of such report was given to the parent at the time notice was given, shall discharge its burden of going forward with the evidence, thereby requiring the parent to introduce evidence (as contemplated in paragraphs f, r, s, and t herein) in support of his contention." (id at 22)

It should also be noted that while the Decree originally conceived that decisions were to be based on substantial evidence, IDEA has expressly lowered the standard to a "preponderance" of the evidence. This record was reviewed, and the decision written in accordance with *Schaffer* and the explicit review requirements of IDEA, as required by Chapter 14 of 22 PA Code. The parents, for the most part, bore the burden of persuading me that the district denied the student

a free appropriate public education.

An exception to the above posture is when IDEA's mainstreaming requirement is specifically at issue. Very recently, PDE entered into a settlement agreement regarding implementation of least restrictive environment obligations under IDEA, Section 504 of the Rehabilitation Act of 1973, and Title II of the Americans with Disabilities Act. In *Gaskin v. Pennsylvania*, No. Civ. A. 94-4048, (E.D. Pa. September 16, 2005), PDE agreed to require school districts to adhere strictly to the IDEA and the case law "including *Oberti v. Board of Education*, 995 F.2d 1204, (3d Cir. 1993) when making placement decisions." In *Oberti*, the Court decided that "it is appropriate to place the burden of proving compliance with IDEA on the school. Indeed, the Act's strong presumption in favor of mainstreaming would be turned on its head if parents had to prove that their child was worthy of being included, rather than the school district having to justify a decision to exclude the child from the regular classroom." The *Oberti* Court held that the district court had correctly placed the burden of proof on the school district to prove that a proposed segregated placement was in compliance with IDEA. When the issue of placement in the least restrictive environment arose in this case, the burden was shifted to the party proposing the more restrictive placement, in accordance with *Gaskin* and the Pennsylvania Department of Education's obligation to adhere to *Oberti*.

Compensatory Education

Section 504

Students who are eligible under the IDEA are also protected handicapped students under Section 504 of the Rehabilitation Act of 1973. *Chad C. v. the West Chester Area School District* where the Court required a Hearing Officer to render two decisions in a case, one under IDEA and one under Section 504, a clear indication that such orders and considerations are appropriate and at times, necessary. In further support of this concept, I invite attention to *LC vs. Olmstead* (Eleventh Circuit, Docket No. 1:95-CV-1210-MHS), a case which discusses community programming and institutionalization of people with disabilities, affirmed by the Supreme Court in 2000 and offers further insight into Section 504 and the ADA. *Olmstead* requires that states apply Section 504 in all cases.

Hearing Officers cannot simply ignore 504. To do so would defy the clear directive of *Olmstead*.

34 C.F.R. 104 is the section of the Rehabilitation Act addresses education.

Reg. Sec. 104.33 which identifies a public school's obligations to provide a free appropriate public education states:

(a) General. A recipient that operates a public elementary or secondary education program shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.

(b) Appropriate education.

(1) For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that
(i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and

(c) Free education.

(1) General. For the purpose of this section, the provision of a free education is the provision of educational and related services without cost to the handicapped person or to his or her parents or guardian, except for those fees that are imposed on non-handicapped persons or their parents or guardian. It may consist either of the provision of free services or, if a recipient places a handicapped person in or refers such person to a program not operated by the recipient as its means of carrying out the requirements of this subpart, of payment for the costs of the program. Funds available from any public or private agency may be used to meet the requirements of this subpart. Nothing in this section shall be construed to relieve an insurer or similar third party from an otherwise valid obligation to provide or pay for services provided to a handicapped person.

By authority of the Rehabilitation Act, the Office of Civil Rights has awarded compensatory education to a student with a disability who had been denied appropriate education services. (*Chicago Board of Education*, EHLR 257:526, OCR 1984).

IDEA and Compensatory Education – Fundamental Concepts

The Third Circuit first awarded compensatory education in *Lester H. v. Gilhool* [916 F.2d 865, 872, (3rd Cir. 1990)] reasoning that compensatory education required school districts to belatedly pay expenses that they should have paid all along. *M.C. v. Central Regional School District,* 23 IDELR 1181 (3rd Cir. 1996), further clarified that a grant of compensatory education did not require a showing of bad faith or gross violations of IDEA on the part of the district. This case indicated that a child is entitled to compensatory education if a district knew or should have know that a child had an inappropriate IEP or was not receiving more than a de minimis educational benefit and did not correct the situation. The period for which compensatory education can be granted is equal to the period of deprivation minus time reasonably required to rectify the problem.

> "Obviously the case against the district will be stronger if the district actually knew of the educational deficiency or the parents had complained…it is the responsibility of the child's teachers, therapists, and administrators – and of the multi-disciplinary team that annually evaluates the student's progress – to ascertain the child's educational needs, respond to deficiencies, and place him or her accordingly"

Cypress-Fairbanks Independent School District v. Michael F., 26 IDELR 303, 118 F.3d 245 (5th Cir. 1997) established a four part test for determining whether or not educational benefit has been provided.

1. Was the program individualized on the basis of the student's assessment and performance?

2. Was the program administered in the least restrictive environment?

3. Were the services provided in a coordinated and collaborative way by "key stakeholders"?

4. Were positive and nonacademic benefits demonstrated?

1.Was the program individualized on the basis of the student's assessment and performance?

2003-2004, 2005

No, the annual goals were vague and not linked to baseline information regarding the student. No school psychologist attended the IEP meetings, and the LEA noted that he was unable to interpret the test scores on the ER. (FF 12) Progress reports were a fruitless exercise (FF 26), and members of the IEP team even dispute the student's exceptionality. The author of the ER identified the student as having PDD; the LEA states that she has mental retardation, and the documents for this year state that she is classified as Other Health Impaired. The psychologist reports that the student's poor progress on achievement tests was due to her exceptionality of PDD, but the LEA who actually went to meetings and knew the student stated that it was appropriate to expect her to make one to two years of progress in one school year (FF 47). The student had been experiencing significant behavioral issues since at least the 2000-2001 school year, but no Functional Behavioral Assessment or Behavior Support Plan was developed to address the problem. When a goal for social stories was adopted, it was abandoned early in the school year and then not replaced with anything more effective. (FF 21) Report cards were not useful in reflecting what, if any progress was made on IEP goals. (FF 27)

Similarly problematic was the [Redacted] program data for the fall of 2005. It was plainly in error. The teacher himself did not know it was in error until I pointed out the problem, yet the data is supposed to provide information on how to tailor the program to the student's needs. (FF 56)

In sum, the team did not even possess information on the student's performance and was unable to interpret her assessments. Even when it had data that could be interpreted, that data was inaccurate; therefore, the IEPs were not based on the student's performance or her assessments.

2. Was the program administered in the least restrictive environment?

This prong is a question of placement. If the district fails to offer the student a placement which occurs in the least restrictive environment (LRE), it has failed to offer a free appropriate public education (FAPE). By agreement, the Pennsylvania Department of Education has stated that it will require school districts to adhere to *Oberti* in matters of placement. (*Gaskin v. Commonwealth* Settlement Agreement, September 2005)

The two concepts (LRE and FAPE) are inextricably intertwined. Children who are not provided with educational services in the LRE appropriate to their needs are not provided FAPE. *Millersburg Area School District v. Lynda T.,* 707 A.2d 572 (1998).

The least restrictive environment is defined in several ways – distance from a child's home, amount of contact with typical peers, and positioning of the proposed placement within a well-defined hierarchy of educational placements. The expectation of least restrictive environment is so rigorous that the courts have held, for example, that a school district is prohibited from placing a child with disabilities outside of a regular classroom if educating the child in the regular classroom with supplementary aids and support services can be achieved satisfactorily. *Oberti* instructs that factors to consider in determining whether this can occur are as follows:

A. Steps to be taken by the school to try to include that child in a regular classroom;
B. The comparison between the educational benefit the child would receive in a regular classroom – social and communication skills, etc – and the benefits the child would receive in the segregated classroom. Thus a determination that a child would make greater academic progress in a segregated program may not warrant excluding that child from a regular classroom.
C. Possible negative effect inclusion may have on the education of the other children in the classroom.

Additionally, if placement outside of a regular classroom is necessary for the child to receive educational benefit, a school district may still be violating IDEA if it has not made sufficient efforts to include the child in school programs with non disabled children whenever possible. [*Oberti v. Board of Education, 995 F.2d 1204 (3rd Cir. 1993) 19 IDELR 908*] The *Oberti* Court concluded that the burden for proving that a more restrictive environment is necessary falls on the party which is proposing the more restrictive placement.

A more recent decision, *Girty v. School District of Valley Grove,* 163 F.Supp.2d 257 (W.D. Pa. 2001), builds upon the *Oberti* test for determining when a child should be placed within a more restrictive environment. It states, "The IDEA **does not require disabled children to receive the same educational experience**

as nondisabled children, and recognized that disabled children may benefit from regular education differently than nondisabled children. Stated differently, the relevant focus is whether [the student] can progress on his IEP goals in a regular education classroom with supplementary aids and services, not whether he can progress at a level near to that of his non-disabled peers."

2003-2004

The evidence is abundant in this case that the district was on notice that the student's time in regular education should be increased for the 2003-2004 school year and that her special education environment was contributing to her behavioral issues. (FF 16) It ignored the father's queries on this subject and did not engage in the required review process to determine if the student was included to the maximum extent appropriate or to discuss the full range of supplementary aids and supports that might benefit her in the regular education environment. Therefore, the program was delivered in an environment that was not the least restrictive.

Fall 2005

The district stipulates that the student is owed compensatory education for the 2004-2005 school year. Testimony shows that the student was not properly supported in the regular education environment when her placement was thoughtlessly changed in the fall of 2004. The *Gaskin v. Commonwealth* Settlement Agreement calls attention to the problem of inadequately supported inclusion efforts, and this student was "dumped" into regular education without appropriate supports. (FF 37) The aide was ineffective (FF 36); homework was not modified and was beyond the student's ability level, and she could not even read her textbooks. (FF 34) Behaviors increased, yet she was still not provided with a behavior support plan, nor were her behaviors formally assessed. Assistive Technology was not considered. (FF 40) She could have been accommodated further in the typing class. (FF 41) Absent from the entire record is any mention of a co-teaching arrangement as a possible supplementary aid for the student, showing that the team did not review all possible supports. Consequently, the placement failed. The father's view of the process makes complete sense. IDEA never intended for students with cognitive impairments to be simply "dumped" in regular education, though it certainly envisions that most students, no matter what their disability, can be successfully accommodated and supported in such settings. This student was never provided with the proper support.

2005

In the fall of 2005, the student's placement was again made more restrictive. She was removed from regular education and placed back into a program that did not permit the same level of contact with typical peers. The father proved that she can likely be included to a greater degree in regular education with better supports. She has a right to be included to the maximum extent appropriate with typical peers, and that has yet to occur.

3. **Were the services provided in a coordinated and collaborative way by "key stakeholders"?**

2003-2004, 2005

No, poorly written IEPs made the coordinated and collaborative delivery of services impossible. In order for there to be coordination and collaboration, there must be a vehicle of communication. IDEA envisions this vehicle of communication among team members to be the IEP. It is the unifying document, providing a common basis for team members to participate in planning, to share information, and to guide decisions regarding the student. Here, there was no reliable vehicle of communication regarding the student's program because the IEPs were fatally flawed. The IEP is the blueprint, the map, for the student's educational program. When the student has these kind of learning difficulties, the IEP is critical because regular education curriculum guidelines cannot be followed. If stakeholders don't have an IEP of reasonable quality, they have no other way to communicate expectations regarding a student like this one.

With these IEPs, the goals are unclear. One cannot pick up any IEP and implement it with any degree of coordination. The IEPs do not include adequate or reliable baseline data. Baselines are fundamentally important in determining whether or not an IEP is serviceable. How can team members communicate about IEP progress if they have no starting point upon which to base such a discussion? If the team does not have an IEP with baseline data or measurable annual goals, it cannot begin to share information about the student's progress or lack of it. It cannot communicate reasonably about the student's education if the IEP does not adequately provide the foundation upon which the team can work.

I was also troubled by the testimony of the 2005 ER author when she could not explain what curriculum was required of the student. (FF 50) Knowing some

details of the curriculum of the student seems to be critical in the development of an Evaluation Report.

In addition, the meaningless progress reports make team collaboration even less likely. (FF 26) Authors of progress reports were unclear as to what they meant when they wrote them. How was any other team member supposed to be able to pick up those same reports and make intelligent and responsible decisions when the data contained therein was bogus? It is impossible.

4. Were positive and nonacademic benefits demonstrated?

2003-2004, 2005

No. All indicators that can be interpreted show regression, not progress. The district's own LEA testified that achievement tests showed that the student regressed across the board academically, and she failed to make meaningful academic progress. She made no progress in behavior before the behavior program was implemented. The same problems that she experienced in 2000-2001 were in place throughout the period which is the focus of this hearing. The problems with the progress reports are described in detail above.

ESY

The district failed to properly assess the student for ESY, and her father reports that she does regress over the summer months. In the absence of any other data, this information entitles the student to compensatory education for the failure of the district to provide ESY services for the summer of 2004 and the summer of 2005.

Conclusion – The district fails all prongs of the Cypress-Fairbanks test for determining if a program is calculated to afford meaningful educational benefit. By a preponderance of the evidence, the student is entitled to compensatory education for the district's failure to provide the student with a program that is reasonably calculated to afford meaningful educational benefit.

Calculation

The purpose of compensatory education is to remedy the student's loss of an appropriate education. The challenge here is determining the proper amount as the student has obtained some benefit in some subjects. The district's lapses have been significant, and the student was deprived of a reasonably calculated and appropriate educational program as a result. The student is entitled to receive one hour for each hour of each school day for the first day of school to the last in the 2003-2004 school year. In addition, the student is entitled to one hour of compensatory education for each hour of school from the first day of school in the 2005-2006 school year through October 4, 2005, the date of the pendent agreement. My rationale is that the student needed a full day of behavioral intervention, given the behavioral issues, which everyone agrees negatively impacted her education. In addition, there were numerous other problems with the design and implementation of her program, any one of which have been identified as "fatal flaws" in other cases.

Though scant, the evidence and the emerging picture of the student dictates that she required extended school year services in the summer of 2004 and in the summer of 2005. She is awarded two hours per day for a six week period for each summer, or a total of 120 hours for the district's failure to provide ESY.

Form of Compensatory Education

Just prior to the issuance of the decision, I was notified that the parents had been to court to address custody concerns and that they had made some arrangements regarding decisions about the student's existing compensatory education award for the 2004-2005 school year. As a result, I defer to the custody process and their agreements rather than impose my opinion on them and that Court. If my opinion on the subject is necessary and the parties cannot, for whatever reason, come to resolution on the subject of compensatory education management, I recommend that the award be split, with each parent making decisions regarding half. The parents may decide how the hours should be spent, as long as they take the form of any appropriate developmental, remedial, or enriching instruction that furthers the goals of the student's pendent or future IEPs. Such hours must be in addition to the student's then current IEP and may not be used to supplant such services. These services may occur after school hours, on weekends, and during the summer months, when convenient for the parent and the

student. Reimbursement for the services shall be at the rate that the parent is obligated to pay, not a district determined rate. This provision shall remain in effect until the student's 21st birthday, but it is urged that the parties attempt to provide this student with compensatory services and supports as soon as possible. The hours are not to be used for college tuition, unless the parties both agree. Should the parties agree, the district may set up a fund with a set dollar amount that the parent may draw upon for present or past educational services and equipment. This form of compensatory education has been affirmed numerous times and is preferential to another management process, that of having the IEP team decide how the award should be spent. In this case, the IEP team process is fraught with problems and has not functioned sufficiently for three school years. I reject this approach in favor of having the parents decide on services because the parents will be able to make decisions faster and with greater ease than will the IEP team at this point.

Program and Placement for 2005-2006 School Year

The pendent IEP is vastly improved over earlier versions. The district has dutifully modified the document several times, and the result is an IEP which is largely appropriate. The father is reminded that the IEP does not have to be perfect, nor does it have to address every preference of the family. It must be reasonably calculated to afford the student meaningful educational progress, and this IEP accomplishes that. Save for the need to add an appropriate transition plan, which everyone agrees is beneficial and/or necessary, the goals, behavior intervention plan, and other aspects of the document are appropriate.

Placement is a different issue. Clearly, the team did not adhere to Oberti when it determined that the student's access to typical peers must be reduced. It did not consider a full range of supplementary aids and supports. The district did not adequately support the student in regular education classes the previous year, and then the mother and the district point to the student's resultant failure as justification for increasing the amount of time that she is segregated away from typical peers. The team needs to adhere to the process described in Oberti. Specifically, it must reconvene, consider the full range of supplementary aids and supports, and increase the student's access and involvement with typical peers.

Order

Hereby:

1. Student is entitled to compensatory education for the district's failure to provide a Free Appropriate Public Education in accordance with IDEA.
2. Student is entitled to compensatory education for the district's failure to provide a Free Appropriate Public Education in accordance with the Rehabilitation Act of 1973.
3. The [Redacted] School District is ordered to provide Student with compensatory education in the form and amounts described above.
4. The [Redacted] School District is ordered to convene the IEP team and identify an appropriate placement for the student within three weeks of receiving this Order. Specifically, the team will consider the full range of supplementary aids and services to support the student in an appropriate placement.
5. Within ten days of receipt of the transition evaluation, the [Redacted] School District is ordered to convene the IEP team to develop an appropriate transition plan for the student.

March 23, 2006
Date

Linda J. Stengle
Hearing Officer