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PENNSYLVANIA

## SPECIAL EDUCATION HEARING OFFICER

Student's Name: E.F.

Date of Birth: xx/xx/xx  
O.D.R. # 6108/05-06 AS

Dates of Hearing: February 8, 2006; February 9, 2006;  
March 23, 2006, March 30, 2006

Type of Hearing: Closed

### Parties to the Hearing:

Parents  
Parent(s)

Represented by:  
Franca Palumbo  
1831 Chestnut Street  
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Date Closing Arguments Received:  
April 13, 2006

School District  
Methacton S.D.  
1001 Kriebel Mill Rd.  
Norristown, PA 19403

Represented by:  
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Date of Decision:  
April 28, 2006

Hearing Officer:  
Linda J. Stengle

## **Background**

The student's date of birth is xx/xx/xx. He resides within the geographic boundaries of the Methacton School District with his family. The student was only recently identified as eligible for special education supports and services under IDEA. The parents and the district agree on his current placement and IEP. The dispute is over whether or not the student is entitled to compensatory education for the period from June 2002 through September 2005.

The district first requested that the claim for compensatory education be reduced to one year only, and later asked for the consideration of the claim to be limited to two years per IDEIA 2004. I ruled for the parents on this aspect of the case, noting that the school's counsel misinterpreted the relevant language of IDEIA's 2004 Section 615 (f)(3)(C). The details of that ruling are at HO 5. In further support of the ruling, I note that at the time of the hearing, the parents explicitly asserted protections under Section 504 of the Rehabilitation Act of 1973. There is no statute of limitations contained within Section 504 at all.

The notes of transcript are contained within four volumes, with consecutively numbered pages. The two attorneys greatly contributed to the smooth management of the hearing by presenting a Joint Exhibit Book, meaning that the exhibits within it had been jointly agreed upon by the parties to be admissible. Therefore, exhibits are referred to as J 1, J 2, etc.

## **Findings of Fact**

1. The student's date of birth is February xx/xx/xx. (J 15)
2. He resides with his family within the geographical boundaries of the School District. (N.T. 41)
3. On May 17, 1999 on a pre-kindergarten perceptual school readiness screening, the district found that the student needed improvement on repeating a sentence. (J 1)
4. In Kindergarten, he received for language arts a grade of 3 for the year, which was identified as the code for "progressing." Other possible codes included a 4 which was "satisfactory" and 5 which represented "skilled." (J 56)
5. He was placed in an early intervention reading program, Reading Recovery, in first grade, the 2000-2001 school year. After Reading Recovery was finished, the student was enrolled in Title 1 reading. (J 1, J 3, J 4, J 9)
6. The student spent excessive amounts of time on homework and required support from his family to do it. For example, in first grade, he would spend a couple of hours a night on homework. (N.T. 50)
7. For first grade, he received for language arts a grade of 3 for the year, which was identified as the code for "progressing." (J 56)
8. The parents put the student in the "book buddies program" sponsored by the district. The parents were charged by the district for this summer program. (N.T. 53)
9. The student received reading support services throughout the second grade year for three times per week, thirty minutes per session. (J 9)

10. The homework situation worsened in second grade. It wasn't unusual for the student to spend most of the evening working on homework. (N.T. 57)
11. He scored an average of 72% on theme tests. (J 9)
12. He experienced a lot of emotional issues. The student began to show frustration in second grade. He would lay awake in bed, saying that he was too worried about something at school. He began to complain of stomach aches and complain that he was tired. His mother began driving him to school and had him checked by the nurse. (N.T. 60-61)
13. In May 2002, the teacher noted several problems with the student's attention and focus during a classroom observation. The teacher found that the student was on task only 30% of the time. (J 8)
14. Near the end of the second grade year, the parents met with the teacher and the intervention monitor. The school personnel expressed concern about the student's struggle with reading and urged the parents to think about having some testing done. At that meeting, the school personnel referred the parents to [redacted] and provided information about tutoring. (N.T. 62-64)
15. In second grade, he received for language arts a grade of 3. (J 56)
16. On June 14, 2002, at the end of his second grade year, the teacher wrote a memo noting several difficulties that the student experienced during the previous school year. She noted problems with writing conventions, finding errors, spelling, sequencing of events, drawing inferences, vowel pairs, base words and endings, grammar, making judgments, fluency, off task behavior, anxiety, reversal of letters, decoding, and testing situations. She noted that the student was passing in grade percentages but that this accomplishment required a great deal of effort not only on the student's part but also on the part of his family. (J 9)
17. At the same time, the reading specialist wrote an end of year report. She also noted significant difficulties with reading and writing. The reading specialist noted that toward the last half of second grade, the student was becoming frustrated with the intense amount of work needed to meet with "some success." (J 10)
18. During the summer of 2002, the parents obtained a private psycho educational evaluation administered by Dr. F, who works for [redacted]. The evaluator found a statistically significant discrepancy between his Verbal IQ score of 117 and his Performance IQ of 98. (J 11)
19. On the Wechsler Individual Achievement Test – Second Edition, the student's reading composite score was 86. (J 11)
20. The student, just prior to starting third grade, scored Independent for reading accuracy but at Frustration for comprehension at the primer level when assessed with the Qualitative Reading Inventory.
21. Dr. F found that the second grade teacher had seen many symptoms of anxiety. BASC rating's indicated that Anxiety was at a clinically significant level. (J 11)
22. Dr. F stated that the student meets the criteria for a language based learning disability

- and a reading disability. (J 11)
23. Dr. F made many recommendations including a systematic, intensive, and multisensory reading program, summer programs, and therapy to deal with the anxiety issues. (J 11)
  24. The parents provided tutoring through the summer and continued it during the ensuing school years. (N.T. 72-73, J 42)
  25. An August 30, 2002, the parents provided the district with a copy of Dr. F's evaluation and asked for a meeting as soon as possible to set up an IEP for the student. (J 11)
  26. The district issued a Permission to Evaluate form at the parent's request in September. There was an error in transmitting the form, and it was not signed by the parent until December 31, 2002. The parents wanted assistance for the student to be implemented as soon as possible. (J 12, N.T. 70-72)
  27. The student participated in Title 1 reading again in third grade. (N.T. 73)
  28. The district convened an Intervention Monitoring System meeting on October 13, 2002. The parent attended and participated. The district identified several academic skills as "very much below grade level" and "below grade level" in the categories of reading/language arts and critical thinking. (J 13)
  29. The Intervention team identified a goal that the student would have at least 80% correct on his Daily and Spelling Edits during the 30 school days timeline of the intervention period. (J 13)
  30. The intervention process went far beyond thirty days. In December, the district documented progress. The student achieved the goal on only six of 29 observations recorded. (J 13)
  31. Despite the failure to consistently reach his goal by the end of March, 2003, the Intervention team opted to continue it and also target journal work, writer's workshop, and theme test responses, setting an intervention time period of thirty days. (J 13)
  32. On March 31, 2003, the district issued an Evaluation Report. The school psychologist noted that he "continues to demonstrate delays in reading and written expression." She relied heavily on the testing completed by Dr. F. (J 15)
  33. The school's ER noted that "full disclosure of emotional/social functioning" could be reviewed in Dr. F's report. It noted that since the report, the student continued to demonstrate consistent worries in and outside of the school setting that appear to be impacting his academic performance and general participation in extra-curricular activities. Rather than identifying the student as having a disability, the district recommended that "a disability classification be deferred until [STUDENT'S] anxiety issues can be ruled out as the major contributing factor to his inconsistencies and delays in language arts." The district further recommended that the parents seek an outside therapist to work with the student on developing coping strategies to deal with the anxiety. (J 15)
  34. The school psychologist that wrote the ER had been aware that the student was being provided tutoring by the parents and that he had received three years of reading intervention directly from the school. (N.T. 100-101)

35. The school psychologist did not agree or disagree with Dr. F's diagnosis of a language based learning disability at the time she wrote the ER. At the time of the hearing, she still could not say "yes or no." (N.T. 408, 490)
36. The parent did not sign the evaluation report. (J 15)
37. The district issued a Notice of Recommended Educational Placement that stated the student was not in need of special education because his academic achievement was commensurate with his cognitive abilities. The parent did not sign the form. (J 16)
38. At the end of April 2003, the teacher completed an IOWA Conners Teacher's Rating Scale, which noted the student engaged in frequent fidgeting, was inattentive, and failed to finish things he started due to short attention span. The teacher wrote on the form that the student's behavior caused him to be unfocused frequently. The same teacher completed the form again on May 12, 2003, with the same results. (J 17)
39. In June 2003, the Intervention team met again and found the student was on task 43% of the time during a one hour observation. (J 13)
40. This time, the team tracked theme test scores rather than the goal it had created for daily and spelling edits. The team found the student did better when a teacher stood next to him but could not show progress on the daily and spelling edit due to a lack of data. (J 13)
41. The parent reported that the student was seeing a counselor outside of school, that he was receiving tutoring, and that he was scheduled to attend a summer reading camp for the summer. (J 13)
42. In third grade, he received for language arts a grade of 2, which represented "inconsistent." (J 56)
43. A more detailed progress report showed increasing problems with language arts over the course of the third grade year. For example, the first quarter, only three skills were identified as "inconsistent." By the fourth quarter, eight skills were identified as "inconsistent."
44. The intervention team decided to place the student on the "target learner" list for fourth grade, meaning that the fourth grade teacher would be aware that "there are strategies that work and can be put into place immediately if necessary." (J 13)
45. The student attended the [redacted] summer program, which was operated for 24 days in the summer of 2003. It was a half day language arts program, which was identified as 1.75 hours per day of language arts instruction. (J 41)
46. On October 22, 2003, the fourth grade teacher reported continued problems with focus and advised the parent to continue "pre reading" stories at home to prepare for school. (J 20)
47. The student was identified with ADHD by a private neurologist and placed on medication on February 19, 2004. The school was notified of the diagnosis. (J 40; N.T.)
48. The teacher referred the student again for the Intervention Monitoring System.
49. In a letter of invitation to the Intervention team meeting, the Intervention Monitor noted that the parents had always been supportive of the team process. (J 26)

50. The team met on April 2, 2004, and noted acquisition problems well below grade level in aspects of reading and language arts. There had been no other Intervention team meetings in fourth grade prior to this. (J 25; N.T. 121)
51. This time, the team set a goal for the student to use a checklist to help him slow down and check answers, spelling, and punctuation. The team opted to track math and language arts scores as the indicator of effectiveness of the strategy. He scored 80-89% for eight of 11 trials for math. For language arts, he scored 80 to 100% on eight of sixteen trials. (J 25)
52. The checklist strategy was to be implemented in fifth grade, and the student was to be monitored. (J 25)
53. In fourth grade, the student received a C for language arts and Bs in all other subjects. (J 56)
54. Teacher comments noted that the student's work demonstrated a need for continued support. Spelling issues were identified, and the teacher noted that the student did better if he worked in a small group. The teacher felt that he improved during the second half of the year. (J 27)
55. The parents notified the school that the student would continue private tutoring in the Wilson method of reading over the summer. (J 25)
56. When the student went to fifth grade, the teacher was not provided with his evaluation report and had not been told that the student had been diagnosed with a language based learning disability. He had not been told that the student had been tutored for years in reading and was not informed of the student's anxiety issues. (N.T. 1077-1078)
57. The teacher implemented only one Intervention strategy for a week or a little more and then decided unilaterally not to use it anymore. (N.T. 1078-1079)
58. Over the course of the fifth grade year, 2004-2005, the student developed a nervous habit [redacted]. (J 54; J 28).
59. In fifth grade, the student continued to see a neurologist. The neurologist's physician's assistant wrote a letter to the parents discussing Dr. F's expression of concern for the "emotional consequence of the Reading Disability." She noted longstanding anxiety issues and their manifestation throughout his school career. She also noted that the student was engaged in stress-related hair pulling, which was a manifestation of anxiety. (J 28)
60. On March 28, 2005, the parents wrote to the school and asked that the student be reevaluated. They included the letter from the physician's assistant. (J 50)
61. The fifth grade Novels teacher noted that she first found out that the student was diagnosed with dyslexia mid school year, when the parent shared the information. (J 30)
62. The fifth grade regular education teacher stated that the form he filled out for the private psychological was inaccurate. Though he said he was trying to be truthful, the information contained within it was not accurate. (J 31; N.T. 1079-1105)
63. In fifth grade, the student received a B in language arts, a B+ in math, and As in science and social studies. (J 56)

64. The first time that the district offered to evaluate the student for a Section 504 plan was at the end of fifth grade. (N.T. 120)
65. On June 14, 2005, the district convened a team meeting and developed a service agreement. It was forwarded to the parents in mid July, and they rejected it because they felt it did not meet the student's needs. (J 34)
66. Accommodations and modifications offered in the service agreement had not been implemented in the fifth grade classroom. (N.T. 1137-1138)
67. After the service agreement was formulated, the school's psychologist wrote up an evaluation of the student and mailed it with the already completed service agreement. (J 34; N.T.)
68. The parents sought another psychoeducational evaluation by Dr. F. Dr. F reviewed the service agreement offered by the district and found it did not include all the supports the student required. (J 35)
69. Dr. F found that the student's anxiety was a constant although low level factor for him in the one on one testing situation. She noted that as soon as he felt he was struggling on a task, his processing faltered, and his anxiety then increased even further. (J 35)
70. Dr. F reported reading skills that were approximately two years below grade level. The student is now at risk for a Disorder of Written expression for very weak spelling, slow graphomotor skills, and weak punctuation. Dr. F stated that he continued to exhibit characteristics of a Reading Disorder and of a Language Based Learning Disability. (J 35)
71. Dr. F noted that the student lost ground academically in the time between her evaluations and stated that if the parents had not provided tutoring than his basic reading skills would be even weaker. (J 35)
72. Dr. F's qualifications far exceed those of the psychologist who authored the initial Evaluation Report and the Section 504 service agreement . (J 29, N.T. 404-405)
73. The student has a language based learning disability and always will have one. He always had one in the past. Such a disability is "hard wired." It is neurologically based. (N.T. 215, 217)
74. The student needs a year round program, meaning he needs the program through the summer. If he were to take the summer off, it would take up until mid to late November for him to get back to his June levels. (N.T. 224)
75. The district issued another Permission to Evaluate form on August 19, 2005. The parent consented the same day. (J 36)
76. The district issued an Evaluation Report on September 23, 2005, which identified the student as eligible for special education and supports under IDEA as a student with a specific learning disability. (J 37)
77. The team met and developed an IEP on October 25, 2005. The IEP includes five annual goals that address reading, writing, and anxiety. Fifteen items of specially designed instruction and program modifications were identified ranging from adaptation in test length and format to spelling accommodations to research based reading programs. (J

### **Issues**

Did the district fail to identify the student as eligible for special education services under IDEA and Section 504 of the Rehabilitation Act of 1973? Is the student entitled to compensatory education from the period from June 2002 through September 2005?

Are the parents entitled to reimbursement for the following services?

Three years of tutoring

Psychological counseling

Two Independent Educational Evaluations, both conducted by Dr. F  
[Redacted] summer reading program for summer of 2003

Text on tape

### **Credibility Assessment**

I found the parents to be highly credible. I found Dr. F to be highly credible, much more so than Dr. C, the school's psychologist. There were numerous reasons for this. First, Dr. F's credentials and experience far exceed that of Dr. C. (FF 72) Second, there were factual disputes between things that Dr. C said and things that other district witnesses said. (FF 66) I found Ms. M to be reasonably forthcoming; I found the school nurse to be very forthcoming, direct, and helpful to the process. I found Mrs. C to be reasonably forthcoming on the first day and far less so on the second day of testimony. The change in her demeanor was pronounced. Other teachers and the guidance counselor seemed reluctant to be wholly forthcoming. Mr. D admitted that he had not been accurate in providing information to the parents' expert, and this was factored into the weighting of his testimony.

### **Discussion**

#### **Compensatory Education**

##### Section 504

Explicitly asserted by the parent, 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.

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**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.

Compensatory Education – Fundamental Concepts

The Third Circuit first awarded compensatory education in *Lester H. v. Gilhool* [916 F.2d 865, 872, (3<sup>rd</sup> 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 (3<sup>rd</sup> 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”

**§300.125 of the IDEA regulations addresses the district’s obligation to engage in child find. The regulations even specify that they apply to children who are migratory.**

(i) All children with disabilities residing in the State, including children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located, and evaluated; and

IDEA’s Section 614 requires that an IEP must be in effect for each eligible student from the beginning of each school year.

(A) IN GENERAL- At the beginning of each school year, each local educational agency, State educational agency, or other State agency, as the case may be, shall have in effect, for each child with a disability in its jurisdiction, an individualized education program, as defined in paragraph (1)(A).

IDEA does not permit exceptions to Section 614.. An IEP has to be in effect for each eligible student at the start of each school year.

*Cypress-Fairbanks Independent School District v. Michael F.*, 26 IDELR 303, 118 F.3d 245 (5<sup>th</sup> 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?

To determine whether or not an appropriate education has been provided, one must determine whether the program has provided the student with educational benefit. In Appeals Panel Opinion #1595, the panel reasoned that if the child had been identified as

eligible for special education, and the district had failed to provide him or her with an appropriate IEP, the district denied the student FAPE. The panel then reviewed each year being requested by the parent and analyzed the appropriateness of the IEP in place for that year.

#### Application

Here, there were no IEPs in place, though they should have been. A Section 504 plan was never offered or even considered until late in fifth grade. (FF 64) The student evidenced signs of considerable academic and emotional difficulty far in advance of the June 2002 period which the parents present as the start time for the compensatory education. (FF 9,10, 11, 12, 13, 15, 16, 17) The evidence presented by the parents at the hearing was overwhelmingly convincing that the student is entitled to compensatory education award. The school knew that the student might have a disability and instead of promptly evaluating him, waited until the end of the year and referred the parents to an outside evaluator and tutoring. (FF 14) When the school finally did evaluate the student, it produced an odd document that failed to address the student's needs. (FF 33, 35) There appeared to be no concept on the part of the school psychologist or other school personnel that anxiety and other emotional issues are actual disabilities and may entitle students to an IEP. (FF 33) The document is fatally flawed and just plain inapposite when compared to the requirements for determining eligibility under IDEIA.

Not only was the student entitled to an IEP for the period in question, he was provided with inconsistent supports that were not effective. (FF 28, 31, 31, 39, 40, 44, 46, 50, 52, 56) He lost ground. (N.T. 70, 71) His anxiety issues escalated to the point where he was pulling out his own hair. (FF 59) Compensatory education is appropriate.

**Conclusion – 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 for the period from June 2002 through September 2005.**

#### 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. Though the district's lapses have been significant and the resultant cost to this student has been very high, I am recommending a partial award. The student is entitled to half days of compensatory education, one half day for each school day for the period between June 2002 through the start of school in September 2005. My reasoning for this is that this period would adequately address the deprivation of school support in areas of language arts, emotional support, and modifications for ADHD that were not provided consistently or effectively. In addition, he is entitled to compensatory education because he

requires Extended School Year services. (FF 74) Specifically, he is entitled to 1.75 hours per day for twenty four days for each summer between June 2002 through September 2005. (FF 45) Therefore, he is entitled to compensatory education for the summers of 2002, 2003, 2004, and 2005.

#### Form of Compensatory Education

The parent 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 present 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 21<sup>st</sup> birthday, but it is urged that the parties attempt to provide this student with compensatory services and supports as soon as possible. They 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.

#### Reimbursement for Various Expenses

IEEs by Dr. F

The parents are entitled to reimbursement for both evaluations by Dr. F. Schaffer v. Weast (USSC, November 2005) clearly notes the need for parents to have expert "firepower" in cases where they are obligated to meet the burden of persuasion as they were in this case. Both of the evaluations were necessary to this process, and the first evaluation was heavily relied upon by the school district in its March 2003 evaluation process.

Psychological counseling, [redacted] summer reading program for summer of 2003, Tutoring

The compensatory education award considers the fact that the parent provided these services and provides appropriate recompense for the school's failure to provide them. Therefore, no further award is necessary.

Text on tape

The parents should receive reimbursement for the text on tape. It was a necessary part of the school program and needs to be provided to the parent free of cost.

## Order

Hereby:

1. The School District is to provide Student with compensatory education in the form and amount described above. Compensatory education is the appropriate remedy for the district's failure to provide the student with a free appropriate public education as required under IDEA and Section 504 of the Rehabilitation Act of 1973.
2. The School District is obligated to reimburse the parents for both Independent Educational Evaluations provided by Dr. F.
3. The School District is obligated to reimburse the parents for the cost of the text on tape, but not for tutoring, summer programs at [redacted], or psychological counseling.

April 28, 2006

Date

Linda J. Stengle  
Hearing Officer