

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

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Child's Name: Student

Date of Birth: xx/xx/xx

File Number: 5714/05-06 LS

Dates of Hearing: September 19, 2005; September 26, 2005;
October 3, 2005; October 17, 2005

CLOSED HEARING

Parties to the Hearing:

Mr. and Mrs.

Red Lion Area School District
696 Delta Road
Red Lion, PA 17356-9185

Representative:

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Date Transcript Received:
October 24, 2005

Date of Decision:¹
October 31, 2005

Hearing Officer Name:
Gregory J. Smith

¹ The record was kept open until receipt of the transcript. This decision was rendered within 15 days of the closing of the record.

Background

Student is an xx-year-old student with a disability who resides with his parents in the [Redacted] School District. Student has a profound hearing loss, cortical vision impairment, and seizure disorder. After receiving early intervention services from the IU, in June 2002 Student entered the [redacted] School for the Blind in [town and state redacted]. Student remained at School for the Blind until September 2004, when he returned home. Following offers of placement in an out of district, approved private school, Student's parents began an in-home educational program for him. The present hearing was requested to address the following issues: compensatory education for the 2004-2005 school year, reimbursement of Student's parents for their costs incurred in providing an in-home program during the 2004-2005 school year, reimbursement of Student's parents for an IEE completed by Dr. J, and appropriate prospective placement.

Findings of Fact

1. Student is an xx-year-old (d.o.b. xx/xx/xx) student with a disability who resides with his parents in the [Redacted] School District (District). (N.T. at 36; P-44, S-36)
2. At the age of 6 months Student contracted meningitis. After a prolonged illness Student was diagnosed with a profound hearing loss, cortical vision impairment, and seizure disorder. (N.T. at 36; P-2)
3. Student is eligible for special education as a student with both a visual impairment and a hearing impairment. Although being classified as both deaf and blind, Student does have some visual and hearing abilities. His family uses total communication, including sign language, speech, pictures, and print, when communicating with him. (N.T. at 39-40)
4. In October 1997 Student began to receive early intervention services from the local Intermediate Unit (IU). (N.T. at 37)
5. In June 2002 Student was placed at School for the Blind in [redacted]. That summer program was originally agreed to by Student's parents and arranged by the IU that was providing Student's early intervention services. (N.T. at 42, 52, 373; S-2, S-34)
6. In September 2002 Student continued at School for the Blind under a placement arranged by the District and agreed to by his parents. (N.T. at 43, 373)
7. In September 2004 Student's parents were informed that Student had been involved in a [redacted] incident. Concerned that this behavior was out of character for Student, Student's parents brought him home on September 13, 2004. (N.T. at 50, 391-393, 447; S-6, S-7, S-34)
8. On September 21, 2004 administrator's at School for the Blind informed the District that they would not re-admit Student (N.T. at 356-357, 393-395, 442-444; P-14, P-44, S-6, S-7, S-12, S-36)

9. On October 6, 2004 a meeting was held to discuss possible placements for Student. Placements considered were [a] School for the Deaf, [Redacted] School for the Blind, and [Redacted] School for the Blind [(SB)]. At that meeting Student's parents informed the District that they were seeking a placement in a regular school. (N.T. at 52-53, 444-446, 603; P-8, P-10, P-14, S-8, S-12, S-10, S-23)
10. During October 2004 the District began the process of arranging a placement for Student at the [SB]. (N.T. at 452-454, 601)
11. On October 19, 2004 Student's parents informed the District that they were seeking a placement in Student's home school, the school he would attend if he were not a student with a disability. (N.T. at 454-455; P-14, S-12)
12. On November 4, 2004 an individualized education program (IEP) team meeting was held. At that meeting evaluations from School for the Blind were discussed. Student's parents reiterated their request for a placement in Student's home school. Student's parents also requested that the District complete an educational evaluation. (N.T. at 57-60, 455-456; P-14, S-14)
13. On November 12, 2004 the District issued a permission to reevaluate form. Permission was given by Student's parents on November 23, 2004. (N.T. at 60, 458-460; P-16, P-17, P-18, S-14)
14. On November 29, 2004 the District issued a completed IEP and Notice of Recommended Educational Placement (NOREP). The proposed placement was a "Full-time deaf/blind program in an out of district/approved private school." P-20 at 3 (N.T. at 61, 462-463; P-20, S-25)
15. On December 9, 2004 Student's parents rejected the proposed placement and requested a pre-hearing conference. (N.T. at 61, 463-464; P-20, S-16)
16. On December 14, 2005 the SB completed a diagnostic evaluation of Student in his home. Present were both of Student's parents, District staff, and an evaluation team from the SB. The SB evaluation team consisted of an outreach coordinator, occupational therapist, two speech/language therapists, a low vision specialist, a physical therapist, a psychologist, and a special educator. (N.T. at 62-65, 466-467, 475-478; S-25)
17. The SB evaluation lasted approximately 2 and one-half hours and included observations of Student interacting with his parents in his living room, while taking a bath, and for a short period of eating lunch. The evaluation included an assessment of Student's overall performance and demeanor and evaluations of Student in the following areas: visual functioning, sensory functioning, cognitive functioning, behavior, receptive language, expressive language, oral/motor feeding, fine motor skills, and gross motor skills. Auditory functioning and mobility evaluations, although planned, could not be completed at that time. (N.T. at 467-468, 482-484; S-25)
18. When Student's parents were subsequently asked to bring Student to SB to complete the auditory functioning and mobility evaluations, they declined. They did provide SB reports from

the Listening Center at [redacted university hospital] (Listening Center). (N.T. at 65-66, 470; S-25)

19. In December 2005 Student's parents began to develop an in-home program for Student. Student's parents hired Dr. J as a consultant for that program. In January 2005 they hired an intervener to work in that program. (N.T. at 69-83; 147)

20. On January 4, 2005 a pre-hearing conference was held. At that meeting Student's parents informed the District that they were setting up an in-home program for Student (N.T. at 86, 130, 465; P-22, P-23, P-24, P-25, S-18)

21. Following the pre-hearing conference, the District continued to offer Student a placement in an out of District approved private school. The superintendent characterized that placement as a specialized program for deaf/blind children, like the one available at the SB. (P-23, S-18)

22. On March 9, 2005 the SB team produced a report with recommendations in the areas of cognitive/behavior, visual functioning, communication and oral /motor feeding, fine motor skills (i.e., an attached list of fun activities), and gross motor skills. The team also attached reports from the Listening Center and referred to them for recommendations on auditory functioning. (550-551; S-25)

23. On April 20, 2005 Dr. J produced a report, titled educational evaluation, detailing Student's progress during the previous four months in vision, behavior, and communication and cognition. In her report she recommended that Student be educated in an inclusive environment with the support of an intervener. (N.T. at P-28)

24. On May 23, 2005 a reevaluation report was produced by the District. The reevaluation report included the SB evaluation report and reports from other sources. On that same day a meeting was held to discuss the SB evaluation. (N.T. at 550-553; P-31, S-26)

25. Student's parents shared Dr. J's report with the District at the meeting held on May 23, 2005. (N.T. at 90-91)

26. During June and July 2005 IEP meetings were held to work on the development of a new IEP for Student (N.T. at 91-92, 397-403, 552, 557-559, 563-564; P-33, P-34, S-31)

27. At the July 28, 2005 IEP meeting Dr. J provided a list of potential goals for Student. Those goals were incorporated into his IEP. (N.T. at 91-92, 194, 404, 565-569; P-35, P-44, S-36)

28. On September 12, 2005 the District delivered an IEP to Student's parents. The proposed placement contained in that IEP was an out of District approved private school. That IEP was entered into the record as P-44 and S-36. (N.T. at 44, 92-93, 405, 440, 553; P-44, P-36)

29. Student is eligible for extended school year services. (P-44, S-36)

30. Student has not attended school since leaving School for the Blind in September 2004. (N.T. at 69)

31. At the present hearing the parties agreed that the issues to be heard were compensatory education for the 2004-2005 school year, reimbursement of Student's parents for their costs incurred in providing an in-home program during the 2004-2005 school year, reimbursement of Student's parents for an IEE completed by Dr. J, and appropriate prospective placement. The parties also agreed that they were not seeking a ruling on the appropriateness of Student's proposed program and that any disagreements regarding the proposed program could be resolved outside of the hearing. (N.T. at 29-30, 209-211)

Issues

Must the [Redacted] School District provide compensatory education to Student equivalent to the 2004-2005 school year?

Must the [Redacted] School District reimburse Student's parents for their costs associated with providing Student with an in-home program during the 2004-2005 school year?

Must the [Redacted] School District reimburse Student's parents for their costs related to an independent educational evaluation completed by Dr. J?

What is the appropriate prospective placement for Student?

Discussion

The present hearing was requested to address the following issues: compensatory education for the 2004-2005 school year, reimbursement of Student's parents for their costs incurred in providing an in-home program during the 2004-2005 school year, reimbursement of Student's parents for an IEE completed by Dr. J, and appropriate prospective placement. [Fact 31] Each of those issues will be considered below. At the present hearing the parties agreed that they were not seeking a ruling on the appropriateness of Student's proposed program and that any disagreements regarding the proposed program could be resolved outside of the hearing. [Fact 31] Accordingly, the appropriateness of the proposed IEP will not be addressed by this hearing officer.

Must the [Redacted] School District provide compensatory education to Student equivalent to the 2004-2005 school year?

Student's parents have requested compensatory education for the 2004-2005 school year, [Fact 31] a period of time in which they claim that the District did not provide their son with a free appropriate public education (FAPE). In claims regarding the appropriateness of programs provided to a student, the burden of proof is on the school district to establish that the student's program complied with the Individuals with Disabilities Education Act (IDEA). *Oberti v. Board of Education of Clementon School District*, 995 F.2d 1204, 1216 (3rd Cir. 1993); see also

Carlisle Area School District v. Scott P., 62 F3d 520 (3rd Cir. 1995) As outlined in *In Re Educational Assignment of N.B.*, Spec. Educ. Op. 1427 (2003):

The Individuals with Disabilities Education Act (IDEA) requires the states to provide a "free appropriate public education" to all students who qualify for special education services. In *Rowley*,²² the U.S. Supreme Court held that this requirement is met by providing personalized instruction and support services to permit the child to benefit educationally from the instruction, providing the procedures set forth in the Act are followed. The *Rowley* standard is only met when a child's program provides him or her with more than a trivial or de minimis educational benefit.²³ As specified in *Oberti*, the burden is on the school district to establish that a child's educational program complies with the IDEA. Moreover, courts and Appeals Panel decisions consistently have held that the denial of a child's right to FAPE will be found where violations of procedural safeguards by a school district result in the loss of educational opportunity.²⁴

²² *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982).

²³ *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3rd Cir. 1988).

²⁴ *W.G. v. Board of Trustees of Target Range School District*, 960 F.2d 1479 (9th Cir. 1992); *Benjamin G.*, Spec. Educ. Opinion No. 555 (1992).

A child is entitled to compensatory education if a school district knew or should have known that a child had an inappropriate IEP or was not receiving more than minimal educational benefit and did not correct the situation. An award for compensatory education should be equal to the period of deprivation minus the time reasonably required for the school district to rectify the problem. *M.C. v. Central Regional School District*, 81 F.3d 389 (3rd Cir. 1996)

In the present matter, the central dispute is over whether or not the District offered Student a placement in the least restrictive environment.

When Student was 6 months old he contracted meningitis. After a prolonged illness Student was diagnosed with a profound hearing loss, cortical vision impairment, and seizure disorder. [Fact 2] In October 1997 Student began to receive early intervention services from the local IU. [Fact 4] In June 2002 Student was placed at School for the Blind in [city and state redacted]. [Fact 5] That summer program was originally agreed to by Student's parents and arranged by the IU that was providing Student's early intervention services. [Fact 5] In September 2002 Student continued at School for the Blind under a placement arranged by the District and agreed to by his parents. [Fact 6] In September 2004 Student's parents were informed that he had been involved in a [redacted] incident. Concerned that this behavior was out of character for Student, on September 13, 2004 Student's parents brought him home. [Fact 7] On September 21, 2004 administrators at School for the Blind informed the District that they would not re-admit Student [Fact 8]

The appropriateness of the program and placement at School for the Blind from Student's original enrollment under an IU sponsored program through until he left School for the Blind on

September 13, 2004 was not in dispute at the present hearing. What was in dispute was whether or not the District offered Student an appropriate placement, one that was in the least restrictive environment, after he left School for the Blind.

Almost immediately after it became clear that Student could not return to School for the Blind the District began to consider alternative placements. The placements considered were [a] School for the Deaf, [Redacted] School for the Blind, and [the SB]. [Fact 9] All of those placements were approved private schools located outside of the District. In response, on October 6, 2005 Student's parents informed the District that they wanted Student to be educated in a regular school program and by October 19, 2004 they had made it clear that they were seeking a placement in Student's home school, the school he would attend if he were not a student with a disability. [Facts 9, 11, 12]

By mid-October the District began the process of arranging a placement for Student at the SB. [Fact 10] It made a formal offer of a placement in a "Full-time deaf/blind program in an out of district/approved private school" (P-20 at 3) on November 29, 2004 [Fact 14] and repeated that offer following a January 4, 2005 pre-hearing conference. [Fact 21] The superintendent characterized that placement as a specialized program for deaf/blind children, like the one available at the SB. [Fact 21] At no time during the 2004-2005 school year did the District offer any placement other than an approved private school located outside of the District.

In disputes regarding what is termed the "least restrictive requirement" the burden of proof is on the school district to establish that a student's proposed program and placement complies with the IDEA. *Oberti v. Board of Education of Clementon School District*, 995 F.2d 1204, 1216 (3rd Cir. 1993); see also *Carlisle Area School District v. Scott P.*, 62 F3d 520 (3rd Cir. 1995) As outlined in *In Re Educational Assignment of N.B.*, Spec. Educ. Op. 1427 (2003):

The IDEA sets forth in clear language that children eligible for special education services are to be educated within the regular classroom "to the maximum extent appropriate."¹⁷ As the Third Circuit explained in *Oberti*,¹⁸ a determination of whether a school district has complied with this inclusion, or mainstreaming, preference in the IDEA requires two considerations: (1) whether education within the regular classroom with supplemental aids and services can be satisfactorily achieved; and (2) if placement outside of the regular classroom is necessary, whether the school has included the child with non-exceptional children to the maximum extent possible. In evaluating this first consideration, a court should look at the efforts the school district has made to include the child, a comparison of the benefits to the child of a regular classroom versus a separate special education classroom, and the effect on the other students.

A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general curriculum.¹⁹ This requirement has been expanded by *Girty*.²⁰ As affirmed by the U.S. Third Circuit court, students with disabilities do not have to receive the same educational experience or benefit as their non disabled peers. The court ruled that regular

education placement was appropriate so long as the student was making progress commensurate with his ability in the regular classroom.

¹⁷ 20 U.S.C. § 1412(a)(5); see also 34 C.F.R. § 300.550.

¹⁸ *Oberti v. Board of Education of Clementon School District*, 995 F.2d 1204, 1216 (3rd Cir. 1993).

¹⁹ 20 U.S.C. § 1412(a)(5).

²⁰ *Girty V. School District of Grove Valley*, 163 F Supp.2d 527, 532-537 (W.D. Pa 2001) aff'd 60 Fed Appx 889, 2002 U.S. App. (2002).

Considering first whether education within the regular classroom with supplemental aids and services can be satisfactorily achieved, the District failed to meet its burden to show that it could not. The District has never made any attempt to educate Student in the regular education classroom, with or without supplemental aids and services. Nothing in the record suggests that the District ever even seriously considered the possibility of educating Student in a regular education setting. Nothing in the proposed IEP is that out of the ordinary. Certainly there are many related services listed in the IEP and at least some of them will have to be provided outside of the regular classroom, but Student's parents have not said that no instruction can occur outside of the regular classroom, what they have asked for is for Student to be educated with typical children to the maximum extent possible. Even if all of the related services in Student's IEP had to be provided outside of the regular classroom (and I am not saying that they will), that would only total 6 hours per week, or 1 hour and 12 minutes per day on average. And even if some of Student's educational instruction had to be provided outside of the regular classroom, that would still allow significant amounts of time during which he could be educated with his non-disabled peers.

Turning to a comparison of the benefits to the child of a regular classroom versus a separate special education classroom, and the effect on the other students in a regular classroom, scant evidence was presented on either issue at the present hearing. In short, the District failed to show that educating Student in the regular classroom with non-disabled peers would be detrimental to his own educational progress or to the educational progress of other students. Likewise, the District failed to meet its burden to show that if placement outside of the regular classroom were ordered by this hearing officer that it has a meaningful plan to educate Student with non-exceptional children to the maximum extent possible.

The District is reminded that it must consider Student's placement in light of what the *Girty* Court said. The standard for appropriateness is not whether or not Student can receive the same educational experiences or benefit as his non-disabled peers. The standard is whether or not Student can make progress toward his own IEP goals commensurate with his own abilities if he is placed in a regular classroom. It is the conclusion of this hearing officer that he can and therefore he should have been placed in a regular education setting. Because he should have been placed in a regular education setting, but was not, Student is entitled to compensatory education.

Several Appeals Panels have delineated the methods for determining the amount of a compensatory education award and the standards by which it should be applied. The method for

determining the award found in *In Re Educational Assignment of C.B.*, Spec. Educ. Op. 1122 (2001) is typical:

Except in unusual circumstances, the cost to a district of providing the awarded hours of compensatory education should not exceed the full cost of the services that were denied. Full costs are the salaries and fringe benefits that would have been paid to the actual professionals and paraprofessionals who should have provided the District services and the actual costs for salaries, tuition and transportation, etc. for contracted services. This principle sets the maximum cost of all of the hours or days of compensatory education awarded. Parents may balance expensive and inexpensive instruction or services so that the average cost is below the maximum amount. Parents may also use fewer hours of expensive services as long as the maximum amount is not exceeded. Finally, parents may not be required to make co-payments or use personal insurance to pay for these services.

As applied to the present case, the full cost is the total actual cost that would have been incurred if an appropriate program, as presented in the most recently offered IEP, had been provided to Student once he left School for the Blind, minus the time it would have taken to develop an appropriate program and placement.

As of the end of September the District was aware that Student could not return to School for the Blind. [Fact 8] As of early October the District was aware that Student's parents were seeking placement in a regular education setting. [Facts 6 and 11] At that point the District was on notice that a new, appropriate placement was required. With that as a starting point, the time it took for the District to develop a new IEP and to offer it to Student's parents was a reasonable amount of time to rectify the situation. On November 29, 2004 the District issued a completed IEP and NOREP. [Fact 14] Because Student has not attended any school program since he left School for the Blind, [Fact 30], it is the determination of this hearing officer that the award of compensatory education should be equivalent to the period from the issuance of that IEP on November 29, 2004, through to the end of the 2004-2005 school year. Because the parties have agreed to the most recently offered IEP, the costs of the compensatory education award, as discussed in *C. B.*, should be based on the cost that would have been incurred by the District if it had provided Student with that program from November 29, 2004 through to the end of the 2004-2005 school year. Further, because Student is eligible for extended school year services, [Fact 29] the compensatory education award should include the equivalent of the extended school year services detailed in the most recently offered IEP.

A typical standard for applying an award of compensatory education can be found in *C.B.*, Spec. Educ. Op. 1122 (2001):

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 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 student. Reimbursement for the services shall be

at the rate that the parent is obliged to pay, not a district determined rate. This provision shall remain in effect until the student's 21st birthday. As described earlier in this opinion, the cost of this compensatory education awarded to Student shall not exceed the actual cost of the appropriate services that were denied.

In the present matter Student's parents may determine how the award will be applied as long as it falls within the standard found in *C.B.*, Spec. Educ. Op. 1122 (2001).

Must the [Redacted] School District reimburse Student's parents for their costs associated with providing Student with an in-home program during the 2004-2005 school year?

In December 2005 Student's parents began to develop an in-home educational program for Student. Student's parents hired Dr. J as a consultant for that program. [Fact 19] In January 2005 they hired an intervener to work in that program. [Fact 19] Student's parents have requested reimbursement for their costs in setting up and conducting that in-home program for Student. Those costs include the costs of hiring Dr. J who served as a consultant, hiring an intervener, materials, supplies, and meals that were part of Student's program.

The standard for reimbursement for parentally provided programs comes largely from cases involving tuition reimbursement. Parents may be entitled to tuition reimbursement for a child's placement in a private school where it is determined that the program offered by the public school did not provide a FAPE, and the private placement is proper. *Florence County School District v. Carter*, 510 U.S. 10 (1993); *Burlington School Committee v. Department of Education*, 471 U.S. 360 (1985). Of course, if the District's program is found to be appropriate, no reimbursement is warranted. *Board of Education v. Diamond*, 808 F.2d 987 (3rd Cir. 1986). In *Burlington* a three part test was established for determining whether or not tuition reimbursement is warranted. First, the burden is placed on the District to demonstrate that the program offered or provided was appropriate. If the program is found to be appropriate, the analysis stops. If the program is found to be inappropriate, the burden shifts to the parents to demonstrate the appropriateness of the private school program. However, the private school program need not satisfy all of the IDEA requirements in order to qualify for reimbursement. *Carter*. The standard is whether the parental placement was reasonably calculated to provide the child with educational benefit. *Carter*. Lastly, there must be a consideration of the equities. *In re Educational Assignment of W.B.*, Spec.Ed.Op. 1235 (2003).

The above standard for tuition reimbursement can appropriately be applied to other types of reimbursement, including the costs of the in-home program created by Student's parents.

Above it was concluded that the District did not provide an appropriate program to Student during the 2004-2005 school year because it failed to adequately consider placement in the least restrictive environment. That discussion need not be repeated here. With that conclusion already made, the question becomes: Was the program provided by the parents appropriate? Now the burden shifts to the parents to establish that their program was appropriate. As noted above, Student's parents' program is not to be held to the same standard that a school district

program may be held to, but their program must have been reasonably calculated to enable Student to receive educational benefit.

During the course of this hearing both Student's mother and Dr. J testified about the program that was developed. Student's mother testified about hiring Dr. J to help develop the program, the cost of Dr. J, hiring an intervener to work in the program, the cost of the intervener, purchasing supplies, making materials, and some specific activities including finger spelling and the counting of objects. Dr. J gave additional testimony about her involvement in the program, certain aspects of the program, and progress she had seen in Student. However, nothing in the record indicates what the program actually consisted of. After carefully reviewing the hundreds of pages of transcript and hundreds of pages of exhibits offered by both the parents and the District, this hearing officer cannot find any clear indication of what was actually done in Student's program. There are small selected bits presented, but neither Student's mother, Dr. J, nor any other witness, nor any exhibit gives a clear, comprehensive picture of what the program consisted of. And even less establishes how the various claimed expenses relate to that program. Because the record does not clearly show what Student's program consisted of, it is impossible to determine whether or not that program was reasonably calculated to enable Student to receive educational benefit. Because the record does not allow for that determination, Student's parents failed to meet their burden to establish that the in-home program that they provided was appropriate.

Because Student's parents failed to meet their burden to prove that the in-home program was appropriate, the equities in the present matter need not be considered.

Because the in-home program was not proven to be appropriate, Student's parents' request for reimbursement for their costs associated with that program must be denied.

Must the [Redacted] School District reimburse Student's parents for their costs related to an independent educational evaluation completed by Dr. J?

As noted above, in December 2005 Student's parents began to develop an in-home program for Student and hired Dr. J as a consultant for that program. [Fact 19] On April 20, 2005 Dr. J produced a report, titled educational evaluation, detailing Student's progress during the previous four months in vision, behavior, and communication and cognition. [Fact 23] Student's parents have requested reimbursement for their costs in obtaining that independent educational evaluation (IEE).

A parent is entitled to an IEE at public expense when the parents disagree with an evaluation obtained by the school district and that evaluation is determined to be inappropriate. 34 C.F.R. § 300.502(b). An IEE must "add something new to the prevailing understanding of the child's disability." *In re Educational Assignment of P. C.*, Spec.Ed.Op. 1140 (2001). Simply showing a difference between the school district's evaluation and the parents' is not enough. *In re Educational Assignment of C.G.*, Spec.Ed.Op. 1205 (2002); *In re Educational Assignment of K.B.*, Spec.Ed.Op. 1111 (2000)

The first question that must be asked is: Was the evaluation completed by the District appropriate? The District carries the burden of proof with this question and, in this matter, the District met that burden.

On December 14, 2005 a team from SB completed a diagnostic evaluation of Student in his home. [Fact 16] Present were both of Student's parents, District staff, and an evaluation team from the SB. [Fact 16] The SB evaluation lasted approximately 2 and one-half hours and included observations of Student interacting with his parents in his living room, while taking a bath, and for a short period of eating lunch. The evaluation included an assessment of Student's overall performance and demeanor and evaluations of Student in the following areas: visual functioning, sensory functioning, cognitive functioning, behavior, receptive language, expressive language, oral/motor feeding, fine motor skills, and gross motor skills. Auditory functioning and mobility evaluations, although planned, could not be completed at that time. [Fact 17]

When Student's parents were subsequently asked to bring Student to SB to complete the auditory functioning and mobility evaluations, they declined. They did provide SB reports from the Listening Center. [Fact 18]

The SB team produced a report with recommendations in the areas of cognitive/behavior, visual functioning, communication and oral /motor feeding, fine motor skills (i.e., an attached list of fun activities), and gross motor skills. The team also attached reports from the Listening Center and referred to them for recommendations on auditory functioning. [Fact 22]

On May 23, 2005 a reevaluation report was produced by the District. [Fact 29] The reevaluation report included the SB evaluation report and reports from other sources. On that same day a meeting was held to discuss the SB evaluation. [Fact 29]

After review of the SB report, the reevaluation report, and the testimony given at the present hearing, particularly the testimony of Ms. H, outreach coordinator for the SB, it is the conclusion of this hearing officer that the diagnostic evaluation completed by SB was appropriate. The rationale for the team approach and the reliance on direct observation and information from the parents, as opposed to using standardized tests with a deaf/blind child, was convincingly presented in a November 11, 2004 letter from SB. see P-17 The evaluation was completed by a highly qualified team [Fact 16] who produced a comprehensive and well-documented report. To a large measure, information in the SB report has influenced the IEP that was developed for Student. Many of the program modifications, specially designed instructions, and related services contained in the IEP were recommended by the SB evaluation team.

Because the diagnostic evaluation completed by the SB was funded by the District and because this hearing officer has concluded that the SB evaluation was appropriate, Student's parents cannot be reimbursed for the IEE completed by Dr. J.

Even if this hearing officer had not reached the above conclusion, reimbursement for Dr. J's IEE could not be awarded because the second question that would have to be addressed is: Did Dr. J's evaluation add useful new information to the understanding of Student and the development of his IEP? The answer to that question is no, Dr. J's IEE report did not add useful new information.

At this juncture the burden of proof shifts to the parents. Reading Dr. J's evaluation this hearing officer was struck by how little it seemed like an evaluation report. It was far closer to a progress report than to an evaluation report. In fact, within the report the purpose is stated as:

Over the course of 4 months, this evaluator has observed and worked with Student, his parents, and his intervener. The purpose of this work has been to establish an in-home program and help his parents and intervener implement it. Student has made significant gains since initiation of this program. These gains are discussed below. P-28 at 1

Clearly the report was developed to document progress in the in-home program, not for the purpose of evaluation, the purpose that is at the core of any IEE. Even so, the impact of that report on the development of the IEP will be discussed below.²

Even if Dr. J's report is accepted as an evaluation report rather than a progress report, Student's parents have failed to meet their burden to prove that the IEE added something new to the understanding of Student. Although there is mention of suggestions from Dr. J in the IEP, most of those suggestions are not contained in her evaluation report. Looking at the first several goals in the IEP (S-36 at 17-38), Dr. J's evaluation report is typically not referenced. In the present levels sections of those goals it is only mentioned a couple of times, and as noted below, even then it is not very helpful. Nothing in the short-term objectives sections of those goals comes from Dr. J's evaluation report. There are some references to input from Dr. J (who was present at the IEP team meetings), but that input does not come from her evaluation report. For example, in relation to a goal to increase responding to signs and a goal to increase responding to objects/pictures/symbols, Dr. J is credited with suggesting that the acquisition of 100 new signs may be feasible for Student. (S-36 at 18 and 19) That suggestion does not appear in Dr. J's evaluation report. While that suggestion may have been offered by Dr. J at the IEP meeting, the consideration here is reimbursement for the IEE completed by Dr. J, not reimbursement for her attendance at the IEP meeting.

Looking at later goals that are attributed directly to Dr. J (S-36 at 39-46), goals that deal with the sequencing of pictures, explaining a sequence, identifying a missing picture from a sequence, following directions that are presented in a sequence of pictures, use of signs related to school, letter identification, and mathematical computation, none of those goals are mentioned in her evaluation report. Dr. J provided those goals, as well as some other goals found in the IEP, to the IEP team on July 28, 2005. [Fact 27] Although Dr. J may have contributed those goals at an IEP meeting, the consideration here is reimbursement for the IEE completed by Dr. J, not reimbursement for her attendance at the IEP meeting. In addition, those goals are not for the present, but for some future point when Student may be ready to address them. At that future point an evaluation will need to be completed to determine if, in fact, Student is ready to address

² Above progress in the in-home program was not considered in this hearing officer's decision not to award reimbursement for that program. That was the case because Student's parents failed to clearly show what the program consisted of. Without a clear picture of what the program was, there was not the need to consider whether or not Student showed progress during the period of time that the program was in place.

them. Therefore, even if those recommendations were in Dr. J's report they would be speculative at best and would not warrant reimbursement.

Other aspects of the IEP contain a similar lack of input from Dr. J's IEE. Out of 20 program modifications/specially designed instructions in Student's IEP, the only one mentioned in Dr. J's evaluation report is the use of an intervener. [Fact 23] Out of 7 related services and 3 supports for school personnel in Student's IEP, none are mentioned in Dr. J's evaluation report.

In summary, looking at the goals in Student's IEP, it is the conclusion of this hearing officer that no specific goal comes directly from the IEE, very little in the present levels sections of the goals comes from the IEE, and nothing in the short-term objectives sections comes from the IEE. Similarly, only 1 out of 20 program modifications comes from the IEE and none of the related services or supports for school personnel come from the IEE. The conclusion that must be reached is that Dr. J's IEE did not make a meaningful contribution to either the understanding of Student or to the development of his IEP. This is true even though Dr. J's evaluation report was included in the IEP. Being included in the IEP in this case clearly did not equate with having an influence on the actual development of Student's program. Dr. J did provide meaningful input into the IEP process that was accepted by the District. However, that input was based on her understanding of Student during the summer of 2005, not her IEE which was a summary of Student's progress from January to April of 2005.

Given all of the above, Student's parents failed to meet their burden because they failed to show that the IEE completed by Dr. J, as represented in her evaluation report, made any meaningful contribution to the IEP that was ultimately developed for Student

Because it was concluded by this hearing officer that the District's evaluation was appropriate and because the evaluation completed by Dr. J did not make a meaningful contribution to either the understanding of Student or to the development of his IEP, the request by Student's parents to be reimbursed for Dr. J's IEE must be denied.

What is the appropriate prospective placement for Student?

During June and July 2005 IEP meetings were held to work on the development of a new IEP for Student [Fact 26] .On September 12, 2005 the District delivered an IEP to Student's parents. That IEP was entered into the record as P-44 and S-36. [Fact 28] At the present hearing the parties agreed that they were not seeking a ruling on the appropriateness of Student's proposed program and that any disagreements regarding the proposed program could be resolved outside of the hearing. [Fact 31]

The proposed placement contained in the IEP offered on September 12, 2005 was an out of District approved private school. [Fact 28] Student's parents have requested a placement in the school he would attend if he were not a student with a disability.

Above, when addressing the question of compensatory education, a comprehensive discussion of the least restrictive environment requirement was presented. That discussion need not be repeated here.

From the point that Student was no longer able to attend School for the Blind in September 2005, through to the present, the only placement the District has ever considered and has ever offered to Student's parents is an approved private school located outside of the District. [Facts 9, 10, 14, 21, and 28] Throughout that period Student's parents have requested a placement in his home school. [Facts 9, 11, and 12]

As discussed above under compensatory education, the District carries the burden to show that its proposed placement is appropriate. *Oberti v. Board of Education of Clementon School District*, 995 F.2d 1204, 1216 (3rd Cir. 1993); see also *Carlisle Area School District v. Scott P.*, 62 F3d 520 (3rd Cir. 1995) Also, as discussed above, the District failed to meet that burden. It did not prove that Student could not be educated within the regular classroom with supplemental aids and services. As concluded by this hearing officer above, nothing in the proposed IEP is that out of the ordinary and nothing in that IEP prevents Student's program from being provided in the school he would normally attend. As noted above, there was very little evidence on the questions of the benefits to Student of a regular classroom versus a separate special education classroom or the effect on the other students if Student were to be placed in a regular classroom. In short, the District failed to show that educating Student in the regular classroom with non-disabled peers would be detrimental to his own educational progress or to the educational progress of other students. Likewise, the District failed to meet its burden to show that if placement outside of the regular classroom were ordered by this hearing officer that it has a meaningful plan to educate Student with non-exceptional children to the maximum extent possible.

After considering all of the above, it is the conclusion of this hearing officer that the appropriate placement for Student is the school which he would attend if he were not a student with a disability.

* * *

In summary, this hearing officer concluded that because the District did not seriously consider any placements other than the restrictive placements of out of district approved private schools, did not ever attempt to provide Student with an education in his home school or any other inclusive setting, and did not prove that Student's placement would be detrimental to him or to other students, the District must provide Student with compensatory education. This hearing officer also determined that the starting point for the award of compensatory education should be November 29, 2004, which was calculated by taking the point that the District knew or should have known its program was not appropriate, minus the time needed to rectify the situation, and that the award should continue through the end of the 2004-2005 school year and include the extended school year services contained in the most recently offered IEP.

This hearing officer also concluded that Student's parents had failed to meet their burden to prove that the in-home program that they provided was appropriate because they failed to present testimony and evidence that clearly established what that program consisted of. Because of that, their request for reimbursement for their costs associated with that program must be denied.

Their request for reimbursement for an IEE was also denied because the District's evaluation, the evaluation completed by the SB, was found to be appropriate and because the IEE completed by Dr. J had little or no impact on the development of Student's IEP.

Lastly, this hearing officer concluded that the appropriate placement for Student is the school he would normally attend if he were not a student with a disability. The most recently offered IEP, which was not in dispute at the present hearing, contains all of the goals, objectives, specially designed instructions, supports, and services that Student needs to be successful in that placement.

Although this hearing officer will order the District to provide Student with compensatory education and although this hearing officer will order the District to place Student in a placement that it has opposed, those two orders should not be taken as an indictment of the District. The [Redacted] School District has gone to extraordinary lengths to support Student and his parents. It accepted a placement at a private school in [state redacted] that was originally developed by the IU and Student's parents. It not only sent staff to that school to attend meetings on a regular basis, it paid for Student's parents to fly to [state] and bring Student home every other weekend, or, when asked, it paid for them to drive to [state] so that they could attend holiday events at School for the Blind. Once the School for the Blind placement was not longer available, the District did not shy away from continuing to consider expensive placements at approved private school. Its staff not only attended meetings at School for the Blind, they accompanied the family to evaluations held at [university hospital]. When the family did not want to travel with Student to the SB, the District paid to have an 8-member evaluation team come from the SB to Student's home. Although the District lost sight of the strong preference under the law to try to educate students in their home school, it cannot be faulted for doing what it believed it could and should do for Student, apparently without concern for cost.

This is not to imply that Student's parents are not also hard working and well intentioned. They too have gone to extraordinary lengths to support Student and they too have expended considerable resources both financial and personal in trying to provide an educational program for their son.

With parents who have gone to such lengths as Student's to support their son and his education and with a District that has also been willing to expend considerable resources in providing educational programs to Student, this hearing officer is confident that the parties will be able to work together to provide an appropriate program and placement for Student within the District.

Accordingly we make the following:

ORDER

The [Redacted] School District must provide Student with compensatory education equal to the amount it would have cost to provide the program found in Exhibit S-36 to Student in his local

school, from November 29, 2005 through the end of the 2004-2005 school year, including the extended school year services contained in that IEP. Student's parents may decide how the award should be applied, as long as it takes the form of appropriate developmental, remedial, or enriching instruction that furthers the goals of Student's pendent or future IEPs. The compensatory education must be in addition to Student's then current IEP and may not be used to supplant such services. The services may occur after school hours, on weekends, and during the summer months, when convenient for the parent and student. Reimbursement for the services shall be at the rate that the parent is obliged to pay, not a district determined rate. This provision shall remain in effect until Student's 21st birthday. As described earlier in this opinion, the cost of this compensatory education awarded to Student shall not exceed the actual cost of the appropriate services that were denied.

The [Redacted] School District is not required to reimburse Student's parents for their costs associated with providing Student with an in-home program during the 2004-2005 school year.

The [Redacted] School District is not required to reimburse Student's parents for their costs related to an independent educational evaluation completed by Dr. J.

The appropriate placement for Student is the school he would normally attend if he were not a student with a disability. Within 30 school days of receipt of this decision the District must have a program and placement in place to educate Student in that school.

Signature of Hearing Officer