

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.](#)

DECISION
DUE PROCESS HEARING

Name of Child: C.P.
ODR #5853/05-06 AS

Date of Birth: xx/xx/xx

Dates of Hearing:

November 1, 2005 (4:00 pm-8:00 pm)
November 2, 2005 (4:30 pm-8:30 pm)
December 5, 2005 (9:00 am-1:40 pm)
February 6, 2006 (9:00 am-3:15 pm)
February 7, 2006 (9:00 am-4:15 pm)
April 10, 2006 (9:00 am-5:00 pm)
April 11, 2006 (9:00 am-5:00 pm)
April 17, 2006 (8:15 am-12:10 pm)

CLOSED HEARING

Parties to the Hearing:

Parent(s)

Council Rock School District
The Chancellor Center
30 North Chancellor Street
Newtown, Pennsylvania 18940

Date Transcript Received:

Date Record Closed

Date of Decision:

Hearing Officer:

Representative:

Ilene Young, Esquire
Law Office of Ilene Young, Esquire
50 East Court Street, Main Floor
Doylestown, Pennsylvania 18901

Grace Deon, Esquire

Eastburn and Gray
60 East Court Street
Doylestown, Pennsylvania 18901

April 23, 2006

May 2, 2006

May 16, 2006

Linda M. Valentini, Psy.D.

Background

Student is a [teenaged] eligible student who was enrolled in the Council Rock School District (hereinafter District) from kindergarten through 7th grade. Following intervention through the Instructional Support Team (IST) in 1st to 3rd grades, and a private neuropsychological evaluation at the end of 4th grade, he was identified as requiring special education. He was classified as having an other health impairment (ADHD) and a specific learning disability in written expression.

Parents (hereinafter Parents) believe that the District failed to offer Student a free appropriate public education (FAPE) for several years prior to their decision to remove him from the District and unilaterally enroll him for the 2005-2006 school year in the [redacted] private school in [another state], which provides programming for students with learning disabilities. The Parents seek compensatory education and tuition reimbursement. The District maintains that it offered Student FAPE in the past and that the proposed IEP for the current school year represented an offer of FAPE.

On October 26, 2005 prior to convening the hearing, the hearing officer issued a ruling establishing that in considering any past denial of FAPE, the remedy for which would be compensatory education, recovery would be limited to the two years preceding the Parents' request for due process, that is the 2003-2004 and the 2004-2005 school years in accord with IDEA 2004.¹ Documents pertaining thereto are included as Hearing Officer Exhibits 1 through 3. On December 3, 2005 the hearing officer issued a Ruling and Order for the Production of Documents in response to the Parents' request for such an Order. Documents relative thereto are included as Hearing Officer Exhibits 4 and 5.

Issues

1. Did the Council Rock School District offer Student a free appropriate public education for the 2003-2004 school year?
2. Did the Council Rock School District offer Student a free appropriate public education for the 2004-2005 school year?

¹ *“Rather and fortunately, Congress specifically adopted a statute of limitations for both the hearing officer and judicial stages in its 2004 amendments to the IDEA, effective 7/1/05; for the hearing officer stage, as we have already applied to cases filed after 7/1/05, the period is two years”*. Special Educ. Opinion No. 1680 (2005); *“... as of its effective date of 7/1/05, this new statutory provision effectively preempted Montour”*. Spec. Educ. Opinion No. 1696 (2006).

3. If the Council Rock School District did not offer Student a free appropriate public education for the 2003-2004 and/or the 2004-2005 school year(s), is he entitled to compensatory education and, if so, in what amount?
4. Did the IEP proposed by the Council Rock School District for Student for the 2005-2006 school year offer him a free appropriate public education?
5. If the IEP proposed by the Council Rock School District for Student for the 2005-2006 school year did not offer him a free appropriate public education, are Parents entitled to tuition reimbursement for their unilateral placement of their son at the [private school]?
6. Are Parents entitled to reimbursement for the independent educational evaluation they obtained from Dr. [G-2]?

Findings of Fact

Background

1. Student is a [teenaged] eligible student residing in the Council Rock School District.
2. Student had difficulty in focus and attention from preschool. (NT 1281)
3. In Kindergarten Student wiggled around and wouldn't keep still, and was "not plugged in" to the instruction. Student evidenced attention and focus problems in 1st grade. (NT 1282, 1286-1291)
4. Student was referred to the Instructional Support Team (IST) in 1st grade² and received regular education supportive reading services. He was exited from these services in 3rd grade, having achieved a reading level that was at or above grade level. (NT 69; S-4)
5. In 2nd grade Student was placed in an inclusion classroom as a regular education student because of the skills and experience of the teacher. (NT 1296)

² The Director of Special Education who was not directly involved at the time testified that Student was referred for issues around focus, attention and staying on task. (NT 57) She also testified that he had "limited success" in IST and that the District proposed but the Parents rejected an evaluation. However, no documentary evidence was produced as some of Student's records were reportedly lost and the Director of Special Education based her testimony about the offered evaluation only on a statement that another individual had made to her the night of the hearing. Her testimony that the District offered an evaluation that the Parents rejected was not judged to be credible as it could not be backed up by a document, it was not direct knowledge and the information came to light the night of the hearing. (NT 58-60)

6. Student was also placed in an inclusion classroom in the 3rd grade. (NT 1296-1299)
7. Although the Parent requested that Student again be in an inclusion classroom for 4th grade he was not placed in an inclusion classroom. (NT 1299-1300)
8. Student's 4th grade report card carried the following comments: 1st quarter – must find ways to focus his attention and effort on his work; 2nd quarter – no consistency to his focus, effort, attention to detail, and class work habits...Student must be tuned into the routine; 3rd quarter – would like to see Student try harder to focus. (S-1)
9. In March 2002, when the Parent informed the District that a private evaluation was being obtained at the Parents' expense, the District re-initiated the IST process for the purposes of data gathering so that once the private evaluation was submitted the District could produce its own Evaluation Report (ER). (NT 61-62, 69, 169-170, 1382-1383; S-3, S-4)
10. Although the Parents received information about the District's special education programs when Student went into the IST program, and the IST teacher at Elementary knew the Parent and had regular contact with her, no one at the District formally suggested³ to the Parent that Student should be evaluated. (N.T. 1305-1307, 1532-1535)
11. During the time between when the IST began gathering data to contribute to an ER once the private evaluation was available certain interventions were initiated on a trial basis but these were not particularly successful unless the teacher kept enforcing them. In other words, Student was not successful in independently employing the strategies. (NT 174-176; S-4)
12. The IST team made a referral to the multidisciplinary team for an evaluation, which was to consist of a review of the private evaluation. The IST referral form states: "Statement Re Achievement – Above average" and "Statement Re Behavior – Needs constant reminders". This information was gleaned from Student's teachers. (NT 64, 165; S-3)
13. On May 16, 2002 the District issued a Permission to Evaluate in order to review the private evaluation and construct an Evaluation Report (ER), and the Parent signed the form giving permission on May 20, 2002. (S-3)
14. The Parent first received a copy of the "Procedural Safeguards Notice" in May 2002 when the District issued the Permission to Evaluate to review Dr. G's report. (S-3)

³ Testimony of the Parent and the IST teacher differed on whether or not the IST teacher suggested a private evaluation. The Parent's testimony was credible in this regard, but not germane to the issues addressed in this hearing. (NT 1483, 1536)

15. Cognitive testing performed privately by Dr. G in March and April 2002 resulted in the finding that Student's Full Scale IQ was 101, in the mid-average range. (S-2, P-4)
16. Achievement testing by Dr. G resulted in the finding that Student had average range skills in all academic areas except for written expression. (S-2, P-4)
17. Dr. G found that Student had a weakness compared to his peers in rapid academic processing in areas such as reading and math, which was likely a function of his attentional problems. (S-2, P-4)
18. Dr. G found that Student demonstrated mild neurocognitive deficits that impacted his attention/concentration, impulse control and organization. This was consistent with reports from Student's parents and his teachers that he had significant difficulty with attention and concentration. (S-2, P-4)
19. Dr. G concluded that Student was an eligible student, having Attention Deficit Hyperactivity Disorder, Combined Type and Disorder of Written Expression. Dr. G also identified handwriting problems. (NT 70; S-2, P-4)
20. The Parent shared the private report with the District. The District considered Dr. G's report and incorporated his findings into an ER wherein Student was identified as a student with a specific learning disability in the area of written expression and an other health impairment (ADHD) who demonstrated the need for specially designed instruction. (NT 1308; S-4)
21. The District produced its Evaluation Report on September 3, 2002. (NT 167-168, 1312-1313; S-4)
22. Following his identification as an eligible student, Student's IEP for 5th grade provided for placement in an inclusion classroom.⁴ (NT 1309-1311, 1337-1338, P-10)
23. In order to insert Student's reevaluation schedule into the District's rotating schedule for evaluations, he received a reevaluation in April 2003. Other than reporting updated levels of educational functioning the reevaluation did not contain information different from the District's previous September 2002 evaluation which in turn was based on the private March/April 2002 evaluation. (NT 71-72; S-5)
24. Student has been tried on a number of stimulants and had adverse reactions that may have been due to the medication. His ADHD⁵ symptoms have not been responsive to medication. (NT 886, 1420-1424)

⁴ As noted earlier, Student was in an inclusion classroom as a regular education student for 2nd and 3rd grades.

Sixth Grade (2003-2004)

25. On May 21, 2003 a draft IEP written by the 5th grade special education teacher was presented to the Parent. There was minimal discussion, no changes to the draft were made and the Parent signed the NOREP approving the program on the same day. In September 2003 the Parent, the 6th grade teacher and another teacher had a meeting to discuss the IEP. (NT 72-73, 252, 255, 258, 1340-1343; S-6).
26. The IEP for 6th grade identified Student's Needs as organization, writing, reading comprehension and handwriting. Attention and focus, ubiquitous difficulties for Student, were not listed as Needs and were not addressed in the IEP. There were no Present Levels of Educational Performance for organization, writing, or handwriting. There were no goals and objectives for organization or handwriting. Despite Student's average cognitive level, the Expected Levels of Achievement on all objectives was 70-80% accuracy. (P-9)
27. Student received his instruction during 6th grade in an inclusion setting, with twenty-four students, eleven having IEPs. In addition to the regular education teacher there was a special education teacher. Student went to another inclusion classroom for science. (NT 258-262).
28. From the beginning of 6th grade Student was constantly agitated, didn't want to go to school, complained of stomachaches and said that his teacher "hated" him. Student was sad at night after school. He was negative. He was miserable. (NT 1345, 1412-1413)
29. At the first parent-teacher conference the special education teacher reported to the Parent that Student was not paying attention, that he was distracted, and that he looked at her (the teacher) as if he hated her. (NT 1349, 1355)
30. The teachers noted that they could not find anything in Student's desk (because it was so messy). (NT 1351)
31. As in the previous year, in 6th grade Student did not bring things home, did not have assignments written down, and did not keep a binder with papers. (NT 1346-1347)
32. During 6th grade as in previous school years, the Parent spent many evenings going back to the school to obtain materials Student did not bring home. (NT 1324-1325)
33. The Parent maintained a network of families from whom she could obtain information concerning where in the curriculum Student was meant to be, copies of worksheets Student did not possess, and any other information concerning

⁵ Although the psychiatrist in testimony referred to ADD, she clarified that she sees Student as having ADHD, Combined Type as he is both inattentive and impulsive. (NT 912)

- school. Student's teachers were aware of the fact that Student was learning the material through his parent's efforts. (NT 1588 -1591)
34. The Parent worked on homework nightly with Student, drilling him, breaking down the material into small chunks and delivering it directly to Student, repeating and retesting to be certain he retained each section, proceeding through each subject area in this way. The 6th grade teacher was aware that the Parent was investing this amount of work with Student. (NT 1330, 1396-1402, 1440-1441)
 35. As of the first parent-teacher conference Student had eight zeroes for homework not turned in. The Parent said that she had done the homework with Student and the teachers said they knew Student had done it but had not turned it in. (NT 1350-1352)
 36. The Parent asked if the teachers could make sure that Student had his assignments at the end of the day, and the teacher responded that she and the other teacher told the students to bring their assignments back at the end of the day. The Parent asked if the teachers would write down the assignments and put the note in Student's pocket and the teachers responded that they wanted him to keep track of it himself. (NT 1349-1350, 1357-1358)
 37. The special education teacher called the Parent five or six times during the year to tell the Parent that Student was not doing his class work and asked the Parent to talk to him about paying attention. (NT 294, 1354)
 38. Neither Student's tests nor his homework were modified in any way to accommodate his special needs. (NT1442-1443)
 39. Although the 6th grade special education teacher testified to accommodations offered (mini lessons, proximity control, staying in from recess for clinic, before or after school assistance, chunking assignments) all the accommodations were offered to all the eligible children in the classroom and there was no individualization for Student. (NT 337-341, 349)
 40. The writing program and the reading program offered in 6th grade were from the District's regular curriculum and were not specially designed sequential programs to address instructional needs of students with learning disabilities. (NT 339-340)
 41. Although handwriting is listed as a need in Student's IEP, there was no goal or any specially designed instruction to address this need. The 6th grade teacher testified that "we do not teach cursive writing, they are not required, and all of my teaching was done with printing". (NT 346, 391)
 42. The 6th grade special education teacher maintained records of her assessments of Student's progress but testified that "they get passed on...to the middle school" and "nobody's quite sure" (where they are). The Director of Special Education

- testified that “something happened” to the 6th grade progress reports.⁶ (NT 194, 263-264, 280, 1426)
43. The students in the inclusion class were using grade level materials with accommodations. According to his teacher, Student required “minimal accommodations”. (NT 263)
44. An Interim Report from 6th grade, dated May 14, 2004 noted that Student was receiving a 57% in language arts with a negative notation in the descriptor “demonstrates appropriate classroom behavior”; a 61% in social studies with a negative in the same descriptor; and no percentage in math but the same descriptor; and no percentage in science but with the same descriptor and the additional negative descriptor for “stays focused on instruction”. When the Parent asked the teacher about the comments she said that Student had trouble staying on task. He would keep getting up to sharpen his pencils, would ask to get a drink, would say he had to use the bathroom, and he went in to the nurse every day. (NT 1414-1419, 1437; P-36 page 89)
45. Despite needing “minimal accommodations” on his 6th grade report card, based on a 4-quarter marking system Student was reported to have made “Limited Progress” as evidenced by at least two of the four quarters being at “2” or lower on the following: Reading - invests time and effort, completes assignments on time, summarizes information, uses critical thinking skills; Writing – invests time and effort, completes assignments on time, style, conventions; Listening and Speaking – demonstrates listening skills; Math – invests time and effort, completes assignments on time, applies appropriate problem solving strategies, explains and justifies answers, demonstrates knowledge of concepts; Social Studies – invests time and effort, completes assignments on time; Science – completes assignments on time. Many of the “2” notations were in the fourth quarter, demonstrating that Student did not progress more than in a limited way over time in that grade. In the areas of demonstrating knowledge of concepts, a “2” is equivalent to a 70 to 79.⁷ (NT 283; S-1))
46. The 6th grade report card comments include negative indications (minus sign) on completes work on time, listens while others speak, stays focused on instruction, keeps materials organized, working independently. On the fourth marking period there was a new negative comment appearing for the first time under the notation “demonstrates appropriate classroom behavior”. (NT 360-362; S-1)

⁶ One problem endemic to this hearing was the District’s having lost, misfiled or mislaid items of documentation when Student moved to the middle school. Although the Parents bear the burden of proof, in the absence of documentation from the District it is difficult for their counsel to fully present the Parents’ case. (NT 178-184, 352, 422-424, 443-444, 574-575, 579-592)

⁷ Although the 6th grade teacher testified more sanguinely about Student’s progress (NT 287-290), this testimony was given considerably less weight than the report card introduced as documentary evidence as the report card represented a contemporaneous, pre-litigation record.

47. Despite the numerous difficulties chronicled on the report card and the interim progress report, the 6th grade special education teacher opined that Student was one of her strongest learning support students, and required minimal modifications, and that he “was successful”. (NT 262-263, 358, 360, 408)
48. On the 7th grade IEP, produced in May 2004 as the 6th grade ended, Student’s present level for reading comprehension was 5.4, as compared to the level for reading comprehension on the 6th grade IEP (written at the end of 5th grade) which was “4 independent, 5 instructional and 6 frustration” suggesting that Student made little progress in this area in 6th grade. (P-8, P-9)

Seventh Grade (2004-2005)

49. Notwithstanding her opinion that Student was “successful” in her classroom and required “minimal modifications” in 6th grade, the 6th grade special education teacher recommended that for 7th grade Student should not be in an inclusion setting but that he should be in a smaller self-contained class setting which was a small and more nurturing environment so that he could receive more attention and feel successful. (NT 204, 300-301, 306-309, 371-379, 384-385, 390, 1448-1452; S-13, P-8)
50. Although she did not participate in the IEP meeting, Student’s 6th grade special education teacher drafted Student’s IEP for 7th grade. The May 18, 2004 IEP meeting for entry into 7th grade was conducted solely between the Parent and one of the special education teachers randomly selected from the middle school who did not know Student and may or may not have become his teacher.⁸ (NT 392-405, 439-440, 1429, 1454, 1488-1495)
51. Although the IEP sign-in sheet has other signatures the only individuals present at the May 18, 2004 meeting were the Parent and this 7th grade teacher. (NT 1458-1460)
52. The IEP meeting in May 2004 was held in a small classroom, in which at least one other parent was also at the same time in the same room meeting with a single person about her child’s IEP.⁹ (NT 1429-1435, 1455-1457, 1484-1488)
53. The Parent approved the NOREP for 7th grade. (NT 81; S-7)
54. In middle school “the resource room is not a pull-out program. It is a self-contained setting where students receive a curriculum identical to the regular education curriculum but in a smaller setting with some other adaptations and

⁸ In fact the teacher who conducted the IEP meeting with the Parent did not become Student’s teacher.

⁹ The District’s Director of Special Education testified that she would be surprised to learn that the IEP meeting for entry into 7th grade consisted only of a special education teacher who was not to be Student’s teacher and the Parent and she did not have knowledge that a meeting of this sort took place. (NT 199-203)

- possibly individual instruction because of the smaller group setting”. (NT 308, 383-385)
55. The resource room was located beside another resource room in a trailer on school property. (NT 595)
 56. For 7th grade Student was scheduled to be placed in the resource room for all academic subjects, except math, where he would be in an inclusion setting. He received his special subjects (art, music, etc.) in the regular education setting. When the Parent requested that Student also be able to attend Social Studies and Science in an inclusion setting, the special education teacher agreed that Student could be supported for social studies in the inclusion setting but recommended that Student would be better served by having science in a small group setting. The move to the social studies inclusion class did not take place until late September. (NT 451, 453-456, 461, 543-549; S-7, S-14)
 57. An inclusion setting in math is puzzling given that his 6th grade report card indicates “minimal progress” in that subject, whereas in science he was seen as “meeting expectations”. (S-1)
 58. The possibility of Student’s being offered accommodations in order to be in the science inclusion class, since he was academically capable of doing the work but needed organization and study skills, was not discussed or offered to the Parent. (NT 549)
 59. Attached to the 7th grade IEP was an “accommodation recommendations” checklist that was signed by a middle school learning support teacher¹⁰ who did not know Student. The accommodations checked included “tests read to student” although there was no evidence of a reading decoding disability. (NT 80; S-7)
 60. Other accommodations checked on the checklist were extended time for tests, preferential seating, daily assignment book, check for understanding of directions”. (S-7)
 61. On the 7th grade IEP the District put forth confused and confusing methods of establishing Student’s actual academic levels and it is difficult to discern if or if not he made progress and the method of measuring progress is nearly impossible to decipher. (NT 392-405, 569)
 62. On the IEP for 7th grade, the Needs continuing from 6th grade were identified as reading comprehension, organization and written expression, with the addition of accepting responsibility for actions and math skills. The need for handwriting assistance which was on the previous IEP was dropped from the list even though

¹⁰ The Director of Special Education “guessed” that the accommodations were checked off by the sending teacher but this testimony was given little weight as it was a guess. (NT 80)

- handwriting had not been addressed in 6th grade. Again there was no mention on this IEP of attention and focus, a major area of difficulty for Student. (P-8)
63. On the IEP for 7th grade, there were no present levels of performance for accepting responsibility, written expression or organization. (P-8)
64. On the 7th grade IEP, Student's present level for reading comprehension was 5.4. Math procedures present level was 4.7. (P-8)
65. Goals and objectives appeared for organization, math, written expression and reading comprehension but, in the absence of baseline present levels, progress on organization and written expression could not be assessed. The description of the measurement standard for annual goals was indecipherable. (P-8)
66. Student participated in a "study skills" class for learning support students for 33 minutes in the morning. The class consisted of anywhere from three to twelve students depending on the day, there was a special education teacher and a teacher assistant, and the class offered pre-teaching, reteaching, notebook organization, test preparation, and vocabulary review of material presented in the inclusion class. (NT 554-557)
67. By October of 7th grade Student's teachers were requesting a meeting with the Parents, and the meeting was held on October 26th. The teachers had concerns about Student's completion of assignments, homework and distractibility. Student was off-task a great deal of the time. His teachers perceived that Student "was having a really good time" in school but felt he needed to take class work and school more seriously. (NT 490-491, 538-539)
68. Prior to the meeting the team had received email communications from the Parents noting that Student was having a very difficult time, was stressed and overwhelmed.¹¹ (NT 539-540; P-20)
69. At the October meeting, the Parents advised the District that they were going to attempt medicating Student to address his ADHD, but Student came down with mononucleosis in December 2004, shortly after going on the medication. (NT492-494)
70. Student demonstrated difficulties keeping his binder and his books organized. (NT 495)
71. Student had a great deal of difficulty with writing. (NT 498)
72. Student's attentional issues were more consistent and more frequent than those of the other students in his 7th grade special education class. (NT 499-500)

¹¹ The 7th grade special education teacher did not recall this email, however. (NT 540)

73. Student received a failing grade in gym because he did not have his shorts and sneakers available. The District made no offer of accommodation to help him with this organization problem and the gym teacher did not communicate the problem to the special education teacher who was the IEP custodian. She did not learn about the failing grade until she saw the interim report. (NT 557-561, 572-573)
74. There were problems with Student's homework completion throughout 7th grade and the problem came to a head in March. (NT 490)
75. Following the issuance of a progress report in March the Parents requested an IEP meeting. A meeting which may or may not have been an IEP team meeting occurred on March 10, 2005. Attendees were a regular education teacher, two special education teachers, the teaching assistant, the guidance counselor, and the Parents. No changes were made to the IEP. (NT 502, 574-576, 578; S-8)
76. Items of concern during the March meeting were that Student was not handing in his homework and not bringing materials such as notebooks or pencils to class. He was "more going off track". (NT 505)
77. The Parents shared that Student was spending an inordinate amount of time doing homework but since it was not getting to school the father offered to drop it off; the group worked out an alternate method whereby Student would give an envelope to his special education teacher as he got off the school bus and she would distribute the homework to his teachers. The team worked out that at the beginning of the day the special education teacher would spend a few minutes getting Student organized with materials and going over any questions or concerns Student had. These measures worked for a while and then stopped working, as the teacher was unaware that Student sometimes did not take the bus and was not dropped off near her room. (NT 505-507)
78. Student had a one-hour consult with the psychiatrist on March 14, 2005. The psychiatrist diagnosed Student with Attention Deficit Disorder and an Adjustment Disorder NOS. Although he did not meet the criteria for depression Student did seem unhappy. (NT 824, 831, 833-836)
79. Student was instructed in science in a learning support classroom that had nine students. (NT 599)
80. The Science teacher did not assign much homework. Student had low test scores and difficulty with the lab assignments in the second quarter. For the third quarter the teacher took into consideration that Student had been very sick. (NT 618)
81. In science class the same textbook as the regular education students had was not used. (NT 628)

82. Student's progress in science class was inconsistent. The teacher attributes the inconsistency to Student's degree of interest in the particular topic. (NT 624)
83. Student's 7th grade report card shows quarterly and final grades in science as follows: C-, D+, B, B-, C. (S-1)
84. Student received math instruction in an inclusion classroom that had a total of twenty-five students, six of whom had IEPs. (NT 639)
85. The math teacher testified that Student was in the middle range of ability among the regular education students and one of the strongest of the special education students. (NT 640)
86. The accommodations offered to Student in the math class were successful on some days and not on others. His ability to focus and concentrate was variable from day to day. (NT 644, 673-674)
87. In an emailed correspondence to the Parent early in the school year the math teacher noted that Student was running around putting out fires. The teacher told the Parent that Student had to "take responsibility". Homework completion was an issue. (NT 672-673, 680, 682, 702-703; P-36)
88. Student evidenced considerable difficulty with attention and focus during math class. He also evidenced organizational difficulties. His teacher opined that he understood the math but that his issue was focus. Student did come to math clinic on many occasions. (NT 644-648, 650, 680)
89. At times in math class Student appeared to be overwhelmed with keeping up with his work. (NT 649)
90. The math teacher attributed Student's variance in grades on the report card to varying interest in the topic. (NT 657, 701-702)
91. The Parent communicated to the math teacher that she was working hard to teach Student the material at home. The Parent requested some tutoring for Student and it was suggested that Student be tutored by high school Honor Students. (NT 683-685, 693, 698-699; P-36)
92. Student's 7th grade report card shows quarterly and final math grades as follows: Math (Acad) D+, C-, D+, C-, C-. (S-1)

93. Despite these grades/progress reports the 7th grade teacher testified that Student “did really well in math, learned a lot in math, and showed improvement in (math)”.¹² (NT 521)
94. Student was transferred to an inclusion social studies classroom which had approximately 25 students, 9 of whom had IEPs. (NT 967-968)
95. Although originally Student was given one social studies text for home and one for school, even though Student’s locker was fifteen feet from the door of the social studies classroom the book at times was not in the locker. Eventually a textbook was left in the social studies classroom for Student’s use. (NT 974)
96. Student was not successful in keeping a notebook by himself and the teaching assistant kept a duplicate notebook in case Student lost his. (NT 997)
97. In the course of a class period the social studies teacher would have to redirect Student once or twice on a daily basis. (NT 994)
98. Originally Student was to receive social studies testing with the other students with IEPs under the supervision of the teaching assistant, but he was a disruption to the other students and required so much attention that she could not attend to the other students. He was placed back into the regular education class for tests and he responded better to the social studies teacher’s structure. (NT 975-977, 994-995)
99. The social studies teacher was aware of the large amounts of time that the Parent was investing in Student’s schoolwork and the quality of the work that came in indicated that the Parent had helped Student with it. (NT 1000, 1002)
100. In social studies Student appeared to be a friendly, happy student who was well-liked by peers. The social studies teacher viewed Student as motivated to do well in the class and please the social studies teacher. (NT 984, 1001)
101. Student indicated to the social studies teacher that he did not like the special education teacher. Although he did not believe that Student was willfully not focusing, the social studies teacher used the technique of threatening Student with a return to the special education classroom for social studies if he could not focus, “Student, if you want to stay in my classroom and not go back to Miss [name redacted]’s then you have to do what you’re supposed to do in here”. The social studies teacher used a return to the special education teacher’s classroom as a punishment. (NT 999-1000-1001)

¹² As was the case with the 6th grade teacher, the testimony of the 7th grade teacher is given considerably less weight than the documentary evidence that was produced contemporaneously with the events in question and were produced pre-litigation.

102. Student's 7th grade report card shows quarterly and final grades for social studies as follows: C. C. C-, D, C. (S-1)
103. In addition to the report card grades noted above, Student's 7th grade report card shows other quarterly and final grades as follows: Language Arts (LRC) C-, C-, C-, C, C; English (LRC) C-, C-, D, C. C-. (S-1)
104. The first three quarters of IEP progress reports noted: organization and studying - limited progress, limited gains, limited gains; math computation skills – limited progress, limited to satisfactory, limited to satisfactory; written expression – limited gains, limited gains, limited gains; reading comprehension – limited progress, limited gains (focus a problem), limited gains. (NT 515; S-1)
105. On the IEP proposed for 8th grade, which was finalized at the end of August 2005, Student's present level of math procedures was 5.0. On the IEP for Student going into 7th grade his math procedures present level had been 4.7, reflecting that Student had made only a few months' progress in math during 7th grade.¹³ (P-8, P-12)
106. Although Student was working hard during the first part of the 7th grade school year, by the last several months of the year he was refusing to work, putting his head down on the desk, refusing at times to go where he was supposed to go, wandering the halls, and being disruptive, and the teachers found it very difficult to instruct him. Based on input from the teachers the District issued a request for permission to do an FBA. (NT 104, 238-244, 509-511)
107. Student's 7th grade teacher nevertheless testified that Student "was the last person that I would think was unhappy with school". (NT 518)
108. On May 12, 2005 the Parent signed authorization for the District to release Student's school records to counsel for the family.¹⁴ (NT 88-89; S-10)

Proposed IEP for 2005-2006 School Year

109. An IEP team meeting to plan for Student's 8th grade year was convened on May 19, 2005. A special education teacher who had never taught Student, but who said she was going to teach Student in 8th grade,¹⁵ headed the team and

¹³ Reading comprehension present level was 3.1 although this grade was spurious and may have been an artifact of Student's attitude while being tested. On the previous IEP for 7th grade, Student's present level for reading comprehension was 5.4.

¹⁴ On July 12, 2005 counsel for the family sent the District a letter asking for all Student's educational records. (NT 88; S-10)

¹⁵ Given some difficulties between the Parents and Ms. H, the teacher who wrote the May 2005 IEP, the District may have subsequently decided to assign Student to another teacher, Mr. M. who in fact testified at the hearing but who said that he was not aware that he has been slated to be Student's teacher. It seems that the decision to have Mr. M rather than Ms. H be Student's teacher was made after the initiation of the due

- presented a draft IEP that she had written for the Parents' consideration. No regular education teacher was present.¹⁶ The 7th grade special education teacher was not involved/present. None of Student's previous teachers were present, although the teacher assistant was present. No school psychologist had input into the IEP. The special education teacher made handwritten notes on the draft IEP when the Parents and Student's psychiatrist offered additional input. (NT 84-85, 161, 224, 577, 687-688, 789, 795-796, 808-809, 812-813, 862, 927-928; S-10, P-7)
110. The proposed IEP for 8th grade called for Student to be in the resource room at least initially for English, reading, math, social studies and science, whereas in 7th grade he had been in an inclusion class for math and for social studies. (NT 801-802)
111. The special education teacher who drafted the proposed IEP for 8th grade did not speak with any of Student's previous special education teachers or regular education teachers. She did speak with the teacher's assistant, who also attended the May 2005 IEP meeting. (NT791-792)
112. At the May 2005 IEP meeting the Parents shared and the group discussed the amount of time the Parent was spending doing homework with Student at night, "three, four hours per night, and that it was a knock down, drag out and very stressful for the entire family". (NT 792-793)
113. When Student's psychiatrist, who attended the May 2005 IEP meeting, brought up the matter of there being global issues with Student, the special education teacher said it will all be taken care of, "we'll add in little adjustments, we'll add in things there". She pointed out that anything that had to be done in terms of prompting and reinforcement would be done by her. (NT 863, 873, 876)
114. The psychiatrist shared at the meeting in May her concern that Student was failing in many ways but had no concept of why he was failing. She saw Student as being at risk and did not see that the interventions being offered through the IEP would help. (NT 863, 881)
115. The psychiatrist was concerned that for Student school was becoming the main focus of how he was judged with "the morning being spent getting him to

process hearing, given that Ms. H was the special education teacher present at the May and the August 2005 IEP meetings. The testimony of Mr. M, who appeared to be a charismatic teacher, was stricken after the hearing officer gleaned that he did not factor into the equation at the time the Parents were deciding whether to accept or reject placement in the District for 8th grade. The District preserved for appeal the right to ask a higher authority to review Mr. M's testimony, but it is not included in the record as is. (NT 129-131, 161)

¹⁶ Despite the signature of a regular education teacher on the IEP sign-in sheet, the Parent testified credibly that this individual was not in attendance.

school, then there was school, then there was the portion of time after school. She viewed him as being in a tailspin.¹⁷ (NT 882)

116. At the May meeting the teaching assistant who was the only District person at the meeting who had worked with Student spoke,¹⁸ saying that it was very frustrating working with Student, and that she tried to redirect him. She could not get him to stay on task, and while she was sitting with him and getting him somewhat more organized still overall it wasn't making a difference in what he was doing. (NT 862-863)
117. The special education teacher who drafted the IEP and attended the meeting on May 19th opined that the meeting was, "fairly lengthy. It was longer than typical ones...I'm thinking an hour and a half. I'm not sure". (NT 800)
118. By signature on May 25, 2005 the Parents signaled that they did not approve the proposed IEP for 8th grade and they requested a prehearing conference. NT 86-87; S-10)
119. Given that the Parents did not approve the NOREP, the involvement of the Director of Special Education was triggered for the first time. By letter dated June 15, 2005 the Director of Special Education noted that attempts had been made to reach the family by telephone and that the District was offering a meeting so that an IEP could be in place by September. (NT 87, 158, 174; S-10)
120. An "IEP Follow-Up Meeting", also considered a pre-hearing conference, was held on July 12 2005. The parties and their attorneys were in attendance. (NT 90-91; S-10)
121. The only changes made to the IEP between May 19, 2005 and the prehearing conference on July 12th was the incorporation of the handwritten changes that had been made to the IEP during the May IEP meeting. These were additions suggested by Student's psychiatrist. (NT 211, 888-890)
122. At the July 12th meeting the Parents informed the District that they were considering removing Student from public school and sending him to the [Private] School because the District had not done a good job in educating Student, he was not an independent learner, and the mother had to work with Student for hours at night doing homework. (NT 94, 805)

¹⁷ The psychiatrist saw Student in March, in April, and for a third time, in November 2005. She has at no time recommended that he receive any individual therapy or family therapy. (NT 962-963)

¹⁸ As this person has left the District she was unavailable to testify. Although it would have been far more preferable to have that individual testify directly, the credible testimony of the psychiatrist was accepted even though it was hearsay.

123. The Parents also explained that Student hated to go to school at the middle school, although his teachers informed the Director of Special Education that Student seemed happy in school, enjoyed it and had friends. (NT 214-215)
124. The Parents explained that their preference for the [Private] School was based on the small class size and the individualized attention and instruction. (NT 213)
125. The District's Director of Special Education opined that the District could fulfill these specifications within the District. (NT 213)
126. By letter dated July 27, 2005 the Parents officially notified the District that they planned to remove Student from the District and place him at the [Private] School and that they were requesting tuition reimbursement. (NT 96; S-10)
127. After receiving and reviewing the private evaluation done by Dr. G-2, the Director of Special Education amended the IEP as noted below. She also added the notation that Student's behaviors could impede his performance or that of others based on Student's difficulties the last two months of 7th grade. She noted that the academic baselines would be determined in September because even though the private evaluator had updated present levels of educational performance she wanted the District to do its own present levels as well. She added some narrative that came from the private testing. She added a Behavior goal and a tentative behavior support plan pending a Functional Behavioral Assessment. She added some modifications into the SDI regarding homework and anxiety management, and added a multi-sensory approach to reading. (NT 104-108, 132-133, 136-140)
128. Although Dr. G-2 had evaluated Student's academic functioning the Director of Special Education did not revise the section on Present Levels of Educational Functioning, but kept those inserted into the IEP in May even though the District thought that at least one of the scores did not represent Student's abilities. (S-12, P-7)
129. The proposed IEP for 8th grade, in the August 2005 revision, noted Needs as reading comprehension and vocabulary, math problem solving, organization, expressive writing skills, following school and classroom rules and focus/attention. (S-12)
130. Although the IDEIA does not require objectives, on the proposed 8th grade IEP the District's annual goal in reading was not sufficiently specific to gauge progress and the level of expected achievement of 75% was low and the methods of measurement and success criteria were non-existent/vague. (S-12)
131. Although the IDEIA does not require objectives, on the proposed 8th grade IEP the District's annual goal in writing was not sufficiently specific to gauge

- progress and the level of expected achievement of 15 out of 20 (75%) was low and the methods of measurement and success criteria were non-existent/vague. (S-12)
132. Although the IDEIA does not require objectives, on the proposed 8th grade IEP the District's annual goal in math procedures was not sufficiently specific to gauge progress and the level of expected achievement of 70% was low and the method of measurement and success criteria was puzzling as he was to increase from 5.6 to 6.3 in "total math" although the specified need was in problem solving at the present level of problem solving was 5.0. (S-12)
133. The goal for organization and study on the proposed 8th grade IEP was to raise Student's level of C- in major subjects to at least C by the end of the year. Although the byproduct of more organization and focus could be improved grades, improved grades are not an appropriate criterion solely on which to judge whether Student was more able to organize and study. (S-12)
134. The District convened an IEP meeting on Friday August 26, 2005, just prior to the school year's beginning date of Monday August 29, 2005. Attendees were the special education teacher¹⁹ who had drafted the original May 2005 IEP but who had never taught or observed Student, a school psychologist who had never worked with Student, the Director of Special Education who had never met/worked with Student, the parents, Student's psychiatrist and counsel for the parties. No one present from the District had ever worked with Student. The school psychologist had not been present at any of the previous IEP meetings for Student and at the August meeting said he had not read the private evaluation report. (NT 99-100, 218, 762; S-12)
135. At the August IEP meeting the Parents listened to the District present the revised IEP but other than some comments offered by Student's psychiatrist they did not actively participate in revising the IEP. (NT 102-103)
136. At the August IEP meeting the District did not mention the possibility of using the Wilson program or the Lindamood Bell program for reading comprehension or any prescriptive writing program for Student. (NT 216-218)
137. In neither the May 2005 not the August 2005 IEP meetings did the District offer any alternative to the programming that was presented in the draft IEPs. (NT 894)
138. Student's psychiatrist told the IEP team that Student was at risk for depression if he returned to a placement such as the 7th grade placement in the District. (NT 220-221)

¹⁹ She also signed as the regular education teacher.

139. The District was continuing to recommend a placement in the middle school in a part-time learning support resource room classroom for 20 hours per week. Student would receive English, Math, Social Studies, Science and Reading in the special education setting. (NT 113; S-12)
140. The Parents explained that they had sent Student to the [Private] School during the summer and that he was very happy with the program there. (NT 109-110)
141. The Parents did not approve the IEP or the NOREP for the 2005-2006 school year. (NT 117, 120; S-12)

The [Private] School

142. The [Private] School is a private school, but not an approved private school. (NT 141)
143. In regard to the appropriateness of the [Private] School the District's Director of Special Education believes that the District can do what the [Private] School does "at least as well – I'm sure we could do better", indicating that the [Private] School offers at least a floor of appropriateness. (NT 152)

Independent Evaluation

144. The initial draft of the 8th grade IEP was based on previously identified needs going back to the first private evaluation at the end of 4th grade and the subsequent District ER adopting the private evaluation (2002) as well as the District's reevaluation the following year (2003) that used the previous ER and only added new present levels of educational performance. The Director of Special Education testified that "we based the IEP on his previously identified needs". (NT 245-246)
145. Parents and their counsel informed the District that they were having a private evaluation done and that they would base their placement decisions on what the evaluator had to say. (NT 95-96)
146. Student was seen for an independent evaluation by Dr. G-2 in May, June and July 2005. (P-1, P-28)
147. Dr. G-2 found that Student has ADHD, and a language-based semantic syntactic dysgraphia, and at the time of the evaluation an adjustment disorder with anxiety. (NT 1025; P-1)
148. The District's Director of Special Education responded by letter on August 10, 2005 noting that the IEP team would be interested in reviewing the results of

- the private evaluation and noting that her secretary would be calling to set up a meeting. (NT 96-97; S-10)
149. On August 11, 2005 counsel for the Parents faxed a copy of the private evaluation to the Director of Special Education. (NT 98)
150. The Director of Special Education drafted an IEP after she reviewed the private evaluation and made revisions based on the private evaluation to make the IEP represent a “more meaningful program” for Student. She was the sole author of the re-draft. (NT 101, 222-223, 225, 236-238; S-12)
151. Specifically from the private evaluation the Special Education Director testified that she learned that Student was anxious, that his writing mechanics were absolutely weaker than other areas, that he could use assistance in reading comprehension. (NT 214-215)
152. The Director of Special Education testified that the private evaluation contributed new and useful information for purposes of programming for Student. (NT 222-223, 247)

Discussion and Conclusions of Law

Special education programming and placement issues are currently governed by the Individuals with Disabilities Education Improvement Act of 2004 (“IDEIA”), which took effect on July 1, 2005, and amends the Individuals with Disabilities Education Act (“IDEA”). 20 U.S.C. § 1400 *et seq.* (as amended, 2004). The events in the instant matter occurred during a time period spanning the IDEIA and the previous statute, IDEA 1997. There are no substantive differences between the IDEIA and the IDEA in the relevant provisions governing this matter.

In November 2005 the U.S. Supreme Court held that, in an administrative hearing, the burden of persuasion regarding the appropriateness of an offered IEP and program is properly placed upon the party seeking relief. Schaffer v. Weast, 126 S. Ct. 528, 537 (2005). The Third Circuit addressed this matter as well more recently. L.E. v. Ramsey Board of Education, 435 F.3d. 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006). The party bearing the burden of persuasion must prove its case by a preponderance of the evidence. *See* 20 U.S.C. § 1415(i)(2)(C)(iii). Thus, in this hearing the Parents had to convince the hearing officer by a preponderance of the evidence that the District did not provide FAPE to Student during the 2003-2004 and the 2004-2005 school years and that the District failed to propose an appropriate program and placement for him for the 2005-2006 school year. Additionally, having unilaterally enrolled Student in a private placement, the Parents also bore the burden of demonstrating that the private placement is appropriate.

Credibility of Witnesses

Hearing officers are specifically charged with assessing the credibility of the witnesses that appear before them. In this matter this hearing officer found Student's mother, although somewhat naïve and too trusting, to be exceptionally credible, and whenever her testimony differed from that offered by District personnel the mother's testimony was given greater weight. The testimony of the District's witnesses was at times contradicted by documentary evidence, particularly by the report cards, and the unavailability of the lost or discarded documents made comparison of the District's witnesses' testimony with contemporaneous writings impossible, thus further diminishing the District's witnesses' credibility. The lack of familiarity of the Director of Special Education with the procedures for conducting IEP meetings for students transitioning to 7th grade was surprising, although her testimony on this point was credible. This hearing officer found Dr. G-2, one of the Parents' expert witnesses, to be quite credible given his professional background as a psychologist and his experience in public schools, and his critique of the IEPs comported with this hearing officer's findings regarding the IEPs. Although the truth of her testimony was not in question, the testimony of Student's psychiatrist as an expert was given little weight in these proceedings as she has no direct experience in the field of education, although her testimony was relied upon for some factual material. A portion of the family's case had to do with Student's suffering emotional distress as a result of an inappropriate educational program. For the most part this information has not been considered in this decision. Although it is clear that Student's behavior at home reflected his frustration with school, the Parents and the psychiatrist did not convincingly establish that Student's frustration rose to the level of emotional distress deserving serious consideration. This hearing officer reasoned that had Student been displaying an emotional reaction of sufficient proportion to be given serious consideration he would have been seen for, or referred by, the psychiatrist or Dr. G-2 for individual and family therapy for at least a portion of the time from March 2005 to the present and/or would have been seen by the psychiatrist more often than three times in nine months. As will be evident below, educational considerations alone form a more than adequate basis upon which to rest this decision.

Did the School District offer Student a free appropriate public education for the 2003-2004 school year?

Having been found eligible for special education, Student is entitled by federal law, the Individuals with Disabilities Education Act as Reauthorized by Congress December 2004, 20 U.S.C. Section 600 *et seq.* and Pennsylvania Special Education Regulations at 22 PA Code § 14 *et seq.* to receive a free appropriate public education (FAPE). FAPE is defined in part as: individualized to meet the educational or early intervention needs of the student; reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress; provided in conformity with an Individualized Educational Program (IEP).

A student's special education program must be reasonably calculated to enable the child to receive meaningful educational benefit at the time that it was developed. (Board of

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

Districts need not provide the optimal level of service, or even a level that would confer additional benefits, since the IEP as required by the IDEA represents only a basic floor of opportunity. Carlisle Area School District v. Scott P., 62 F. 3d at 533-534. What the statute guarantees is an “appropriate” education, “not one that provides everything that might be thought desirable by ‘loving parents.’” Tucker v. Bayshore Union Free School District, 873 F.2d 563, 567 (2d Cir. 1989). If personalized instruction is being provided with sufficient supportive services to permit the student to benefit from the instruction the child is receiving a “free appropriate public education as defined by the Act.” Polk, Rowley. The purpose of the IEP is not to provide the “best” education or maximize the potential of the child. The IEP simply must propose an appropriate education for the child. Fuhrman v. East Hanover Bd. of Educ., 993 F. 2d 1031 (3d Cir. 1993).

The IEP for each child with a disability must include a statement of the child’s present levels of educational performance; a statement of measurable annual goals, including benchmarks or short-term objectives, related to meeting the child’s needs that result from the child’s disability to enable the child to be involved in and progress in the general curriculum and meeting the child’s other educational needs that result from the child’s disability; a statement of the special education and related services and supplementary aids and services to be provided to the child...and a statement of the program modifications or supports for school personnel that will be provided for the child to advance appropriately toward attaining the annual goals (and) to be involved and progress in the general curriculum...and to be educated and participate with other children with disabilities and nondisabled children; an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class... 34 CFR §300.347(a)(1) through (4)

An IEP must be crafted in such a manner that, provided it is implemented, there is a reasonable degree of likelihood that the student will make educational progress. Implementation of an appropriate IEP does not guarantee that the student will make progress.

Prior to the years addressed by this hearing, Student had been in inclusion classrooms as a regular education student twice, and had received one year of special education in an inclusion classroom during his 5th grade year. Although testimony was not extensive about 5th grade, the Parent’s testimony made clear that the problems Student experienced

in 6th grade were nothing new and that he had earlier experienced the same level of difficulty with focus and organization and task completion. Although the available documentary evidence was skimpy, comments on Student's progress reports indicate that although his teachers liked Student immensely, there were difficulties with needing to be redirected, with completing assignments independently, with being distracted, with not taking time and checking his work, and with having a disorganized desk. (S-1, page 17) The Accommodation Checklist for 5th grade lists "redirecting" but does not indicate that this was done in any subject. There is no indication that Student received any specially designed instruction to help him stay focused and attentive or to help him organize his assignments.

Thus Student came to 6th grade after the District had one year of experience working with him as a special education student. The Parents offered uncontested testimony that a meaningful IEP meeting with adequate parental participation and participation of District staff who knew and worked with Student was not held to plan for the 6th grade school year. Of concern are the substantive inadequacies of the 2003-2004 program and placement. For Student's 6th grade year he was again placed in an inclusion classroom and was offered minimal accommodations in a program that did not significantly differ from his programming prior to his identification. The modifications, accommodations and specially designed instructions listed were not specific to him, with many on the list being not special education modifications but practices generally in place in regular education classrooms. In addition, many of the modifications were not delivered, particularly organizational support and providing assignments. Inexplicably, his 6th grade special education teacher opined that Student needed minimal accommodations in the inclusion classroom but then recommended assignment to the self-contained resource room for 7th grade.

An examination of the IEP for 6th grade shows that on its face, within the four corners of the document, the IEP does not meet the substantive legal standard for provision of FAPE. Attention and focus are not listed as Needs and there are no goals and objectives concerning focus or attention. There is no evidence that in 6th grade the District effectively or appropriately addressed Student's significant needs for assistance in maintaining attention and focus. The areas of organization and a specific learning disability in written expression do not have present levels of educational performance presented. Despite being listed as a Need these were no specific goals or objectives to address organizational skills. There is no organized programming to address his specific learning disability in writing. While handwriting is identified as a need, the IEP contains no programming, goals or objectives to address this area. There is no mechanism for progress to be objectively measured or reported. During testimony, Dr. G-2, the parent's expert, provided an extensive analysis of the IEP and this hearing officer agrees with his conclusion that it failed to offer FAPE. (NT 1137-1139)

The record regarding 6th grade reflects that an attitude of blaming Student for his disabilities began to creep in to the classrooms. This hearing officer notes that there was significant discrepancy between the recollections of the Parent and the recollections of the special education teacher regarding events during 6th grade. To a series of specific

questions regarding alleged conversations between the teacher and the Parent the teacher replied that she did not recall. (NT 363-367) Having observed the witnesses and having listened to the testimony, this hearing officer concluded that the Parent was credible and that the 6th grade teacher was not credible in this regard. Furthermore, the credibility of the 6th grade teacher is diminished by the fact that although she viewed Student as “successful” and needing “minimal accommodations”, his report card reflects a trend of making “limited progress” and this teacher recommended that he receive a more restrictive environment for the next school year.

Did the School District offer Student a free appropriate public education for the 2004-2005 school year?

Disturbingly many if not most documents (teacher notes, meeting notes, planning, email or other communications by and between any district individuals involved with Student and anything documentary reflecting on this period of time.) regarding Student’s transition between 6th grade and 7th grade (other than those included in the district exhibit book) were lost or discarded. The Parents presented a Motion for Production of Documents and this hearing officer issued an order for production of documents but none were able to be produced.²⁰

Seventh grade programming and placement for Student was decided by his 6th grade special education teacher who unilaterally decided that Student should be placed in full time learning support for his 7th grade year. Other team members and the Parents were not party to a discussion concerning this decision. The parents had no understanding of exactly what this placement entailed as no explanation was provided prior to the beginning of 7th grade. There is no record of a least restrictive environment analysis being done by anyone except perhaps informally by the 6th grade special education teacher, and although she had testified that Student needed minimal modifications to curriculum academically, the 6th grade special education teacher did not explain why the “slowed down” curriculum of learning support was being suggested for him as a course selection.

Although the IDEA requires that the District hold an IEP meeting that includes the participation of individuals with relevant knowledge, in Student’s case the district did not even make a token gesture toward holding an appropriate IEP meeting, and instead held the meeting between the Parent and one teacher who did not have knowledge of Student

²⁰ Under the IDEA parents of “disabled” children have the right to examine relevant records pertaining to the child. They further have a right to an Independent Educational Evaluation, and to access to information within the sole control of the District in Due Process Proceedings. All of these rights are denied through the district’s selective denial of necessary documents. 20 U.S.C. 1415 (b); In Schaffer v Weast, 44 IDELR 150; No. 04-698 U.S. (2005), the assignment of the burden of production to the parents in due process proceedings was justified through the guarantee of fairness implied by the parents’ and parents’ experts rights to all documentary information in the possession of the LEA. “ IDEA thus ensures parents access to an expert who can evaluate all the materials that she school must make available and who can give an independent opinion. *They are not left to challenge the government without realistic opportunity to access the necessary evidence...*” Schaffer v Weast, No. 04-698, 546 US at ____ (2005).

and who may or may not have become Student's teacher in a small space where another parent was also having an IEP meeting for her child. The people listed on the IEP attendance sheet were not in attendance and signed the sheet after the fact. Student's mother's testimony and the parent of another student's testimony was completely credible and stood uncontradicted by the District witnesses although the Director of Special Education testified that she would be "surprised" if the IEP meetings were conducted in this fashion.

The IEP presented to the Parent for her signature on May 18, 2004 had been written and put into a pile of other students' IEPs which was then divided among special education teachers solely for purposes of the IEP meeting. The sixth grade teacher testified that she did not know who made changes in the IEP between her draft and the final document presented to the Parents (NT 1489). These changes consisted of the addition of test scores to the goals in such a way as to make those already vague goals indecipherable to the District's witness, the Parent and the hearing officer. (NT 396-407, 1492-1503) At the IEP meeting the Parent still trusted that the district and the teachers would provide what was necessary to meet Student's needs and accepted the special education teacher who was conducting the IEP meeting's assurances that the IEP was not intended to be a meaningful document. (NT 1492-1493, 1501)

The IEP produced by this process contains on its face many of the flaws noted in the preceding section concerning the sixth grade IEP. It has been changed only to the extent that Accepting Responsibility for Actions has been added as a need, though no goals are provided for this need. (SD 7) Dr. G-2 offered extensive and credible testimony on the inappropriateness of this IEP. (NT 1147-1155) In addition to the failings similar to those in the sixth grade IEP, the IEP for 7th grade contains limited present levels based upon test scores declared unreliable by the teachers themselves, and completely indecipherable starting levels and goals and objectives. It contains no programming designed to meet Student's attentional needs and disorder of written expression. It contains no individually designed modifications or specially designed instruction to accommodate his extreme organizational needs.

Student's difficulties continued in 7th grade. He was placed in a more restrictive setting, physically located in a trailer, but there was no trade-off of receiving a more structured and more effective program, as the District failed to make changes of any significance to address his serious attention and his organization problems. It was disturbing to hear the inclusion (regular education) social studies teacher testify that he threatened Student with a return to the learning support classroom if he continued to exhibit the hallmarks of his disability.

If the School District did not offer Student a free appropriate public education for the 2003-2004 and/or the 2004-2005 school year(s), is he entitled to compensatory education and, if so, in what amount?

Compensatory education is a remedy designed to provide a student with the services he should have received pursuant to a free appropriate public education (FAPE). When a student has been denied the due process rights or an appropriate educational program that he should have received, compensatory education is an in-kind remedy. Lester H. v. Gilhool, 916 F. 2d 865 (3d Cir. 1990), cert. denied 499 U.S. 923, 111 S.Ct. 317 (1991) A child is entitled to compensatory education services if the child is exceptional and in need of services and/or accommodations and if through some action or inaction of the District the child was denied FAPE.

With regard to the standard for determining whether and to what extent compensatory education should be awarded was summarized by the Third Circuit in M.C. v. Central Regional School District, 81 F. 3d 389, (3d Cir. 1996). As the Court in M.C. observed, when a school district fails to deliver that to which a student is entitled, an award of compensatory education is justified. However, the Court also recognized that the development and delivery of special education programs can be a complex and complicated process requiring time for a reasonable and appropriate response. Thus, the Third Circuit, while recognizing a district's responsibility to correct its failure to provide FAPE, also excludes from the calculation of the compensatory education period, "the time reasonably required for the school district to rectify the problem".

Ordinarily Districts are given some allowance of time to correct ineffective programming. Although this hearing officer believes that the District had plenty of experience with Student by the time he entered 6th grade, she nevertheless will allow the District a grace period of two months during which the District should have recognized that Student's program was not working and was not appropriate and should have revised the plan and put other strategies in place. Accordingly compensatory education will be due to Student for every day he was present in school from November 1, 2003 to the last day of June in the 2004-2005 school year. Each school week is the equivalent of twenty-five hours, translating into five hours per day. 22 PA Code §11.3 (a). As Student received negligible educational benefit from his programs and placements during 6th and 7th grades, he will receive the full five hours per day multiplied by the number of days he attended in the period defined above.

The form of the compensatory education will be chosen by the Parents, and may include any educational, tutorial, developmental, or therapeutic activity that will contribute toward the needs identified in Student's evaluations. The hours may not be used to substitute for services that Student should be receiving through his IEPs should he re-enter the District or another school district. The hours may be taken singly or in blocks and may be used after school, in the evening, on weekends, and/or in the summer and may be used after Student turns twenty-one, although the family is urged to begin providing remediation to Student immediately. The District has the right to question the reasonableness of the cost of a service if it is not in line with the usual and customary rate for the service in the geographical area. The total cost of all the services must not exceed the total cost the District would have borne (salaries and benefits) if it were providing Student with the appropriate program and services.

Did the IEP proposed by the School District for Student for the 2005-2006 school year offer him a free appropriate public education?

The 1999 implementing regulations of the IDEA, which is authoritative as regulations for the IDEA are not yet available, provide that

At the beginning of each school year, each public agency shall have an IEP in effect, for each child with a disability within its jurisdiction. Each public agency shall ensure that an IEP is in effect before special education and related services are provided to an eligible child under this part...” 34 CFR Section 300.342(a)(b)(1)(I).

If the District were to have offered an appropriate IEP on August 26, 2005, the Parents’ claim for tuition reimbursement would fail, as there would be an IEP in place “just-in-time” to be in compliance with the statute. The question then rests solely on whether the District’s program and placement offer for 2005-2006 was appropriate. This hearing officer, looking carefully over the document and granting considerable weight to the highly credible testimony of the Parents’ expert witness Dr. G-2, has determined that it was not.

The first IEP meeting to plan for 8th grade was held on May 18, 2005. The Parent requested that the district invite the teaching assistant who had been working with the special education students in the inclusion setting, and she requested the attendance of the school counselor²¹. Although the Parents expected that others familiar with Student would be present, no special education teacher or regular education teacher who had worked with Student were present. The meeting was conducted by a special education teacher unfamiliar with Student, and unfamiliar with his ER, who was not assigned to be his teacher for the coming year although she said she was likely to be. Those present who were familiar with Student maintained that the programming provided in the IEP had already been ineffective for Student. The teaching assistant who had worked in Student’s classes presented her opinion that the accommodations had not been effective. There was no discussion about the previous failures. No additional or different services were offered.

The Parents disapproved the IEP/NOREP and requested a prehearing conference which was not scheduled until the middle of July, after the conclusion of the 2004-2005 school year. At the prehearing conference on July 12, 2005, no changes in programming were suggested by the district and again no one familiar with Student from the district was present. The Director of Special Education who attended the July meeting testified that she did not suggest programming but was waiting to hear what the parents wanted.

A final IEP was presented by the District on August 26, 2005, on the Friday before the Monday on which school was to open. (S-12). No one from the District familiar with

²¹ The school counselor signed in as the LEA but it is unclear whether he was authorized to commit resources of the District.

Student attended that IEP meeting and the school psychologist present did not participate in previous IEP meetings, had never tested Student and had not read the private evaluation report. The August 2005 IEP proposed for 8th grade was a superficially modified version of the May IEP with most of the failings described above in relation to the IEPs of 6th and 7th grades. It included no specific attentional training, no adequate means of addressing Student's organizational difficulties, no additional one-on-one assistance such as an aide and no specified program to address Student's disorder of written expression. On its face, the IEP offered to Student for the 8th grade fails as an appropriate program. It does not provide programming related to IEP goals, the goals contained therein are not clear, and measurement toward progress is not meaningful. The August 2005 IEP did not represent an offer of FAPE.

If the IEP proposed by the School District for Student for the 2005-2006 school year did not offer him a free appropriate public education, are Parents entitled to tuition reimbursement for their unilateral placement of their son at the [Private] School?

Having found that the District did not offer an appropriate program and placement we turn to the next step, the question of tuition reimbursement.

Parents who believe that a district's proposed program is inappropriate may unilaterally choose to place their child in an appropriate placement. The right to consideration of tuition reimbursement for students placed unilaterally by their parents was first clearly established by the United States Supreme Court in Burlington School Committee v. Department of Education, 471 U.S. 359, 374 (1985). A court may grant "such relief as it determines is appropriate". "Whether to order reimbursement and at what amount is a question determined by balancing the equities." Burlington, 736 F.2d 773, 801 (1st Cir. 1984), *affirmed on other grounds*, 471 U.S. 359 (1985).

In 1997, a dozen years after Burlington the Individuals with Disabilities Education Act (IDEA) specifically authorized tuition reimbursement for private school placement. The IDEIA, effective July 1, 2005, is the reauthorized version of the IDEA and contains the same provision:

(i) In General. – Subject to subparagraph (A) this part does not require a local education agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such a private school or facility.

(ii) Reimbursement for private school placement. -If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private school without the consent of or referral by the public agency, a court or hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency has not made a

free appropriate public education available to the child in a timely manner prior to that enrollment. 20 U.S.C. § 1412(a)(10)(C)(ii)

Florence County Sch. Dist. Four v. Carter, 114 S. Ct. 361 (1993) had earlier outlined the Supreme Court's test for determining whether parents may receive reimbursement when they place their child in a private special education school. The criteria are: 1) whether the district's proposed program was appropriate; 2) if not, whether the parents' unilateral placement was appropriate, and; 3) if so, whether the equities reduce or remove the requested reimbursement amount.

Case law has established that the private school placement selected by a parent, where the District's program is inappropriate, does not need to conform to federal or state IDEA regulations. Florence County 4 School District v. Shannon Carter, 126 L.Ed.2d 284 (1993). Therefore the teachers do not have to meet state requirements and the students do not have to have IEPs generated by the school. Under the federal IDEA as interpreted by the United States Court of Appeals for the Third Circuit in Oberti v. Board of Educ. of Borough of Clementon School Dist., 995 F.2d 1204 (3d Cir. 1993) Student is presumed to be entitled to the least restrictive environment, that is, the educational setting appropriate to her needs that maximizes interaction with nondisabled students. However, when a District has failed to provide an appropriate program, the fact that the private school is not the least restrictive environment is not relevant. See, for example, Rose v. Chester County I.U., No. 95-239 (E.D. of Pa., May 6, 1996), aff'd. 114 F.3d 1173 (3rd Cir. 1997) and Rairdan M. v. Solanco School District, 97-CC-5864 (E.D.Pa. 1998). Equitable considerations must now enter into the equation as it has been determined that the District did not offer Student an appropriate IEP for the 2005-2006 school year and the placement unilaterally chosen by the Parents was appropriate.

It is a fact that the Parents decided to enroll Student in the [Private] School prior to the August 2005 IEP meeting. The special education appeals panels in Pennsylvania have established that when "parents have become so singularly focused on the [private school they have already enrolled their child in] that they appear unwilling to consider the District's proposals in good faith," tuition reimbursement should be denied. In re the Educational Assignment of P. J., Special. Ed. Op. No. 1271 (2002) (J. Cautilli, concurring opinion). Similarly, where the parents have predetermined that they will place their child in a private school regardless of the district's ability to program for the child, the equities favor the district. In re the Educational Assignment of C.S., Special Ed. Op. No. 1658 (2005). Had the District offered an appropriate IEP the Parents' claim for tuition reimbursement would have failed. However, the District did not offer an appropriate IEP.

The program and placement offered to Student by the District in August 2005 represented the third step in an accordion-folded triptych: First, in 6th grade he was in an inclusion class; Second, in 7th grade he was in a resource classroom which was in essence a self-contained special education classroom but received some academic instruction in math and social studies in inclusion classes (albeit with threats to be returned back to the resource room for social studies if he did not control behaviors triggered by his

disability); and Third, in 8th grade he was to be returned to the resource room setting with no academic inclusion classes. Although the District made adjustments in the setting(s) over the years in question, the District did not make changes in the supports necessary to assist Student in staying focused and organized so as to be able to make use of his potential. The District likewise offered no individualized instruction to assist Student in learning the material presented in his classes even though personnel were well aware of the Parent's conducting evening school for re-teaching and assignment completion. The District had never offered and did not in August 2005 propose to offer a systematic program of instruction in written expression. The fatal flaw in the District's programming for Student for the 8th grade, as well as for the 6th and 7th grades, lies in its failure to convene along with the Parents, a proper IEP team consisting of an LEA empowered to commit the District's resources, special education and regular education teachers who know and have taught Student, a knowledgeable psychologist who has read and understands the evaluation reports, with additional input at the table from behavior specialists and others who may be able to assist in crafting an appropriate IEP.

An examination of the [Private] School, based on the observations offered by the Parents' expert witness, and on the belief of the District's Special Education Director that the District could do what the [Private] School does "just as well" or better, leads to the conclusion that the Parents' unilaterally-chosen placement is appropriate for Student and can offer him the structure and the support he needs to make meaningful educational progress.

The Parents' decision to look outside the District for a school for Student was entirely reasonable and an examination of the equities in this case does not result in any mitigation of the District's responsibility for tuition reimbursement.

Are Parent's entitled to reimbursement for the independent educational evaluation they obtained from Dr. G-2?

A parent has the right to an independent evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency. If a parent requests an independent educational evaluation at public expense, the public agency must either initiate a hearing and at that hearing show that its evaluation is appropriate or ensure that an independent evaluation is provided at public expense. If the public agency initiates a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent evaluation, but not at public expense. 34 CFR §300.502(b)(1)(2)(3).

Under the IDEA parents of disabled children have the right to examine relevant records pertaining to the child. In due process proceedings they have a right to access to information within the sole control of the District. 20 U.S.C. 1415 (b) In this matter, through the District's loss of necessary documents, the Parents' rights in this regard were compromised. In Schaffer v Weast the assignment of the burden of persuasion to the parents in due process proceedings was justified through the guarantee of fairness implied

by the parents' and parents' expert's rights to all documentary information in the possession of the District. "IDEA thus ensures parent's access to an expert who can evaluate all the materials that the school must make available and who can give an independent opinion. They are not left to challenge the government without realistic opportunity to access the necessary evidence..."

By early March of 7th grade the Parents requested, in writing, an IEP meeting. A meeting of the teaching team was called, but it did not result in changes to the IEP, only superficial homework and behavioral suggestions, most of which were not implemented after having been agreed upon. (NT 1620, 1630) When course selection again was presented to the parents, they again requested guidance. (P-36 page 80) When none was offered, in April, the Parent contacted the District and requested an evaluation. (NT 1651-1655) She was told that an evaluation could not be accomplished before well into the coming school year. (NT 1655). Therefore at this point, asking Dr. G-2 to conduct an independent educational evaluation of Student after Student had two disastrous years in the District was the only reasonable action that the Parents could take. The independent evaluation allowed the Parents access to updated and detailed information about their child's needs and allowed their evaluator, an expert in the field, to knowledgeably review the District's proffered program and placement for the coming school year.

The District requested that the Parents share the independent evaluation, which the Parents did. Although the District's Director of Special Education utilized a small part of the private evaluation to revise Student's IEP for 8th grade, resulting in a slightly improved but still inappropriate IEP, that IEP was not implemented.

This hearing officer reluctantly concludes that she cannot order the District to reimburse the Parents for their independent evaluation. As useful as Dr. G-2's evaluation was it was not done in response to a District's evaluation that the Parents deemed inappropriate and it did not contribute substantial new information that the District then used to craft an appropriate IEP. Although Schaffer v. Weast places the burden of proof in this matter upon the Parents, it does not provide for the Parents to receive a right for reimbursement for an independent evaluation beyond the already existing right conferred by the IDEA and it does not confer the right to receive reimbursement for the costs associated with an independent expert used to establish their case.

Accordingly the Parents' request for reimbursement for Dr. G-2's independent evaluation must be denied. However, this hearing officer notes that the United States Supreme Court has received oral arguments, and may issue a decision by June, in Murphy v. Arlington Cent. Sch. Dist., 402 F.3d 332, 43 IDELR ¶ 31 (2d Cir. 2005), *cert. granted*, 126 S.Ct. 978 (2006) a case that may allow this issue to be decided in a different way as it deals with the question of whether prevailing parents may recover expert fees under the IDEA as part of attorneys' fees and costs.

ORDER

It is hereby ORDERED that:

1. The School District did not offer Student a free appropriate public education for the 2003-2004 school year.
2. The School District did not offer Student a free appropriate public education for the 2004-2005 school year.
3. As the School District did not offer Student a free appropriate public education for the 2003-2004 and the 2004-2005 school years, he is entitled to compensatory education in the amount of five (5) hours per day for every day that Student was present in school from November 1, 2003 to the last day of school in June 2005. The compensatory education is to be selected and governed according to the parameters out forth above.
4. The IEP proposed by the School District for Student for the 2005-2006 school year did not offer him a free appropriate public education.
5. As the IEP proposed by the School District for Student for the 2005-2006 school year did not offer him a free appropriate public education, Parents are entitled to tuition reimbursement for their unilateral placement of their son at the [Private] School.
6. Parents are not entitled to reimbursement for the independent educational evaluation they obtained from Dr. G-2.

May 16, 2006
Date

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