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PENNSYLVANIA

SPECIAL EDUCATION HEARING OFFICER

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5891/05-06 AS

File Number

D.J.

Child's Name

Xx/xx/xx

Date of Birth

12/19/05

Date of Hearing

Open

Type of Hearing

For the Student:

Parent

For the School District of Philadelphia:

Kimberly Caputo, Esq.  
School District of Philadelphia  
440 North Broad Street – Third Floor  
Philadelphia, PA 19130-4015

Date of Hearing:

December 19, 2005

Date of Receipt of Transcript:

December 23, 2005

Date of Decision:

January 5, 2006

Hearing Officer:

Daniel J. Myers

## BACKGROUND

Student (Student) is a/an xx year old resident of the School District of Philadelphia (School District) whose parent<sup>1</sup> complains that Student is not receiving a free and appropriate public education in his current educational program and placement, that the School District has breached an agreement to provide bus tokens for transportation to school, and that the School District has used compensatory education services to supplant, rather than to supplement, other educational services to which Student is entitled. For the reasons described below, I find for the School District on all issues.

## ISSUES

1. Whether or not Student is receiving FAPE during his twilight program;
2. Whether or not the School District has breached an agreement to provide bus tokens to Student for transportation to school; and
3. Whether or not 60 hours of compensatory education awarded by me in the past has been used to supplant, rather than to supplement, other educational services (apparently called “SES”) to which Student is also entitled.

## FINDINGS OF FACT

1. Student is a/an xx year old resident of the School District who hopes to graduate at the end of this 2005-2006 school year. (N.T. 87, 107)<sup>2</sup>
2. Student has had several due process hearings in the past and has been awarded compensatory education. E.g., In Re the Educational Assignment of J.D., Special Education Opinion No. 1387 (2003)
3. Some time after my May 2004 decision concerning this Student, the parties agreed that the School District would discharge its obligation of 75 hours of compensatory education in the follow manner: 10 hours equivalent via a copier/fax/printer and ink cartridges; 60 hours tutoring by [a] learning center; and 5 hours equivalent via school uniforms and subway tokens. (P 1; N.T. 34)
4. In July 2004, Student’s parent acknowledged receipt of the copier/fax/printer and ink cartridges, discharging 10 hours of the School District’s 75 hour May 2004 agreement. (P 1; N.T. 45-46)
5. On August 25, 2004, Student’s parent acknowledged receipt of \$50 as part of the 5 hours equivalent via school uniforms and subway tokens. (P 1) In all, Student’s parent received \$150 in reimbursements. (N.T. 46-47)

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<sup>1</sup> Student lives with [a grandparent], who is hereinafter referred to as “parent.”

<sup>2</sup> References to D, P and HO are to School District, Parent and Hearing Officer exhibits, respectively. References to N.T. are to the transcript of the December 19, 2005 hearing.

6. In February 2005, the School District entered into a \$2,400 contract with [the] learning center for 60 hours of tutoring services. More specifically, the School District paid for 30 hours of math tutoring and 30 hours of reading tutoring. (N.T. 50-52, 57, 124; P 4; D 10)
7. On or about February 12, 2005, [the] learning center assessed Student for his math-related tutoring services.
  - a. Student's parent had advised [the] learning center to start with math tutoring because Student was doing so poorly in math.
  - b. During March 2005, Student received math-related tutoring services from [the] learning center. (N.T. 50, 53, 97, 123-124; P 4; D 8; D 10)
8. At the end of March 2005, Student stopped attending [the] learning center services because he felt that the lessons were childish. (N.T. 50, 53, 97) Student's learning center tutor was unaware of the reason why Student stopped receiving services, and the tutor has indicated that he would have changed the lesson format if Student had mentioned his objection. (N.T. 84, 109) Nothing in the record suggests that Student is prevented in any way from resuming his compensatory education services at [the] learning center.
9. On May 19, 2005, Student's IEP team developed an IEP for 2005-2006. (N.T. 57-58, 74; D 6; D 7)
  - a. Student's present educational levels are described as 8<sup>th</sup> grade in reading, 6<sup>th</sup> grade in spelling, and 3<sup>rd</sup> grade in math.
  - b. His IEP goals address needs in reading comprehension, written expression and math.
  - c. It provides part time learning support services for 15 hours per week in [an alternative] program.
    - i. The [alternative] program is [redacted] an alternative program that allows students age 17-21 to work during the day. (D 8)
  - d. The May 2005 IEP provides for free transportation tokens and transportation from the [the] learning center.
  - e. It provides transition services related to obtaining employment, academic counseling, and aptitude testing.
  - f. It contains a functional behavioral assessment regarding acting out during academic classroom time.
10. Mr. D, a School District resource room and transition teacher, taught Student at the high school during the 2004-2005 school year, and also obtained two employment placements for Student.
  - a. One job placement was at a [redacted] retail store during March 2005. Student interviewed well and performed well. Because he missed work on several occasions and had failed to call in on those missed days, however, Student was dismissed from employment. (N.T. 62, 66, 102, 126-127)
  - b. The second job placement was with [redacted] during Summer 2005, performing maintenance work at the high school. Again, Student performed well when he showed up for work, but he missed work seven times and failed to call in on those days. (N.T. 66, 127-128)

11. In September 2005, Student started the [alternative] program for the 2005-2006 school.
  - a. Initially, Student walked to school because he did not receive subway tokens from the School District. Student admits that he did not ask anyone for subway tokens. When he did ask for tokens, he did receive them. (N.T. 90)
  - b. During the first semester in the [alternative] program, Student received instruction in U.S. History, Science and Spanish. Student is scheduled to receive instruction in math and English during the second semester of the [alternative] program. (N.T. 101)
  - c. As late as October 18, 2005, the School District believed Student was still working, based upon Student's conversation with his principal. (D 8)
  - d. Student frequently skipped the [alternative] program, however, to avoid confrontation with other students who wanted to look at his papers during class. Student also wanted to avoid confrontation with teachers who accused him of talking with other students during class. (N.T. 93-94, 99)
12. Mr. D, who is stationed at the high school and not at the [alternative] program location, tried but was unable to contact Student during the 2005-2006 school year either by phone or by mail regarding job placements.
  - a. During Fall 2005, however, Student sent a message to Mr. D stating that Student had obtained employment for himself at a [redacted] restaurant. (N.T. 103, 129)
  - b. Mr. D visited [redacted] restaurant and learned that Student worked well when he showed up, but Student was terminated when he did not show up for work and did not call in on those days. (N.T. 129)
13. Student is also entitled during this 2005-2006 school year to supplemental educational services (SES) by virtue of the performance of his former school building under the No Child Left Behind Act.
  - a. The School District has apparently selected [the] learning center as its vendor for the delivery of SES. (N.T. 27, 29; P 2)
  - b. Although SES services are free to Students, their parents must register for SES services. (P 2; P 3; D 8)
  - c. On or about October 18, 2005, the School District informed Student's parent of Student's entitlement to SES services during this 2005-2006 school year. (P 2)
  - d. On or about November 30, 2005, Student was tested at [the] learning center for the purpose of providing the SES services. (N.T. 47-48)
14. On or about September 20, 2005, Student's parent filed a request for due process hearing. (HO 8)
15. Student's parent believed, in May 2005, that Student's IEP was appropriate only because it was intended that Student would be simultaneously working and also attending [the] learning center instruction. Student's parent believes that the May 2005 IEP was no longer appropriate once Student was neither working nor attending [the] learning center instruction. (N.T. 60-62)

16. On September 29, 2005, in response to a written notification of insufficiency from the School District, I found that Student's September 20, 2005 due process hearing request (also referred to as a "complaint"), lacked sufficiency. Accordingly, I cancelled the scheduled hearing unless and until an appropriately amended complaint was filed. (HO 6; HO 7)
17. On November 8, 2005, I concluded that a ten page fax from Student's parent included sufficient information to support a due process hearing on the three issues described earlier in this decision. Accordingly, I scheduled a due process hearing for December 19, 2005. (HO 3; HO 4; HO 5)
18. Also on November 8, 2005, I denied the request of Student's parent that I recuse myself on the basis of bias toward the Student. (HO 3)
19. On November 30, 2005, the School District principal contacted Student's parent to discuss concerns regarding the [alternative] program and to revisit Student's IEP. (D 9) The School District principal has suggested to Student that, if he was interested in coming back to day school, he could have a late arrival/late departure schedule to accommodate his sleeping patterns. (N.T. 95) Student testified at the hearing that he is interested in returning to the day school under the Principal's late arrival/late departure proposal. (N.T. 101)
20. On December 19, 2005, I conducted a due process hearing in this matter. Student and his parent attended the hearing. At the hearing, Student's demeanor was respectful and impressive. He was attentive not only to the hearing, but also to the needs of his pre-school [sibling] for whom child care apparently was unavailable.<sup>3</sup> He testified credibly and in a forthright manner. (N.T. 87-119)
21. On January 3, 2006, I received a 25 page fax from Student's parent. This fax was apparently intended to be a 15 page post-hearing brief and 10 pages of additional exhibits. There is no certificate of service indicating that a copy of this 25 page document was served upon counsel for the School District. In addition, I did not authorize submission of post-hearing briefs and additional exhibits. Accordingly, because the January 3, 2006 fax appears to be both unauthorized and ex parte, I will not consider it when rendering this decision today.
22. Student's parent appears to be an honest, sincere, caring, hard-working, and reasonably intelligent person. She is, however, extraordinarily difficult to communicate with.
  - a. Both in prehearing correspondence and at the hearing, she frequently conveyed herself in an angry, rambling and incoherent manner that discourages communication. (HO 5; N.T. 11-17, 40-44, 80)

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<sup>3</sup> While the pre-school child did not disrupt the hearing, [his/her] name appears seemingly out of context and at odd times in the transcript. These were times when the child needed to be redirected, without opportunity to go off the record first. (N.T. 5, 61, 67, 72, 76, 80)

- b. Student's parent sometimes does not open mail from the School District, and she does not answer her telephone. (N.T. 78-80) She absolutely refuses to deal with the School District's regional special education director. (N.T. 69) She seemed offended that the high school principal stopped by the home unannounced on a Saturday morning to discuss Student. (N.T. 68) Yet, she complains that she doesn't get information from the School District regarding Student's education. (N.T. 61)
- c. Student's parent and Student do not talk with each other. Student's parent does not know when Student goes to work and when he will be returning home each day. (N.T. 63-64, 71-72) Student's parent was unaware that Student was not attending school at the [alternative] program. (N.T. 81)

23. As discussed later in this opinion, I find that the May 2005 IEP was reasonably calculated to produce meaningful educational benefit and, therefore, I find that it was appropriate. I further find that the School District principal appropriately has initiated discussion with both Student and Student's parent regarding a revision of the May 2005 IEP now that it does not appear to be working out for Student.

24. Exhibits HO 1- HO 8, D 6- D 10, and P 1- P 4 were admitted into evidence. (N.T. 145)

## DISCUSSION

### I. The School District provided FAPE during Student's [Alternative] Program

A school district is required to offer an IEP reasonably calculated to enable a child with a disability to receive meaningful educational benefit. Failure to offer such an IEP will be deemed a denial of a free and appropriate public education (FAPE). Board of Education v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982) A program which confers only trivial or minimal benefit is not appropriate. M.C. v. Central Regional School, 81 F.3d 389, 393 (3d Cir. 1996); Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3d Cir. 1988); In the Educational Assignment of Re Victor B., Special Education Opinion No. 1070 (2000)

On the other hand, the School District need not provide an optimal level of services since the IEP, as required by the IDEIA, represents only a basic floor of opportunity. Carlisle Area School District v. Scott P., 62 3<sup>rd</sup> Cir. 533-534 The purpose of the IEP is not to provide the "absolute best education" or "potential maximizing education" for the child. The IEP must simply propose an appropriate education for the child. Fuhrman v. East Hanover Bd. Of Educ., 993 F.2d 1031 (3<sup>rd</sup> Cir. 1993) An IEP is appropriate if at the time it was offered it was reasonably calculated to provide some meaningful educational benefit to the Student. The benefit must be more than de minimus. Susan N. v. Wilson School District, 70 F.3d 751 (3d Cir. 1995); Carlisle Area School District v. Scott P., 62 F.3d 520 (3d Cir. 1995)

All parties believed, at the time that it was written, that the May 2005 IEP was an appropriate program for Student. It provided a three-pronged approach toward Student's education, allowing him to (1) gain work experience, (2) benefit from his [redacted] learning center tutoring during the day, and (3) receive school-based instructional services during the late-afternoon/evening

hours at the [alternative] program. After the Fall 2005 semester began, the School District provided what it had promised. When Student asked for the subway tokens that were promised in the IEP, he received them. (N.T. 90) As late as October 18, 2005, the School District believed Student was still working, based upon Student's conversation with his principal. (D 8)

Further, the School District did not simply ignore Student during the Fall 2005 semester. Both Mr. D and the high school principal genuinely followed-up on Student's progress during the Fall 2005 semester. (N.T. 95, 101, 103, 129; D 9) By the end of November, the high school principal was urging Student's parent to meet and revisit Student's IEP. (D 9)

It is clear that all parties accurately believe that Student needs a new IEP that takes into account his new circumstances now that he is not working. That does not mean, however, that his May 2005 IEP was not calculated to produce meaningful educational benefit at the time that it was written. Nor does it that the School District did not implement Student's IEP during Fall 2005.

The School District is not to blame for Student's parent's failures to make herself available for communication from the School District. (N.T. 68-69, 78-80) The School District is not to blame for Student's failures communicate to the School District and/or to his parent his unemployment and his decision not to attend [the] learning center. (N.T. 63-66, 93-99) Once the School District had such information, it properly proposed revising Student's IEP.

When the parties do revise Student's IEP, the IEP team may want to consider whether Student, who apparently is a sincere and hard-working student and employee, demonstrates a behavioral tendency that impacts upon his educational opportunities – specifically by withdrawing from perceived problems at work, or school, or tutoring, without calling in and/or discussing his concerns with anyone in authority (N.T. 96, 104). The IEP team might consider a behavioral intervention plan that anticipates this behavioral tendency and that teaches Student appropriate assertiveness, self-advocacy and/or problem-solving skills.

## **II The School District did not breach an agreement to provide bus tokens to Student for transportation to school**

Initially, Student walked to school in Fall 2005 because he did not receive subway tokens from the School District. Student admits that he did not ask anyone for subway tokens and that he did receive them when he did ask for tokens. (N.T. 90) I find no breach of any agreement, either in the IEP or in the compensatory education agreement, with respect to the provision of subway tokens.

## **III The School District did not use compensatory education hours to supplant, rather than to supplement, other educational services to which Student was entitled**

The School District has chosen to use the same vendor, [the] learning center, to provide to Student both the 60 hours of compensatory education to which he is owed and the supplemental educational services (SES) to which he is entitled under the No Child Left Behind

act. (N.T. 27, 29; P 2) The record adequately establishes that the School District is engaged in providing both types of services.

The School District entered into a \$2,400 contract with [the] learning center for 60 hours of tutoring services, which are clearly related to Student's compensatory education entitlement. (N.T. 50-52, 57, 124; P 4; D 10) During March 2005, Student received math-related tutoring services from [-the] learning center pursuant to that contract. (N.T. 50, 53, 97, 123-124; P 4; D 8; D 10) Student stopped attending [the] learning center services because he felt that the lessons were childish, but he did not explain this to his learning center tutor, who would have changed the lesson format if Student had mentioned his objection. (N.T. 50, 53, 84, 97, 109) Nothing in the record suggests that Student is prevented in any way from resuming his compensatory education services at [the] learning center.

On or about October 18, 2005, the School District informed Student's parent of Student's entitlement to SES services during this 2005-2006 school year. (P 2) On or about November 30, 2005, Student was tested at [the] learning center for the purpose of providing those SES services. (N.T. 47-48) Clearly, the School District is treating the compensatory education tutoring and the SES tutoring as two separate obligations. There is no basis for concluding that the compensatory education services are being used to supplant, rather than to supplement, any other educational service to which Student is entitled.

## **CONCLUSION**

The School District has provided FAPE to Student during his [alternative] program. That program was part of a three-part educational program (employment, tutoring, and [alternative program] instructional services) contained in a May 2005 IEP that was reasonably calculated to produce meaningful educational benefit. School District officials attempted to follow up during the Fall 2005 semester despite communication failures on the part of Student and his parent, and in fact, the School District appropriately recommended revisiting the IEP once it became aware of a change in Student's circumstances. When the IEP team meets again, it may want to consider any behavioral trends that it may have noticed during the Fall 2005 semester that impact upon Student's educational program.

The School District has not breached its agreement to provide bus tokens to Student. In addition, the School District is not using Student's compensatory education to supplant, rather than supplement, services to which Student is otherwise entitled. The School District is simply using the same vendor to provide compensatory services as well as other services, but the evidence establishes that both compensatory and other services are being offered as required.



**ORDER**

For the reasons described above, I ORDER that no action is required of the School District.

*Daniel J. Myers*

Hearing Officer

January 5, 2006

Re: Due Process Hearing  
File Number 5891/05-06 AS  
Student