This is a redacted version of the original hearing officer decision. Select details have been removed from the decision to preserve anonymity of the student as required by IDEA 2004. Those portions of the decision which pertain to the student's gifted education have been removed in accordance with 22 Pa. Code § 16.63 regarding closed hearings.

PENNSYLVANIA

SPECIAL EDUCATION HEARING OFFICER

DECISION
DUE PROCESS HEARING

Name of Child: P.P.
ODR #5928/05-06 KE

Date of Birth: xx/xx/xx

Dates of Hearing:
November 18, 2005
January 23, 2006
January 24, 2006
March 10, 2006
March 21, 2006
May 15, 2006

CLOSED HEARING

Parties to the Hearing: Mr. and Mrs.	Representative: Tanya Alvarado, Esquire McAndrews Law Firm 30 Cassatt Avenue Berwyn, Pennsylvania 19312
West Chester Area School District Spellman Administration Building 829 Paoli Pike West Chester, Pennsylvania 19380	Hollie John, Esquire Sweet, Stevens, Tucker & Katz P.O. Box 5069 New Britain, Pennsylvania 18901
Last Transcript Received:	May 20, 2006
Record Closed	June 17, 2006
Date of Decision:	June 30, 2006
Hearing Officer:	Linda M. Valentini, Psy.D.

Background

Student is a xx-year-old fourth grade student who resides in the West Chester Area School District (hereinafter District). He was enrolled in a parochial school for his entire educational career, until Mr. and Mrs. (hereinafter Parents) unilaterally enrolled him in a private school for children with learning disabilities. The Parents requested this hearing, raising Child Find issues under the IDEA/Chapter 14 and Section 504/Chapter 15, and asserting that the District's evaluation and its proffered IEP were inappropriate under these statutes. The Parents sought compensatory education for alleged Child Find violations from 2002-2003 through 2004-2005 and for alleged denial of a free appropriate public education (FAPE) because of an inappropriate evaluation and IEP. The Parents also sought reimbursement for two independent educational evaluations (IEEs), for vision therapy services from July 2003 through March 2004, for a summer 2005 program at Private School, and for tuition to Private School for the 2005-2006 school year.

Prior to the convening of the hearing, the District filed a motion to limit the issues and remedies (HO-1) and the Parents responded (HO-2, HO-8). The hearing officer determined that she would limit any recovery to the period from October 5, 2003 through October 5, 2005, but would allow the Parents to present evidence from September 2002 through October 4, 2003 in the event a higher body chose to consider that period.

The U. S. Supreme Court handed down its ruling in Schaffer v. Weast[1] regarding the burden of persuasion in special education matters four days before the first session of the hearing. In an unexpected conference call from the attorneys, the hearing officer was asked which party would bear the burden of production; she ruled that the District retained the burden of production and should present its case first. However, on the day of the first hearing session, having had time to reconsider, the hearing officer reversed her ruling following a motion by the District, and assigned the burden of production to the parents, recessing the hearing after opening statements in order to allow time for the Parents to prepare their case. The hearing officer denied a motion from the Parents to reconsider (HO-3, HO-6, HO-7).

The Parents filed a request that the hearing officer order and/or the District voluntarily fund, an independent educational evaluation (IEE), as they interpreted Schaffer as bestowing such an entitlement. The hearing officer and the District denied this request in a prehearing conference. (HO-4, HO-5).

This matter was delayed at the outset by the hearing officer's granting a continuance after the first session in order to allow the Parents time to prepare their case presentation and the matter was also delayed at the end of the case as the last witness required unexpected surgery and was not available for the originally scheduled final session.

[1] Schaffer v. Weast, 126 S. Ct. 528, 537 (2005).

Issues

1. Is the School District required to provide compensatory education services to Student for school years 2002-2003, 2003-2004, and 2004-2005 for failing in its Child Find obligation and/or for its failure to timely evaluate Student?

2. Is the School District required to reimburse Parents for expenditures incurred to obtain vision therapy for Student from July 2003 through March 2004?

3. Is the School District required to reimburse Parents for an independent educational evaluation conducted when Student was in 1st grade and/or an independent educational evaluation conducted when he was in 3rd grade?

4. Is School District required to reimburse Parents for their expenditures for Student's summer programming for the summer of 2005?

5. Is the School District required to reimburse Parents for tuition at the Private School in which they unilaterally placed Student for the 2005-2006 school year, based on their assertion that the District conducted an inappropriate evaluation (timeliness and substance) and produced an inappropriate IEP under Chapter 14 and [redacted]?

Findings of Fact

1. Student is a xx-year-old student who resides in the School District. (S-1)

2. Student has been educated exclusively outside the public school system. (S-1)

3. Student attended a parochial school from Kindergarten through third grade. (S-1)

4. Student's mother has an undergraduate degree in early childhood education from [a university] and taught kindergarten in a parochial school for three years (1979-1982). (NT 616-617)

5. Student had difficulties in pre-reading skills as early as Kindergarten. (NT 618-621)

6. The Parents claim to have had an exploratory telephone conversation with a district psychologist in February 2003 and to have made a written request for an evaluation from the District in March 2003, but they did not call or subpoena the psychologist as a witness and could not produce a copy of the letter. (NT 628-630, 701)

7. The mother testified that she did not follow up on her letter to the District and recounted no further contact with the District until early November of 2004 in Student's third grade year. (NT 637, 703)

8. The parochial school guidance counselor, Ms. G, who is an employee of the [redacted] IU and was responsible for facilitating referrals for testing through the District recalled telling the Parents the process for obtaining an evaluation from the District, and produced her notes from the 2002-2003 school year relative to her conversation(s) with the family, but did not recall ever receiving a copy of a letter or completed parent input forms from the Parents. She did not recall delivering any information relative to Student to the District. (NT 295, 316,321, 333; P-1)

9. The school psychologist at the Elementary School, Ms. P, had no contact with Ms. G during the 2002-2003 school year regarding Student. (NT 508)

10. Dr. S, the school psychologist who facilitated all non-public school referrals for the 2001-2002 school year, and who was assigned to [another] Elementary School for the 2002-2003 school year, handling all evaluation referrals for students residing in that school's boundaries, testified. Dr. S, who maintains an extraordinarily thorough and meticulous record-keeping system, had no record of any conversation with the Parent or any documentation regarding the student. (NT 537-558, 560-565, 569-571, 574-575).

11. The Parents did obtain an independent educational evaluation from Dr. B in April 2003 when Student was in first grade. (S-2)

12. Dr. B found Student to have Above Average verbal intelligence and Low Average to Average perceptual organizational skills, and she opined that "a delay in Student's visual-motor integration skills and fine motor coordination skills is having a negative impact on the development of his reading and writing abilities. The frustration caused by this delay is causing Student to experience anxiety and is having a negative impact on his self-esteem." (S-2)

13. Dr. B recommended ongoing communication between Student's parents and his teachers, work with a reading specialist or tutor, working with an occupational therapist to address fine motor skills and re-evaluation in one year. (S-2)

14. The District engages in extensive Child Find Activities, including annual notices in the Daily Local News, a general circulation newspaper in the District. The notices inform parents about matters germane to this hearing such as the availability of evaluations, and the requirement that requests for an evaluation must be in writing and cannot begin without written consent, that there are timelines for requesting due process, and whom to contact for further information. The same information is provided on public access television. (NT 577-580, 975-976, 983-984; S-17)

15. Additionally there are posters and pamphlets posted in private schools within the District and within District buildings that inform parents of what to do in the event they think their child may need special education. These pamphlets also inform parents that written consent is needed for evaluations. (NT 577-579, 979; S-18)

16. Information about accessing special education services is sent to resident homeowners in their tax bills and posted on the District's website. (NT 977-980)

17. The District conducts trainings for principals and counselors of non-public schools regarding referral processes and other Child Find issues, including being given the information that parents must make written requests for an evaluation in order for the process to begin. (NT 302-303, 354, 361-363, 418-422, 467-468, 581-582; S-22)

18. The District was found to be 100% compliant with Child Find obligations at its last monitoring review by the state. (NT 980-983; S-23)

19. On November 22, 2004 the Parents made and sent to the District a written request for an evaluation of Student, noting difficulties in reading and writing. (S-1)

20. When the Parents made their written request to the District, they already had an independent evaluation scheduled with Dr. L for December 14, 2004, and made the District aware of this via the Parent Input Form and in conversations as well. (NT 76-77, 204-205; S-1, S-2)

21. The Parents indicated to the District a "strong possibility" that they would need to enroll Student in public school for the 2005-2006 school year. (S-1)

22. Ms. A, school district psychologist and representative of the District in all matters pertaining to Student's evaluation, understood this letter to represent a request by the Parents for an evaluation of Student for special education eligibility. (T 59-60)

23. When the District receives such a request, rather than issue a Permission to Evaluate form, its practice is to make a referral of the child to the child study team, to seek further information from the child's parent and to request that the parent sign release of information forms. (NT 60)

24. Ms. A. noted, "*although the District uses a 'pre-referral process'* [that] *children enrolled in the District often enter for progress monitoring, in cases of children who are non-public at times we've taken them through that process but normally we go straight to testing if there's enough information to warrant testing*." (NT 208-210)

25. On November 29, 2004 the District sent a Release of Records Form and a Parent Input Form to the Parents. (NT 60, 201, 366, 427, 444; S-1)

26. Ms. A. explained that once the information from parents is obtained, the District then forwards the releases to the child's school(s) and/or other provider(s). (NT 60)

27. The Parents filled out the parent input form, signed the releases and sent these back to the District. The Parents, attached to or separate from the parent input form, provided a copy of the earlier independent educational evaluation done by Dr. B. when Student was in first grade. The Parents also informed the District that Student was scheduled for a December 14, 2004 evaluation by Dr. L. (NT 73; S-2)

28. On December 17, 2004 the District sent copies of the releases to the parochial school's guidance counselor and to Dr. L. (NT 60-61, 73, 201-202, 447; S-3)

29. The District informed the Parents that an information gathering process would precede issuance of a Permission to Evaluate Form and that the receipt of a signed Permission to Evaluate Form would trigger the start of the regulatory timelines for completion of the evaluation. (S-1)

30. Once the school and/or provider information is received, the District psychologist takes the information to the child study team and the child study team discusses the case. (NT 61)

31. Early in January the District received information from [the parochial school]. (NT 61, 202-203, 211, 447; S4)

32. The District convened a Child Study Team in mid to late January to review the information. Ms. A. characterized the next step as follows: "*And if we feel at that time that that child should be evaluated, then a Permission to Evaluate is issued*". (NT 61)

33. Although Ms. A. agreed that once a parent has signed a Permission to Evaluate Form the District has 60 school days in which to complete an evaluation, she was not familiar with any timelines within which the District needed to issue a Permission to Evaluate Form following a parental request for an evaluation. (NT 62-65)

34. After agreeing with Parents' counsel that a Permission to Evaluate should be issued in a "reasonable time", Ms. A. could not specify what length of time would be "reasonable", but after repeated questioning stated her belief that a Permission to Evaluate should be sent to parents within 10 days of the written request for an evaluation. (NT 66-68)

35. Ms. A. further elucidated the District's procedure: "*Now, if the team does not believe that a permission to evaluate should be issued, then we should do a Notice of Recommended Educational Placement if we, as a team, believe that the child should not be tested at that time"*. (NT 68-69)

36. The District mailed a Permission to Evaluate dated January 28, 2005 to the Parents on February 2, 2005. This mailing was 72 calendar days from the date of the Parents' letter to the District requesting an evaluation. (NT 98; S-1)

37. Ms. A. had conversations with the Parents between December 17, 2004 and the end of January 2005. During these conversations Ms. A. "believed" that she informed the Parents that the District could perform some of the assessments that Dr. L was going to perform. (NT 79)

38. Ms. A, after learning from the Parents that some of the instruments the District proposed to use as per the Permission to Evaluate were being administered by Dr. L, advised the Parents not to sign this Permission form because the form would have to be amended. The Parents therefore did not sign this Permission to Evaluate Form and were told by Ms. A that it would not take long for her to get out a new Permission to Evaluate form. (NT 129-131, 212-213, 643, 645; S-5)

39. On or about February 21, 2005 Dr. L sent the District psychologist a list of the measures she used, noting that her report was in progress. (NT 132-133, 210-211, 490-491; P-3)

40. Despite knowing the tests that Dr. L did not administer, Ms. A and her supervisor decided that a new Permission to Evaluate, listing measures the District would use, should not be issued until the District had Dr. L's report. The Parent was not asked to agree to wait for the L results before signing a new Permission to Evaluate. (NT 132-135, 644)

41. Ms. A testified she (herself) decided to wait "*for the results, to see the final results of the independent evaluation, to see what additional things needed to be done*". (NT 210-211)

42. After receiving from the Parents and reviewing the L report the District issued a revised Permission to Evaluate Form dated April 7, 2005, which the Parents signed on April 11th. The Permission was issued 64 days after the first Permission, which Ms. A instructed the Parents not to sign, was mailed. (NT 131, 133, 650; S-8)

43. Dr. L found Student to qualify for special education under the classifications of Learning Disabled. (S-7)

44. The District did not disagree with any of Dr. L's assessment results or her interpretations of the assessment results. The District did not disagree with any of Dr. L's impressions or recommendations. (NT 152-153)

45. Testing from the District having begun in early June, the Parents enrolled Student in the District on June 8th or 9th (the first day of the testing) after speaking with the person who would likely be Student's teacher in the District. (NT 653-657)

46. At the time of the testing/enrollment Ms. A told the Parents that there would be a summer IEP meeting in July. In mid-July she called the Parents to say that there could not be a summer meeting because all the parties could not be convened. (NT 656-658)

47. The District produced an Evaluation Report (ER) and provided a preliminary copy to the family in July 2005. The Parents were not invited to a multidisciplinary team meeting to discuss the ER at that time. The documented date of the ER was September 1, 2005 and it was re-sent to the Parents on that date. A meeting to discuss the evaluation and/or craft an IEP was not held until September 13, 2005 on which date the multidisciplinary team signed off on the report. The vision evaluation was not yet completed at that time. (NT 154-155, 159-160, 163; S-9)

48. The ER concluded that Student had a specific learning disability in the areas of reading and written expression and noted an additional need in the area of occupational therapy. The ER comported with and incorporated much of Dr. L's report, except that Dr. L did not recommend occupational therapy and the ER did. (S-7, S-9)

49. On August 19, 2005 the Parents wrote to the District noting that they were not in agreement with the ER as it did not identify Student as having a learning disability in math computation and no assessments of social and emotional functioning were performed. (S-10)

50. Student became dizzy during the math portion of the Dr. L evaluation, and although he was not familiar with some of the types of problems on the test instrument, he still received a standard score at the top of the low average range (89) in math calculation, his fluency standard score was average (99) and his applied problems subtest standard score was average (103). There were no indications that he was doing poorly in math in his program at the parochial school.[2] (NT 176-179, 480-481, 498-502; S-2, S-4, S-7, S-9)

51. Although the District performed assessments that supplemented those Dr. L did, the District did not conduct social/emotional assessments as the Parents reported Student to be social, happy and responsible and Dr. L found him to be "incredibly" pleasant, joyful and interpersonally and intellectually engaging. His

[2] Nevertheless the subsequent IEP addressed mathematics. (S-20)

teachers described him as motivated, positive and behaving appropriately. (NT 238-239, 476-477, 481; S-2, S-4, S-7)

52. In their August 18, 2005 letter the Parents also notified the District that since the ER was not finalized and the Parents were told that Student would not be offered an IEP until after the school year began, the Parents "had no alternative but to find a placement for him that will address his educational needs". The Parents told the District they were enrolling Student at Private School for 2005-20006 and were asking that the District fund the placement. (S-10)

53. The 2005-2006 school year began on September 6, 2005. On September 8th or 9th the Parents received an Invitation to Participate in an IEP meeting on September 13, 2005. The finalized ER of September 1, 2005 was presented and the Parents signed and noted agreement with the slightly revised ER. (NT 240-241, 667; S-9, S-20, S-21)

54. The IEP contains present levels of academic achievement and functional performance, presents strengths and needs, contains annual goals and measurable short term objectives in reading, written expression, math computation, fine motor skills (pencil grasp) and visual-motor coordination. (S-20)

55. The IEP contains a provision for Student to learn keyboarding skills. (S-20)

56. Although Spelling is not recognized as a specific learning disability category, Student has difficulties in that area and the area is addressed in the IEP. (NT 185-186; S-20)

57. The IEP contains an extensive list of well-thought-out specially designed instruction that addresses his learning needs. (S-20)

58. The IEP notes that Student was not eligible for Extended School Year (ESY) but his eligibility would be "monitored" for the summer following 2005-2006. (S-20)

59. [Redacted.]

60. The Parents did not approve the IEP. (NT 679)

61. The District received several pieces of data suggesting that Student may have difficulties with his vision that interfered with his schoolwork, but Ms. A and the child study team did not initially include a vision evaluation as part of the proposed evaluation. (NT 88-89, 96-97, 102-103, 137; S-2, S-4)

62. A Functional Vision Evaluation, included as part of the proposed multidisciplinary evaluation on the second Permission to Evaluate of April 7, 2005, was not completed until November 10, 2005. (NT 105, 144-145; S-16, P-4)

63. Student was not found to qualify for vision support services. However, recommendations made in the November 2005 report were incorporated into a revised IEP on November 15, 2005 by agreement of the parties. Neither vision services nor accommodations are currently provided to Student at the Private School. (S-20)

64. Following Student's evaluation by Dr. L, the mother visited Private School on or about March 7, 2005 on the advice of Dr. L. (NT 686-687, 716)

65. The Parents received a positive impression of Private School from the mother's visit and the Parents filled out and sent an application after the March visit. (NT 688-692, 716)

66. The Parents gave questionnaires required by Private School to Student's teachers at the parochial at the end of March. (NT 719)

67. The family interview for Private School admission for the fall was held sometime before the middle of May. (NT 719, 756)

68. In order to qualify for fall admission to Private School, all students must attend the five-week Summer Language Arts Program where they are evaluated for their appropriateness for the regular school year program. (P-13)

69. The family started the early admissions process for Private School, as they were concerned about being able to get him admitted to the summer program because it is overcrowded. The brochure indicated that the early admission deadline for declaring candidacy for the fall program was April 21st. (NT 713-714, 755; P-12, P-13)

70. An application fee for fall admission must be returned to Private School before the applicant is screened at Private School for the Summer Language Arts Program placement. The application fee must be paid prior to the family interview or June 1. (P-13)

71. Student was accepted for admission to Private School for the summer program and for the coming school year (2005-2006) at the end of May or the beginning of June. (NT 721, 756, 780)

72. The Parents first made contact with counsel in early June. (NT 706)

73. Student was screened for the summer program in mid-June. (NT 717)

74. The Parents sent in a deposit to secure a place for Student in Private School for the fall in early June, as they did not know what the District was going to offer and they believed the parochial school was no longer appropriate for him. (NT 694)

75. The Parents began paying tuition in June for Student's attendance in the fall program. The Parents were aware that there are few exceptions that allow opting out of the 10-month June through March payment cycle. (NT 776-780)

76. The Parents unilaterally placed Student in the Private School's summer program during the summer of 2005 (July 5th through August 2nd or 3rd) prior to receiving the District's evaluation report. (NT 660)

77. The Parent unilaterally placed Student at the Private School program for the 2005-2006 school year. (NT 776-780)

78. Private School's "primary purpose is to create an environment where bright struggling readers" receive guidance, family support and a strong academic background. (P-13)

79. [Redacted.]

Discussion and Conclusions of Law

Legal Parameters

Special education programming and placement issues are currently governed by the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA" or "IDEA 2004"), which took effect on July 1, 2005, and amends the Individuals with Disabilities Education Act of 1997("IDEA"). 20 U.S.C. § 1400 *et seq.* (as amended, 2004). The majority of events in the instant matter occurred during a time period prior to the implementation date of the IDEIA.

The Parents brought this hearing under Section 504 of the Rehabilitation Act of 1973 as well as under the IDEA. All claims arise out of the same facts alleged under the IDEA claims, and they are subject to the same statute of limitations as applied to the IDEA claims. (See M.D. V. Southington Bd. Of Educ., 119 F. Supp. 2d 115-116 (D. Conn., 2000), reversed in part, affirmed in part, M.D. v. Southington Bd. Of Educ., 334 F.3d 217, 222 (2d Cir. 2003) "There is ample authority that where the parents did not show a distinct issue, such as accessibility, the disposition of the IDEA claim resolves the alternative 504 claim".[3] (Special Educ. Opinion No. 1724 (2006). Further in Lower Merion School District v. Doe, 878 A.2d 925 (Pa.Cmnwlth.2005) the Commonwealth Court analyzed the applicability of IDEA standards to Section 504 requirements and explicitly determined that requirements under the IDEA apply with equal force to Section 504.

[3] *See, e.g.*, Alexis v. Dallas Indep. Sch. Dist., 286 F. Supp. 2d 551 (N.D. Tex. 2004); Corey H. v. Cape Henlopen Sch. Dist., 286 F. Supp. 2d 380 (D. Del. 2003); Gregory R. v. Penn Delco Sch. Dist., 262 F. Supp. 2d 488 (E.D. Pa. 2003).

In light of the above, this hearing officer applied the IDEIA's two-year period of recovery that requires a parent or an agency to request a due process hearing within two years of the date that the parent or agency knew or should have known about the alleged action that forms the basis of the complaint (20 U.S.C. § 415(f)(3)(C)), rejecting for the IDEA/Section 504 claims both the Commonwealth Court's one-year period under Montour[4] as well as the open-ended recovery periods permitted by the federal District Courts in Pennsylvania prior to July 1, 2005. (Special Educ. Opinion No. 1680 (2005[5]) The two exceptions to IDEIA's two-year provision, namely misrepresentation by the LEA that it had resolved the problem forming the basis of the complaint and/or withholding information from the parent that was required to be provided to the parent were not operative in this matter. [Redacted.]

Child Find

IDEA's so-called "Child Find" provision requires that states ensure that:

> "…All children with disabilities residing in the State, including children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving special education and related services." 20 U.S.C. § 1412(a)(3).

A 'child with a disability' means a child evaluated in accordance with §§300.530-300.536 as having mental retardation, a hearing impairment including deafness, a speech or language impairment, a visual impairment including blindness, serious emotional disturbance (hereafter referred to as emotional disturbance), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services. 34 C.F.R. §300.7

"Special education' is defined as specially designed instruction…to meet the unique needs of a child with a disability. 'Specially designed instruction' means adapting, as appropriate to the needs of an eligible child …the content, methodology, or delivery of instruction to meet the unique needs of the child that result from the child's disability and to ensure access of the child to the general curriculum so that he or she can meet the

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[4] Prospectively as of its effective date of 7/1/05, this new statutory provision [IDEIA] effectively preempted *Montour*. Special Educ. Opinion No. 1680 (2005).

[5] "In our view, neither the *Montour* approach, which the District advocated and the hearing officer adopted, nor the open-ended approach, which the Parent advocated and a string of unpublished federal court decisions adopted, applies. 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."

educational standards within the jurisdiction of the public agency that apply to all children. C.F.R. §300.26

The Commonwealth of Pennsylvania has adopted regulations requiring school districts to conduct awareness activities and to inform the public of child identification activities through an annual public notification, announced or published in newspapers and/or other media with circulation adequate to notify parents throughout the school district. 22 Pa. Code §14.121.

Ms. C, the special education program director for the District testified credibly and at length about the District's general Child Find activities and this hearing officer finds that they are well-thought out and comprehensive.

Specific to Student, although their counsel called and queried a number of witnesses on this issue, the Parents failed to establish that the District had any knowledge whatsoever of Student and his potential need for special education services at any point prior to their written evaluation request of November 22, 2004. The IU guidance counselor stationed at the parochial school, Ms. G, presented testimony that was credible and thorough, and the fact that she could retrieve handwritten notes about a telephone call from a past school year added to her credibility. The school psychologist at the Elementary School for the year in question, Ms. P, credibly confirmed Ms. G's testimony that there was no contact between them about Student. Dr. S, who was the school psychologist at [another] Elementary School and formerly processed all non-public school evaluation referrals, employs an amazingly exacting and meticulous record keeping system. She testified in a thoroughly credible and engaging manner that she received no referrals regarding testing for Student and that she did not have any telephone or other conversations in which a parent identified him or herself as being Student 's parent. Witnesses addressing the Child Find issue convinced this hearing officer that a written referral or written request for an evaluation of Student was never received, either at the parochial school or by anyone in the District. The Parents' claim that the District violated its Child Find responsibilities to Student lacks any basis in testimony or documents.

Procedural Errors

In the 2004 revisions to the IDEA, Congress affirmed its position that de minimis procedural violations do not constitute a deprivation of FAPE. In Section 1415, it provides

> In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies (1) impeded the child's right to a FAPE; (2) significantly impeded the parents' opportunity to participate in the decision making process…; or (3) caused a deprivation of educational benefits.

The primary witness regarding the District's response once a written request for an evaluation *was* made was Ms. A. This witness was hesitant, confused, often requested

that questions be repeated or clarified, requested several breaks and appeared to be poorly informed about required special education procedures and timelines. It was difficult to determine whether she was highly anxious or extremely cagey, as at times her testimony conveyed the impression that she was walking on egg shells. Although she made several poor judgments along the way in her handling of the Parents' request for an evaluation, and did not lend any credibility to the District's case, this hearing officer did give weight to her descriptions of the District's policy, discussed below, regarding how to handle requests for evaluations.

This hearing officer considers the District's procedural violation in failing to timely issue a Permission to Evaluate Form upon receipt of a written parental request for an evaluation, which thereby created the situation of an evaluation being completed far outside the regulatory timelines, a substantial violation that goes well beyond *de minimis*. The District's stance that the District and the District alone, through the child study team, is the gate-keeper of which parental requests for an evaluation are honored and which are not frankly comes across as arrogant and paternalistic, although the District's staff testifying in the hearing did not so present. It is this hearing officer's understanding that the IDEA and Chapter 14 provide that when a District receives a written request for an evaluation from any parent the District is obligated to respond in one of three ways: 1) Issue a Permission to Evaluate form and commence the evaluation, including data gathering, when the signed form is returned; 2) Confer with the parent and request permission to institute an instructional support process rather than begin an evaluation; or 3) Initiate a due process hearing and seek a decision to support its refusal to conduct an evaluation. In the case of a child attending a parochial or other private school, the District does not readily have the instructional support process option open and therefore must evaluate or go to hearing about why it does not feel an evaluation is necessary. This hearing officer holds that the policy and procedure established by this District is in violation of the unfettered rights of a child to an evaluation upon parental request.

In this matter the District waited 72 calendar days to issue a Permission to Evaluate, then acting on information about an independent educational evaluation of which it was aware since mid-December *advised the Parents not to sign the Permission* because a new Permission form had to be created, ultimately waiting another 64 calendar days to issue another Permission to Evaluate form. Incredibly, the District did not issue an appropriate Permission to Evaluate form to the Parents until 136 calendar days past the date of the Parents' written request for an evaluation. By anyone's calculus this was astoundingly and significantly delayed. Compounding the problem was that, having neglected to include a vision evaluation in the first Permission to Evaluate, the District did not request such an evaluation from its provider, the IU, until April 7th, the date the second Permission was issued, and the vision assessment was not completed until November 10, 2005, well into the period in which the proffered IEP would have been in effect had the Parents placed Student in public school. Thus a final evaluation addressing all Student's areas of disability was not completed until 349 calendar days after the Parents' written request. Milestones along the way, which provide little if any mitigation are recognized: a preliminary draft of the ER was given to the Parents in July, although there was no invitation to an MDT meeting offered at the time; an ER minus the vision evaluation was

sent to the Parents on September 1, 2005, 309 calendar days after the Parents' written request. It is arguable that, since the vision evaluation did not result in a finding that specific vision therapy services were needed, the September 1, 2005 date suffices as the date of the "final" ER. However, if a child is ultimately determined to be eligible, the ER serves to discover what needs to be included in an IEP and what needs to be excluded from an IEP, in order that the program for the child's education addresses the disability in a way that appropriately limits the child's time in special education and supportive services in order to promote maximum time in the regular education milieu. This hearing officer contends that the finding that Student did not require vision therapy supported the final structuring of an appropriate IEP, and that prior to that finding the IEP could not be complete. In a sense, the finding that there was not a need for vision therapy was as important to shaping the final appropriate program for Student as the hole in the doughnut (the absence of batter) assists in structuring the finished delicacy.

This issue would be easily decided in favor of the Parents if Student attended public school. On the basis of the length of time it took the District to complete its evaluation, provided the evaluation was substantively appropriate and that an appropriate IEP was crafted based on the ER findings, it would be reasoned that Student was denied FAPE in the District for 80 school days[6] [11-22-04 to 12-2-04: Period to issue PTE[7] [8]; 12-2-04 to 12-10-04: Period for signing and returning PTE; 12-13-04: Start 60 school days for evaluation completion; 4-6-05: End 60 school days and issue ER; 4-6-05 to 4-16-05: Period for Parents to consider the ER; 4-16-05 to 5-3-05: Period for MDT/IEP meetings; 5-4-05: FAPE delivery begins]. Given Student's needs in the area of reading and written expression, and given that he was not determined to be in need of vision therapy, he was denied FAPE for approximately three hours a day which would result in an award of 240 hours of compensatory education.

Student was, however, parentally-placed in private schools during the 2004-2005 and the 2005-2006 school years, and precedents exist to suggest that compensatory education is not an available remedy in such circumstances. J. D., Spec. Educ. Opin. No. 1120 (2001); D. H., Spec. Educ. Opin. No. 1474 (2004). This hearing officer would and does argue that, given the Parents' indication to the District in November 2004 that there was a "strong possibility" that he would be enrolled in public school, it is possible that given a

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[6] Using the District's calendars, (S-21) holidays, vacations, and snow days were factored out.

[7] Special Educ. Opinion No. 922 (1999) would start the clock on November 23rd. "Parent's counsel, district counsel and the hearing officer express disparate views and interpretations of the applicable regulations (22 Pa Code 14.25 (b) and (m) (1)) and a Basic Education Circular promulgated by the Pennsylvania Department of Education. The Hearing Officer correctly determined that the district had not met the 45 day timeline under the regulations requiring the district to complete the MDE within 45 days after receiving parental permission. Further, the hearing officer correctly determined that the letter of consent from the parents established the date on which the 45 day clock began, not the date on which the BEC prescribed Permission to Evaluate Form was received. The District's evaluation was tardy.

[8] In regard to evaluations for Section 504 only, Pennsylvania regulations protecting handicapped students at 22 PA Code §15.6(d) provide that within 25 days of receipt of parents' written request for an evaluation and provision of services the district shall evaluate the information submitted by the parents and send a written response to the parents' request. Districts may also, as provided in 22 PA Code §15.6(f) request additional information of the parents or ask for permission to evaluate the student.

timely, appropriate and complete evaluation followed by a timely and appropriate IEP, the Parents might have transferred Student to public school at the beginning of May 2005 or at the latest enrolled him in public school in September 2005. The mother's testimony on cross examination that she was not planning to move Student before the end of the school year is not dispositive, as Student was struggling at the parochial school and a timely strong welcome from the District in the form of a response with an appropriate ER and IEP may have changed her plans.

Hearing officers may fashion equitable remedies that fit the individual cases before them. As the District's egregious actions denied Student even the *possibility* of receiving FAPE for May and June 2005, despite the Parents' good faith and timely request for an evaluation, Student will be awarded three hours per day for every school day from May 4, 2005 through June 21, 2005 [34 days], a total of 102 hours.

Evaluation

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1414[a][1][A] provides that a local educational agency shall conduct a full and individual initial evaluation, in accordance with subsection [b] dealing with evaluation procedures, before the initial provision of special education and related services to a child with a disability. 20 U.S.C. §1414[b][2] instructs that in conducting the evaluation, the local educational agency shall use a variety of assessment tools and strategies to gather relevant information, including information provided by the parent, that may assist in determining whether the child is a child with a disability. 20 U.S.C. §1414[b][3][C] requires that the child be assessed in all areas of suspected disability.

In evaluating a child, a district may not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child; and

Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

Further, IDEA 2004 at Section 614(b)(3) imposes additional requirements that local educational agencies ensure that

> Assessments and other evaluation materials used to assess a child
>
> > Are selected and administered so as not to be discriminatory on a racial or cultural basis;
> > Are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally and functionally unless it is not feasible to so provide or administer;
> > Are used for purposes for which the assessments or measures are valid and reliable;

> Are administered by trained and knowledgeable personnel; and
> Are administered in accordance with any instructions provided by the producer of such assessments;
>
> The child is assessed in all areas of suspected disability;
>
> Assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided.

Once a child has been evaluated it is the responsibility of the multidisciplinary team to decide whether the child is eligible for special education services. IDEA 2004 provides, at Section 614(b)(4) that

> Upon completion of the administration of assessments and other evaluation measures,
>
> > The determination of whether the child is a child with a disability as defined in section 602(3) and the educational needs of the child shall be made by a team of qualified professionals and the parent of the child in accordance with paragraph (5).

In light of the requirements above, this hearing officer finds that, although significantly delayed, the evaluation produced by the District was ultimately substantively appropriate.

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).

Guidance for determining the factors comprising "meaningful benefit" is offered in Cypres v. Fairbanks, 118 F.3d 245, 253 (5th Cir. 1997) as follows:

1. The program must be individualized on the basis of the student's assessment and performance;
2. The program must be administered in the least restrictive environment;
3. The services must be provided in a coordinated and collaborative manner by the key "stakeholders"; and
4. Positive academic and nonacademic benefits must be demonstrated.

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 Private Schools 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.

The IEP that the IEP team created on September 13, 2005 met the criteria for appropriateness. The November 15, 2005 amendments incorporated findings from the delayed vision examination and the IEP remained appropriate according to the criteria established by statute and case law for the IDEA/Chapter 14.

[Discussion redacted.]

Summer Program

Student's IEP noted that he was ineligible for ESY. The summer program at Private School was a pre-admissions requirement for enrollment in the fall program at Private

School. The Parents took on this expense unilaterally and the District is not required to reimburse them for it.

Tuition Reimbursement

The 1999 implementing regulations of the IDEA, which are authoritative as regulations for the IDEIA 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).

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 his needs that maximizes interaction with nondisabled students.

This hearing officer has determined that the ER and the IEP produced by the District were substantively appropriate. There is no question that the District was inexcusably slow and significantly in violation of Student's procedural rights when it did not produce a final and complete ER until 349 calendar days after the Parents' written request for an evaluation. However, the Parents, acting in the opposite mode, were rushing into a decision about Private School well before the time that, under lawful timelines, the District was required to complete an ER and offer an IEP. Looking again at this hearing officer's calculation of a reasonable and proper timetable

> [[**11-22-04 to 12-2-04**: Period to issue PTE; **12-2-04 to 12-10-04**: Period for signing and returning PTE; **12-13-04**: Start 60 school days for evaluation completion; **4-6-05**: End 60 school days and issue ER; **4-6-05 to 4-16-05**: Period for Parents to consider the ER; **4-16-05 to 5-3-05**: Period for MDT/IEP meetings; **5-4-05**: FAPE delivery begins],

a comparison must be made with the Parents' actual timetable with regard to placing Student in Private School, keeping in mind that the summer program is a pre-admission requirement for the fall program and the parents opted for early admission to the fall program. As established through the mother's testimony,

> **2-21-05**: Dr. L recommends Parents look at Private School; **3-7-05**: Parent visits Private School; **End of March 2005**: Parent gives Private School forms to parochial school teachers; **April 21, 2005**: Deadline for declaring candidacy for early admission to 2005-2006 school year program; **Prior to Family Interview**: Payment of application fee; **Mid-May 2005**: Family interview; **End of May-Beginning of June**: Early acceptance to fall program, tuition deposit, first of 10 tuition payments, contact with counsel.

Looking at these two timelines superimposed on one another, the Parents had already given forms to the parochial school teachers by the end of March (within the 60 school day period to which the District would have been entitled to complete the ER) and they

declared Student's candidacy for early admission by April 21st, which is precisely the period of time they would have been considering an ER from the District.

The Parents' timeline of actual events contradicts the mother's testimony that they "definitively decided" to unilaterally enroll Student in the Private School for the 2005-2006 school year following Ms. A's notification that there was not going to be a July IEP meeting and their review of the July draft of the ER. (NT 660-661) By mid-July Student had two weeks of the summer program under his belt and was accepted into the fall program on early admission, and the Parents had already paid a tuition deposit and had made two of ten tuition payments for the fall program to a payment agency under a contract which they could not terminate.

It is this hearing officer's conclusion that although the District did not have a provisional IEP to offer Student until six school days after the beginning of the 2005-2006 school year, the Parents had no intention of sending Student to public school in the District from late April, when they opted for early admission to Private School's fall program. The equities favor the District in this regard, as six days constitutes a *de minimis* procedural violation.[9] Support for the denial of tuition reimbursement as explained above is found in Pennsylvania Special Education Appeals Opinions: "When [t] he parents have become so singularly focused on the [private school in which they have already enrolled their child] that they appear unwilling to consider the District's proposals in good faith," tuition reimbursement should be denied. Special. Educ. Opinion 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". Special Educ. Opinion No. 1658 (2005). The Parents' request for tuition reimbursement is denied.

Vision Therapy

Student received vision therapy from July 2003 through March 2004. The District was not made aware of Student or his potential eligibility for special education services until November 22, 2004. Therefore the District is not responsible for reimbursing the Parents for this service.

Reimbursement for Independent Educational Evaluations

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).

[9] The significant procedural violation regarding the ER that led to the minor violation has already been addressed through an award of compensatory education.

Student's first IEE was conducted in April 2003. The District was not made aware of Student or his potential eligibility for special education services until November 22, 2004. Therefore the District is not responsible for reimbursing the Parents for this evaluation.

At the time the Parents made their November 22, 2004 request to the District for an evaluation, Student's second evaluation was already scheduled to begin on December 14, 2004. The reasons for the Parents' essentially initiating two separate evaluation procedures were never made clear in this hearing. Obviously the Parents were not challenging the findings of a District evaluation. Although it could be argued that since Dr. L's evaluation was relied upon to a considerable degree when the District finally produced its own evaluation report the Parents should receive reimbursement for it. This hearing officer rejects that argument, finding that the Dr. L evaluation in a sense pre-empted the District's evaluation and in some respect served to delay the District's evaluation even more. Had the Dr. L evaluation not been in process the Parents would have signed the first Permission to Evaluate and the District possibly would have begun its evaluation in a more timely fashion. While offering no excuse to the District for its unconscionably late evaluation, this hearing officer cannot construe the Dr. L evaluation as being the Parents' frustrated response to waiting an inordinate length of time for the District to do its evaluation, as it was commissioned long before the District began down the path of violating Student's procedural rights to a timely evaluation. Therefore the Parents' request for reimbursement of the second IEE is denied.

By way of dicta, this hearing officer observes that the family saved the District many years of public expenditure by educating all six of the children in parochial schools, outside the public school system. This fact makes the District's cavalier response to Parents' request for an evaluation of one child all the more difficult to comprehend. The District would do well to re-examine its procedures and policies, and be sure that when any parent requests an evaluation of a child, whether the child attends public school or not, recognition is given to the amount of anguish and anxiety parents of as-yet-unidentified children may be feeling. Extending a supportive and welcoming hand through a timely response to this family may have avoided the situation in which the parties found themselves and may have avoided needless expenditures of time and tangible resources on both sides.

ORDER

It is hereby ORDERED that:

1. The School District did not fail in its Child Find obligation to Student.

2. The School District is not required to provide compensatory education services to Student from October 5, 2003 through May 3, 2005.

3. The School District did fail to evaluate Student in a timely manner, and the length of time it took from written parental request for an evaluation to completed evaluation report was a significant procedural violation.

4. The School District is required to provide compensatory education services to Student from May 4, 2005 through June 21, 2005 in the amount of one hundred two (102) hours as described above [redacted].

5. The School District is not required to reimburse Parents for expenditures incurred to obtain vision therapy for Student from July 2003 through March 2004.

6. The School District is not required to reimburse Parents for the independent educational evaluation conducted in April 2003when Student was in 1st grade or the independent educational evaluation conducted in December 2004 and February 2005 when he was in 3rd grade.

7. The School District is not required to reimburse Parents for their expenditures for summer programming for Student for the summer of 2005.

8. The School District conducted an appropriate evaluation of, and offered an appropriate IEP for, Student, and therefore is not required to reimburse Parents for tuition for the 2005-2006 school year at the unilaterally selected Private School.

June 30, 2006
Date

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