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## **PENNSYLVANIA**

### **SPECIAL EDUCATION HEARING OFFICER**

#### **DECISION**

**Child's Name: C. N.**

Date of Birth: xx/xx/xx

Date(s) of Hearing: March 13, 2006; April 3, 2006, May 1, 2006, May 2, 2006

**CLOSED HEARING**

**ODR NO. 6283/05-06 LS**

Parents

Mr. and Mrs. Parent

Parents' Representative:

Jefferey Ruder, Esq.  
1717 Murray Avenue, Suite 101  
Pittsburgh, PA 15217

School District:

Moon Area School District  
8353 Moon Boulevard  
Moon Township, PA 15108-2509

District Representative:

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Dated Transcript Received: 5/8/06

Date Closing Arguments Received: 5/24/06

Date Record Closed: 5/24/06

Date of Decision: 6/8/06

Hearing Officer: Margaret Drayden, Esq.

## Précis

Student is a xx-year old child identified with multiple needs including mental retardation, speech and language delays, occupational therapy needs, epilepsy, and, possibly, autism. Currently, Student attends an early intervention program 5 days a week because the District and Parents have not agreed upon what constitutes an appropriate placement for Student. The District believes Student needs a part-time life skills program and part-time regular education kindergarten program while Parents believe Students needs can be provided in a regular education classroom with supplementary aids and services.

## Stipulations

1. Dr. M is an expert in the areas of child development, school psychology and autism. (NT at 25.)<sup>1 2</sup>

## Findings of Fact

1. Student was born on xx/xx/xx and is currently [school aged]. (D-1, D-9.)
2. Student has received early intervention services since infancy and is currently in an early intervention educational program where she also receives speech and language (“S/L”) and occupational (“OT”) therapies. (*Id.*)
3. Student has a history of neonatal seizures and complex partial seizures which are primarily nocturnal. (*Id.*; NT at 149-50.)
4. As of 5/6/05 [date of the initial Evaluation Report (“ER”)], Student was identified as a child with disability categories in autism, mental retardation (full scale IQ score: 40), S/L, other health impairment (“OHI”), pervasive developmental disorder – not

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<sup>1</sup> Parents’ exhibits are noted as “P-“; District exhibits are noted as “D-“; Hearing Officer exhibits are referenced as “HO-“; Noted Transcript is referenced as “NT”; Findings of Fact are noted as “FF”.

<sup>2</sup> The quality of transcripts for the first two hearings were exceptionally poor and replete with errors which made citing to it problematic.

otherwise specified (“PDD-NOS”), and in need of specially designed instruction. (*Id.*, D-39; NT at 142-144.)

5. The ER was comprised of information gathered from the AIU Early Intervention Report of October 2004, an Assessment Information of March/April 2005, a telephone conversation with Student’s speech pathologists on 5/10 and 11, 2005, Behavior Assessment System for Children (“BASC”) scores dated 3/15 and 4/7, 2005, Stanford-Binet Intelligence Scales – 5<sup>th</sup> Ed. (“SB-5”) scores dated 4/8 2005, a classroom observation of 4/6, 2005, parental input (undated), and included a summary of outside reports from Children’s Hospital, Watson Institute psychological evaluations and a Wesley Institute Family and Child Development Center report. (D-9; NT at 126-59.)
6. The ER noted Student’s Strengths as: Gross motor strengths; positive response to dietary changes; pleasant, compliant demeanor; developing language skills; and Needs were noted as: Increase functional communication skills, develop interaction skills, increase adaptive skills and functional independence, increase academic readiness, and increase task focus and attention. (*Id.*)
7. The school psychologist administered the Scales of Independent Behavior – Revised (“SIB-R”) on 4/7/05 and found that Student’s overall measure of adaptive behavior was, on that date, “comparable to that of an average individual at age 1 year 9 months. Her functional independence is very limited....[her] motor skills are limited. Her social interaction and communication skills, personal living skills, and community living skills are very limited.” The school psychologist found limitations in 13 adaptive skill areas and opined that Student “will need frequent support, much more than others her age, primarily because of very limited adaptive behavior.” (D-38; NT at 127-28.)
8. The school psychologist found Student eligible for special education with an autism spectrum disorder due to her PDD-NOS diagnosis, a S/L impairment, a diagnosis of moderate mental retardation, and OHI due to a seizure disorder. (NT at 159-60.)
9. The school psychologist recommended a part-time life skills class with some mainstreaming. (NT at 160-65.)
10. The District’s life skills program currently has a life skills special education teacher, 2 full-time and 2 part-time instructional assistants for 4 pupils; if Student were to attend this class, she would be the 5<sup>th</sup> student in the class. (NT at 165.)
11. The school psychologist only “briefly considered” full inclusion in the regular education kindergarten class because she felt it would be “setting [Student] up for a lot of frustration and lack of success.” (NT at 166.)
12. The psychologist testified that an adaptive curriculum is offered in learning support class and there are students with mental retardation and autism in learning support

classes but she believes Student's needs are such that they need an alternative curriculum, which is offered in the life skills class. (NT at 166-69.)

13. The psychologist testified that learning support students are on "possibly the same grade level" and use the same texts and materials as the regular class, but with some supplemental services. (NT at 222-224.)
14. The school psychologist testified she believes Student needs an alternative curriculum and opined that this could not be successfully administered in a regular classroom setting. (NT at 167-170.)
15. The school psychologist considered and rejected an approved private placement. (NT at 224.)
16. The school psychologist opined that the difference between a life skills class and a regular education classroom with a one-on-one aide would be the "life skills teacher ...is trained and able to facilitate her learning much more appropriately with all of the supplemental aids and supports available within that classroom in terms of being able to design learning situations for her that she can be successful with as opposed to a kindergarten classroom of anywhere from probably 20 other students with an instructional assistant that is going to be reinforcing the skill that a regular kindergarten teacher is going to be instructing the entire class at one time. I think the instruction is going to be much less individualized, because the instruction doesn't come from the instructional assistant...I think it would be difficult for an assistant to break a task down in a kindergarten environment. I think that would have to be done – that would have to be done by the teacher." (NT at 265-266.)
17. The school psychologist testified that she did not believe a regular education kindergarten teacher could "bridge the gap" between a regular kindergarten curriculum and Student's needs because "I don't think a kindergarten teacher would have the skills to be able to do that." (NT at 267-68.)
18. When asked if coloring or cutting, which are part of the Kindergarten Curriculum, could be broken into the necessary tasks for Student, the psychologist testified instructional aides could facilitate Student but that she wasn't sure Student "could do them with a reasonable level of success compared to her peers" and "I think she to perform as a typical participating kindergarten kid, she would have limited success with coloring and cutting, because part of what tasks she would need [would include] ... be[ing] able to identify which color she is being directed on." (NT at 269-70.)
19. The psychologist testified that she thought Student would make some progress in a regular classroom with a one-on-one aide but she would make more progress in a life skills class. (NT at 271-272.)
20. The psychologist testified that she feels a life skills teacher is better at breaking down complicated tasks into manageable steps than a regular education teacher and that

even if a regular education teacher was trained in how to break down tasks for Student that “there would be the issue of implementation” which would still remain. (NT at 278.)

21. When asked “Do you have any way of knowing, ... whether or not [Student] would be capable of making meaningful educational benefit in a mainstream classroom with all the supports that we just talked about? Do you have any way of knowing whether she could or could not?” the psychologist testified, “No, I wouldn’t have any way of knowing for certain.” (NT at 285.)
22. The psychologist testified that she believes Student would receive meaningful educational benefit in the life skills class, but could not state Student would not receive a meaningful educational benefit if provided with all the supplemental aids and services in a regular education class. (NT at 311, 328-330, 332-33.)
23. The psychologist testified she believes Student would have better interaction with children with similar cognitive and developmental delays rather than in a regular education classroom. (NT at 351-352.)
24. The psychologist testified that special education teachers consult with regular education teachers when there are identified children in the classroom. (NT at 353.)
25. The psychologist testified that the regular education kindergarten classroom teacher would have regular access to the special education teacher. (NT at 354.)
26. The psychologist understands “meaningful educational benefit” to mean, in her professional opinion, “making progress toward goals that were delineated to be necessary for the child to have appropriate educational participation in a school environment.” (Id.)
27. The psychologist has not seen personal living skills, such as toileting and dressing, addressed in a regular education classroom. (NT at 356-57.)
28. Student’s 10/15/04 Early Intervention IEP – under “Present Levels of Educational performance” – described Student, *inter alia*, as an affectionate and fun-loving child who enjoyed coming to school and was able to communicate her needs; that she “seeks out adults, gains eye contact, will point or ‘pull’ adult to what she wants.” Student “is able to imitate one-step directions, follow the daily routine with minimal prompts, participate in circle time and work activities with verbal and physical prompts, and wait for her turn....[She] greets familiar adults spontaneously, discriminates between familiar and unfamiliar persons, expresses emotions, knows her first name and age, and follows directions related to the daily routine, and waits her turn for teacher or adult attention. [She] was able to match a circle, triangle, and square is able to sort forms by shape and color. [Student] can give 2 objects on request, and respond to one more when presented with manipulatives.” Student uses “at least 25 words or parts of words in the classroom setting.” (D-1.)

29. Student's 10/15/04 E.I. IEP contained 5 Measurable Annual Goals, each with multi-Short-Term Objectives/Benchmarks. The Goals included the areas of language and vocabulary, total communication, sensory motor skills, fine motor skills, and self-care skills. There were also 3 Annual Goals pertaining to staff assisting with transition to the District. Specially designed instruction contained 20 separate entries, including TSS support which would fade. (Id.)
30. Student's 10/15/04 E.I. IEP stated Student "will participate with non-eligible peers 100% of the time." (Id.)
31. Parents and the District mutually agreed to an independent education evaluation, entitled Psychological Evaluation, dated 11/16/05, was conducted by Dr. M [from] The Watson Institute. (D-28; NT at 26.)
32. Dr. M had previously conducted a wrap around evaluation of Student at The Watson Institute in July of 2003 and on 10/19/05. (NT at 27.)
33. Dr. McAllister noted that Student's only problematic behaviors had been directed towards her TSS but said behaviors were "manageable on the days that the TSS was not able to attend." (D-28; NT at 32.)
34. Dr. M observed Student in the classroom, the hallways during transitions, and in the gross motor room in activities for 70 minutes. The evaluation was based upon this observation, a Parent report, input from Student's EI program, discussions with the EI program director and EI personnel. Additionally, he had read the school psychologist's report, the District's proposed IEP, and previous wrap-around reports. (D-28; NT at 26-32, 36, 75-80.)
35. The Psychological Evaluation concluded that Student's presentation was more consistent with "global retardation that with an autism spectrum disorder." This conclusion was based on Student obtaining a score of 22 on the Childhood Autism Rating Scale ("CARS"), where scores "of 30 and above are considered to fall within the autistic range" as well as by observing Student's social skills are more advanced than a child with autism. He "would not expect a level of engagement or social engagement [Student] shows, smiling, recognition of people, reciprocal smiling, interest in other people. Just general social orientation she is displaying is more social skill that I would expect in a child with autism at this age." (D-28; NT at 44-45.)
36. Dr. M found Student's skills on par with a 1-1/2 to 2-1/2 year old child. (NT at 45-6.)
37. Dr. M's "professional opinion is that student's primary diagnosis would be mental retardation. I don't see the autism diagnosis as fitting at this time." (NT at 46.)
38. Dr. M's diagnosis is contrary to the District school psychologist's primary diagnosis

of autism with mental retardation as a secondary category. However, the school psychologist did not find that inconsistent with her assessment. (D-9; NT at 172.)

39. Dr. M opined that Student would receive a lesser level of educational benefit from a full-time regular Kindergarten class than a part-time life skills class but could not state Student would not receive a meaningful educational benefit from a full-time regular education Kindergarten class with a full range of supplementary aids and services. (NT at 83-87, 97, 100-101.)
40. Dr. M opined that if Student were in a full-time regular education class, “a menu of possibilities – not necessarily something that you would recommend” could include an aide, a second teacher in the class, consultants, and ancillary supports such as S/L and OT. (NT at 83-84.)
41. Dr. M opined that Student could do parallel academic activities in a regular education class. For example, if regular peers were adding and subtracting numbers, Student could work on coins. (NT at 109-111.)
42. Dr. M testified that his preference would be to transition Student from the life skills class to regular Kindergarten “on a gradual basis” and that “if the transition goes smoothly, that might happen in a matter of weeks in introducing academic tests.” He did not project a lengthy period of time for increasing her inclusion in regular education. (NT at 110-114.)
43. The school psychologist testified she did not see Student transitioning into a regular education classroom on a full-time basis. (NT at 345-46.)
44. Dr. M opined that while it is “desirable in terms of inclusion” to have Student’s education program mirror what is being taught in the regular education classroom, “it is not an absolute requirement.” (NT at 114-15.)
45. On 12/15/05, Student was observed for an Assistive Technology Consultation (“ATC”), and the report issued on 12/28/05. (D-30.)
46. The ATC noted Student followed verbal directions, “demonstrated a significant level of eye contact and was observed to respond with appropriate actions and imitation/approximations of sign/gestures/vocalizations.” The ATC recommended “implementation of a total communication approach that includes the use of vocalization, sign/gesture, and visual supports/picture symbols.” (Id., NT at 450-52.)
47. Student has limited verbal speech and has sign language skills. (NT at 342, 451, 501.)
48. The District’s proposed IEP, dated 1/19/06, incorporated the present levels of academic achievement from the ER. Under “Effect on Involvement and Progress in General Education Curriculum” it states: “[Student] has difficulty integrating sensory

information as needed for organized purposeful activities at school and at home. She struggles with the use of her hands for all fine motor activities and self-care tasks. Student has limited pre-writing and pre-cutting skills for academics in the classroom. [Student] exhibits severe needs in the areas of receptive and expressive language.” (D-31.)

49. The 1/19/06 proposed IEP contains 7 Annual Goals with multiple Short Term Objectives. (Id.)
50. The Program Modifications (“PM”) and Specially Designed Instruction (“SDI”) are to be provided in a special education class, a regular education class, speech room, and throughout the school as needed. (Id.)
51. The school psychologist testified that the PM and SDI were, to a large extent, pre-academic in nature. (NT at 189.)
52. The District’s 1/19/06 Notice of Recommended Educational Placement (“NOREP”) recommended a part-time life skills support program as well as S/L therapy. It shows the only other placement considered was learning support. (D-32.)
53. The part-time life skills class and part-time regular education kindergarten class as currently set forth in the 1/19/06 proposed IEP is based on a ½ day – consisting of 160 minutes per day. However, this could change for the 2006-07 school year to a full-day program. (NT at 425-433.)
54. Student’s proposed ½ time in life skills and ½ time in regular kindergarten was considered by the life skills and regular kindergarten teachers, and they proposed a schedule of:

	<u>Regular Kindergarten</u>	<u>Life Skills classroom</u>	
Monday:	65 minutes	95 minutes	
Tues/Wed/Thurs:	95 minutes	65 minutes	
Friday:	85 minutes	75 minutes	(NT at 425-431.)

55. Student could attend school in the fall with a ½ day in a kindergarten class or a ½ day in a first grade class with the remainder in her life skills class. (NT at 372.)
56. On 2/22/06, the EI program issued a Progress Monitoring Report to Parents which reported Student making progress on her IEP goals. Seven goals were either totally or partially mastered; 4 goals showed “S” for “steady, consistent progress; and 15 goals were listed as “E” for emerging skill/inconsistent progress. (P-2.)
57. The life skills K-2 teacher wrote the Measurable Annual Goals (except for the S/L goals) for the District’s proposed 1/19/06 IEP. (NT at 373-384.)



58. The life skills K-2 teacher wrote those goals without having observed Student but by just reading the ER. (NT at 393.)
59. The life skills K-2 teacher testified that Student could address those goals in the kindergarten classroom but she would be working on a separate curriculum from the other kindergarten students for approximately 80% of the goals. (NT at 393-94.)
60. The life skills K-2 teacher testified that a benefit to a life skills class is small group work which she believes is optimal but she would not state that the regular education classroom, whether kindergarten or first grade, would be unproductive for Student. (NT at 397.)
61. The life skills K-2 teacher testified that when she attended the IEP meeting on 1/19/06, there was a high probability that she would be Student's teacher as that was why she was invited to attend. (NT at 408, 437, 441-43.)
62. The proposed January 2006 IEP was written for a 30-day period upon the assumption that Student would have already learned 40-50% of the skills, so a 30-day trial period was proposed to see her true current levels. (NT at 397-98.)
63. The life skills K-2 teacher came to the IEP team meeting with goals written "because it was assumed that I would be the teacher." (NT at 402.)
64. The only placements consider by the IEP team were learning support and life skills. (NT at 413-14, 417.)
65. The EI coordinator testified that Student attends class with non-eligible peers 100% of the time. (NT at 475.)
66. Student attends the EI program 5 days a week with 2 different peer groups. Students usually attend a Tuesday/Thursday or Monday/Wednesday/Friday schedule. However, an agreement was reached for Student to attend 5 days per week so she would receive the same amount of schooling as she would if attending the District kindergarten program. (NT at 476-77, 579.)
67. On Monday/Wednesday/Friday, Student's class has 13 students with 2 who are typically developing, 1 student has only a S/L delay, others have various needs in social, adaptive, behavior or cognitive areas. (NT at 477-78, 532-34.)
68. On Tuesday/Thursday, Student's class has 10 students, 2 who are typically developing, 1 has only social needs, 5 have developmental delays and 2 have autism. (NT at 479.)
69. The adults are the same for both classes. There is the special education certified classroom teacher and 2 teaching assistants; on Monday/Wednesday/Friday a 3<sup>rd</sup>

- teaching assistant is assigned as a one-on-one assistant for one of the students. Both classes have S/L therapists, OT and PT working in the class. (NT at 480, 522-23, 529, 534-35.)
70. The EI curriculum parallels that of the District's kindergarten curriculum in many areas, including, *inter alia*, coloring, cutting, reading readiness, math and science skills, prereading and identifying letters, learning sight words. (D-23; P-1; NT at 480-90.)
  71. The EI coordinator testified she has known Student for 3 years and while Student's communication delays are a significant barrier to her social interaction because other children expect her to respond verbally, Student imitates other children and want to be with them. (NT at 510-11.)
  72. The EI coordinator testified that it is best practices to have typical peers/models for children with special needs. (NT at 514.)
  73. The EI coordinator testified that the only time the needs of typical children are impeded by being with identified children is when there are behavior problems but that Student does not have behavior issues that would interfere with other students' learning. (NT at 516-17.)
  74. Student is not toilet trained, but her needs are met by having a set bathroom time and Student wears pull-ups. (NT at 517-18.)
  75. The toileting schedule in the District's life skills class would be handled primarily by a TSS or teacher assistant. (NT at 373-74.)
  76. Student wants to communicate with other children and the special education teacher created a "communication book" for her so she could participate in activities. (NT at 552-555.)
  77. The EI classroom teacher testified that Student has made "great progress" – more than she expected when she first met her. The teacher also testified that Student has experienced great progress with peer interaction. ((NT at 558-59.)
  78. Student had a TSS until January; since that time Student has become increasingly verbal, more interactive with peers, has shown more growth in skills, and the classroom teacher is seeing skills which Parent has reported seeing in the home. (NT at 559-575, 602-03.)
  79. Student lacks skills typical of most kindergarten students. (NT at 580-590.)
  80. Dr. M – B.A. in psychology from Wheeling Jesuit University, 1978; M.S. and Ph.D. in psychology from the University of Rhode Island, 1985. He is certified as a school psychologist in Pennsylvania since 1990 and since 1983 in Maryland and is a licensed

psychologist. He has 28 years relevant experience and has been the Director of Psychological Services at The Watson Institute since January 2000. (D-37; NT at 23-25.)

81. The school psychologist has a B.A. in school psychology and sociology from Ball State University, a Master's in school psychology, post Master's work from Ball State, Indiana University, Bloomington, University of Pittsburgh, and Duquesne University. She is a Level Two certified school psychologist in Pennsylvania and has a certificate for W. Virginia and license for Indiana. She has 27 years experience as a school psychologist and is in her 8<sup>th</sup> year as a school psychologist with the District. (NT at 119-120.)
82. The life skills support teacher has a dual certification from Pennsylvania State University in elementary and special education, and has a Master's degree in teaching the developmentally impaired from the University of Pittsburgh. She has been a teacher "off and on" for 22 years and employed with the District for 5 years. (NT at 366.)
83. The speech pathologist has both a Bachelor's degree in speech, language and hearing and a Master's in speech and language from W. Virginia University. She has a certificate of clinical competence from the American speech and Hearing Association and Pennsylvania and W. Virginia certifications to teach in public schools. She has 19 years' experience and is employed by the [local] Intermediate Unit. (NT at 445-46.)
84. The Early Learning Institute center coordinator of the Ohio Valley preschool center has a Bachelor's degree in child development and child care and a Master's degree in special education with a teaching certificate for special education in Pennsylvania. She has 13 years experience at the Institute and has been the center coordinator for 3 years. (NT at 470-72.)
85. The Early Learning Institute special education teacher has a B.S. in education from California University, is certified in both special education and elementary education, has an unspecified number of years of experience, but has been with the Institute for 2 years. ((NT at 520-21.)

### **Witness Credibility**

1. This Hearing Officer finds the testimony of Dr. M, who is the expert mutually agreed upon by Parents and District, to be highly credible. He has 28 years of relevant, extensive experience in the field of autism spectrum disorders; he has researched, taught and publicly addressed a wide variety of audiences. His demeanor throughout his testimony was professional and his commitment to educational practices obvious. Dr. M had prior experiences with Student and saw her in various educational settings for over an hour, spoke with her school administrators, and reviewed records before preparing his IEE. Due to his years of experience in the field of autism spectrum disorders, his

testimony was persuasive that Student does not meet the diagnosis of autistic, but rather is mentally retarded and that Student's educational program must address that particular need. While Dr. M found Student would initially benefit from a part-time life skills class, his focus was on increasing Student's inclusion in the regular education classroom. This was highly persuasive in light of the congressional mandate for mainstreaming.

2. The school psychologist has post-Master's work in school psychology and 27 years of experience as a school psychologist. She spoke knowledgeably and maintained a professional demeanor throughout the hearing, including extensive time testifying. Her concern for Student was obvious and it was clear that she wanted Student to obtain the best possible education the District offers. However, this Hearing Officer discounted her testimony for failure to consider well-accepted inclusionary practices which permit disabled students with significant disabilities to successfully experience a full-time regular education classroom as well as rejecting those which were posited to her during her testimony. Additionally, her determinations regarding the lack of skills that a regular education teacher has to meet the needs of identified children, including things such as coloring or cutting, were such that this Hearing Officer found her testimony less credible.

3. The life skills support teacher has a Master's degree and 22 years of "off and on" teaching. She presented herself well and this Hearing Officer believes she is a capable teacher. However, her testimony had limited value for determining whether or not Student should receive full-time or part-time regular education.

4. The speech pathologist also presented herself in a professional manner, is well educated – possesses a Master's degree in speech and language – and has 19 years of experience and attested to Student's need for speech and language, but was unable to add weight one way or the other as to whether Student should be in a regular education classroom full- or part-time.

5. The Early Learning Institute coordinator has a Master's degree in special education and 13 years' experience with 3 of those years as Coordinator. She has known Student for those 3 years and has seen Student's educational advancement. She was professional and had a calm demeanor, totally believable and reasonable, presented a clear picture of Student – her strengths and needs. Her testimony was very persuasive.

6. The Early Learning Institute special education teacher has a B.S. in education and is dually certified and is an experienced teacher. She presented herself as knowledgeable about Student, expressed a very pleasant surprise at the ways in which Student has grown recently, most particularly due to the absence of the TSS. The teacher was professional and eager to share her insights about Student, and she also was professional, totally reasonable and believable in her testimony. Her testimony was very persuasive as well.

## Issues

1. Can Student's receive a free appropriate public education in a regular education classroom or does she require a part-time life skills kindergarten class?<sup>3</sup>

## Discussion and Conclusions of Law

### Jurisdiction

A due process hearing is a hearing authorized through special education laws of both federal and state legislation. The jurisdiction of such a hearing is highly circumscribed. A hearing officer cannot decide any issue – no matter how significant – which is outside those narrowly defined parameters. Thus, any concerns parents may have regarding education services which concern matters beyond those parameters are beyond the purview of this process and this Hearing Officer.

### Witness Credibility

Within the context of the special education arena, however, "Hearing officers are empowered to judge the credibility of witnesses, weigh evidence and, accordingly, render a decision wherein the hearing officer has included 'findings of fact, discussion and conclusions of law. . . [and] the decision shall be based solely upon the substantial evidence presented at the hearing.'"<sup>4</sup> Quite often, testimony – or documentary evidence – conflicts; this is to be expected for, had the parties been in full accord, there would have been no need for a hearing. Thus, as stated, part of the responsibility of the Hearing Officer is to assign weight to the testimony and documentary evidence of facts which

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<sup>3</sup> This is the agreed upon issue as set forth in the NT at 19. While Parent's counsel then stated there would be an issue of what supplemental aids and services were considered, that is subsumed in the agreed upon least restrictive environment issue. (NT at 20.)

<sup>4</sup> Spec. Educ. Op. No. 1528 (11/1/04), quoting 22 PA Code, Sec. 14.162(f). See also, Carlisle Area School District v. Scott P., 62 F.3d 520, 524 (3rd Cir. 1995), cert. denied, 517 U.S. 1135 (1996).

concern a child's special education experience.

Hearing Officers have the plenary responsibility to make “express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses” and “give some reason for discounting”<sup>5</sup> or crediting evidence. Further, Hearing Officers’ decisions are to “specifically mak[e] credibility determinations among the various witnesses and contrary expert opinions”.<sup>6</sup> The Third Circuit, in Shore Regional High School Bd. Of Educ. v. P.S., 381 F.3d 194 (3d Cir. 2004), held that “if a state administrative agency has heard live testimony and has found the testimony of one witness to be more worthy of belief than the contradictory testimony of another witness, that determination is due special weight. Id.;<sup>7</sup> Carlisle Area School v. Scott P., 62 F.3d 520, 527-29 (3d Cir. 1995). Specifically, this means that a District Court must accept the state agency’s credibility determinations ‘unless the non-testimonial, extrinsic evidence in the record would *justify* a contrary conclusion.’ Carlisle, 62 F.3d at 592 (emphasis added). In this context the word ‘justify’ demands essentially the same standard of review by a federal appellate court. See Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 574 (1985).”<sup>8</sup> This court further held that “the task of evaluating [witnesses’] conflicting opinions lay in the first instance with the ALJ in whose presence they testified.”<sup>9</sup>

Similarly, credibility has been addressed in various jurisdictions. Looking to California, Stevens v. Parke Davis & Co., 9 Cal.3d 51, 67-68 (1973) held that a trier of fact may “accept part of the testimony of a witness and reject another part even though

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<sup>5</sup> Blount v. Lancaster-Lebanon Intermediate Unit, 2003 LEXIS 21639 at \*28 (2003).

<sup>6</sup> *Id.* at \*34.

<sup>7</sup> Citing S.H. v. State-Operated School Dist. of City of Newark, 336 F.3d 260, 271 (3d Cir. 2003)

<sup>8</sup> Shore Regional at 199.

<sup>9</sup> *Id.* at 201.

the latter contradicts the part accepted....[and also] reject part of the testimony of a witness, though not directly contradicted, and combine the accepted portions with bits of testimony or inferences from the testimony of other witnesses thus weaving a cloth of truth out of selected material.” Further, a fact finder may reject the testimony of even an expert witness, although not contradicted. Foreman & Clark Corp. v. Fallon, 3 Cal.3d 875, 890 (1971) And California courts have also found that “one credible witness may constitute substantial evidence”. Kearl v. Bd. Of Medical Quality Assurance, 189 Cal.App.3d 1040, 1052. (1986).

### **Burden of Proof**

The burden of proof consists of both the burden of production and the burden of persuasion. Neither the IDEA nor the IDEIA<sup>10</sup> addressed the subject of burden of proof and therefore the question of which party bore the burden was handled on a state-by-state basis with only a handful of states passing any laws or regulations on the matter. In Pennsylvania, the burden in an administrative hearing challenging an Individualized Education Program (“IEP”) generally fell to the LEA. Recently, however, the United States Supreme Court addressed this issue in Schaffer v. Weast, 126 S. Ct. 528 (2005). In the concluding paragraph of the Opinion of the Court, Justice O’Connor held: “The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief.”<sup>11</sup> In Antoine M. v. Chester Upland School District, Civ. Action No 05-3384, (E.D.Pa. Mar. 14, 2006), the Court held that even where the challenge is not to the sufficiency or appropriateness of an IEP, but rather for the failure to find a child eligible for one, “the overarching logic of Schaffer – that, in the context of the IDEA, the

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<sup>10</sup> The IDEIA is variously referred to in case law as the IDEIA or IDEA 2004. In either event, it is one and the same.

<sup>11</sup> 126 S.Ct. at 537.

party bringing the challenge bears the burden of proof...[and] [a] student’s challenge to a district’s determination that he or she is not eligible for an IEP should not be treated any differently than a challenge to the adequacy of an IEP.” Thus, where a “case is brought solely under the IDEA and arises in a state lacking a statutory or regulatory provision purporting to define the burden of proof in administrative hearings assessing IEPs, *Schaffer* controls.”<sup>12</sup>

The burden of persuasion in an administrative proceeding lies with the party seeking relief.<sup>13</sup> This requires the Hearing Officer to make a determination of whether or not the evidence is “equipose” rather than preponderant. Preponderance of the evidence is defined as evidence presented by one party that is of greater weight or more convincing than the evidence offered by the other party. In other words, where there is evidence which tips the scales, the party which presented that evidence prevails. However, where the Hearing Officer finds the evidence is equally balanced on an issue, the non-moving party prevails.

In Pennsylvania, the order of presentation of the case is left to the discretion of the Hearing Officer. The Pennsylvania Special Education Dispute Resolution Manual states, in pertinent part, in Section 810 – Burden of Proof – that “[d]espite this general rule, a Hearing Officer has discretion to change the order of presentation if he or she believes it is warranted. An example of where that may occur would be where a school district seeks to change a student’s placement, and a parent initiates a due process hearing to challenge the change of placement. In that instance, a hearing may be more efficiently

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<sup>12</sup> *L.E. v Ramsey Bd. Of Educ.*, 435 F.3d 384, 391 (3d Cir. 2006).

<sup>13</sup> *Greenwood v. Wissahickon Sch. Dist.*, Civ. Action No. 04-3880 (E.D. Pa. Feb. 3, 2006) (“Hence, because there is no Pennsylvania law imposing the burden on the district, *Schaffer* applies and the burden of persuasion at the administrative level in Pennsylvania is now on the party contesting the IEP”.)



conducted by commencing with the district's explanation of the rationale for the change."<sup>14</sup> This case warranted such a change of presentation of evidence (burden of production) and the parties agreed that the District would present its case first.

After a close examination and analysis of all of the evidence and the testimony, this Hearing Officer did not find "equipoise". Thus, the burden of persuasion was not at issue in this case.

### **Least Restrictive Environment Appropriate for Student**

While the IEP goals and objectives (except for those for speech and language) were written prior to the Team meeting by the life skills teacher with that placement in mind, Parents are not questioning the appropriateness of the District's proposed IEP but they do disagree with where it is to be implemented.

The IDEIA provides that identified students are to be educated to the maximum extent appropriate with children who are not disabled. To that end, "special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aides and services cannot be achieved satisfactorily." 20 U.S.C. Sec. 1412(a)(5)(A); 34 C.F.R. Sec. 300.550.

The Third Circuit addressed the issue of least restrictive environment in Oberti v.

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<sup>14</sup> See 20 U.S.C. §§1401-1482; 34 C.F.R., Part 300; 22 Pennsylvania Code at Chapter 14.

Board of Education of Clementon School District, , 995 F.2d 1204 (3d. Cir. 1993).<sup>15</sup>

The court set forth what is now a famous two-part test to determine the appropriateness of a student's placement. First, the court determines whether education in the regular classroom with supplementary aids and services can be achieved satisfactorily.<sup>16</sup> To accomplish this, *Oberti* set forth three factors: (1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom with supplementary aids and services; (2) a comparison of the educational benefits available in a regular class and the benefits provided in a special education class; and (3) the possible negative effects of inclusion on the other children in the class.<sup>17</sup> If there is a determination that the child cannot be educated in the regular education classroom, the second part of the test is considered. At that point, the court must decide whether the district has mainstreamed the child to the maximum extent possible.<sup>18</sup>

#### Part I of II-Part Test

##### Factor No. 1 – Reasonable efforts to accommodate in the regular education classroom with supplementary aids and services

Placement must be in the least restrictive environment where Student can receive a meaningful educational benefit.<sup>19</sup> *Oberti* requires that before a placement other than the regular education class can be considered, “the school ‘must consider the *whole range* of supplemental aids and services, including resource rooms and itinerant instruction,’

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<sup>15</sup> *Oberti* is particularly persuasive because Rafael Oberti, although 2 years older than Student and having a history of behavior problems which Student does not experience, had, by virtue of Down's syndrome, severely impaired intellectual functioning and limited ability to communicate. Student also has a limited IQ and ability to communicate. *Id.* at 1207.

<sup>16</sup> *Id.* at 1215.

<sup>17</sup> *Id.* at 1220.

<sup>18</sup> *Girty v. Sch. Dist. of Valley Grove*, 163 F.Supp.2d 527, 533 (W.D.PA 2001)

<sup>19</sup> See *S.H. v. State-Operated Sch. Dist. of the City of Newark*, 336 F.3d 260, 272 (3d Cir. 2003).

*Greer*, 950 F.2d at 696, speech and language therapy, special education training for the regular teacher, behavior modification programs, or *any other available aids or services* appropriate to the child’s particular disabilities. The school must also make efforts to modify the regular education program to accommodate a disabled child.” Oberti, 995 F.2d at 1216 (emphasis added). Absent this “serious consideration to including the child in a regular class with such supplementary aids and services and to modifying the regular curriculum to accommodate the child, *then it has most likely violated the Act’s mainstreaming directive*. ‘The Act does not permit states to make mere token gestures to accommodate handicapped students; its requirement for modifying and supplementing regular education is broad.’ *Daniel R.R.*, 874 F.2d at 1048; see also *Greer*, 950 F.2d at 696.” Oberti, 995 F.2d at 1216 (emphasis added.)

While the District offers Student part-time life skills and part-time regular kindergarten class inclusion, there is no evidence in the record that there was any serious discussion of supplementary aids and services to enable Student to remain in a regular classroom placement on a full-time basis.<sup>20</sup> Rather, the record shows just the opposite – the school psychologist only “briefly considered” full inclusion in the regular education classroom.<sup>21</sup> Indeed, the life skills teacher was asked to come to the IEP Team meeting with goals already prepared because there was a high probability that she would be

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<sup>20</sup> See F/F No. 52 – the NOREP shows the only other placement considered was learning support.

<sup>21</sup> F/F No. 11. Further, The school psychologist was not persuasive when testifying that Student would have limited success compared to her peers when coloring or cutting in a regular class with the services of an instructional aide . It is not necessary for Student to attain the same level – or even broach the same level – of mastery of an academic area. Rather, one asks: “can the IEP be implemented in the regular education classroom?” As addressed by the court in Roncker v. Walter, 700 F.2d 1058 (6<sup>th</sup> Cir. 1983), the issue of “bringing educational services to the child” rather than “bringing the child to the services” established a “principal of portability”, and held that “if a desirable service currently provided in a segregated setting can feasibly be delivered in an integrated setting it would be inappropriate under P. L. 94-142 to provide the service in a segregated environment.” Id. at 1063.

Student's teacher.<sup>22</sup> Testimony and the District's NOREP shows the only other placement considered was learning support.<sup>23</sup>

The school psychologist testified that she did not believe a regular education teacher could "bridge the gap" between the curriculum and Student's needs nor "have the skills to be able do that."<sup>24</sup> These conclusions were reached without the IEP Team's consideration of a full range of supplementary aids and services which could enable Student to remain in the regular education kindergarten class for academics. There was no discussion of special teacher training, co-teaching, use of an itinerant teacher trained in aiding students with mental retardation, consultation for the regular teacher, or any other well-accepted inclusion techniques. See Girty, 163 F.Supp.2d at 536 ("simple techniques exist which could be used to facilitate Spike's inclusion in regular education instruction....with a small amount of research into the methods that many school districts already use, a program beneficial to Spike could be developed."); Blount, 2003 LEXIS 21639 at 27 ("A review of the record... does not show that the IU proposed any specific supplementary aids and services,...The IU did not present any evidence as to what specific supplemental aids and services it considered. Its exhibits...make no reference either to those specific supplementary aids and services typically available to comparable children, or to any actually considered by the relevant decision-makers in the instant case.") and Oberti, 995 F.2d at 1211 ("a number of commonly applied strategies...could be used, in combination, by the School district to integrate Rafael in a regular classroom, including: (1) modifying some of the curriculum to accommodate Rafael's different level of ability; (2) modifying only Rafael's program so that he would perform a similar

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<sup>22</sup> F/F Nos. 57, 58, 61 and 63.

<sup>23</sup> F/F No. 52.

<sup>24</sup> F/F No. 17.

activity or exercise to that performed by the whole class, but at a level appropriate to his ability; (3) ‘parallel instruction,’ i.e., having Rafael work separately within the classroom on an activity beneficial to him while the rest of the class worked on an activity that Rafael could not benefit from; and (4) removing Rafael from the classroom to receive some special instruction or services in a resource room, completely apart from the class. Dr. Brown explained that with proper training a regular teacher would be able to apply these techniques and that, in spite of Rafael’s severe intellectual disability a regular teacher with proper training would be able to communicate effectively with Rafael. Dr. Brown also testified that many of the special educational techniques applied in the segregated Winslow class could be provided for Rafael within a regular classroom....[Further] speech and language therapy Rafael needs could be most effectively provided within a regular classroom....language and speech therapy could easily be provided by a therapist inside the regular class during ongoing instruction if the therapist were able to collaborate ahead of time with the instructor regarding the upcoming lesson plans....Dr. McGregor...testified that, given the resources and expertise available to public schools ... the School District should be able to design an inclusive program for Rafael with assistance from professionals who have experience integrating children with disabilities in regular classes.”) Steps such as these are what Oberti referred to as “reasonable efforts to include [Student] in a regular classroom with supplementary aids and services”. Oberti, 995 F.2d at 1204.

The District offered no testimony to show there was any consideration of any combination of supplementary aids and services or that Student would be unable to receive a meaningful educational benefit with such aids and services. Further, the school

psychologist testified she would have no way of knowing whether or not Student could experience a meaningful educational benefit in the regular education classroom if provided all of the necessary aids and services.<sup>25</sup> Certainly absent the legally mandated full range of supplementary aids and services, Student is unlikely to receive educational benefit from the regular kindergarten class. This Hearing Officer does not dispute that the life skills class could be the optimal placement. Nonetheless, the legal standard is not what is optimal. Rather, it is the least restrictive environment where student can obtain an adequate or “meaningful educational benefit in light of his individual needs and potential.”<sup>26</sup>

This Hearing Officer finds the evidence not only preponderant but clear and convincing that the District failed to make reasonable efforts to accommodate Student in the regular classroom with appropriate supplemental aids and services.

Factor No. 2 - A comparison of the educational benefits available in a regular class and the benefits provided in a special education class

This portion of the analysis requires (1) a heavy reliance on the “testimony of educational experts”, and, (2) a requirement that the Hearing Officer “must pay special attention to those unique benefits the child may obtain from integration in a regular classroom which cannot be achieved in a segregated environment, i.e., the development of social and communication skills from interaction with nondisabled peers”.<sup>27</sup> (emphasis added.) The second element was discussed at length by the Oberti court. It found a “fundamental value of the right to public education for children with disabilities is the right to associate with nondisabled peers....Thus, a determination that a child with

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<sup>25</sup> F/F No. 21.

<sup>26</sup> T.R. v Kingwood Township Bd, of Educ., 205 F.3d 572, 578 (3<sup>rd</sup> Cir. 2000).

<sup>27</sup> Oberti at 1216.

disabilities might make greater academic progress in a segregated, special education class may not warrant excluding that child from a regular classroom environment. We emphasize that the Act does not require states to offer the same educational experience to a child with disabilities as is generally provided for nondisabled children. [cites omitted.] To the contrary, states must address the unique needs of a disabled child, recognizing that that child may benefit differently from education in the regular classroom than other students. See *Daniel R.R.*, 874 F.2d at 1047. In short, the fact that a child with disabilities will learn differently from his or her education within a regular classroom does not justify exclusion from that environment.” Oberti at 1216-1217.

A. Testimony of Educational Experts

Dr. M testified his preference for a part-time life skills class to enable Student to transition to a regular Kindergarten class and opined that that could take place in a matter of weeks, as opposed to months or even years.<sup>28</sup> He further stated that Student could do parallel academic activities in a regular education class; for example, while typical peers were adding and subtracting numbers, Student could be working on coins.<sup>29</sup> His professional opinion was that Student would receive a lesser level of educational benefit from a full-time regular Kindergarten class than a part-time Kindergarten and part-time life skills class, but could not state that Student would not receive a meaningful educational benefit from a full-time regular placement with a full range of supplementary aids and services.<sup>30</sup>

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<sup>28</sup> F/F No. 42.

<sup>29</sup> F/F No. 41. See Oberti at 1211. Parallel instruction is included as an inclusion technique. -- This position is at variance with the District. The District plans for all of Student’s academic activities to be provided for in the life skills class.

<sup>30</sup> F/F No. 39. Additionally, the District and Dr. M’s observations and evaluations took place while Student still had a TSS. Student’s classroom teacher testified that Student has made remarkable progress this year without the TSS.

Also persuasive was Student's program coordinator's testimony that Student currently attends class with non-eligible peers 100% of her educational day and that it is best practices to have typical peers/models for children with special needs.<sup>31</sup> Additionally, some of the identified students have minimal exceptionalities such as a speech and language delay or social needs. Student's classroom teacher testified very credibly that Student has recently experienced "great progress" since she has been without the TSS, thus forcing her to be more independent, that there has been progress with peer interaction - that Student is reaching out to these peers and is making effort to model herself after them, and Student is becoming increasingly verbal.<sup>32</sup>

B. Requirement that Hearing Officers "must pay special attention to those unique benefits the child may obtain from integration in a regular classroom which cannot be achieved in a segregated environment."

As previously noted, Student has - just this year - started experiencing unexpected gains in her efforts at interaction with nondisabled peers. She is attempting to be more verbal and independent. Certainly the opportunity to model those more developed behaviors exists in the regular classroom. Opportunities for developing friendships with nondisabled students and peer modeling in academic areas such as coloring and cutting are available in the regular classroom. While the District would have to modify the curriculum to meet Student's needs, this is "not a legitimate basis upon which to justify excluding a child' from the regular classroom unless the education of other students is significantly impaired."<sup>33</sup>

On the other hand, there certainly are benefits to a life skills program. Small class size and a 1:1 ratio of adults to children is very appealing, as is the immediate access to a

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<sup>31</sup> F/F Nos. 65 and 72.

<sup>32</sup> F/F Nos. 76, 77, 78.

<sup>33</sup> Oberti at 1222.



special education teacher with the years of experience that the District is willing to provide. The school psychologist believes this is the setting where Student could benefit most from her educational program.<sup>34</sup>

In comparing the benefits, this Hearing Officer must again turn to Oberti. “[A] determination that a child with disabilities might make greater academic progress in a segregated, special education class may not warrant excluding that child from a regular classroom environment.”<sup>35</sup> Further, the Blount court found a Congressional preference for mainstreaming children “at the earliest possible time, rather than assigning a disabled child to special education with the hope that he will improve sufficiently to go into a mainstream educational setting.”<sup>36</sup>

It appears to this Hearing Officer that while the life skills class could offer a higher degree of personal attention, the testimony of the EI coordinator and classroom teacher, combined with that of Dr. M, leads to the conclusion that if Student was provided with supplementary aids and services individualized to Student’s educational needs, Student could currently experience a meaningful educational benefit from a regular education class. As in Oberti, of course, there is the possibility that as Student reaches higher grades, “inclusion in regular academic classes may become less appropriate” for Student.<sup>37</sup> That decision is not before this Hearing Officer, however, and it would certainly be premature to speculate upon.

Factor No. 3 - The possible negative effects of inclusion on the other children in the class.

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<sup>34</sup> F/F No. 22.

<sup>35</sup> Oberti at 1217.

<sup>36</sup> Blount, 2003 LEXIS 21639 at 41, fn. 5.

<sup>37</sup> Oberti, 995 F.2d at 1224.

Oberti requires a consideration of any disruptive behaviors which could negatively impact upon the education of other classroom children.<sup>38</sup> There is no dispute that Student's behaviors are within acceptable norms and this is not a concern.

#### Part II of II-Part Test

The second part of the test, which is a determination as to whether the school has mainstreamed the child to the maximum extent appropriate, is reached only if there is a finding that placement outside of the regular classroom is required. There is no need to address the second part of the test in this case.

#### CONCLUSION

The foregoing analysis leads to the conclusion that the Parents met their burden of proving by a preponderance of the evidence<sup>39</sup> that District did not consider a regular education placement with supplementary aids and services and that Student can receive a free appropriate public education in a regular education classroom.

#### Compensatory Education Awards

A student is entitled to compensatory education starting when the District knew or should have known that it had not provided FAPE. The period of compensatory education is equal to the period of deprivation, excluding the time reasonably required for the District to rectify the deprivation.<sup>40</sup>

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<sup>38</sup> Id. at 1217.

<sup>39</sup> Parents chose to meet their burden through the testimony of the EI coordinator, classroom teacher, and Dr. M who was a mutually-agreed upon expert, as well as by Parents' counsel's cross-examination of District witnesses.

<sup>40</sup> M.C. v. Central Regional Sch. Dist. 81 F.3d 389 (3d Cir. 1996).

The law does not require a finding of bad faith or egregious circumstances in order to award compensatory education; neither does it depend upon the vigilance of the parents. M.C. v. Central Regional Sch. Dist., 81 F.2d 389 (3d Cir. 1996). Compensatory education is an appropriate remedy to cure the violation of statutory rights while the child is entitled to those rights. Big Beaver Falls Area Sch. Dist. V. Jackson, 615 A.2d 910 (1992); M.C. v. Central Regional Sch. Dist., *supra*. Courts have found that compensatory education is the appropriate remedy where there is a finding of denial of a FAPE, even where the student maintained good grades and made educational progress. Punxsutawney Area Sch. Dist. v. Kanouff, 719 A.2d 198 (1999). Obviously, then, a program which confers only trivial or minimal benefit is not appropriate. Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3d Cir. 1988).

#### Nature of Compensatory Education Award

Three Appeal Panel decisions are particularly helpful in elucidating the nature of compensatory education awards and provide guidance for this decision.

First, Spec. Educ. Op. No. 1481, p. 13, explains:

The compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product or device that assists him in overcoming the effects of having been denied FAPE. To that end, the compensatory education shall be in addition to, and not supplant, educational services and/or products/devices that should appropriately be provided by the district through student's IEP, to assure meaningful educational progress. These compensatory education services may occur after school hours, on weekends and/or during summer months when convenient for STUDENT and his parents. The hours and nature of compensatory education created by this paragraph may be implemented at any time from the present to student's 21<sup>st</sup> birthday, as determined by the IEP team.

Second, Spec. Educ. Op. No. 1431 (2004), pages 10-13, clarifies the award should meet

the present need of Student, rather than provide a simple replacement of services denied through lack of FAPE:

“Compensatory”, and court interpretations of it in education, continue to suggest to this Panel, as they have in the past, a preferred remedy that replaces precisely what was denied. In a strict sense, compensating for educational deprivation entails, to the extent possible, providing those specific services that should have been a part of FAPE in the first place. Otherwise, the relationship between conduct resulting in denial of services and the remedy, likely necessary to prevent the latter from becoming punitive, can be tenuous.

Nevertheless, service-for-service remedial replacement may not always be “compensatory”, particularly where a student can no longer derive “meaningful educational benefit” from them. Failing to provide that benefit, and in turn an appropriate education, is what we believe compensatory education seeks to address, and not the simple absence of a particular service. Conversely, awarding the identical service later, from which obtaining such benefit has become impossible, is not compensatory and emphasizes the service rather than the benefit.

Consequently, we believe the equitable nature of this remedy permits, when previously denied services are no longer appropriate, discretionary substitution of others. In the first instance, the latter should be directed towards achieving what was or should have been the goals of the deprived services, but this too may fall victim to the deleterious effect time can have on appropriateness. Where that too is the case, then we see a substituted service in furtherance or enrichment of the student’s then current IEP documented educational goals generally as “compensatory”.

Decisions as to the form, location, scheduling, and costs, so long as they remain roughly equivalent to the public costs of these substituted services, can rest with no other than the parent. These controversies incept in district failure to provide “meaningful educational benefit”, and if they then influence substituted services to remedy that, the rule prohibiting their profit therefrom is besmirched. It is, in fairness, parents who expend the due process proof and remedy seeking effort, and who must likely deal with making the student available for compensatory services. We see no impropriety, therefore, in parental fashioning of the delivery vehicle for substituted services, if the services are developmental, remedial, or enriching instruction in furtherance of the then pending or a future IEP. See In Re the Educational Assignment of B.R., Special Education Opinion 1102 (2001). Obviously, then parents’ discretion is not complete, and a district is not faced with a fait accompli, as it may challenge parental selections in the proper forum. It was, then, completely acceptable for this District not to have a role in determining the nature of the compensatory education remedy.

...

It is insignificant that the goals and services student is recognized as needing are not documented in an IEP, since the focus of compensatory education is and should be that which was denied and not where its need is memorialized.

Further, in its Exceptions, the District seeks a limit on the rate for compensatory education services selected by parents. In fact, B. R. and too numerous to cite cases following it, in some instances, support limiting such costs to what the district would have incurred, since the services are in the nature of compensation rather than damages. We believe the line of demarcation for applying this limitation can only rest in the fact that this remedy is equitable, and facts such as parental inability to secure properly selected services at the district's rate or cost may justify not applying it. Nonetheless, on this record no factual basis is established for not applying the limitation....

Lastly, further discussion regarding the cost to the District for providing services and the Hearing Officer's authority to order specific services or programs is discussed in Spec.

Educ. Op. No. 1122 (2001), p. 9:

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

....

By way of dicta, we inform the District (and other interested parties) that this rationale does not preclude a Hearing Officer from ordering specific services or programs as compensatory education in some cases.

I hereby adopt the rationale of these three Appeal Panel decisions and award the following:

Compensatory education is due from the date of the District's January 19, 2006 proposed IEP - as by that date the District knew or should have known it was not offering

FAPE - through the end of the 2005-06 School Year, less any holidays, vacation days, or days Student was absent from school. The computation of compensatory education per day is the total amount of time the District would have educated Student in the life skills class.

Attorney's Fees

34 C.F.R. Sec. 300.513(a) provides that "In any action or proceeding brought under section 615 of the Act, **the court, in its discretion**, may award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party." Emphasis added.

In light of the foregoing, a Hearing Officer is unable to award attorney's fees

**ORDER**

For the reasons hereinabove discussed, it is hereby ordered:

1. Student is to receive her free appropriate public education in a regular education classroom.
2. The School District is ORDERED to compute the number of hours Student would have attended a life skills classroom from 1/19/06 through the end of the 2005-06 school year and provide Student with compensatory education as provided in this Decision.
3. Parents are not awarded attorney's fees.

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Margaret Drayden,  
Hearing Officer

June 8, 2006