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**HEARING OFFICER DECISION/ORDER
CHILD'S NAME: J.G.
(FILE # 6353/05-06 AS) CARLYNTON SCHOOL DISTRICT**

Date of Birth: xx/xx/xx
Type of Hearing: OPEN
Dates of Hearing: April 7, 2006; April 26, 2006

I. PARTIES TO THE HEARING

PARENTS

DATE TRANSCRIPT RECEIVED:
April 29, 2006

PARENT REPRESENTATIVE:

HEARING OFFICER:
Dorothy J. O'Shea, Ph.D.

Signature: Hearing Officer

DISTRICT CONTACT:

Dr. Walter McMillan
Pupil Service Coordinator
435 Kings Highway
Carnegie, PA 15106

May 11, 2006
Date of Decision/Order

DISTRICT REPRESENTATIVE:

Jocelyn M. Perry, Esquire
503 Ft. Pitt Commons Building
445 Ft. Pitt Blvd.
Pittsburgh PA 15219

HEARING OFFICER DECISION/ORDER
CHILD'S NAME: Student
(FILE # 6353/05-06 AS) CARLYNTON SCHOOL DISTRICT

II. BACKGROUND INFORMATION

Student, a resident of the Carlynton School District (i.e., the District), was a [teenaged] student attending the District's *Carlynton High School* during the 2005-2006 school year. The parties participated in a previous due process hearing in the Spring 2004 to address the appropriateness and implementation of Student's *Gifted Individualized Educational Program* (GIEP). As a result of that hearing, the hearing officer ordered the District to develop an appropriate GIEP prior to the beginning of the 2005-2006 school year.

However, during the spring 2004, Student received an independent educational evaluation (IEE), diagnosing a Specific Learning Disability and recommending Student's eligibility for and need of Special Education. The current hearing centered on the parties' dispute of the appropriateness of Student's individualized services offered and implemented. Because the Parents alleged a denial of Student's free appropriate public education (FAPE), the Parents claimed Student should be awarded compensatory education during his eighth grade (2004-2005) and ninth grade (2005-2006) years.

III. FINDINGS OF FACT

1. Student was born xx/xx/xx (Parents' Exhibit 1, page 1: P1, page 1).
2. Student received Gifted Support programming when he was in the second grade (P4, page 1).
3. On May 22, 2003, the *Huntington Learning Center* evaluated Student. This report recommended a skills-based tutoring program focusing on phonics and spelling, vocabulary and language skills, reading comprehension skills and strategies, study skills, and math concepts-computation skills (P7, pages 1-3).
4. On October 9, 2003, Student received a GIEP (P1, page 2; HO 3, pages 1-10).
5. On October 23, 2003, Student received a second GIEP that included goals/objectives in Science (P1, page 2).
6. On October 23, 2003, Student's mother signed a *Notice of Recommended Assignment* (NORA), agreeing with the October 23, 2003 GIEP (P1, page 2).
7. Student received an IEE, dated March 15, 2004, conducted by personnel from *Johns Hopkins University*. The report diagnosed Student with a reading disability (P9, SD 3).
8. Student's March 15, 2004 IEE recommended Student's continuation of his GIEP and participation in the District's Gifted Support program entitled: *GATE* (P9, pages 16-17).
9. Student's IEE recommended independent research and mentoring projects, science enrichment, skills-building strategies, and extracurricular activities based on Student's needs (P9, pages 1-17).
10. In the Spring 2004, the Parents alleged that Student's October 23, 2003 GIEP was inappropriate and not being implemented (P1, page 1).
11. The Parents sought compensatory education for Student's Grade 7 (the 2003-2004 academic year) (P1, page 1).
12. On May 10, 2004, the parties participated in a due process hearing (Notes of Transcript, page 26: NT 26; P1, page 5).
13. By Order dated May 24, 2004, the hearing officer directed the District to develop Student's appropriate GIEP for Grade 8, prior to the beginning of the 2004-2005 School Year (P1, page 5).
14. The May 24, 2004 Decision/Order directed the District to provide Student with 108 hours of Compensatory Education, such that, "*the 108 hours of compensatory education were to supplement, not replace appropriate instruction according to Student's GIEP*" (P1, page 5).
15. The District received the report from *Johns Hopkins University* in the Spring 2004 (SD 6).

16. The District did not create a new GIEP prior to the 2004-2005 school year (HO 3, NT 139).
17. The District implemented the October 23, 2003 GIEP during the beginning of the 2004-2005 school year, referring to it as the “*pendent*” GIEP (NT 142-143).
18. On September 7, 2004, the District referred Student for a reevaluation “*to review psycho-educational evaluation completed by John’s Hopkins Center for Talented Youth 3/15/2004*” (P10, page 1; SD 4).
19. On September 7, 2004, Student’s mother granted her permission to start “*an initial Gifted Multidisciplinary Evaluation as you propose*” (P10, page 2).
20. On September 28, 2004, the Intermediate Unit received the District’s referral. Included in data presented to the IU was Student’s 1st semester 2004/2005 schedule. His schedule highlighted Student’s participation in *GATE*, Algebra, English, and Reading (P11, pages 1-3).
21. Ms. R, IU school psychologist, received the assignment to review Student’s evaluation data (P11, page 1).
22. On October 12, 2004, the District provided another *Permission to Evaluate* form “*to review psycho-educational evaluation completed by John’s Hopkins Center for Talented Youth 3/15/2004*” to begin a special education evaluation (P12, page 1; SD 5).
23. On October 19, 2004, Student’s mother granted her permission for special education consideration to start “*an initial evaluation as you propose*” (P12, page 2; SD 5, page 2).
24. The District conducted the special education evaluation, culminating in Student’s November 15, 2004 *Evaluation Report* (ER) (P13, pages 1-9).
25. Student’s November 15, 2004 ER summarized the psycho-educational evaluation completed by *John’s Hopkins University*, current classroom based assessments, teacher observations, a student interview, and parental input (P13, pages 1-6; SD 6).
26. Student’s November 15, 2004 ER concluded, Student is a student with a Specific Learning Disability and in need of specially designed instruction, in addition to Student’s need for Gifted Support (P13, page 7; SD 6).
27. Student’s November 15, 2004 ER recommended that Student’s IEP team determine an appropriate program for Student and incorporate goals and objectives from his GIEP into his new educational program (P13, page 7; SD 6, page 7).
28. Student’s November 15, 2004 ER recommended Student’s need for reading instruction from a learning support teacher, “*to improve reading fluency and comprehension skills... (i.e., previewing text, highlighting, making margin notes, generating questions, summarizing and paraphrasing important details, and predicting future events)*” (P13, page 7; SD 6, page 7).
29. Student’s November 15, 2004 ER also recommended Student’s need for organizational, study, and time management skills (P13, page 7; SD 6, page 7).
30. Only the signature of the IU school psychologist appeared on the signature page of Student’s November 15, 2004 ER provided to the Parents (P13, page 9; NT 181-183).
31. The signature of the IU school psychologist, principal, seven teachers, Student’s Parent, friend of Student’s Parent, and the Pupil Services Coordinator appeared on the signature page of Student’s November 15, 2004 ER provided by the District (SD 6, page 10; NT 181-183).
32. On December 1, 2004, Ms. R, the District’s Pupil Services Secretary, sent Student’s Parents a copy of Student’s November 15, 2004 ER, scheduling Student’s GIEP meeting for December 3, 2004 (P14, page 1).
33. Student’s IEP team met December 6, 2004 and reconvened December 16, 2004 (SD 1).
34. Student’s December 2004 IEP contained goals related to organizational skills in his major subject areas; use of study guide and homework materials; academic assignments and materials offered in English class; oral reading and accurate reading fluency skills, and enrichment to the 8th grade Earth/Space science curriculum by completing special projects and activities designed by the gifted coordinator and the Earth/Space science teacher (SD2).

35. On December 16, 2004, the District offered a *Notice of Recommended Placement* (NOREP) to Student: "*Itinerant Gifted Support and one on one tutoring for Reading*" (SD 27, pages 1-2).
36. On December 16, 2004, Student's mother approved the December 16, 2004 NOREP (SD 27, page 2; NT 163; P3, page 2).
37. Student's mother claimed that the December 16, 2004 IEP, resulting in the December 16, 2004 NOREP, was not what the Parent was given to sign during the December 16, 2004 meeting. The Parent claimed she was asked to sign another IEP version that the Parent already had entered into evidence during Student's hearing (P1, P2; NT 162).
38. On January 10, 2005, the District's Pupil Services Coordinator sent a memo to Superintendent Dr. D to update Dr. D on Student's IEP and teachers' concerns (P16, page 1).
39. On February 2, 2005, the District sent a letter to Ms. C, the District's Reading Specialist, outlining Student's "*tutoring in reading*" (P 15, page 1; SD 22, page 2).
40. The February 2, 2005 letter indicated Student's tutoring schedule, location, reading program, and reading level. The teacher would receive training and materials prior to instructing (P 15, page 1; SD 22, page 2).
41. On April 7, 2005, Ms. S, the District's Gifted Support teacher, wrote a letter protesting the March 24, 2006 IEP meeting held without her and the Learning Support teacher, Ms. M (SD 25, page 1; NT 172-173).
42. On April 7, 2005, Ms. S stated Student's IEP was updated at the December 16, 2004 meeting in which both Ms. S and Ms. M requested to be present. The meeting was held without the teachers' presence during after school hours with just Student's mother, the mother's friend, and the District's Pupil Services Coordinator present (SD 1; NT 162).
43. On April 7, 2005, Ms. S stated there were considerable changes made to the December 16, 2004 IEP that were originally drafted December 6, 2004 (SD 1; NT 162-163).
44. On April 14, 2005, Ms. S offered another IEP to the Parents via the Parents' receipt of April 4, 2005 and April 12, 2005 phone calls (P17, pages 1-16).
45. The April 14, 2006 IEP cover page stated, "*Regular and special education teachers and mother agreed to change the science goals*" (P17, page 1).
46. Ms. S stated, Student's mother was offered enrichment on his pendent IEP (NT 177-178) but Student's mother declined (NT 179-181).
47. Ms. S stated students requiring Gifted Support are to schedule the *GATE* class on their own, and if they don't physically schedule the *GATE* class, they are not put in scheduled time for Gifted Support (NT 168-169).
48. Student did not schedule the *GATE* class for the 2005-2006 school year, so he did not receive the *GATE* class (NT 169).
49. On September 2, 2005, Dr. M, the District's newly appointed Pupil Services Coordinator, wrote a letter to Student's mother agreeing to change Student's tutoring dates (SD 23, page 1).
50. On September 6, 2005, the District sent Student's Parents an *Invitation to Participate in the IEP Team Meeting or Other Meeting*, set for September 15, 2005 (P18, pages 1-2).
51. On September 15, 2005, the District offered Student another IEP (P19, page 2; SD 8, page 2).
52. In addition to Student's mother, a friend of the Parent, the Local Educational Agency (LEA) representative, Pupil Services Coordinator, guidance counselor, two regular education teachers, and a Gifted Support teacher were members of the September 15, 2005 IEP team (P19, page 2; SD 8, page 2).
53. Student's September 15, 2005 IEP addressed three goals (i.e., related to organizational skills, academic assignments and materials offered in the *Scholars 9 English* class, and oral reading and reading fluency) (P19, pages 8a-8b; SD 8, pages 10-12).
54. Student's September 15, 2005 IEP named Student's Related Services: "*In-service Training for both Regular and Special Education teachers*" (P19, page 11; SD 8, page 15).

55. Student's September 15, 2005 IEP named Student's Supports for School Personnel Provided for the Child: "*One on one instruction to remediate the reading skill deficit*" (P19, page 11; SD 8, page 15).
56. Student's September 15, 2005 IEP named Student's Educational Placement: "*Itinerant Learning Support for Reading and Gifted Support.*" It named the Type of Support: "*Reading LS-240 minutes/week beginning by December 1, 2005-April 29, 2006*" (P19, page 12; SD 8, page 16).
57. On September 22, 2005, Ms. S, Gifted Support teacher, and Ms. M, Learning Support teacher, sent a letter to Student's Parents enclosing Student's "*most current I.E.P., dated 9/15/05, stating...the goals written into to this current I.E.P. will be implemented immediately*" (P20, page 1).
58. On January 17, 2006, the District sent Student's Parents an *Invitation to Participate in the IEP Team Meeting or Other Meeting*, set for January 25, 2006 (P21, page 1).
59. On February 3, 2006, the District's Pupil Service Coordinator, Dr. M, sent Student's Parents a copy of Student's IEP and NOREP (P 24).
60. On January 31, 2006, the District conducted another IEP meeting. Student's mother, a friend of the Parent, the LEA, a guidance counselor, four regular education teachers, the Learning Support teacher, the Pupil Services Coordinator, and the Gifted Support teacher were members of the January 31, 2006 IEP team (P25, pages 1-13; SD 9, page 2).
61. Student's January 31, 2006 IEP stated, "Student's "*Individualized instruction will be in place four days a week ending April 30, 2006. This will assist Student in fluent, accurate, and oral reading...*"(P25, page 4; SD 9, page 4).
62. Student's January 31, 2006 IEP provided no annual goals (P25; SD 9).
63. Student's January 31, 2006 IEP named Student's Related Services: "*In-service Training for both Regular and Special Education teachers*" (P25, page 10; SD 9, page 10).
64. Student's January 31, 2006 IEP named Student's Supports for School Personnel Provided for the Child: "*One on one instruction to remediate the reading skill deficit*" (P25, page 10; SD 9, page 10).
65. Student's January 31, 2006 IEP named Student's Educational Placement: "*Itinerant Learning Support for Reading and Gifted Support.*" It named the Type of Support: "*Reading LS-240 minutes/week beginning by December 1, 2005-April 29, 2006*" (P25, page 11; SD 9, page 11).
66. On January 31, 2006, the District's NOREP stated that Student's recommended educational placement is "*a continuation of gifted support and learning support*" (P29, pages 1-2).
67. On February 10, 2006, Student's Parent did not approve the NOREP (P29, pages 1-2).
68. On February 14, 2006, the District received back from Student's Parents a January 31, 2006 NOREP requesting a due process hearing (P29, pages 1-2).
69. On February 16, 2006, Dr. M, the District's Pupil Services Coordinator, sent a letter to Student's Parents noting receipt of the Parents' request for due process and asking for specificity concerning Student's September 5, 2005 IEP and January 31, 2006 IEP concerns (P27, page 1).
70. On February 24, 2006, the District sent Student's Parents an *Invitation to Participate in the IEP Team Meeting or Other Meeting*, set for March 2, 2006 (P32, page 1).
71. On February 24, 2006, Student's Parents responded to the District's settlement attempts and requested the District to put a proposal in writing by March 2, 2006 (P33).
72. On February 26, 2006, Student's mother indicated she would not attend the meeting stating, "*I filed for due process on 2/10/06. I have made my position very clear ... and in writing. I have asked for your position in writing*" (P32, page 2).
73. On March 1, 2006, Student's mother sent an e-mail to the Office for Dispute Resolution (ODR) regarding the processing of the Parents' request for due process (P34).
74. On March 1, 2006, Student's mother sent a second e-mail to the ODR regarding the processing of the Parents' request for due process (P 35).
75. On March 2, 2006, the District conducted Student's IEP meeting. Student's Parents did not attend (SD 10; NT 184).

76. The LEA, two Regular Education teachers, a Learning Support teacher, the Pupil Services Coordinator, and the Gifted Support teacher were members of the March 2, IEP team (SD 10).
77. On March 2, 2006, the District offered another NOREP to Student's Parents recommending Student's educational placement: "*Itinerant Gifted Support and remediation in reading for his mild learning disability*" (P 39, page 1).
78. On March 9, 2006, the ODR assigned the Hearing Officer to preside over the due process hearing (HO 1).
79. On March 9, 2006, the ODR sent a *Notice Of Hearing* to the parties. The hearing was scheduled for April 7, 2006 (HO 1, NT 5-6).
80. On March 9, 2006, the Hearing Officer sent a letter to the parties naming responsibilities of the LEA and parents when a party requests a due-process hearing under the *Individuals with Disabilities Education Act* (IDEA) (Hearing Officer Exhibit 1: HO 1).
81. The Hearing Officer's document included the March 9, 2006 *Notice of Hearing* from the Office for Dispute Resolution, naming April 7, 2006, as the hearing initiation date (HO 1, pages 1-2).
82. On March 10, 2006, the Hearing Officer directed the parties to complete certain steps that must be taken before a hearing can be held, including participation in a Resolution Meeting; completion of a written waiver of the Resolution Meeting; filing of a request for mediation; and/or evidence of an agreement signed by both sides (HO1, NT 5-6).
83. On March 11, 2006, Student's Parent did not approve a NOREP offered by the District (P39, pages 1-2).
84. The District and Student's mother stipulated that the issues in the Parents' two requests for due process, sent via e-mail to ODR March 1, 2006, would be merged into one hearing in the designated ODR File 6353/05-06 AS (NT 76-77).
85. On March 14, 2006, Dr. M sent a letter to the Parents inviting the Parents to a March 24, 2006 Resolution Session (P42, p10).
86. On March 15, 2006, the District sent Student's Parents an *Invitation to Participate in the IEP Team Meeting or Other Meeting*, set for March 21, 2006 (HO2, pages 1-2).
87. On March 21, 2006, the District held a "Resolution" meeting, with no Resolution reached (HO 2; NT 10).
88. At the Resolution session held March 21, 2006, the District presented an IEP to the Parent. The Parent rejected the IEP (SD 11, SD 12).
89. On March 27, 2006, the District reconvened an IEP meeting to revise Student's IEP (P46, pages 1-14; SD 11, SD 12; NT 189-197).
90. Student's mother attended the March 21, 2006 IEP meeting but did not attend the revision meeting March 27, 2006 (P46, pages 1-3; SD 43).
91. On March 22, 2006, Student's mother sent an e-mail to the District declining Student's testing offered by the District (P44, page 1).
92. On March 27, 2006, the District offered another NOREP recommending Student's educational placement: "*Itinerant Gifted Support and Itinerant Learning Support*" (SD 15, page 1).
93. On March 27, 2006, the Parent only agreed "*to the science and math goals*" on the March 27, 2006 NOREP (SD 15, page 2).
94. Student's grades during the first semester of the 2004-2005 school year indicated high achievement (SD 17, page 1).
95. Student's schedule indicated he was enrolled in the *GATE* class during the 2004-2005 school year (SD 19).
96. Student's grades during the 2005-2006 school year indicated high achievement (SD 18, pages 1-2).

97. Student was to schedule the *GATE* class on his own (NT 203-205, 224-225, however, Student's schedule indicated he was not enrolled in the *GATE* class during the 2005-2006 school year (SD 20).
98. On April 7, 2006, the parties challenged the authenticity of educational programming documents the District and Parents presented on the record (SD 1, SD 2, SD 7, SD 8, SD 9, SD 10, SD 11, SD 12; P2, P17, P19, P25, P37; NT 189-201).
99. The parties disputed whether IEP goals changed without NOREPS presented (NT 210-211).
100. The parties disputed whether the District wrote and changed IEP goals without convening IEP team meetings (NT 221-222; 253-256).
101. On April 7, 2006, the Hearing Officer granted a continuance to April 26, 2006, requesting that the District and Parent meet prior to the next hearing session to clarify confusion and authenticity over the parties' exhibits (HO 4, pages 1-2).
102. On April 26, 2006, the District requested and the Hearing Officer granted permission for the District to start over with the admission of exhibits for the purpose of keeping the numbers consistent with the new exhibit binder that the District prepared which included both District and Parent exhibits (NT 160-161).
103. On April 26, 2006, from 9:30 a.m. until 2:00 p.m., the parties engaged in a clarification of documents and potential settlement discussion, however, the settlement did not materialize (NT 164).
104. On April 26, 2006, Ms. C, the District's Reading Specialist, stated she received appointment to serve as Student's reading tutor in February 2005 although the IEP team scheduled the tutoring services to begin in January 2005 (NT 244-247).
105. Ms. C stated Student's mother declined reading tutoring due to Student's football schedule (NT 247-248).
106. On April 26, 2006, Ms. G, Mathematics teacher, explained she was not providing Student enrichment in Student's math class during the 2005-2006 school year (NT 261-264).
107. On April 26, 2006, Ms. B, Student's Biology teacher, described changes in Student's science class during the 2005-2006 school year (NT 228-232, 269-270).
108. Ms. M, Learning Support teacher, was a member of Student's IEP team since the onset of Student's seventh grade but had not formally met nor been introduced to Student at any point in time (NT 277-280).
109. On April 26, 2006, Ms. M explained Learning Support services could be beneficial to Student; however, Itinerant Learning Support for the reading resource room as per Student's IEP would not be possible (NT 277-280; 287-289).
110. Dr. G described purposes of the March 21, 2006 and March 27, 2006 Resolution sessions: to come up with an IEP that could be agreed upon and review Compensatory Education owed (NT 296-300).
111. Mr. M, Junior/Senior High School principal, recalled the Parent testifying that, initially she hand delivered a letter to him on January 31 of 2006, although he was not in school on that day (NT 308).
112. Ms. S attended all of the IEP meetings discussed during Student's hearing (NT 314).
113. Ms. S was involved in litigation with the District for a number of years (NT 317).
114. Student's Parent desired the opportunity to write her closing statement and send to the Hearing Officer and the District (NT 320).

IV. ISSUES

The parties agreed to the hearing issues on the record (NT 22):

- Did the District offer and implement an appropriate GIEP from August 26, 2004 through December 5, 2004?
- Was the District obligated to offer an appropriate IEP from September 1, 2004 through December 5, 2004?
- Did the District implement an appropriate IEP from December 6, 2004 through June 3, 2005?
- Is compensatory education an appropriate remedy for any alleged denial of FAPE during the 2004-2005 and 2005-2006 school years?
Student's hearing initiated April 7, 2006. Based on the Hearing Officer's authority to grant continuances (34 C.F.R. §300.511(c)), Student's hearing continued to and adjourned on April 26, 2006 (HO 1, HO4; NT 325).

V. DISCUSSION AND CONCLUSIONS OF LAW

DID THE DISTRICT OFFER AND IMPLEMENT AN APPROPRIATE GIEP FROM AUGUST 26, 2004 THROUGH DECEMBER 5, 2004?

Pennsylvania procedural safeguards mandate that parents of students requiring Gifted Support have the opportunity to present complaints to initiate due process hearings, pursuant to 22 Pa. Code §16.61(d)(4). The Parents requested and the parties participated in a due process hearing May 10, 2004 (P1, NT 26). By a Decision/Order dated May 24, 2004, the hearing officer directed Student's GIEP team to develop an appropriate GIEP prior to the start of the 2004-2005 school year (P1, page 5).

On February 10, 2006, Student's Parents requested the current due process hearing arguing that the District failed to follow a May 2004 Decision/Order, thereby failing in the provision of a FAPE from August 26, 2004 through December 5, 2004 (P32, page 2; P34, P35).

THE FOLLOWING POINTS ARE RELEVANT BASED ON THE FACTUAL EVIDENCE OF RECORD:

- **The October 2003 GIEP was flawed.** During the May 2004 proceedings, Student's Parents rejected the District's offered October 23, 2003 GIEP and rejected it being implemented as the pendent GIEP. In the May 2004 Decision/Order, the hearing officer agreed with the Parents that the October 23, 2003 GIEP was procedurally and substantively inappropriate (P1, pages 1-5).
- **The District ignored the May 2004 Decision/Order.** After the May 2004 Decision/Order, the District received an IEE conducted by personnel from *Johns Hopkins University*, diagnosing Student with a reading disability. The District determined after the close of the 2003-2004 school year that Student may be eligible for Special Education and Related Services with regards to a Specific Learning Disability (P13, SD 6). Notwithstanding the May 2004 Decision/Order, in the instant matter, the District contended that although Student's GIEP team did not develop a new GIEP prior to the 2004-2005 school year as per the May 2004 Decision/Order (P1, pages 1-5; NT 139, HO 3), the District implemented the October 23, 2003 GIEP during the beginning of the 2004-2005 school year (NT 142-143). The District argued inappropriately that because the "pendent GIEP" continued to be implemented, the District provided Student a FAPE (NT 139, 177-178; HO 3).
- **Student continued to receive inappropriate GIEP goals, enrichment, and specially designed instruction.** The October 23, 2003 GIEP did not receive approval and sanctioning as an appropriate pendent GIEP. In fact, the May 2004 Decision/Order

underscored the District's violation of Student's right to a FAPE. The hearing officer cited to an inappropriate math goal, science enrichment, and specially designed instruction (P1, pages 1-5). Student's GIEP team did not convene to devise a new, appropriate GIEP prior to the start of the 2004-2005 school year, thus, the District did not comply with the dictates of the May 10, 2004 Decision/Order (P1, pages 4-5).

Because the District implemented a flawed October 23, 2003 GIEP that does not represent a pendent GIEP/NOREP, the record evidence supports a conclusion that the District did not offer and implement an appropriate GIEP from August 26, 2004 through December 5, 2004.

WAS THE DISTRICT OBLIGATED TO OFFER AN APPROPRIATE IEP FROM SEPTEMBER 1, 2004 THROUGH DECEMBER 5, 2004?

According to 22 Pennsylvania Code, Chapter 16, parents of students in need of Gifted Support, at the parents' own expense, may obtain an IEE by a certified school psychologist. A district is required to consider this information when making decisions regarding student identification and need for Gifted Support. See 22 Pa. Code §16.61(e)(3).

THE FOLLOWING POINTS ARE RELEVANT BASED ON THE FACTUAL EVIDENCE OF RECORD:

- **The District followed mandated evaluation procedures.** The District received Student's IEE from *Johns Hopkins University* on or about June 9, 2004 (SD 6). Upon receipt of Student's IEE and at the Parents' request, the District undertook its own multi-disciplinary evaluation of Student. The District received permission to conduct a Gifted Re-evaluation September 7, 2004, and then received permission to conduct an initial Special Education evaluation October 12, 2004. The District conducted the Special Education evaluation between September 8, 2004 and November 6, 2004 (P10, P12). The Parents received Student's ER (SD6) on or about November 15, 2004, which is within sixty (60) school days from receipt of the *Permission to Evaluate*, and in accordance with Special Education regulations. See 22 Pa.Code. §14.123. The IEP team drafted the IEP within thirty (30) calendar days of the completion of the ER (SD1), convening December 6, 2004 (SD1).
- **Student had not been recommended to receive Special Education until December 6, 2004.** The District offered the IEP and NOREP to Student's Parents December 6, 2004, revising it December 16, 2004 (SD1, SD27).

Although the District had a mandate to consider Student's IEE, the District was under no obligation to follow the IEE recommendations. Neither Chapter 16 regulations, nor federal Special Education regulations mandate that a district must do more than consider recommendations from an IEE. 22 Pa. Code §16.61; 34 CFR 300.502(c)(1). Student's IEP team did not recommend Student's receipt of specially designed instruction until December 2004. The District, therefore, was not obligated to provide an IEP prior to the start of the 2004-2005 school year and was not obligated to provide an IEP from September 1, 2004 until the end of December 2004.

DID THE DISTRICT IMPLEMENT AN APPROPRIATE IEP FROM DECEMBER 6, 2004 THROUGH JUNE 3, 2005?

Pennsylvania regulations indicate that nothing in Chapter 16 is intended to reduce the protections afforded to students who are eligible for Special Education as provided for under 22

Pennsylvania Code, Chapter 14 (relating to Special Education services and programs) and the IDEA. See 22 Pennsylvania Code § 16.7 (a); 22 Pennsylvania Code § 14.1; 20 U.S.C. A. §§ 1400-1485.

Chapter 16 specifically states that if a student is Gifted and eligible for Special Education, the procedures in Chapter 14 take precedence. For a student identified with dual exceptionalities, however, the needs established under the child's gifted status must be fully addressed in the procedures required in Chapter 14. 22 Pa. Code §16.7(b).

Student received the identification of a Gifted student with a Specific Learning Disability, thus, he is entitled to reasonably calculated educational services provided to yield meaningful educational benefit and student progress related to both his Gifted strengths and needs, as well as to his Special Education strengths and needs.

THE FOLLOWING POINTS ARE RELEVANT BASED ON THE FACTUAL EVIDENCE OF RECORD:

- **Student received a procedurally and substantially flawed December 2004 IEP.** While Student's Gifted Support and Special Education needs were to be addressed through the provision of one IEP (See 22 Pa. Code §16.7(c)), the District did not implement an appropriate IEP from December 2004 through the present date. The District presented IEPs that were flawed procedurally and substantively because they did not address Student's Gifted needs and Special Education needs appropriately (SD 1, SD 2, SD 9, SD 10, SD 11, SD 12, P2, P25, P37).

The District argued that procedural defects alone, such as failure to update goals and objectives from a previous year, are insufficient to find a violation of the IDEA. *Watson v. Kingston City Sch. Dist.*, 43 IDELR 244, 2005 WL 1791553 (2d. Cir. 2005). Under the IDEA, a denial of FAPE may be found only if the district's procedural inadequacies: (1) impeded the child's right to a free and appropriate public education; (2) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the parents' child; or (3) caused a deprivation of educational benefit.

In the instant case, while the burden of persuasion rests with the petitioner, in this case Student's Parents who raised the due process claims, and the IDEA does not support the proposition that an IEP is invalid until proven valid by a district (see *Schaffer v. West, _S.Ct._*, 2005 WL 3028015 (November 14, 2005)), more than procedural inadequacies defined the District's failure to implement Student's appropriate IEP from December 2004 through the present. Documents provided by both the Parents and the District during Student's due process hearing underscored the conclusion that the District impeded Student's right to a FAPE.

- **The District offered and implemented procedurally and substantively inappropriate IEPs, never implementing an appropriate IEP from December 2004 through the present.** Both parties challenged the authenticity of educational programming documents the District and Parents presented on the record (SD 1, SD 2, SD 7, SD 8, SD 9, SD 10, SD 11, SD 12; P2, P17, P19, P25, P37; NT 189-201). There were so many versions of documents presented by both sides that it was difficult to ascertain when mandated meetings were held; whether required participants were invited or attended; and whether changes were made collaboratively as a functional IEP team, or were made behind the backs of others. The parties disputed whether IEP goals changed without NOREPs presented (NT 210-211) and whether the District changed IEP goals without convening IEP team meetings (NT 221-222; 253-256). Because the Parents' evidence did not match District evidence, (how would Student's mother have her versions of the ERs, IEPs, and

NOREPs if not given to her by the District?), a logical conclusion highlighted the fact that educational documents received multiple revisions without the Parents' written approval and input.

- **District personnel demonstrated disregard for the process of multidisciplinary teaming by scheduling meetings with and without relevant IEP team members.** For example, the District held a December 16, 2004 meeting without the Special Education teachers' presence (P1, P2, SD 1, SD 2, SD 25; NT 162, 172-173). The District attempted to hold IEP meetings without the provision of NOREPs offered when major changes were made (SD 1, SD 2, SD 7, SD 8, SD 9, SD 10, SD 11, SD 12; P2, P17, P19, P25, P37; NT 253-256). Such actions constituted a denial of Student's right to a FAPE.
- **The District completed the ER November 15, 2004 (SD 6) but ignored the ER's recommendations.** Student was found to be a student with a Specific Learning Disability and in need of specially designed instruction, in addition to his need for Gifted Support (P13, page 7; SD 6). While the ER recommended that Student's IEP team incorporate relevant goals and objectives into his new IEP (P13, page 7; SD 6, page 7), the December 16, 2004 IEP did not focus appropriately on the provision of reading instruction from a learning support teacher using specific reading, organizational, study, and time management skills targeted (P13, page 7; SD 6, page 7). Rather, the District assigned a reading tutor who is not a special education teacher (NT 241, 244-247).
- **The IEP implementation did not initiate on time.** The December 16, 2004 IEP designated January 3, 2005 as the implementation date (SD1). However, the District did not begin to implement Student's reading portion of the IEP until February 15, 2005 (SD 1; NT 241). The one-on-one reading tutoring, erroneously considered a Related Service and not Special Education, took place one (1) hour per day (2:15-3:15), four (4) days per week from February 15, 2005 (SD 1; NT 242). Ms. M, the Learning Support teacher, stated she had never met Student and her itinerant learning support classroom would not be possible as per Student's IEP (NT 277-280; 287-289). Such actions constituted a denial of Student's right to a FAPE.
- **Students' December 16, 2004 IEP did not address appropriately Student's gifted needs relevant to his math goal, science enrichment, and specially designed instruction as per the May 2004 Decision/Order (P1, pages 1-5).** Ms. G, the math teacher, stated she was not providing any math enrichment (NT 261-264). Changes to the science enrichment received attention through an inappropriate NOREP and it was unclear how specially designed instruction was to occur in the regular classrooms (SD 1, SD 2, SD 27, P17, page 1).
- **Student's least restrictive environment (LRE) received inappropriate attention on his IEPs and NOREPs.** The educational placement category designating Student's LRE (SD 1, SD 2) and his NOREP placement option agreed to by the Parents (SD 27) did not match the actual services Student received for Gifted Support and Special Education services.
- **The District inappropriately expected Student to schedule himself for Gifted Services.** The December 16, 2004 IEP was revised March 24, 2005 (SD 2, NT 171). Student's IEP team did not implement Student's *GATE* services. The District argued that during the summer, the District mailed student schedules for parents' review and approval (NT 205). Because Student did not schedule *GATE* for the 2005-2006 school year (NT 168-169, 204), the District argued it did not have to offer the services. Under no circumstances should the provision or denial of Gifted Services be left to a student's own scheduling.

IS COMPENSATORY EDUCATION AN APPROPRIATE REMEDY FOR ANY ALLEGED DENIAL OF FAPE DURING THE 2004-2005 AND 2005-2006 SCHOOL YEARS?

Compensatory education is an appropriate remedy for the District's denial of FAPE during the 2004-2005 and 2005-2006 school years.

THE FOLLOWING POINTS ARE RELEVANT BASED ON THE FACTUAL EVIDENCE OF RECORD:

- **Compensatory education is appropriate because the denial of Student's FAPE is more than de minimis.** The District ignored the May 2004 Decision/Order of a hearing officer and failed to implement an appropriate IEP during Student's eighth grade (2004-2005) and ninth grade (2005-2006) school years. (See, e.g., *Carlisle Area Sch. Dist. V. Scott P.*, 62 F.3d 520, 537 (3rd Cir. 1995), referencing the failure to implement an IEP (see, e.g., *Bd. Of Educ. V. Munoz*, 792 N.Y. S.2d 275 (App.Div.2005). Also see *Central Bucks Sch. Dist. V. Sara K.*, 34 IDELR 235 (Pa. Commw. Ct. 2000). The District effectively denied Student a FAPE prior to the start of the 2004-2005 school year through the present date.
- **The District has not provided an appropriate individualized program to date.** The District argued on the basis of an Appeals Review Panel decision, citing to *In re: The Educational Assignment of E.F., A Student in the Pennridge School District* (Special Education Opinion No. 1405). In that decision, the Panel opined that in the case where a "District 'responsively' followed and fine-tuned the IEP," the evidence showed that the district complied with its obligation to provide FAPE through its good-faith implementation of one IEP and a reasonable formulation of a successor IEP. However, as the evidence in Student's record demonstrated, the District ignored the opportunity to provide an appropriate GIEP and never offered and implemented an appropriate IEP, once Student was found to be eligible and needing both Gifted Support and Special Education.
- **Student's Parent did not act inappropriately when seeking Student's services.** The Pennridge School District Panel decision noted that, "even if any denial of FAPE had been more than de minimus, we conclude that, as an equitable matter, the Parents would not have warranted compensatory education in any form, acting as if the District's sole or primary responsibility was Student, they insatiably insisted on untold hours of communication, concerning unending minutia, unrealistic expectations, and irrational impediments." *Id.* However, as based on this Hearing Officer's authority to assess the credibility of witnesses and weigh evidence (See *Carlisle Area School District v. Scott P.*, 62 F.3d 520,524 (3rd Cir. 1995), cert. denied, 517 U.S. 1135 (1996)), in Student's case, Student's District faced a persistent and caring Parent familiar with her rights under the law. She would not settle for anything less than what was appropriate for her child-a child who demonstrated complex needs because of his dual identification. The efforts by Student's Parent on behalf of Student were not unrealistic expectations and irrational impediments.
- **Student's Parent met her burden of persuasion.** On February 10, 2006, Student's Parents filed for due process alleging a denial of FAPE. The District cited to *Schaffer v. Weast*, 126 S. Ct. 528; 163 L. Ed. 2d 387; 2005 U.S. LEXIS 8554; 74 U.S.L.W. 4009 (2005). Under *Schaffer v. Weast*, the burden of proof is placed upon the moving party. Therefore, the Parent had the burden of proving a denial of Student's FAPE through evidence presented by her in her case in chief. Student's Parent testified giving a narrative of her version of the history of Student's placement during the 2004-2005 and 2005-2006 school year. The burden of persuasion in an administrative proceeding challenging an IEP, which comes into play when the evidence is in "equipoise," rests with the party seeking

relief. In the instant matter, the Parent demonstrated through accepted documents in the record that Student was denied a FAPE through procedural and substantive inappropriate IEP offerings and implementations. The educational documents provided by both the Parent and the District were revealing, speaking to both procedural and substantive flaws in the District's offerings.

- **The Parents did not violate a statute of limitations.** The District cited to *Montour School District v. S.T.*, arguing that absent mitigating circumstances, the Parents' claim for Student's compensatory education must be limited to one year prior to the request for due process. See 805 A.2d 29 (Pa. Cmmw. 2002). However, the *Montour* decision carries no weight in Student's proceedings. The *Montour* statute of limitations applies to hearings filed before July 1, 2005. The IDEA 2004 period of two years for hearings filed after July 1, 2005 holds jurisdiction in Student's case because as of December 2004, the District identified Student as an eligible student (P13, SD 6) and the Parents filed for due process February 10, 2006 (P34, P35).
- **The District argued incorrectly that any compensatory education award issued by this Hearing Officer should reflect the delay in educational programming that was precipitated by Parents' requests.** In *Re: The Educational Assignment of M.H., a student in the Forest Area School District*, the Panel held that while a student was not offered FAPE for a school year, if implemented properly, the IEP could have provided FAPE. (Special Education Opinion No. 1666.) That Panel concluded that the parent, "*in failing to allow the Student to partake of educational programming during the 2004-2005 school year*" was equally as responsible as the district in the denial of FAPE, and as such, reduced the award of compensatory education in half to recognize the parent's role. *Id.* In Student's case, Student's offered IEPs, if implemented as presented by the District, would not have provided a FAPE because of numerous procedural and substantive deficiencies.

The record evidence supports a conclusion that Student is entitled to compensatory education. The District knew or should have known of the denial of FAPE effectively two years prior to the Parent's filing for due process. The duration is the period of denial. (See *Lester H. v. Gilhool*, 916 F.2d 865, 868 (3^d Cir. 1990). Also see, *M.C. v. Central Reg'l Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. 1996). Student's pendent IEP (SD 1, SD 2) indicated that Student should receive 47 minutes per week of Gifted Support and 240 minutes per week of Reading Learning Support. In order to calculate compensatory education, Student should be awarded compensatory education based on the following:

- Student should receive compensatory education in the form of **47 minutes per week for each school week of appropriate Gifted Services denied** from August 26, 2004 through the end of December 2004. Additionally, Student should receive compensatory education in the form of **47 minutes per week for each school week of appropriate Gifted Services denied, plus 240 minutes per week of Reading Learning Support denied for each school week** from January 2005 through May 11, 2006. The Total Compensatory Education hours are to supplement, not replace appropriate instruction according to Student's IEP.

HEARING OFFICER DECISION/ORDER
CHILD'S NAME: STUDENT
(FILE # 6353/05-06 AS)

AND NOW, this 11th day of May 2006, this Hearing Officer orders the School District to take the following action:

- 1) Within 35 calendar days of the receipt of this Decision/Order, Student's IEP team must reconvene for the purpose of updating Student's program and placement. The IEP team must consider all information available to it in making the determination, especially Student's dual exceptionality and needs for Gifted Support and Learning Support as recommended by his November 15, 2004 ER.
- 2) Student should receive compensatory education in the form of 47 minutes per week for each school week of appropriate Gifted Services denied from August 26, 2004 through the end of December 2004. Additionally, Student should receive compensatory education in the form of 47 minutes per week for each school week of appropriate Gifted Services denied, plus 240 minutes per week of Reading Learning Support denied for each school week from January 2005 through May 11, 2006. The Total Compensatory Education hours are to supplement, not replace appropriate instruction according to Student's IEP.
- 3) Student's Parents shall decide how the compensatory education hours should be spent so long as they take the form of appropriate developmental, remedial or enriching instruction that furthers Student's needs and furthers the goals of Student's present or future IEPs. These services may occur during the weekday, on weekends and during the summer months, when convenient for Student and Student's Parents.

Dorothy J. O'Shea, Ph.D.
Hearing Officer

DECISION DATE: _____

MAILING DATE: _____