

PENNSYLVANIA

# Special Education Hearing Officer

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*This is a redacted version of the original hearing officer decision. Select details may have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.*

## DECISION

Student  
Date of Birth: xx/xx/xx  
ODR File No.: 6597/05-06 LS

Date of Hearing:  
June 26, 2006

Closed Hearing

Parties to the Hearing:

Mr. and Mrs. Parent

Wilson Area School District  
2040 Washington Blvd.  
Easton, PA 19042

Date Transcript Received:

Record Closed:

Date of Decision:

Hearing Officer:

Representatives:

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July 3, 2006

July 3, 2006

July 17, 2006

Rosemary E. Mullaly

## **I. Background and Procedural History**

### *A. Background*

The Student is a resident of the Wilson Area School District (the “District”) who, in February of 2003, was identified as having specific learning disabilities in reading, math, and written expression. The Student’s parents believe that he has received an appropriate educational program between the time he first received special educational programming until the end of the 2005-2006 school year. For 2006-2007, the Student will be transitioning to the District’s high school for ninth grade. Only one issue is in dispute regarding the District’s proposed IEP: whether the specially designed instruction of “in-class support will be provided by a special education teacher in all academic classes” is required in order for the District’s proposed IEP to be appropriate. The parents believe that this level of support was previously provided to the Student during his entire successful middle school education and having a special education teacher rather than an instructional aide accompanying him to his academic courses is necessary for him to make meaningful education progress in his high school program. The District does not believe that the Student previously received the requested level of service in his academic classes and that he does not require this level of intervention to receive an appropriate program now. Instead, the District proposes an instructional aide supervised by the Student’s special education teacher to accompany him to all of his academic classes and the eight learning support study halls periods each six-day cycle.

### *B. Procedural History*

The Office for Dispute Resolution received the parents’ May 12, 2006 hearing request in this matter on May 24, 2006. On May 24, 2006, the parties engaged in a resolution meeting that did not resolve their dispute regarding whether “in-class support will be provided by a special education teacher in all academic classes” is necessary for the Student to receive an appropriate education. The single session hearing took place on June 26, 2006 addressing this sole issue.

## **II. Stipulations and Findings of Fact**

### *A. Stipulations*

1. The Student is [teenaged]; his date of birth is xx/xx/xx, and he resides within the Wilson Area School District. (N.T. 10).
2. The Student is a student eligible for special education services as a result of learning disabilities in the area of reading, math, written expression. (N.T. 11).
3. The Student is about to enter the ninth grade in the fall of 2006. (N.T. 11).
4. The school that he would attend if not exceptional is the currently proposed school, the Wilson Area High School. (N.T. 11-12).

### *B. Findings of Fact*

1. The most recent assessment of the Student in February 2003 concluded that “[the Student] is a verbal rather than perceptual learner. His measured abilities indicate that he should be able to successfully manage the verbal part of learning in the general curriculum but will continue to

experience difficulty when required to plan, organize and produce written expression and multi-step problems in math where sorting out, restructuring, retrieving and processing information are required.” The psychologist’s observation of the Student at that time concluded that in math “[the Student] needs direct (1:1) instruction; much guided practice and much reinforcement. He will not retain this information long term without periodic re-learning/reinforcement. (S-1, at 8-9, 14).

2. The March 3, 2005 IEP, the program implemented during the Student’s eighth grade year, did not include the specially designed instruction “in-class support will be provided by a special education teacher in all academic classes.” Rather, the least restrictive environment section of the IEP contains the following statement: “[The Student] will continue to participate in all regular core subjects areas with learning support. He will also attend resource room for a 30 minute SMART period each day for additional support. Should test-taking supports be necessary, [the Student] will take tests in the resource room. The following program modifications and specially designed instruction are contained in the eighth grade IEP: “test given in alternative setting” within the resource room; “use of keyboard for written projects” across all environments; “small group or individualized instruction” within resource room setting; “allow for student teacher editing of all graded writing projects prior to grading” across all environments; “test taking supports to include study guides and sessions, extra time, opportunities to recheck work prior to grading, re- test if necessary” across all environments; “opportunities to rephrase and retell information in his own words afforded in the classroom” across all environments; “extra time to complete projects with an option to take home” within Family Consumer Science and Keyboarding. The support for school personnel listed on the IEP was “consultation with regular education teachers regarding progress” with a “daily as needed” frequency. (N.T. 38-39, 131; Compare S-2, at 7 to S-2, at 9).
3. During the 2005-2006 school year, the Student was in all eighth grade regular education classes taught by teachers who had been hand-selected by his special education teacher because they were receptive to making changes that needed to be made for learning support students to be successful. (N.T 89, 127-128).
4. In eighth grade at the middle school, there are two teams in each grade; the Student’s special education teacher was assigned to the team that housed the itinerant and resource students who were in the regular education setting for the majority of classes. The special education teacher split her class load in half and scheduled two period of each of the academic classes; she would accompany a group of students to one class and her instructional aide would accompany the other group of students to class. Due to a scheduling conflict a different special education teacher<sup>1</sup> accompanied the Student along with other learning support students to civics. (N.T. 34, 88-89).
5. During eighth grade, a special education teacher accompanied the Student along with other learning support students to his reading, civics, math, and science classes, although the specific personnel, level of involvement, and frequency of accompaniment differed from class to class. During eighth grade, the Student was assigned to a daily study hall period (SMART period) with his special education teacher. His educational placement level of support was described as itinerant. (N.T. 88-89, 97-98, 102-103, 125, 127; S-2, at 9).

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<sup>1</sup> Hereinafter referred to as the secondary special education teacher.

6. Notwithstanding the fact that written expression has been identified as one of the Student's major subject needs, during eighth grade, an instructional aide accompanied the Student, along with other learning support students, to his English class. In addition to the aide's presence in-class, his special education teacher was involved with the regular education teacher in the planning stages of the curriculum implementation; she had daily communication with the aide; she modified and administered tests; she prepared outlines for writing assignments; and she and the regular education teacher met to plan how to teach a unit to the students in that class. The special education teacher trained the aide who accompanied the Student to English class. The aide would help the Student, as well as other learning support students, in that class if they were having trouble coming up with ideas for written assignments. With parts of speech and grammar, the instructional aide was successful on her own in the classroom as far as helping the students. If the students didn't understand something or something wasn't clear, the aide was able to answer the questions or rephrase things so that the Student could understand it. With the level of intervention he received in English, the Student made appropriate progress. (N.T. 88, 89-90, 91-98, 124-125; S-7, at 1; S-8).
7. Compared to his other subjects, math class was more challenging for the Student. He has extreme difficulty working with mathematical diagrams, charts, figures, geometry, ratios, proportions, stem and leaf plots, and box and whisker plots. The Student will struggle with any subject that involves any kind of map reading, diagrams, charts, or figures. The special education teacher accompanied the Student, along with other learning support students, to math class. For half of the math class period, a regular education teacher taught the class, but for medical reasons, she could not remain in the classroom for the entire class period. For the other half of the class period, the special education teacher taught the math class by herself. When she was present, the regular education teacher would introduce the lesson, and the special education teacher would interrupt as the students were going through that lesson. When the math teacher left, the special education teacher was the only teacher in the classroom and would normally re-teach the lesson to all of the students because they didn't understand it the first time the skill was introduced. The special education teacher cut down the amount of homework the Student would have, provided on the spot intervention when he did not grasp a concept, administered and modified tests, and provided one-on-one assistance in study hall. With this level of intervention in math, the Student made appropriate progress. (N.T. 88-89, 99 – 100, 124-25, 126, 127, 129; S-7, at 2; S-8).
8. The Student's eighth grade special education teacher did not believe that he would have been able to achieve the grades he received in math if not for her support; while reducing the homework assignments helped him to do better because it alleviated the stress, the modification that helped him most were the test modifications. For math class, the special education teacher took the test made by the math teacher and cut down the number of problems and made room to show work. (N.T. 129-130).
9. The special education teacher was not in the Student's reading class on a daily basis. If he needed assistance in reading, it was addressed in the study hall period. His special education teacher made some modification to projects. The Student received few test taking supports in reading class. With this level of intervention in reading, the Student made appropriate educational progress. (N.T. 104; S-7, at 3; S-8).
10. A secondary special education teacher accompanied the Student to his civics class. His special education teacher consulted with the regular education teacher and the secondary special education teacher. The Student was given a study guide, and he received special education

teacher assistance with any projects or homework assignments in study hall. With this level of intervention, the Student made appropriate educational progress in civics. (N.T. 88-89, 101-102).

11. The Student's special education teacher accompanied him, along with other learning support students, to science class. She provided him with the same type of support as she did for his civics and English classes. (N.T. 88-89, 103.)
12. During eighth grade, the special education teacher did not go in and support the Student's special classes unless a teacher report that the Student was struggling. (N.T. 125).
13. Although there were times that the Student's special education teacher had to do on-the-spot modifications for him in math, most of the modifications that the special education teacher did for the Student during eighth grade were also things that she did for her other students and that were done a head of time in the planning stages. (N.T. 125-126, 129-130).
14. In the draft IEP the Student's special education teacher prepared for review at the April 5, 2006 IEP meeting to develop the Student's educational program for high school, she included the statement in specially designed instruction "in-class support will be provided by a special education teacher in all academic classes." This statement was added because the parents had specifically requested that it be included based upon their understanding of the way the special education was set up at the high school. The special education teacher believed that the requested model would be appropriate for the Student. The in-class support by a special education teacher requested by the parents was not included in the final IEP. (N.T. 42, 46, 108-109, 110-111, 112, 131-132; S-6).
15. The District currently offers in-class support by special education teachers in some classes at the high school, but not the classes the Student will be taking. (N.T. 205-206).
16. The IEP proposal for the 2006-2007 provides for the Student to be placed in all regular education classes and to be accompanied to his academic classes by an instructional aide. He will receive eight periods a week of learning support at times when other students would be participating in study hall. The regular education teachers would be responsible for delivering necessary modifications to the Student during class time. The Student's ninth grade special education teacher indicated that she could have daily contact with the instructional aide, more than weekly contact with the Student's regular education teachers, regular contact with the other special education teacher with whom the Student will participate in two learning support study hall periods, pre-teach math concepts that are difficult for the Student, and arrange for the Student to meet with staff prior to the start of the school year to discuss changes in his program, although none of these services or supports are listed in the Student's IEP. (N.T. 163-64, 184, 183, 186, 188, 190, 191, 192, 193. 197; S-6, at 15).
17. The Student's eighth grade special education teacher believes that the proposed IEP for ninth grade is a good indication of most of what she did for the Student during the 2005-2006 school year. While she believes that the Student could not have received the grades he did without her support, she could not say that it was the only appropriate way to deliver the IEP. She was unaware what level of support that the Student received in sixth and seventh grade because she was not the Student's teacher at that time. She felt that the test modification she made for the Student could be successfully done at the high school and that with the increase in the amount of learning support study hall to eight sessions a cycle, the ninth special education teacher

hand-selection of the student's regular education teachers, and the Student meeting daily with his primary special education teacher, the IEP proposed by the District could work. (N.T. 128, 129-130, 133, 134, 135, S-6, at 14).

18. During the 2005-2006 school year when the Student was in eighth grade, he began experiencing anxiety toward school. The parents discussed this with the Student's special education teacher and counselor and some modification was made to his IEP related to homework. The parent opted to obtain private counseling services rather than avail themselves of counseling services offered by the District. The level of support that the Student received in school during eighth grade helped him with his anxiety. During discussions related to the development of the 2006-2007 school year IEP, the IEP team addressed alleviation of stress through program modifications. His eighth grade teacher did not believe that services of a high school guidance counselor were necessary for the Student. (N.T. 28-32, 36-37, 80, 121-122).

### III. Issue Presented

**Does the Student require in-class support by a special education teacher in all academic classes in order to receive a free appropriate public education?**

### IV. Discussion and Conclusions of Law

#### *Burden of Persuasion*

The United States Supreme Court explained the concept of burden of proof in *Addington v. Texas*, 441 U.S. 418 (1979) (citation omitted) states

The function of a [burden] of proof, as that concept is embodied in the Due Process Clause and in the realm of fact finding, "is to instruct the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." The standard services to allocate the risk of error between the litigants and to indicate the relative importance to the ultimate decision.

*Id.* at 423. In administrative and judicial proceedings under the IDEA, the party bearing the burden of persuasion must prove its case by the "preponderance of the evidence." See 20 U.S.C. § 1415(i)(2)(C)(iii). The term "preponderance of evidence" is defined as "evidence that is of greater weight or more convincing than the evidence that is in opposition to it." *Black's Law Dictionary* (Fifth Edition), at 1064. The burden of persuasion in "an administrative hearing challenging an IEP is properly placed upon the party seeking relief." *Schaffer v. Weast*, 546 U.S. \_\_\_, 126 S. Ct. 528, 537 (2005). Since the parents are seeking relief in the form of in-class support by a special education teacher in all the Student's academic classes, they bear the burden in this matter.

**Does the Student require in-class support by a special education teacher in all academic classes in order to receive a free appropriate public education?**

#### *1. Free Appropriate Public Education*

In order to determine whether a special education teacher in all academic classes is necessary for the Student to receive a free appropriate public education, one must first consider the procedural and substantive components of an appropriate education.

The IDEA defines a free appropriate public education (“FAPE”) as special education and related services that

- (a) are provided at public expense, under public supervision and direction and without charge;
- (b) meet the standards of the State educational agency;
- (c) include preschool, elementary school or secondary school education in the State involved ; and
- (d) are provided in conformity with an individualized education program (IEP) under Sec. 614(d).

See 20 U.S.C Sec. 1402(9) and 34 C.R.F. §300.13.

In *Board of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07 (1982), the U.S. Supreme Court articulated for the first time the IDEA standard for ascertaining the appropriateness of a district’s efforts to educate a student. It found that whether a district has met its IDEA obligation to a student is based upon whether “the individualized educational program developed through the Act’s procedures is reasonably calculated to enable the child to receive educational benefits.” *Id.* at 206-207. The high court placed procedural compliance on the same level as substantive compliance with IDEA mandates. *Id.* Moreover, by recognizing that “the primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child’s needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child,” *id.* at 207, *Rowley* establishes substantial deference to districts in determination of methodology. See *Rowley*, 458 U.S. at 207 -208, 209-210). See also, *Grim v. Rhinebeck Cent. Sch. Dist.*, 346 F.3d 377 (2d Cir. 2003); *Lachman v. Illinois Bd. of Educ.*, 852 F.2d 290 (7<sup>th</sup> Cir. 1988); *Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648 (8<sup>th</sup> Cir. 1999); *O’Toole v. Olathe Sch. Dist.*, 144 F.3d 692 (10<sup>th</sup> Cir. 1998); *Logue v. Shawnee Mission Unified Sch. Dist.*, 28 IDELR 609 (10<sup>th</sup> Cir. 1998); *Watson v. Kingston City Sch. Dist.*, 325 F. Supp 2d 141 (N.D. N.Y. 2004); *Moubry v. Indep. Sch. Dist. No. 696*, 9 F. Supp 2d 1088 (D. Minn. 1998); *J.P. v. West Clark Cmty. Sch.*, 230 F.Supp. 2d. 910 (S.D. Ind. 2002); *Kuszewski v. Chippewa Valley Sch.*, 131 F. Supp. 2d 926 (E.D. Mich. 2001); *In re: the Educational Assignment of D.S.*, Spec. Educ. Op. No. 1584 (PDE 2005), at 9; *In re: the Educational Assignment of Y.D.*, Spec. Educ. Op. No. 1502 (PDE 2004), at 4; *In re: the Educational Assignment of E.G.*, Spec. Educ. Op. No. 1463 (PDE 2004), at 4; *In re: the Educational Assignment of N.K.*, Spec. Educ. Op. No. 1424 (PDE 2004), at 6-7 (“the general rule is that methodology is not a required element of an IEP and that the choice beyond the IEP is the District’s discretion”).

In addressing whether a student was offered an appropriate program, the Pennsylvania state-level Appeals Panel offers the following standard:

In order to be appropriate, the program must be in a regular public school class unless certain criteria are met, and when offered be “reasonably calculated” to confer “educational benefit”, or “meaningful educational benefit”, that is not trivial nor *de minimis*. See *Board of Education v. Rowley*, 458 U.S. 176 (1982), *Polk v Central Susquehanna Intermediate Unit 16*, 853 F 2d 171 (3<sup>rd</sup> Cir., 1998), *Fuhrmann v. East Hanover Board of Education*, 993 F. 2d 1031 (3<sup>rd</sup> Cir., 1993), *Susan N. v. Wilson school District*, 70 F. 3d 751 (3<sup>rd</sup> Cir., 1995), *Neshaminy School District v. Karla B.*, 25 IDELR 725 ( ED PA, 1997), *Oberti v. Board of Education of the Borough of Clementon*, 995 F.2d 1204 (3<sup>rd</sup> Cir., 1993), 20 U.S.C. § 1412 (a) (5), and 34 C.F.R. § 300.550.

*In re: the Educational Assignment of S.J.*, Spec. Educ. Op. No. 1435 (PDE 2004), at 5; and *In re: The Educational Assignment of R.A.*, Spec. Educ. Op. No. 1431 (PDE 2004), at 7-8. See also *T.R. v.*

*Kingwood Township Board of Education*, 205 F.3d 572 (3<sup>rd</sup> Cir. 2000); *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3<sup>rd</sup> Cir. 1999); *S.H. v. Newark*, 336 F.3d 260 (3<sup>rd</sup> Cir. 2003).

Judicial and administrative bodies interpreting the *Rowley* standard have fleshed out the extent of a district's obligation to provide FAPE to students. For example, a school district is not required to maximize a child's opportunity; it must provide a basic floor of opportunity. See *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290 (7th Cir.), *cert. denied*, 488 U.S. 925 (1988). An appropriate IEP should identify a student's needs and strengths and provide programs and services to address the needs and enhance the strengths the IEP identified. See *In Re: Educational Assignment of K.H.*, Spec. Op. No. 1031 (PDE 1999). An IEP is appropriate if it offers meaningful progress in all relevant domains under the IDEA. See e.g., *M.C. v. Central Regional S. D.*, 81 F.3d 389 (3<sup>rd</sup> Cir. 1996), *cert. denied*, 117 S. Ct. 176 (1996); *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3<sup>rd</sup> Cir. 1999). If an IEP does not address all areas of a child's needs, if it does not contain measurable annual goals to monitor a student's progress, or if it is inadequate in any material way, the IEP is not appropriate. See e.g., *Rose by Rose v. Chester County Intermediate Unit*, 24 IDELR 61 (E.D. Pa. 1996); *In Re: the Educational Assignment of T.K.*, Spec. Educ. Op. No. 892; and *S.H. v. Newark*, 336 F.3d 260 (3<sup>rd</sup> Cir. 2003).

With regard to implementation of an IEP, the "IDEA's mainstreaming requirement prohibits a school from placing a child with disabilities outside of a regular classroom if educating the child in the regular classroom, with supplementary aids and support services, can be achieved satisfactorily." *Oberti v. Bd. of Educ.* (995 F.2d 1204, 1207 (3d Cir. 1993).

## 2. Discussion

The sole issue in this hearing was whether the service of "in-class support by a special education teacher in all academic classes" was necessary for the Student to make meaningful educational progress. If the preponderant evidence supports a conclusion that the Student requires the specific requested service to make meaningful educational progress, the Student's IEP is inappropriate if it is not included. If, however, the specific interventions that the Student requires to make meaningful progress can also be provided through a different model, the District may offer, within its discretion, any appropriate model to provide these services. If what the District offered, however, does not constitute an appropriate program for the Student, it does not mean that the parents' requested relief must be awarded. Instead, the District could be ordered to augment its proposal with services necessary for the provision of an appropriate program

In reviewing the evidence presented by the parents, two underlying assumptions were made to support their request for relief; specifically that the Student actually received "in-class support provided by a special education teacher in all academic classes" during eighth grade and that it is, in fact, the only appropriate model in which the Student can make meaningful educational progress. The parents claim that the District did not assign a special education teacher to accompany the Student to each of his ninth grade academic classes because the high school model does not currently offer such an alternative. Evidence at hearing clarified that the District does assign special education teachers to regular education classes, but not to any of the classes in which the Student is currently enrolled. In any event, administrative convenience cannot be the basis for educational decision-making when it conflicts with a student's individual needs. To counter the parents' position, the District asserts that the intervention requested by the parents of "in-class support by a special education teacher in all academic classes" was not provided to the Student in eighth grade, and that is not the methodology that the District has chosen to offer in its proposed program which is nevertheless reasonably calculated to yield meaningful education benefit.



What services were provided to the Student last year? Conflicting evidence exists on the record regarding the actual services that the Student received in eighth grade. The parent testified that the District-offered service of a paraprofessional in all academic courses would not be appropriate because the “a paraprofessional would not be able to meet [the Student’s] academic needs. A paraprofessional has not met his needs in the last three years, it was the special ed teacher.” (N.T. 49-50). She also testified, however, that during the 2005-2006 school year, “the Student had access to a middle school teacher in all core classes. If the middle school teacher was not actually present in one or two classes, there would be a paraprofessional in the class under the direct supervision of the special education teacher.” (N.T. 34). The Student’s eighth grade learning support teacher testified that she believed that the parent request for in-class support by a special education teacher in all academic classes was appropriate and consistent with what he was receiving during his successful eighth grade year. She also testified, however, that in reading, a special education teacher would occasionally be in the classroom; in English, only an aide accompanied him; and in math the special education teacher was actually imparting the math curriculum all by herself to the whole class for half of the math period every day. Based upon her testimony, only in two academic classes - civics and in science - were both a regular education teacher and a special education in his academic classes for the whole period. The preponderant evidence at hearing, however, demonstrated that the Student did not have in-class support provided by a special education teacher in all classes every day, therefore the parents’ request for this service is denied; the Student made meaningful educational progress with much less than the services that the parents are now requesting.

The balance of the discussion will focus on the type of services actually provided to the Student to ascertain whether they are necessary to provide an appropriate program for the 2005-2006 school year. It is significant to note that while the services he received last year are relevant to what is necessary for an appropriate program, they are not dispositive of what constitutes a free appropriate public education for this year. Just because a service was provided last year and resulted in appropriate progress does not mean that it is the only appropriate programming model. The testimony of the Student’s special education teacher supports the conclusion that for reading, science, English and civics, the type of interventions necessary for the Student to be successful were things that could be done prior to class and did not have the immediacy of on-the-spot interventions. Hand-selection of regular education teachers, training of regular education professionals and paraprofessional staff, planning lessons, modification and individualized administration of tests, and daily small group meetings in the learning support study hall were the crucial aspects of the special education teacher’s role in the Student’s academic success. The currently proposed IEP provides for each of these aspects and was developed through input and in consultation with the Student’s eighth grade special education teacher. With the inclusion of other services not explicitly in the IEP- the ninth special education teacher hand-selection of the student’s regular education teachers and the Student meeting daily with his primary special education teacher – her testimony was that she believed that the IEP could work. Regarding all subjects except for math, which will be individually addressed below, the preponderant evidence supports the conclusion that a special education teacher does not need to accompany the Student to his academic classes, although his IEP should be modified to provide for selection of regular education teachers with input by his special education teacher and for daily meetings between the Student and his primary special education teacher.

Unlike his other academic classes, the issue of math and the level of services that the Student received in that subject does present a conflict regarding whether the Student requires a special education teacher in the class with him to do on-the-spot interventions when he experiences difficulties. For the following reasons, the evidence of record is preponderant that it does not.

Significantly absent from the hearing record is a delineation of the responsibilities that the Student's regular education eighth grade teachers had to deliver the modifications the Student needed in his academic classes. In support of their requested support, the parents also suggest that because the content level of academics in high school is much more rigorous than it was in middle school, and an aide who has not demonstrated mastery of the content area would not be able to answer the Student's questions. (N.T. 49). Moreover, they stress that a paraprofessional cannot develop strategies, change homework assignments or re-teach material (N.T. 50). The parents fail to acknowledge, however, that in every one of the Student's academic classes, there will be a teacher certified by the Commonwealth of Pennsylvania in the content area – someone who can be trained to provide individualized assistance to the Student and guidance to the aide right on the spot. In the instance of the Student's math needs, the eighth grade math teacher's absence from the classroom for half the period removed an important professional who would otherwise have been responsible for assessing student mastery of a concept and for providing on the spot interventions. The parents are correct that the instructional assistant cannot teach the class, but under the direction of a teacher certified by the Commonwealth of Pennsylvania to teach a content area, she could be guided to redirect, reinforce and review the content and alert the teacher when the Student requires more intervention. In that the IEP does not specifically provide greater than weekly contact with, or training for, the Student's regular education teachers to fulfill this role in the classroom, the IEP should be modified to include this support.

Moreover, while one way to provide intervention would be for a special education or regular education teacher to provide on the spot intervention in response to a student's failure to grasp a concept; another, equally valid method also exists. Specifically, the District could acknowledge that the Student has had consistent difficulty with certain skills and use the small group learning support study hall setting to introduce the concept before it is presented in the regular education classroom and provide repetition, reinforcement and review until mastery is achieved. The caselaw is clear that the District gets to decide which of these appropriate interventions it will use to implement the Student's IEP. While the ninth grade special education teacher testified that she could pre-teach concepts that are difficult for the Student in the learning support study hall, the IEP should be modified to include this support.

Comparing the interventions provided last year and those proposed in ninth grade, there are some important differences in the circumstances of his eighth grade math classes. First, during eighth grade the Student was one of several students with special needs placed in the academic classes he took. The testimony of his special education teacher is that she split into two groups all the students on her case load and she attended some of the classes and her aide attended the others. This model of several students sharing the attention of a special education teacher is different than the one proposed for the 2006-2007 school year wherein the aide will be individually assigned to the Student. Moreover, no evidence of record supports the conclusion that the Student's Applied Algebra teacher suffers from a medical need which would require him or her to exit class mid-period leaving only the special education teacher as the lone instructor. In addition, the Student is scheduled to receive 33% more small group assistance by a special education teacher. In eighth grade, three separate people accompanied him to his classes; this year the same individual will accompany him to all classes and, according to testimony, but not listed in the IEP, the daily learning support study hall. Because of the Student's needs in the area of math, the IEP should be modified to include the service that the paraprofessional will accompany the Student to one study hall session daily.

In support of their request for relief, the parents believe that the issue of the Student's anxiety should factor into the District's decision to assign a special education teacher to accompany him to each of his academic classes. While this intervention may very well alleviate anxiety that the Student might experience, it is by no means the only way to do so. His eighth grade special education teacher

believed that the interventions contained in the District's proposed IEP already address the anxiety issue. While the impact of a change in schools and in service provision model could certainly cause anxiety, no evidence supports the conclusion that the services described in the proposed IEP, which were successful last year, will not be successful in ninth grade. In the event that anxiety does interfere with the student's progress, the IEP team can reconvene and consider this issue when it actually presents itself. At this time, the District retains the discretion to render its programmatic proposals based upon what is currently known about the Student's needs and not what his needs might become. Of course, the same individual accompanying him to each of his academic classes and his learning support study hall may in fact decrease the anxiety because one person will have all the information about how he performed in all his academic classes during the day and see consistent issues that can be addressed in the learning support study hall. Because the ninth grade special education testified that to address the anxiety issue, the Student could meet with staff prior to the start of the school year to discuss the changes to his program, but this service was not included in the proposed IEP. Because the Student does manifest anxiety toward school work responsibility, and he will have a different service model, it would be an appropriate intervention for him to be prepared for this change by a meeting with staff prior to the start of the school year; the IEP should be modified to include this service.

The remaining factor to consider in determining whether the District should be permitted to exercise its discretion in placing an instructional aide in the classroom rather than a special education teacher is whether this choice violates the least restrictive environment mandate. While it is generally true that a district ultimately has the discretion to choose from among a group of appropriate programs, the choice of methodology no longer belongs to the district if it results in a disregard of the least restrictive environment mandate. With reference to implementation of an IEP, the "IDEA's mainstreaming requirement prohibits a school from placing a child with disabilities outside of a regular classroom if educating the child in the regular classroom, with supplementary aids and support services, can be achieved satisfactorily." *Oberti v. Bd. of Educ.* (995 F.2d 1204, 1207 (3d Cir. 1993). In that the additional two sessions of learning support study hall do not decrease the amount of time that the Student is accessing the ninth grade regular curriculum with the regular education setting, the least restrictive environment mandate is not violated by the District's choice to employ the intervention currently contained in his IEP. The evidence of record is preponderant that regular education students would also be in a study hall during these additional two periods. Therefore the District may exercise its discretion to modify the model for services provided to the Student.

## V. ORDER

AND NOW, this 17th day of July 2006, in accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED that the School District must convene an IEP team meeting to develop a plan to include daily contact between the Student's primary special education teacher and the Student; direct supervision of, and daily contact with, the Student's instructional aide; more than weekly contact between the Student's special education teacher and his regular education teachers; training for the Student's regular education teachers to provide individualized assistance to the Student and guidance to the aide; input by the special education teacher on the pre-selection of the Student's regular education teachers; pre-teaching mathematical diagrams, charts, figures, geometry, ratios, proportions, stem and leaf plots box and whisker plots, map-reading, diagrams, charts, or figures that are known challenges for the Student; and a meeting with the Student and staff prior to the start of the school year to prepare him for the changes in his program. All other relief not contained in this order is specifically denied.

Dated: July 17, 2006

Rosemary E. Mullaly

Special Education Hearing Officer