

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

PENNSYLVANIA
SPECIAL EDUCATION HEARING OFFICER

6678/05-06 KE
File Number

N.S.
Child's Name

[redacted]
Date of Birth

7/21/06, 7/27/06, 7/28/06
Dates of Hearing

Closed
Type of Hearing

For the Student:

Parent[s]

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For the Warwick School District:

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Dates of Hearing:	July 21, 27 and 28, 2006
Date of Receipt of Transcript:	August 2, 2006
Date of Decision:	August 11, 2006
Hearing Officer:	Daniel J. Myers

Background

[Student] (Student) is a [teenaged] 8th grade resident of the Warwick School District (School District) whose parents have unilaterally decided that [Student] will attend a private school for the upcoming school year. Student seeks compensatory education and [Student's] parents seek tuition reimbursement as well as reimbursement for an independent educational evaluation (IEE), alleging that the School District's past programming and proposed individualized education program (IEP) has denied a free and appropriate public education (FAPE) to Student. For the reasons described below, I find for the Student and [Student's] parents.

Issues

- What is the appropriate program and placement for Student for the 2006-2007 school year?
- Are Student's parents entitled to tuition reimbursement for the 2006-2007 school year?
- Was the 2005-2006 school year IEP appropriate?
- Was the 2005-2006 school year IEP appropriately implemented?
- Should the School District should have identified and programmed for Student as a child with a disability for the 2004-2005 school year?
- Are Student's parents entitled to reimbursement for a December 2005 IEE?

Findings of Fact

1. [Student], born [redacted], is a [teenaged] 8th grade resident of the School District (School District) with an undisputed specific learning disability in the areas of reading comprehension and listening comprehension. (SD 3.11)¹
 - a. [Student] takes a very long time to decode words, [Student] lacks reading fluency and automaticity, and [Student] labors over every syllable and phonic structure in a word. (Vol. I, N.T. 84-86)
 - b. [Student] has difficulty with higher level reading skills such as getting the main idea, understanding inferences, and recognizing implied cause and effect. (Vol. I, N.T. 90)
 - c. It is also undisputed that Student has very slow processing speed. (Vol. I, N.T. 71; Vol. II, N.T. 330)
2. Student has never been much of a reader, preferring sports and hands-on activities. (Vol. I, N.T. 168) [Student] is sociable with peers and adults, with good interpersonal skills. [Student] is methodical and conscientious. (Vol. I, N.T. 109, 253) [Student] has always required 2-3 hours of parental help with [Student's] homework. (Vol. I, N.T. 177, 180) [Student] has attention deficit disorder (ADD) and is easily distracted. (Vol. I, N.T. 170;

¹ References to "HO," "P," and "SD" are to the Hearing Officer, Parent, and School District exhibits, respectively. References to "Vol. I, N.T.," "Vol. II, N.T.," and "Vol. III, N.T.," are to the transcripts of the hearing sessions conducted on July 21, 27 and 28, 2006, respectively.

SD 3.2) [Student] needs visual examples to comprehend what is being said. (Vol. I, N.T. 74)

3. Student entered the School District in 4th grade (2002-2003), at which time [Student] was referred to the School District’s Instructional Support Team (IST). (Vol. I, N.T. 171, 174; Vol. II, N.T. 13) [Student] IST goals were to improve [Student] listening comprehension skills, improve math computation and problem solving, and increase [Student] independent work skills. (P 3, p. 1) School District officials cannot explain why Student was eventually exited out of IST. (Vol. II, N.T. 14; Vol. III, N.T.228)

Sixth Grade, 2004-2005

4. In September 2004, Student’s parents requested an educational evaluation of Student. (Vol. II, N.T. 12; P 4, pp.1,3; P 18, pp.1-2) [Student’s] 6th grade teacher reported that Student seemed to be on grade level in reading. (SD 3.2) The School Nurse reported that Student was “one of my most frequent flyers to the health room. [Student] will find any excuse to come to the health room.” (P 4, pp.4, 20; Vol. I, N.T. 199)
- a. [Student’s] Wechsler Intelligence Scale for Children, 4th edition (WISC-IV) scores were:

Composite Index	Standard score	Percentile rank	Range
Processing Speed	68	2 nd	Extremely low
Verbal Comprehension	83	13 th	Low Average
Working Memory	102	55 th	Average
Perceptual Reasoning	104	61 st	Average

(Vol. II, N.T. 19; SD3.4)

- b. [Student’s] Wechsler Individual Achievement Test, 2nd edition (WIAT-II) scores were:

Subtests	Standard score	Percentile rank	Range
Listening comprehension	78	7 th	Borderline
Reading comprehension	81	10 th	Low Average
Spelling	86	18 th	Low average
Pseudoword decoding	96	39 th	Average
Written expression	96	39 th	Average
Word Reading	103	58 th	Average
Math reasoning	106	66 th	Average
Numerical operations	121	92 nd	Superior

(Vol. II, N.T. 19; SD 3.7-3.8)

- c. Student required substantial time to complete test items. (Vol. II, N.T. 18, 22, 33, 100)

- d. On the Listening comprehension subtest, Student did not know many of the words on the receptive vocabulary portion of the test and [Student's] difficulty on the expressive vocabulary portion of the test was more in not understanding the definitions of words rather than a problem with word retrieval. (SD 3.8-3.9)
- e. The School District's evaluation report (ER) concluded that Student has a learning disability in reading comprehension and listening comprehension. (SD 3.11)
- f. The School District's ER did not recommend a speech and language evaluation. (Vol. II, N.T. 81)
5. Although Student's parents did not object to the School District's December 2004 ER, they did submit a letter on December 16, 2004, requesting a complete speech and language evaluation to analyze possible receptive and expressive language impairments. Their letter also complained that the IEP team had not yet fully understood Student's learning needs, did not know why [Student's] reading level is not at grade level, and had not explained what must be done to bring Student to grade level. (P 4, p.25; Vol. II, N.T. 41)
6. In January 2005, the parties developed an IEP. (P5; Vol. I, N.T. 210-211)
- Student's vocabulary goal was to correctly define vocabulary and story elements from 6th grade text;
 - [Student's] reading decoding goal was to learn phonemic patterns;
 - [Student's] listening comprehension goal and objective was to translate aural information into appropriate action 75% - 100% of the time;
 - Although the IEP did not contain a reading comprehension "goal," it contained "objectives" to identify and learn unknown words and unclear passages/events in pre-reading selections; and
 - Similarly, the IEP included an encoding objective (not a goal) to learn encoding patterns through spelling tests.
- (P5, p.5)
7. On February 4, 2005, the School District issued a speech and language evaluation report.
- It noted that Student required extra processing time for almost every answer.
 - Standardized test scores were:

Test	Standard score	Percentile rank	Range
Receptive One Word Picture Vocabulary	102		Solidly average
Expressive One Word Picture Vocabulary	98		Well within average
Test of Semantic Skills (receptive)	78	7 th	
Test of Semantic Skills (expressive)	102		Quite Average
Test of Semantic Skills (overall)	90		Average

(P 6, p.6)

- c. Inexplicably, although the evaluation report did not report any articulation examination results, it stated that Student has a need to improve articulation skills. (P 6, p.4)
 - d. No speech and language services were recommended. (P 6, p.11)
8. In February, March and April of the 2004-2005 school year, the IEP team regularly reconvened to revise the program modifications in Student's IEP. (P 7; P 8; Vol. I, N.T. 218)

Seventh Grade, 2005-2006

9. On October 24, 2005, the IEP drafted by the School District indicated average grades of 83%, 94% and 96.5% in math, social studies and science, respectively. All teachers reported that Student had difficulty in focusing. (P 11; Vol. II, N.T. 184, 187) Present education levels:
- a. In Reading decoding were reported as "could identify 50% of words decoded," had difficulty with multi-syllabic words and word retrieval, and often guessed at words rather than applying decoding strategies.
 - b. In written expression were reported as "difficulty with spelling", "difficulty with long and short vowel sounds" and "needs to improve on writing sentences of different lengths and using a variety of sentence structures and sentence beginnings, and needs to elaborate when writing and add specific details to keep writing focused and interesting."
 - c. In Reading comprehension were reported as:
 - i. Difficulty with identifying main idea, cause and effect and inferences;
 - ii. Weak vocabulary with constant drill and practice need for mastery;
 - iii. Often asks what a word means during silent reading;
 - iv. Difficulty with long term retention of vocabulary words; and
 - v. A Burns and Roe Informal Reading Inventory indicated:

Grade level	Wpm	Accuracy	comprehension
7 th	57	90%	70%
7 th	71	90%	40%
6 th	100	95%	80%

(P 11, p.6)

10. On December 6, 2005, Student's parents obtained an independent educational evaluation (IEE.) (Vol. I, N.T. 64, 232; P12)
- a. Consistent with other examiners' observations, Student required substantial time before responding to questions as [Student] tried to process the question and formulate [Student's] thoughts. (Vol. I, N.T. 107)
 - b. WISC-IV scores (P12, p.2) were:

Composite Index	Standard score	Percentile rank	Range
Processing Speed	70	2 nd	Borderline

Verbal Comprehension	75	5 th	Borderline
Working Memory	104	61 st	Average
Perceptual Reasoning	108	70 th	Average

c. WIAT-II scores were:

Subtests	Standard score	Percentile rank	Range
Reading comprehension	77	6 th	
Oral Expression	78	7 th	
Written expression	83	13 th	
Numerical operations	86	18 th	
Spelling	88	21 st	
Word Reading	89	23 rd	
Pseudoword decoding	96	39 th	
Listening comprehension	98	45 th	
Math reasoning	110	75 th	

(P 12, p.3)

d. On the Comprehensive Test of Phonological Processing (CTOPP), which is a pure test of ability to process language in its smallest units of sound called phonemes, Student had difficulty discriminating phonemes and words, retaining them in [Student's] memory, and then associating the sounds with symbols. Specifically, [Student's] scores included:

Composite Index	Standard score	Percentile rank	Range
Phonological Awareness	76	5 th	Poor
Phonological Memory	85	16 th	Below Average
Rapid Naming	61	<1 st	Very Poor

(Vol. I, N.T. 101-103; P 12, p.3)

e. The IEE concluded that Student's needs were not being met by the School District. It recommended rigorous and intensive intervention to improve basic reading, spelling, reading comprehension, reading fluency and written expression. It suggested consideration of a private school for students with severe language-based learning disorders. (P 12, p.45)

11. The IEP team met to consider and incorporate the IEE. Student's parents neither approved nor disapproved the School District's proposed IEP. (Vol. III, N.T. 173-174) The IEP team regularly convened during this school year in an attempt to develop an IEP acceptable to Student's parents. (SD 4; Vol. I, N.T. 227-228; Vol. II, N.T. 45)
12. In the meantime, Student's teachers provided what they believed was a free and appropriate public education to Student. Student attended regular education math, science and social studies classes.
 - a. [Student's] 7th grade learning support teacher, who had 28 years total experience, taught Student reading and written expression, and provided support in the other

content areas (math, science and social studies.) (Vol. II, N.T. 181, 193, 195; SD 5)

- b. Reading and writing instruction occurred in small groups of up to ten students. (Vol. II, N.T. 287) In the beginning of the year, reading instruction focused on decoding through the use of the Wilson Reading program. When a February 2006 WADE (Wilson assessment) test indicated that Student knew [Student's] consonants and vowels, Student's teacher stopped using the Wilson Reading program, except for selected strategies. (Vol. II, N.T. 215-217, 237-238, 243, 281; SD19) She continued to use kinesthetic and visualizing techniques in [Student's] reading instruction. (Vol. II, N.T. 225; Vol. III, N.T.201)
 - c. Sometime during the school year (possibly the last one or two marking periods), Student's learning support teacher began providing one-on-one reading instruction to Student for one period three times per six-day cycle. (Vol. II, N.T. 194, 198-199) She used the REWARDS reading program, and the Jamestown Education and Jamestown Timed Reading programs to work on reading fluency and comprehension, carrying those lessons over into spelling instruction in order to reinforce instruction in both subjects. (Vol. II, N.T. 220, 226-227, 280, 282; Vol. III, N.T. 142, 153, 201)
 - d. Written expression was taught through journal writing and the MY ACCESS! computer program for written expression. (Vol. II, N.T. 228)
 - e. Student's learning support teacher tried the Earobics computer program for auditory discrimination of sounds, but she stopped using it almost immediately after discovering that it was very elementary and Student was getting 100% consistently. (Vol. II, N.T. 235-236)
 - f. Vocabulary instruction consisted of constant drill and practice and constant usage of 270 words that Student was to learn over the course of the year. (Vol. II, N.T. 255)
 - g. Support for regular education classes included review of special study guides that contained only essential information, modified tests with word banks and/or a reduced number, assistance in tracking and performing homework. (Vol. II, N.T. 202-209, 214)
13. On June 13, 2006, Student's parents requested a due process hearing. (P1)
14. I conducted an evidentiary hearing in this matter on July 21, 27 and 28, 2006.
- a. School District exhibits SD1-SD15, SD17-22 and SD24-SD28 were admitted without objection. SD 16 and SD 23 were withdrawn. (Vol. III, N.T.240)
 - b. Student's exhibits P1-P19 and P21 and P22 were admitted into the record without objection. (Vol. III, N.T.248) P20 was admitted over the School District's objection. (Vol. III, N.T.248)
15. The parties disagree regarding the effectiveness of the School District's educational programming in addressing Student's needs.

16. Student presented at the hearing Dr. K as an expert witness in school psychology. (Vol. I, N.T. 54) Dr. K prepared the December 2004 IEE and she participated in two of Student's IEP meetings, one of which was a facilitated IEP. (Vol. I, N.T. 129)
 - a. Dr. K has Masters and Doctoral degrees in educational psychology and school psychology. (Vol. I, N.T. 47) Her doctoral dissertation was on the cognitive predictors of dyslexia. (Vol. I, N.T. 58) She teaches a course for Penn State in educational and school psychology. (Vol. I, N.T. 58) She has testified as an expert on dyslexia in educational due process hearings and in federal court. (Vol. I, N.T. 58) She has been a certified school psychologist in Pennsylvania since 1978, a licensed psychologist in Pennsylvania since 1980, and a nationally certified school psychologist since 1989. (Vol. I, N.T. 48) She has spent 26 years performing independent educational evaluations. (Vol. I, N.T. 57) 80% of her current patient case load is school age children. (Vol. I, N.T. 59-60)
 - b. Dr. K believes that the School District should have evaluated Student in 4th grade rather than provide IST and then exit Student out of IST. (Vol. I, N.T. 119)
 - c. She also believes that the School District's December 2004 ER should have explored Student's various deficits further to provide guidance in addressing them. (Vol. I, N.T. 124) She notes that the School District's February 2005 speech and language evaluation is "as bare bones as you can get," failing to evaluate Student's hearing, perception of language without distraction, affect of background noise, phonological processing, rapid naming, word retrieval or ability to process language at a certain rate of speed.(Vol. I, N.T. 157, 159)
 - d. Dr. K also thinks that the School District's IEPs neither described Student's needs sufficiently, nor did they describe a clear operating procedure for Student's specially designed instruction. (Vol. I, N.T. 115, 126-127, 129)

17. Dr. K notes that Student is a very bright person, a strong visual, hands-on learner who does well on the WISC-IV subtests measuring visual, concrete, hands-on learning, but with a very severe language processing problem that should not be equated with low ability or low intelligence. (Vol. I, N.T. 70-71, 73, 77) She notes that Student has had no exposure to intensive rigorous language training. (Vol. I, N.T. 113)
 - a. Dr. K recommends very intensive, very direct instruction that works on decoding and encoding language, increasing reading fluency, and intensive work on reading comprehension, with substantial one-on-one instruction. (Vol. I, N.T. 111, 145-146)
 - b. She recommends that Student be instructed with Lindamood-Bell programs because those programs are intensive, therapeutic, and strong on language based processing. (Vol. I, N.T. 112) She also recommends Fast ForWord and Earobics computer programs to train Student in processing language more rapidly. (Vol. I, N.T. 113)

18. Student also presented at the hearing an educator from the [redacted] School (Private School), which is a private school for children with learning disabilities.
 - a. This witness testified that Student needs to be in a small classroom (4-10 students) with substantial one-on-one instruction because it is very easy to assume that [Student]'s understanding what a teacher is saying when Student really isn't

- understanding. (Vol. III, N.T.22) In one-on-one and small group settings, the teacher can see right away whether Student is understanding what teacher is saying. (Vol. III, N.T.23, 38, 40)
- b. Private School uses Lindamood Bell programs that are designed as intensive therapy programs to improve the functioning of people that have serious language based learning disorders. NanciBell is their program that teaches reading comprehension. (Vol. II, N.T. 177-178)
 - c. Private School also will provide Student with a class of 3-4 students in which [Student] would be taught organizational strategies and study skills. (Vol. I, N.T. 285)
 - d. The School District stipulates that the Private School is an appropriate school for Student for purposes of the tuition reimbursement analysis. (Vol. I, N.T. 152-153)
 - e. Dr. K helped create the Private School in the late 1980s. (Vol. I, N.T. 151; Vol. II, N.T. 176)
19. The School District presented at the hearing two school psychologists, Student's 7th grade learning support teacher, and an educational consultant. School District officials believe that its proposed IEP and all IEP implementation have been appropriate. (P 18, p.54)
20. The school psychologists attributed Student's academic difficulties to [Student's] low ability levels in the area of verbal expression and understanding. (Vol. II, N.T. 52; Vol. III, N.T.62)
- a. They do not believe that dyslexia or reading decoding deficits are the reasons for Student's academic difficulties. (Vol. II, N.T. 35, 41, 46) Nor are they convinced that Student's classroom inattention is related to [Student's] ADD. (Vol. II, N.T. 25) Essentially, they believe that, as a result of Student's slow processing and poor listening comprehension abilities, [Student] does not, and never will, fully understand the world around [Student]. (Vol. II, N.T. 30) They believe that this is proven by Student's low Verbal IQ score, which is the most accurate predictor of a child's academic success in school, and which cannot be improved. (Vol. II, N.T. 20, 30, 35-36, 46, 129) They believe that Student's disability was not discovered prior to 6th grade because, until then, the curriculum was sufficiently concrete and more in line with Student's strengths, and involved less abstract reasoning and fewer higher level thinking skills. (Vol. II, N.T. 39)
 - b. They do not believe that any further speech and language evaluation was ever required because Student's weak listening comprehension ability was evident through classroom observation and psychoeducational testing. (Vol. II, N.T. 23)
 - c. They believe that Student's low WIAT II listening comprehension scores are more related to [Student] not knowing sufficient vocabulary than with word retrieval. (Vol. II, N.T. 114)
 - d. They believe that Student's slow processing is related to [Student's] lack of any organized way of how to work efficiently and how to break a project down into workable tasks. (Vol. II, N.T. 123)
 - e. They do not believe that Dr. K's IEE gave additional insight into Student's learning. (Vol. II, N.T. 55, 59)

21. Student's learning support teacher testified to the educational program described in Finding of Fact No. 12 above.

- a. At the hearing, Student's lawyer demonstrated numerous instances where the learning support teacher's assessment of Student's vocabulary skills is much more optimistic than anyone would conclude simply from reviewing Student's vocabulary tests. For example, Student's teacher believes that Student's sentences "Im a dapper" and "I cant belligerent spiders" sufficiently demonstrate Student's knowledge of the words "dapper" and "belligerent," based upon post-test questions when the teacher asked Student to explain those words. (P 19, p2; Vol. II, N.T. 254-259, 293; SD 19.3) Student's teacher explained away Student's relatively disappointing 58% end-of-year vocabulary test score by stating that a different teacher administered that test and Student probably would have received a higher grade if the learning support teacher had administered that test and been able to question Student about the words on the test. (Vol. II, N.T. 290-292)
- b. Although the Informal Reading Inventories that Student's learning support teacher administered do include listening comprehension components, [Student] did not use these, preferring instead to assess listening comprehension through small group instruction. (Vol. III, N.T.219)
- c. In Spelling, Student's learning support teacher has no idea why Student went from 8 correct words out of 20 in September 2005, to 14 correct out of 20 in March 2006, and then down to 14 correct out of 20 in May 2006. (Vol. II, N.T. 303; P 19, p.41)
- d. In reading fluency, Student's goal was to increase in one year from 74 to 120 words per minute with 80% accuracy. In fact, [Student] was at 74, 89, 82 and 99 words per minute at the ends of the 1st-4th marking periods, respectively. School District officials acknowledge that Student was not even close to the expected fluency rate for 7th grade students of 150-170 wcpm. (SD18.3; Vol. II, N.T. 148, 284; Vol. III, N.T.235)

22. I find the Student's evidence to be more credible than the School District's.

- a. Dr. K has substantial professional experience, her IEE and testimony was extremely thorough, and she has actually participated in two of Student's IEP team meetings. Although she was very involved in creating the Private School nearly 20 years ago, and although she erroneously thought the School District's Jamestown Reading Programs were general education reading programs, I find that these factors do not reduce her credibility in assessing Student's needs and in recommending the Private School for educational programming. (Vol. I, N.T. 54-60, 129, 134)
- b. The School District's psychologists appeared to be so heavily influenced by Student's low Verbal Comprehension IQ scores that they appeared unable to believe that anything more, or different, might ever be done to address Student's needs. Despite undisputed evidence of severe listening comprehension abilities, they saw no need for a speech and language evaluation in the first place, and they considered acceptable the "bare bones" speech and language evaluation that the School District ultimately produced. (Vol. II, N.T. 23, 52; Vol. III, N.T.62; P 6)

- c. School District testimony regarding the effectiveness of its curriculum based assessment and progress monitoring struck me as insincere lip service, as demonstrated by Student's failure to reach [Student's] reading fluency and vocabulary goals, with no clear proposal for different instructional strategies based upon progress monitoring. It was disappointing to hear Student's 58% end-of-year vocabulary test score explained away by the learning support teacher as a result of a different teacher administering that particular test, and to hear the educational consultant testify that she is not sure that poor vocabulary scores are significant anyway. (Vol. II, N.T. 290-292; Vol. III, N.T. 58, 221, 226; SD18.2)
- d. School District officials were not on the same page regarding how to program for Student's needs. The educational consultant testified that that decoding and fluency instruction automatically lead to better comprehension, but she also believes Student needs one-to-one instruction focused on comprehension. (Vol. III, N.T.143, 156) The learning support teacher was unclear regarding Student's need for one-to-one instruction next year, suggesting that Student needs assistance in study skills and other academic content areas (math, science and social studies) more than [Student] needs one-on-one reading and written expression instruction. (Vol. II, N.T. 269-270; Vol. III, N.T.131; SD 21)
- e. School District officials sometimes define "direct instruction" as any instruction provided by a teacher in front of classroom teaching, as opposed to Students learning through their own reading or through a computer. (Vol. III, N.T.230) But apparently where it is convenient, they will also consider even a computer program such as MY ACCESS! to be "direct instruction." (Vol. III, N.T.231, 237)

Discussion

The burden of proof in this administrative hearing is properly placed upon the party seeking relief, i.e., Student. Schaffer v. Weast, 546 U.S. ___, 126 S.Ct. 528, 163, L.Ed. 387 (2005) There are three prongs to the decision to award reimbursement for a parent's unilateral placement of a student at a private school. First, I must determine that School District has not offered Student a free appropriate public education (FAPE.) Second, Student's parents must show that the Private School is appropriate for Student. Third, if the School District has not offered FAPE and if the Private School is appropriate, then I must weigh the equities in the case. Florence County School District 4 v. Shannon Carter, 510 U.S. 7, 126 L.Ed.2d 284, 114 S. Ct. 361 (1993); School Committee of the Town of Burlington, Mass. v. Dept. of Education of Mass., 471 U.S. 359, 105 S. Ct. 1996 (1985)

My first determination is whether or not the program and placement offered by the School District is appropriate. An appropriate program is one that is provided at no cost to the parents, is individualized to meet Student's educational needs, is reasonably calculated to yield meaningful educational benefit, and conforms to applicable federal requirements. The IEP for a child with a disability must include present levels of educational performance, measurable annual goals and short term instructional objectives, appropriate objective criteria by which it may be determined on at least an annual basis whether short term objectives are being achieved, and specially designed instruction that will be provided to meet the unique needs that result from the child's disability. A school district's failure to offer an IEP reasonably calculated to enable

the child to receive meaningful educational benefit will be deemed a denial of FAPE. Rowley v. Hendrick Hudson Board of Education, 458 U.S. 176, 102 S. Ct. 3034 (1982)

The appropriateness of the IEP is based on information known at the time it is drafted. Fuhrmann v. East Hanover Board of Education, 993 F.2d 1031 (3d Cir. 1993) While school districts are not required to provide the optimal level of services, a program that confers only trivial or minimal benefit is not appropriate. Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3d Cir. 1988), cert. denied, 488 U.S. 1030 (1989) The IEP must be likely to produce progress, not regression or trivial educational advancement. Board of Education v. Diamond, 808 F.2d 987 (3d Cir. 1986) The purpose of the IEP is not to provide the “absolute best education” or “potential maximizing education” for the child. The IEP must simply propose an appropriate education for the child. Susan N. v. Wilson School District, 70 F.3d 751 (3d Cir. 1995); In Re K.N. and Bethlehem Area School District, Special Education Opinion No. 1225 (2002)

The School District’s proposed IEP’s present education levels in reading decoding are reported as “could identify 50% of words decoded,” “had difficulty” with multi-syllabic words and word retrieval, and “often guesses at words rather than applying decoding strategies.” (SD 18.5) Present education levels in written expression are reported as “difficulty with spelling”, “difficulty with long and short vowel sounds,” “needs to improve on writing sentences of different lengths using a variety of sentence structures and sentence beginnings,” and “needs to elaborate when writing and add specific details to keep writing focused and interesting.” (SD 18.5) Present education levels in reading comprehension are reported as: “Difficulty with identifying main idea, cause and effect and inferences;” “Weak” vocabulary with constant drill and practice need for mastery; “Often asks what words mean” during silent reading; “Difficulty with long term retention of vocabulary words;” and Burns and Roe Informal Reading Inventory data indicating:

Grade level	Wpm	Accuracy	Comprehension
7 th	57	90%	70%
7 th	71	90%	40%
6 th	100	95%	80%

(SD 18.5)

These present educational levels are confusing and imprecise. The ubiquitous word “difficulty” does not provide a base line measure against which progress can be monitored systematically. Even the more precise format of the IRI data is deficient because it appears to utilize test scores taken at various unspecified times, thereby failing to establish a true baseline against which future goals may be established. In addition, the quarterly progress listed later in the IEP (SD 18.12; SD 18.13) indicates that the data contained in the present educational levels section of the IEP are outdated. Similarly, it suggests that the goals themselves are out-dated and are not based upon Student’s current educational levels. In addition, the Appeals Panel has held previously that the state PSSA writing rubric, upon which the written expression goals are based, does not meet the requirements of objective measurement required by IDEA and special education regulations. In Re R.U., Special Education Opinion No. 1492 (2004)

I conclude that the School District's proposed 2006-2007 IEP is simply not appropriate and fails to meet the first prong of the tuition reimbursement test.²

The second prong of the tuition reimbursement test has been met through the School District's stipulation that the Private School can appropriately program for Student.

The third prong of the tuition reimbursement test, i.e., the weighing of the equities, weighs in favor of Student. [Student's] parents have cooperated with, and have not withheld information from, the School District. They attended numerous IEP team meetings, consistently expressing as best they could their concerns with the School District's educational programming for Student. The School District, with its greater professional expertise and resources, first exited Student from IST, then did not initiate a psychoeducational evaluation, did not initiate a speech and language evaluation, and does not appear to be sufficiently rigorous in adjusting instruction to Student's responses to intervention. When weighing the equities, I find in favor of Student and [Student's] parents.

Thus, I will award tuition reimbursement for the Private School for the 2006-2007 school year. In addition, I will award reimbursement of Dr. K's IEE, based upon my conclusions regarding the inadequacies of the School District's December 2004 and February 2005 psychoeducational and speech and language reports, as well as upon the usefulness of the additional, more in-depth information contained in Dr. K's December 2005 IEE.

It is well settled that compensatory education is an appropriate remedy where a school district knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only trivial educational benefit, and the district fails to remedy the problem. M.C. v. Central Regional School District, 81 F.3d 389 (3rd Cir. 1996). Such an award compensates the child for the period of time of deprivation of special education services, excluding the time reasonably required for a school district to correct the deficiency. Id.

In this case, for the last two years, Student has not had an IEP that meets the fundamental requirements of an "appropriate IEP." Appeals Panels have long held that the evaluation is the foundation for the IEP, and that an IEP will not be appropriate if the evaluation is incomplete. M.H., Special Educ. Opinion No. 736 (1996); K.B., Special Educ. Opinion No. 1300 (2002); M.C., Special Educ. Opinion No. 1731 (2006) With respect to evaluations, the special education regulations require that the child be assessed in all areas related to the suspected disability, and that the evaluation be sufficiently comprehensive to identify all of the child's special education and related services needs. 34 CFR §300.304

Dr. K credibly testified that the School District's December 2004 ER should have explored Student's various deficits further to provide guidance in addressing them. (Vol. I, N.T. 124) She notes that the School District's February 2005 speech and language evaluation is "as bare bones as you can get," failing to evaluate Student's hearing, perception of language without

² Frankly, the School District's proposed IEP at SD 18 appears simply to be a "trial balloon," which the School District did not bother to update until it knew whether it would "float" in a due process hearing against a unilateral private school placement.

distraction, affect of background noise, phonological processing, rapid naming, word retrieval or ability to process language at a certain rate of speed.(Vol. I, N.T. 157, 159) Despite undisputed evidence of severe listening comprehension abilities, the School District saw no need for a speech and language evaluation in the first place, and it considered acceptable the “bare bones” speech and language evaluation that the School District ultimately produced. (Vol. II, N.T. 23, 52; Vol. III, N.T.62; P 6)

Further, the record demonstrates that Student’s progress was not nearly as great as the District asserts, and that much of Student’s progress was due in large part to the efforts of the parents who, on average, spent 2 hours each evening teaching, reinforcing, and re-teaching Student, and helping Student complete homework assignments. (Vol. I, N.T. 177, 180) See M.C., Special Education Opinion No. 1731 (2006) This case does not involve simply a difference of opinion regarding the pedagogical methodology that should be used to address Student’s educational needs. See D.S. Special Education Opinion No. 1584 (2005) This case involves the School District’s lack of depth of understanding, and apparent reluctance to further investigate, Student’s educational needs.

Student had two years within which to seek compensatory education for the School District’s denial of FAPE. [Student’s] parents filed their due process hearing request in June 2006, 1 ½ years after the School District’s initial evaluation report and 16 months after the School District’s inadequate speech and language evaluation report. Giving the School District ample time within which to evaluate, program and adjust instruction for this complex child, I will award compensatory education of one hour per day beginning with the first day of the 2005-2006 school year. Thus, I will award 180 hours of compensatory education.

CONCLUSION

The School District’s evaluation reports inadequately assessed Student’s educational needs. Its IEPs, based upon those evaluation reports, were also inadequate. The private school in which Student’s parents have unilaterally enrolled will provide appropriate programming for Student. For the reasons described above, Student is entitled to tuition reimbursement, IEE reimbursement, and 180 hours of compensatory education.

ORDER

- The School District shall reimburse Student's parents for [redacted] School tuition for the 2006-2007 school year;
- The School District shall reimburse Student's parents for Dr. K's IEE;
- The School District shall provide to Student 180 hours of compensatory education.

Daniel J. Myers

Daniel J. Myers
Hearing Officer

August 11, 2006

Re: Due Process Hearing
File Number 6678/05-06 KE