

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

6687/05-06 KE
File Number

G.K.
Child's Name

[redacted]
Date of Birth

8/02/06, 9/08/06
Dates of Hearing

Closed
Type of Hearing

For the Student:

Parent[s]

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**For the Dallastown Area School
District:**

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Dates of Hearing:
Receipt of Last Transcript:
Date of Decision:
Hearing Officer:

August 2 and September 8, 2006
September 13, 2006
September 26, 2006
Daniel J. Myers

BACKGROUND

[Student] (Student) is [a pre-teenaged], 6th grade resident of the School District with learning disabilities in reading and written expression. Contending that the School District's proposed program and placement for 2006-2007 is not appropriate, Student's parents seek reimbursement of [Student's] private school tuition. For the reasons described below, I find for Student's parents.

ISSUE

Whether the appropriate educational program and placement for Student is the School District's proposal or the [redacted] School (hereinafter Private School)?

FINDINGS OF FACT

1. Student, whose date of birth is [redacted], is [a pre-teenaged], 6th grade resident of the School District. (N.T. 17, 166)¹ [Student] is generally considered to be a kind, personable child who gets along with [Student's] peers, has good listening skills and is primarily a visual, concrete, hands-on learner. [Student] struggles greatly with writing and with reading decoding and reading comprehension, to a lesser extent with math, and [Student] exhibits anxiety about [Student's] academic difficulties. (N.T. 134, 138, 148-150, 232, 257; J-10, p.10; J-14, p.13, 28)
2. Student's overall cognitive functioning is average.
 - a. In January 2003, May 2005 and April 2006, [Student's] overall WISC-III and WISC-IV Standard Scores were 102, 94 and 87, respectively. (J-10, p.7, 14; J-14, p.3, 11-12; J-3, p.11)
 - b. [Student's] May 2005 K-BIT, and May 2005 and April 2006 TONI standard scores were 94, 111, and 95, respectively. (J-14, p.3, 13; J-14, p.13, 28; J-3, p.11)
 - c. [Student's] WISC-IV working memory and processing speeds have measured relatively weaker, however.
 - i. May 2005 and April 2006 working memory standard scores were 83 (low average) and 68 (significantly impaired). (J-14, p.3, 11-12; J-3, p.11)
 - ii. May 2005 and April 2006 processing speed standard scores were 88 (low average) and 75 (significantly impaired). (J-14, p.3, 11-12; J-3, p.11)
3. Student received regular education instruction in kindergarten and first grade. (N.T. 18; J-3, p.2; J-10, p.1)

¹ References to "N.T." are to the transcripts of the August 2 and September 8, 2006 hearing sessions. References to "J" and "HO" are to the Joint and Hearing Officer exhibits, respectively. At the hearing, the parties apparently arrived with their own sets of "P" and "S" exhibits, but then chose to combine their School District and Parent exhibits into a single, joint exhibit book. Thus, each exhibit in the record has a unique number, but each page in the exhibit book is randomly marked either with an "S" or a "P." For simplicity in this decision, I refer to all exhibits as "J" or joint exhibits. (N.T. 276)

4. In 2nd grade Student began receiving Title I and instructional support team (IST) services to address difficulties in reading and writing and, although [Student] received an A in math, [Student] exhibited a weakness in problem solving strategies. (J-3, p.2; J-10, p.1; J-14, p.6)
5. In January 2003, mid-2nd grade, Student was referred for a psychoeducational evaluation. In addition to the cognitive testing described above, Student's academic achievement was observed on the Wechsler Individual Achievement Test, 2nd Ed., (WIAT-II) to be: 1) low average in reading overall and in all reading subtests; and 2) low average in writing overall with average spelling and low average written expression. (J-10, pp. 7-8, 15) A Comprehensive Test of Phonological Processing (CTOPP) indicated an average range 91 composite standard score, with borderline range phonological memory (79) and rapid naming (79) standard scores. (J-10, p.8) The evaluation report (ER) also observed anxiety and frustration associated with reading and writing. (J-10, p.10)
6. In 3rd and 4th grades, Student received Learning Support services. (N.T. 18) Student's parents report that, as [Student's] work became more difficult in 4th grade (04-05), Student became more withdrawn and exhibited increased crying, shutting down, and poor self-esteem around academics. (N.T. 168, 170-171)
7. In May 2005, at the end of 4th grade, Student's parents had Student privately evaluated. (J-14) WIAT-II results confirmed ability-achievement discrepancies in reading and written expression. (J-14, p.52) In addition, all subtest standard scores were lower than corresponding standard scores two years earlier. (J-14, p.21) CTOPP subtest standard scores had also fallen to 73s in comparison to the earlier 79s. (J-14, pp. 4, 18; J-10, p.8) Finally, a Piers Harris self-concept scale suggested significant emotional indicators of frustration in completing written work, guilt over failure to perform correctly, insecurity in the present environment, and an inability to go forward with self-assurance. (J-14, p.26)
8. On or about August 25, 2005, the parties agreed that Student would attend 5th grade at the Private School at public expense, with a reevaluation at the end of the year to determine Student's appropriate program and placement for 2006-2007. (J-1, p.1; N.T. 17, 169) Student's parents report that, after attending Private School, Student began coming home happy, laughing, less anxious, and more like [Student's] old self. (N.T. 171, 181, 187)
9. Student's 5th grade class at Private school had 7-8 students in it. (N.T. 133, 199) Private School used an Orton-Gillingham approach to reading, which is a language-based multisensory association of sound and symbols. (N.T. 202) Very explicit instruction in reading included phonics skills, letter blends, vowel pairs, short vowel sounds, syllable types, and identification, construction and deconstruction of words. (N.T. 232-233) Private School used letter tiles, buzzers, magnetic letters on a white board, spelling games such as Boggle, and a computer webbing game called Kidspiration. (N.T. 205, 215) Because Student comprehends better when [Student] reads aloud, [Student] uses a

- WhisperPhone (a PVC tube in the shape of a telephone) that enables [Student] to read aloud to himself without distracting the rest of the class. (N.T. 247, 248) An Intermediate Unit speech pathologist came into the class twice per week, facilitating writing and comprehension, and working on word retrieval, vocabulary, writing skills. (N.T. 255-256) Student's classroom teachers at Private School were not certified special education teachers. (N.T. 257)
10. Student's Private School language arts instruction consisted of three 45 minute blocks of instruction, with group instruction (8 students and 2 teachers) in the first block for writing, grammar and some spelling strategies (N.T. 208-209, 237), small group instruction (2-3 students and 1 teacher) in the middle block, working on particular skills, strengths and weaknesses (N.T. 237, 255, 275), and group instruction in the last 45 minute block with a reading specialist, working on reading comprehension and fluency. (N.T. 237)
 11. Private School addressed Student's fear of failure, [Student's] shutting down, and [Student's] "availability for learning." (N.T. 206, 223, 229-230) Error analysis of Student's reading skills at the beginning of the school year indicated random answers with no patterns. (N.T. 203) [Student] frequently was anxious and gave [Student's] teacher many examples of [Student's] repeated failures in the past. (N.T. 235) [Student] was often overwhelmed by writing assignments and would not write anything at all. (N.T. 241) By the end of the school year, Student was genuinely attempting to use techniques [Student] was taught, making associations with beginning sounds, ending sounds, letter combinations within words. (N.T. 203, 236, 245-246) [Student's] failure to hand in homework diminished as the year progressed. (N.T. 222) Teachers broke down writing projects sentence by sentence, having Student first tell them a detail and then having [Student] write it down. (N.T. 241) [Student] learned to write five sentence paragraphs with ease on topics with which [Student] was comfortable. (N.T. 240)
 12. At the beginning of the school year, Student's Woodcock Reading Mastery test indicated that [Student] was at a 2.3 reading level and 2.0 word attack reading level. (N.T. 226-227; J-2, p.12) [Student's] teacher thinks [Student] was at DRA level 24 or 28. (N.T. 271) [Student's] Gates-MacGinitie Reading Test indicated a 2.5 grade level in reading comprehension. (J-2, p.12)
 13. At the end of the school year, Student's Woodcock Reading Mastery test indicated that [Student] was at a 2.4 word identification reading level and 2.7 word attack reading level. (N.T. 226-227; J-2, p.12) [Student] was at a 3rd grade DRA level. (N.T. 251, 260) [Student's] Gates-MacGinitie Reading Test indicated a 2.4 grade level in reading comprehension in a timed-test situation and a 2.8 grade level in reading comprehension in an untimed-test situation. (J-2, p.12)
 14. A May 19, 2006, Private School final report for Student's 2005-2006 school year indicated increased confidence in decoding, progressing from unwillingness to attempt words [Student] did not recognize to attempts and requests for help. (J-2, p.3) Reading was becoming less laborious and more fluent and more confident. (J-2, p.4) Student's

- oral reading accuracy was estimated to be around the end of 2nd beginning of 3rd grade level. Student was using context clues to figure out a word. (J-2, p.4) [Student] was breaking down [Student's] writing assignments into more manageable chunks. (J-2, p.4) In Saxon math, [Student] was benefiting from frequent review, repetition and practice with skills and concepts. (J-2, pp.7, 17) Over the school year, Student had also become more engaged in the learning process, becoming more willing to state when [Student] does not understand something (rather than engaging in avoidance and distraction behaviors.) (N.T. 238-239; J-2, p.15)
15. In April 2006, the School District issued an ER as part of the parties' August 2005 settlement agreement.
- a. It confirmed earlier measurements of Student's cognitive functioning, ranging from average verbal comprehension and perceptual reasoning to significantly impaired short term memory and visual processing. (J-3, p.15)
 - b. WIAT II results were:
 - i. 64 reading composite (significantly impaired range), with subtests scores that also were all within the significantly impaired range;
 - ii. 68 written language composite (significantly impaired), with 67 written expression subtest and 75 spelling subtest; and
 - iii. 87 math composite (low average) (J-3, pp.12-13):
 - c. The evaluator believed that Student's standard scores may have been depressed due to Student's overall negative demeanor, lack of perseverance and resistance to reading and writing tasks during the testing. (J-3, p.15)
 - d. The Piers-Harris self-concept scale indicated low overall self-concept. (J-3, p.14)
 - e. On-task behavior during the evaluator's classroom observation at the Private School was 96%. (J-3, p.9)
 - f. The ER concluded that Student continues to demonstrate significant weaknesses in reading decoding, reading fluency and reading comprehension. (J-3, p.15) Academic skills continue to be below grade level in all areas, with significant learning weaknesses in reading, writing, and spelling, and with low average to average skills observed in mathematics. (J-3, p.15)
16. The School District's psychologist believes that Student is more frustrated and upset about [Student's] academic problems now than when [Student] was at the School District. (N.T. 138) She observed frustration at the test. (N.T. 148-149) She also believes that Student gets frustrated in school as the curriculum naturally becomes more difficult, and as Student gets older and progresses into higher grades. (N.T. 149) Student did tell the psychologist that [Student] does not want to leave Private School and [Student] seemed anxious not to return to the School District. (N.T. 150, 257)
17. On May 11, 2006, the School District proposed an educational program and placement within its public middle school. (J-6; N.T. 22)
- a. The IEP's reading decoding goal is to decode words at [Student's] independent reading level 85% of the time. (J-6, p.14)
 - b. A combined Reading comprehension, accuracy and fluency goal is to progress from DRA level 20 to level 36 in one year (N.T. 29; J-6, p.15)

- c. Oral reading fluency goal is to increase fluency at the 2nd-3rd grade level by one word per week from 60 to 96 words correct per minute with 95% accuracy. (N.T. 30; J-6, p.16)
 - d. A specific reading comprehension goal is to answer comprehension questions with 90% accuracy on instructional level passages (J-6, p.17);
 - e. One written expression goal is to edit and write dictated sentences with 85% accuracy in capitalization and punctuation, and 90% accuracy in spelling (J-6, p.18);
 - f. Another written expression goal is to score 13 under a PSSA rubric on timed 50 word passages. (J-6, p.19)
 - g. A math computation goal is to increase by 2, each marking period, [Student's] digits correct per minute on 6th grade level math probes. (J-6, p.20)
 - h. A math application goal is to increase by 4, each marking period, the number of points correct in timed weekly 6th grade level math probes. (J-6, p.21)
18. The School District proposes to achieve the IEP goals through:
- a. A daily collaborative reading class with 17-20 regular and special education students and two teachers (one regular education and one special education) (N.T. 29, 57) This class will use pre-reading, re-reading, highlighting and comprehension webs as reading strategies. It will also provide Student with frequent opportunities for oral reading, and word drills to increase [Student's] sight word vocabulary. (N.T. 30)
 - b. One-on-one instruction in the Wilson reading program three times per week. (N.T. 28, 32, 62, 93, 192)
 - c. A support class two times per week in which Student and 1-2 other students will receive any support that [Student] may need in written language, study skills strategies, math or other subjects. (N.T. 32-33)
19. The daily collaborative classroom will meet for three periods per day, covering language arts, reading and math. (N.T. 34-35) About 50% of the children in the class will have IEPs. (N.T. 108) Most of those children will be at a mid-3rd grade independent reading level. (N.T. 104) The regular education teacher will deliver most of the lesson, with the special education teacher filling in gaps for particular students. (N.T. 102) Last year, the maximum number of children in that classroom was 14. (N.T. 115) Student's parents observed that classroom last year and they believe it is too fast-paced and lacks sufficient opportunity for Student to receive as much assistance as [Student] will need. (N.T. 185)
20. The Wilson reading program will be a sequential, multisensory, highly structured reading program. (N.T. 84-86) Each lesson will have 10 parts, and each lesson is designed to be taught in one day. There are approximately three lessons per sub-step, three to eight sub-steps per Step, and twelve Steps in total. (N.T. 84) The teacher will administer a diagnostic evaluation (WADE) at the beginning and end of the school year to measure progress. She will also be charting Student's performance daily. (N.T. 84) The Wilson program recommends a minimum amount of instruction of three times per week, and this is the number of times that Wilson instruction is provided at this middle school, regardless of any student's need. (N.T. 93) Although the Wilson program is not

explicitly mentioned by name in the School District's proposed IEP, it was explicitly described at the IEP meeting and there is no reason to believe that it will not be the reading program delivered under the proposed IEP. (N.T. 28, 32, 62, 93, 192)

21. The School District will use a writing workshop approach and the "Everyday Spelling" series for written expression instruction. (N.T. 31-32, 119) Progress on Student's written expression goal will be measured according to the PSSA rubric, as allegedly recommended by the Pennsylvania Training and Technology Assistance Network (PaTTAN). (N.T. 87, 95) School District personnel were unclear both as to what Student's present educational levels are in writing and what grade level assessment will be used to measure progress under the IEP. (N.T. 95-96, 118, 151-152, 156-157)
22. The School District is uncertain of Student's present education levels in math, although they appear to be around the 4th grade level, with weakness in basic facts, problems with regrouping numbers, and inability to perform division. (N.T. 33, 158)
23. On May 24, 2006, Student's parents rejected the School District's recommended program and placement. (J-7, p.2; J-8; N.T. 43) On June 19, 2006, the School District refused parental request for placement at Private School at public expense. (J-9)
24. Student's parents are concerned that the School District's proposed program and placement is too fast paced and too crowded for Student. (N.T. 189) They would accept a proposed program and placement of six or seven students in a class, with no time restrictions and adequate time to answer questions. (N.T. 190) They note, however, that Student is scared and worried about having to return to the School District, and they are concerned about Student's history of shutting down in frustration. (N.T. 190)
25. I was assigned to serve as hearing officer in this matter on June 23, 2006. The parties waived a resolution meeting. (HO 2) I conducted the hearing on August 2 and September 8, 2006. Joint Exhibits J-1 through J-21 were admitted without objection. (N.T. 276)

DISCUSSION

The Individuals with Disabilities Education Act (IDEA) and its most recent reiteration, Individuals with Disabilities Education Improvement Act (IDEIA), requires the School District to provide a "free appropriate public education" to all students who qualify for special education services. 20 U.S.C. §1412 This requirement is met by providing personalized instruction and support services to permit Student to benefit educationally from the instruction, as long as the procedures set forth in the Act are followed. Board of Education of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982)

There are three prongs to the decision to award reimbursement for a parent's placement of a student at a private school. First, the School District must show that it has offered Student a free appropriate public education (FAPE.) Second, if the School District does not prevail on the first prong, Student's parents must show that the Private School is appropriate for Student. Third, if the School District has not offered FAPE and if 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); In re S.K. and the Upper Darby School District, Special Education Opinion No. 1769 (2006)

Regarding the first prong of the tuition reimbursement test, 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. Fuhrman v. East Hanover Bd. of Educ., 993 F.2d 1031 (3d Cir. 1993); 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 IEP must be likely to produce progress, not regression or trivial educational advancement. Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3d Cir. 1988), cert. denied, 488 U.S. 1030 (1989); Board of Education v. Diamond, 808 F.2d 987 (3d Cir. 1986)

In addition, the School District is required to educate children eligible for special education services within the regular classroom "to the maximum extent appropriate." 20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.550; 22 Pa. Code §14.102(a)(2)(xxiv) Courts have long recognized the tension between the strong preference for mainstreaming/inclusion, and the requirement that schools provide appropriate individualized programs tailored to the specific needs of each disabled child. Oberti v. Board of Education of Clementon School District, 995 F.2d 1204, 19 IDELR 908 (3rd Cir. 1993)

In this case, where the School District seeks to move Student from [Student’s] pendent placement to a new educational program and placement, the burden is on the School District to establish that its proposed educational program complies with the IDEA. Schaffer v. West, ___ U.S. ___, 126 S.Ct. 528 (2005); Oberti v. Board of Education, 995 F.2d 1204 (3rd Cir. 1993) The appropriateness of the IEP is to be judged based on information known at the time it is drafted. Fuhrmann v. East Hanover Board of Education, 993 F.2d 1031 (3rd Cir. 1993).

I believe the circumstances in this case are similar to those in In re E.B. and the Hempfield School District, Special Education Opinion No. 1312 (2003) The public and private evaluations in this case are substantially similar in identifying Student’s needs, and the School District’s proposed IEP appears to list goals that will address Student’s identified reading, writing and math needs. As in E.B., supra, however, there is more to Student’s educational program than sound ERs and IEP goals. The School District must also establish that it can provide an appropriate placement for the delivery of the services set forth in the IEP. Review of the record in its entirety compels me to conclude that the School District has not met this burden.

It is undisputed that Student has very significant needs in reading. Given [Student’s] low reading levels, it is clear that Student will require intensive intervention to succeed not only in language arts, but also in [Student’s] regular education classes. The IEP provides three one-on-one sessions per week of the sequential, multisensory, highly structured Wilson reading program. (N.T. 84-86) The School District also proposes: 1) a support class two times per week in which Student and 1-2 other students will receive any support that [Student] may need in written language, study skills strategies, math or other subjects (N.T. 32-33); and 2) a daily collaborative

reading class that will meet for three periods per day, covering language arts, reading and math, consisting of 17-20 regular and special education students and two teachers (one regular education and one special education.) (N.T. 29, 34-35, 57, 104, 108, 115)

While at first glance, these appear to be extensive program modifications and specially designed instruction, it does not appear that the proposed program as a whole has been individualized for Student. E.B., supra, Special Education Opinion No. 1312 (2003) The three Wilson Program sessions per week are not offered on the basis of any analysis of Student's needs, but rather because that is the minimum recommendation of the Wilson program, and that is the number of times that Wilson instruction is provided to any student at the School District's middle school, regardless of that student's need. (N.T. 93) The twice-weekly support class appears simply to be a way of filling the time slot on the two days per week that Wilson instruction is not offered. And the collaborative classroom, while generally laudable in its provision of mainstream education to some special education students in a smaller-than-typical regular education classroom setting, is at least twice as large as Student's Private School setting, and there is no evidence in the record indicating why such a relatively large class size (compared to Private School) is appropriate for Student's unique needs. I agree with Student's parents that the collaborative classroom seems likely to overwhelm Student and appears to lack sufficient opportunity for Student to receive as much assistance as [Student] will need. (N.T. 185)

Accordingly, I conclude that the School District's proposed educational program and placement is not appropriate for Student. Having so concluded, I now turn to the other prongs of the tuition reimbursement analysis. Private School need not satisfy the IDEA requirements in order to qualify for reimbursement. Florence County School District v. Carter, 510 U.S. 10 (1993); School Committee of Burlington v. Department of Education, 471 U.S. 359 (1985) It simply must be reasonably calculated to provide Student with educational benefit. E.B., supra, citing David P. v. Lower Merion School District, 27 IDELR 915 (E.D. Pa. 1998)

Private school uses an Orton-Gillingham approach to reading, which is a language-based multisensory association of sound and symbols, in classrooms of 7-8 students. (N.T. 133, 199, 202) An Intermediate Unit speech pathologist comes into the class twice per week, facilitating writing and comprehension, and working on word retrieval, vocabulary, writing skills. (N.T. 255-256) Student's Private School language arts instruction consists of three 45 minute blocks of instruction, with group instruction (8 students and 2 teachers) in the first block for writing, grammar and some spelling strategies (N.T. 208-209, 237), small group instruction (2-3 students and 1 teacher) in the middle block, working on particular skills, strengths and weaknesses (N.T. 237, 255, 275), and group instruction in the last 45 minute block with a reading specialist, working on reading comprehension and fluency. (N.T. 237)

Most importantly, Private School is addressing Student's fear of failure, [Student's] shutting down, and [Student's] "availability for learning." (N.T. 206, 223, 229-230) Over the last school year, Student has become more engaged in the learning process, becoming more willing to state when [Student] does not understand something (rather than engaging in avoidance and distraction behaviors.) (N.T. 238-239; J-2, p.15) Error analysis of Student's reading skills at the beginning of the last school year indicated random answers with no patterns. (N.T. 203) [Student] was often overwhelmed by writing assignments and would not write

anything at all. (N.T. 241) By the end of the school year, Student was genuinely attempting to use techniques [Student] was taught, making associations with beginning sounds, ending sounds, and letter combinations within words. (N.T. 203, 236, 245-246) Reading was becoming less laborious, more fluent and more confident. (J-2, p.4) Student's failure to hand in homework diminished as the year progressed. (N.T. 222) [Student] learned to write five sentence paragraphs with ease on topics with which [Student] was comfortable. (N.T. 240) This is good enough to satisfy the second prong of the tuition reimbursement analysis.

Finally, the equities in this matter favor the Student. There is no evidence that Student's parents delayed the process, failed to meet timelines, attend meetings, or participate in discussions. Student is now being served appropriately at Private School for the current school year (2006-2007). Given Student's success at Private School, Student's anxiety and other individual needs, it would be too disruptive and damaging to transfer the Student to the District school at this point in time, even after the District revises its IEP to provide FAPE. In Re S.K. and the Upper Darby School District, Special Education Opinion No. 1769 (2006)

Accordingly, I conclude that Student's parents satisfy the tuition reimbursement analysis. I will order the School District to reimburse Student's parents for Private School tuition for the current school year (2006-2007).

CONCLUSION

Student is [a pre-teenaged], 6th grade resident of the School District with learning disabilities in reading and written expression. Contending that the School District's proposed program and placement for 2006-2007 is not appropriate, Student's parents seek reimbursement of [Student's] private school tuition. For the reasons described above, I find for Student's parents.

ORDER

For the reasons described above, I ORDER that:

- The School District shall reimburse Student's parents for [redacted] School tuition for the current school year (2006-2007).

Daniel J. Myers

Hearing Officer

September 26, 2006

Re: Due Process Hearing
File Number 6687/05-06 KE