

*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.*

**DECISION**

**Child's Name: R.N.**  
**Date of Birth: [redacted]**  
**Type of Hearing: Closed**  
**Dates of Hearing: August 15, 2006**  
**August 17, 2006**  
**September 14, 2006**  
**September 15, 2006**  
**September 19, 2006**  
**September 20, 2006**

**Parties:**

Parent[s]

**Representatives:**

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**School District:**

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Date Closing Statements Received:  
Date of Decision:  
Hearing Officer

October 10, 2005  
October 25, 2006  
Elaine P. Stanko, Esquire

## **I. BACKGROUND**

The student is a [teenaged] who immigrated to the United States from [another country]. [Student] was placed by [the local] Department of Human Services in [redacted], a residential facility located within the Marple Newtown School District (the District). The Parent and the District agree that the Student is eligible for special education services as a student with mental retardation and the other health impairment of intractable epilepsy. Although the Student is in the custody of the [local] Department of Human Services, the Parent's parental rights have not been terminated. The Parent [speaks another language] and [is] illiterate. The Parent was represented in this matter [redacted].

The Parent disagreed with the IEP developed for the Student and instituted this due process proceeding seeking compensatory education, the inclusion of numerous additional services in the Student's IEP, and reimbursement for the cost of evaluations and technical assistance by Dr. G. a licensed psychologist, and Dr. F, a licensed psychologist.

## **II. FINDINGS OF FACT**

1. The Student (DOB [redacted]) is a [teenaged child] who was placed by [the local] Department of Human Services in [redacted], a residential facility located within the School District.
2. The Student has mild to moderate mental retardation. (N.T. at 237, S-29).
3. The Student emigrated to the United States from [another country] following the death of [family members who were] caretakers. (N.T. at 237, S-29).
4. The parties agree that the Student is eligible for special education services as a student with mental retardation and the other health impairment of intractable epilepsy. (N.T. at 238, 281, 378, 437, S-2, S-29).
5. The Student's Parent is an illiterate [and speaks another language]. (N.T. at 19).
6. The Student was initially enrolled in a life skills curriculum at the [redacted] School. (N.T. at 971, S-29 at 5.)
7. The District's life skills support program is run by the County Intermediate Unit and was moved to [redacted], located on the same premises where the Student resides, at the beginning of the 2002 – 2003 school year. (P-24).
8. The Student suffers from intractable epilepsy for which [Student] takes a number of prescribed medications including Keppra, Depakote, and Trileptal. (S-30).
9. The Student's seizure disorder and prescription protocol often cause [Student] to be tired, and they may affect [Student's] ability to participate in [Student's] educational programming. (N.T. at 828).
10. The side effects of the Student's seizure disorder impede [Student's] ability to acquire new information and to retain material that [Student] has learned. (N.T. at 384, 445).
11. The Student has limited ability to generalize information and skills that [Student] has learned. (N.T. at 384-385, 840-842).
12. The staff nurses who work with the Student in the residential setting where the Student lives have regularly shared information about the Student's condition with the staff of the school, and have made the determination of whether or not the Student attends or remains at school after [Student] suffers a seizure. (N.T. at 543-546, 862, 917, 974).
13. The Student's speech is concrete, and [Student] speaks in short simple sentences or phrases. (N.T. at 372, 565, 569- 570, 714).
14. Testing shows that the Student has deficits in both expressive and receptive language in both English and [another language]. (N.T. at 381, 428, S-29, S-31).

15. The Student's IEPs while [Student] has been enrolled in the District's life skills support program have included goals and objectives for prevocational skills, community awareness and safety skills, functional academics, domestic and daily living skills, and language and communication skills. (S-3, S-5, S-7, S-16, S-23, P-22).

16. Throughout [Student's] enrollment at the District, the Student has received group speech and language therapy to address [Student's] functional communication skills. (S-2 at 6, S-3, S-5, S-7, S-16, S-23, P-22). In addition to group speech and language therapy, the Student's IEPs have provided for consultation between the speech and language therapist and the Student's classroom teacher. (N.T. at 873, 942, S-2, S-3, S-5, S-7, S-16, S-23, P-22).

17. "Pull-out" ESL instruction was removed from the Student's IEP after the 2001 – 2002 school year on the basis of the IEP team's determination that [Student] was not benefiting from the ESL instruction and that the Student's language needs would be better addressed in the classroom setting by the speech therapist and the Student's classroom teacher. (N.T. at 769).

18. Dr. M, a licensed bilingual school psychologist testified that the approaches of a speech therapist and an ESL teacher are similar when addressing the language needs of students with low cognitive functioning. (N.T. at 579-580).

19. Dr. M also testified that students with limited cognitive ability are better served by integrating ESL into the life skills curriculum rather than by being "pulled out" for ESL. (N.T. at 573).

20. The Student's IEP progress reports indicate that [Student] has made progress toward the goals and objectives of [Student's] IEPs, and the IEP goals provide for a progression in the Student's skills and for [Student] to build upon what [Student] has previously learned. (N.T. at 977, 1019-1039).

21. The District completed a biannual evaluation of the Student in October 2005. (S-13).

22. A bilingual evaluation of the Student was ordered by a Family Court judge in October 2005 in proceedings not related to the District or the County Intermediate Unit. (N.T. at 983-984, S-17).

23. After an IEP meeting for the Student held on November 2, 2005, the District agreed to complete a bilingual evaluation of the Student even though the Family Court order did not pertain to the District and despite the fact that the District had recently completed the required biannual reevaluation of the Student. (S-16, S-17. N.T. at 983-984).

24. The District's bilingual evaluation of the Student was completed in February 2006, and it included standardized and achievement testing conducted of the Student conducted by Dr. M, as well as the Developmental Test of Visual Motor Integration, and completion of a Vineland Adaptive Behavior Scale. (S-21). As a result of the testing she conducted of the Student, Dr. M did not recommend "pull-out" ESL instruction for [Student], rather, she recommended "push-in" ESL services. (N.T. at 573).

25. At an IEP meeting held following the District's bilingual evaluation of the Student on March 21, 2006, the Student's IEP was revised to include a monthly consultation with an ESL teacher. (S-2).

26. The Parent rejected the NOREP accompanying the IEP on April 7, 2006, citing "lack of accommodation for child's language needs" as the reason for the disapproval. (S-24).

27. The Parent requested and subsequently withdrew his request for a due process hearing. (S-28).

28. ESL consultation has been provided to the Student's classroom teacher by Ms. C, the County Intermediate Unit's Coordinator / Facilitator. She has observed the Student in [Student's] classroom and made recommendations to the Student's classroom teacher and has validated strategies the teacher was already employing. (N.T. at 796-799, 872).

29. The Parent obtained an independent evaluation of the Student by Dr. G, who administered a cognitive assessment and a language survey, the results of which were consistent with the previous testing of the Student conducted by the District. (S-29).

30. Dr. G recommended that the Student's educational program include occupational and vocational training, direct ESL instruction, a language evaluation in Spanish, life skills instruction and bilingual psychotherapy. (S-29).

31. The Parent also obtained an independent evaluation of the Student by Dr. F, who conducted only one test of the Student and spent about one hour with the Student. (N.T. at 423, S-31).

32. Dr. F recommended that the Student's educational program include occupational therapy, classroom tools and modifications to combat the fatigue the Student suffers from [Student's] medication; a vocational evaluation and off-site interactive job training; ESL instruction; a speech and language evaluation and therapy; and bilingual psychotherapy. (S-31).

33. Dr. H, the Student's treating neurologist at the University of Pennsylvania, provided information about the Student's seizure disorder, but the sole basis of her information about the Student's educational program was Parent counsel, and Dr. H did not undertake a review of the Student's educational programming or make any educational recommendations. (S-30, N.T. at 717).

34. Parent counsel arranged for the evaluations of the Student by Dr. G, Dr. F and Dr. H, and she accompanied the Student to [Student's] visits with Dr. G and Dr. H. (N.T. at 234, 245, 421, 700).

35. At an IEP meeting held on June 13, 2006, the District agreed to conduct a situational assessment of the Student for purposes of considering appropriate vocational training for the Student, although the next step for a student in the District's life skills program would typically be to participate in jobs in the school setting. (N.T. at 925, 997).

36. At the June 13, 2006 IEP meeting the District also agreed to conduct an occupational therapy screening to determine whether the Student needs further evaluation and programming. The parties did not reach any other agreement regarding the other services recommended by Dr. G and Dr. F. (N.T. at 997-998).

37. The Student has presented as a happy affable student well-adjusted to [Student's] environment and [Student's] school routine. (N.T. at 903, 1002).

38. Dr. G's recommendation that the Student receive bilingual psychotherapy was based on her generalized belief that any significant trauma in a person's life impacts their ability to learn. (N.T. at 360).

39. On June 27, 2006, the Parent filed a complaint with the Pennsylvania Office for Dispute Resolution (ODR), requesting a due process hearing and challenging the educational program offered to the Student by the District and seeking compensatory education for the 2003-2004, 2004-2005 and 2005-2006 school years. (Parent's Complaint dated June 27, 2006/cover letter page 6). The Parent's Proposed Findings of Fact and Conclusions of Law dated October 10, 2006 proposes an award of compensatory education for "the 2000-2005 school years."

### **III. ISSUE PRESENTED**

Is the Student entitled to compensatory education for the 2000 through 2005 school years?

### **IV. DISCUSSION AND CONCLUSIONS OF LAW**

The first two hearing sessions were limited to the issue of whether the Parent met the statutory standard for presenting claims for a period extending more than two (2) years prior to the due process hearing request. I directed that the Parent had the burden of showing: i) the date when he knew or should have known about the alleged action that forms the basis of his claim for compensatory education (20 U.S.C. Section 1415(b)(6)(B), (f)(3)(c)); and/or ii) whether either of the exceptions set forth in subsection (f)(3)(D) apply to extend the time for which the Parent could seek compensatory education. At the first two hearing sessions, the Parent presented evidence that almost all correspondence between the District and the Parent was in English (N.T. at 56, 61, 64, 66, 87, 125-126, P-25, P-45, P-55, P-62, P-65, P68, S-15), that the District did not always provide translation services or make certain that a translator was present at IEP meetings (N.T. at 68-69), and that the Parent may have signed NOREPs that he did not understand (N.T. at 65-66, S-9, S-24, P-20).

On the basis of this disturbing pattern of insensitivity to the fact that the Parent is monolingual [redacted] speaking and illiterate, I found, at the conclusion of the first hearing session, that the Parent should be permitted to present evidence to support his claims for compensatory education for a time period beyond the two (2) year period prior to his request for a due process hearing (20 U.S.C. Section 1415(f)(3)(D)).

Procedural violations alone do not support an award of compensatory education. To the contrary, a departure from proper procedures must result in a denial of a free appropriate public education (FAPE) in order to justify an award of compensatory education. In Re: The Education Assignment of J.N., Special Education Opinion No. 1425 (December 5, 2003).

Although considerable hearing time was devoted to the introduction of evidence that the Parent's meaningful informed consent was not consistently obtained by the District throughout the course of the Student's enrollment in the District, the Parent has failed to "connect the dots" from the procedural violations emanating from District's flawed and insufficient attempts to communicate with the Parent and a denial of FAPE to the Student.

Clearly the District needs to get its house in order and to enact measures to ensure that it deals more effectively with the challenges of communicating with parents who are non-English speaking, or who are involved in complex residential placements or diverse family situations such as the Student's. However, the simple fact is that the Parent presented no evidence that any of the departures from proper procedures resulted in a denial of FAPE to the Student. Having found that there was no denial of FAPE on the basis of failure to properly comply with procedures, no award of compensatory education can be awarded on this basis.

I granted the Parent leave to present evidence in support of an extended time period for compensatory education partly to acknowledge and redress the inadequacies of the District's procedures with respect to the Parent, as well as the District's disregard of the critical role of parents in a student's educational planning. However, the Parent was not a convincing witness. He appeared to me to have been highly coached by his counsel. He often answered questions before his counsel even completed a question. Without a moment's hesitation or the opportunity for reflection, he frequently responded to questions with the repetitive statement that he "didn't



understand what was going on”. (N.T. 22-24). It must be noted, however, that almost without exception, the Parent regularly attended IEP meetings (N.T. 26, 28, 38-39, S-3, S-5, S-7, S-16), so I must conclude that he understood, or through some means was able to access, the import of the invitations, and that his presence could have indicated to the District that he was able to comprehend the invitations and proceedings.

The Parent claims that the IEP that the District has offered to the Student is insufficient specifically in that it allegedly does not provide for a number of items the Parent wishes to have included: occupational therapy, vocational therapy, direct ESL instruction, bilingual psychotherapy, a speech and language evaluation in [another language], and life skills instruction focused on self-sufficiency, domestic tasks and independence. The Parent must establish, by a preponderance of the evidence, that the District has failed to provide the Student with FAPE. Schaffer v. Wiest, 126 S.Ct. 528 (2005). The Parent has failed to meet his burden.

Although the IDEA requires that a disabled student receive more than a trivial educational benefit, it does not mandate that a student’s IEP confer the optimal level of services, or even a level of services that would confer additional benefits on a child. Rather, the IDEA only requires that an IEP provide a “basic floor of opportunity for a child.” Carlisle Area School District v. Scott P., 62 F.3d at 533-534; Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171, 181 (3d Cir., 1988); Board of Education of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982). The Parent’s argument that the IEP is inadequate rests largely on the Student’s failure to make significant progress. However, lack of achievement does not necessarily mean that an IEP was inappropriate. Carlisle Area School District v. Scott P. Id.

The Parent is not satisfied with the Student’s progress chiefly in that the Student has not learned English. (N.T. at 31). Unfortunately, this appears to be a case where a parent’s

expectations (or those of [Student's] devoted legal guardian and counsel) for a child may simply not be realistic or reasonable given the child's abilities and deficits. There was no evidence of almost any disagreement, among the several experts who testified on behalf of both parties, as to the Student's limited cognitive functioning. (N.T. at 573, S-29, S-31). The Student suffers from an "intractable" (N.T. at 725) form of epilepsy that is extremely difficult to control, according to Dr. H, the Student's treating neurologist. (N.T. 694, 711, 725). Dr. H testified that it is difficult to separate out the effects of the Student's seizure disorder from [Student's] underlying mental retardation. Dr. G testified that the Student's seizure disorder has either "caused the mental retardation or certainly exacerbated it because in general they cause cognitive harm." (N.T. at 398).

There was universal acknowledgement of the fact that the Student is moderately mentally retarded, and that the life-long assault\* that has been inflicted on the Student's brain from [Student's] seizure disorder impacts [Student's] ability to learn and to acquire and retain learned material, as does the daily regimen of high doses of multiple medications that the Student has taken and must continue to take in order to seek seizure control. (N.T. 726, S-30). There is ample evidence that the Student's academic functioning and minimal progress is consistent with [Student's] abilities given [Student's] staggering health issues and considerable deficits. (N.T. 302, 314, 492, 569-574).

The evidence presented by the Parent did not demonstrate that the District's IEP was not reasonably calculated to provide meaningful educational benefit to the Student. The IEP includes numerous measurable annual goals and corresponding short term objectives which address the Student's needs identified in the IEP, meeting the requirements of the IDEA. I find

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\* Parent has pointed out that the Student's medical records reveal that the Student suffered nearly 400 seizures between 2000 and 2006. (Closing Argument Submitted by Parent on Behalf of Student, page 5).

that the Student has made some meaningful progress, albeit slow and incremental over the years, consistent with [Student's] disabilities and deficits and [Student's] severe seizure disorder.

Although not perhaps provided in the exact form or venue the Parent may wish for, vocational skills are addressed in classroom-based workshop activities; and daily living domestic skills are incorporated in a classroom apartment setting, at a level appropriate to [Student's] current level of skills and abilities. There are goals and objectives for the Student to further develop [Student's] functional English and Math including handling money. The IEP includes specially designed instruction for speech and language development, which includes opportunities for repetitive practice, picture association and multi-sensory approaches. (S - 23).

The Parent's list of requirements for inclusion in the IEP is speculative and at times seems more like a wish list. The Parent has argued most strenuously for the inclusion of direct ESL instruction, and this argument is based on claims of violations of Pennsylvania regulations pertaining to ESL programming and alleged failures to comply with requirements of the Office for Civil Rights. The Parent has repeatedly failed to establish a jurisdictional basis for me, as a Pennsylvania Special Education Hearing Officer, to even hear these claims. Moreover, the Parent has failed to prove that the Student requires direct ESL instruction. In fact, there was credible evidence that the Student's language skills in both English and [another language] is impaired and is "extremely concrete" and characterized by short simple sentences, according to Dr. M, the District's very experienced licensed bilingual school psychologist. (N.T. at 565, 569-570).

At the hearing, a philosophical debate of sorts ensued among the parties' expert witnesses over whether the Student's English language instruction should be predicated on a "pull-out" or a "push-in" approach. While I do not purport to resolve the controversy over the most efficacious

methodology of English language instruction to non-English speakers, I do accept as sound, Dr. M's conclusion that in this case, where the Student has moderate mental retardation and profound medical/neurological issues, it is appropriate for language instruction to be integrated into and imbedded in the Student's life skills curriculum. This is even consistent with some of the opinions of Dr. G. (N.T. 333, 377). In the final analysis, even Dr. F's recommendation for direct ESL instruction was based on his own anecdotal conclusions drawn from his own personal ESL instruction growing up and not on his evaluation of the Student. (N.T. 502-503). The Parent has requested that the District conduct a speech and language evaluation in [another language]. My review of the record indicates that no evidence was introduced to justify this request or to prove that such an evaluation is necessary.

The Parent claims that the District has failed to accommodate the Student's seizure disorder. However, the Parent patently failed to present any evidence of specific accommodations that are lacking from the Student's educational program. Dr. H, when asked specifically to identify the accommodations the Student needs, did not make any recommendations other than for additional time to complete tasks. Neither Dr. G nor Dr. F made any specific recommendations for the District to accommodate the Student's seizure disorder. (N.T. at 388-389, 496). The only other recommendation proffered by the Parent's experts was that the District be apprised of the Student's medical condition. The evidence indicated that the exchange of information about the Student's medical condition as it pertains to [Student's] school day regularly and routinely occurs through the nurses who work in the residential facility where the Student resides contiguous to the school the Student attends. (N.T. at 543-546).

The Parent has demanded that bilingual psychotherapy be added to the Student's IEP because of the many traumatic events [Student] has suffered. Although most of the traumatic

events referred to by the Parent at hearing were not actually substantiated, I accept as true the proposition that the Student has experienced inordinate trauma. I likewise fully accept, however, Dr. M's conclusion that the Student lacks the ability to have the abstract thought processes and insight that psychotherapy requires. (N.T. at 587). Moreover, Dr. G's recommendation that bilingual psychotherapy be added to the Student's educational program provided by the District on the general theory that "any significant trauma in a person's life impacts their learning" (N.T. at 360) simply does not support the claim that the District is legally required to provide bilingual psychotherapy because the Student needs it in order to derive meaningful educational benefit from the educational program. This is a generalized and highly skeptical assumption.

The Parent's complaint included a claim that the Student's program constituted a violation by the District of the IDEA's least restrictive environment requirement. I find that the Parent failed to address this claim at any point in the hearing or to present any evidence to support the claim. I consider it to have been dropped.

As to the Parent's claim for reimbursement for the cost of the evaluations conducted by Dr. G and Dr. F, I find that the Parent failed to prove that reimbursement is appropriate. Although the Parent may disagree with the District's evaluation, the Parent has simply not proved that the District's evaluation was inappropriate, 34 C.F.R. Section 300.502 (b). In fact, the Parent really only disagreed with the recommendations of the District's evaluation, not with its results. The Parent's experts were reasonably well qualified and credentialed. However, they administered limited testing to the Student which yielded results consistent with the District's (N.T. at 343-344, 346, 347), they spent minimal time with the Student and did not set out to evaluate [Student] in the educational setting, and frankly, my strong impression of them was that they appeared to have been retained for the purpose of reaching conclusions provided by Parent's

counsel in order to buttress the Parent's case.(N.T. 363-370, 482-484, 717). Accordingly, I do not grant the Parent's request for reimbursement of the cost of [Student's] independent evaluations.

The Student has faced and will, it unfortunately appears, continue to face staggering adversity, and I am deeply sympathetic to [Student's] plight. I am impressed by the level of dedication and service the Student's counsel, advocate and legal guardian have devoted to the Student and the Parent, and I commend them for their efforts. However, I am bound to apply the law to the evidence presented, and in doing so, I find that there has been no denial of FAPE, therefore, there is no basis to award compensatory education.

October 25, 2006

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Elaine A. Stanko, Esquire  
Hearing Officer