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PENNSYLVANIA
SPECIAL EDUCATION HEARING OFFICER

DECISION

DUE PROCESS HEARING

Name of Child: DG
ODR #6810/06-07 KE

Date of Birth:
Xx/xx/xx

Dates of Hearing:
October 18, 2006,
January 5, January 8, January 9, February 23, March 5,
March 6, March 20, April 10 and June 11, 2007

CLOSED HEARING

Parties to the Hearing:
Mr. and Mrs.

Council Rock School District
30 N. Chancellor Street
Newtown, Pennsylvania 18901

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:
Frederick Stanczak, Esquire
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Doylestown, Pennsylvania 18901

Grace Deon, Esquire
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Doylestown, PA 18901

August 15, 2007

August 29, 2007

Linda M. Valentini, Psy.D.

Background

Student is a xx year old male who was formerly enrolled in the Council Rock School District (hereinafter District). He was found to have a specific learning disability in reading and written expression and to be eligible for special education at the end of 1st grade and continued to be eligible throughout his school career. Although Student completed all credits necessary for graduation in the Commonwealth, satisfied District requirements for graduation including completing a senior project, and participated in the graduation ceremony with his class in June 2004, he did not return to the school to retrieve his diploma. Mr. and Mrs. (hereinafter Parents) maintained that Student had not graduated since he had not picked up his diploma, and filed for a due process hearing in November 2004, asserting that Student was denied a free, appropriate public education (FAPE) in the areas of reading, written expression and transition planning and that he therefore is entitled to compensatory education during all the times he was an eligible student. The District maintains that Student graduated in June 2004, and that at all times Student was provided with FAPE. Additionally, the District maintains that the transition services it offered Student during the parties' efforts to settle the matter were appropriate and satisfied any further obligations the Parents assert remained.

Scope of the Hearing

Following the Parents' filing for due process on November 4, 2004, the parties attempted to resolve the matter, but ultimately the parties could not come to an amicable agreement and this hearing became necessary¹. In the course of their attempts to settle the matter, the parties agreed to preserve the original filing date. Granting the District's pre-hearing Motion to Limit Claims, this hearing officer determined that in light of the original filing date the potential recovery period in this matter was controlled by Montour School District v. S. T., 805 A.2d 29, 40 (Commw. Ct. 2002). Although this hearing officer recognized that U. S. courts in unpublished decisions specifically rejected the "statute of limitations" on compensatory education imposed by Montour (See Jonathan T. v. the Lackawanna Trail School District 2004 WL 384906 M.D. Pa. February 26, 2004; Jonathan H. v. Elizabeth Forward School District Civil Action No. 03-1996, March 4, 2004 and Amanda A. et. Al. v. Coatesville Area School District, Civil Action No. 04-4184, February 23, 2005) the fact remained that Pennsylvania Commonwealth Court is a court of competent jurisdiction to resolve disputes arising under the Individuals with Disabilities Education Act in this jurisdiction. Additionally, it had been well established by the Pennsylvania state-level educational agency (Appeals Panels) that Montour was controlling in the Commonwealth, at least since the date that the Pennsylvania Supreme

¹ A federal Magistrate Judge eventually entered an Order staying discovery in a federal proceeding until the completion of this administrative proceeding.

Court refused to review the case (grant *allocatur*), Montour School District v. S.T., 820 A.2d 163 (PA. 2003)².

Nevertheless, anticipating an eventual appeal to federal court, and a certain ruling against Montour in that forum based upon Jonathan T., Jonathan H. and Amanda A., this hearing officer permitted the parties to present testimony and evidence beyond the one-year period so that a complete record could be made. Testimony and evidence were submitted from 2nd grade through post-graduation transition activities. When preparing written closing arguments, the parties opted to submit their arguments as to all issues in this case, as well.

Upon request of the Parents in their closing argument, and upon reflection during the writing of this decision, this hearing officer has reconsidered her ruling on the issue of limiting the potential recovery period to one year. In rendering their opinions prior to the implementation of IDEA 2004, the Appeals Panels were relying on the distinction between the unpublished federal court decisions - Jonathan T., Jonathan H. and Amanda A., which had no precedential value, and the published Montour decision. However, in Keystone Cent. Sch. Dist. v E.E., 438 F. Supp.2d 519 (E.D. Pa. 2006) the federal court has since announced its position in a published decision, which has precedential value. Given the certain route the instant matter would take to a remand via federal court, in the interest of adjudicate economy, this hearing officer is reversing her opinion in light of Keystone, determining that the decision to do so is legally sound and in the parties' overall best interests as well.

Having determined that Student's entire period of eligibility may be at issue in this matter, it is first necessary to examine the end date of this period. The Parents maintain that since Student did not retrieve his diploma from the school building, he has not "graduated" despite fulfilling all the requirements. The District maintains that Student has graduated despite the fact that his diploma, dated June 2004, is a "regular" diploma currently in the District's safe. In 11th grade and during the entirety of Student's 12th grade year the Parents and Student gave no indication to the District that they had any interest in his remaining in secondary school past June of his senior year. IEP meetings in fall of 12th grade addressed the topic of credits needed for graduation. There were numerous discussions held by District and [redacted][Alternate] School staff with Student and the Parents about whether he would have enough credits to graduate, and the father even voiced this concern to a physician consulting on a medical issue Student was having. Student met all graduation requirements as established by the Commonwealth of Pennsylvania and by the District. A student is eligible for special education services until the end of the school year in which he turns 21, or if he has met the requirements for graduation. The decision whether a student's entitlement will end with graduation, meeting IEP goals, and/or age 21 is determined by the IEP team. At all times the IEP team, including the Parents, was working towards Student's graduation in June 2004. The

² See e.g., Spec. Ed. Op. No. 1262 (2002), No. 1273 (2002), No. 1270 (2002), No. 1301 (2002), No. 1353 (2003), No. 1360 (2003), No. 1365 (2003), No. 1372 (2003), No. 1373 (2003), No. 1376 (2003), No. 1388 (2003), No. 1400 (2003); No. 1547 (2004).

Parents did not re-enroll Student in school for the 2004-2005 school year. Student represented himself as a high school graduate in prison and before the bar of the court in a criminal proceeding. Until his incarceration Student maintained gainful employment which he enjoyed, and to which he may have returned. It is this hearing officer's conclusion that legal considerations, common sense and equity all demand the finding that Student's eligibility for special education services ended with his completion of all graduation requirements and that he exited from secondary school and from special education entitlement as of graduation day 2004, despite his not picking up his diploma on the advice of his attorney. If the opposite position were considered *arguendo*, the District's multiple offers of transition services including specialized reading instruction and job training/placement satisfied any requirements of offering FAPE to this young adult. (See generally District's closing argument, proposed findings of fact numbers 270-275 for an overview, as well as the testimony of Ms. J – District Transition Coordinator, Mr. G – BCIU Transition Coordinator, Ms. L – BCIU Job Coach, Mr. S – BCIU Job Coach). Therefore, the end point of the scope of this decision is established as being at the conclusion of the 12th grade school year. Findings of fact are presented below to support the conclusion that Student graduated in June 2004.

Establishing a beginning point is somewhat less complicated. Student's older brother was a special education student in the District, and the Parents were familiar with the system through participation in IEP meetings and other meetings and through receipt of the Procedural Safeguards Notices which the practice at that time demanded be given to Parents virtually every time there was an official contact - a meeting or forwarding of a document. Before the start of Student's 6th grade year, the Parents retained an attorney³ to represent them regarding his special education programming. Both the attorney and the Parents communicated with the District in writing. This was during the pre-Montour period, thus there was no time limitation on filing in cases that did not involve tuition reimbursement. During the 6th grade year, despite the mother's threatening to sue for Student's education, "plus what he had lost", the Parents and their attorney decided not to file for a due process hearing to address any claims from the beginning of Student's period of eligibility (end of 1st grade) through 5th grade; nor did the Parents file for a hearing during Student's 7th or 8th grade year. In Re J.L. and the Ambridge School District, Special Education Opinion No. 1763 (2006) held that "A student has been held not entitled to raise claims for compensatory education for claims that student's parents had twice before raised – and withdrawn – more than two years prior to the most recent due process hearing request". Equitable considerations demand that since the Parents represented by competent counsel and having prior experience with the special education system did not follow through with their intentions to "sue" the District during the 1997-1998 school year for that year (6th grade) and/or years previously, and did not follow through for several years after that, they are not entitled to bring those claims at the present time. Therefore this hearing officer finds that the scope of the current hearing should begin at 7th grade.

³ An individual other than the attorney representing them in the current due process matter.

Issues

1. Did the Council Rock School District fail to provide Student with FAPE at the time he was an eligible student within the scope of the parameters established by the hearing officer?
2. If the Council Rock School District denied Student FAPE during any relevant period, what type and amount of compensatory education is owed?

Findings of Fact

Graduation

1. Students need twenty-three credits in specific areas to graduate, must take certain electives and must complete a graduation project. The principal of Student's home school and the director of the alternative school discussed graduation credits with Student and with the Parents. Student qualified for graduation on all counts. (NT 809, 828, 1191)
2. The Parents did not communicate any request to the District that Student receive special education services past the end of his 12th grade year during 12th grade or in the period just prior to graduation. The Parents gave every indication that they wanted Student to graduate in all IEP and planning meetings with the District. (NT 1193-1194)
3. The mother clearly testified that at the IEP meeting held to plan 12th grade discussion centered on having Student obtain enough credits to graduate. (NT 348, 372-373)
4. The father expressed concern about Student not graduating if he missed school to a physician evaluating Student for headaches in November 2003. (P-36)
5. The District's guidance counselor and the Alternative School staff collaborated with Student to see that his graduation requirement would be met. (NT 1238-1239)
6. When Student was being measured for his cap and gown on or about June 9, 2004 he expressed to the director of the Alternative School that he was not sure he was going to graduate. When the director reassured him that he was on track with enough credits Student said he thought his Parents were going to "sue the District for a lot of money". (NT 1402-1404; S-21)
7. The District issued an Invitation on June 9, 2004 to an IEP meeting to be held on June 15, 2004 to finalize Student's graduation and to issue the NOREP exiting him from special education. (NT 1192-1193; S-22)

8. The Parents did not attend the meeting nor did they respond to the NOREP issued to them by mail. They did not contact the District to report their unavailability on the scheduled date.⁴ The Parents did not re-enroll Student in the high school or at Alternative School for the 2004-2005 school year. (NT 1192-1193, 1408-1409; S-22)
9. Student walked in the graduation procession and participated in the ceremony but did not go back to pick up his diploma as the students were required to do. (NT 1196)
10. When Student was incarcerated he told the staff that he was a high school graduate and in court when he entered his guilty plea he said he graduated from [the Council Rock School District] in June 2004. (NT 829, 980-986, 2644-2645; S-31)

12th Grade – 2003-2004

11. Pursuant to the Parents' signaling on July 30, 2003 that they wanted a due process hearing, the District issued a Permission to Evaluate on July 31, 2003. The Parents did not sign the form. (NT 1161-1162; S-20)
12. The District issued an Invitation to Participate in an IEP meeting to be held on September 26, 2003. The Parents attended and both they and the District were accompanied by counsel. The team discussed issues such as Student's motivation, transition issues, and possible credit deficiencies. (NT 1167, 1173-1174; S-20)
13. At the September 2003 IEP meeting the team discussed the Parents' refusal to sign a Permission to Evaluate and discussed their request for an Independent Educational Evaluation (IEE). The District and the Parents eventually made an agreement that included an IEE at public expense to resolve the due process request, and a written commitment to this effect was sent to the Parents' attorney on November 19, 2003. It was not until December 8, 2003 that the Parents' attorney sent an executed Permission to Evaluate with confirmation of the understanding that the District would pay for the IEE. (NT 1179; S-20, S-24)
14. The independent evaluator saw Student on January 6, 2004 and January 11, 2004, as well as on February 10, 2004 and February 17, 2004. In spring 2004 the District contacted the independent evaluator asking when a report would be available and was told the testing was completed. However, it was not until June 28, 2004 that the District received the report, by email, along with a note from the evaluator that she would be out of the country for the next two weeks. The report was not useful for Student's educational programming during 12th grade since the school year was already over. (NT 1194-1195, 1244-1245; S-23, P-1)

⁴ The Parents' testimony that they did not receive the Invitation is not credible.

15. During 11th grade (2002-2003) Student had truancy issues, and when he was in school he was resistant. At the beginning of 12th grade Student was already cutting classes. (NT 1162-1163, 1167-1168)
16. Although the Parents had requested that Student be permitted to participate in the work co-op program for 12th grade, the District IEP team members were concerned as he had not done well in that program the previous year. An additional concern was that Student had not made up a physical education credit over the summer as he was supposed to do. (NT 1168-1169)
17. The presence of a sleep disorder was not brought up by the Parents with regard to Student's truancy issues when the team was discussing possible consequences. The Parents viewed Student as struggling and did not want to impose consequences such as limiting access to his car or his girlfriend for cutting school, lateness or missing assignments. (NT 363-364, 369-370, 1174)
18. The team decided to reconvene to discuss other placements for Student, and at an IEP team meeting on October 16, 2003 discussion took place about possible participation in the Twilight Program (which offered late afternoon and early evening classes). Other options considered were [three redacted alternative placements]. The District had invited the director of its alternative school, the Alternative School, to the October IEP team meeting, as well as the person in charge of its co-op work programs. Since Student had an interest in police and ambulance work the latter individual agreed to explore apprenticeships in these areas. (NT 1181-1183; S-21)
19. The Parents and Student visited the Alternative School and agreed to that placement. The Parents approved the placement on October 28, 2003 and another IEP team meeting was convened on October 29, 2003 to devise Student's program in that setting. Student was scheduled to have academics in the morning and a work experience in the afternoon. No further IEP meetings were held during 12th grade. (NT 1185-1187; S-21)
20. The mother thought that the Alternative School was appropriate for Student and she was pleased with the staff and the staff's responsiveness. (NT 348)
21. Until the end of October 2003 Student was taught reading by a certified special education teacher who holds a Master's Degree plus thirty-six credits and has specialized training in the Wilson Reading Program and in the Lindamood Bell Program. (NT 1873-1874)
22. The reading teacher worked one-to-one with Student every other day for 50 minutes per session using the Prescriptive Reading Program to address comprehension and writing. The reading teacher believed that the Prescriptive Reading Program was delivered at the appropriate level for Student. The teacher

- also pulled appropriate sections of the Wilson to use with Student as needed. (NT 1874-1885)
23. The reading teacher found that in comparison with her other students Student fell within the middle range and that his highest reading need was reading comprehension. (NT 1883)
 24. At Alternative School Student was instructed in reading and writing by a certified special education teacher. (NT 1362-1363, 1373-1374)
 25. Student's reading and writing instruction was very frequently done on a one-to-one basis, and there were no more than four students in the math class. (NT 1376)
 26. The District ordered and provided high-interest reading materials on law enforcement as well as materials on the state first-responders test to be used in Student's reading instruction at the Alternative School, as Student had indicated a career interest in these areas. Vocabulary development was based on career-focused terms. (NT 1183-1184, 1375, 1429)
 27. In addition to the career-oriented materials Student's reading teacher at Alternative used literature-based texts purchased specifically for Student. (NT 1424-1425)
 28. Student received direct instruction in written expression, with daily work on sentence structure and organization. Reading and writing were correlated and career interests were addressed, for example by a writing assignment that included a letter of inquiry about a job. (NT 1378-1379)
 29. Student received career-oriented opportunities at Alternative School. It was arranged that he could shadow an EMT position. It was also arranged that he work with a Council Rock graduate who had difficulty in school but who now has his own [redacted] business. After training the man intended to supply Student with a van, needed equipment, and a fax machine to receive orders. The job would eventually pay \$40,000 annually. Student did not follow through with appearing where the employer instructed him to appear. Additionally there were insurance issues around the van because of Student's poor driving record. He and the employer mutually agreed to discontinue the relationship. (NT 1380-1383, 1431-1434)
 30. A [redacted] training site was proposed wherein after training Student could move up in salary and become a driver. Student was concerned about the work involved in loading and unloading boxes and did not accept the position. (NT 1412-1413)
 31. Student also worked with his father and explored other jobs on his own while he was at Alternative School. (NT 1384)

32. The director of the Alternative School, who was also the reading and writing instructor, addressed attendance, punctuality, preparation, graduation requirements, and other job issues with Student and the Parents. (NT 1385, 1390-1391)
33. At Alternative School Student received instruction in conversational skills in a course called Interpersonal Communication to enhance his effectiveness in the work world. A therapist at the Alternative School implemented social skills and problem solving training. (NT 1387-1388, 1390-1391)
34. Alternative School's director worked with Student and his Parents around issues of staying up late and the effect this had on his getting up in the morning, on limiting caffeine at night, and on possible drug use. Student admitted to smoking "a little pot" to the staff but in the hearing testified that he started a Percocet addition as early as 10th or 11th grade. (NT 1397-1401)
35. Student was evaluated on each of his IEP goals on a weekly basis at Alternative School and the Parents were provided with weekly progress reports by phone or in person, and with interim progress reports⁵ as well as report cards. (NT 1425-1427)
36. As the director of special education had weekly meetings at the Alternative School she saw Student in that setting and learned from discussions with staff there that he was making progress such that the staff and the Parents were pleased. His progress indicated that he would graduate with his class at the end of the school year. (NT 1190-1191)
37. Student arranged with his English teacher (10th grade through October of 12th grade) at the high school to use a project he had begun in 10th grade as the basis for his senior project, a graduation requirement. (NT 2401-2402)
38. The director of Alternative School contacted the father when Student expressed that he was not going to graduate. Father expressed that the Parents were very happy with the Alternative School and thought Student had done very well there, but that they had hired a lawyer and were going to due process for issues dating back to 3rd grade. The director of Alternative School discussed transition services that had been offered to Student and the father reiterated that the Parents were happy about the Alternative School program and the due process matter had nothing to do with Student's 12th grade year. (NT 1405-1408)
39. Student's final grades for 12th grade were as follows: Graduation Project B, English 12 B, Algebra C+, Social Studies C+, Health B-, Prescriptive Reading B-, Co-op B, PE B. There were 32 days on which he was absent. (S-38)

⁵ Copies of the interims could not be located by either party.

11th Grade – 2002-2003

40. In 11th grade Student was instructed in reading by a certified special education teacher who is a reading specialist. She has instructed students in the Wilson method. (NT 1535-1537)
41. Student received 55 minutes of reading instruction daily in a class of six students. (NT 1546-1547)
42. Since Student had the Wilson program through Step 5 in middle school, the reading specialist selected him for the comprehension section of the Prescriptive Reading Program rather than for the Wilson Program. Student did not stand out as having severe decoding issues, he was average in the class in fluency and comprehension, and was properly placed. (NT 1542-1546)
43. During reading instruction, oral and silent reading, writing in a reading log, various genres, test-taking skills, vocabulary, context clues, visualization and fluency were addressed. Student enjoyed Scrabble and UpWords and was the best in the class on these games, which he really enjoyed. (NT 1546-1557)
44. Student's English teacher, who taught him English from 10th grade through October of his 12th grade year testified that Student went from writing just a few sentences in 10th grade, to writing compositions with several paragraphs in 11th grade. (NT 2405-2406)
45. Student had absenteeism difficulties. The IEP team was concerned. The principal spoke with Student to see what was happening and spoke with the Parents often. The principal spoke with the teachers in order to see what they could do to increase Student's motivation for attendance. (NT 2163-2164)
46. One intervention devised by the principal was a referral to the CARES program, a program for at-risk students to address discipline, attendance, behavioral and/or drug use. Another intervention was employing a home/school visitor (a social worker) to encourage attendance. (NT 2177-2178, 2181)
47. Student told the principal that he was interested in the Fire Academy or one of the helping professions and that if he could work he might be more interested in school. However, although Student was attending the public safety course through the [redacted] program during 11th grade⁶ he was having trouble in that program. The principal spoke with the Parents about Student's seemingly sudden change in attitude. The teacher of the public safety course noticed something was different about Student in 11th grade as opposed to his functioning in 10th grade. Student dropped out of the public safety program. (NT 1513-1514, 2164-2168).
48. Although Student's mother said he dropped out of the public safety program because he could not have accommodations when taking tests, this was not

⁶ He also participated in this program in 10th grade.

- entirely the case and the teacher assisted greatly with test-taking challenges. In comparison to other students in the program Student's skills were average and students reading at a much lower level were able to be successful. Student took the handcuffing written test and received his certification, even though the test was extensive. (NT 131, 1497, 1515-1516, 1519-1520, 1523-1524)
49. By January of 11th grade there was very great concern about Student's attendance. There was a referral to the MDT in January and a truancy court conference in March. Overall there were 27 absences and 22 occasions of tardiness. (NT 1271, 2206; S-16)
50. The principal met with Student's counselors to see what could be done scheduling-wise to motivate Student and met with the Parents about Student's credit deficiencies. It was decided that a summer health class would make up one missing area, but Student ended up not attending in the summer. (NT 2181-2182)
51. At an IEP meeting on February 10, 2003 it was discussed that Student would usually go to class and not participate, or cut class and be with his friends including his girlfriend. The IEP team, considering Student's expression of an interest in working, believed this might be beneficial. (NT 2172-2173)
52. The Parents and Student seemed eager for Student to try a work experience so he began participating in a work program in winter of 11th grade. He was to go to school in the morning and to a work place in the afternoon. Although 11th graders do not usually participate in such a program an exception was made for Student. (NT 2179-2180)
53. Student was not successful in the work program in 11th grade because he did not follow through with the requirements of the program. (NT 2185)
54. Student's final grades for 11th grade were as follows: Plants/Animals1 NG, Plants/Animals2 W, Essential Nutrition D-, Applied Nutrition D-, English 11 LRC D+, Stu SK LRC D, World Cultures 11 LRC F, Health Issues WD, Prescriptive Reading D, PE WF, Public Safety B WF, Work Experience F. There were 27 days on which he was absent. (S-38)

10th Grade – 2001-2002

55. Student's 10th grade English teacher is a certified special education teacher who has taught English Composition at [redacted] College. She taught him from 10th grade through his transfer to Alternative School in November of 12th grade. (NT 2383)
56. Student's English class was a small group of students (approximately ten) with specific needs in the areas of decoding, reading comprehension, and written expression; some of the students attended a vocational/technical program for part of the school day, as did Student. (NT 2383-2384)

57. The English teacher provided Student with direct instruction in reading decoding and comprehension, and he was a competent reader relative to his classmates. (NT 2391)
58. In English class the students had readings that reflected material they were learning in history and social studies. (NT 2389-2390)
59. The English teacher used the John Collins Writing Approach, a research-based program, which focuses on a specific lesson in writing (conventions or grammar) and then the actual writing using the specific material from the lesson. Student's writing demonstrated more detail and greater length than the other students in the class. (NT 2392-2394, 2406-2407, 2415)
60. When Student's mother notified the English teacher that Student said he could not read cursive, the teacher tested Student in this skill and he could in fact read cursive but admitted that if he could read his mother's notes then he would have to do what she had asked him, in writing, to do. (NT 2423)
61. Data was collected and progress reports prepared in the areas of reading and writing. (NT 2396-2397)
62. The English teacher had conversations with the Parents about Student's work or lack of work and on one particular occasion he was kept from a special event because his work was not completed – his mother telephoned and said that he was refusing to go to school because he could not go to the event. (NT 2397-2399)
63. Student told the English teacher he did not like school. She engaged him and tried to keep him motivated. On occasion Student voluntarily came to the after school clinic for extra help. The teacher did not detect behaviors suggesting sadness or depression in Student during the time she taught him. (NT 2402-2404, 2424)
64. The English teacher, recognizing Student's career-orientation, had him do a research paper on post-secondary options for careers. (NT 2408-2410)
65. The English teacher also addressed study skills, including managing assignments and organizing materials. (NT 2410-2411)
66. Student participated in the public safety curriculum at [redacted] with a very experienced and qualified educator⁷ beginning in 10th grade and for a part of 11th grade. The mother viewed the teacher as very supportive of Student and as helping Student a great deal. (NT 130-131,1451-1453, 1477, 1481-1482)

⁷ This teacher, Mr. F, who testified at this hearing was eminently credible and projected a level of skill and of concern for his students that deserves special recognition and mention.

67. The public safety curriculum addressed law enforcement, emergency medicine, firefighting, corrections and security. Students can become certified in their field of interest, and through an arrangement with Bucks County Community College can even earn college credits. Students who do not opt to go to college have obtained employment in the fields they studied in high school in this program. (NT 1454-1457, 1522-1523)
68. In 10th grade the curriculum addressed criminal justice skills including writing clear incident reports and addressing medical emergencies. The curriculum also, in 10th grade, begins the firefighter module, which is completed the next year, when students can take the written firefighter test. Student did not complete this module. (NT 1457-1471)
69. Students in the public safety curriculum have various ways to communicate with the teacher if they need extra assistance. Student never had behavioral difficulty in the public safety class. The teacher wishes that Student has completed the curriculum.⁸(NT 1468-1474, 1486)
70. Student's final grades for 10th grade were as follows: English 10 LRC C-, American Civilization 10 LRC C-, Foundations Consumer Math LRC C+, Public SafetyA C-. There were 5 days on which he was absent. (S-38)

9th Grade – 2000-2001

71. In his 9th grade year Student was instructed by a certified reading specialist in a small group with a total of six or seven students for one half hour two times a week. (NT 2313-2314)
72. The reading specialist, who is qualified to teach the Wilson program, used high-interest low-level materials in the students' areas of interest to spark interest in reading. The instruction focused on comprehension, vocabulary, fluency, decoding, and writing. (NT 2316-2320)
73. Based on Student's having completed the Wilson Program through Level 5, and her observation of his reading decoding strategies, the reading specialist did not believe that Student needed the intensive Wilson decoding program in 9th grade. (NT 2320-2321)
74. Student's final grades for 9th grade were as follows: Health 9 D, PE 9 A-, IA Science 1 C-, IA Science 2 C-, English 9 LRC F, Social Studies 9 LRC D, Science 9 LRC C, Math 9 LRC C, Summer School English 9 C. There were 19 days on which he was absent. (S-38)

⁸ Student left the program in mid-11th grade. The teacher later offered Student the chance to sit in on his college-level classes and audit topics that were already familiar to him but Student didn't take advantage of this opportunity. (NT 1499-1500)

8th Grade – 1999-2000

75. Student's 8th grade special education teacher was certified in special education and in reading. She taught Student English daily in the resource room setting for about 45-40 minutes per period and addressed reading (decoding, fluency, and comprehension), writing, oral language, and literature in a class of about eight students. (NT 2035-2036, 2038, 2054-2057)
76. The special education teacher used the Pennsylvania Writing Rubric to assess Student's productions – writing prompts, journaling, research papers and power point presentations. Computers were used for word processing to aid in writing. (NT 2043-2045, 2048-2049)
77. The special education teacher collaborated with the other subject teachers to develop vocabulary and text continuity. (NT 2038-2040)
78. Student presented with homework completion issues in 8th grade and the special education teacher met with the Parents. She used a grid and positive praise. Her discussions with the Parents led the teacher to believe that Student was not missing assignments because he could not do them, but rather because, in his mother's words, he found school "boring". The mother expressed that Student would perform better if school were more interesting. (NT 2063-2069)
79. In 8th grade Student also was instructed by a reading specialist who also collaborated with the special education teacher. This reading teacher had also instructed him in 7th grade. (NT 2028-2040, 2138-2139)
80. The reading specialist utilized the Wilson reading program for the decoding portion of the reading instruction and also addressed fluency, comprehension and vocabulary. By the end of 8th grade Student reached the Fifth Book in the Wilson Program, which was deemed sufficient decoding instruction. [The Sixth book covers most of the remaining odd syllables in the words in the English language.] (NT 2139-2142, 2144, 2227-2228)
81. Student's final grades for 8th grade were as follows: Reading 8 Dev C-, Health 8A D-, Health 8B A, Phys Ed 8 D, IA Tech 8 B, Home Ec 8 A-, Art 8 D+, Music 8 D-, English 8 LRC C, Social Studies 8 LRC B-, Science 8 LRC D, Math 8 LRC B. There were 6 days on which he was absent. (S-28)

7th Grade 1998-1999

82. In June 1998, in preparation for Student's 7th grade year, the Parents attended the IEP meeting accompanied by an attorney. The Parents signed the resultant NOREP. (S-11)

83. In 7th grade Student's English teacher was a certified reading specialist who has taught Reading Instruction at the graduate level at a local private university. (J-1)
84. The teacher provided direct reading instruction on decoding and comprehension strategies in a small group of seven or eight students. (J-1)
85. The reading instruction also encompassed writing skills including pre-writing and graphic organizers. (J-1).
86. In 7th grade Student was instructed by the same reading specialist who worked with him in 8th grade. This teacher was trained in the Wilson program and has instructed students at all levels in Wilson since 1998. (NT 2155)
87. The reading specialist taught Student in a Corrective Reading Class of about six students that met every other day for about forty-five minutes. The class used activities from the Wilson to strengthen decoding, and used other vocabulary and reading activities as well. (NT 2116-2117, 2123-2125)
88. The reading specialist integrated her work with the other classroom teachers for vocabulary and theme development. (NT 2117-2118)
89. By the end of 7th grade Student was at the end of Book 2 or the beginning of Book 3 of the Wilson Reading Program. (NT 2137)
90. Student's final grades in 7th grade were as follows: Reading 7 Dev C-, Computer 7 C+, Health 7 F, Phys Ed 7 C, IA Tech 7 B-, Home Ec 7 A-, Art 7 C, Music 7 D-, English 7 LRC C-, Social Studies 7 LRC C, Science 7 LRC C-, Math 7 LRC C-, Social Studies 7 Inc WP. There were 5 days on which Student was absent. (S-28)

Grade 6 - 1997-1998

91. In the summer prior to 6th grade the Parents retained legal counsel to help with designing Student's program. As their other son was eligible for special education they had experience in the system and had received procedural safeguards notices through the years. The attorney communicated with the District in August 1997 and in February 1998. In October 1997 the mother wrote to the District threatening to sue for Student's education, "plus what he had lost". The Parents were accompanied by their attorney for the IEP meeting at the end of 6th grade. The Parents signed the NOREP for the upcoming year. The Parents did not follow through with a due process hearing. (NT 195-196, 427-428; P-21, P-23)

Test Results

92. Student was administered a number of different reading tests over the years and his performance waxed and waned. He was given the Stanford Achievement Test

- on at least four occasions; in April 2000 he received a grade equivalent⁹ of 4.5 in Total Reading, in May 2001 he received a grade equivalent of 5.2 on Total Reading, in June 2002 he received a grade equivalent of 3.4 on Total Reading, and in March 2003 he received a grade equivalent of 6.6 on Total Reading. (S-13, S-14, S-18, S-19)
93. Student was administered several Woodcock Johnson instruments over the years. Yielding Standard Scores, which are far more robust than grade equivalents, they are the most suitable for comparison, yet again Student's functioning was inconsistent. On the Woodcock Johnson Psychoeducational Battery-Revised given in March 1997 he received scores as follows: Letter-Word Identification 83, Passage Comprehension 86, **Writing Samples 95, Broad Reading 82**, Broad Written Language 84. On the Woodcock Johnson Reading Mastery Test given in January 2003 he received scores as follows: Word Identification 67, Word Attack 83, Word Comprehension 84, Passage Comprehension 78, Basic Skills Cluster 73, Reading Comprehension Cluster 80, **Total Reading Cluster 78**. On the Woodcock Johnson Psychoeducational Battery – III given in January/February 2004 he scored as follows: **Reading Fluency 80, Writing Fluency 97**.¹⁰ [In contrast, in January/February 2004 on a different instrument – the WIAT-II Student scored a 71 in Reading and an 80 in Written Language]. (S-7, S-23, P-1, P-4)
94. Student received four known intelligence tests. In December 1992 the K-BIT registered a Full Scale IQ of 97; in March 1993 the WISC-III registered a Full Scale IQ of 107; In October 1995 the WISC-III registered a Full Scale IQ of 97, and in February 2004 the WAIS-III registered a Full Scale IQ of 87. The FS 107 was done by a private practitioner who had seen other members of Student's family and given that this score is significantly out-of-pattern it may reflect some unconscious bias in scoring. The FS 87 was obtained in the midst of litigation and may reflect respondent reluctance. Interestingly, the average of all four FS IQ scores (97+107+97+87) is 97; this may be the closest estimate of Student's cognitive potential. All scores obtained fall into the Low Average to Average Ranges.

Additional Pertinent Findings

95. Prior to the commencement of the current due process proceedings, the District had no knowledge of the Parents' claims that Student had a sleep disorder, migraine headaches, or any other medical condition that would preclude his attending school regularly and on time. (NT 1202-1203)
96. On the questionnaire Student completed as part of an April 20 and 21, 2004 sleep study by Dr. S he indicated that sleepiness only "sometimes" caused trouble at school or work and that he kept late hours on weekdays and later hours on

⁹ This hearing officer is familiar with and recognizes all the inherent problems with using grade equivalents and is merely illustrating Student's testing inconsistencies with three administrations of the same test.

¹⁰ Bolding added to illustrate the general consistencies: Reading 82, 78, 80; Writing 95, 97.

- weekends. The father also testified that Student went to sleep very late, and that no one monitored Student's bedtime/sleep time. (NT 901, 2269, 2271-2272; P-33, P-34)
97. When asked on the questionnaire whether he felt drowsy or good most of the time Student checked "consistently good". (NT 2274; P-33)
98. Dr. S2, who is a Board Certified physician in the areas of internal medicine, pulmonary medicine, critical care medicine and sleep disorders testified as an expert witness regarding his review of the sleep study performed by Dr. S on Student in April 2004. The witness' fellowship in the area of sleep disorders was pursued at Harvard Medical School in 1996 and 1997. (NT 2252-2254; S-35)
99. Dr. S2 testified that Dr. S's initial hypothesis of Delayed Sleep Phase Syndrome is a fairly common occurrence during the teen years and early 20's. Dr. S2 did not believe that this diagnosis was warranted, based on the brief time it took for Student to fall asleep during a multiple sleep latency test. There was nothing indicated during the sleep study to suggest that Student experienced significant disruption in the quality of his sleep while he was sleeping. Also, it was the opinion of Dr. S2 that there was nothing in Student's presentation during testing that suggested he would be physically unable to be awakened without great effort. (NT 2261-2262, 2274-2275, 2278, 2280-2282; P-34)
100. Given Student's suddenly "growing out of" his difficulties in waking after graduation during the time he was employed in [occupation redacted], and given the mild nature of Student's sleep difficulties, Dr. S2 doubts whether Student had Sleep Latency Syndrome and whether the difficulties waking Student father testified to were genuine¹¹. (NT 368, 893-895, 899, 2284-2285, 2307-2308)
101. Prior to the commencement of the current due process proceedings the District had no knowledge of Student's having a back injury¹² or of his being addicted to pain medication. (NT 1203-1204)
102. Dr. S2 opined that given Student's mild sleepiness (categorized as "idiopathic hypersomnolence", a designation that means the condition is of unknown cause) he would want to know if drug use (marijuana, opiates) was in play. (NT 2287-2289)
103. Student testified to taking Percocet starting at age 16 or 17 (November 2001 or November 2002, which was in the fall of either the 10th grade or the 11th grade) and continuing for two or three years, and he admitted to turning to heroin

¹¹ It can be speculated that Student may have been feigning being asleep versus the father's being untruthful.

¹² Although Student may well have injured himself riding a dirt bike or other recreational vehicle, he is most recently employed as a [redacted], a physically demanding occupation at which he has worked for two years, 60 or 70 hours per week. (NT 767)

at age 19. He was a student in the District at the time he began abusing Percocet and this coincides with the change in him noted by the director of the public safety program and the principal. Student received actual prescriptions for Percocet in October and November 2004 and November and December 2005 as opposed to obtaining the drug illicitly. (NT 2653; P-37, P-38)

104. Student has since participated in inpatient and outpatient drug abuse treatment. (NT 2656-2658; Timeline)
105. On the sleep study questionnaire Student denied depression or sadness and denied that sleepiness had any effect on his enjoyment of his social life. This study was done around the same time that Dr. R [independent evaluator] thought he had dysthymia. (NT 2270-2271; P-33, S-23, P-1)
106. Although Dr. R had recommended that Student seek counseling, he did not have a first session until March 9, 2006 and attended for a total of 12 sessions, ending on July 6, 2006. Student engaged in criminal activities on July 7, 14, 15 and 16, 2006 for which he entered a Guilty Plea and was incarcerated. (S-23, P-1, S-37; Timeline)

Credibility of Witnesses

Hearing officers are empowered to judge the credibility of witnesses, weigh evidence and, accordingly, render a decision incorporating findings of fact, discussion and conclusions of law. The decision shall be based solely upon the substantial evidence presented at the hearing.¹³ Quite often, testimony – or documentary evidence – conflicts; this is to be expected as, had the parties been in full accord, there would have been no need for a hearing. Thus, part of the responsibility of the hearing officer is to assign weight to the testimony and documentary evidence concerning a child’s special education experience. Hearing officers have the plenary responsibility to make “express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses”. Blount v. Lancaster-Lebanon Intermediate Unit, 2003 LEXIS 21639 at *28 (2003). This is a particularly important function, as in many cases the hearing officer level is the only forum in which the witnesses will be appearing in person.

Although this hearing officer was favorably impressed by the fact that both Student’s Parents were present for virtually every hour of this hearing, and evidenced unconditional caring for Student as well as a general sense of warmth and cordiality during the proceedings, there are significant credibility issues with Mrs. ’s testimony. In particular it was crystal clear that she was protective of Student, to the point where she told her attorney that Student was ill when he was in fact incarcerated, and testified to no present knowledge about Student’s illegal substance use/abuse despite being present for his earlier testimony to the contrary. One issue of particular import, given that the issue goes

¹³ Spec. Educ. Op. No. 1528 (11/1/04), quoting 22 PA Code, Sec. 14.162(f). See also, Carlisle Area School District v. Scott P., 62 F.3d 520, 524 (3rd Cir. 1995), cert. denied, 517 U.S. 1135 (1996).

toward the scope of the hearing, is her denial of having received the Invitation to attend the IEP meeting on June 15th when the District intended to issue an exit NOREP. She had never previously failed to receive mail from the District, and Student had already told the Alternative School director that his parents were going to sue the District and that he would not take his diploma. Credibility issues render it impossible to accept her testimony versus the District's whenever there is a conflict.¹⁴

Student presented as generally forthright in the hearing sessions during his testimony, although this hearing officer questions his recall of events occurring during the periods of his substance addiction and does not doubt that he put a spin in the direction most favorable to his Parents' position on his overall testimony. This family has faced a very difficult several years, together, and it is hoped that Student will remain free of addictions and maintain gainful satisfying employment so as to become the positive and productive son the Parents desire and deserve. It is a positive portent that Student likes his work as a [redacted]¹⁵ and that his boss classifies him as likely the best worker he has ever had. (NT 869)

Although this hearing officer has had the opportunity to hear Dr. R testify on several occasions, and usually finds her to be a credible witness who can shed light on issues, in this hearing her credibility was tarnished by her not completing her evaluation report until the school year was over, and then absenting herself for two weeks such that neither party could follow up with her at the planned final IEP meeting. It is also unfortunate that despite her having conducted numerous IEE's in the past and appearing as a witness at due process hearings Dr. R: did not request and obtain Student's complete school records from the District, particularly an evaluation done in Student's 4th grade at the District (of which she had the first page only) and a document containing a K-BIT score from 1st grade (NT 535-538, 2483-2484, 2487-2488; S-5); did not interview any of Student's teachers at the District or staff at the District (NT 533-534); did not observe Student in, or interview the staff at, the Alternative School (NT 545); opined about Student's reading instruction in the District without having familiarized herself with it beforehand (NT 2501-2502); did not more thoroughly explore and/or report Student's conduct issues that came to light on the clinical portion of her evaluation (particularly from the Milton Adolescent Personality Inventory [MAPI] results, and responses on the CBCL) as this factor seems to have played a large role in Student's approach to academics and school attendance (NT 585-587, 2520-2522, 2607; Appendix 2, Appendix 3); did not explore drug abuse or alcoholism given Student's age and his absenteeism (NT 578); did not review the results of the sleep study, or the sleep study questionnaire, in light of her having recommended the study to the Parents and of the fact that the results were available prior to her writing her report (NT 2522, 2525-2529; P-33); and, under-reported Student's absenteeism and tardiness, also being unaware of a March 2003 Truancy Hearing. (NT 2538).

¹⁴ An example of the mother's testimony being impeached by a disinterested third party through records is that although she testified that Student had applied and been accepted at [redacted] College, there was no acceptance letter on file at [redacted] College; although she testified that Student had applied online, the college told the District upon inquiry that it was only just now beginning the process of setting up the capability to apply online. (S-38)

¹⁵ On vocational assessment administered as part of the IEE, Student showed a strong preference for working with his hands. NT 571-573)

The witnesses who were employed by, or who worked on behalf of or in conjunction with, the District presented no troubling issues of credibility. Several witnesses stand out for their particular contributions to the hearing officer's process of fact-gathering and forming an impression of District professionalism and competence. These are: Ms. H, Ms. M, Mr. F, Mr. N, Mr. C, Ms. J, Mr. G, Mr. S, Mr. B and Dr. S2.

Discussion and Conclusions of Law

Legal Basis

The purpose of the IDEA is "To ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services that are designed to meet their unique needs and prepare them for further education, employment or independent living". 20 U.S.C. § 1400(d), 34 C.F.R. § 300.1(a).

Special education issues are currently governed by the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA"), which took effect on July 1, 2005, and amends the Individuals with Disabilities Education Act ("IDEA"). 20 U.S.C. § 1400 *et seq.* (as amended, 2004). However, this hearing was filed in November 2004, prior to the enactment of IDEA 2004 and prior to its implementation on July 1, 2005. In any respects where the provisions of IDEA 2004 conflict with the previous version of IDEA, the previous IDEA(s) will be used.

Having been found eligible for special education, Student is entitled under the IDEA and current Pennsylvania Special Education Regulations at 22 PA Code § 14 *et seq.* to receive a free appropriate public education (FAPE). FAPE is defined in part as: individualized to meet the educational or early intervention needs of the student; reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress; provided in conformity with an Individualized Educational Program (IEP).

A student's special education program must be reasonably calculated to enable the child to receive meaningful educational benefit at the time that it was developed. (Board of Education v. Rowley, 458 U.S. 176, 102 S. Ct. 3034 (1982); Rose by Rose v. Chester County Intermediate Unit, 24 IDELR 61 (E.D. PA. 1996)). The IEP must be likely to produce progress, not regression or trivial educational advancement [Board of Educ. v. Diamond, 808 F.2d 987 (3d Cir. 1986)]. Polk v. Central Susquehanna IU #16, 853 F.2d 171, 183 (3rd Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989), citing Board of Education v. Diamond, 808 F.2d 987 (3rd Cir. 1986) held that "Rowley makes it perfectly clear that the Act requires a plan of instruction under which educational *progress* is likely." (Emphasis in the original). The court in Polk held that educational benefit "must be gauged in relation to the child's potential." This was reiterated in later decisions that held that meaningful educational benefit must relate to the child's potential. See T.R. v. Kingwood Township Board of Education, 205 F.3d 572 (3rd Cir. 2000); Ridgewood Bd. of Education v. N.E., 172 F.3d 238 (3rd Cir. 1999).

Districts need not provide the optimal level of service, maximize a child's opportunity, or even provide a level that would confer additional benefits, since the IEP as required by the IDEA represents only a basic floor of opportunity. Carlisle Area School District v. Scott P., 62 F. 3d at 533-534.; Hartmann v. Loudoun County Bd. of Educ., 118 F.3d 996, 1001 (4th Cir. 1998); Lachman v. Illinois Bd. of Educ., 852 F.2d 290, 297 (7th Cir. 1988). In creating a legally appropriate IEP, a School District is not required to provide an optimal program, nor is it required to "close the gap," either between the child's performance and his untapped potential, or between his performance and that of non-disabled peers. In Re A.L., Spec. Educ. Opinion No. 1451 (2004) ; See In Re J.B., Spec. Educ. Opinion No. 1281 (2002)

What the statute guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving parents.'" Tucker v. Bayshore Union Free School District, 873 F.2d 563, 567 (2d Cir. 1989). Under the IDEA parents do not have a right to compel a school district to provide a specific program or employ a specific methodology in educating a student. M.M. v. School Board of Miami - Dade County, Florida, 437 F.3d 1085 (11th Cir. 2006); Lachman, supra. If personalized instruction is being provided with sufficient supportive services to permit the student to benefit from the instruction the child is receiving a "free appropriate public education as defined by the Act." Polk, Rowley. The purpose of the IEP is not to provide the "best" education. The IEP simply must propose an appropriate education for the child. Fuhrman v. East Hanover Bd. of Educ., 993 F. 2d 1031 (3d Cir. 1993).

The IDEA requires that the IEP team develop a transitional services plan for students with disabilities beginning in the school year in which they turn 16 years of age. 20 U.S.C. § 1401(34), 1414(d)(1)(a), (d)(6). The transitional plan is a coordinated set of activities. 34 C.F.R. § 300.321(b).

In November 2005 the U.S. Supreme Court held that, in an administrative hearing, the burden of persuasion for cases brought under the IDEA is properly placed upon the party seeking relief. Schaffer v. Weast, 126 S. Ct. 528, 537 (2005). The Third Circuit addressed this matter as well more recently. L.E. v. Ramsey Board of Education, 435 F.3d. 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006). The party bearing the burden of persuasion must prove its case by a preponderance of the evidence. This burden remains on that party throughout the case. Jaffess v. Council Rock School District, 2006 WL 3097939 (E.D. Pa. October 26, 2006). This case was begun in October 2006 and continued for eleven sessions into June 2007. The burden of proof is borne by the Parents as it was they who filed for the hearing. However, application of the burden of proof does not enter into play unless the evidence is in equipoise, that is, unless the evidence is equally balanced so as to create a 50/50 ratio.

Discussion

Whether a school district has offered a free appropriate public education to a disabled student is a mixed question of law and fact. Heather S. v. State of Wisconsin, 125 F.3d 1045, 1053 (7th Cir. 1997). The Third Circuit has determined that a student's demonstrated progress in an

educational program is sufficient to show that a school district's IEP allows for significant learning and provides meaningful benefit as necessary to satisfy the IDEA's FAPE standard. Ridgewood Board of Education v. N.E., 172 F.3d 238, 242 (3d Cir. 1999). Given that progress is relevant to the determination of whether a student with a disability received an educational benefit, progress is therefore also relevant to determining whether a reimbursement award is due. It is likewise necessary to examine the program Student actually received during the years in question, his ability to access the program, and his Parents' support to him in accessing the program.

At the beginning of **12th grade** the District and the parties agreed that Student would have an IEE. Unfortunately for all, the independent evaluator did not send her report to the District until late June 2004, after Student had graduated. (FF 13, FF 14) The District worked with the Parents to effect a change in placement that yielded positive results, the most outstanding being assisting Student to acquire the credits and fulfill the requirements he needed to graduate with his senior class. (FF 18, 19, FF 20) During most of 12th grade Student participated in programming at the Alternative School, much of it one-to-one and the rest in very small groups. At Alternative School Student received specific instruction in reading and written expression and his program was specifically designed to effect transition to a career. (FF 19, FF 24, FF 25, FF 26, FF 27, FF 28) The program also provided instruction in conversation and social skills to enhance Student's job-seeking skills. (FF 33) One particularly excellent career possibility was offered by a Council Rock graduate who was willing to set Student on a route toward a job that would yield \$40,000 in a year. Another opportunity offered was a job at [redacted].¹⁶ (FF 29, FF 30) The Alternative School provided progress reports to the Parents on the phone or in person, and the Parents were pleased with Alternative School and Student's progress there. (FF 32, FF 34, FF 35, FF 38) Student finished all credits needed for graduation at Alternative, and he finished the District's required graduation project. (FF 5, FF 6, FF 37) Prior to beginning the Alternative School Student was instructed in a District high school. He was instructed in reading every other day, one-to-one, for 50 minutes by a certified special education teacher who has specialized training in the Wilson and the Lindamood Bell reading programs. She used the Prescriptive Reading Program and pulled elements from the Wilson as well. (FF 21, FF 22). During 12th grade there were elements at work that militated against Student's taking advantage of the program the District offered. At the beginning of the year, despite a referral to truancy court the previous spring and the principal's having conversations with the Parents about truancy issues, Student had already begun cutting classes. (FF 15, FF 49) Once he was at the Alternative School the school's director had conversations with the Parents similar to those the high school principal had with them; the Parents were unable or unwilling to impose consequences on Student to ensure attendance in school. (FF 34, FF 17) The Parents and Student have since maintained that Student had a sleep disorder, but this was not raised with the high school staff or the staff at the Alternative School during Student's time there. (FF 95) Furthermore, a sleep study in April 2004 did not result in any treatment recommendations and no findings of significance to Student's not getting out of bed in the morning were made. (FF 96, FF 97, FF 99, FF 100) Although Student

¹⁶ The hearing officer is aware that [redacted] is a company that offers generous benefits including tuition reimbursement for its employees.

admitted to smoking “a little pot” to the director of the Alternative School, it is now known that he had also been using and/or addicted to Percocet for one or two years by the time he was in 12th grade, and this certainly has to be considered as possibly contributory to his attendance issues. (FF 34, FF 101, FF 102, FF 103, FF 104) Despite intensive work with his Parents, the motivating circumstance of being able to accumulate required credits for graduation, and the possibility of launching a career, Student did not take full advantage of the program offered to him – he was absent 32 days in 12th grade. (FF 39) The fact that he still managed to obtain grades in the B/C range raises the question of how much better he may have done if he actually attended school regularly. The Parents failed to meet their burden of proof that the District denied Student FAPE during 12th grade.

During **11th grade** Student was instructed in reading for 50 minutes daily in a group of six students by a certified special education teacher who is a reading specialist. She has instructed students in the Wilson method. (FF 40, FF 41, 43) Because Student had already reached Book 5 in the Wilson program the teacher did not believe that he had decoding issues that warranted using the Wilson program for decoding. (FF 42) When he played Scrabble and UpWords in class Student was superior to his classmates. (FF43) She saw his needs in the area of reading comprehension. In reading class Student also was instructed in written expression through maintaining a reading log. Student’s English teacher in 11th grade also had him in 10th grade. She is a certified special education teacher who has taught English Composition at a local college. (FF 55) She testified that during 11th grade he advanced from writing only a few sentences to writing multiple paragraphs. (FF 44) Student’s absenteeism was significant in 11th grade, and he was referred to truancy court in spring of that year. (FF 49) The principal spoke with Student (FF 47), he spoke with Student’s Parents and he spoke with the teachers to see if they could make Student’s instruction more engaging. (FF 45, FF 50, FF 51) Although his public safety teacher was extremely supportive he dropped out of the public safety program. (FF 48) The principal employed a home school visitor and discussed referrals to other programs with the Parents. (FF 46) The principal viewed Student’s behavior in 11th grade as a sudden change in attitude and spoke with his Parents on several occasions. The Parents noted Student’s wanting to be in a work experience, and the District allowed this, although generally only seniors could have this privilege. (FF 51, FF 52) Unfortunately Student failed to follow through with the requirements of the work study program. (FF 53) During 11th grade the District noticed a marked change and from January on held IEP meetings, explored alternative settings, involved a home/school visitor and granted Student permission to engage in a work-study program about which his Parents were excited. None of these interventions proved effective, and Student’s final grades were in the D/F range. Student was absent for 27 days. (FF 54) At the beginning of the next school year the District and the Parents made plans to place Student in an alternative school environment in which they hoped he would do well. Notably during 11th grade Student was in the first or second year of his use of/addiction to Percocet, a fact not known to the District or the Parents at the time. (FF 101, FF 103, FF 104) The Parents failed to meet their burden of proof that the District failed to offer Student FAPE during 11th grade.

During **10th grade** Student was in an English class with a certified special education teacher who has taught English Composition at a local college. She taught him English from 10th grade until he entered the Alternative School. (FF 55) The English class was a small class of ten students with specific needs in the areas of reading comprehension, decoding and written expression. (FF 56) Student was provided direct instruction in this class in reading decoding and reading comprehension; readings reflected material he was learning in other classes. (FF 56, FF 57, FF 58) The teacher used a research based reading program, the John Collins Writing Approach with Student. (FF 59) Student shared with his teacher that he did not like school, so she attempted to engage him as fully as possible. Because he was interested in working she assigned a paper on career options. (FF 63, FF 64) In addition to addressing reading and writing the English teacher also addressed organizational and study skills. (FF 65) During 10th grade Student participated in a public safety curriculum that provided classroom-based and hands-on experiences in areas such as law enforcement, emergency medical care, and firefighting. Students can earn college credits from Bucks Community College and can become certified in various discrete skills through this program. (FF 66, FF 67, FF 68) The Parents believed that the public safety teacher was very supportive of Student and helped him a great deal. The teacher viewed Student very positively, said he was never a behavior problem and wishes he would have finished the program rather than dropping out in the middle of 11th grade. (FF 66, FF 69) However, given Student's identification as a student with a specific reading disability it is concerning that Student did not receive a reading course in addition to the reading instruction he received in English class. It may have been that participating in the public safety program crowded his schedule making an extra course impossible. Nevertheless, no reading instructor other than the English teacher testified, and Student's transcript for 10th grade does not indicate that he received a reading class. Student received grades in the C range in 10th grade and was absent only 5 days. Although his testimony suggests that drug use may have begun as early as 10th grade, the deleterious effects were not yet apparent at this time. It is this hearing officer's finding that by not offering Student a discrete period of remedial reading the District failed to deliver FAPE in that regard and on this aspect the Parents have met their burden of proof. An award of compensatory education is due, and will be set forth below.

In **9th grade** Student was given reading instruction twice a week for 30 minutes each session in a class of six or seven students with a certified reading specialist who was qualified to teach the Wilson method. (FF 71, FF 72) The reading specialist focused on comprehension, vocabulary, fluency, decoding and writing. (FF 72) Because Student had completed Book 5 of the Wilson program previously, and after observing his reading decoding strategies, the reading specialist determined that Student did not need the intensive Wilson program in 9th grade. It is notable that although Student also received English in the learning support setting, he failed that subject and needed to retake it in summer school. It is also notable that Student had 19 absences in 9th grade, an excessive number for a student in his freshman year. There were no medical issues or drug abuse issues brought to light in the record for that year, and given Student's age, unfortunately, his truancy has to be viewed as being largely his Parents' responsibility. Nevertheless, given Student's having been diagnosed as having a specific reading disability, it is

troubling that he received so little reading instruction during 9th grade – two thirty-minute periods per week is deemed inadequate as an offer of FAPE and the Parents have met their burden of proof in this regard. An award of compensatory education is due, and will be set forth below.

In **8th grade** Student was instructed by a reading specialist who had also taught him in 7th grade. Trained in teaching the Wilson at all levels, the reading specialist utilized the Wilson reading program for the decoding portion of the reading instruction and also addressed fluency, comprehension and vocabulary. (FF 80, FF 86) By the end of 8th grade Student reached the Fifth Book in the Wilson program which the teacher deemed sufficient for his needs. (FF 80) Student's reading specialist collaborated with the special education teacher who had also instructed him in 7th grade. (FF 79) The special education teacher was certified in special education and in reading. She addressed reading (decoding, fluency and comprehension), writing, oral language and literature in a class of about 8 students. (FF 75) For instruction in written expression the special education teacher used writing prompts, journaling, research papers and computers for power point and word processing. She collaborated with other subject teachers to develop vocabulary for text continuity. (FF 76, FF 77) Student presented with homework completion issues, and the special education teacher met with the Parents and developed a motivation chart for Student. His mother reported to her that Student found school "boring" and opined that he would do better if it were "more interesting". (FF 78) Student's final academic grades were good in 8th grade; he was absent 6 days. (FF 81) The Parents have not met their burden of proof that the District failed to offer Student FAPE for 8th grade.

In **7th grade**, Student's educational program was crafted in conjunction with the Parents' then-attorney. Student was instructed by the same reading specialist who had worked with him in 8th grade. (FF 86) Reading instruction was delivered in a Corrective Reading Class of about six students that met every other day for 45 minutes. The class used Wilson activities to strengthen decoding, and used other vocabulary building activities as well. (FF 87) The reading specialist integrated her work with the other subject teachers. (FF 88) By the end of 7th grade Student was at the end of Book 2 or the beginning of Book 3 in the Wilson program. (FF 89) In 7th grade Student's English teacher was also a certified reading specialist who has taught Reading Instruction at the graduate level in a local university. She provided reading instruction on decoding and comprehension strategies in a group of seven or eight students. (FF 83, FF 84) The reading instruction also targeted writing skills including pre-writing and graphic organizers. (FF 85) Student's grades in academic subjects were in the C range at the end of 7th grade, and he was absent only 5 days. The Parents have not met their burden of proof that the District failed to offer Student FAPE for 7th grade.

In summary, Student has broadly average intelligence and a specific learning disability. An examination of progress must be done in light of standard scores, rather than grade equivalents. As expectations for raw score levels increase with the student's age, in order for a student to receive the same standard score range on later administrations of the same or similar tests as he received on earlier administrations, the student must progress about

one year per year from year to year in order to keep the same place he formerly occupied in his same-aged cohort. Taking into account variances due to the Standard Error of Measurement, Student progressed about seven years in reading between 1997 and 2004 as assessed by the Standard Scores on various Woodcock Johnson instruments, such that his 1997/2003/2004 comparisons in reading assessments are 82/78/80 and in writing assessments are 95/NA/97. In addition to Student's year to year progress as assessed through comparable test results, with the exception of the insufficient reading instruction in 10th and 9th grades, the overwhelming appropriateness of Student's program was amply illustrated through the testimony of Student's teachers and other support personnel. The area in which the District tended to fall short in this matter is the quality of its IEPs, many of which present confusing present levels, do not provide specific end-points for goals/objectives and do not provide specific standards for measuring progress and reporting it. Although Student's teachers testified credibly, without exception, to the appropriateness of the program they delivered to Student, the IEPs themselves could not stand alone as an indication of the delivery of FAPE. However, the District's less than stellar IEPs are counterbalanced by the program the District actually provided, as very credibly described in testimony. That the program the teachers described was effective is demonstrated by Student's progress over the years in question in terms of standard scores for reading and writing, and in terms of gaining access to meaningful employment. Whether he would or could have made additional progress had the IEPs been more skillfully crafted is a question for speculation, as is the question of whether he would have made more progress with better attendance, greater discipline at home and abstinence from drug abuse. Student did make meaningful educational progress in reading and writing. A specific award of compensatory education will be made to account for the limited specialized reading instruction in 9th and 10th grades.

As regards transition planning, the District made many plans that were solid and based in Student's stated interests. Rather than follow any career opportunity the District offered, however, Student found his own niche in a [redacted] business. He enjoys the work and has been successful in it for at least two years. In terms of being prepared for self-sufficiency and independent living, Student has been able to work, have a social life, drive a car, and maintain employment. Although he has gotten off-track through drug-abuse and criminal activity, his periods in rehab and his incarceration may have served to put him back on track.

Compensatory Education

B.C. v. Penn Manor Sch. Dist., 805 A.2d 642 (Pa. Commw. 2006) provides instruction for awarding compensatory education, counseling against a rote hour-for-hour approach [which in this case would amount to 226 hours¹⁷] in favor of an award that would bring the student to the point where he would be had FAPE been offered. This is very difficult due to the intervening variables of Student's behavioral issues. However, as he is now older and perhaps more mature, to this end, this hearing officer will order that the District fund a 12-month reading program for Student, geared for adult learners, through the Lindamood Bell program or through a local college

¹⁷ [180 days minus 5 days times 50 minutes divided by 60 minutes] plus [180 days minus 19 days times .60 times 50 minutes divided by 60 minutes]

reading lab school¹⁸ or other comparable local educational facility. Should Student incur mileage and/or parking expenses the District must reimburse him the mileage rate prevalent at the time in the District and pay the parking expenses in full upon receiving proof of Student's having paid for parking. In order to motivate Student to utilize this opportunity, it will be ordered that Student complete the program within 15 months of receiving this decision or forfeit the remainder of the award. However, any time that Student is incarcerated or in drug rehabilitation would not be counted against the 15 months. The total cost of the program may not exceed the specific amount of money the District would have paid in salary and benefits to a reading specialist for 226 hours of service. It is hoped that Student will take advantage of this opportunity, now that he is an adult and presumably free of drug issues and presumably motivated.

By way of dicta, it seems that the parties would have been better served by settling this case between themselves rather than engaging in a due process hearing which, by necessity, was long and intense.

¹⁸ This hearing officer is aware of one such program through St. Joseph's University, having heard an expert witness from that program in another matter.

ORDER

It is hereby ordered that:

1. The Council Rock School District failed to provide Student with FAPE in the area of reading instruction for 10th grade and part of 9th grade. At all other relevant times the District provided Student with FAPE in reading, in written expression and in transition planning.
2. As the Council Rock School District denied Student FAPE in the area of reading during 10th grade and part of 9th grade, the District shall fund a 12-month reading program for Student, geared for adult learners, through the Lindamood Bell program or through a local college reading lab school or other comparable local educational facility. Should Student incur mileage and/or parking expenses, the District must reimburse him the mileage rate prevalent at the time in the District and pay the parking expenses in full upon receiving proof of Student's having paid for parking. Student must complete the program within 15 months of receiving this decision, or forfeit the remainder of the award. If he does not utilize the award at all he will forfeit it. However, any time that Student may be incarcerated or in drug rehabilitation will not be counted against the 15 months. The total cost of the program may not exceed the specific amount of money the District would have paid in salary and benefits to a reading specialist for 226 hours of service.

August 29, 2007

Date

Linda M. Valentini, Psy.D.

Linda M. Valentini, Psy.D.
Hearing Officer