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PENNSYLVANIA
SPECIAL EDUCATION HEARING OFFICER

DECISION

DUE PROCESS HEARING

Name of Child: JH
ODR #6884/06-07 LS

Date of Birth: xx/xx/xx

Dates of Hearing:
October 31, 2006
January 12, 2007
January 19, 2007
March 19, 2007

CLOSED HEARING

Parties to the Hearing:
Mr. and Mrs.

Representative:
Frederick Stanczak, Esquire
179 N. Broad Street
Doylestown, Pennsylvania 18901

Souderton Area School District
760 Lower Road
Souderton, Pennsylvania 18964

Karl Romberger, Jr., Esquire
Fox Rothschild
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Date Record Closed:

April 5, 2007

Date of Decision:

April 20, 2007

Hearing Officer:

Linda M. Valentini, Psy.D.

Background

Student is a xx-year-old eligible student who resides in the Souderton Area School District (hereinafter District). Student is classified as having a specific learning disability that affects reading, mathematics and writing.

Mr. and Mrs., Student's parents (hereinafter Parents) requested this hearing, alleging that Student did not make meaningful educational progress and was not afforded a free appropriate public education (FAPE) for the 2004-2005 and the 2005-2006 school years, and is therefore entitled to compensatory education. Further, the Parents allege that the IEP the District offered Student for the current school year, 2006-2007, is inappropriate and that they should therefore receive tuition reimbursement for [redacted] the private school into which they enrolled him for the current school year.

The District maintains that it did provide Student with FAPE for the two school years in question, that the IEP offered for the current school year is appropriate, and that therefore Student is not entitled to compensatory education and the Parents are not entitled to tuition reimbursement. Further, it is the District's position that the placement unilaterally chosen by the Parents is not appropriate.

Originally scheduled for October 20, 2006, a date within the IDEIA regulatory timelines, the first session of this matter was rescheduled due to an educators' conference. Later sessions were scheduled from among various dates offered in accord with availability of both parties, of witnesses, and of the attorneys. One session was delayed by nearly two hours due to multiple accidents on icy area roads.

Issues¹

1. Did the Souderton Area School District fail to provide Student with a free, appropriate public education for the 2004-2005 and/or the 2005-2006 school years?
2. If the Souderton Area School District failed to provide Student with a free, appropriate public education for the 2004-2005 and/or the 2005-2006 school years, is he entitled to compensatory education and in what form and what amount?
3. Did the Souderton Area School District fail to offer Student an appropriate IEP for the 2006-2007 school year?

¹ The issues are stated in the negative as the Parents bear the burden of proof.

4. If the Souderton Area School District failed to offer Student an appropriate IEP for the 2006-2007 school year, is the Private School, the placement unilaterally selected by the Parents, appropriate?
5. If the Souderton Area School District failed to offer Student an appropriate IEP for the 2006-2007 school year, and the Private School is an appropriate placement, does a balancing of the equities reduce or remove the District's responsibility for tuition reimbursement?

Findings of Fact

Background

1. Student is a twelve-year-old student who resides in the Souderton Area School District.
2. After IST intervention, in December of first grade the District obtained parental permission and evaluated Student. He was found to have a learning disability and to require specially designed instruction in the areas of language arts and math. (NT 26-31; P-1/S-12; S-3, S-4, S-7, S-8)
3. The District issued a Notice of Recommended Educational Placement (NOREP) for part-time learning support, which the Parents approved, and an IEP was developed on 2-12-02 to be implemented as of 2-19-02. (NT 31-32; P-2/S-13/S-14)
4. Student's cognitive ability is in the Low Average Range as assessed in May 2005 with the Wechsler Intelligence Scale for Children - Fourth Edition (WISC-IV). Index Standard Scores are Verbal Comprehension 89, Perceptual Reasoning 96, Working Memory 77, Processing Speed 83, and his Full Scale IQ is 84.² (P-18)
5. A speech/language evaluation requested on 6-22-05 was conducted on 12-14-05 and 12-16-05. Instruments utilized were the Clinical Evaluation of Language Fundamentals III (CELF-4), the Expressive Vocabulary Test and the Test of Word Finding (Second Edition). On the CELF-4 Student's Standard Scores were as follows: Core Language Index 98, Expressive Language Index 93, Language Content Index 92, Language Memory 101, and Working Memory 69. It was determined that Student's working memory deficit did not interfere with overall language processing as all his language-based scores were in the Average Range. On the Expressive Vocabulary Test Student received a standard score of 94, in the Average Range. On the Test of Word Finding Student's Word Finding Quotient

² An earlier version of the Wechsler, the WISC-III, was just short of being out-of-date when it was administered to Student in first grade. The next edition, the WISC-IV separated out working memory and processing speed from verbal and non-verbal reasoning skills. Generally subjects score slightly lower on new versions of standardized tests. (P-1)

was 99, in the Average Range. It was determined that Student did not present with a speech-language disability. (S-41, S-49)

School Years 2004-2005 and 2005-2006

6. The academic years 2004-2005 and 2005-2006 were Student's fourth and fifth grades, respectively. The first IEP covering these two school years is dated 2-24-04; it was modified on 6-8-04 to prepare for the coming school year. Rather than have a new IEP drafted in February 2005 the Parents requested that the pendent IEP be extended for 60 days since a re-evaluation had been requested and results were to be incorporated into a new IEP. (NT 75; S-19, S-21, S-28)
7. Following the reevaluation, an IEP for fifth grade was developed on 6-1-05 and on 6-9-05. A special education professional parent advocate was present for both IEP meetings. (NT 82-83; S-38)
8. On 6-22-05 the Parents approved the IEP, with the proviso that concerns addressed in a letter accompanying the signed NOREP be addressed. The information that the Parents wanted included was added to the IEP. (NT 121-124, 474, 670-671; S-38, S-39, S-41)
9. For the second half of fourth grade and all of fifth grade Student's special education teacher was an individual with up to date pedagogical training, a bachelor's degree and certification in special education, and the designation of "highly qualified"³. (NT 653-654)
10. Student's special education classroom had seven students. (NT 655)
11. Student was instructed in reading with the Soar to Success program. (NT 729-730)
12. Student was instructed in math with the Everyday Math program. (NT 669)
13. The Wechsler Individual Achievement Test, an individually administered, computer scored, nationally normed and standardized test, was administered in April of fourth grade; it had also been administered in the middle of first grade. Although the time interval covers the entire time Student was in special education up until the spring of fourth grade rather than just the two years in question, a score comparison⁴ indicates that Student was making educational progress in reading and math in comparison with his same-aged peers and with his same grade peers, since in order to stay at the same standard score vis a vis his age and grade cohort he needed to make a year's progress in one year. His standard scores

³ No Child Left Behind standards.

⁴ Standard scores obtained by an individual may vary within a specific range due to internal and external factors that are taken into consideration and quantified under the concept of Standard Error of Measurement (SEM).

using age norms and grade norms were as follows: (NT 659-661; P-1/S-12, P-18/S-32)

WIAT & WIAT II Subtest ⁵	2001 Age	2005 Age	2001 Grade	2005 Grade
Word reading	89	91	93	92
Reading comprehension	71	105	74	104
Spelling	90	99	93	97
Math reasoning	93	90	95	90
Numerical operations	89	94	88	89
Receptive/expressive vocabulary	73		73	
Pseudoword decoding		101		97

14. The Woodcock Johnson Third Edition (WJ III), an individually administered, nationally normed and standardized test, was administered three times, at actual grade levels 3.6, 4.8 and 5.5. The WJ III assessed five areas of reading. The total testing interval covers a 19-academic month period, as each school year is 10 academic months. The 19-month period covers the end of third grade, all of fourth grade, and the first half of fifth grade. Student made educational progress in reading during this period as illustrated by his grade equivalency scores.⁶ There was an average of 18.8 (or 17.6 – see footnote 5 below) months progress in reading overall $[(10+14+13+27+30)/5]$ or $[(10+18+13+27+30)/5]$. (P-8/S-19, P-17/S-30, P-30/S-52)

WJ III Reading Subtest	Grade 3.6 Test	Grade 4.8 Test	Grade 5.5 Test	Progress in 19 Months
Letter word identification	2.8	3.6	3.8	10 months
Reading Fluency ⁷	2.2	3.6	3.0	14/8 months
Passage Comprehension	2.7	3.2	3.8	13 months
Reading Vocabulary	2.5	2.2	5.2	27 months
Word Attack	3.1	4.7	6.1	30 months

15. Student's progress in reading is also illustrated through curriculum-based assessments. He went from a Level M in guided reading in January 2005 to a Level T in June 2006. (NT 657, 778, 784, 787; S-25, S-38, S-52, S-59)

⁵ Although the instrument was updated, the basic test was unchanged. As a general pattern in looking at updated instruments, the newer version usually yields slightly lower scores; had two WIAT's been given the increase in scores may have been slightly higher.

⁶ Standard scores are not available for the first test administration, therefore only grade equivalent scores are used here.

⁷ The appearance of a loss of skill in this area is anomalous given increase in other reading skills. Therefore, the table shows the gains both without and with the final administration.

16. The Woodcock Johnson Third Edition (WJ III), assessed four areas of math over a 19-academic month period, covering the end of third grade, all of fourth grade, and the first half of fifth grade. Student made educational progress in math during this period as illustrated by his grade equivalency scores.⁸ There was an average of 18 months progress in math overall $[(21+20+10+21)/4]$. (P-8/S-19, P-17/S-30, P-30/S-52)

WJ III Math Subtest	3.6 Test	4.8 Test	5.5 Test	Progress in 19 Months
Calculation	3.2	3.5	5.3	21 months
Math Fluency	1.7	2.0	3.7	20 months
Applied Problems	2.8	2.6	3.8	10 months
Quantitative Concepts	2.9	4.4	5.0	21 months

17. Oral Language, part of Language Arts, was evaluated on the WJ III through a picture vocabulary subtest at the intervals described above. Student's three grade equivalency scores over the 19 academic month period were 2.5, 5.0, and 5.7, a 27-month gain overall. (P-8, P-17, P-30)
18. When she performed her reevaluation in May 2005 the District's psychologist did not administer an assessment of Student's written expression skills. Her evaluation data did not provide a level of functioning or an assessment of Student's progress in writing. (NT 604-608; P-18)
19. The District did not administer any standardized test of written expression to assess Student's progress in this area, although such tests are available, for example in the WIAT II and the WJ III. The District assessed progress in written expression through application of the grade-level District Rubric which is based upon the Pennsylvania Writing Rubric. (NT 486-489, 753, 792)
20. To assess Student's writing level each year, in the fall and in the spring, he was given the Domain Writing Test which entailed his being given a writing prompt for his chronological grade level, and then his response being assessed using the domain writing rubric. (NT 668)
21. The record contains only two sets of scores for the Domain Writing Test. Although a descriptive report was given for a Fall 2005 administration no scores were listed. Between fall of third grade and spring of fourth grade Student made little if any progress as assessed by his scores shown below. (S-19, S-38, S-52)

⁸ Standard scores are not available for the first test administration, therefore only grade equivalent scores are used here.

Area	Fall 2003	Spring 2005
Focus	3	2
Content	2	3
Organization	2	2
Style	N/A	3
Conventions	2	2

22. The verbal narrative for the Fall 2005 Domain Writing Test notes that Student grew as a writer in the last year, and used some expression, voice, and creativity when laying out his piece. Further, Student is able to construct an opening lead, beginning and middle. (S-52)
23. The Private School also assesses writing progress through a collection of writing samples and benchmarks relative to its language arts curriculum. (NT 373)

Program Offered for 2006-2007

24. A meeting to develop an IEP to cover the remainder of fifth grade (February 2006 to June 2006) and into sixth grade (2006-2007 school year) was first convened on 2-13-06. As some team members needed to leave, the meeting was reconvened on 3-1-06. As for the previous two IEP meetings, the Parents were again accompanied by their special education professional advocate for these two IEP meetings. (S-52, S-52 A)
25. At the 3-1-06 meeting the team continued a previous discussion on specially designed instruction, making adjustments and additions. It was noted that the Specially Designed Instruction (SDI) might have to be fine-tuned when Student moved into the middle school. (S-52 A)
26. Despite it having been determined in December 2005 that Student was not eligible for speech/language services, at the 3-1-06 IEP meeting it was agreed that there would be a minimum of once-weekly consultation between the special education teacher and the speech/language therapist, and the speech/language therapist was added under Supports for School Personnel to monitor Student's progress and SDI in all classes. The Parents requested that the District discuss the need for speech/language therapy with Student's tutor, and the District agreed to do so. (S-52 A)
27. Noting that Student engaged in hair-twisting behavior in school, at the IEP meeting on 3-1-06 the District proposed a Functional Behavioral Assessment (FBA) to explore the function of this behavior. The Parents declined this offer in a 3-9-06 phone conversation, as they felt that this behavior was a habit rather than a behavioral concern. (NT 214-215; S-52 A, S-55)
28. On 3-2-06, the day following the IEP meeting, the Parents requested a copy of Student's school records. (S-53)

29. On 3-26-06 the Parents returned the NOREP as disapproved and requested a Due Process Hearing, giving as reasons for their disapproval: SDI is insufficient and Goals do not reflect meaningful progress placement. The mother testified that she doesn't think the District can help Student. The father said the IEP was rejected because the Parents did not agree with some of the goals in it, "and there may have been some omissions...the speech and language..." (NT 139-141, 153, 199, 525; S-56)
30. On 3-29-06 the District issued an invitation to a Resolution Meeting at a mutually convenient date and time, and sent the Parents an ODR Due Process Request Form to complete and return to the District or to ODR. The meeting did not occur, the Parents did not complete and submit the Request Form to the District or to ODR, and the District heard nothing further from the Parents. (NT 200; S-57, S-59)
31. The Parents first learned about Private School in the summer of 2005 when they were looking for tutors; the special education professional parents' advocate also told the Parents to look into the school. (NT 152)
32. The Parents began looking into Private School in June 2006. (NT 152)
33. On 7-11-06 the Parents applied for Student's admission to Private School. Private School reviewed his school records, and on 7-20-06 and 7-21-06 Student visited Private School for two days as part of the admission process and received screening testing⁹. (NT 153, 336, 339, 342)
34. The Parents were notified that Student was accepted into Private School shortly after the testing at Private School in late July 2006. By the time the Parents were notified, perhaps in early August they had decided to send Student to Private School. (NT 531, 547)
35. Although the date the Parents received Student's acceptance letter or phone call from Private School is not clearly in evidence¹⁰, at that time they were required to pay a 10% deposit on a year's tuition that is approximately \$25,000. The deposit is not refundable if a family decides not to enroll the child, except if the decision

⁹ One phonological awareness screening instrument, the TASS, does not yield an interpretable level for purposes of establishing skills at Student's grade and age. See discussion on the record between the witness from Private School and the Hearing Officer at NT345-349. Overall, placement of Student at a 3-2 level (second half of third grade) for reading was spurious given the witness' description of the tests. See NT 352-356, 400-401.

¹⁰ The mother's estimate that the acceptance letter was received just prior to August 24th was not realistic given that Student had admissions testing in mid-July and the private school would have wanted to firm up its enrollment, although it is possible that there was a prior verbal acceptance. The father was credible in his testimony that they were notified of Student acceptance shortly after the admissions testing. (NT 209, 531)

is based on an insufficient offer of financial assistance from Private School.¹¹ (NT 156, 204, 341, 394)

36. On 8-18-06 the District issued an invitation to participate in an IEP meeting scheduled for Monday 8-28-06. The District noted in its cover letter that the last-agreed-upon IEP was that of 6-9-05, and that the IEP developed on 3-1-06 and 3-9-06 could not be implemented due to parental disapproval. (S-60, S-62)
37. By letter from their counsel dated 8-21-06 (it is not in evidence when the District received this letter) the Parents notified the District for the first time that they were withdrawing Student from the District and enrolling him in the Private School for which they would seek tuition reimbursement. The District was unaware that the Parents intended to disenroll Student from public school. Assuming a best-case scenario, the District received the letter on Tuesday 8-22-06, nine business days before 9-5-06, the date Student began school at Private School. (NT 199, 382; S-62)
38. By letter dated 8-24-06, received at the District on Friday 8-25-06, Parents' counsel informed District's counsel that there was no reason to convene an IEP meeting, that therefore the Parents would return the Invitation with a notation that the time and place were not convenient, but that a Resolution Meeting would make sense. (S-63)
39. By signature dated 8-23-06 Parents indicated that they could not attend the meeting on the scheduled date. However, at an IEP meeting for their other son on Friday 8-25-06, the mother indicated that she was able to attend on 8-28-06 but that her attorney had told her to check the box indicating inability to attend. Mother indicated that she would consider attending, but she later decided not to attend, sending an email to that effect on Saturday 8-26-06. (NT 144-145; S-60, S-64)
40. The father could have attended the IEP meeting on 8-28-06, but would not attend without his wife. (NT 541, 545)
41. On 8-25-06 at the other son's IEP meeting the Parents told the District verbally that Student would not be returning to the District. (NT 532)
42. On Monday 8-28-06 the District responded to the Parents' 8-26-06 email, presenting a cogent chronology of events to date. The mother found this letter very upsetting, for unclear reasons. (NT 148-149; S-64)
43. On Monday 8-28-06 the IEP team met to draft an IEP for middle school because the Parents had indicated that their plans to enroll Student in Private School had not been solidified. The last agreed-upon IEP (June 2005) was not sufficient as

¹¹ The mother first testified that the Parents paid a deposit then testified that they did not. (NT204-205, 217)

- Student had mastered most of the goals, and the SDI needed to be updated to reflect implementation at the middle school level where he would be working with staff who had never worked with him before. (S-64, S-65)
44. The Parents received a copy of the IEP of 8-28-06 by certified mail. (NT 150)
 45. The Parents gave Private School a copy of the 8-28-06 IEP, and it was circulated among his Private School teachers. (NT416)
 46. The 8-28-06 IEP team was appropriately constituted, although the Parents did not attend. (S-65)
 47. The 8-28-06 IEP (hereinafter The IEP) contained explicit Present Levels of Academic Achievement. (S-65)
 48. The IEP contained results of District evaluations as well as evaluations from a private speech/language evaluator, an IU speech/language evaluator, and a private optometry evaluator. (S-65)
 49. The IEP contains Annual Goals in reading comprehension and reading fluency, math concepts/applications and math computation and writing. (S-65)
 50. The IEP contains specific ways that progress on the Annual Goals will be measured. (S-65)
 51. The IEP contains specific times at which progress on the Annual Goals will be reported to the Parents. (S-65)
 52. The IEP contains 17 well-thought out strategies for Specially Designed Instruction. (S-65)
 53. The IEP is clear as to where and when each SDI is to be offered. (S-65)
 54. The IEP provides for Counseling as an appropriate Related Service as needed. (S-65)
 55. The IEP provides Supports for School Personnel that are appropriate including speech/language consultation. (S-65)
 56. The IEP notes there will be timely progress monitoring in term of ESY eligibility. (S-65)
 57. The IEP provides for learning support programming at the resource level in Student's neighborhood school, the least restrictive environment appropriate to address his special education needs. (S-65)

Credibility of Witnesses

A hearing officer is specifically charged with assessing the credibility of witnesses. Without doubt, this hearing officer deemed Student's special education teacher, a young woman who has recently entered the teaching profession, to be a most credible, sincere and exact witness. She presented herself calmly and with great dignity, but her warmth and concern for her students was unmistakable. The District is fortunate to have her in its employ. She served as Student's learning support teacher from January 2005 until the end of the 2005-2006 school year, that is the end of fourth grade and all of fifth grade. She holds the designation of "highly qualified" under NCLB. The District's other witnesses' credibility was established by their education and years of experience. The witness from Private School provided a good overall description of the school and its program, but presented a rather confusing account of the admissions testing such that this hearing officer did not consider these results to be robust indicators of Student's educational levels. Clearly the Parents are concerned and caring and acting in their son's best interests according to their beliefs; however, the mother's credibility was somewhat diminished in that in much of her testimony she presented as being strikingly unaware of the meaning of elements in the IEPs, and as simply trusting in the District's expertise, despite having an older son in special education, having previously participated in that child's special education planning, having the benefit of a special education professional parent advocate with her at four IEP meetings, and having produced herself or in collaboration with the special education professional parent advocate several precise written responses to IEPs and requests for testing. (See NT 196, 211; S-33, S-35, S-37) The father's testimony was deemed credible as he conveyed the sense of trying to testify accurately and candidly.

Discussion and Conclusions of Law

Legal Basis

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).

Special education issues are 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). Having been found eligible for special education, Student is entitled under the IDEIA and 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).

As per the IDEA regulations, the IEP for each child with a disability must include a statement of the child's present levels of academic achievement and functional performance, a statement of measurable annual goals including academic and functional goals designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum and meet the child's other educational needs that result from the child's disability; a description of how the child's progress toward meeting the annual goals will be measured and when periodic reports on the progress the child is making toward meeting the annual goals will be provided; a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child...and a statement of the program modifications or supports for school personnel that will be provided to enable the child to advance appropriately toward attaining the annual goals (and) to be involved and progress in the general curriculum...and to be educated and participate with other children with disabilities and nondisabled children; an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class... CFR §300.320(1-4)

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 IEP must afford the child with special needs an education that would confer meaningful benefit. 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); S.H. v. Newark, 336 F.3d 260 (3rd Cir. 2003) (district must show that its proposed IEP will provide a child with meaningful educational benefit). The appropriateness of an IEP must be based upon information available at the time a district offers it; subsequently obtained information cannot be considered in judging whether an IEP is appropriate. Delaware County Intermediate Unit v. Martin K., 831 F. Supp. 1206 (E.D. Pa. 1993); Adams v. State of Oregon, 195 F.3d 1141 (9th Cir. 1999); Rose supra.

Districts need not provide the optimal level of service, maximize a child's opportunity, or even 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, supra. 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 v. Illinois Bd. of Educ., 852 F.2d 290, 297 (7th Cir. 1988) 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).

IDEIA (IDEA 2004) provides that tuition reimbursement may be reduced or denied if at the most recent IEP meeting that the parents attended prior to the removal of the child from the public school, the parents did not inform the IEP team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense, or 10 business days prior to the removal of the child from the public school the parents did not give written notice to the public agency of the information described (above). 20 U.S.C. §1412(a)(10)(C)(iii).

The 1999 implementing regulations of the IDEA, which were still authoritative as of the date the District sent an invitation to the Parents to participate in the August 2006 IEP meeting, provided that:

At the beginning of each school year, each public agency shall have an IEP in effect, for each child with a disability within its jurisdiction. Each public agency shall ensure that an IEP is in effect before special education and related services are provided to an eligible child under this part...” 34 CFR Section 300.342(a)(b)(1)(I). Similar wording is contained at the IDEIA regulations at 34 CFR Section 300.323(a).

Parents who believe that a district’s proposed program is inappropriate may unilaterally choose to place their child in an appropriate placement. The right to consideration of tuition reimbursement for students placed unilaterally by their parents was first clearly established by the United States Supreme Court in Burlington School Committee v. Department of Education, 471 U.S. 359, 374 (1985). A court may grant “such relief as it

determines is appropriate”. “Whether to order reimbursement and at what amount is a question determined by balancing the equities.” Burlington, 736 F.2d 773, 801 (1st Cir. 1984), *affirmed on other grounds*, 471 U.S. 359 (1985).

In 1997, a dozen years after Burlington the Individuals with Disabilities Education Act (IDEA) specifically authorized tuition reimbursement for private school placement. The IDEIA, effective July 1, 2005, is the reauthorized version of the IDEA and contains the same provision:

(i) In General. – Subject to subparagraph (A) this part does not require a local education agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such a private school or facility.

(ii) Reimbursement for private school placement. -If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private school without the consent of or referral by the public agency, a court or hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency has not made a free appropriate public education available to the child in a timely manner prior to that enrollment. 20 U.S.C. § 1412(a)(10)(C)(ii)

Florence County Sch. Dist. Four V. Carter, 114 S. Ct. 361 (1993) had earlier outlined the Supreme Court’s test for determining whether parents may receive reimbursement when they place their child in a private special education school. The criteria are: 1) whether the district’s proposed program was appropriate; 2) if not, whether the parents’ unilateral placement was appropriate, and; 3) if so, whether the equities reduce or remove the requested reimbursement amount.

Discussion

In deciding the initial questions regarding past provision of FAPE for two school years, this hearing officer examined the IEPs in effect during the years in question and found they met the standards for appropriateness. However, although an IEP is not a performance contract, and must only provide a program under which educational progress is *likely*, realistically in retrospect parents and teachers look to educational progress or lack thereof to evaluate whether or not a student has been provided with FAPE. This hearing officer therefore examined whether or not Student, who has low average range to lower end of average range cognitive ability (FF 4), had made meaningful progress in reading, math and writing during the two years prior to his disenrollment from the District. From the array of evidence presented, two data sets, one derived from the WIAT II and the other derived from the WJ III, were deemed to be robust indicators of Student’s functioning because they were individually administered, they were nationally normed, they were standardized and they were well-researched. Notably the WIAT was in its second edition, and the WJ was in its third edition. Other

data available for possible scrutiny, the Terra Nova and the PSSA, were not appropriate as the last Terra Nova in the record was administered only two months into the period under scrutiny in this hearing, and there were results from only one PSSA administration (Grade 3) in the record. Another data set, from a respected and well-known commercial tutoring service, was not used as there was not a representative from the service present to explain the test construction, and pre-testing/post-testing results have business as well as educational implications. Although still other data sources, such as curriculum-based assessments, were available, except for looking at the area of writing, they were minimally relied upon to gauge progress because there was more robust data available from the WIAT II and the WJ III.

A comparison of Student's WIAT II scores at first administration in December 2001 and at second administration in May 2005 demonstrated unquestionably that, using both age-based norms and grade-based norms, Student made meaningful progress in reading and math through the end of the first academic year addressed in this hearing (FF 13). In order to stay exactly at the same standard score from one year to the next, a student must make one year's progress in one year, regardless of the actual value of the standard score (e.g., one year's progress must be made to maintain an 80 standard score, a 100 standard score or a 120 standard score). A student functioning in the low average range to lower end of average range of cognitive ability, Student was still able to make a year's progress for each year in special education as assessed by the WIAT II. (FF 8)

The WJ III likewise provided evidence that Student had made meaningful educational progress in reading and in math through the first year of the period in question and at least halfway through the second year of the period in question. Testing at three grade-level points - mid-third, end-fourth and mid-fifth grades – demonstrated that in a 19-academic month period Student made anywhere from 8/14 academic months¹² to 30 academic months progress in reading for an average of 17.6 to 18.8 academic months of progress over reading areas tested. (FF 14) Testing over the same period indicated that Student made from 10 to 21 academic months progress in math for an overall average of 18 academic months in a 19 academic month period. (FF 16) Therefore, no compensatory education is owed in these areas.

It was in the area of written expression that the District fell short. Although the special education teacher testified credibly to how she taught writing, and that she incorporated a researched methodology, Lucy Kalkins Writing (NT 714-715, 720-723), there was no evidence that Student's progress was assessed routinely, even using the rubric, and no scores were provided for one of the three assessments on record. First, it was troubling that despite testimony that a writing sample was scored according to chronological grade level rubrics in the fall and in the spring of each year, in the record there was evidence of only three such tests from Fall of 2003, Spring of 2005 and Fall of 2005, and only two sets of rubric scores from these tests were in the record (FF 21). The Fall 2003 test was from third grade, and it is the only score that can be used as a baseline in the absence of a Fall 2004 test. Although the Parents bore the burden of proof in this matter, the District was required to provide Parents with Student's educational records, and apparently did

¹² See footnote #5 above regarding one out-of-pattern score that suggested some regression in grade-level.

not provide any documents related to the other writing tests. If such documents existed one party or the other would surely have produced them and used them to bolster its position.

Progress must be measurable, and this hearing officer would have given fair consideration to a series of four, or ideally five, rubric score sets as part of a larger writing assessment picture, were they available. Further, there are subtests of the WIAT II and the WJ III that assess written expression, and in the presence of otherwise appropriate progress monitoring in reading and math, not using these nationally normed, standardized, research based subtests to assess writing progress is not defensible in the absence of any other robust data (FF 19). The sketchy data from two writing rubrics, one in the fall of third grade and one in the spring of fourth grade, covering two academic years, one of which is in question in this hearing, suggests that Student did not make meaningful educational progress in this area. Therefore, compensatory education is owed Student and will be ordered.

An examination of the IEP offered for the 2006-2007 year reveals that it is appropriate, although not perfect (ff 47 to FF 57). It contains present levels of academic achievement and functional performance, measurable annual goals, a description of how Student's progress toward meeting the annual goals will be measured and when periodic reports on the progress he is making toward meeting the annual goals will be provided, a statement of the special education and related services and supplementary aids and services to be provided to Student, a statement of the program modifications or supports for school personnel that will be provided to enable him to advance appropriately toward attaining the annual goals (and) to be involved and progress in the general curriculum...and to be educated and participate with other children with disabilities and nondisabled children, and an explanation of the extent, if any, to which Student will not participate with nondisabled children in the regular class. The IEP would be enhanced by the addition of "annual administration of a standardized achievement assessment instrument such as the WJ III" under the progress monitoring section of each goal, given that the District does, and is to be commended for, using the instrument to assess reading and mathematics. It is also appropriate, and the District is highly advised, to use the WJ III or another similar instrument with a nationally normed well-researched sample to assess writing.

The IEP offered to Student for the current school year, 2006-2007, is reasonably calculated to provide meaningful educational benefit. It is clear that the Parents consider the Private School program superior to the District's, and they have the right to educate their child wherever they wish, but in this case, not at public expense. As the Parents failed to meet their burden of proving that the IEP offered to Student for the current school year is inappropriate, it is not necessary to examine the appropriateness of their unilaterally-chosen placement, or to balance the equities. If such analyses were undertaken, Student's right to be educated in the least restrictive environment would need to be considered, as would the Parents' having embarked upon an exploration of private schools well before the District offered its IEP, and their failure to communicate with the District or ODR from the time they rejected the NOREP in early March 2006 until late

August of that year, and their giving less than ten days notice of their intent to disenroll Student from the District and place him in private school.

Order

It is hereby ordered that:

1. The Souderton Area School District did not fail to provide Student with a free, appropriate public education for the 2004-2005 and the 2005-2006 school years in the areas of reading and math. However, the Souderton Area School District did fail to provide Student with a free, appropriate public education for the 2004-2005 and the 2005-2006 school years in the area of written expression.
2. As the Souderton Area School District did fail to provide Student with a free, appropriate public education for the 2004-2005 and the 2005-2006 school years, in the area of written expression, he is entitled to compensatory education. Student is entitled to 45 minutes a day of compensatory education for each day that he was present in school during the entire period in question. The hours must be used for remedial or other courses, tutoring, books, computer software, writing camps and/or other resources geared toward developing/enhancing his writing skills; the hours may be used in the evening, on weekends, and during the summer from the present through the end of the summer in which he graduates from high school; the services or tangible resources are to be selected by the Parents in consultation with knowledgeable individuals including but not limited to their special education professional advocate or Student's teachers; the total cost of the compensatory education may not exceed the total cost the District would incur in providing the denied appropriate instruction in written expression.
3. The Souderton Area School District did not fail to offer Student an appropriate IEP for the 2006-2007 school year.
4. As the Souderton Area School District did not fail to offer Student an appropriate IEP for the 2006-2007 school year, the appropriateness of the Private School, the placement unilaterally selected by the Parents, does not need to be addressed.
5. As the Souderton Area School District did not fail to offer Student an appropriate IEP for the 2006-2007 school year, a balancing of the equities does not need to be addressed.

April 20, 2007

Date

Linda M. Valentini, Psy.D.

Linda M. Valentini, Psy.D.
Hearing Officer