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**PENNSYLVANIA**  
**SPECIAL EDUCATION HEARING OFFICER**

DECISION

DUE PROCESS HEARING

Name of Child: BD

ODR #7229/06-07 LS

Date of Birth: xx/xx/xx

Dates of Hearing:

April 17, 2007

April 23, 2007

April 24, 2007

CLOSED HEARING

Parties to the Hearing:

Spring-Ford Area School District  
199 Bechtel Road  
Collegeville, Pennsylvania 19426

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

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May 11, 2007

May 26, 2007

Linda M. Valentini, Psy.D.

## Background<sup>1</sup>

Student is a xx year old, second grade, eligible student who resides in the Spring-Ford Area School District (hereinafter District). He has been classified under the category of specific learning disability. Following reading specialist assistance in the school setting during kindergarten, he was placed with parental permission in a Skills Mastery Class (SMC) for first grade; the class addressed the needs of students who were in regular education but needed extra academic supports. Parents<sup>2</sup> became dissatisfied and in early November effected a change to an ordinary first grade classroom taught by a teacher whom they preferred. At the same time as his transfer, the Parents and District decided to pursue a multidisciplinary evaluation for which the Parents gave written permission. Just prior to the commencement of the evaluation the Parents told the District to cease all testing until the date they anticipated an Independent Educational Evaluation (IEE) would be finished. In April 2006, following the completion of the IEE, they removed Student from the District and unilaterally enrolled him in a private school for children with learning disabilities. Given another signed permission, the District completed its evaluation of Student towards the end of the academic year and produced an Evaluation Report (ER) by July. The District convened an IEP meeting in September 2006, following an aborted attempt to meet in August 2006. The Parents participated in the meeting but declined the District's proffered placement.

The Parents allege that the District denied Student FAPE, having failed in its Child Find obligations by not identifying him at an earlier time. They also contend that the District's proposed IEP for the 2006-2007 school year did not offer him FAPE. They are seeking compensatory education, reimbursement for the IEE and tuition reimbursement for the private school for the end of the first grade year, the summer program of 2006, and the 2006-2007 school year. The District maintains that it offered FAPE at all times, and that none of the remedies sought by the Parents should be awarded.

## Issues

1. Did the Spring-Ford Area School District deny Student a free, appropriate public education (FAPE) through a failure to exercise its Child Find responsibilities in a timely manner?
2. If the District denied Student FAPE, is he entitled to compensatory education, and in what amount and what type?

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<sup>1</sup> The hearing was originally scheduled for February 16, 2007 which was within the regulatory timelines, but needed to be cancelled because one of the key participants was ill. The group of dates on which the hearing was held were available for all participants and represented the most time-efficient way of conducting the hearing.

<sup>2</sup> Although "Parents" is used throughout the decision except when it is necessary to make a distinction it should be understood that the mother was the principal actor on behalf of both the father and herself.

3. Are the Parents entitled to reimbursement for the independent educational evaluation (IEE) they obtained for Student?
4. Are the Parents entitled to tuition reimbursement for the private school into which they unilaterally placed Student?

#### Findings of Fact

1. Student is a xx-year-old second grade student residing in the Spring-Ford Area School District. He currently attends a private school for students with learning disabilities.
2. Student was very attached to his mother for his first seven years and just now is growing out of it a bit. If his mother left the room he worried about her, if he wasn't looking at her directly he had concerns. (NT 199)
3. Student began preschool at age two, and experienced separation difficulty in his two preschool placements; the Parents removed him from the second preschool placement the March prior to his entering Kindergarten; the mother worked with him at home. (NT 89-90; P-5)
4. For the first few months of kindergarten Student struggled with separation from his mother. The teacher and the Parents arranged that the mother would be the "classroom mother". (NT 201-202)
5. Academically in kindergarten Student struggled with his letters and following directions of more than one step. (NT 202-203)
6. The reading specialist worked with some of the kindergartners in small groups of two to five students outside the classrooms, and Student was regularly included in the weekly groups. (NT 595-596, 648)
7. The reading specialist was trained in the VAKT (visual, auditory, kinesthetic, tactile) approach, which is multi-sensory and is an early model of implementing the Orton-Gillingham approach. (NT 701)
8. The Parents asked the kindergarten teacher if Student should receive tutoring over the summer and asked the teacher whom she would recommend from a list. The teacher supported the idea and Student received tutoring in reading over the summer – one-half hour in reading and one-half hour in math – from one of the District's first grade teachers. The tutor noted that Student was having difficulty retaining information. (NT 209, 314-315, 374, 517, 540-543)
9. The District recommended that Student be placed in the Skills Mastery Classroom (SMC) for first grade. Students selected for the SMC had average to high ability

- and were seen as having the best possible chance of Student benefiting from extra attention in reading and math. The SMC was not for children who had been identified as being eligible for special education. (NT 309-312; P-2)
10. The Parents consented to the SMC placement. (NT 208)
  11. The SMC had 13 students and offered a strong emphasis on reading and math. The regular education reading specialist and the regular education math specialist worked closely with the SMC teacher, who was an experienced teacher, to develop the program around the specific needs of the students. (NT 309-311, 526; P-2)
  12. The reading specialist in the SMC was the same individual who worked with Student during kindergarten. Starting about the end of the second week in school she was in the classroom every day for 30 minutes on a push-in basis. Her work with the class was coordinated with what the teacher was doing and the needs of the children. (NT 597, 599, 659-662)
  13. The children in the SMC were well behaved. (NT 605-606)
  14. Student experienced adjustment difficulties upon entering first grade. He vomited before going to school on days when there would be a spelling test, nightmares became more prevalent, he resisted going to bed and ended up sleeping with his mother or on the floor next to her, and had bedwetting issues. (NT 210-211)
  15. Student had anxiety around homework time, throwing tantrums and refusing to do the work. The homework sometimes was not turned in. (NT 211)
  16. The mother wanted to be visible in the school and in the classroom so she volunteered during first grade lunch to see Student and help out as needed, and she volunteered in the SMC. She was there on the first occasion the reading specialist came into the classroom; at that time the reading specialist was just observing the children. In between there were phone calls and emails. Communication between the mother and the school was ongoing. (NT 328-329, 605-606)
  17. The first day of school for first grade was August 29, 2005. On September 14, 2005 the Parents wanted Student removed from the SMC as they were “very unhappy with the progress Student had made in two and a half weeks” and his regression at home had become severe. (NT 213, 317; P-2, P-4)
  18. The mother believed that the SMC teacher “motivated through negative reinforcement” and that this made Student anxious. The mother also noted that the communication between herself and the teacher “had become so volatile that I felt that was going to be reflected on Student’s education”. (NT 229, 278)

19. Additionally the mother “frankly...didn’t care for the Skills Mastery Program”, believing that it was causing Student to regress as he was not getting the attention that the Parents thought he would get. (NT 230)
20. In early September the summer tutor was asked by the Parents for an opinion about the SMC for Student and she replied that he needed the repetition of material that the SMC provided. (NT 534-535; P-3)
21. There was an interpersonal relationship difficulty between the SMC teacher and the mother, such that the mother expressed reservations about Student’s staying in that classroom. However, when the principal suggested a meeting the Parents agreed. (NT 318-319)
22. A Child Study Team (CST) meeting was held on September 15, 2005. The identified problem was, “Often Student does not want to come to school in the morning. Student’s parents have questioned whether Student is comfortable in the classroom with both peers and teacher”. (NT 318; S-4)
23. Although the meeting was “tense” between the SMC teacher and the mother, the CST moved forward and selected five interventions: the counselor to engage Student in conversation about his feelings regarding school, the counselor to provide opportunities for Student to have positive peer interactions, the teacher to find ways for Student to develop leadership among his peers, the teacher to design a communication plan with the Parents, the teacher to work out opportunities for the mother to volunteer in the classroom and the school. The CST was to reconvene on October 20, 2005. (NT 319-320, 388-389; P-4)
24. The District was seeing success on the issue of the teacher and parent’s relationship. Student seemed happy in the classroom when observed by the counselor, and by the teacher’s report. The Parents were reporting positive interactions in the classroom. (NT 320-321, 325, 327)
25. The mother, the SMC teacher, the reading specialist and the teacher who tutored Student in the summer met on September 27, 2005 to discuss Student’s language arts and reading abilities. The SMC teacher suggested that the Child Study Process look at Student’s learning. (NT 233-234, 527-528; S-7, P-3)
26. In late September<sup>3</sup> the reading specialist administered the first part of the Gates-MacGinitie reading test as part of a pre-test procedure for the SMC children, with results placing Student at the 19<sup>th</sup> percentile with a kindergarten grade equivalent. The test results were reviewed with the Parents. (NT 600, 602, 609-610; S-7, P-10)
27. Another CST meeting was requested on October 3, 2005 and held on October 20, 2005 to focus on the academics, with the identified problem being, “Student has

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<sup>3</sup> The record is contradictory as to whether the testing began on September 22<sup>nd</sup> or September 28<sup>th</sup>.

- difficulty retaining letter recognition and letter sounds”. The reading specialist had noticed the difficulty in retention toward the end of September, although this has not been evident in kindergarten. (NT 320-321, 396-397, 664-666; P-11)
28. The teachers were asked for input into the CST referral form. All comments about Student’s participation and attitude in school were positive, with attention and focus being the only area of behavior difficulty noted. The referral form also noted the previous year’s teacher seeing difficulty with retention and a need for repetition. The mother “struggled with” the comment that Student enjoyed school and participated in all areas of the curriculum as she felt he was not progressing; she agreed with the comments about retention and repetition. (NT 228-229; P-11)
  29. In addition to what was already occurring in the SMC, the CST developed six language arts interventions for the next 30 days, including home-based activities and practice with the teacher and the reading specialist. (NT 398-400, 698; P-11)
  30. The CST also decided that Student would be referred for a psychoeducational and a speech-language evaluation. (NT 237; P-11)
  31. On October 31, 2005 “everything just changed”, according to the principal, following what she understood to be a teacher/mother conflict at the class Halloween party. The principal was contacted by the mother with the demand that Student be removed from the SMC. (NT 322-324)
  32. Having received the mother’s email after the time that the mother indicated she would be available, the principal spoke with the father, and a conversation ensued about the relationship between the teacher and the mother. Asked his assessment of whether the relationship was “beyond repair” and damaging Student or not, the father’s observation was that the situation was at the point where it could not be pulled back together. (NT 322-323, 326)
  33. The principal made the decision to change Student’s classroom, although she had “great concerns” based on the transitioning difficulties young children can have. (NT 322-323)
  34. In Student’s new first grade classroom there were three learning support students, four students including Student who went to remedial reading, two who went to math support, students receiving speech, occupational and physical therapy, and a student with Down syndrome who had a one-to-one assistant. (NT 537)
  35. Student’s transition into another first grade classroom on November 7, 2005 went smoothly due to coordination between District staff and the Parents. The Parents had a good rapport with the new teacher, as she had been the summer tutor. Because the class into which Student was transferred had a full teacher-student ratio (21-1) and several of the students had disabilities the teacher was supported through counselor and administrative communication. The new teacher stayed in

- contact with the mother and their interaction was positive. There were frequent meetings between the mother, the new teacher and the reading specialist. (NT 241, 403, 518, 524-526, 548)
36. Because he would no longer have the in-classroom reading specialist support of the SMC, Student was given pull-out remedial reading. When this new service was beginning the remedial reading teacher sent home a copy of the results of Student's September 28, 2005 testing along with a permission slip for remedial reading. (NT 222-223, 429-430, 432, 606-607, 610-611, 658-659)
  37. Student also received reading instruction in leveled groupings from the first grade teacher in the new class. (NT 574)
  38. The remedial reading program involved a 4 times<sup>4</sup> per week 30<sup>5</sup>-minute pull-out period with five or six other students. (NT 537-538, 552, 611, 644, 647; P-10)
  39. In the new classroom the teacher utilized a homework book for communication with the Parents. (NT 530)
  40. In the new classroom the teacher used preferential seating, repetition of directions, frequent positive praise, modeled and repeated practice for decoding, small group instruction, extended time for tests, use of math manipulatives, gave two choices for word retrieval, provided phonemic cues to aid in retrieving, and often gained Student's attention before beginning directions, chunked directions, allowed extra processing time, used proximity control, used multisensory activities, gave breaks during the day and encouraged Student to ask for help. These were some of the specially designed instructions that were eventually incorporated into the offered IEP, although they might be implemented differently by a special education teacher. (NT 558-567, 570)
  41. A progress report dated November 21, 2005, about two weeks after Student had entered the new class, notes many "commendations" including good spelling test results<sup>6</sup>; there was a notation that he lacked basic skills for reading and phonics. (NT 581; S-40)
  42. The first grade teacher observed that Student fit in "wonderfully" with the other students and saw him as a happy, social, upbeat student with a lot of friends. He had no problems with social skills. (NT 536, 567)
  43. By mid-year it had become apparent to the reading specialist and the teacher that Student needed more than what he had been receiving in regular education and they met with the mother about this. The most significant problem seemed to be Student's difficulty retaining what he learned. At this time Student was on the

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<sup>4</sup> Reportedly Student told his Parents that it was once a week (NT 225)

<sup>5</sup> P-35 page 2 has an incorrect number of minutes. See NT 646-647.

<sup>6</sup> Later in the year Student again had difficulty with spelling.

- testing log and the process for identifying him had started. (NT 612-615, 618, 664)
44. The Parents had signed a Permission to evaluate on November 1 2005. The form noted that testing would take place between January 11, 2006 and January 26, 2006, a period within the state regulatory timelines for completing an evaluation. (NT 237-240; P-4)
  45. The Parents also in early November contacted [redacted] Institute about obtaining an evaluation. Because of the cost the Parents decided to wait for the District's evaluation. However, the mother was becoming frustrated because she had not heard from any members of the team about when the testing was going to take place. At some indeterminate time the Parents arranged for the independent educational evaluation (IEE) through the Institute "to help speed up the process". (NT 241-243, 291-292, 294, 479-480)
  46. The District psychologist's procedure is to contact the parents of a child she is evaluating in close time proximity to beginning her actual testing with the child. The District psychologist spoke to the mother in January 2006 prior to the time that she had hoped to schedule the evaluation to let the Parents know she was setting up the evaluation. She learned in that telephone conversation that a private evaluation was being conducted by the Institute. (NT 709-710, 719, 721-722)
  47. The District psychologist asked the Parents to find out what tests were being done privately so that she would not duplicate testing and so that a reliable and valid evaluation could be done. The mother seemed skeptical about this request. Neither the Parents nor the private psychologist provided this information. (NT 720, 722)
  48. The District psychologist did not tell the Parents that her evaluation would be "generic in nature". (NT 712)
  49. The private psychologist advised/suggested to the Parents "to put the [District's] testing on hold so that two different evaluations were not being conducted at the same time". (NT 94-95)
  50. Fairly soon after her conversation with the mother the District psychologist received the word to cease testing. (NT 722)
  51. On January 13, 2006 the Parents sent a letter to the District making a formal request that the District "postpone evaluating" Student and "cease all current testing". They asked that testing resume or begin no later than February 13, 2006, with an evaluation meeting being held no later than March 13, 2006. The superintendent's office notified the participants to stop all testing. The Parents had been advised by the private psychologist, and the District psychologist concurred,



- that two psychological evaluations should not take place at the same time. (NT 257, 441; S-19; P-2)
52. At the time the District was directed by the Parents to cease testing, Student was next on the testing log for the reading specialist. (NT 683)
  53. The speech/language pathologist had begun preliminary testing work with Student. (NT 412)
  54. The District had responded on January 18<sup>th</sup>, agreeing to discontinue testing and noting that a new Permission to Evaluate would be issued on February 13, 2006. The Parent believed that the 60-day timeline would begin anew. The second Permission to Evaluate was issued on February 13, 2006 but the Parents reportedly did not sign it upon the advice of their attorney and the Education Law Center.<sup>7</sup> The “testing window” on this form was between April 17, 2006 and May 11, 2006. A third Permission to Evaluate was issued on February 27, 2006 with a testing window of May 8, 2006 to May 23, 2006. A fourth Permission to Evaluate was sent on March 10, 2006 with a window of May 23, 2006 to June 7, 2006. A fifth Permission to Evaluate was sent on March 24, 2006, with a window of June 7, 2006 to June 17, 2006. The third Permission to Evaluate (2-27-06) is the one the Parents signed on June 1, 2006.<sup>8</sup> (NT 246, 448-452, 454-456; P-2, P-3)
  55. The former Director of Special Education did not know why the Parents wanted testing discontinued. She was not aware that the Parents were obtaining private testing. The District did not want to be out of compliance regarding timelines, and a postponement would put the testing out of compliance. (NT 444-446, 453, 475-478, 506; P-3)
  56. The District’s current Special Education Director was previously with the Department of Education, Bureau of Compliance. He is conversant with past and current regulations and is not aware of any regulatory authority for extension of time for an evaluation. (NT 764-767)
  57. IEE commenced on January 17, 2006 with an interview with the Parents. On January 31, 2006 there was an observation of Student in the District. Testing with Student took place on February 2, 7 and 15, 2006. However, the Parents did not meet with the private evaluator until March 25, 2006 to discuss her results, and a report was not received by the District until March 30, 2006 at the earliest. (NT 87, 457-458; P-5)

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<sup>7</sup> The Parents believed that the advice they were given included that asking for a postponement was within their rights. This may have been a misunderstanding as noted in the legal basis and discussion section below. (NT 247-248)

<sup>8</sup> The “testing window” or range of dates is the District’s attempt to comply with the state’s directive to provide actual dates rather than to just note “in 60 school days”. (NT 742-745)

58. In an email dated February 23, 2006 the Parents informed the school counselor that the private evaluation would be available “within the next 2 weeks or so”. (NT 296; P-3)
59. Had the District completed its testing in the timeframe indicated on the first Permission to Evaluate the ER would have been ready for the Parents to review on February 13, 2006. The Parents were informed of this on January 6, 2006 by email. (P-3)
60. When the District did eventually receive another signed Permission to Evaluate Student was already at Private School so he had to be brought in for testing by appointment. Nevertheless the evaluation was completed quickly, before the end of the school year. (NT 460-461)
61. Among other credentials, the District psychologist was the Director of Temple University’s Psychoeducational Services Clinic and was an assistant professor at that university. She also was a regular education classroom teacher for three years in the Philadelphia School District. She has been a school psychologist for thirty-two years. (NT 705-706)
62. The District psychologist chose to do the Stanford Binet Fifth Edition (SB-V) because, normed from age two upward, it has a lower floor than the WISC-IV which is normed from age six. Standardized age-normed tests tend to have lower reliability at the lower ends of the norm tables. (NT 735-737)
63. The disparity in cognitive test results between the District’s evaluation (Verbal IQ 91, Non-verbal IQ 95, Full Scale IQ 92) and the private evaluation (Verbal Comprehension 100, Perceptual Reasoning 112, Full Scale IQ 115) may be due to this reliability factor. The private psychologist did not calculate the General Ability Index, which removes the working memory and processing speed functions from the calculation of the full scale IQ. Had she completed this step the GAI would have been closer to the Full Scale IQ on the WISC-IV. (NT 98-99; S-35, P-5)
64. The District found Student eligible for special education with a classification of a specific learning disability. (NT 719; S-35)
65. The District’s psychologist believes that the District can appropriately program for Student. (NT 722)
66. After evaluating Student the private psychologist “educated” the Parents about private school options and “encouraged them to explore” these options. At the time she was under the impression that Student had already been receiving “special education services” [evaluation report] or “specific interventions thus far” [testimony] in the District. (NT 87, 103-104; P-5)

67. The private psychologist had a “general idea” but no knowledge of specifics about what special education would be available in a public school. (NT 105)
68. The private psychologist did not do any specific study to support her recommendation that Student receive summer programming. (NT 113; P-5)
69. The private psychologist who opined about the District’s proffered IEP had no formal or informal training regarding writing IEPs. She did not know what PaTTAN is, and had never participated in any training by PaTTAN or the Department of Education. She had never taught in a public school, or been responsible for implementing an IEP in a public school. (NT 84-85)
70. The private psychologist had not participated in Student’s IEP meeting, or advised any member of the District about her concerns about the proffered IEP. She did not investigate the available curricula for first and second grades in the District. She was not knowledgeable about the District’s ability to offer specialized reading instruction in the elementary school. She is not familiar with the qualifications of the District staff that would be providing Student’s reading and writing intervention. (NT 86-87)
71. The private psychologist did not attempt to verify with the District any of the school information provided by the Parents. (NT 90-91, 93)
72. The private psychologist was not aware of any specific reading program used at the Private School for Student despite having visited the Private School to observe him. (NT 85)
73. The private psychologist did not ask to see Student’s goals for reading, writing or language arts at the Private School when she observed him in that setting. (NT 110)
74. The Parents first learned about the Private School in the fall of 2005 because a relative’s daughter attended the school. They began considering the Private School in January 2006, but in March 2006 they were “assured that’s where he needed to be”. (NT 250)
75. The date on the Parents’ application for Student’s admission to the Private School was 2-21-06. (NT 176)
76. The Private School first tested Student for admission on 3-21-06. (NT 176)
77. Student began attending the Private School in April 2006. His teacher in the District was not asked to participate in any transition planning from her class to the Private School. (NT 251, 526)

78. Student exhibited some anxiety upon entering the Private School. The Private School attributed Student's anxiety upon entering the program at least partially to making a change in schools so late in the year. (NT 191-192)
79. The Private School is a private school specifically for students with language-based learning disabilities, ages five to fifteen, in roughly kindergarten through 8<sup>th</sup> grade. The students are grouped in their homerooms primarily around chronological age and grade equivalency. They are instructionally grouped by skill level. (NT 131, 135-136)
80. Although the Private School approach to reading is based in Orton-Gillingham theory, and all teachers have been trained in Project Read, some of the teachers have training in other reading programs based on Orton-Gillingham. (NT 150, 179)
81. Student's progress at the Private School has been at a slow rate, although his pace is not uncommon given his profile. There is no way to determine how long it will be for there to be progress. (NT 157, 190-191)
82. As of the hearing dates, Student was still on a PP-3 reading level. The Parents watch him "take one step forward and two steps back" and accept the Private School's explanation that this would be "normal progression" for him. (NT 281-282)
83. At the end of the first grade school year, after Student had been in the Private School for two and a half months, he tested at the instructional level of beginning first grade (Pre-Primer) on the Qualitative Reading Inventory (QRI). (NT 640-641; S-35)
84. The District's ER was provided to the Parents on July 26, 2006. (NT 503-504; P-6)
85. An IEP meeting was scheduled for August 18, 2006 but not held because the District refused to allow the Parents to tape it. (NT 464; P-2)
86. The IEP meeting was rescheduled and held on September 13, 2006. The elements of the IEP were generated at the meeting and the document was put into final form afterwards and sent to the Parents on October 3, 2006 along with a Notice of Recommended Education Placement (NOREP). (NT 746-747, 770; S-37)
87. The IEP team included members of the staff at Student's original elementary school and staff from the school that would be serving him in the District as he had moved within the District. (NT 746)
88. The elements of the IEP were drawn from the ER, the IEE, the District's direct classroom experience with Student, the Parents' input, and information the

- Parents provided about Student's time at the Private School from April 2006 onwards. (NT 749)
89. District staff who participated in the development of Student's IEP had extensive training through PaTTAN and the Montgomery County IU. (NT 750-752)
  90. The IEP includes a statement of Student's present levels of academic achievement and functional performance presented over eighteen pages that include testing results and qualitative and quantitative descriptions of his classroom performance. (S-37)
  91. The IEP lists Student's strengths as well as his academic, functional and developmental needs that result from his disability. (S-37)
  92. The IEP includes measurable annual goals designed to meet Student's needs so as to enable him to be involved in and make progress in the general education curriculum and meet his other educational needs that result from his disability. The IEP's Goals (and Short-term Objectives/Benchmarks when provided) are particularly clear, precise and measurable. The IEP carries goals in the areas of reading, written expression, motor skills and visual-motor integration for grapho-motor tasks. (S-37)
  93. The IEP contains 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 to the Parents. (S-37)
  94. The IEP contains thirty-eight well-articulated and logical items of specially designed instruction. Some of the specially designed instruction offered to Student was used in his previous regular education classroom. In the special education setting it may look different or be delivered in a different student grouping. A desired outcome is to transport the SDI's into the regular education setting as well to support success there. (NT 762; S-37)
  95. The IEP provides for the related service of Occupational Therapy to address specific needs in that area. (S-37)
  96. The IEP contains a statement of the supports for school personnel that will be provided to enable Student 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. (S-37)
  97. The IEP contains an explanation of the extent to which he will not participate with nondisabled children in the regular class. (S-37)

98. The IEP calls for Student to receive a highly structured, research-based, sequential, phonics-based reading program. All the programs the District uses fit these criteria. Reading instruction would have been provided to Student using a highly structured, research based, sequential, phonics based program. Programs in use at the school Student would be attending are the Scott-Foresman, the SRA Reading Mastery or Corrective Reading program, and the Wilson program. The Parents expressed their preference for the use of a Wilson or another Orton-Gillingham based program. (NT 643, 758-760; S-37)
99. The Direct Instruction method would be used with the SRA reading programs. (NT 799)
100. In the District regular education reading and language arts are taught in an integrated curriculum and special education learning support follows this model as well. (NT 760-761)
101. The District conducts Child Find activities through local newspapers, the District website, the school calendars and the student handbooks. (NT 763)
102. The first grade teacher who had been Student's tutor and who received him into her classroom at the beginning of November never told the Parents that the District could not meet Student's needs. (NT 522, 536)
103. The reading specialist recalled a conversation with the Parent wherein she told the Parent that the District was not meeting Student's needs in the first grade regular education program in which he was placed after November 2005. (NT 545)

#### Credibility of Witnesses

A Hearing Officer is specifically charged with making credibility determinations regarding the witnesses' testimony; in the great majority of cases the hearing officer level is the only level at which direct testimony is taken. The weight assigned to the various witnesses is addressed in the Discussion and Conclusions of Law section of this decision.

#### Discussion and Conclusions of Law

Special education issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA" or "IDEA 2004" or "IDEA"), 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). When a child has been found eligible for special education, the child 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).

*1. Did the Spring-Ford Area School District deny Student a free, appropriate public education (FAPE) through a failure to exercise its Child Find responsibilities in a timely manner?*

The District's (or LEA's) obligation to serve a student commences within a "reasonable time" after the District should have suspected the child to be disabled, the "reasonable time" being allowed to the District to conduct an evaluation, identify the student as disabled, and formulate an appropriate program for the child. See Puxatawney Area School District v. Kanouff and Dean; Ridgewood; W.B. v. Matula; Palmyra Board of Education v. F.C.; T.B. v. School District of Philadelphia; In Re: The Educational Assignment of R.A. Special Education Opinion No.1431 (Jan. 5, 2004).

The IDEA regulations at 34 C.F.R §300.301 (c)(d) provide, regarding Procedures for Initial Evaluation, that:

The initial evaluation must be conducted within 60 days of receiving parental consent for the evaluation, or if the State establishes a timeframe within which the evaluation must be conducted, within that timeframe<sup>9</sup>.

There are two exceptions to the timelines:

The timeframe described (above) does not apply to a public agency if the parent of a child repeatedly fails or refuses to produce the child for the evaluation, or a child enrolls in a school of another public agency after the relevant timeframe has begun and prior to a determination by the child's previous public agency as to whether the child is a child with a disability. The preceding exception applies only if the subsequent public agency is making sufficient progress to ensure a prompt completion of the evaluation, and the parent and subsequent public agency agree to a specific time when the evaluation will be completed.

The Parents directed the District to cease all testing and sought to extend the timeline for completion of the District's evaluation. (FF 51) Permitted no other logical choice by law, the District deemed the Parents' direction as a withdrawal of their permission to evaluate Student. (FF 55) The Parents were resistant to signing another Permission to Evaluate, but finally did so three and a half months after the District's first re-issuance of the form. (FF 54)

The elementary school principal testified very credibly to the intensity with which the Parents issued their directive to cease testing. The District's former director of special education provided detailed and highly credible testimony that she sought guidance from a number of informed sources as to whether or not it was legally permissible to accede to the Parents' request that the testing timeline be extended. Her conclusion was that the timeline could not be waived, therefore she considered the Parents' clear direction to stop

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<sup>9</sup> Pennsylvania has established the timeframe as 60 school days as opposed to the federal 60 calendar days.

testing to constitute their rescinding their original permission to evaluate their son. Supportive testimony on this point was provided by the District's current director of special education, who formerly served within the state department of education, bureau of special education's compliance monitoring division. His testimony conveyed that he is clearly knowledgeable, informed by his own direct knowledge, that the IDEA has no provision for a waiver of timelines for the reasons pertinent to this case. (FF 56) Although he was not involved in the matter at the time it unfolded, he was highly credible on the question of special education regulations and his testimony was given considerable weight because of his particular special knowledge. Student's mother testified that she contacted the "Philadelphia, Pennsylvania Law Center" (NT 248) (likely the Education Law Center) about whether she should sign the re-issued permission forms and was told she should not. Unfortunately it appears that either the information conveyed to ELC was incomplete or the ELC contact was misinformed.

The implementing regulations of the IDEA were quoted above; there are two exceptions to the timelines for an initial evaluation. There is notable and considerable detail regarding timelines in the event of a child's move from one LEA to another; the IDEA is otherwise silent on the topic of extension of timelines. Silence in the IDEA does not constitute a gap for interpretation contrary to the provisions about which the statute is not silent. A Pennsylvania Special Education Appeals Panel has provided guidance regarding a waiver of provision of FAPE:

"[We] reject the notion that a district's duty to provide FAPE can be "waived". The District's duties under IDEA to evaluate Student and to have an IEP in place for him by the start of the school year could not be more clear, and the panel cannot accept that those duties are negotiable. It makes no difference...that the Parents initiated the offer of delaying the provision of FAPE...A "waiver" of the duty to provide FAPE is no remedy for the District's failure to perform a timely evaluation, prepare an appropriate IEP and recommend an appropriate placement (or to seek due process when necessary to validate the proper execution of its duties)." In Re the Educational Assignment of P.J., Special Education Opinion #1271.

Although many things can be waived, the timelines for an evaluation cannot be waived by either the Parents or the District. The District, faced with the Parents' mandate to cease all testing, could do nothing than consider this a withdrawal of the former permission. Any delay in evaluating Student occurred because the Parents refused to sign another permission form; as soon as they did sign another form immediate arrangements were made to test Student, working around his schedule at the private school in which he was enrolled.

The District was correct in its decision to consider the Parents' demand to "cease all testing" as a retraction of their Permission to Evaluate, and the District was likewise correct in its procedure of issuing another Permission to Evaluate. What was shortsighted, using Monday Morning Quarterbacking, was to wait until the date the Parents specified testing could resume to reissue a Permission to Evaluate, and to utilize



the algorithm the special education secretary devised to indicate the testing “window”. The reissuing of several additional Permission to Evaluate forms represented the District’s diligence in performing its legal duty, albeit imprudently as regards the “testing window”. For their part, the Parents did not sign the subsequent forms because they had erroneously been told that their waiver request was valid and that they did not have to sign another form. It is notable, however, that February 13<sup>th</sup>, the date indicated by the Parents for resumption of testing, fell within the time span that the private evaluation was still being conducted and it may have been that the Parents would have instructed the District to hold off again.

Even if, for purposes of argument, the District were in procedural violation regarding the evaluation timelines, and it was not, any trace of responsibility for educational harm to Student was removed by 1) the Parents having commissioned a private evaluation at the same time the District was preparing to conduct its own evaluation (although the report was produced 6 weeks later than the District’s ER would have been available had the Parents not stopped testing); and 2) the Parents removing Student from the District in early April 2006. The District was ready and certainly capable of producing a fine evaluation, as demonstrated by the ER that was ultimately completed, and an appropriate IEP could have been in place in the District by the end of March at the very latest, if not sooner.

Even before Student was in the process towards being identified, the District provided him with FAPE. The reading specialist provided convincing testimony that she delivered appropriate pull-out and push-in services to Student during his stay in the District. (FF 6, 7, 12, 36) Her testimony about the number of sessions of pull-out services she provided once Student was transferred to the second first grade classroom was deemed more credible than the mother’s testimony, gleaned from conversations with the child. (FF 38) The first grade teacher who accepted Student into her classroom from the SMC likewise provided credible testimony. She was precise in her recollections, and her demeanor was straightforward and convincing, particularly in her denial of ever having told the mother that the District could not provide an appropriate program for Student. (FF 102)

During the time from Student’s entry into Kindergarten until his removal from the District in April 2006, and through the completion of the ER in July 2006, Student was a regular education student. The District received Student into kindergarten and deemed him, along with a number of other regular education students, likely to benefit from instruction by a reading specialist. (FF 5, 6) When the District recommended Student for the SMC the Parents hesitated, but ultimately accepted the placement. (FF 10) As described the SMC seemed perfect for Student. (FF 9, 11, 12, 13) However, there was an almost immediate personality clash between the mother and the teacher (FF 17, 18), and although both accepted the opportunity for conflict resolution in the September 2005 CST meeting (FF 22, 23) and both seemed to be trying to make the home/school partnership work over the next six weeks (FF 24), for unclear reasons the situation exploded on the last day of October (FF 31) resulting in the mother’s demand that Student be removed immediately from the SMC and in consultation with the father, the District’s agreeing to this move. (FF 32)

Offering a Permission to Evaluate at the beginning of November 2005 was exactly the right time for the District to begin the process of identifying Student. (FF 30) He had reading services in kindergarten, and was doing well the first few weeks of first grade, where he received the push-in services of a reading specialist and the advantage of a smaller classroom environment that moved at a slightly slower pace than the ordinary first grade classes. The reading specialist was finding by the end of September or early October that he had difficulty retaining the material she was teaching him. (FF 25, 27) In October, a CST chose strategies for intervention for 30 days, in addition to the SMC program, but also determined that an evaluation would be done. (FF 28, 29) Once his Parents had him removed from the SMC Student received thirty minutes of reading instruction by a reading specialist four times a week as well as reading instruction in the ordinary first grade classroom. (FF 36, 38)

In presenting their case the Parents repeatedly referenced best practices for early reading instruction, citing research as well as endorsements by the state department of education. Although this hearing officer has no reason to reject this information on a pedagogical level, it remains that, other than the Birth-to-Three and Three-to-Five age categories, the legislature has not chosen to differentiate its regulatory timelines or its procedures for special education, 1) by age or 2) by disability. Clearly the legislature had access to the same research as did the Parents, and if the federal or state governments had chosen to do so they could have enacted special education provisions for different timelines and/or procedures in the area of reading for the “primary grades”, commonly K through 3<sup>rd</sup> grade. At the time events transpired Student was six going on seven, and was in first grade. The IDEA and Pennsylvania regulations provide reasonable timelines for completing an evaluation using public funding, and children and their families must wait their turn. It is noteworthy that, even funding the evaluation themselves, the Parents had to wait until their private evaluator completed the evaluation and issued her report.

For all the time relevant to the inquiry regarding provision of FAPE and compensatory education consideration, Student was a regular education student. He was not determined to be eligible until the ER was completed, in July 2006. (FF 64, 84) Had the District been permitted to conduct its evaluation as planned, the ER would have been available on February 13, 2006 for the Parents to review. (FF 59) Even if they had taken the full ten days to review the ER, given the IEP being crafted in a timely fashion, Student would have received special education services at the very latest towards the end of March.

The evidence in this case is predominant and persuasive that the District did not deny Student FAPE at any time during his attendance in District classes as a regular education student, that it made legally correct decisions regarding re-issuance of the Permission(s) to Evaluate<sup>10</sup>, and that it did everything necessary to obtain the Parents’ consent to complete the evaluation process. Under the aegis of regular education the District provided Student with an appropriate educational program in reading through the services

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<sup>10</sup> Although the calculation of the “testing window” dates, at least in Permission forms two through five, represented a lapse of good judgment given the volatility of the case.

of a reading specialist and through classroom interventions designed to address deficits in attention and memory.

2. *If the District denied Student FAPE, is he entitled to compensatory education, and in what amount and what type?*

Where there is evidence that there were deficiencies in either an IEP itself or in the delivery of the program resulting in a denial of services altogether or in a trivial or minimal educational benefit in any area of need, a student is entitled to an award of compensatory education. In such cases, compensatory education is due for a period equal to the deprivation, measured from the time that the school district knew or should have known of its failure to provide FAPE. *M.C. v. Central Regional School District*, 81 F.3d 389 (3<sup>rd</sup> Cir. 1996).

Compensatory education is a remedy designed to provide a student with the services he should have received pursuant to a free appropriate public education (FAPE). When a student has been denied the due process rights or an appropriate educational program that he should have received, compensatory education is an in-kind remedy. *Lester H. v. Gilhool*, 916 F. 2d 865 (3d Cir. 1990), cert. denied 499 U.S. 923, 111 S.Ct. 317 (1991) A child is entitled to compensatory education services if the child is exceptional and in need of services and/or accommodations and if through some action or inaction of the District the child was denied FAPE. With regard to the standard for determining whether and to what extent compensatory education should be awarded was summarized by the Third Circuit in *M.C. v. Central Regional School District*, 81 F. 3d 389, (3d Cir. 1996). As the Court in *M.C.* observed, when a school district fails to deliver that to which a student is entitled, an award of compensatory education is justified.

As the District at all times in question provided Student with a free appropriate public education no compensatory education is due.

3. *Are the Parents entitled to reimbursement for the independent educational evaluation (IEE) they obtained for Student?*

A parent has the right to an independent evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency. If a parent requests an independent educational evaluation at public expense, the public agency must either initiate a hearing and at that hearing show that its evaluation is appropriate or ensure that an independent evaluation is provided at public expense. If the public agency initiates a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent evaluation, but not at public expense. 34 CFR §300.502(b)(1)(2)(3).

The Parents' reasons for opting for the private evaluation (the length of time Student was waiting to be evaluated and the belief that the District's evaluation would be "generic") (FF 45, 48) hold no basis in reality when the private evaluation was still being conducted two days after the ER would have been produced (FF 57), and the highly specific ER

produced by the District was completed by a clinician who directed the well-established and exceptionally well-regarded Temple Psychoeducational Services Clinic (FF 61). This District psychologist holds superb credentials, has many years of experience, was able to very amply support her reason for choosing a particular cognitive testing instrument over the one chosen by the private evaluator (FF 62, 63) and was able to confidently and clearly explain her reason for diagnosing a working memory deficit by analyzing conflicting data sets. Her testimony was given considerable weight; it was particularly striking that she provided direct answers, did not speculate, and did not over-interpret her data.

The Parents considered having an IEE done at the same time they gave the District permission to evaluate Student (FF 44, 45), and they decided to go forward with the IEE ostensibly because they could not tolerate the timelines federal and state statutes provide and/or they believed the District's evaluation would be "generic". They did not commission an IEE to challenge an ER produced by the District. A District has the right to conduct its own evaluation of a student for whom it will be responsible for delivering FAPE. Parents may use private sources when public resources are inappropriate or unavailable, and under those circumstances may be entitled to receive reimbursement. Parents are otherwise free to use private sources, but without the support of public funds. Reimbursement for the IEE is not due Student's Parents.

4. *Are the Parents entitled to tuition reimbursement for the private school into which they unilaterally placed Student?*

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 (3<sup>rd</sup> Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989), citing Board of Education v. Diamond, 808 F.2d 987 (3<sup>rd</sup> 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 (3<sup>rd</sup> Cir. 2000); Ridgewood Bd. of Education v. N.E., 172 F.3d 238 (3<sup>rd</sup> Cir. 1999); S.H. v. Newark, 336 F.3d 260 (3<sup>rd</sup> 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 (9<sup>th</sup> 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 (4<sup>th</sup> 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 (11<sup>th</sup> Cir. 2006); Lachman v. Illinois Bd. of Educ., 852 F.2d 290, 297 (7<sup>th</sup> 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).

As per the IDEIA 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)

Parents who believe that a district's proposed program is inappropriate may unilaterally choose to place their child in an appropriate placement. The IDEA's implementing regulations at 34 C.F.R. §300.148 ( c ), which are identical to the regulations in effect earlier, make it clear that tuition reimbursement can be considered only under a specific condition:

“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 a 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 had not made FAPE available to the child in a timely manner prior to that enrollment...”

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 (1<sup>st</sup> 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.

Again it bears repeating, that at the time the Parents removed Student from the District and placed him in the Private School (FF 77) he had not yet been identified by the

District as eligible for special education services. He was still a regular education student. Student remained a regular education student throughout the entire 2005-2006 school year. The IDEA is very clear that tuition reimbursement is possible only for students previously receiving special education services. As the District did not fail to identify Student in a timely manner, the Parents' request for tuition reimbursement from April through June 2006 must be denied. Likewise, there had been no determination that he was eligible for an Extended School Year program. Although the private psychologist opined that he required a summer program, and a summer program may have been beneficial, she based her opinion on no regression/recoupment data and established none of the other conditions for which a child may qualify for ESY. (FF 68)

The IEP offered to Student for the 2006-2007 school year was appropriate and represented an offer of FAPE as defined by statute and case law, and in the opinion of this hearing officer, went far beyond what would be required to deem the plan "appropriate". The IEP includes a statement of Student's present levels of academic achievement and functional performance presented over eighteen pages that include testing results and qualitative and quantitative descriptions of his classroom performance. (FF 90) The IEP lists Student's strengths as well as his academic, functional and developmental needs that result from his disability. (FF 91) The IEP includes statements of measurable annual goals designed to meet his needs, to enable him to be involved in and make progress in the general education curriculum and meet his other educational needs that result from his disability. The Goals (and Short-term Objectives/Benchmarks when provided) for reading, written expression, motor skills, and visual-motor integration are particularly clear, precise and measurable. (FF 92) The IEP contains 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 to the Parents. (FF 93) The IEP contains thirty-eight well-articulated and logical items of specially designed instruction. (FF 94) The IEP contains the related service of Occupational Therapy deemed necessary to help him access the special education program. (FF 95) The IEP contains a statement of the supports for school personnel that will be provided to enable Student 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. (FF 96) The IEP contains an explanation of the extent to which he will not participate with nondisabled children in the regular class. (FF 97)

The Parents' claim that the IEP "was very generic in nature and didn't address specific learning disabilities that Student had" (NT 262-262) cannot be supported. In order for an IEP to be appropriate, it is not necessary to specify a particular instructional methodology, a point which they visited repeatedly during the hearing. Additionally, their hindsight concerns regarding the IEP's failure to address home/school communication (NT 789-790) and failure to address "parent training" (NT 790-791) fail as they were full participants in the IEP meeting and could have asked for these elements to be added. That they were not does not render the IEP inappropriate, and as the director of special education pointed out, all the Parents need do is ask (NT 791, 798).

To assist in developing their case for the hearing the Parents depended upon the opinions and advice of the private evaluator, who did not participate in the development of the IEP, although she could have. (FF 70) With some reservations, the private evaluator performed an appropriate evaluation, but when she stepped into the role of expert advisor regarding private vs. public educational placement, and regarding IEP critique, she ventured far from her training and experience and her opinion in these regards was given very little weight. (FF 66, 67, 69, 71) Even if she had not testified to a patent lack of experience with public schools in general and the District in particular, her opinion would not necessarily be probative. In Watson v. Kingston City School District, 325 F.Supp.2d 141 (July 2004) the court held, “The mere fact that a separately hired expert has recommended different programming does nothing to change this [that the district’s IEP was appropriate], as deference is paid to the District, not a third party”. The Watson court cites Pascoe v. Washingtonville Cent. Sch. Dist., No. 96 Civ. 4926 (holding that recommendation that a student be given private O-G [Orton-Gillingham] instruction did not, in itself, invalidate substantive recommendations in IEP).

This case involves dedicated and earnest Parents’ impatience with the speed or lack thereof with which the IDEA and state regulations mandate initial identification and service provision, and involves invested Parents’ desire that their son have what they consider “the best” educational program. The mother’s testimony was entirely credible as she described these factors. A close scrutiny suggests that the Parents had decided on Student’s applying to the Private School fairly early in the process and were barely considering special education in the District. In November 2005 the Parents heard about the private school (at about the time they signed the Permission to Evaluate and explored testing at Institute). (FF 45, 74) They obtained application materials prior to February 21, 2006 (8 days after receiving the District’s second Permission to Evaluate and 6 days after Student’s final testing date with the private evaluator). They submitted the application on February 21<sup>st</sup>. (FF 75) They took Student to the Private School for admissions testing on March 21, 2006 (four days before their feedback session with the private psychologist). (F 76) They removed him from the District to attend the Private School on April 7, 2006. (FF 77)

The District offered Student an IEP that is reasonably calculated to produce meaningful educational benefit within the parameters of the statutes and case law. Therefore, it is not necessary to examine whether the Private School is an appropriate placement for Student. Should such an inquiry have needed to be made, it would start with the question of whether Student’s rights to be educated with nondisabled peers were justifiably superseded by the benefit of the Private School program. Likewise an examination of the equities does not have to be conducted, although if it did it would start with the Parents’ removing the child from the District when he had never received special education in the District and before the District could resume conducting its evaluation.

Based on all the evidence in the record, this hearing officer cannot find for the Parents on the issue of reimbursement for the Private School placement. It is fortunate that the hearing and decision come at the end of a natural school year break. Unless the Parents choose to pay Student’s tuition privately he will be re-entering the District, likely at the



[redacted] Elementary School. It is anticipated that the District's ability to assist him to effect a smooth transition from the SMC to another first grade classroom will again be in evidence if and when he comes back into the neighborhood school. Although he seemed to weather the transition from the SMC to the alternate first grade well, (FF 35) he exhibited some anxiety after being placed at the Private School. (FF 78) As he has already been abruptly pulled from three educational settings (preschool, the SMC, and the first grade classroom of his beloved teacher/tutor), and had some difficulty with the third transition, it will be very important for the Parents and the staff at the Elementary School to work together to support Student's return to the District in every way possible.

#### Burden of Proof

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). 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. The evidence in this case is not a close call and does not approach equipoise on any of the issues; therefore a final decision on each issue did not have to be reached via a Weast analysis.

## ORDER

It is hereby ordered that:

1. The Spring-Ford Area School District did not deny Student a free, appropriate public education (FAPE) through any failure to exercise its Child Find responsibilities in a timely manner.
2. As the District did not deny Student FAPE, he is not entitled to compensatory education.
3. The Parents are not entitled to reimbursement for the independent educational evaluation (IEE) they obtained for Student.
4. The Parents are not entitled to tuition reimbursement for the private school into which they unilaterally placed Student.

The Spring-Ford Area School District is not required to take any further action.

May 26, 2007

Date

*Linda M. Valentini, Psy.D.*

Linda M. Valentini, Psy.D.  
Hearing Officer