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# Pennsylvania Special Education Hearing Officer

## DECISION

Child's Name: AR

Date of Birth: xx/xx/xx

Dates of Hearing:

June 21, 2007, September 6, 2007, October 17, 2007, November 13, 2007, December 4, 2007, December 5, 2007

OPEN HEARING

ODR #7623/06-07 KE

Parties to the Hearing:

Mr. and Mrs.

Bethlehem Area School District  
1516 Sycamore Street  
Bethlehem, PA 18017

Date Record Closed:

Date of Decision:

Hearing Officer:

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January 8, 2008

January 23, 2008

William F. Culleton, Jr., Esquire

## **INTRODUCTION AND PROCEDURAL HISTORY**

Student is a xx year old, eligible resident of the Bethlehem Area School District (District). (NT 9-1 to 13.) She is identified for special education as mentally retarded with speech and language impairment. (NT 9-13 to 16.) She is diagnosed with Down Syndrome. Parents requested due process alleging a failure to provide placement in the least restrictive environment, appropriate services in academic, behavioral and transitional skills, and both compensatory education and tuition reimbursement.

The District argues that the Parents had demanded inappropriate program and services that they were now attacking, that the Student made significant educational gains in the 2005-2006 school year, that their offer for the 2006-2007 school year was appropriate, and that the Parents enrolled the Student in a private school that was inappropriate for the Student.

The Parents requested public reimbursement for private school tuition less than one week before a mediation session on June 28, 2006. (S-17.) They requested due process originally on or about September 29, 2006, but due to an emergent family matter, they withdrew their request and re-filed on or about April 27, 2007. The initial hearing commenced on June 21, 2007; however, the original hearing officer withdrew due to an emergent family matter, and this matter was reassigned to the undersigned, who convened the second session on September 6, 2007. A total of six sessions were conducted between June 21, 2007 and December 5, 2007. Counsel submitted written summations and findings of fact on January 8, 2008 and the record closed on that date.

## **ISSUES**

1. In the 2005-2006 school year, did the District provide a program and placement in the least restrictive appropriate educational environment?
2. In the 2005-2006 school year, did the District provide an appropriate program and placement, addressing the Student's individual needs for functional academics in reading comprehension, listening comprehension, written expression, oral expression, and math calculation, as well as social skills training?
3. In the 2005-2006 school year, did the District provide an appropriate transition plan and services?
4. In the 2005-2006 school year, did the District provide appropriate related speech and language services addressing speech pragmatics?

5. For the 2006-2007 school year, did the District offer the Student a program and placement in the least restrictive appropriate environment, that was reasonably calculated to provide an opportunity for meaningful educational benefit?
6. Should the Parent be reimbursed for the cost of an Independent Educational Evaluation?
7. Should the District be ordered to pay for tuition reimbursement and transportation costs for the 2006-2007 school year?
8. Should the hearing officer award compensatory education for the 2005-2006 school year?

### **FINDINGS OF FACT**

1. The Student's cognitive abilities fall within the lowest .1% of the population, as measured by norm referenced measures, considered an "extremely low" range of ability. (NT 136, 812-813; P-11 p. 4, P-13 p. 2, S-9 p. 2.)
2. The Student's adaptive behaviors are similarly very low, and this is to be expected in light of the Student's low tested ability. (P-11.)
3. In August 2002, the District issued an Evaluation Report based in part on cognitive and achievement testing performed in March 2002, including norm referenced testing; tests scores were reported for vocabulary and decoding, academic knowledge, language fundamentals, and speech sound production, and rate of academic knowledge acquisition. (S-1.)
4. The August 2002 ER also addressed reading comprehension, listening comprehension, written expression, oral expression, mathematics calculation, and social skills. It noted little progress in academic areas and recommended life skills training and a curriculum leading to competitive employment, along with placement in a separate, self-contained life skill program for the mentally retarded. (S-1.)
5. The Parents objected to the ER, criticized the eight grade program the Student had received, and requested inclusion in general education with support for academic instruction. (S-1.)
6. In November 2003, the District offered an IEP with placement in learning support for reading, part time life skills support, and regular education for vocational training and extracurricular participation in a choral activity. The IEP addressed reading comprehension, written expression, oral expression, mathematics

- calculation, social skills and transition planning. ESY services were offered in reading, written expression and mathematics. (P-6.)
7. In March 2004, the District issued an Evaluation Report based upon response to intervention and curriculum based testing. (NT 61, 63; S-2.)
  8. The March 2004 ER noted significant improvement (as measured by increasing scores) in the reading comprehension curriculum, ongoing needs in written expression, adequate oral expression, mathematics calculation, social conversation and vocational needs. (S-2.)
  9. The March 2004 ER recommended continued placement in general education with program modifications and specially designed instruction, reduction of speech and language support to a consultative service, and extended school year services, both vocational and academic. (S-2.)
  10. In April 2004, the District offered an IEP with placement in learning support for reading, part time life skills support, and regular education for vocational training and extracurricular participation in a choral activity. The IEP addressed reading comprehension, written expression, oral expression, mathematics calculation, social skills and transition planning. ESY services were offered in reading, written expression and mathematics. (NT 342; S-3.)
  11. During the 2005-2006 school year, the Student has had a one to one assistant during the school day, and one to one instruction in reading, written expression and mathematics. (NT 465, 227-228, 324-326; S-2. S-33.)
  12. In March 2005, the District offered an IEP with placement in part time learning support for reading and mathematics, regular education for vocational training and extracurricular participation in a choral activity. The IEP increased the level of inclusion from under 61% to 21% to 60% outside the regular classroom. It offered speech and language consultation, Occupational therapy consultation and job coaching as related services. ESY services were offered in reading, written expression and mathematics. (NT 335, 344; S-5.)
  13. The March 2005 IEP addressed reading comprehension, written expression, oral expression, mathematics calculation, social skills and transition planning. (S-5.)
  14. The March 2005 IEP provided two measurable goals in social skills, focusing upon making appropriate eye contact in conversation, and initiating conversation with unfamiliar persons. (S-5.) .)
  15. During the 2005-2006 school year, the Student was in a self-contained learning support program, located in a single classroom for most of the school day. (S-9.)

16. In March 2006, the District issued an Evaluation Report based in part upon norm referenced testing, including intelligence and achievement testing and a behavior inventory. This was in response to the Parents' request for norm referenced testing. (S-9.)
17. The March 2006 ER reported norm referenced cognitive testing scores showing that the student has relative strength in abstract thinking and general fund of information. Weakness was indicated in mathematics beyond operations permitting reliance upon one-to-one correspondence. Social understandings appeared to be based upon perception, not logic. (S-9.)
18. The March 2006 ER, regarding reading comprehension, reported norm referenced achievement scores showing that the Student failed at the third grade level, below the .1 percentile for children her age. Four curriculum based assessments rated the Student's highest reading comprehension at various levels from third grade (3.6), to 6<sup>th</sup> grade. The Student's PSSA scores in reading were below basic in 2005. (NT 1194-1197, 1214-1220, 1224-1228; S-9, S-23, P-19 p. 15-.)
19. Progress reports of the one-to-one instruction received by the Student in reading comprehension show that she made progress in sequencing, and some more generalized progress in reading comprehension. (NT 1037-1039, 1170-1176, 1194-1197, 1214-1219, 1226-1229, 1294-1321; S-13, S-20, S-23, S-26.)
20. The March 2006 ER, regarding written expression, reported norm referenced achievement scores in spelling at the first grade level, below the .1 percentile for children her age. No curriculum based assessment scores were reported in written expression. The Student's PSSA scores in writing were below basic in 2005. She received a grade of "B" in English in eleventh grade. (S-9.)
21. An April 2006 IEP later added that the Student had progressed, in the 2005-2006 school year, from first grade to the beginning of second grade in written expression, based upon the District's writing rubrics. This was the same progress reported in the March 2005 ER for the 2004-2005 school year. (S-5 p. 16, S-13 p. 7.)
22. The April 2006 IEP written expression goals were the same as those in the March 2005 IEP – to improve written expression to the end of third grade level within the District's curriculum. The objectives required almost identical skills, but the numerical objectives were slightly increased. (P- 8 p. 8, P-9 p. 13, S-13 p. 20.)
23. The March 2006 ER, regarding mathematics calculation, reported norm referenced achievement scores for numerical operations below the .1 percentile. Curriculum based assessment placed the Student at the Intermediate level of a mathematics checklist. (S-9.)

24. The March 2005 IEP had noted mastery of 20 out of 27 mathematics tasks at the Kindergarten to first grade level. It had set three goals, one to complete mastery of that level, one to master the skills at grade 2, and one to master the skills at grade 3. The April 2006 IEP noted mastery of the first grade level and growth in mastery of second and higher grade skills. (S-5 p. 3-6, S-13 p. 8.)
25. As reflected in an April 2006 IEP, the Student progressed in mathematics calculation, in the 2005-2006 school year, in mastery of both first grade and second grade skills, based upon a state approved leveled math skills checklist. (NT 1032-1035, 1229-1231; S-13, S-18, S-23.)
26. The March 2006 ER, regarding social skills, presented data from the behavior inventory indicating that the Parents rated the Student's social skills as average, while teachers rated these skills as at risk. Teachers' anecdotal ratings indicated gains, with continuing needs. Teachers reported that the Student had begun initiating conversations with peers, but not with teachers, with one exception. The Student needed prompting for appropriate eye contact and needed support in self advocacy, including initiating conversations with unfamiliar persons. There was no data pursuant to the measurable goals in the 2004 IEP. (S-9.)
27. The speech and language services provided to the Student in the 2005-2006 school year failed to address her educational needs and IEP goals. (NT 1144-1150.)
28. An April 2006 IEP later confirmed the continuing need for fading of prompts for making appropriate eye contact and further support for initiating conversations with unfamiliar persons, including requests for help in the classroom setting. (S-13.)
29. The Student developed a habit of going to the school nurse's office with minor or imaginary complaints, and District personnel considered this to be evidence of a desire to escape the classroom situation at those times. However, the Student did not exhibit the ability to express this desire to escape the situation, nor why she felt that desire. (NT 1129-1134.)
30. The March 2006 ER, regarding oral expression, reported good functional language skills, with initiation of conversation and successful conversational speech. The speech and language report indicated continued needs in the classroom for appropriate eye contact and self advocacy. Continued consultative speech and language services were recommended. (S-9.)
31. In April 2006, the District offered an IEP with placement in part time learning support for one to one instruction in reading, writing and mathematics; regular education for electives; and extracurricular participation in a choral activity. Inclusion was provided for 34% of the school week. The IEP offered speech and

- language consultation and Occupational therapy consultation as related services. ESY services were offered. (NT 335, 344, 578; S-13.)
32. The April 2006 IEP provided measurable goals and objectives in reading, based upon the Student's present levels of academic achievement, as measured by multiple curriculum based assessments, including the Steck-Vaughn Reading Comprehension Skills Series, a supplemental reading program which is diagnostic and prescriptive, and as used with the Student, highly individualized. (NT 1170-1176, 1194-1197, 1214-1219, 1294-1321; S-13.)
  33. At the time it was provided, the IEP team, including the Parents, was in agreement that this method of addressing reading comprehension offered a reasonable opportunity for meaningful educational gain. (NT 1170-1176; S-13.)
  34. The April 2006 IEP provided measurable goals and objectives in functional written expression, as measured by the District's writing rubric. The goal was based upon a baseline of beginning of second grade achievement, as measured according to the District's writing rubric, and reported in the March 2004 ER. (S-13.)
  35. The April 2006 IEP provided measurable goals and objectives in mathematics calculation, based upon the Student's present levels of academic achievement, as measured by a state-sanctioned curriculum based checklist. (S-13.)
  36. The April 2006 IEP provided one goal in social skills, specifically in pragmatic speech. The measurement formulation is unclear. The goal does not address fading of prompts for making appropriate eye contact. The initiation of conversation aspect of the goal is limited to the classroom setting and does not address community based needs, such as conversation with store clerks in the community. (S-13.)
  37. The April 2006 IEP provided a transition plan that was not being implemented as part of the IEP goals and objectives. Transition outcomes included functional mathematics, reading, writing and vocabulary skills, vocational skills, employment training, linkage with social service agencies, and practical academics related to baking and food service. (S-13.)
  38. In April 2006, the Parents requested a discrepancy analysis of ability and achievement test scores. (S-9.)
  39. In April 2006, the Parents obtained an independent educational evaluation showing that the Student's achievement gains from 2002 to 2006 were significantly lower than those predicted for a child of her age based upon her IQ scores. (P-11.)

40. In May 2006, the District offered to provide job training including work goals to be included in the IEP after a baseline was established. (S-15.)
41. In June 2006, after mediation, the Parents advised the District of their intention to enroll the Student in a private school and demanded reimbursement, which the District declined to provide. (S-17.)
42. In August 2006, the Parents received an Independent Educational Evaluation from the same evaluator, who reported additional testing and found that the Student is functioning below her potential in reading comprehension, mathematics reasoning and calculation, written expression, listening comprehension and oral expression. The Student scored in the average range in social skills. The evaluator recommended direct, individualized and coordinated instruction, with more direct time with special educators than the Student has received from the District. (P-13.)
43. From November of 2003 through March of 2005, the Student participated in the baking rotation at the [redacted vocational] School (VS), a regular education program (N.T. 230-231, 309, 326-327, 409-410, 494-495, 1181-1186, 1355-1356.)
44. The Student traveled to the VS by bus, approximately three and one-half miles. The VS program lasted for up to three hours each day. Upon her return from VS each day, A.R. would participate in academics (N.T. 231, 517, 791.)
45. The VS curriculum and tests were modified for the Student. She received support from a Special Education Teacher, the Supervisor of Special Education, and the Occupational Therapist, as well as a one to one aide. Task analysis was utilized to instruct A.R., and tests were adapted and modified for her. (N.T. 386, 390-398, 404-414, 422-431, 496-497; S21.)
46. The VS program is typically a three-year program. (N.T. 794.)
47. The District also made available to the Student several other vocational opportunities, including Employment English and Employment Math, which addressed functional skills, Site Training Employment Program Services (STEPS), which is a precursor to sheltered employment, School To Work Training Program (STWTP), and a career preparatory program, which reviews careers and skills required for each career. ( N.T. 379-381, 462-466, 472, 794-795; S31.)
48. The STEPS program is a typically a three to four year program. (N.T. 463-464, 473.)

49. The March 2005 IEP offered a transitional program that addressed the Student's interests and abilities with regard to employment, independent living, recreation, leisure and social interaction. (S-5 p. 10-11.)
50. The March 2005 IEP offered a job shadowing program that could have progressed to employment with a job coach. (NT 335-6, 578; S-5.)
51. During the 2005-2006 school year, the Parents chose to forego these transitional opportunities and insisted that the Student be placed in full time learning support in the learning support room for academic instruction, on grounds that the Student should receive the maximum possible academic education before reaching the age of 21. (NT 336-339, 518, 586-588; S-33 p. 11.)
52. The District recommended against full time academic instruction for the Student, but the Parents repeatedly decided against vocational programming. (NT 574-580; S-9 p. 18.)
53. In the April 2006 IEP, the District offered a combined schedule including academic instruction and vocational/ transitional training. (NT 535-536, 619-620; S-13 p. 28, S-15.)
54. The April 2006 IEP offered a transitional program that addressed the Student's interests and abilities with regard to employment, independent living, recreation, leisure and social interaction. (S-13 p. 14-19.)
55. The Private School is a private residential school for adolescents and young adults with learning disabilities, located in [town redacted, state redacted]. (P-17.)
56. Private School serves individuals with a wide range of learning disabilities, and it typically serves individuals with IQ scores above 70, which is substantially higher than the Student's tested scores. (NT 776; P-17.)
57. Private School is a self contained program with virtually no opportunities for interaction with typical, same age peers of the Student. (NT 777, 782; P-17.)
58. Private School has offered prevocational, but not vocational training to the Student. (NT 783-4.)
59. Placement at Private School would deprive the Student of needed opportunities to establish personal relationships and relationships with service agencies. (NT 793-794.)
60. The Student does not have an educational need for a residential school placement. (NT 794-796.)

61. The Parents requested two different ESY programs for the summer of 2006, including six weeks of one to one tutoring and funding of a summer camp. (NT 316-317; S-13 O. 27, S-33 p. 7.)
62. The District offered to provide the services requested, but not the cost of residence at a summer camp. (NT 316-318; S-13 O. 27, S-33 p. 7.)
63. Subsequently, the Parents placed the Student in the Private School for the summer. (NT 316-318.)

### **DISCUSSION AND CONCLUSIONS OF LAW**

The District was and is obligated to provide the Student with a free and appropriate public education (“FAPE”), in accordance with an Individualized Education Plan reasonably calculated to enable the child to receive meaningful educational benefit. Bd. of Educ. v. Rowley, 458 U.S. 176, 206 (1982). “The education provided must be sufficient to confer some educational benefit upon the handicapped child.” L. E. v. Ramsey Bd. of Educ., 435 F.3d 384, 390 (3d Cir. 2006). Since the Parents here are challenging the provision of FAPE, they are the moving party and they bear the burden of persuasion in the administrative hearing. Schaffer v. Weast, 546 U.S. 49, 62 (2005).

The IDEA requires the states to educate children with disabilities “with children who are not disabled” and this must be done “to the maximum extent appropriate . . . .” 20 U.S.C. §1412(a)(5)(A). The intent of Congress was to “ensure, to the maximum extent possible, that children with disabilities are educated with children who are not disabled.” Jonathan G. v. Lower Merion School District, 955 Fed. Supp. 413 (E.D. Pa. 1997). Each disabled child must be placed in the least restrictive environment that will provide him or her with meaningful educational benefit. T.R. v. Kingwood Twp. Board of Education, 205 F.3d 572 (3d Cir. 2000)

School Districts must include disabled students in regular education classrooms even if the curriculum must be modified to permit such placement. 34 C.F.R. §300.116(e). The IDEA recognizes that a child with a disability may benefit differently from the general educational setting than non-disabled children. Oberti v. Board of Educ. of Borough of Clementon Sch. Dist., 995 F.2d 1204, 1217 (3d Cir. 1993) Even if the child receives less academic benefit in an inclusive setting, such setting may be warranted if the benefit of social modeling, language development and social skills development outweighs the potential academic benefit of a segregated setting. Ibid; Girty v. School District of Valley Grove, 163 F. Supp. 2d 527 at 536 (W.D. Pa. 2001), aff’d 60 Fed. Appx 889 (3<sup>rd</sup> Cir 2002). The relevant focus is whether a student can progress on his or her IEP goals in a regular education classroom with supplementary aids and services, not whether he or she can progress at a level near to that of his or her non-disabled peers. Ibid. Thus, the gap between a student’s abilities and the demands of the general curriculum is not determinative. Ibid.

Compensatory education is an appropriate remedy where a district has failed to provide a student with FAPE under the IDEA. M.C. v. Central Regional School District, 81 F.3d 389 (3<sup>rd</sup> Cir. 1996); Lester H. v. Gilhool, 916 F.2d 865 (3<sup>rd</sup> Cir. 1990), cert. denied, 488 U.S. 923 (1991). Where an IEP confers only trivial or de minimis educational benefit, the student has been denied FAPE and is entitled to compensatory education. M.C., supra. The period of compensatory education is equal to the period of deprivation, and accrues when the District knows, or has reason to know, that the student is not receiving an appropriate education. Ridgewood Board of Education v. N.E., 172 F.3d 238 (3<sup>rd</sup> Cir. 1999).

## SCOPE OF THE HEARING

At the outset, the initial hearing officer established that the hearing covered the years 2005 and 2006, the latter relating to the tuition reimbursement claim, and the former being a claim of failure to provide FAPE. (NT 5-6.)

## CREDIBILITY

The hearing officer finds that the Parents' expert evaluator's testimony cannot be given definitive weight, due to questions about her credibility. The Appeals panel in In re Educational Assignment of G.T., Spec. Educ. Op. 1808 at 4, 12 (March 19, 2007), found that this expert had provided reports in that and other cases that raised doubts about her objectivity. Moreover, they found that the expert had "cherry-picked" her data to bolster the Parents' case in that matter. They also criticized the expert for criticizing a school district without obtaining any data from the district itself through teacher interviews, and that she had skewed the information she reviewed by requesting behavior inventories for the Parents, but not from the teachers.

These findings are applicable to the credibility determination in this case. To a finder of fact, an expert witness's reliability is of the essence, and anything in the expert's history that casts doubt on that reliability should be weighed. Here, the hearing officer takes notice of a published Appeals Panel decision finding that the witness was unreliable. While the hearing officer makes his own findings regarding credibility in this matter, the Appeals Panel decision is an appropriate fact to take into consideration.

This matter was assigned to this hearing officer after the session in which the Parents' expert testified. The hearing officer takes into account the fact that, after a lengthy discussion of the decision and its implications and limitations, in which the Parents' expert sought to limit the import of the decision, (NT 24 to 25, 41, 46, 157-158, 171-175.), the previous hearing officer indicated that she would make her own findings, and the testimony regarding G.T. came to a close. This hearing officer nevertheless relies in part on the Panel's findings for credibility purposes, because the

expert had an adequate opportunity to address the issue, and because the Panel's findings are a fact that cannot be erased through a subsequent collateral attack.

The Panel's decision does not call into question directly the expert's reliability in the mechanics of her testing and scoring of instruments. In this matter, moreover, the expert's scores from the WISC – II and the WIAT-II were duplicated essentially by the District's school psychologist. These scores are therefore accepted.

However, the expert's interpretation of her scores, particularly her use of discrepancy analysis, is placed in doubt by the Panel's decision. In short, this expert has been found to select data and create statistics (not numerically challenged) that embellish the record in favor of parents. The record in this matter supports the hearing officer's concern that the Parents' expert's interpretation of data may be unreliable. The expert stated that she considers herself to be an advocate for children. (NT 43.) The hearing officer is concerned that this expert may not have clearly delineated the border between her advocacy stance and the role of an independent expert upon whose opinions the fact finder must rely to understand the implications of the factual record, including psychological test scores. The expert's advocacy stance, in light of the history of the Panel's finding, leads this hearing officer to conclude that he cannot rely upon the expert's interpretation of the arcane psychometric evidence that she proffered, including the implications of the discrepancy analysis that she ran.

This is especially true where, as here, those interpretations are challenged by a qualified expert witness for the District. (NT 141-143.) The District's school psychologist testified that the independent evaluator's data were not of a kind that was useful to him in a school setting. He questioned the reliability of the discrepancy analysis. Under these circumstances, the hearing officer declines to rely upon the Parents' expert's discrepancy analysis for the conclusion that the Student had fallen behind her peers in educational achievement.

This finding is buttressed also by the fact that the expert did not seek information from the District concerning its program. She relied entirely upon the Parents' assertions as to the District's program. Thus, the expert failed to test the validity of these assertions. As a result, she deprived herself of valuable information that could have either corroborated her interpretations of the data, or cast them into doubt. Even if her data showed a relative regression as she testified, she was in no position to add weight to the Parents' argument that this regression was attributable to deficiencies in the District's program, as opposed to the slow pace of Student's learning.

#### ADEQUACY OF EDUCATIONAL PROGRAM OFFERED FOR 2005-2006 AND 2006-2007 SCHOOL YEARS

The Parents rest their case upon two assertions, both of which they have failed to prove by a preponderance of the evidence regarding much of the Student's program and

placement in the relevant period. The first assertion is that the Student did not make adequate progress in the years in question, and that this proves an inadequate program. The second is that the District's program was fragmented and uncoordinated during the Student's entire high school career, and that the District offered her more of the same for the 2005-2006 school year and the 2006-2007 school year, justifying the Parents in placing her unilaterally in a private school.

The first assertion is undercut by the credibility problems of their expert witness. The hearing officer, as explained above, cannot rely upon the keystone of her testimony, that discrepancy analysis proved lack of progress. The hearing officer is left to review the documented program and assess District staff's assessments of the record.

The second assertion depends in large part upon an attempt to raise an inference from evidence of various problems in the first three years of the Student's high school tenure. The Parents argue that, in the first three years, the Student's program was ill conceived and poorly executed, by staff who did not understand how to implement an inclusive program for a child identified with mental retardation. They then suggest that the District offered more of the same for the 2006-2007 school year, which was why the Parents enrolled the Student in private school. There are three problems with this argument in this hearing officer's view.

First, the Parents, against the District's advice, adamantly insisted that the Student receive in effect a self contained, full time learning support program of academics during the only year at issue here, the 2005-2006 school year. (FF 15, 51, 52.) Under these circumstances, the Parents' actions prevented the District from implementing an appropriate program. The record therefore permits no inference that inadequate programming would somehow continue into the 2006-2007. The Parents' insistence on full time tutoring in the intervening years makes any such inference too attenuated.

. In this regard, there was contradictory testimony from the Student's Father and the District's director of special education. The Father emphasized that he at all times desired the Student to receive transitional services, including vocational training. The director of special education testified that the Parents adamantly insisted that the Student should receive the maximum possible academic training in the years in question, partly because they perceived the 2005-2006 school year as the Student's last chance to receive academic training, and partly because the Father took the position that the Student's vocational opportunities and goals would depend upon the extent of her academic achievement in the 2005-2006 school year. (FF 51.) The hearing officer must weigh the apparently conflicting evidence concerning the Father's intentions. The hearing officer finds not only multiple credible examples of the Parents' intransigence in their position, but also written confirmation that their intransigence was intentional and explicit. Therefore, regardless of the Father's general attitude, the hearing officer finds that the Parents rigidly insisted on full academic instruction in the 2005-2006 school year, despite the District's efforts to dissuade them in favor of a mixed program.

Second, the hearing officer finds that the Parents have failed to prove by a preponderance of the evidence that the District failed to offer appropriate programs for

the 2005-2006 and 2006-2007 school years, based upon the weight of the evidence in this matter, including his credibility determinations as set forth above. In all but two of the areas of concern in this case, the District offered appropriate IEPs, individually tailored to the educational needs of the Student, in the least restrictive setting. (FF 12-15, 31-40.)

Third, the Parents' argument is, in effect, that the hearing officer should award "make whole" compensation in the form of tuition reimbursement. However, to do so would be tantamount to remedying failures to offer FAPE that occurred more than two years prior to the request for due process. The Parents had two years from the date of those alleged failures to request due process, and they failed to do so. To award relief now on account of those alleged failures would circumvent the IDEA's limitations period. 20 U.S.C. §1415(f)(3)(C).

The hearing officer finds that the Parents have failed to prove that the Student's program was inadequate in the relevant period with regard to reading comprehension, listening comprehension, oral expression, math calculation, and transitional services. Regarding written expression and social skills, the hearing officer finds by a preponderance of the evidence that the District failed to offer FAPE in the relevant time period.

## READING COMPREHENSION

The Parents' evaluator specifically criticized the QRI curriculum based measure. She testified, without contradiction, that this measure has been found invalid by an authoritative professional study. Thus, its scores cannot be relied upon for a good measure of progress. However, the District used the QRI only as an additional measure, among three measures of progress in reading. Thus, this criticism is not determinative.

The primary curriculum based measure used by the District was the Steck Vaughn, which is a supplemental reading program that guides instruction and measures progress sequentially on several axes of reading skill, including factual recall, sequential recall and identifying the main idea of a reading exercise. (FF 19, 30-33.) This instrument was unchallenged in expert testimony on this record, and it measured progress over time within its own curriculum standards.

In determining whether or not progress was meaningful, the hearing officer is guided by the principle that meaningful benefit is to be gauged in relationship to the student's intellectual potential. In re Educational Assignment of M.P., Spec. Educ. Op. 1812 at 7 n. 51 (April 12, 2007). In the case at bar, the Student's potential is severely limited. While the hearing officer understands that high expectations are essential to successful teaching for any child with a disability, this does not detract from the concomitant reality that the Student can be expected to make progress slowly. (FF 1-2, 16, 18-20, 39.) The hearing officer finds that the slow pace of this Student's progress did not render such progress meaningless, trivial or de minimis. Moreover, the test of FAPE is not simply the actual attainment of the Student in the view of hindsight; rather it is the

reasonableness of the offer and implementation, at the time it was offered. Susan N. v. Wilson school District, 70 F.3d 751, 762 (3d Cir. 1995).

Here, the District's April 2004 IEP offered services that addressed the Student's reading comprehension needs, and the record shows that it was implemented. (FF 31-33.) The program, agreed to by all parties when written, took a systematic, step-wise approach to reading comprehension with this primarily concrete – thinking student. It provided for flexibility, allowing for movement from one aspect of comprehension to another as the Student demonstrated readiness for learning new skills. It permitted a progression of skills, from those for which the Student had already shown ability (fact recall), to those for which the challenge would be greater (sequencing and main idea). Progress monitoring indicates that the Student made slow progress under this program.

The Parents argue that the program was so slow that the various elements of comprehension were never put together. However, this step-wise approach, necessarily put the combination of skills at the end of the process, and this was apparent to the entire IEP team at the outset. The Parents adduced no expert testimony to show that this program was somehow below the standard of appropriate educational practice when adapted for this Student, or that it was implemented improperly. The District's witnesses credibly testified that they saw progress and that the program was appropriate for the Student. Thus, the hearing officer does not find a denial of FAPE in reading comprehension, either in the 2005-2006 school year, or in the April 2006 offered program that was rejected ultimately by the Parents in favor of a private school.

#### LISTENING COMPREHENSION

The record provides inadequate support for the claim that the District failed to provide opportunity for meaningful educational benefit in listening comprehension. The Parents rely entirely upon the norm referenced score in the WIAT-II administered by their independent evaluator, which showed listening comprehension in the same percentile rank as the Student's overall cognitive functioning. (P-13 p. 2.) While they cite a few recorded instances of what they regard as evidence of listening comprehension problems, none of the documents that they cite identifies listening comprehension as a need within the relevant time frame, and their independent evaluator, since she was completely unfamiliar with the District's program, was unable to interpret these few instances as examples of listening comprehension problems. She did offer that educators can fail to identify behaviors as symptomatic of listening comprehension problems, but she did not give any examples of this in the record of the Student's education with the District. The possibility of missing a problem is not the same as the event. The Parents have failed to prove even a prima facie case of failure to provide FAPE in this area of functioning.

#### WRITTEN EXPRESSION

Most of the evidence adduced in this case concerned the methods by which the Student was being taught in her early high school years, years that are not at issue in this

matter. There was virtually no evidence of whether the District made any effort to improve the Student's writing in the 2005-2006 school year. There was a baseline in the March 2005 IEP, indicating that the Student's writing skills were at the beginning of second grade level. The IEP set goals to raise this to the end of third grade level, with objectives addressing paragraphing, number of sentences, and mechanics. (FF 13, 21 .) There was testimony by the District's director of special education that the Student had made progress. (NT 1229.) There were three work samples from 2006. However, there was no testimony that these samples showed progress; most of the testimony addressed progress in the preceding years.

The hearing officer notes, however, that the IEP team in 2006 indicated a lack of progress by their repeating of virtually the same goals. (FF 21.) Moreover, there were District findings in successive documents that create the inference that there was no progress. (FF 21, 22.) The March 2005 ER noted progress in the previous year to the beginning of second grade level. The April 2006 IEP noted the same progress for the 2005-2006 school year. The 2006 ER summary did not claim meaningful gains in writing at all. (FF 20-22.) Thus, on this record, there appears to have been no progress in the 2005-2006 school year. Yet the District did not offer any changes in its approach, nor did it provide more testing, to identify why there had been no progress, and to look for alternative approaches. The hearing officer concludes that the Student did not receive meaningful educational benefit in the 2005-2006 school year.

Compensatory education will be awarded. However, there is no record from which the hearing officer can derive the amount of compensatory education that would appropriately remedy this situation. The hearing officer concludes that one hour per week of compensatory education in this area would be an equitable award. A reasonable period within which to have remedied the deficiency in the Student's program is sixty days. Therefore, compensatory education will be awarded from November 1, 2005 until the end of the 2005-2006 school year.

## ORAL EXPRESSION

Generally, the District found the Student to have good expressive language skills during the relevant period. (FF 16, 17, 26, 30.) The District continued to address the Student's needs in this area through consultative speech and language services specifically addressing the Student's ability to make appropriate eye contact independently in conversation and to self advocate for her needs. (FF 28, 30.) IEP goals were provided, but no data were provided regarding progress. (FF 36.)

## MATHEMATICS CALCULATION

The hearing officer finds that the Student made meaningful educational progress in the 2005-2006 school year. The March 2005 IEP noted mastery of 20 out of 27 mathematics tasks at the Kindergarten to first grade level. (S-5 p. 3.) It set three goals, one to complete mastery of that level, one to master the skills at grade 2, and one to

master the skills at grade 3. (S-5 p. 5-6.) The April 2006 IEP noted mastery of the first grade level and growth in mastery of second and higher grade skills. (S-13 p. 8.) While norm referenced testing showed lower grade level scores, the hearing officer will rely upon the curriculum based tests, for two reasons. First, grade level assignments in norm referenced tests do not have the reliability that percentile ranks provide, so there is little validity in contrasting such tests' grade level designations with the grade designations in CBAs. Second, the norm referenced tests did not show baseline data sufficiently recent to permit an inference of growth or non-growth, while the District's state-recommended checklist permitted comparison over the time period in issue here.

#### SOCIAL SKILLS/ PRAGMATICS/ SPEECH AND LANGUAGE SERVICES

The Student exhibited good social interaction with her peers, but the District's anecdotal reports indicated that she did not make progress in her goals of improved eye contact and self advocacy. (FF 28, 30, 36.) There were a significant number of examples of the Student's inability to ask for needed directions, explain unusual or avoidant behavior, and access the help that she needed from adults in authority. Nevertheless, the March 2005 IEP did not offer to increase the level of speech and language intervention from the consultative level. (FF 12.) Therefore, the hearing officer finds that the District failed to provide FAPE during the relevant period, and failed to offer FAPE in the area of social skills development for the 2005-2006 school year.

Compensatory education will be awarded. However, there is no record from which the hearing officer can derive the amount of compensatory education that would appropriately remedy this situation. The hearing officer concludes that one hour per week of compensatory education in this area would be an equitable award. A reasonable period within which to have remedied the deficiency in the Student's program is sixty days. Therefore, compensatory education will be awarded from November 1, 2005 until the end of the 2005-2006 school year.

#### TRANSITION

The District offered but did not provide a full transitional program to the Student in the 2005-2006 school year, providing no vocational services to the Student. As stated above, the hearing officer finds that this was solely due to the insistence of the Parents. (FF 40, 43-54.) Under these circumstances, the Parents will not be heard to complain that the Student did not receive adequate transitional programming. The District offered adequate transitional services for the 2005-2006 school year, and again for the 2006-2007 school year. They were prevented from delivering those services.

#### DISCRIMINATION AND LEAST RESTRICTIVE ALTERNATIVE

The Parents argue that the District failed to implement the inclusion of the Student in regular education. However, the examples given largely refer to years not in question here. As to these examples and those that pertain to the 2005-2006 school year, the Parents failed to adduce evidence that these examples were anything more than

happenstance. The Student was not allowed to join the school swim team on a non-competitive basis, but this rule was applied across the board. (NT 1240.) The Student wanted to direct the school choir in which she participated as a singer; this request was declined and there was no evidence that anyone else had been allowed to conduct. (NT 1351.) The Student wanted to continue a “Best Buddy” program involving non-disabled students, but there were no volunteers the following year. (NT 1236.) A social program was discontinued. (NT 1187.) The Student was required to ask permission of peers with whom she wanted to sit at lunch. (NT 1139.) There was no evidence that these events suggest a general pattern of non-inclusion of the Student in the general education setting.

Moreover, in the relevant time period, the Parents prevented the District from implementing an inclusive program adequately, by insisting upon learning support, as discussed above. Having thus handcuffed the District, they cannot now be heard to complain that the inclusion aspect of the program was not implemented appropriately. The hearing officer finds that the Parents have failed to prove by a preponderance of evidence that the District failed to provide an education in the least restrictive setting.

To the extent that the Parent claims that the above events violated the Student’s rights under the Rehabilitation Act of 1973, section 504 and the Americans with Disabilities Act, the record is not adequately developed and a prima facie case is not presented. The hearing officer therefore denies any such claim.

## TUITION REIMBURSEMENT

### ESY

There was no evidence that the District offered inadequate ESY services for the summer of 2007. On the contrary, the District made two successive offers, both of which were eventually rejected by the Parents. (FF 61-63.)

### PRIVATE SCHOOL 2006-2007 SCHOOL YEAR

An administrative hearing officer may award tuition reimbursement when parents unilaterally place their child outside the public school system under the Burlington-Carter test. Florence County Sch. District v. Carter, 510 U.S. 7, 114 S.Ct. 361 (1993); Burlington Sch. Committee v. Dept. of Educ., 471 U.S. 359, 105 S. Ct. 1996 (1985). The test requires three findings: 1) the District’s program and placement is not appropriate; 2) the private school selected by the parents is appropriate; and 3) the “balance of the equities” favors reimbursement. See Carter, 510 U.S. at 13; Ridgewood Bd. of Educ. v. N.E. for M.E., 172 F.3d 238, 248 (3d Cir. 1999).

In this matter, the hearing officer has found that the District offered placement and services in all aspects of the Student’s program and placement except written expression and the pragmatic language aspect of social skills. The program offered inclusion and addressed all of the Student’s needs, although it failed to provide an adequate program in two areas of need. Nevertheless, an IEP must address all areas of

need, 34 C.F.R. §300.320(a)(2)(B). Thus the April 2006 IEP was inadequate, and the second and third Burlington-Carter tests should be addressed.

As to the adequacy of the Private School Program, the hearing officer remains skeptical. (FF 55-59.) The program is located in [state redacted], far from the Parents' home and the Student's community of origin. It is a self contained program with virtually no opportunities for interaction with typical, same age peers of the Student. The school's programs are not specifically designed for students with mental retardation, but address a range of disabilities. It has not offered vocational training to the Student. The Student did not need a residential program. (FF 60.)

While the Parents' evaluator testified that Private School is appropriate for the Student, her knowledge of the school was cursory at best, based upon no more than a review of documentation, and entitled to little weight. Private School's administrator testified that the Student was appropriate for Private School's services, and the hearing officer credits her knowledge of her own program, but her knowledge of the Student is inadequate to provide a reliable determination of appropriateness. (NT 745-747, 778.) On the other hand, District staff, who have worked with the Student for years, credibly testified that the program was not appropriate, because it would isolate the Student from her home community, to which she would presumably return, depriving her of the opportunities that she needed to establish personal relationships and relationships with service agencies that she would need.

Weighing all of the evidence, the hearing officer finds that the evidence is in equipoise on this factual issue. Since it is the Parents' burden to prove entitlement to this relief, they have failed to establish the second Burlington Carter test.

The third test is a balancing of the equities. The hearing officer will reach this issue, since it depends at least in substantial part upon the record and the hearing officer's "feel of the case." The hearing officer finds that the equities balance in favor of the District, for two reasons. First, as noted above, the Parents prevented the District from providing adequate vocational and community based services that they credibly testified were far more appropriate than the isolated, academics-only program that the Parents insisted upon against all reasoned advice. The hearing officer looks at this, not in terms of whether or not the Parents were at fault, but whether it is equitable to saddle the District with the costs of private tuition under these circumstances. The hearing officer strongly believes that this would not be equitable. Second, the bulk of the District's program was appropriate under IDEA standards. It would be disproportionate to visit these large costs upon the District when its default concerned only a portion of its obligations, which can easily be remedied by an award of compensatory education.

In sum, the Parents have failed to show that the Burlington Carter test is met. Tuition reimbursement is denied.

IEE

Parents are entitled to an independent educational evaluation if they disagree with the district's evaluation. 34 C.F.R. §502(b)(1). For a parent-initiated evaluation, parents are entitled to reimbursement if a hearing officer finds the district's evaluation inappropriate. In the Matter of the Educational Assignment of J.B., Spec. Ed. Opinion 1341 (April 2003).

In the present matter, the hearing officer does not find the District's evaluations inappropriate. Moreover, the IEE itself was inappropriate, as discussed above. Under these circumstances, reimbursement will not be awarded.

### **ORDER**

1. In the 2005-2006 school year, the District provided a program and placement in the least restrictive appropriate educational environment.
2. In the 2005-2006 school year, the District provided an appropriate program and placement, addressing the Student's individual needs for functional academics in reading comprehension, listening comprehension, oral expression, and math calculation.
3. In the 2005-2006 school year, the District failed to provide an appropriate program and placement, addressing the Student's individual needs for functional academics in written expression and social skills.
4. In the 2005-2006 school year, the District provided an appropriate transition plan and services.
5. In the 2005-2006 school year, the District did not provide appropriate related speech and language services addressing speech pragmatics.
6. For the 2006-2007 school year, the District offered the Student a program and placement in the least restrictive appropriate environment, that was reasonably calculated to provide an opportunity for meaningful educational benefit, with the exception of written expression, social skills and speech and language services.
7. The Parent will not be reimbursed for the cost of an Independent Educational Evaluation.
8. The District will not be ordered to pay for tuition reimbursement and transportation costs for the 2006-2007 school year.
9. The District is ordered to provide compensatory education in the form of one hour per week of speech and language therapy, and one hour per week of individual

tutoring in written expression, for the period from November 1, 2005 until the end of the 2005-2006 school year.

10. The compensatory education ordered above shall not be used in place of services that are offered in the current IEP or any future IEP. The form of the services shall be decided by the Parent, and may include any appropriate developmental, remedial, or enriching instruction that furthers the goals of the student's current or future IEP. The services may be used after school, on weekends, or during the summer, and may be used after the Student reaches 21 years of age. The services may be used hourly or in blocks of hours. The hourly cost to the District shall not exceed the reasonable and customary average cost of one hour's salary for a special education teacher hired by the District. The District has the right to challenge the reasonableness of the hourly cost of the services.

*William F. Culleton, Jr. Esq.*

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WILLIAM F. CULLETON, JR., ESQ.  
HEARING OFFICE

January 23, 2007