

Special Education Hearing Officer

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This is a redacted version of the original hearing officer decision. Select details may have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

DECISION

Due Process Hearing for M.H.
Date of Birth: xx/xx/xx
ODR File No.: 7702/06-07 KE

Dates of Hearing:
July 19, 2007
July 20, 2007
July 23, 2007

Closed Hearing

Parties to the Hearing:

Parents

Mr. and Mrs.

Representatives:

Frederick M. Stanczak, Esquire
179 N. Broad Street
Doylestown, PA 18901

District

Ms. Diane Paul, Director of Special Education
Pennsbury School District
134 Yardley Avenue, P.O. Box 338
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Claudia L. Huot, Esquire
Wisler Pearlstine, LLP
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Dates Transcripts Received:

July 28, 2007

Record Closed:

August 3, 2007

Date of Decision:

August 18, 2007

Hearing Officer:

Rosemary E. Mullaly

I. Background and Procedural History

A. Background

The Student is a xx-year-old recent high school graduate of the Pennsbury School District. Since first grade he has been identified with a specific learning disability in reading and written expression. The Parents assert that the District denied the Student a free appropriate public education because the IEPs implemented during the period between May 21, 2005 and the end of the 2006-2007 school year did not provide the Student with appropriate academic instruction in reading and written expression; it failed to identify and address his hearing impairment and specific learning disability in math; and it failed to provide the Student with an appropriate transitional services plan. They request two years of hour-for-hour compensatory education in order to make up for these asserted deprivations. They also seek an independent educational evaluation at public expense to ascertain the extent to which the Student requires remedial education, specific services and assistive technologies in order for him to be successful in his post-secondary career.

The District asserts that the Student received an appropriate educational program because he made meaningful progress in all areas of need as indicated by passing grades; that his gradual hearing loss did not rise to the level of an impairment for which the Student was entitled for services; and because he was accepted into two colleges, his transition plan was appropriate. The District asserts no compensatory education award is therefore merited according to law. With regard to reimbursement of the independent evaluation at public expense, the District further asserts that this remedy is prospective relief for an inappropriate evaluation of a student who continues to remain eligible for special education services – a status the Student does not currently hold since his graduation in June of 2007.

B. Procedural History

The Office for Dispute Resolution received the parents' hearing request in this matter on May 21, 2007. The mandatory resolution meeting took place on June 14, 2007. The hearing was originally scheduled for June 20, 2007, but during a June 19, 2007 conference call with counsel, the parties sought a continuance until July 20, 2007 to allow for up-to-date achievement testing of the Student to be completed. In hope that this additional information could result in an amicable resolution, the continuance was granted contingent upon the assurance that the parties would schedule as many days as were necessary to compile the record in a timely manner. The three-session hearing was held on three consecutive days - July 19, July 20, and July 23, 2007. The hearing officer received the transcripts of the proceedings on July 28, 2007, but did not receive a post-hearing stipulation from counsel until August 3, 2007.

II. Stipulations and Findings of Fact

A. Stipulations

1. The Student and his parents are residents of the District.
2. The Student is identified as eligible for special education under the IDEA.
3. The Student graduated from high school in June 2007.

(N.T. 12-13).

B. Findings of Fact

1. During the 1995-1996 school year, when the Student was in first grade, he was identified as having a specific learning disability in the areas of reading and written expression. He began receiving speech and language services in first grade and learning support instruction in reading and language arts at the beginning of second grade. (S-2, at 1).
2. The Student best modality for processing and retaining new information is through the visual channel. Coupling auditory information with visual cues when ever possible has been recommended since at least May 2002. (S-1, at 10; N.T. 402; 418).
3. The following chart contains the results of ability testing of the Student:

| | WISC III 5/96 1st Grade S-1, at 3-4 | Otis Lennon Scholastic Achievement Test 2/97 2nd Grade S-1, at 3-4 | WISC III 1/98 3rd Grade S-1, at 3-4 | CogAT 2/99 4th Grade S-1, at 3-4 |
|----------------------------|---|--|---|--|
| Verbal Skills | 23% | 89% | 12% | 22% |
| Performance Skills | 47% | | 39% | |
| Nonverbal Skills | | 77% | | 78% |
| Quantitative Skills | | | | 6% |
| Composite | 32% | 86% | 19% | 32% |

4. Notwithstanding inconsistent test scores that ranged from above average to below average intelligence, a determination was made in the Student's May 30, 2002 ER that he had low-average to average range overall school aptitude. The two administrations of the WISC-III yield the following scaled scores: May 1996 administration – Verbal IQ: 89; Performance IQ: 99; Full Scale IQ: 93 uneven development was noted. The January 1998 Administration Verbal IQ: 82; Performance IQ: 96; Full Scale IQ: 87. Both test results were described as having a great deal of intrasubtest scatter. No measure of intellectual ability was performed on the Student since 1999. (S-1, at 3-4, 8; N.T. 249; 269, 297-98; S-2, at 3-4; S-3).
5. The choice to disregard certain ability test scores obtained by the Student had an impact upon his programming. For the May 30, 2002 ER, a comparison of the Student's achievement and intellectual ability no longer indicated a severe discrepancy. The evaluation team concluded, however, that the Student continued to demonstrate a specific learning disability in the areas of reading and written expression. (S-1, at 6, 13-14).
6. At the time of the March 4, 2005 evaluation, the District had notice of inconsistent intelligence test scores, significant needs in the area of math, a hearing loss first identified in 1999 that was increasing in severity, reports from the Student's parent and teacher related to difficulty receiving verbal information, and IEP goals which sought to reduce daydreaming and drawing in class

suggesting an impediment to accessing verbal information in the classroom. (S-17; N.T. 576, 363-364, 578-579; S-1, at 9; S-1, at 12).

7. Although he had never been identified as having a learning disability in math, between February 28, 2003 and March 10, 2006 and between March 9, 2007 – June 2007, the Student’s IEPs contained a math goal. (S-2, at 3-4; P-4, at 8; S-2, at 10; S-5, at 10).
8. In its March 2005 reevaluation of the Student, the District conducted a record review which relied upon testing completed prior to May 30, 2002 without considering whether its validity was affected by the Student’s hearing loss; which did not include any assessment to ascertain how the environments in which the Student was provided with instruction impacted upon his ability to access auditory information; which failed to establish and/or measure whether the Student had a specific learning disability in math; and which did not attempt to obtain accurate ability test scores notwithstanding the fact that the only IQ testing it had at that point had been brought into question because of four inconsistent testing results. The information contained in the March 2005 reevaluation fails to provide sufficiently comprehensive information to identify all of the Student’s special education and related services needs. (N.T. 260, S-3, at 1).
9. The Student’s 2004-2005 IEP, developed on March 3, 2004 contained goals for reading, written expression and math. It provided for the following instructional levels: reading – “3.5 grade” based upon the Stanford Test of Academic Skills Total Reading Score; written expression “10/20”- based upon an unidentified rubric; math – “proficiency level of 1-2” (defined as “minimal understanding”). The IEP also contained specially designed instruction which included “teacher skills, concepts and behaviors at the student’s instructional level” and “combine verbal directions with visual cues.” (S-2. at 8, 9, 10, 11, 19).
10. The Student’s 2005-2006 IEP, developed on March 3, 2005, contained goals for reading, written expression and math. It provided for the following present levels of functioning: “Stanford Testing was administered on October 21 2004, the results were as follows: Reading 6.1; Math 5.0; Spelling 4.6; Language 6.2; Study Skills 4.1. [The Student] is passing all his classes at present time with a C or better.” The Student was instructed within his grade appropriate general curriculum in all academic courses in a small group setting. He was not provided with individualized instruction in reading, written expression or math at his instructional level. (S-5, at 4, 6, 10, 14, 15; N.T. 404-408).
11. The role of the Student’s special education teacher during the 2005-2006 school year was to support him; provide instruction in geometry, make sure the modification described in his IEP were implemented. The high school did not have a particular reading program; students worked on reading within the general curriculum courses. The instruction she provided to the Student to address his reading and written expression was done during physics and geometry. To address his reading needs, the teacher read an unmodified version of the physics textbook at an unknown reading level out loud to the student . To address his written expression goal she used a PSSA rubric in geometry. His progress in the areas of reading and written expression were incorporated within his grades in each of these courses, and if he achieved an 80% in the class, she assumed he had met the goal. She did not review any of his records prior to teaching him, although she was told about his hearing loss. (N.T. 385, 386, 388, 389, 391, 392, 393, 401, 403, 404, 405, 408, 420; 450-51; S-5, at 4).
12. The Student’s 2006-2007 IEPs, developed on March 10, 2006, contain as the present levels of functioning, progress reports of how the Student was progressing within the general education

curriculum. No baselines or measurable annual goals are established for reading, written expression, even though no evidence was presented to support a finding that the Student had achieved any of these goals. The Student was instructed within his grade appropriate general curriculum in all academic courses in a small group setting. He was not provided with individualized instruction in reading, written expression or math at his instructional level. (N.T. 116-117,124-125; S-15, at 3-4; S-7, at 7, 10).

13. The role of the Student’s special education teacher during the 2005-2006 school year was to teach him Algebra 2; he would also provide additional help, he was the custodian of progress reports from the Student’s other teachers.. He did not review any records for the Student except for his prior IEP. He did not know that the Student had learning disabilities in the areas of reading and written expression. (N.T. 457-458, 461).
14. The Student’s 2007 IEP, developed on March 9, 2007 and reviewed on April 19, 2007, contains as the present levels of functioning, the grades and progress reports of how the Student was progressing within the general education curriculum. No baselines or are established for reading, written expression, or math. No measurable annual goals are established for reading and written expression even though no evidence was presented to support a finding that the Student had achieved these goals. . The Student was instructed within his grade appropriate general curriculum in all academic courses in a small group setting. He was not provided with individualized instruction in reading, written expression or math at his instructional level. (S-16, at 1-16; S-9, at 4-5, 8).
15. The following is a summary of the “Measureable Annual Goals” contained in the IEPs being implemented between May 21, 2005 and June 2007:

| S-5, at 4-11 3/3/05 IEP | S-7, at 10 3/10/2006 IEP | S-9, at 8 3/9/07 IEP |
|--|--|--|
| 10th-11th Grade | 11th-12th Grade | 12th Grade |
| <p>“1) Given an assignment using the writing process, the Student will improve their writing from scores of two (basic) to scores of three (proficient) as measured by a writing rubric.</p> <p>2)The student will improve his reading skills to reflect on year’s growth from his current baseline level as reported in the present levels section of the IEP.</p> <p>3)The Student will demonstrate effective study/organizational skills to earn at least satisfactory grades in each subject area.</p> | <p>“1) [The Student] will demonstrate effective study/organizational skills to earn at least satisfactory grades in each subject area, by developing an individual study skills plan with his IEP teacher, taking notes in class and asking the teacher to review for accuracy and completeness, and completing all assignments given in each subject area.</p> <p>2) The Student will remain on task, refraining from daydreaming or drawing during the class</p> | <p>“1) [The Student] will demonstrate effective study/organizational skills to earn at least satisfactory grades in each subject area.</p> <p>2) [The Student] will perform at the 80% accuracy level in Algebra 2 Part B.</p> <p>3) [The Student] will use an assignment book daily. This will be an independent goal for [the Student], without teacher/parent signature. Every 15 days of school, [the student] will show his assignment book to his case manager for evaluation by [the Student] and his resource teacher to determined (sic) if progress is being made.</p> |

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| <p>4)The Student will perform at the 80% accuracy in Algebra I Part A.</p> <p>5) The Student will remain on task, refraining from daydreaming or drawing during class period and proceed from one task to the next, 4 out of 5 occasions.”</p> | <p>period and proceed from one task to the next on 4 out of 5 occasions.”</p> | <p>4) Given the results of the audiogram conducted at [redacted] Ear, Nose & Throat Associates,[the Student will discuss hearing conservation, lipreading/speechreading hints and repair strategies that he can use to accommodate for his hearing loss.”</p> |
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16. The following is a summary of the “Specially Designed Instruction/Related Services” contained in the IEPs implemented between May 21, 2005 and June 2007:

| S-5, at 11 3/3/05 IEP | S-7, at 11 3/10/2006 EP | S-9, at 9-10 3/9/07 IEP |
|--|---|---|
| 10th-11th Grade | 11th-12th Grade | 12th Grade |
| <p><u>Modifications/SDI</u> “Extended test times” <u>Related Services</u> “None” <u>Supports for School Personnel</u> “Conference and suggestions as they arise in general curriculum for assistance with adaptations and modifications”</p> | <p><u>Modifications/SDI</u> “Additional reinforcement during directions/independent work” “Extended time on tests” “Classroom assessments read to student” <i>A. Related Services</i> “None” <u>Supports for School Personnel</u> “Teachers of students receiving special education will consult with regular education teachers regarding instructional and environmental adaptations and accommodations.”</p> | <p><u>Modifications/SDI</u> “additional reinforcement during directions/independent work Extended tie on tests The use of an assignment book Break down of complex tasks into more manageable units Seat near the front of the room with left ear towards the speaker and away from a sound source Positive reinforcement and feedback Allow student to turn to face speaker behind him Restate or rephrase what others are saying behind the student during a classroom discussion to provide clarification Write dates for all homework, quizzes, tests, assignments, projects on board Face student during discussions/lectures/conversation Do not stand in front of a window during classroom/discussion (sic), instruction” <i>B. Related Services</i> “Hearing Support” <i>C. Supports for School Personnel</i> “Contact with the Regular Education personnel to</p> |

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| | | conference or provide assistance and suggestion as needs arise in the regular classroom/activity/general curriculum; Itinerant hearing Support Teacher is available to consult with staff about the results of [the Student's] hearing evaluation” |
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17. The Student's grades for first semester eleventh grade were: Rhetoric B+; Applied Geometry B-; Environmental Science Issues and Answers B-; Physical Education B. . The parent received no specific documentation indicating a present level of functioning or evidence of progress in the areas of reading or written expression. (S-15, at 28, 109, 113).
18. On the 11th grade administration of the PSSA, the Student achieved the following scores: Reading 842; Math 840; Writing 1136. According to the PSSA Performance Level Cut Scores, his reading score was below basic; specifically, he received a score of 842 and the below basic cut was a score of 1111 and below. According to the PSSA Performance Level Cut Scores, his math score was below basic; specifically, he received a score of 840 in math and the below basic cut score was 1166 and below. According to the PSSA Performance Level Cut Scores, his writing level was basic; specifically, he received a score of 1136 in writing and the basic cut score was between a score of 952 and 1235. The Student did not re-take the PSSA tests in the 2006-2007 school year. (H.O.-2, at 2-4; S-9, at 6)
19. The Student's grades for the first semester of twelfth grade were: Contemporary Topics B+; American Political and Economic Systems C+; Algebra 2A C-; Short Stories A-; Fundamentals of Woodworking B. The only grade placed in the record for the second semester of twelfth grade was Algebra 2B: C. The parent received no specific documentation indicating a present level of functioning or evidence of progress in the areas of reading or written expression. (S-9, at 4; N.T. 123, 474).
20. The Student graduated from the District with a regular high school diploma. (H.O.-2, at 1).
21. The following represents three years of transition planning for the Student related to his post-secondary education/training outcome. No transition assessments were completed to ascertain the reading, writing and math levels necessary for the student to pursue his transition outcome of college attendance. (See generally S-1, S-3, S-4, S-5, S-7, S-9).

| S-5, at 9, 15 3/3/05 IEP | S-7, at 9 3/10/2006 IEP | S-9, at 7 3/9/07 IEP |
|---|---|--|
| 10th-11th Grade | 11th-12th Grade | 12th Grade |
| <u>Post Secondary Education/Training Outcomes</u> “The Student would like to attend a college post high school.” | <u>Post Secondary Education/Training Outcomes</u> “In-school curriculum-based instruction. Review college catalog, and college web sites.” | <u>Post Secondary Education/Training Outcomes</u> [The Student] is planning on attending (sic) college in the Fall of 2007. He has applied to several schools (I.e. (sic) Kings College, East Stroudsburg (sic), Bucks County Community |
| <u>How service will be provided</u> “In-school curriculum-based | | |

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| <p>instruction”</p> <p><u>Person responsible</u> “Student/teacher/parent”</p> <p><u>Statement of Coordinated Transition Services</u> “His current educational program will address his needs in order to assist him in meeting post-school outcomes.”</p> <p>IEP Goal: “As part of the tenth grade English course, a career will be researched by the Student.”</p> | <p><i>Activity/Service Including Courses of Study</i> (not filled in)</p> | <p>College.</p> <p><i>Activity/Service Including Courses of Study</i> “Scheduling of academic courses that allowed [the Student] the opportunity to apply to schools to further his education.”</p> |
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22. The Student was accepted by a college in New York state as a transitional student. He is required to participate in a complement of services designed to ensure academic success. He will be permitted to take no more than 13 credits during his first semester. As a result it will take him longer than four years to complete his education unless he takes classes during one or more summer terms, take extra credits during some semesters and/or take classes during the summer prior to starting at the New York state college. He will need to take remedial math and reading until he attains college level achievement in these subjects. (P-8; N.T. 136, 599).
23. The Student was accepted by the community college in his county of residence. All students who obtain a diploma from a high school or GED are permitted to enroll. Prior to taking courses for college credit, the Student must take several developmental reading classes and pre-college level math classes. (S-9; N.T 137, 601).
23. Since at least 1999, the District was aware of that the Student had a high frequency sensorineural hearing loss characterized by air conduction thresholds greater than 25 dB at two or more frequencies above 2000 Hz in one or both ears. From that time, the Student’s hearing loss gradually became more severe and started to impact both ears. (S-12, at 5, 8, 11, 12, 15; S-13, at 1; S-17, at 4, 5, P-7, at 1,2).
24. Prior to the 2005-2006 and 2006-2007 school years, the Student had a hearing loss for which recommendations for classroom interventions were proffered by an audiologist. None of the IEPs in place between March 3, 3005 and April 19, 2007 contain any reference to the recommendations regarding the Student’s hearing loss contained in the Audiological Evaluation conducted on November 5, 2005. (Compare S-12 at 10 and S-5, S-7, and S-9).
25. The individuals providing recommendations to the District regarding the Student’s hearing loss did not assess the extent to which the Student’s hearing loss impacted his progress within the general curriculum. No attempt was made to assess whether the environment in which he was provided instruction impacted his ability to access his program. At the time they assessed the Student, he was daydreaming, drawing, and tuning out and having difficulty receiving auditory information within the classroom, but they were not aware of this and did not factor that information into the recommendations they made about need for services. Based upon the hearing

testing, the District did not the Student's hearing loss an issue in making program recommendations or providing accommodation, and did not recognize it as a special consideration in programming for the Student until April 19, 2007. (N.T. 52, 60, 120-121,124; 319, 321, 363-364, 416-418, 422, 458, 464, 579, 381, 349, 388, 576, 585-579; S-1, at 9, 12; Compare S-5 at 2 and S-7 at 6 to S-9 at 3; S-12, at1-3).

26. No evidence is contained in the record that any psychologist who tested the Student made any changes to the way any test was administered based upon the Student's hearing loss notwithstanding that inability to hear directions could affect test results. (S-1, at 13; N.T. 249-50, 297).

27. The Student is able to hear auditory information, but it is incomplete because he misses the high frequencies in speech. High frequency sounds in speech would be the /T/, /S/, /F/, /SH/, an /FH/. Even though his left ear is picking up the sound, many factors in the classroom impact upon that such as the teacher walking around the room and ambient noise. (N.T. 161-62).

24. Multiple standardized tests were administered to the Student throughout the period between his first and eighth grade years including nine administrations of some form of the Woodcock Johnson – Test of Achievement (S-1, at 3, P-2, at 4-5, P-4, at 2, S-14, at 1-2). The District considers the Woodcock Johnson scores to be the most accurate and, comparison from year to year of test scores reported as a percentage or a standard score, to be the most useful for accessing progress. (N.T. 239, 245). The last three administrations of some form of the Woodcock Johnson resulted in the following results.

| Woodcock-Johnson Tests of Achievement III - 4/2/02; Grade 7; P-2, at 4-5 | Woodcock-Johnson Revised Test date: 2/25/03: Grade 8; P-4, at 2 | Woodcock-Johnson Tests of Achievement III – 6/18/07; Grade 12; S-14, 1-2 |
|---|--|---|
| <u>Broad Reading</u> *SS 82; 12%; GE 4.3 | <u>Broad Reading</u> SS 86; 17%; GE 5.6 | <u>Broad Reading</u> SS 79; 9%; GE 6.1 |
| <u>Basic Reading</u> SS 88; 21%; GE 4.5 | | <u>Basic Reading</u> SS 86; 18%; GE 7.2 |
| <u>Reading Comprehension</u> SS 92; 30%; GE 6.2 | | <u>Reading Comprehension</u> SS 92; 31%; GE 9.6 |
| <u>Letter-Word Identification</u> SS 85; 26%; GE 4.6 | <u>Letter-Word Recognition</u> SS 87; 20%; GE 5.8 | <u>Letter-Word Identification</u> SS 87; 19%; GE 8.0 |
| <u>Passage Comprehension</u> SS 89; 24%; GE 5.1 | <u>Passage Comprehension</u> SS 87; 19%; GE 5.1 | <u>Passage Comprehension</u> SS 92; 29%; GE 8.9 |
| <u>Reading Vocabulary</u> SS 96; 40%; GE 7.1 | | <u>Reading Vocabulary</u> SS 94; 33%; GE 10.2 |
| <u>Reading Fluency</u> SS 79; 8%; GE 3.8 | | <u>Reading Fluency</u> SS 73; 4%; GE 4.4 |
| <u>Broad Math</u> SS 85; 16%; GE 5.4 | <u>Broad Math</u> SS 92; 30%; GE 7.3 | <u>Broad Math</u> SS 82; 11%; GE 7.2 |
| <u>Math Calculation</u> SS 83; 13%; GE 5.4 | | <u>Math Calculation</u> SS 77; 6%; GE 6.4 |
| <u>Math Reasoning.</u> SS 88; 22%; 5.4 | | <u>Math Reasoning.</u> SS 88; 21%; 8.3 |

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| <u>Calculation</u> SS 91; 27%; GE 6.2 | | <u>Calculation</u> SS 85; 16%; GE 8.0 |
| <u>Math Fluency</u> SS 72; 3%; GE 4.1 | | <u>Math Fluency</u> SS 66; 1%; GE 4.3 |
| <u>Applied Problems</u> SS 89; 22%; GE 5.4 | <u>Applied Problems</u> SS 95; 36%; GE 7.4 | <u>Applied Problems</u> SS 91; 27%; GE 8.7 |
| <u>Quantitative Concepts</u> SS 90; 25%; GE 5.4 | | <u>Quantitative Concepts</u> SS 87; 19%; GE 7.8 |
| | <u>Writing Samples</u> SS 99; 47%; GE 8.9 | <u>Writing Samples</u> SS 84; 15%; 6.5 GE |
| | | <u>Spelling</u> SS 93; 93%; GE 10.9 |

*SS=Standard Score; GE=Grade Equivalent.

III. Issues Presented

- A. **Whether the District Appropriately Evaluated and Programmed for the Student during the period between May 21, 2005 and the present, and if not, to what extent is the Student entitled to compensatory education?**
- B. **Is the Student entitled to an independent educational evaluation at public expense.**

IV. Discussion and Conclusions of Law

A. *Burden of Persuasion*

The United States Supreme Court explained the concept of burden of proof in *Addington v. Texas*, 441 U.S. 418, 423 (1979) (citation omitted) stating

The function of a [burden] of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to “instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.” The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.

Id. In administrative and judicial proceedings under the IDEA, the party bearing the burden of persuasion must prove its case by the “preponderance of the evidence.” See 20 U.S.C. § 1415(i)(2)(C)(iii). The term “preponderance of evidence” is defined as “evidence that is of greater weight or more convincing than the evidence that is offered in opposition to it.” *Black’s Law Dictionary* (Fifth Edition), at 1064. The burden of persuasion in “an administrative hearing challenging an IEP is properly placed upon the party seeking relief.” *Schaffer v. Weast*, 546 U.S. ___, ___, 126 S.Ct. 528, 537 (2005). The Third Circuit more recently addressed the issue of burden of proof in *L.E. v. Ramsey Board of Education*, 435 F.3d 384; 2006 U.S. App. LEXIS 1582 (3d Cir. 2006) wherein it provides that the party bearing the burden of persuasion must prove its case by a preponderance of the evidence. Since the parents requested the hearing in this matter, they bear the burden of proving that the District did not offer FAPE to the Student.

B. Free Appropriate Public Education

The IDEA defines a free appropriate public education (“FAPE”) as special education and related services that

- (a) are provided at public expense, under public supervision and direction and without charge;
 - (b) meet the standards of the State educational agency;
 - (c) include preschool, elementary school or secondary school education in the State involved ; and
 - (d) are provided in conformity with an individualized education program (IEP) under Sec. 614(d).
- See 20 U.S.C Sec. 1402(9) and 34 C.R.F. § 300.13.

In *Board of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034, 3051 (1982), the U.S. Supreme Court articulated for the first time the IDEA standard for ascertaining the appropriateness of a district’s efforts to educate a student. It found that whether a district has met its IDEA obligation to a student is based upon whether “the individualized educational program developed through the Act’s procedures is reasonably calculated to enable the child to receive educational benefits.” *Id.* The high court placed procedural compliance on the same level as substantive compliance with IDEA mandates. *Id.* An appropriate IEP is one that meets the procedural and substantive regulatory requirements and one that is designed to provide meaningful education benefit to the child. *Board of Education v. Rowley*, 458 U.S. at 206-07, 102 S. Ct. 3034 (1982); see also *Rose by Rose v. Chester County Intermediate Unit*, 24 IDELR 61 (E.D. Pa. 1996).

1. Appropriate Evaluation and Programming

In addressing whether a student was offered an appropriate program, the Pennsylvania Appeal Panel offers the following standard:

In order to be appropriate, the program must be in a regular public school class unless certain criteria are met, and when offered be “reasonably calculated” to confer “educational benefit”, or “meaningful educational benefit”, that is not trivial nor *de minimis*. See *Board of Education v. Rowley*, 458 U.S. 176 (1982), *Polk v Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3rd Cir., 1998), *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031 (3rd Cir., 1993), *Susan N. v. Wilson school District*, 70 F.3d 751 (3rd Cir., 1995), *Neshaminy School District v. Karla B.*, 25 IDELR 725 (ED PA, 1997), *Oberti v. Board of Education of the Borough of Clementon*, 995 F.2d 1204 (3rd Cir., 1993), 20 U.S.C. § 1412 (a) (5), and 34 C.F.R. § 300.550.

In re: the Educational Assignment of S.J., A Student in the Tredyffrin/Easttown School District, Spec. Educ. Op. No. 1435 (PDE 2004), at 5 and *In re: The Educational Assignment of R.A., A Student in the Interboro School District*, Spec. Educ. Op. No. 1431, at 7-8 (PDE 2004). See also *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572 (3rd Cir. 2000); *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999); *S.H. v. Newark*, 336 F.3d 260 (3rd Cir. 2003).

Judicial and administrative bodies interpreting the *Rowley* standard have fleshed out the extent of a district’s obligation to provide FAPE to students. For example, a school district is not required to maximize a child’s opportunity; it must provide a basic floor of opportunity. See *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290 (7th Cir.), *cert. denied*, 488 U.S. 925 (1988). An appropriate IEP will identify a student’s needs and strengths and provide programs and services to address the needs and enhance the strengths the IEP identified. See *In Re: Educational Assignment of K.H.*, Spec. Op. No. 1031 (PDE 1999). An IEP is appropriate if it offers meaningful progress in all relevant domains under the IDEA. See e.g., *M.C. v. Central Regional S. D.*, 81 F.3d 389 (3rd Cir. 1996), *cert. denied*. 117 S. Ct. 176

(1996); *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999). If an IEP does not address all areas of a child's needs, if it does not contain measurable annual goals to monitor a student's progress, or if it is inadequate in any material way, the IEP is not appropriate. See e.g., *Rose by Rose v. Chester County Intermediate Unit*, 24 IDELR 61 (E.D. Pa. 1996); *In Re: the Educational Assignment of T.K.*, Spec. Educ. Op. No. 892; and *S.H. v. Newark*, 336 F.3d 260 (3rd Cir. 2003). If the evaluation upon which the District bases the IEP is not appropriate, the IEP is not appropriate. The IEP cannot reflect the Student's needs because the ER does not identify them. See *In re: Educ. Assignment of S.K.*, Spec. Educ. Op. No. 1759 (PDE 2006), at 11. *In re: Educ. Assignment of R.N.*, Spec. Educ. Op. No. 1785 (PDE 2006), at 8; 34 C.F.R. §300.305 and 34. C.F.R. §300.320(a)(2).

An IEP must further address the child's needs in all areas of deficit including academic, behavioral and communication needs. In general, the IEP team must consider the strengths of the child, concerns of the parents for enhancing the education of their child, evaluation results and the academic, developmental and functional needs of the child. See 20 U.S.C. ' 1414(d)(3)(A); see also, 34 CFR. ' 300.305(a)-(e); *Ridgewood Bd. Of Education v. N.E.*, 172 F.3d 238 (3d Cir. 1999), *In re: J. L.*, Spec. Educ. Op. No. 944 (PDE 1999). The District has an obligation to use in the evaluation process "technically sound instruments that may assess the relative contribution of cognitive or behavioral factors, in addition to physical or developmental factors." 34 C.F.R. § 300.304(a)(3). The IDEA also requires, when evaluating children with impaired sensory skills, the tests be selected and administered to accurately reflect the abilities that the test purports to measure rather than reflecting the child's impaired sensory skills and it must assess the child in all areas related to the suspected disability including, and if appropriate, hearing. See 34 C.F.R. § 300.304(c)(3)-(4). The IEP must include a statement of the specially designed instruction that will be utilized in the provision of educational services. 34 CFR. ' 300.320(a)(4). Specially designed instruction means adapting, as appropriate, the content, methodology or delivery of instruction to address the unique needs of the child and to assure access to the general curriculum to allow the child to meet the educational standards that apply to all children within the district. 34 C.F.R. § 300.39(b)(3)(i)-(ii). The IEP must identify the existence of special factors, including hearing loss, and whether the child needs assistive technology devices. 34 C.F.R. § 300.324(2)(iv),(v). Finally, the IEP must include objective means of measuring the child's progress in a special education program. 34 C.F.R. § 300.320(a)(3).

A student with a disability is entitled to meaningful, not trivial progress. *L.E. v. Ramsey Bd. of Educ.* 435 F.3d 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. ,2006); 20 U.S.C. § 1400(c)(4). Congress has expressed its intent that the implementation of the IDEA not be impeded by low expectations and a failure to employ effective instructional methods. See, 20 U.S.C. § 1400(c)(4); 34 CFR. ' 300.320(a)(4) (special education and related services, and supplementary aides and services should be based upon peer-reviewed research to the extent practicable); *County School Bd. of Henrico County, Va. v. R.T.* 433 F.Supp.2d 657, 689 (E.D.Va. 2006).

2. Appropriate Transition Services

The IDEA defines the term "transition services" as a coordinated set of activities for a child with a disability that--

(A) is designed to be within a results-oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child's movement from school to post- school activities, including post-secondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation;

(B) is based on the individual child's needs, taking into account the child's strengths, preferences, and interests; and

(C) includes instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation.

20 U.S.C. § 1402(34). Section 300.43 of the IDEA implementing regulations clarify the language of the statute by providing that “transition services for children with disabilities may be special education, if provided as specially designed instruction, or a related service, if required to assist a child with a disability to benefit from special education. 34 C.F.R. § 300.43. With regard to the role of the IEP in transition planning, 20 U.S.C. § 1414(d)(1)(A)(VIII) explains that beginning not later than the first IEP to be in effect when the child is 16, and updated annually thereafter must contain appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and the transition services (including courses of study) needed to assist the child in reaching those goals. See 20 U.S.C. § 1414(d)(1)(A)(VIII); see also 34 C.F.R. § 300.320(b)(1)-(2).

Transition services can take the form of

- ❑ On-site job training or coaching. *Urban by Urban v. Jefferson County School District*, 89 F.3d 720 (10th Cir. 1996); *Bonita Unified School District*, 27 IDELR 248 (SEA CA 1997); *Arlington Central School District*, 20 IDELR 1130 (SEA NY 1996).
- ❑ Provision of counseling for depression, career information and vocational evaluation. *Lancaster Ind. Sch. Dist.*, 29 IDELR 281 (SEA TX 1998).
- ❑ Assistance in finding competitive employment; *Coldspring-Oakhurst (TX) Consolidated Ind. Sch. Dist.*, 33 IDELR 250 (OCR 2000).
- ❑ Enrollment in sheltered workshops. *Tuscaloosa County Bd. of Educ.*, 29 IDELR 435 (SEA AL 1998).
- ❑ Assistance in pursuing higher education. *Yankton Sch. Dist. v. Schramm*, 93 F.3d 1369 (8th Cir. 1996); *Cinnaminson Twp. Bd. of Educ.*, 26 IDELR 1378 (SEA NJ 1997); *San Francisco Unified Sch. Dist.*, 29 IDELR 153 (SEA CA 1998); *Houston Ind. Sch. Dist.*, 32 IDELR 79 (SEA TX 1999); *Bret Harte Union High School*, 29 IDELR 1014 (SEA CA 1999).
- ❑ College preparation. *Caribou Sch. Dept.*, 35 IDELR 118 (SEA ME 2001); *Susquehanna Twp. S.D. v. Frances J. et al.*, 823 A.2d 249 (Pa. Commw. 2003); *but see Fort Bend Ind. Sch. Dist.*, 34 IDELR 111 (SEA TX 2000); *Elmhurst Sch. Distr. 205*, 34 IDELR 112 (SEA IL 2000).
- ❑ Activities of daily living skills. *Tuscaloosa County Bd. of Educ.*, 29 IDELR 435 (SEA AL 1998); *Arlington Central School District*, 20 IDELR 1130 (SEA NY 1996).
- ❑ Community-living skills. *Coldspring-Oakhurst (TX) Consolidated Ind. Sch. Dist.*, 33 IDELR 250 (OCR 2000) (voter registration); *Portland Sch. Dist.*, 30 IDELR 250 (OCR 2000) (instruction in city bus system); *Novato Unified School District*, 22 IDELR 1056 (SEA CA 1995) (residential placement in the community with on-site therapy and one-to-one aide).
- ❑ Assistance in accessing services from other governmental agencies prior to aging out of school age services. *Bd. of Educ. of City School District of NY*, 32 IDELR 24 (SEA NY 1999); *Coldspring-Oakhurst (TX) Consolidated Ind. Sch. Dist.*, 33 IDELR 250 (OCR 2000).

- Transition services can stand alone as a special education program in the IEP. *Yankton School District v. Schramm*, 93 F.3d 1369 (8th Cir. 1996) (an acknowledged orthopedically impaired child who required specially designed instruction solely to develop skills for transition to adult life).

3. Independent Educational Evaluation (“IEE”)

An independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question; and public expense means that the public agency either pays for the full cost of the evaluations or ensures that the evaluation is otherwise provided at no cost to the parents. 34 C.F.R. § 300.502. The IDEA implementing regulations provide the following process for obtaining an independent educational evaluation.

(a) The parents of a child with a disability have the right to obtain an independent education evaluation of the child, subject to the following:

(b) Parent right to evaluation of public expense

- (1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency subject to the conditions in paragraphs (b)(2) through (4) of this section..
- (2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either –
 - (i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or
 - (ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing that the evaluation obtained by the parent did not meet agency criteria.
 - (iii) If the public agency files a due process complaint notice to request a hearing and the final decision is that the agency’s evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.
 - (iv) If a parent requests an independent educational evaluation, the public agency may ask for the parent’s reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation.
 - (v) A parent is entitled to only one independent educational evaluation at public expense each time the public agency conducts an evaluation with which the parent disagrees.

34 C.F.R. 300.502 (a)(2)-(3).

The obligation to provide an IEE falls upon the agency responsible for providing the student with a FAPE. Once a student achieves the ages 21 years, *see* 20 U.S.C. § 14.12(a)(1)(B) or graduates from high school, *see Susquehanna Township School District v. Frances J. and Charles J., parents of Jelani J., and Jelani J.*, 823 A.2d 249, 254 (Pa. Commw. 2006), the District of residence is no longer required to provide him or her with a free appropriate public education.

C. Calculation of Compensatory Education

A disabled student's right to compensatory education accrues when the school knows or should know that the student is receiving an inappropriate education." *Ridgewood Bd. Of Educ. v. N.E.*, 172 F.3d at 250. Determination of an award of compensatory education, however, must take into consideration "the time reasonably required for the school to rectify the problem ... since a school district may not be able to act immediately to correct an inappropriate IEP; it may require some time to respond to a complex problem." *M.S. v. Central Regional Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. 1996). In summary, the holdings in *M.C.* and *Ridgewood* demonstrate that "a school district that knows or should know that a child has an inappropriate IEP or is not receiving more than a *de minimis* educational benefit must correct the situation." *Ridgewood*, 172 F.3d at 250. If it fails to do so, "a disabled child is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably require for the school district to rectify the problem." *M.C.* 81 F.3d at 397.

In the event that a district is found responsible for the provision of compensatory education, certain time limitations apply to the award. The IDEA was revised in 2004 to provide for a specific limitation period at 20 U.S.C. Sec. 1415(f)(3)(C)(2005); and Sec. 1415(b)(6)(B). Therein, it explains that "A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing..., in such time as the State law allows." 20 U.S.C. § 1415(f)(3)(C)(2005).¹

1. The District has failed to appropriately evaluate the Student.

The evidence at hearing is preponderant that the District's evaluation simply was not appropriate because it failed to identify the impact of the Student's hearing loss on his education as well as on the administration of testing which formed the basis of district decision making; it failed to establish the Student's actual ability levels; and it failed to identify the scope and extent of the Student's needs in math.

The parties do not dispute the fact that since 1999 the Student had a high frequency sensorineural hearing loss characterized by air conduction thresholds greater than 25 dB at two or more frequencies above 2000 Hz in one ear or that his loss become more severe as he got older and that now both ears are impacted by the high frequency loss. They merely dispute the impact of the hearing loss on the Student's education. *See generally*, N.T.140-233, 306-382, and 485-577. The focus of the testimony of the District's witnesses was on whether the Student could perceive sounds between 250 and 1000 Hz - which appear to be the sound most closely related to language development. For example, the hearing support teacher indicated that certain standards applied to determine if the hearing loss impeded the learning process (N.T. 315) although she could not provide the specific basis for limiting the analysis in this manner. (N.T 356-57). Specifically she asserted that "educationally" she used pure tone average to determine the degree of hearing loss, (N.T. 316), and that in order to assess whether a student qualified for itinerant hearing support services, she would do a pure tone average analysis looking at the word recognition score and the speech reception threshold in order to recommend that the student receive hearing support services.

¹ Certain exceptions can apply to this timeline, specifically, it shall not apply to a parent if the parent was prevented from requesting the hearing due to specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint or the local educational agency's withholding of information from the parent that was required under this part [20 U.S.C. § 1411 et seq.] to be provided to the parent. *See* 20 U.S.C. §1415(f)(3)(C0 and (D).

(N.T. 313, 316). The IU audiologist stated that for identification of an auditory processing deficit, the Student's performance must be one standard deviation below the mean from the norm; this would be required for qualifying for hearing support services. (See S-12, at 3; N.T. 511-512).

The testimony provided, however, failed to focus on the undisputed hearing loss experienced by the Student has on his actual academic achievement in the actual environment in which it was being provided. This is a fatal flaw to the District's evaluation and programming. The District failed to provide evidence that it ruled out the high frequency loss as a factor in the Student's educational progress. The Parents' audiology expert described her concern for the hearing loss and what should have been done for the Student within the classroom setting. She noted that the testing by the District did not take into consideration how the high frequency sounds that the student cannot hear impact upon the Student's ability to follow auditory information. She recommended a personal amplification device or a sound field. The opinion of the parents' expert is supported by numerous studies that address the delayed achievement and functional status of "hard of hearing" children with "minimal sensorineural hearing loss" (MSHL). Students falling within this class include those students with the same hearing loss as the Student, specifically those who have high frequency sensorineural hearing loss characterized by air conduction thresholds greater than 25 dB at two or more frequencies above 2000 Hz in one or both ears. See Bess, Dodd-Murphy and Parker (1998), "Children with minimal sensorineural hearing loss: Prevalence, educational performance, and functional status." *Ear and Hearing*, 19, 339-354. Studies have found that, although the speech and language of children with unilateral MSHL ordinarily develops normally, they are much more likely than children with bilaterally normal hearing to fail at school and repeat grades. Bess, F. H. (1986), "The unilaterally hearing-impaired child: A final comment." *Ear and Hearing*, 7, 52-5; see also Oyler, R. F., see also Oyler, A. L. and Matkin, N. D. (1988), "Unilateral hearing loss: Demographics and educational impact." *Language, Speech and Hearing Services in Schools*, 19, 201-209. Because of the nature of their hearing condition, children with high frequency hearing loss have more difficulty localizing sound sources as well as comprehending speech under adverse acoustical conditions. (Bess 1998). A child with a high frequency hearing loss is able to respond normally to low frequency sounds, but because he or she cannot perceive the full spectrum of speech frequencies, his or her responses to speech are inconsistent. Moreover, the presence of low frequency noise diminishes "the child's awareness of meaningful stimuli, since such noise masks the speech information that is available. Compared to a child with a flat hearing loss, the one with a high frequency hearing loss is likely to display more severe speech language problems but less abnormalities with vocal quality and speech rhythm." (Bess 1986).²

² Multiple studies also confirm the difficulty that children with MSHL – experience with academics. See e.g., Elfenbein, J. L., Hardin-Jones, M. A. and Davis, J. M. (1994), "Oral communication skills of children who are hard of hearing." *Journal of Speech and Hearing Research*, 37, 216-226; Wilcox, J. and Tobin, H. (1974), "Linguistic performance of hard of hearing and normally hearing children." *Journal of Speech and Hearing Research*, 17, 286-293; Davis, J. and Blasdell, R. (1975), "Perceptual strategies employed by normally hearing and hearing-impaired children in the comprehension of sentences containing relative clauses." *Journal of Speech and Hearing Research*, 18, 281-295; Levitt, H., McGarr, N. and Geffner, D. (1987). *Development of Children*. ASHA Monograph #26, Washington, D.C.: American Speech-Language-Hearing Association; Davis, J. M., Elfenbein, J. Schum, J. and Bentler, R. A. (1986), "Effects of mild and moderate hearing impairments on language, educational, and psychosocial behavior of children." *Journal of Speech and Hearing Disorders*, 51, 53-62.

Children with moderate and severe MSNL experience two or three year performance delays with poorest performance in areas most directly dependent upon reading comprehension and word-meaning skills. Even students with milder hearing loss tend to experience more than one year delay. See Ross, M., Brackett, D. and Maxon, A. (1991), "Assessment and Management of Mainstreamed Hearing-Impaired Children: Principles and Practices. Austin, TX: Pro-Ed. and Quigley, S. P. (1978), "Effect of hearing impairment in normal language development." In F. Martin (Ed.), *Pediatric Audiology*, Englewood Cliffs, N J.: Prentice-Hall.

Whether a student can perceive sounds is a different analysis than whether he can reliably understand what is being said to him in the educational setting. If a person cannot hear a sound, is that person reliably going to be able to read that sound or spell words containing that sound? What if the student has a learning disability in addition to this hearing loss? What type programming and with what supports are going to address both of these needs. If standardized testing was administered by individuals who did not address the Student's hearing loss, do they represent an accurate picture of his ability and achievement? In the instant matter, the District's evaluations simply do not provide this information.

2. Inappropriate IEPs

Once a determination is made that that the evaluation was inappropriate, the IEP is *de facto* inappropriate, see *In re: Educ. Assignment of S.K.*, Spec. Ed. Op. No. 1769 at 11. The problems with the relevant IEPs are worth examining, however. First, annual goals for the Student's known disabilities in reading and written expression disappeared from the IEP in March of 2006 and were not addressed in any meaningful way within the general curriculum classes the Student took. The team did not undertake any process to ascertain whether the goal of college attendance was realistic or what basic skills he would need to be successful in his post-secondary outcomes. The achievement test scores he received on the Woodcock Johnson III in June 2007 (S-14), coupled with his PSSA scores from 2006 (H.O. 2), demonstrate he simply did not have the basic skills necessary to be successful in college. While the District does suggest that its transition plan was appropriate because the Student was accepted into two colleges, in fact he did not get accepted anywhere that did not limit his ability to start earning college credit without first achieving certain achievement levels. The fact that the Student could not take college level classes rendered the transition plan inappropriate. *Elizabeth M v. Wm. S. Hart Union High School District, 2003 U.S. Dist. LEXIS 25786 (C.D. Ca. 2003) at 4.*

With regard to whether the Student made meaningful progress during the two years that are the subject of this hearing, there is no baseline that can be compared with his current levels of functioning. A comparison between the Woodcock John scores he achieved in 2004 and 2005 compared with the June 2007 scores show little to no progress in a variety of subtests scores. The District attempts to establish progress by reference to the grades the Student received in his curriculum courses, but there is no evidence of record to support such a conclusion. While the Student's 11th grade teacher suggested that she was working on reading and written expression, the evidence is contrary to her assertions. First, she indicated she worked on the Student's reading disability by reading to the Student his physics textbook – the grade level of which is unknown. She also indicated that she was working on written expression by using a rubric similar to the PSSA – but no evidence of a baseline or movement through the rubric was contained in the record. In any event the PSSA results indicated the student to be below basic in reading and in math and at the basic level in written expression. These scores are consistent with the achievement testing that was administered in June 2007. While in 12th grade,

In addition to multiple administrations of different achievement tests, the District similarly administered four tests of ability – but used three different measures. The tests were reported as percentages instead of standard scores in a report which did not attempt to analyze these scores in relation to the Student's achievement for purposes of discrepancy analysis. Moreover, the District discounted the first and second grade administration of the ability testing – both of which indicated scores within at least the average range, and instead accepted as valid the tests administered in third and fourth grade which indicated scores within the below average range. No analysis is contained in any of the District's documents to explain why this decision was made, although it significantly impacted upon the Student's

educational program and the extent of progress that the District suggested was an appropriate level. In seventh grade, based upon a comparison of this below average score on the assessment of his cognitive ability and the Student's achievement scores, the Student's evaluation team found that the continued basis for his eligibility as a student with a specific learning disability in reading and written expression was no longer based upon a discrepancy analysis – basing it instead upon the Student's daily performance in the classroom being hindered by his attentional and organizational needs. (S-2, at 14).

With regard to the Student's transition planning, early on it was noted that the Student wanted to attend college. The District did not undertake to assess the level of skills necessary for a student to be successful in college and determine the extent that the Student possessed these skills. Instead, it appears that the only planning the District did was to arrange the Student's courses so that he had the requisite number of credits in the college-prep areas. Even after the receipt of the Student's eleventh grade PSSA scores in reading and math at the below basis level and in written expression at the basic level, no change was made in the manner in which the District programmed for the Student.

The Students current level of function in reading, written expression and math are obviously not sufficient for him to be successful in college. While the District suggests that he was accepted into college, the evidence at the hearing suggests that before he will start early credit toward college graduation he will be required to take a variety of transitional or remedial classes. At the end of his high school career, the Student was still learning how to read and write – how could the District have assumed that his post-secondary career would be successful when colleges expect you to read to learn and generate written products at an instructional level that is far beyond what the Student is currently capable of achieving.

3. Remedies

a. Independent Evaluation:

Because the Student graduated from high school and does not contest the graduation, he is no longer eligible for special education and related services prospectively. Therefore, the student is not entitled to a remedy for an inappropriate evaluation since the District is under no current obligation to provide him with a prospective educational program.

b. Compensatory Education

Turning to the calculation of the compensation that the Student is due, the shortcomings in the ER resulted in the shortcoming in the IEPs which pervade all of the instruction the Student received. The parents do not dispute the application of the limitation period nor is there evidence of record that any of the exceptions to the limitation period apply to this matter.

In calculating the amount of compensatory education owed to the Student, the District could argue that back in May 2005, it was entitled to sixty school days to evaluate and generate an evaluation report, to thirty calendar days to develop an IEP and to ten days to implement an IEP– easily totaling several months that should be subtracted from the time it owes the student for compensatory education. Regarding any limitation on the claim for compensatory education, because the record supports the conclusion that the manifestation of Student's hearing impairment and specific learning disability did not just arise during his eleventh grade year, the District is not permitted to invoke the *M.C.* limitation on a compensatory education award for the period of time necessary for the District to address the Student's educational needs. *Ridgewood* and *M.C.* establish that actual knowledge is not necessary to establish liability for compensatory education. Preponderant evidence of record supports the conclusion that the

Student had the same presenting needs prior to May 2005 and a timely evaluation by the District would have similarly found. The Student is therefore entitled to an award of compensatory education for the period between May 21, 2005 and the end of the 2006-2007 school year.

Compensatory transition services may not be post-secondary services. *See In re: the Educational Assignment of A.B., A Student of the Lower Merion School District*, Spec. Ed. Op. No. 1644 (PDE 2005), at 13; *see Letter to Riffel*, 34 IDELR 292 (OSEP 2000) (“Part B does not authorize a school district to provide a student with compensatory education, through the provision of instruction or services, at the post-secondary level. See 34 CFR 300.25.” The type of relief that is to be awarded for compensatory education to cure the denial of FAPE during the period when the student was entitled to FAPE, must be the type of educational and related services that are part of elementary and secondary school education offered by the state.” A district is not required to provide compensatory services to a graduated student once the student enters college or junior college, unless such a level of education is considered "elementary and secondary education" under state law).

Therefore the Student is entitled to compensation in the form of additional secondary education instruction equivalent to the number of hours in the school day times the number of days in the school year for each school year between May 21, 2005 and the present. Consistent with *B.C. v. Penn Manor*, 2006 Pa. Commw. LEXIS 445 (Pa. Commw. 2006). Nothing short of one-to-one compensation will provide the Student with the opportunity to gain what has been lost as a result of the denial of FAPE because of the Student’s age, hearing loss and learning disability. The services for which this award may not be used must be used to obtaining post secondary training or education, although the provision of services by an entity that is also providing the student with post-secondary training is not prohibited. The Student may use this award to obtain evaluations of his functioning and abilities which would include obtaining the independent evaluation they requested as relief in this matter.

V. ORDER

AND NOW, this 18th day of August 2007, in accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED that the Pennsbury School District must provide two years of compensatory services to the Student. The District must determine a sum of money that is the equivalent of what the cost of providing two years of services to the Student and make it available for any services that furthers the Student’s development of skills necessary for post secondary academic success consistent with the limitation that the funds not be used to provide post-secondary education or training. The District is not obligated to provide the Student with an independent educational evaluation, but the Student may apply funds from the compensatory education award to the cost of the independent evaluation that he seeks.

All other relief not contained in this order is specifically denied.

Dated: August 18, 2006

Rosemary E. Mullaly

Special Education Hearing Officer