PENNSYLVANIA
Special Education Hearing Officer

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

DECISION

Due Process Hearing for JG
Date of Birth: x/xx/xx
ODR File No.: 7820/06-07 KE

Dates of Hearing:
July 30, 2007
August 13, 2007
September 12, 2007
September 19, 2007

Closed Hearing

Parties to the Hearing:	Representatives:
Parents Mr. and Mrs.	John R. Wiese, Esquire 1604 Tuckerstown Road Dresher, PA 19025
District Director of Special Education Abington School District 970 Highland Avenue Abington, PA 19001-4535	Ms. Claudia Huot, Esquire Wisler Pearlstine, LLP 484 Norristown Road Suite 100 Blue Bell, PA 19422
Dates Transcripts Received:	August 10 and 22, 2007 September 19 and 25, 2007
Record Closed:	October 1, 2007
Date of Decision:	October 15, 2007
Hearing Officer:	Rosemary E. Mullaly

I. Background and Procedural History

A. Background

The Student is a xx-year-old resident of the Abington School District ("District") who attended District schools from kindergarten through fourth grade. From the beginning of the 2006-2007 school year – his fifth grade year - to the present the Student attended a private school - the tuition for which the District reimbursed the Parents according to the terms of a settlement agreement. In May 2007, the District proposed an IEP for the 2007-2008 school year that the Parents rejected on June 1, 2007, but they did not request a hearing. On June 15, 2007, the District requested the instant hearing to obtain an order that it offered a free appropriate public education to the Student. The Parents request relief in the form of a declaratory order that the private school should be the Student's pendent placement because the District's proposed program and placement were not appropriate.

A. Procedural History

On June 1, 2007, the Parents rejected the NOREP (S-19).On June 15, 2007, the District initiated a due process hearing to defend its IEP and placement proposal. On the "Due Process Complaint Notice" form, the District provided the following as the nature of the problem:

> The student attended a private school for the 2006-2007 school year. The District reimbursed the parent for tuition pursuant to a settlement agreement. The parent asked the District for a placement for the 2007-2008 school year. The District reevaluated the student and offered an appropriate placement in learning support in the least restrictive environment, in a District school. The parents rejected the placement and requested tuition reimbursement at the private school. (S-22).

The Parents did not file a sufficiency challenge to the District's complaint notice. The Parents filed the following response to the District's complaint notice on June 25, 2007:

> The IEP proposed by the District is not appropriate; we believe our son should remain in his current program and placement where he has made meaningful progress.

Because the District is currently funding the Student's placement at the private school for the first semester of the 2007-2008 school year according to a pendency provision contained in the Settlement Agreement, the Parents are not seeking tuition reimbursement at this time; instead that seek an order modifying the Settlement Agreement to extend the timeframe for which the private school is the Student's pendent placement.

II. Stipulations and Findings of Fact

A. Stipulations

1. Exhibits S-1 through S-19, S-21through S-23, and S-25, P-2 through P-5, P-7 though P-12, P-14 though P-15, and P-17 through P-23 are the Exhibits contained in the record of this matter. (H.O.–2).
2. The IEP contained at Exhibit P-5 is the last agreed upon program. (N.T. 894).
3. The District did not place the Student in the private school. It did not develop an IEP for the Student's attendance there nor did it monitor the implementation of the Student's educational program while he attended the private school. (N.T. 923).

B. Findings of Fact

1. In June 2006 at the end of the Student's fourth grade school year, the parties entered into a settlement agreement pursuant to which
    i. The Parents received reimbursement for the tuition at the private school in exchange for a waiver of all claims they may have against the District from the date they established residency in the District until the first day of the 2007-2008 school year;
    ii. In the event that the parties were unable to agree upon a program or placement for any period from the first day of the 2007-2008 school year forward, the Student's "then-current educational placement" pending the outcome of any due process proceedings, including appeals to the special education appeals panel, within the meaning of 1415(j) of the Individuals with Disabilities Education Act or any similar provision of State law would be the private school for the first semester of the District's 2007-2008 school year, after which pendency for the second semester of the District's 2007-2008 school year would be the placement offered by the District for the 2007-2008 school year.
    iii. Prior to entering into the June 2006 agreement, the Parents received written notice of their rights under state and federal law as parents of a child with disabilities; they were fully aware of these rights and of the extent to which they were waiving them in the agreement; they were fully aware that they were waiving rights on behalf of the Student; that they had the opportunity to consult with counsel concerning their rights and the agreement; and they signed the agreement including waiver of rights voluntarily. (P-22).

2. The District issued a permission to reevaluate the Student on February 9, 2007 to which the Parents provided their consent. (S- 5, at 3).
3. The District issued a reevaluation report to the Parents on April 12, 2007. Due to typographical errors on page 5 of the document, a revised copy was sent to the parents on April 30, 2007. Although pagination breaks are different, the only substantive difference between the two documents is contained on page 5. (S-9, S-10, S-25; N.T. 43, 142; Compare P-17 to S-10).

4. In preparation for the evaluation conducted by the District in the spring of 2007, the psychologist contacted the private school, sought information from the Student's teacher and observed him in the private school setting; contacted the Parents, conducted standardized testing including a behavioral assessment, arranged for specialists to conduct instructional assessments, reviewed records, and considered results of neuropsychological examination presented by the parents in 2006. A reading assessment was completed by a District reading specialist, a math assessment was completed by the elementary curriculum specialist, and an occupational therapist administered testing to assess the Students' handwriting, keyboarding, visual motor, self-help skills. (S-10; N.T. 44-45, 48, 49, 62, 58).
5. Based upon the observation of the Student in the private school setting, the evaluation report concluded that the Student interacted appropriately with peers and followed teacher directions, although it was noted that the Student appeared frustrated with classmates and needed prompts to stay focused. The psychologist administered the Behavior Assessment System for Children, Second Edition ("BASC 2") which is a standardized assessment that integrates information provided in multiple environments from a child's teacher, parent, and the child. On that assessment, the Student's behavioral symptom index fell within the average range. On the adaptive skills composite that reflects pro-social skills, both the Parent and teacher rating scale fell within the average range. There were elevated scores in regard to internalizing problems such as anxiety or a tendency to be overly focused on physical complaints. Scores on the hyperactivity range and adaptability scale were also somewhat elevated. The caution index which suggests that the Student was overly negative was elevated. His overall emotional symptom index, which provides an overall indication of his adjustment, fell in the at-risk range. Two areas fell in the clinically significant range – locus of control and the school problem scale. These indicated that he believes that he does not control punishments or rewards and that he has a pattern of dissatisfaction with schooling, school personnel and the educational process. (S-10, 16-17; N.T. 58, 59-60, 62-66).
6. The IEP that resulted from the reevaluation report identified the Student's need to improve reading skills, to improve written language skills, to improve mathematic skills, and to improve functional writing skills and provided present levels of functioning in each area. (S-10, N.T. 74, 86-87, 138)
7. At the May 2, 2007 IEP meeting, the Parents were presented with a draft IEP Statement and the Student's proposed special education teacher took contemporaneous notes of the meeting.. (S-12, S-13, S-17)
8. The District's proposal for reading is to place the student in small group instruction of three to six students implementing the Wilson program for forty-five daily. In addition, the student will work on reading comprehension, written expression, and handwriting for another forty-five minutes daily. For reading comprehension portion of his instruction, the Student will use the *Soar to Success* program in conjunction with the *Paperback Plus* series. He will receive an additional twenty minutes of individual Wilson reading instruction. Although "Wilson" is not listed in the IEP, the Student's Parents were aware that the District was proposing to use the Wilson Reading Program. (N.T. 286- 288).

9. The private school the Student is currently attending uses a comprehension strand - *Project Read*- in addition to the Wilson comprehension program. (N.T. 983-986)
10. The IEP provides for interventions for when the Student is frustrated, agitated or needs support. It provides for adults to assist with social interventions when needed; it provides for opportunities for the Student to visit the proposed District placement to ease transition back to the public school setting. It also provides opportunities for movement in the classroom, frequent teacher feedback, redirection, encouragement, reinforcement and praise (S-16, at 9).
11. The IEP provides present levels of functioning for reading, written language, written expression, spelling, math computation, and writing skills. For each need there is a goal. Some of the goals do not attempt to utilize as a baseline the present levels of functioning contained in the IEP. For certain goals, the District acknowledges that when the Student returns to District schools a current level of functioning would need to be reassessed. (S-16 at 3-4; , N.T. 256-76).
12. Specially designed instruction and modifications are provided for each of the goals, except for handwriting. Although no specific description is provided as to how to improve the Student's handwriting, reference in the goal is made to the skills being addressed in "the area of occupational therapy," and small group occupational therapy is provided 30 minutes a week. (S-16, at 7, 8-9).
13. The frequency for the provision of some of the accommodations being offered to the Student are "as needed" or "as deemed necessary." For keyboarding, the IEP provides that the Student will be given opportunities to practice keyboarding with no description given for the computer driven tutorial to be used or the frequency he will use it. (S-16, at 7, 8, and 9).
14. The IEP provides that the special education teacher will meet weekly to collaborate with regular education teachers to monitor progress in content areas and to provide support as necessary. (S-16, at 8, 10; N.T. 276).
15. The handwriting program offered at the private school is five minutes a day five times a week; the keyboarding instruction offered at the private school is the same computer driven tutorial being offered by the District. (N.T. 993, 994).
16. On May 3, 2007, the District issued an IEP and NOREP for the 2007-2008 school year describing the proposed program for the 2007-2008 school year. The NOREP recommended placement at the same District school that the Student attended prior to his attendance at the private school. On June 1, 2007 the Parents returned the NOREP indicating that they did not approve the recommendation and requested a pre-hearing conference. In their disapproval of the NOREP, the Parents provided the reason for the disapproval as "The Notice of Recommended Placement does not consider continuing [the Student]'s current placement." It refers to an attached email of the same date which again references the recommended placements as the specific concern they had with the IEP. (S-6, at 21; S-19, at 2).

III. Issues Presented

A. Which Party Bears the Burden of Persuasion in This Matter?

B. What Is the Student's "Then-Current Educational Placement"?

C. *Did the District Offer the Student a Free Appropriate Public Education in the Least Restrictive Environment for the 2007-2008 School Year?*

IV. Discussion and Conclusions of Law

A. Which Party Bears the Burden of Persuasion in This Matter?

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." *L.E. v. Ramsey Board of Education*, 435 F.3d 384; 2006 U.S. App. LEXIS 1582 (3d Cir. 2006); s*ee also* 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,* 126 S.Ct. 528, 537 (2005) (emphasis added).

The difficulty with determining who has the burden of persuasion in this matter arises from the fact that although the District requested the hearing, it did so to defend – not to challenge - its May 3, 2007 program and placement recommendations. On June 1, 2007, the Parents sought a pre-hearing conference – not a due process hearing to challenge the IEP. On the rejected NOREP the reason provided for disapproval was "The Notice of Recommended Placement does not consider continuing [the Student]'s current placement." (S-19, at 2). Moreover, the Parents challenge the District's IEP as the basis for the relief they are requesting - a declaratory statement that the Student's pendent placement should be the private school because the District's program and placement proposal is inappropriate. So it appears that while District requested the hearing, it did not challenge the IEP nor seek relief; on the other hand, while the Parents did not request the hearing, they challenged the IEP and they sought relief.

As the state-level appeals recently cautioned, the issue of the burden of proof is a threshold matter, and hearing officers should not be too quick in their conclusion as to which party bears the burden. *In re: Educational Assignment of N.R.*, Spec. Educ. Op. No. 1792 (PDE 2006), at 4. In *N.R.*, the panel raised this issue in a situation – similar to

that presented in the instant matter – when a parent rejects a NOREP (in *N.R.* it was a proposal for a disciplinary change in placement) and a district requests a hearing to demonstrate that its proposal is appropriate. *See In re: Educational Assignment of N.R.*, Spec. Educ. Op. No. 1792 (PDE 2006), at 4-5. In *N.R.*, the panel emphasizes that the *Schaffer* court was careful to limit its decision to challenges to an IEP. *Id.* 126 S.Ct. 528, 537 (2005). While it was not specifically at issue in *N.R.*, the *Schaffer* court also clarified that in matter relating to IEP challenges the burden of persuasion falls upon the party seeking relief. In the instant matter the Parents are the only party seeking relief - in the form of a change in the Student's pendent placement based upon their challenge to the appropriateness of the IEP.

Because the evidence presented by the parties in *N.R.* was not "in equipoise," *id.* at 5 *citing Schaffer*, at 126 S.Ct. at 535, the Panel did not render an opinion whether the District shoulders the burden of persuasion when it is defending rather than vindicating its decision. In the instant matter, however, because evidence relating to certain issues raised by the Parents are is in equipoise – largely due to the fact that the District received no specific notice of the issues that the Parents had with the District's proposed program and placement, it appears necessary for the hearing officer decide this issue at this time.

The hearing officer found no caselaw or other on-point authority to suggest that the burden of proof in cases being brought under the IDEA is shouldered by a party simply because it requested a hearing. The *Schaffer* holding clearly does not support such a conclusion. Moreover, it would be unfair for such a burden to obtain when the requesting party is not provided with a clear statement of what it needs to prove by the preponderance of the evidence.

It is significant to note that the IDEA itself provides no effective statutory mechanism to force the non-requesting party who is also challenging an IEP to provide specific reasons for the challenge. The IDEA and its implementing regulations provide that a due process proceeding is initiated by filing a due process hearing complaint. 20 U.S.C. § 1415(b)(7)(A). Either the LEA or the parent may file a complaint on any matter related to the identification, evaluation, provision of a free appropriate public education or educational placement concerning a child with a disability. 20 U.S.C. § 1415 (b)(6); 34 C.F.R. § 300.507(a). Either the LEA or the parent must file "a response" to the complaint within ten days of receipt of the complaint. 20 U.S.C. § 1415 (c)(2)(B); 34 C.F.R. § 300.507(a). The LEA, however, must provide in a parent-initiated due process complaint a "response" that includes an explanation of why the agency proposed or refused to take the action raised in the complaint, a description of other options considered and reasons for rejection, description of each evaluation procedure, assessment, record or report used as the basis of proposed or rejected action(s), and a description of other factors relevant to the LEA actions. 20 U.S.C. § 1415(c)(2)(B)(1); 34 C.F.R. § 300.508(e). The parent, on the other hand, must only provide to the LEA - a "response" that specifically addresses the issues raised in the complaint. 20 U.S.C. § 1415 (c)(2)(B)(1)(ii).(See 34 C.F.R. § 300.508(f). Either the LEA or the parent may file a "sufficiency challenge" to the complaint within 15 days of receipt, and failure to file a challenge deems the complaint sufficient. 20 U.S.C. § (c)(2)(A); 34 C.F.R. §

300.508(d)(1). No provision exists for the party that filed the notice to receive a more specific statement. In a situation when an LEA is vindicating its position, its complaint notice will be simply a statement that it believes its position is appropriate. The parents can assert a sufficiency challenge, but they have no obligation or incentive to do so. The LEA, on the other hand, does not have the mechanism available to it to seek a more specific response resulting in an LEA proceeding to a hearing without a clear notion of what would have been necessary to meaningfully participate in the mandatory resolution meeting or to prepare its case for hearing. Until the actual presentation of the evidence, the LEA does not have the kind of information that basic fairness suggests is necessary in order for it to bear a burden of proof.

In the instant matter, at the time that the Parent's rejected the IEP on June 1, 2007, the only issue raised by the Parents as the reason for disapproval was the "the Notice of Recommended Placement does not consider continuing [the Student]'s current placement. (S-6, at 21; S-19 at 2). The District's complaint notice addressed that one issue by asserting that it offered a placement in the least restrictive environment. The Parents provided a similarly general statement notwithstanding the fact that they offered voluminous objections to the IEP at the hearing. In the instant matter, the *Schaffer* holding, coupled with the limits inherent in the IDEA complaint notice requirements as well as basic fairness supports the conclusion that the Parents bear the burden of persuasion in this matter.

B. What Is the Student's "Then-Current Educational Placement"?

Pendency or the "stay-put" rule is triggered whenever a dispute arises between an LEA and a parent. The purpose of pendency, "is to protect the Student during a dispute by requiring the parties to continue to honor the terms of the last agreed upon placement and program during the term of the dispute. Thus, during a dispute in which the terms of the placement and program are at issue, regulations require maintenance of the status quo under the assumption that the status quo, because it represents "the most current and agreed program, is most likely to protect the student from excesses or unilateralism of either party." *In re: Educational Assignment of B.T.,* Spec. Educ. Op. No. 1781 (PDE 2006), at 6. The hearing officer has the authority to determine the Student's pendent placement. *In re: Educational Assignment of K.B.,* Spec. Educ. Op. No. 1581 (PDE 2005), at 8-10; *In re: Educational Assignment of D.F.,* Spec. Educ. Op. No. 1675 (PDE 2005), at 3.

Section 300.518 of the federal regulations implementing the IDEA provide the following regarding a child's status during due process:

> Except as provided in § 300.533, during the pendency of any administrative or judicial proceeding regarding a due process complaint notice under § 300.507, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement.

34 C.F.R. § 300.518(a); *see also* 20 U.S.C. § 1415(j). In the instant matter, the Student's pendency during a dispute is an explicit term of the June 2006 Settlement Agreement, specifically

> In the event that the DISTRICT and the FAMILY are unable to agree upon a program or placement for any period from the first day of the 2007-2008 school year forward, the "then-current educational placement" of [of the Student] pending the outcome of any due process proceedings, including appeals to the special education appeals panel, within the meaning of 1415(j) of the Individuals with Disabilities Education Act or any similar provision of State law, shall be [the private school] for the first semester of the DISTRICT'S 2007-2008 school year, after which pendency for the second semester of the DISTRICT'S 2007-2008 school year shall be the placement offered by the District for the 2007-2008 school year.

Both judicial and administrative agency decisions uphold the concept that "a settlement agreement is viewed as a contract and public policy favors such agreements, which serve ... to resolve disputes between parties amicably." *See D.R. v. East Brunswick Bd. of Educ.*, 109 F.3d 896 (3d Cir. 1997); *In re: Educational Assignment of R.B.*, Spec. Educ. Op. No. 1802 (2007), at 6-7; *In re: Educational Assignment of B.B.*, Spec. Educ. Op. No. 1484 (2004). A hearing officer has jurisdiction to interpret the terms of a settlement agreement (*see In re: Educational Assignment of C.G.*, Spec. Educ. Op. No. 1816 (PDE 2007), at 4; *see also In re: Educational Assignment of S.K.*, Spec. Educ. Op. No. 1769 (PDE 2006); *In re: Educational Assignment of B.B.*, Spec. Educ. Op. No. 1484 (PDE 2004); *In re: Educational Assignment of C.T.*, Spec. Educ. Op. No. 1505 (PDE 2004); and "should interpret the significance of a settlement agreement and the terms and provisions contained in that agreement in making his decision." *See In re: Educational Assignment of R.B.*, Spec. Educ. Op. No. 1802 (PDE 2004), at 6.

In reviewing a settlement agreement, the state-level appeals panel in *R.B.* advises that one must the look to "the totality of the circumstances surrounding the execution of the settlement agreement pursuant to *W.B. v. Matula*, 67 F.3d 484 (3d Cir. 1995) and Special Education Opinion No. 1484 [In re: *Educational Assignment of B.B.*, (PDE 2004)] ... and [determine whether] the agreement is well drafted and the terms and provisions are stated clearly, in plain unambiguous language capable of being understood by both parties; there was consideration given; both parties were represented by competent counsel; there was no element of coercion or undue influence at play, and the agreement was entered into voluntarily...; [and whether the parties] already benefited from certain provisions of the agreement...; and [whether or not] this is ... a case in which the playing field was one-sided or there was unfairness" *In re: Educational Assignment of R.B.*, at 6 - 7.

In the instant matter, no evidence of record supports a conclusion that the settlement agreement is inconsistent with this analysis under which other judicial and administrative bodies have enforced its contractual terms. Since both statute and regulation clearly envision that the local educational agency and the parents may

otherwise agree to pendency being a placement other than the "current educational placement," there is no reason why the agreement in this matter should be set aside. The Parents' request to have the hearing officer disregard the terms of the settlement agreement and change the Student's pendent placement is denied.

C. Did the District Offer the Student a Free Appropriate Public Education in the Least Restrictive Environment for the 2007-2008 School Year?

1. 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.F.R. § 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).

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., Spec. Educ. Op. No. 1435 (PDE 2004), at 5 and *In re: the Educational Assignment of R.A.,* 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 in 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: Educational Assignment of S.K.,* Spec. Educ. Op. No. 1759 (PDE 2006), at 11. *see also In re: Educational Assignment of R.N.*, Spec. Educ. Op. No. 1785 (PDE 2006), at 8; and 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 Educational Placement: 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 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).

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). The IDEA does not require that a school district maximize a student's potential or provide the best possible education. Rather, the statutory obligation is satisfied "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Bd. of Educ. v. Rowley*, 458 U.S. 176, 203 (1982). The IEP must provide "meaningful" access to education, *id*. at 192, and confer "some educational benefit" upon the child. *Id*. at 200. Districts must provide access to specialized instruction and related services that are "reasonably calculated" in order to provide the student with "some" educational benefit. *Id*., at 207-208. The IDEA mandates an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving parents.'" *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989). The Third Circuit has consistently found that the standard for educational benefit is more than "trivial" or "de minimis" benefit. *See Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 1179 (3d Cir. 1998), *cert. denied* 488 U.S. 1030 (1989). *See also Carlisle Area School Dist., v. Scott P.,* 62 F.3d 520, 533-34 (3d Cir. 1995), quoting *Rowley*, 458 U.S. at 201; (School Districts "need not provide the optimal level of services, or even a level that would confirm additional benefits," only a "basic floor of opportunity"); *Polk v. Central Susquehanna IU 16*, 853 F.2d 171, 182-84 (3d Cir. 1998). An appropriate program is one that is "reasonably calculated" to provide the child with "significant learning and meaningful benefit." *Ridgewood Board of Education. v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999). In order to be appropriate, however, this educational benefit must be more than "trivial." *Ridgewood Bd. of Educ. v. N.E.* 172 F.3d 238, 247)3d Cir. 1999). An appropriate IEP is "gauged in relation to the child's potential," id., and must offer the potential for "significant learning" and "meaningful benefit." *Id.*

The analysis for determining whether an IEP is appropriate may only consider evidence that was available to a district when it made its program and placement decisions. *Fuhrmann v. East Hanover Bd. of Educ*., 993 F.2d 1031 (3d Cir. 1993) ("[n]either the statute nor reason countenance 'Monday Morning Quarterbacking' in

evaluating the appropriateness of a child's placement.") *Id*. at 1040. The Third Circuit has consistently affirmed its holding in *Fuhrmann*. *See e.g., Susan N. v. Wilson Sch. Dist.*, 70 F.3d 751, 762 (3d Cir. 1995).

An IEP as written need not be flawless to be appropriate. *See In re: Educational Assignment of S.M.*, Spec. Educ. Op. No. 1011 (PDE 2000), at 3. Deficiencies in an IEP document, such as annual goals not being measurable, may be mitigated by other factors such as a student not being educated within the district and limited information about the specifics of a student's achievement in a particular curriculum. *Id*.

2. Least Restrictive Environment

The IDEA contains a requirement that the IEP for a disabled child educate that child in the "least restrictive environment":

> To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. Section § 1412 (a)(5); see also, 34 C.F.R. §Sec. 300.114(a)(2). *See also* 34 C.F.R. § 116(c) ("Unless the IEP of a child with a dsiability requires some other arrangement, the child [should be] educated in the school that he or she would attend if nondisabled"). The Third Circuit has interpreted this requirement to mean "mandating education 'in the least restrictive environment that will provide [the student] with a meaningful educational benefit." *S.H. v. State-Operated School District of the City of Newark*, 336 F.3d 260, 265 (3d Cir. 2003) (quoting *T.R. v. Kingwood Twp. Bd. of Educ.*, 205 F.3d 572, 578 (3d Cir. 2000)). "The least restrictive environment is one that, to the greatest extent possible, satisfactorily educates disabled children together with children who are not disabled, in the same school the disabled child would attend if the child were not disabled." *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 535 (3d Cir. 1995).

The hearing officer disregarded or offered little weight to certain testimony offered by the Parents in the record. First, the Parents proffered at hearing evidence regarding the Student's functioning related to a period of time after the development of the Student's IEP in May 2007. This after-acquired data, specifically information from the Parents' advocate regarding an observation of the Student in September 2007 and information from the representative of the private school regarding the Student's functioning during the beginning of the 2007-2008 – specifically his need for one-to-one instruction for reading - cannot form the basis of a finding that the District's program and placement proposal was inappropriate. An IEP must be reasonably calculated to yield meaningful educational benefit at the time it is offered. Allowing the Parents to critique

the District's proposal with information not available to the District when it developed the documents is inappropriate Monday-morning quarterbacking prohibited by the Third Circuit. See *Fuhrmann* and *Susan N.* Second, extensive testimony by the Student's advocate was proffered by the Parents. To the extent that her opinion was presented to contradict the testimony of the certified educational professional, it must be given less weight. The advocate did not have any educational or occupational therapy training or teaching experience and therefore her opinion cannot constitute expert testimony necessary to contradict the District witnesses' testimony. Finally, the Parent's testimony asserting that the District's educational program in fourth grade was inappropriate is not founded on educational evidence of record or contrary evidence was presented by the District which placed the evidence in equipoise and therefore was resolved in favor of the District.

While the Parents assert in their written closing that "the District's ER is "flawed in several ways" they present no testimony regarding these flaws. To the contrary, the District provide uncontroverted evidence that its Reevaluation Report addressed each area of the Student's presenting needs. Therefore the evidence of record is preponderant that the District's evaluation was appropriate.

On May 3, 2007, the District offered the Student an IEP that addressed each of the Student's needs based upon its recent reevaluation of the Student. Was it a perfect document? Unfortunately, it was not. Was it reasonably calculated to yield meaningful educational benefit, the evidence is preponderant that it did. The hearing officer finds that certain deficiencies in an IEP document, such as annual goals not being measurable, may be mitigated by other factors as exist in the instant matter - such as a student not being educated within the district and limited information about the specifics of a student's achievement in a particular curriculum. *See e.g. In re: Educational Assignment R.M.*, Spec. Educ. Op. No. 1011 (PDE 2000), at 3.

To support their challenge to the IEP, the Parents assert the following deficiencies in the areas of social skills, reading, handwriting, and written expression:

a. Social Skills

The Parents object to the District's proposal since it does not include a behavior plan to address the Student's social and behavioral issues. The preponderant evidence of record, however, demonstrates that the District sought information about the Student's social emotional functioning through its evaluation report using standardized assessments, observing the Student in the educational setting, and obtaining information from his parents and teachers. While it is accurate that the Student is receiving a social skills program at the private school he is currently attending, no evidence contained in the record suggests that at this time his social emotional needs require social skills training class or a behavior plan in order to make educational progress. In the event that behavioral issue present themselves in a District school, the District would be obligated to address them in a meaningful way. While the IEP does not contain a behavior plan, it does provide for intervention to address the social needs he demonstrated at the time of

the assessment and to aid in his transition from the private school back to the public school setting. The evidence is preponderant that the District appropriately addressed the Students social skills in the May 3, 2007 IEP.

b. Reading

The Parents suggest that the District's proposed reading program is flawed since the Student will only cover half the lesson a day with the proposed group size; the teacher proposed for 2007-2008 school year is not Level II certified; the Student will only be given only 110 minutes of communication instruction; the extra twenty minutes a day of reading instruction is not fully specified and would take away from other portion of his reading program; the proposed reading comprehension program is not coordinated with his Wilson reading program and no evidence was placed in the record that the District's program is research-based or effective in addressing reading disabilities. They assert that the District's proposed reading program does not provide adequate accommodations to allow the Student to function in regular education because his regular education teachers do not have instruction in the Student's reading program.

The District assessed the Student's reading levels and offered a highly structured program to address his needs – although it did not specifically state it would be the Wilson program, it is uncontroverted on the record that the Parents knew that it was what the District was proposing. The District program provides ample time to address the Student's needs in a small group setting in a learning support classroom and provided an individual who is certified in special education and who has received training in the implementation of the reading program the District is proposing. While the Student currently is receiving daily one-on-one reading instruction with a Level II Wilson certified teacher for forty-five minutes a day in the private school, no evidence suggests that he requires that level of service to make meaningful educational progress or that a Level II certified teacher is necessary for him to benefit from his instruction.

An objection was raised by the Parents that the manner in which the District is addressing the comprehension component of the Student's is inconsistent with the Wilson Reading program. Evidence of record, however, demonstrates that the private school is also using a comprehension strand - *Project Read*- in addition to the Wilson comprehension program. Evidence proffered by the Parents suggests that because the teachers who teach the program at the private school are Wilson trained it cures the coordination problem. The comprehension strands being used by the District are similarly being taught by a Wilson trained teacher; evidence of record suggests the same outcome should therefore obtain.

c. Handwriting

The Parents challenge the District's proposal regarding remediation of the Students handwriting needs. The District identified through a functional handwriting assessment that the Student has a significant need in the area of handwriting. While the District included a handwriting goal in the IEP, the Parents assert that it is poorly written

and provides no baseline. The District should re-write the goal to describe what it means by ”legibly and efficiently” and translate the present level of functioning contained in the IEP to a baseline to measure the goal. The District should also revise the list of accommodations for handwriting speed to include the use of a tape recorder. The collaboration between the special education and regular education staff already contained in the IEP should be sufficient to assure that the accommodations provided for the Student’s handwriting - such as teacher notes - are provided in a format that will be meaningful to the Student and to establish when a particular accommodation is needed so it will be provided consistently to the Student. While the District did provide a baseline for keyboarding skills, it was not specific to the goal as written. If the District cannot translate the present level of functioning for keyboarding into a word per minute format, when the Student returns to school the District should assess his keyboarding skills to establish a baseline for how many words a minute he can type. When the Student will use the computer for keyboarding tutorial should also be specified.

d. Written expression

The Parents disagree with the use of a domain scoring structure as the manner in which the IEP suggests achievement will be measured in written expression. They further argue that the IEP does not contain a baseline for the domain scoring structure and no specially designed instruction is provided for the Student’s written expression need. The District should clarify the goal by focusing progress reporting on the Student’s areas of need in written expression. While present levels of functioning are contained in the IEP regarding written expression, the District should translate the present level of functioning contained in the IEP to a baseline to measure the goal as clarified.

The hearing officer need not address the issue of whether the private school is appropriate because the District’s IEP with the clarifications herein provided can be implemented in a regular school within the District. One need only address a more restrictive placement when the proposed placement is found to be appropriate. None of the issues raised by the Parents in the hearing result in a conclusion that the District cannot provide an appropriate educational program in a less restrictive environment than the private school the Student currently attends.

V. ORDER

AND NOW, this 15th day of October 2007, in accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED that the Student's "then-current educational placement" is defined by the terms of the Settlement agreement – for the first semester of the 2007-2008 school year it is the private school, for the second semester of the 2007-2008 school year it is the placement offered by the District for the 2007-2008 school year unless the parties otherwise agree. The District's May 3, 2007 IEP and placement are appropriate, although consistent with the decision of this hearing officer, some modification should be made to clarify the District's proposed program. All other relief not contained in this order is specifically denied.

Dated: October 15, 2007

Rosemary E. Mullaly

Special Education Hearing Officer