

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

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

DECISION

DUE PROCESS HEARING

Name of Child: Student  
ODR #7940/07-08 KE

Date of Birth:  
Xx/xx/xx

Dates of Hearing:  
October 22, 2007  
November 30, 2007  
December 18, 2007  
February 8, 2008

CLOSED HEARING

Parties to the Hearing:

Morrisville Borough School District  
550 W. Palmer Street  
Morrisville, Pennsylvania 19067

Date Final Transcript Received:  
Date Closing Arguments Received:  
Date of Decision:

Representative:

Charles Weiner, Esquire  
179 North Broad Street  
Doylestown, Pennsylvania 18901

Jane Williams, Esquire  
Michael Connolly, Esquire  
Sweet, Stevens, Katz and Williams  
331 Butler Avenue  
New Britain, Pennsylvania 18901

February 13, 2008  
March 5, 2008  
March 18 2008

Hearing Officer:

Linda M. Valentini, Psy.D.

## Background

Student is a teen-aged eligible student residing in the Morrisville Borough School District (hereinafter District). Student was enrolled in the District from the beginning of the 2003-2004 school year until the end of the 2005-2006 school year. At the beginning of the 2006-2007 school year Student's mother, (hereinafter Parent) removed Student from the District and placed Student in [redacted] Academy (hereinafter Academy) because she believed that Student's special education program in the District was inappropriate. In an attempt to improve Student's reading and mathematics skills the Parent enrolled Student in tutoring, and this tutoring was continued as a condition for admission to Academy because of Student's previous academic record and because Student achieved low scores on an admission test.

The Parent requested this hearing, asserting denial of FAPE and requesting compensatory education, tuition reimbursement and reimbursement for tutoring services.

## Scope of the Hearing

Prior to beginning the Parent's case in chief, testimony was taken from the Parent and Student's former special education teacher, and documents were examined, related to whether either of the two specific exceptions to the IDEIA's two year limitation period existed. The hearing officer ruled on the record that, "the parent...had sufficient knowledge to be concerned about her [child's] educational progress, and had sufficient knowledge to file for a due process hearing. Therefore I do not find any exceptions that are relevant to the statute of limitations on filing that are put forth in the IDEIA". Pursuant to that ruling the scope of the hearing was the 2005-2006 school year forward. It is noted that as the Parent filed for due process on July 25, 2007 the two year look-back (to July 25, 2005) period also encompasses ESY programming for summer 2005.

## Issues

1. Did the Morrisville Borough School District deny Student a free, appropriate public education during the 2005-2006 school year, including summers 2005 and 2006?
2. Should the Morrisville Borough School District be required to reimburse [Parent] for Student's tuition to Academy for the 2006-2007 and the 2007-2008 school years?
3. Should the Morrisville Borough School District be required to reimburse [Parent] for Student's tutoring at the [redacted] Center, beginning in the summer of 2006 and continuing to the fall of 2007?

### Findings of Fact

1. Student is a teen-aged eligible student residing in the Morrisville Borough School District. Student was first evaluated and found eligible for special education services in November 2002 when Student was enrolled in 3<sup>rd</sup> grade in a charter school. (NT 34-36; P-1)
2. On the evaluation Student evidenced needs in the areas of word reading, decoding and spelling, and it was specifically noted that phonemic awareness was below average. (P-1)
3. The evaluation also noted needs in the areas of behavior and emotional expression. (P-1)
4. Student entered the District's public school system beginning in the 2003-2004 school year (4<sup>th</sup> grade). The District adopted the evaluation conducted by the charter school, and issued an IEP dated September 2, 2003. The IEP identified needs in the areas of phonemic awareness, reading comprehension, math applications and writing. The Parent approved the Notice of Recommended Educational Placement (NOREP). (NT 35, 38, 455; P-2)
5. A new IEP was written dated October 18, 2004. This IEP covered the summer of 2005 and the beginning of the 2005-2006 school year, and is therefore subject to the scope of this hearing. The IEP identified needs in the areas of math applications, writing, reading comprehension and spelling. Unlike the previous IEP, this IEP listed phonics and phonetic awareness as strengths, but the basis for this determination is unclear as these areas continued to be weaknesses. (P-4)
6. The District did not issue a NOREP pursuant to this IEP. (NT 867)
7. The District did not supply the Parent with quarterly progress reports on the IEP goals during any quarter that this IEP was in effect. Notably the District's files did not contain any copies of progress reports relative to the goals contained in the October 2004 IEP. (NT 49-50)
8. In the 2003-2004 and the 2004-2005 school years Student evidenced behavioral issues concerning homework completion and peer interaction as documented through report cards for these years. Student's teachers noted that Student needed improvement in the areas of respect and consideration for self and others. Student was given two suspensions for fighting in January 2005. (NT 64; P-6, P-10, P-15)
9. In the 2004-2005 school year the Parent requested a reevaluation to address academic and behavioral needs. Pursuant to receiving a signed Permission to

- Evaluate in January 2005 the District commenced an evaluation which it also considered its triennial evaluation. (NT 41, 872; P-5)
10. During the course of the District's conducting its evaluation the parent expressed her concern regarding Student's academics in writing on a least three occasions between February and March 2005 to the school psychologist, the school principal and/or Student's teachers. (NT 42-46, 872; S-2, P-1, P-17)
  11. On April 8, 2005 the District issued its reevaluation report. Despite the fact that Student's cognitive ability testing had occurred nearly four years before and the instrument utilized had since been significantly restructured and renormed<sup>1</sup>, the reevaluation did not include a test of cognitive functioning, and also did not include any comprehensive standardized achievement test such as the Wechsler Individual Achievement Test – Second Edition (WIAT-II) or the Woodcock Johnson educational achievement battery. (NT 874-875; P-5)
  12. The school psychologist did not interview Student or conduct a classroom observation.<sup>2</sup> These parts of the reevaluation were conducted by an individual listed on the IEP signature page as "BCIU Program and Training Specialist". This individual's credentials do not include training as a psychologist, counselor, or school social worker. (NT 902-904; P-5)
  13. The only academic assessment reported in the April 2005 reevaluation was a Kaufman Test of Educational Achievement (KTEA) from January 27, 2005. This test was administered by a teacher, and administration does not require a permission to evaluate. The District routinely administers these to special education students. Unfortunately the only scores provided were expressed as grade equivalents, a less robust indicator of academic achievement than standard scores. (NT 828, 872-873; S-3)
  14. The results of the KTEA reflected well below grade level performance in each of the areas tested - reading decoding, reading comprehension, math computation, math applications and spelling. (S-3, P-5)
  15. The reevaluation report noted that Student was not meeting the math goal or the writing goal. (S-3)
  16. The reevaluation report contained an FBA which was completed by the BCIU Program and Training Specialist and a psychology intern.<sup>3 4</sup> The BCIU Program

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<sup>1</sup> The Wechsler Intelligence Scale for Children – Third Edition (WISC-III) was nearly outdated when it was administered to Student in 2002. There was an extensive restructuring of the instrument and the WISC-IV was published in 2003 (the hearing officer independently verified the publication date during the writing of this decision as neither she nor the District's psychologist could recall the exact year during the hearing).

<sup>2</sup> The current director of pupil services, a school psychologist, testified that she "served as a consultant" to the persons who did the observation. She did not observe Student directly. (NT 822, 826)

<sup>3</sup> The intern's level of completed coursework and the length of time she had already spent as an intern at the time were not a matter of record.

- Specialist is a special education teacher, as noted above is not a psychologist, and any credentials she might possess in behavioral analysis were not entered into the record. (NT 825, 902-904; S-3)
17. The reevaluation report noted that Student engaged in inappropriate conduct such as name-calling and threatening other students. (S-3)
  18. The reevaluation report contained a recommendation that the IEP team consider including behavioral goals in Student's IEP, and that the IEP team reconvene again in early September 2005 to discuss Student's needs as they related to middle school. (S-3)
  19. On the Grade Five PSSA's Student's Reading score was Below Basic and Student's Mathematics score was Below Basic.<sup>5</sup> (P-11)
  20. Pursuant to the evaluation an IEP dated April 25, 2005 was crafted for Student. The IEP identified math applications, writing conventions, reading comprehension and peer interaction skills as "Needs" and math computation and focused content and organization of writing pieces as "Strengths"<sup>6</sup>. The IEP also listed reading decoding as a strength in contradiction to the KTEA results which showed reading decoding to be a year and a half below grade level (at the 4.0 grade level). Additionally, spelling was not included as an area of need despite Student's poor performance (at the 2.9 grade level) in this area on the KTEA. (S-5)
  21. The April 2005 IEP included a goal addressing reading comprehension. It calls for reading a passage "at [Student's] instructional level" without identifying the level, and contains no baseline data. (S-5)
  22. The April 2005 IEP does not provide for a systematic, scientifically-based method of instructing Student in reading. (S-5)
  23. The April 2005 IEP included a goal addressing math applications. This goal was set at a 4<sup>th</sup> grade level,<sup>7</sup> more than 1½ grade levels below Student's actual grade level at the time (late 5<sup>th</sup> grade), and one grade level below the prior IEP of October 18, 2004 which targeted progress to a 5<sup>th</sup> grade level. Moreover, the goal target is 15 out of 24 points correct, which this hearing officer calculates at 60%, an unacceptably low expectation. The IEP indicates that progress toward the math applications goal will be measured by bi-weekly probes. The District was not

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<sup>4</sup> See footnote number 2 above.

<sup>5</sup> Although not directly comparable it is instructive to note that Student's Terra Nova scores, obtained when Student was near the end of 4<sup>th</sup> grade placed Student at national percentile rankings of 58<sup>th</sup> in reading, 40<sup>th</sup> in language, and 77<sup>th</sup> in math. Local percentile ranks were 39<sup>th</sup>, 20<sup>th</sup>, and 60<sup>th</sup> respectively. (P-11)

<sup>6</sup> Given Student's low WIAT-II scores in written expression on the April 2006 and May 2007 administrations, the designation of any area of writing skills as a strength is unsupported.

<sup>7</sup> While the Present Levels of Educational Performance note KTEA of January 2005 scores of math computation at the 4.7 grade level and math applications at the 3.5 grade level.

- able to produce any evidence that these probes were actually administered. (NT 323-335) (P-4, S-5)
24. The April 2005 IEP included a goal addressing geometry with a target of 80% correct on consecutive teacher-made quizzes. There is no baseline data presented in connection with this goal, and no indication of the grade level/difficulty level of the teacher-made tests. (S-5)
  25. The April 2005 IEP does not provide for a systematic, scientifically-based method of specially-designed instruction of Student in mathematics. There is no evidence that the District employed such a method for Student. (S-5)
  26. The April 2005 IEP included a goal addressing written expression. There is no baseline data provided, and the method of assessing progress is the PA Writing Assessment Holistic Scoring Guide (PA Writing Rubric), an inappropriate progress monitoring tool.<sup>8</sup> (S-5)
  27. The April 2005 IEP does not provide for a systematic, scientifically-based method of instructing Student in written expression. There is no evidence that the District employed such a method for Student. (S-5)
  28. The April 2005 IEP indicated that Student had behaviors that impede Student's learning or that of others, and the IEP addressed specific behavior in specific locations, with specially designed instruction carried out by specific school staff. Although well thought out, this plan was only operative for the approximately six weeks remaining in the 2004-2005 school year, as the specific behaviors, locations and personnel were related to the elementary school and not to the middle school Student was to enter in the coming school year covered by the April 2005 IEP. (NT 129-130; S-5)
  29. The April 2005 IEP notes, "Student does not meet the necessary requirements for ESY". There was no documentary evidence or credible testimony presented that the District collected any data on regression/recoupment, or in any other meaningful way determined Student's eligibility or ineligibility for ESY. When the Parent requested summer 2005 ESY services because Student was not reaching Student's IEP goals and was testing below grade level the District denied the request. The director of special education said that although forms are used in the District to determine ESY eligibility, "in the case of Student, it was just an agreement by the entire team that Student did not qualify for ESY". (NT 123-125, 495-496, 883; S-5)
  30. In violation of the Pennsylvania Department of Education Bureau of Special Education guide, the District did not issue a NOREP when it refused to initiate the

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<sup>8</sup> The Appeals Panel has held that the use of rubrics to assess writing progress is not measurable and is, therefore, inappropriate. See, for example In re M.B., Special Education Opinion No. 1603 (2005); In re R.U., Special Education Opinion No. 1492 (2004)

- parentally-requested provision of ESY services to Student for the summer of 2005. Further there was no evidence that any NOREP at all had been issued pursuant to this IEP. (NT 461-462, 865-866, 883; S-5, P-9)
31. Although the April 2005 reevaluation recommended that when Student entered 6<sup>th</sup> grade at the beginning of the 2005-2006 school year there be an IEP meeting to revise the behavior plan, the District did not convene a meeting despite requests by the Parent. The director of special education, testifying about the April 2005 IEP, noted that because of the transition to 6<sup>th</sup> grade there were a number of things in the behavioral goal that would not have made sense (after 5<sup>th</sup> grade). In lieu of convening an IEP meeting the special education teacher asked members of the IEP team individually whether there were behaviors of note and these members seemed to decide that there were none and that no IEP meeting was necessary. (NT 298-299, 364-365, 379, 464-465, 474-476, 493-494; P-5)
  32. Despite these staff members' opinions, Student had six instances of inappropriate behavior resulting in disciplinary action or suspension, three incidents being in the first marking period. Two of the six incidents were referred to the Constable. (S-40; P-15)
  33. The District failed to report Student's progress on the IEP goals during any marking period of the 2005-2006 school year. The District's files contained no copies of progress reports on IEP goals for the 2005-2006 school year. (NT 49-50, 60, 869)
  34. By letter dated February 26, 2006, the parent requested a comprehensive evaluation, and receiving no response the Parent sent another letter dated March 6, 2006 in which on the advice of a professional at the ADHD Center of the [redacted] Hospital she specified three particular tests (WISC-IV, WIAT-II and CTOPP) she wanted to be administered. (NT 465-467, 839-840; P-7)
  35. The March 8, 2006 Permission to Evaluate indicated that Student would be evaluated using tools assessing intellectual and academic functioning. (P-7)
  36. The District produced a reevaluation report dated April 5, 2006. The report contained a review of school records, an interview with the student and results from the administration of a WIAT-II. (P-7)
  37. No test of intellectual functioning was administered, as provided in the Permission to Evaluate, and hence the District continued to rely on cognitive testing data derived from an outdated instrument given when Student was eight years old. The District neither administered the WISC-IV per Parent's request, nor did it administer any other intelligence test.<sup>9</sup> (NT 468, 478-479, 876-877; P-7)

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<sup>9</sup> This is a particularly significant omission as the Wechsler Scale for children was near the end of the old norming period when it was given to Student in 2002, and the new version had been substantially revised to reflect current thinking about various cognitive processes. (See NT 874)



38. The District explained its failure to administer an updated intelligence test by asserting that IQ remains stable over time. In Student's case, as is not unusual for individuals with learning disabilities, this did not hold true as evidenced by an administration of the WISC-IV in May 2007. The differences in Student's Full Scale IQ score was 12 points, with the WISC-III score being 104 and the WISC-IV scores being 92.<sup>10</sup> The District's Acting School Psychologist noted that a change of ten points or more could be a cause for concern. (NT 445, 468, 887-889; P-14)
39. The District also failed to administer the CTOPP as requested by the parent. The District asserted that this test assesses phonological processing and that this was an area of strength for the student. Although the April 2005 IEP incorrectly identifies phonological processing as an area of strength, all test results in evidence show phonological processing as an area of weakness. The 2002 ER indicated a WIAT-II Pseudoword Decoding at a standard score of 84 (14<sup>th</sup> percentile); on the January 2005 KTEA administration Reading Decoding was at 4.0 grade level mid way through Student's 5<sup>th</sup> grade year; in May 2007 the WIAT-II Pseudoword Decoding score was 86 (18<sup>th</sup> percentile). Phonological processing is the basis for decoding (reading) and encoding (spelling), both being areas of need for Student and the latter being a distinct area of weakness for Student. (NT 467, 480-481, 845, 904- 905; P-7)
40. The ER failed to include any observations of the student in a classroom setting, and failed to include any behavioral feedback from the teachers or from the parent in the form of interviews or published standardized inventories (questionnaires). The psychologist who performed the April 2006 evaluation asserted that he did a classroom observation and elicited feedback from teachers and the Parent but his secretary neglected to include this information in his report although he reviewed and signed the ER. There are no documents, such as those present in the file for the April 2005 evaluation, indicating that written information was obtained from the teachers and Parent for the April 2006 evaluation. (NT 481-483, 877-878; P-5, P-7)
41. The ER failed to include any input from Student's physician at the ADHD clinic at Hospital. (NT 483; P-7)
42. The ER failed to include any behavioral inventories or rating scales. (NT 489-490, 878-879)
43. On the Grade Six administration of the PSSA's Student scored at the Below Basic Level on Reading and at the Below Basic Level on Mathematics. (P-11)

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<sup>10</sup> Other comparisons are not as robust, for example the WISC-III Verbal IQ of 108 versus the WISC-IV Verbal Comprehension Score of 96, as the subtests making up the major components of the scales had been substantially reworked.

44. The only credible basis that can be used to gauge whether Student made academic progress during the time Student spent in the District are two sets of WIAT-II scores, from November 2002 and from April 2006.<sup>11</sup> The scores show declines in Math Reasoning and Written Expression. As decoding was not assessed in April 2006 progress cannot be inferred, but is unlikely given Student's poor encoding skills.

Area	October 2002 <sup>12</sup>	April 2006	Difference
Word Reading	87	93	+6
Reading Comprehension	100	96	-4
Pseudoword Decoding	84	N/A	
Math Reasoning	100	88	-12
Numerical Operations	100	98	-2
Spelling	84	85	+1
Written Expression	100	81	-19

(NT 484-489, 910-912; P1, P-7)

45. An IEP for the 2006-2007 was crafted on June 14, 2006 and offered for the Parent's consideration for the 2006-2007 school year. (P-8)
46. The June 14, 2006 IEP removed the designation that Student had behaviors that impeded Student's learning or that of others, despite the disciplinary incidents that had occurred during the 2005-2006 school year and earlier. The removal of this designation was not supported by any behavior reports, behavior inventories, data sheets or functional behavioral assessments. (S-40, P-8)
47. The June 14, 2006 IEP did not list the correct present levels of academic achievement (PLEPs). Instead the scores listed were from KTEA testing done in January 2005, eighteen months earlier, whereas scores from the testing in April 2006 with the WIAT-II should have been used. Testifying that these scores were placed in the IEP in error, the special education teacher said that the scores from the November 2005 KTEA [the authenticity of which was seriously brought into question] should have been put into the IEP. This statement ignores the fact that Student received the WIAT-II in April 2006 and that this final testing actually represented Student's PLEPs. (P-8)

<sup>11</sup> There was a KTEA administered in January 2005. Another KTEA was reportedly administered in November 2005. Parent's counsel successfully cast doubt upon the November 2005 KTEA such that the hearing officer cannot accept it into the record as evidence. Moreover the special education teacher did not believe that Student was performing at the academic level the November 2005 KTEA scores suggested. See cross-examination of the special education teacher (NT 302-304) and see Footnote 11 of Parent's closing argument. Also note additionally that grade level scores are not as robust as standard scores.

<sup>12</sup> Student did not enter the District until September 2003 (4<sup>th</sup> grade). The hearing officer reasons that although one of the years of instruction was not in the District, it is fair to hold the District responsible for Student's declines so long as the District is also credited with Student's improvements. This judgment call is necessary as these are the only two administrations of a valid and reliable instrument.

48. The June 14, 2006 IEP carries a math goal (whether the goal relates to math computation or math applications is not noted) for 7<sup>th</sup> grade set at the 5<sup>th</sup> grade level, the same level as that carried in the then 19-month old October 2004 IEP, two years below Student's grade level at the time the IEP was prepared (end of 6<sup>th</sup> grade). The data on which this benchmark was set is unclear, and the District witnesses did not elucidate this matter. It may be that the math goal was pegged to the incorrect PLEP's recorded in the IEP. (P-8)
49. The math goal calls for an increase of 5 digits correct per minute (from 47 to 52) on probes over the course of the year. The IEP calls for presentation of the probes at the 5<sup>th</sup> grade level, but does not provide normative expectations for 7<sup>th</sup> grade students, and does not relate to a present level of functioning or a gauge of progress in mathematics that is comprehensible to a parent or to the hearing officer. (P-8)
50. The June 2006 IEP does not provide for a systematic, scientifically-based method of specially-designed instruction of Student in mathematics. There is no evidence that the District contemplated using such a method for Student. (P-8)
51. The June 14, 2006 IEP carries a reading goal (that is not specifically related to decoding or word recognition) that proposes that given a 5<sup>th</sup> grade text, Student will increase words correct per minute from 134 to 163. Progress is to be measured "by timed math probe". Presuming that this is yet another mistake that was overlooked by the District staff who prepared and signed off on this IEP and the probe should be a reading probe, there is no basis for selecting a 5<sup>th</sup> grade text and there is no indication of what expectations should be met by a 7<sup>th</sup> grade student. (P-8)
52. The June 2006 IEP does not carry a goal related to reading comprehension. (P-8)
53. The June 2006 IEP does not provide for a systematic, scientifically-based method of instructing Student in reading. There is no evidence that the District contemplated using such a method for Student. (P-8)
54. The written expression goal contained in the June 2006 IEP is incomprehensible. It calls for Student to "increase skills necessary" (there is no specific mention of what skills are lacking), to "perform written expression" (there is no indication whether Student will be writing letters, compositions, paragraphs, or sentences) "to 7<sup>th</sup> grade level 2, basic, including conventions" (there is no baseline) assessed by "portfolio of work and teacher made tests" (there is no indication of the specific criteria that will be used to assess Student's productions). (P-8)
55. The June 2006 IEP fails to contain any goal for spelling, which has been an identified area of need since the student has been in the District. (P-8)

56. The June 2006 IEP does not provide for a systematic, scientifically-based method of instructing Student in written expression. There is no evidence that the District contemplated using such a method for Student. (P-8)
57. The sole goal related to behavior on the June 2006 IEP addresses organization (collecting assignments, bringing appropriate materials, and completing and turning in homework). There are no other behavioral goals on the IEP to address Student's aggression with peers. (P-8)
58. In the June 2006 IEP meeting, the District again failed to consider any data related to approval or denial of ESY services for Student, despite the Parent's having requested ESY. In fact the special education teacher working on a daily basis put ESY into the IEP, but the Director of Special Education removed the item. (NT 163-164, 176-177, 495-496, 572; P-8)
59. In violation of the Pennsylvania Department of Education Bureau of Special Education guide, the District did not issue a NOREP when it refused to initiate the parentally-requested provision of ESY services to Student for the summer of 2006. (NT 496-497; P-8, P-9)
60. The District did not issue a NOREP (the equivalent of a prior written notice) to accompany the June 2006 IEP. (NT 863-865)
61. The only NOREP that the District ever issued to the Parent was in conjunction with the first IEP Student received in the District, in October 2003. (NT 867)
62. As no NOREP was issued for the June 14, 2006 IEP the Parent did not have the opportunity to formally reject or accept the proffered IEP for 2006-2007. (NT 867)
63. On the last Wednesday in August 2006 the Parent informed the District that she was enrolling Student in Academy. (NT 187)
64. In order to assist Student to improve reading and mathematics skills, the Parent enrolled Student in tutoring at the Center. As a condition of admission to Academy Student had to continue to receive tutoring from Center. (NT 181, 184, 684-685)
65. Academy is a small school that holds a state-issued license as a private academic school. All the teachers are certified teachers. (NT 666, 728).
66. Academy does not provide any type of individualized special education programming (NT 702)
67. Student did not receive any type of special education services at Academy in 7<sup>th</sup> grade (2006-2007). (NT 704)

68. In 2006-2007 Academy was relying on the tutoring at Center, tutoring after school at Academy and accommodations to address organizational difficulties. (NT 704-705)
69. In 2007-2008 Academy implemented a special small math class twice a week under the auspices of its Act 89 provider and continues to provide accommodations for organization as per an Accommodations Checklist. (NT 709-710, 716-717)
70. In 2007-2008 the math teacher that Academy has assigned to Student's math class has special education certification, but she is not providing special education services to Student. (NT 713-714, 727)
71. Academy does not implement a written program specific to Student. (NT 738-739).
72. As a condition of returning to Academy Student was required to attend summer school which Student did. The Parent paid for Student to attend summer school in the [redacted] School District. Student also continued at Center for part of the summer. (NT 711-713)
73. Student was tutored at the Center from August 10, 2006 to sometime in November 2007. (NT 632-634; P-13)
74. All Student's teachers at the Center are certified teachers. (NT 597)
75. Center meets with and provides progress reports to the school from which its pupils come. There were two meetings between the director of the center Student attends and Academy. (NT 598, 702)
76. At the Center Student was given assessments after 50, 100, 150, and 200 sessions<sup>13</sup> of tutoring to determine progress (NT 636-637; P-13).
77. At the 50 session mark, as assessed through the California Achievement Test, Student had gone from the 19<sup>th</sup> percentile at Student's grade level (7<sup>th</sup>) to the 52<sup>nd</sup> percentile at Student's grade level in vocabulary. (P-13; HO 1)
78. At the 50 session mark, as assessed through the California Achievement Test, Student had gone from the 9<sup>th</sup> percentile to the 71<sup>st</sup> percentile in reading comprehension. (P-13; HO-1)

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<sup>13</sup> Although the report says "hours", the information available on the record clearly suggests that these were sessions, not hours as each session was roughly divided into reading and mathematics.

79. In math, as assessed by the California Achievement Test, Student had advanced to the 22<sup>nd</sup> percentile after 50 sessions of tutoring, and only to the 30<sup>th</sup> percentile at 100 sessions, 150 sessions, and 200 sessions. (P-13; HO-1)
80. Half the session was spent on reading and half the session was spent on math.
81. The per session rate charged to the Parent was thirty-six dollars (\$36.00). The per session fee charged to the Parent was \$36.00. The total amount the Parent paid to Center was \$8,882.00. (NT 632, 634)
82. The Parent paid for the first 125 sessions in a lump sum, out-of-pocket and financed the remaining sessions. Financing incurred an interest charge. (NT 640-641)
83. During the 2006-2007 school year Student made progress in the areas addressed at the Center as represented by the following chart of WIAT-II administrations. Student has kept pace with Student's age-cohort, making a year's progress in a year, within the standard error of measurement in all aspects of reading and in math. Student has made substantial gains in spelling. Student's written expression has steadily decreased over the years (from 100 in 2002 to 72 in 2007), and continues to represent an as yet unremediated area of Student's academic functioning.

Area	April 06	May 07	Diff
Word Reading	93	89	-4
Reading Comprehension	96	96	=
Pseudoword Decoding	N/A	86	N/A
Math Reasoning	88	88	=
Numerical Operations	98	93	-5
Spelling	85	94	+9
Written Expression	81	72	-9

(P-1, P-7, P-14)

### Credibility of Witnesses

Hearing officers are empowered to judge the credibility of witnesses, weigh evidence and, accordingly, render a decision incorporating findings of fact, discussion and conclusions of law. The decision shall be based solely upon the substantial evidence presented at the hearing.<sup>14</sup> Quite often, testimony or documentary evidence conflicts; this is to be expected as, had the parties been in full accord, there would have been no need for a hearing. Thus, part of the responsibility of the hearing officer is to assign weight to the testimony and documentary evidence concerning a child's special education experience. Hearing officers have the plenary responsibility to make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses". Blount v. Lancaster-Lebanon Intermediate Unit, 2003 LEXIS 21639 at \*28 (2003). This is a particularly important function, as in many cases the hearing officer level is the only forum in which the witnesses will be appearing in person. This hearing officer has made the following determinations of the witnesses' credibility related to the parties' cases in chief<sup>15</sup>:

Parent: Student's mother was quite credible. She testified forthrightly during her case in chief, and evidenced a great deal of compassion towards her child. It was notable that in several instances when the District attempted to contradict the Parent's testimony, for example on the issue of whether or not progress reports were sent, the District could not produce copies of any of the documents it claimed existed, despite a purported search of the files, enhancing the Parent's credibility.

Special Education Teacher: This witness was earnest and fairly new in his role. He clearly tried his best to help Student and generously filled a mentoring role to the Student. The IEPs that he produced, however, were inappropriate, and included significant errors. It appeared to this hearing officer that he did not seem to have received the close professional supervision and mentoring that he needed. This is evidenced by the fact that the former Director of Special Education himself (the individual who produced the April 2006 ER) signed off on the June 2006 IEP, apparently not noticing its glaring errors. This individual's testimony was not given weight when his recollections and assertions conflicted with those of the Parent.

Director of Academy: This witness, who testified by telephone, was judged to be very credible. She did not attempt to embellish, simply stating what was. She was not defensive and remained courteous and open during cross-examination.

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<sup>14</sup> Spec. Educ. Op. No. 1528 (11/1/04), quoting 22 PA Code, Sec. 14.162(f). See also, Carlisle Area School District v. Scott P., 62 F.3d 520, 524 (3rd Cir. 1995), cert. denied, 517 U.S. 1135 (1996).

<sup>15</sup> The mother's testimony during the preliminary part of the hearing that addressed the presence of exceptions to the IDEIA's two-year limitations period was less credible than her testimony during her case in chief.

Teacher at Academy: This witness, also testifying by telephone, also was judged as quite open and credible. She tended to give very long answers, and seemed to want to convey the school's sincere interest in and positive regard for Student.

Former Supervisor of Special Education/School Psychologist: There were numerous problems that led to this witness' testimony being given little weight, foremost of all being that his responses tended to swerve and sway so as to modify or take back what he had just said as follow-up questions uncovered problems with his original answers. Other areas that greatly diminished his credibility were: Although under his direction the District issued a Permission to Evaluate in response to Parent request, and the Permission to Evaluate listed intellectual testing, he determined that intellectual testing was not necessary. His explanatory testimony regarding the stability of IQ over time failed to take into account that handicapped populations tend to have more test/re-test IQ variability than the typical population, and most particularly he did not take the restructuring and renorming of the Wechsler into account. His testimony that he explained to the Parent that intellectual testing would not be done was simply not credible. With regard to a reconvening of the IEP team in September 2005 to consider an updated behavior plan this witness first testified that it had met and then backtracked to say that IEP team members met but not with the Parent and not as an IEP team. The witness testified that he reviewed progress reports as part of his reevaluation of Student in April 2006, but the District failed to establish that progress reports existed and the Parent credibly testified that she had received none; likewise he reported reviewing math probes when none were in evidence or found in the records. This witness asserted that he performed a classroom observation of Student and that he received progress reports from the teachers and although he included them in an audiotape of the report the information did not appear in the ER. This explanation stretches belief beyond the breaking point given that this individual reviewed and signed off on the ER and given his many years of experience and his holding both the position of school psychologist and the position of director of special education. In a formal Response to the Parent's Complaint filed with the Office of Civil Rights, this witness represented that the April 2006 reevaluation included a review of intellectual testing from an "evaluation conducted the year prior"; when questioned he admitted that this was "a misstatement".

Supervisor of Pupil Services/School Psychologist: This individual was part of the team that conducted Student's evaluation in 5<sup>th</sup> grade. She reviewed the records and acted as a consultant to the persons who performed the direct observations and the FBA. She never had direct contact with Student. Other than her involvement with the 5<sup>th</sup> grade evaluation she has had no involvement in the matter other than reviewing records in preparation for the due process hearing. Overall this hearing officer gained the impression that she was simply trying to mop up after the District's recent failures, while still trying to maintain her own integrity. At times her discomfort seemed almost palpable.<sup>16</sup>

Center Director, Center: This witness testified credibly in the areas in which he was permitted to testify. He was not defensive when he was not allowed to testify in certain areas beyond his professional training.

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<sup>16</sup> Notably the observed discomfort was around questioning regarding things the District failed to do or did inappropriately. The witness' mentioning the need for water and to take medication was taken into account.



## Discussion and Conclusions of Law

### Burden of Proof

In November 2005 the U.S. Supreme Court held that, in an administrative hearing, the burden of persuasion for cases brought under the IDEA is properly placed upon the party seeking relief. Schaffer v. Weast, 126 S. Ct. 528, 537 (2005). The Third Circuit addressed this matter as well more recently. L.E. v. Ramsey Board of Education, 435 F.3d 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006). The party bearing the burden of persuasion must prove its case by a preponderance of the evidence. This burden remains on that party throughout the case. Jaffess v. Council Rock School District, 2006 WL 3097939 (E.D. Pa. October 26, 2006). As the Parent asked for this hearing, the Parent bears the burden of persuasion. However, application of the burden of persuasion does not enter into play unless the evidence is in equipoise, that is, unless the evidence is equally balanced so as to create a 50/50 ratio. In this matter that is not the case.

### Legal Basis and Discussion

Did the Morrisville Borough School District deny Student a free, appropriate public education during the 2005-2006 school year, including summers 2005 and 2006?  
This question is answered in the AFFIRMATIVE.

Special education issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 (“IDEIA” or “IDEA 2004” or “IDEA”), which took effect on July 1, 2005, and amends the Individuals with Disabilities Education Act (“IDEA”). 20 U.S.C. § 1400 *et seq.* (as amended, 2004). When a child has been found eligible for special education, the child is entitled under the IDEIA and Pennsylvania Special Education Regulations at 22 PA Code § 14 *et seq.* to receive a free appropriate public education (FAPE). FAPE is defined in part as: individualized to meet the educational or early intervention needs of the student; reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress; provided in conformity with an Individualized Educational Program (IEP).

A student’s special education program must be reasonably calculated to enable the child to receive meaningful educational benefit at the time that it was developed. (Board of Education v. Rowley, 458 U.S. 176, 102 S. Ct. 3034 (1982); Rose by Rose v. Chester County Intermediate Unit, 24 IDELR 61 (E.D. PA. 1996)). The IEP must be likely to produce progress, not regression or trivial educational advancement [Board of Educ. v. Diamond, 808 F.2d 987 (3d Cir. 1986)]. Polk v. Central Susquehanna IU #16, 853 F.2d 171, 183 (3<sup>rd</sup> Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989), citing Board of Education v. Diamond, 808 F.2d 987 (3<sup>rd</sup> Cir. 1986) held that “Rowley makes it perfectly clear that the Act requires a plan of instruction under which educational *progress* is likely.” (Emphasis in the original). The IEP must afford the child with special needs an education that would confer meaningful benefit. Additionally, the court in Polk held that educational benefit “must be gauged in relation to the child’s potential.”

Districts need not provide the optimal level of service, or even a level that would confer additional benefits, since the IEP as required by the IDEA represents only a basic floor of opportunity. Carlisle Area School District v. Scott P., 62 F. 3d at 533-534. What the statute guarantees is an “appropriate” education, “not one that provides everything that might be thought desirable by ‘loving parents.’” Tucker v. Bayshore Union Free School District, 873 F.2d 563, 567 (2d Cir. 1989). If personalized instruction is being provided with sufficient supportive services to permit the student to benefit from the instruction the child is receiving a “free appropriate public education as defined by the Act.” Polk, Rowley. The purpose of the IEP is not to provide the “best” education or maximize the potential of the child. The IEP simply must propose an appropriate education for the child. Fuhrman v. East Hanover Bd. of Educ., 993 F. 2d 1031 (3d Cir. 1993).

The IEP process must be based upon an appropriate and comprehensive evaluation which identifies the student’s complete educational needs. East Penn School District v. Scott B., 29 IDELR 1058 (E.D. Pa. 1999) (“an IEP cannot be appropriate if the evaluation is incomplete,”@ at Footnote 6). Special Education Opinion Number 1024 (an IEP must be based upon a proper CER, and if the CER is not proper, the IEP cannot be appropriate). The District’s ERs of April 2005 and April 2006 were fatally flawed. For this reason, and for the intrinsic reasons inherent in the IEPs themselves, the IEPs, as written, are fatally flawed. “[A]n Individual Education Program (IEP) is the primary vehicle for providing students with the required free and appropriate education.” S.H. v. State-Operated School District of the City of Newark, 336 F.3d 260, 264 (3d Cir. 2003).

The IEP for each child with a disability must include a statement of the child’s present levels of educational performance; a statement of measurable annual goals, including benchmarks or short-term objectives, related to meeting the child’s needs that result from the child’s disability to enable the child to be involved in and progress in the general curriculum and meeting the child’s other educational needs that result from the child’s disability; a statement of the special education and related services and supplementary aids and services to be provided to the child...and a statement of the program modifications or supports for school personnel that will be provided for the child to advance appropriately toward attaining the annual goals (and) to be involved and progress in the general curriculum...and to be educated and participate with other children with disabilities and nondisabled children; an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class... CFR §300.347(a)(1) through (4)

In the 2004 revisions to the IDEA, Congress has affirmed its position that *de minimis* procedural violations do not constitute a deprivation of FAPE. Section 1415, provides that in matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies: impeded the child’s right to a free appropriate public education; significantly impeded parents’ opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the child; or caused a deprivation of educational benefit. Thus, mere procedural violations do not compel a finding that a student has been denied FAPE. The denial of FAPE will be found only

where the violations of a procedural safeguard result in the loss of educational opportunity or prejudice the student's ability to receive FAPE. In Re J.D. and the Colonial School District, Special Education Opinion No. 1120 (2001); In Re K.B. and the Sto-Rox School District, Special Education Opinion No. 1477 (2004); In Re B.T. and the Harrisburg School District, Special Education Opinion No. 1577 (2005); In Re D.J. and the Philadelphia School District, Special Education Opinion No. 1745 (2006). Nevertheless, in this particular case, this hearing officer is compelled to quote the appeals panel's Opinion No. 655 (regarding another school district) as follows, "We advise the District that the procedural safeguards established under IDEA and Pennsylvania regulations are neither optional nor insignificant. We further advise the District that the pertinent legal opinion (see, e.g., Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 1982) requires compliance -- not partial compliance, not compliance only with significant aspects, not intended compliance."

The evidence is overwhelming that the two evaluations performed on Student by the District were inadequate to identify Student's educational needs and to plan an appropriate program of specially designed instruction (FF 11, 12, 13, 14, 37, 39, 40, 41, 42). In this regard, and in regard to the IEP for 2005-2006 and the proffered IEP for 2006-2007, the District engaged in both procedural violations and substantive violations that combined to deny Student FAPE. Although there is ample basis upon which to decide that FAPE was denied through substantive failures, the District's procedural violations were numerous and bear mentioning as well.

Testimonial and documentary evidence, as well as the lack of some documents and the uncertain provenance of one document (the purported November 2005 KTEA), showed that the District had consistently acted in, at best, a careless manner with regard to fulfilling its obligation to provide Student with FAPE, and that it disregarded the Parent's rights to meaningful participation in her child's education. Among other things, the District did not issue NOREPs with any of its IEPs after the first IEP (FF 6, 60, 61, 62), did not gather data regarding regression/recoupment in order to make a determination of ESY eligibility (FF 29, 58), did not issue NOREPs when it refused parental requests for ESY (FF 30, 59), did not provide IEP progress reports to the Parent (FF 33), prepared a Permission to Evaluate proposing assessment elements that it then did not carry out and did not explain to the Parent why it was not performing the types of assessment she and Student's ADHD specialist physician had requested<sup>17</sup> (FF 34, 35, 36, 37, 38), neglected to update the previous behavior management plan when Student entered the middle school which was a totally different setting and offered a totally different schedule despite the recommendation to do so in the ER (FF 31), did not provide a behavior management plan in its proposed IEP despite Student's having behavioral issues during the school year just ended (FF 46, 57), identified a longstanding weakness as a strength (FF 5), produced an ER for which behavioral observations and behavior assessments either were not done or through clerical error were left out of the ER (which was however reviewed and signed off by the author) (FF 40, 42), placed PLEPs that were eighteen

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<sup>17</sup> Although the District was not required to employ the specific tests requested by the Parent, as choice of instruments is at the discretion of the psychologist, the failure here is that the District did not use any tests of the kind requested by the Parent and listed on the Permission to Evaluate.

months old into an IEP (that was reviewed and approved by the IEP team) (FF 47), failed to write meaningful IEP goals to address identified needs (FF 20, 21, 22, 23, 24, 25, 26, 27, 48, 49, 50, 51, 52, 53, 54, 55, 56), failed to indicate baselines for expected levels of achievement (FF 20, 21, 22, 23, 24, 25, 26, 27, 48, 49, 50, 51, 52, 53, 54, 55, 56), failed to carry out the progress monitoring assessments called for in the IEP (FF 33), and listed math probes in the IEP to assess reading progress (FF 51).

Compensatory education is an appropriate remedy where a school district has failed to provide a student with FAPE. M.C. v Central Regional School District, 81 F.3d 389 (3<sup>rd</sup> Cir. 1996); Lester H. v. Gilhool, 916 F.2d 865 (3<sup>rd</sup> Cir. 1990), cert. denied, 488 U.S. 923 (1991). For many years the period of compensatory education has been calculated to be equal to the period of deprivation, less a reasonable rectification period. Ridgewood Board of Education v. N.E., 172 F.3d 238 (3<sup>rd</sup> Cir. 1999) Since 2006, hearing officers can also focus on what it will take to bring the student to the point s/he should have been if not for the deprivation of FAPE. B.C. v. Penn Manor, 906 A.2d 642 (Pa. Cmwlth. 2006)

The evidence is overwhelming that the District's procedural and substantive errors deprived Student of FAPE, and compensatory education will be awarded for the summer of 2005, and the 2005-2006 school year. Although Student would also be awarded compensatory education for the summer of 2006, an award for tutoring services beginning that summer will suffice in this regard. Compensatory education will be awarded in the amount of 72 hours (3 hours per day x 4 days per week x 6 weeks) for failure to appropriately assess ESY needs for the summer of 2005.

Concerning the 2005-2006 school year, although Districts are sometimes granted a reasonable rectification period during which to correct an inappropriate IEP, this will not be done in this case. In line with Spec. Educ. Opinion No. 1783 (December 2006) ("the District has known of these disabilities since long before the school year [forming the basis of the complaint] yet failed to address them in any meaningful way during the [previous school years]; consequently, we find no deduction is necessary to allow for a period of reasonable rectification by the District."), the District should have known during the 2004-2005 school year that its program for Student was not working and had plenty of time to make any necessary adjustments. Had it produced an appropriate ER in April 2005 perhaps an appropriate IEP for 2005-2006 would have ensued, but it did not. Compensatory education will be awarded for the entire 2005-2006 school year, as the District failed to provide Student with an appropriate ER upon which to base an appropriate IEP, failed to provide Student with appropriately designed and progress-monitored instruction in reading, mathematics and written expression, and failed to adequately address Student's needs in the areas of behavior management and organization. This hearing officer estimates that an award of three and a half hours per day is equitable, given the extent of the failure to provide FAPE, and the award is therefore 630 hours (180 days x 3.5 hours per day).

The total compensatory education award therefore is 702 hours.

Spec. Educ. Appeal No. 1763 (September 2006) provides a comprehensive explanation of the parameters of compensatory education awards and is reproduced here for the benefit of the parties:

The Panels have provided guidance for determining how, when and where compensatory education that is due a student must be provided. In B.R., Spec. Educ. Opinion No. 1102 (2001), the Panel held: “Certain guidance may be inferred from applicable case law, however, as well as in common sense principles. First and foremost, compensatory education is a remedy which does not seek to give a student that to which s/he is already entitled. As an eligible student is entitled to FAPE, it follows that compensatory education may not simply further current and future educational goals which are (or should be) included in Student’s present IEP. Instead, compensatory education serves to make up for a prior deprivation of service. In addition, it is the parent who has properly sought and obtained an award of compensatory education from a school district which had deprived a student of FAPE. Just as a parent may choose the site of a private school placement, which will be upheld where a school district has denied FAPE so long as the placement is ‘reasonable’, then logically a parental selection of compensatory education services should be honored so long as the selection is appropriate and reasonable under the circumstances.”

Thus, we hold that Student’s parents may decide how the hours should be spent so long as they take the form of appropriate developmental, remedial or enriching instruction that furthers the goals of Student’s present or future IEPs. Such hours must be in addition to Student’s then current IEP and may not be used to supplant such services. These services may occur after school hours, on weekends and during the summer months, when convenient for Student and Student’s parents.

There are financial limits on the parents’ discretion in selecting the appropriate developmental, remedial or enriching instruction that furthers the goals of the student’s present or future IEPs. The costs to the District of providing the awarded hours of compensatory education should not exceed the full cost of the services that were denied. Full costs are the salaries and fringe benefits that would have been paid to the actual professionals who should have provided the District services and the actual costs for salaries, tuition and transportation for contracted services. This principle sets the maximum cost of all of the hours or days of the compensatory education awarded. The parents may balance expensive and inexpensive instruction or services so long as the total cost and hours do not exceed the maximum amount. The parents also may use fewer hours of expensive services so long as the maximum amount is not exceeded. Finally, the parents may not be required to make co-payments or use personal insurance to pay for these services.

Additionally, we reiterate the rule underscored in previous decisions that the time for utilizing the compensatory education awarded may extend beyond age 21. Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990); R.S., Spec. Educ. Opinion No. 1755 (2006).

Should the Morrisville Borough School District be required to reimburse [Parent] for Student's tuition to Academy for the 2006-2007 and the 2007-2008 school years?

This question is answered in the NEGATIVE.

Parents who believe that a district's proposed program is inappropriate may unilaterally choose to place their child in an appropriate placement. The right to consideration of tuition reimbursement for students placed unilaterally by their parents was first clearly established by the United States Supreme Court in Burlington School Committee v. Department of Education, 471 U.S. 359, 374 (1985). A court may grant "such relief as it determines is appropriate". "Whether to order reimbursement and at what amount is a question determined by balancing the equities." Burlington, 736 F.2d 773, 801 (1<sup>st</sup> Cir. 1984), *affirmed on other grounds*, 471 U.S. 359 (1985).

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

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

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

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

placement was appropriate, and; 3) if so, whether the equities reduce or remove the requested reimbursement amount.

Case law has established that the private school placement selected by a parent, where the District's program is inappropriate, does not need to conform to federal or state IDEA regulations. Florence County 4 School District v. Shannon Carter, 126 L.Ed.2d 284 (1993). Therefore the teachers do not have to meet state requirements and the students do not have to have IEPs generated by the school. However, even if this hearing officer were inclined to apply the most generous criteria possible, Academy falls far short of the standard for providing an appropriate replacement for the program the District failed to provide.

Had this parent had the financial means to pay tuition to one of the established and well-respected private schools specifically addressing students with learning disabilities, the evidence in this hearing would have overwhelmingly supported an award of tuition reimbursement for the 2006-2007 school year at the very least, and possibly for the current school year depending on whether the District used the data from the Catapult evaluation of May 2007 to craft an appropriate IEP. Instead, the Parent did the best she could and placed Student in Academy, a small private school whose tuition is about one-fifth of the tuition of a school dedicated to the education of special education students. This hearing officer regrettably must find Academy inappropriate. Although it seems to have served the purpose of providing Student with a safe, nurturing environment where Student's behavior and attitude have changed substantially, and seems to have accommodated Student's organizational difficulties to some extent, it did not offer Student any form of specially designed instruction that would replace/remediate the deprivation Student suffered through the District's inappropriate programming. Academy has relied heavily on the tutoring at Center and on the Act 89 services through the BCIU to address Student's special education needs. It has in itself not afforded Student the type of program that would satisfy the second step in considering tuition reimbursement. This hearing officer agrees with the District citing *In re: The Educational Assignment of Robert M.*, Spec. Ed. Op. No. 845 (1998), in its closing argument, wherein it noted that Appeals Panel ruled that in order for a parent's private school to be found appropriate, "Minimally, parental placements should be calculated to provide some element of programming [in which] they assert the district's proposal to be deficient."

Should the Morrisville Borough School District be required to reimburse [Parent] for Student's tutoring at the Center, beginning in the summer of 2006 and continuing to the fall of 2007?

This question is answered in the AFFIRMATIVE, with modifications.

In order to begin to provide the instruction in reading and math that the District failed to provide, the Parent enrolled Student in tutoring at the Center in the summer of 2006. This tutoring is being considered as a replacement for potential ESY services for the summer of 2006, and also most importantly as a replacement for the FAPE which the

District should have offered through the June 2006 IEP but did not and which the Parent, had she the financial means, might have accessed through a private school dedicated to educating learning disabled children. As the tutoring did provide Student with the FAPE that the June 2006 IEP so clearly denied Student the tutoring is being considered analogous to tuition reimbursement, and as it was an appropriate service, will be reimbursed up to the point where Student reached grade level in reading, and for its entirety in math as Student did not reach grade level in that area.

The Parent paid out of pocket for a total of 242 sessions. Each session was divided roughly into reading instruction and math instruction. The Parent paid \$36 per session which will be divided into \$18 for reading and \$18 for math. After 50 sessions of Reading instruction Student reached the 50<sup>th</sup> percentile at Student's grade level in reading. This reading instruction will therefore be reimbursed as follows: 50 sessions x \$18 = \$900. After 200 sessions Student had still not reached the 50<sup>th</sup> percentile at Student's grade level in mathematics. It stands to reason therefore that by 242 sessions Student would still not have reached grade level, as Student was at the 30<sup>th</sup> percentile at the 200-session mark. The first 125 sessions were directly paid by the Parent out-of-pocket, and the remaining 117 sessions were financed and an interest charge was incurred. (NT 640) Therefore, the math instruction will be reimbursed as follows: 125 sessions x \$18 = \$2,250; and 117 sessions x \$18 = \$2106 plus the interest the Parent paid on this latter amount.



## Order

It is hereby ordered that:

1. The Morrisville Borough School District denied Student a free, appropriate public education during the 2005-2006 school year, including summers 2005 and 2006.
2. The Morrisville Borough School District must provide Student with compensatory education in the amount of 702 hours as calculated above. The compensatory education should be structured in accord with the discussion above.
3. The Morrisville Borough School District is not required to reimburse the Parent for Student's tuition to Academy for the 2006-2007 and the 2007-2008 school years as, although the District failed to offer an appropriate program for 2006-2007, the placement unilaterally chosen by the Parent is not an appropriate placement for delivery of special education services.
4. The Morrisville Borough School District is required to partially reimburse the Parent for Student's reading tutoring at the Center, and totally reimburse the Parent for Student's mathematics tutoring at the Center, beginning in the summer of 2006 and continuing to the fall of 2007, in the amount of \$4356.00 as calculated above, plus the finance charge on part of that sum as described above.

March 18, 2008

Date

*Linda M. Valentini, Psy.D.*

Linda M. Valentini, Psy.D.  
Hearing Officer