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

Student  
ODR #7981/07-08 LS

Date of Birth: xx/xx/xx

Dates of Hearing  
October 4, 2007  
October 9, 2007  
January 24, 2008

CLOSED HEARING

For the Student:

Parents

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Date Record Closed: February 22, 2008  
Date of Decision: March 7, 2008  
Hearing Officer: Daniel J. Myers

## **Background**

Student contests the School District's proposed educational program and placement, arguing that it fails to offer a free and appropriate public education (FAPE.) As an alternative to the School District's proposal, Student's parents have secured Student's acceptance at an Approved Private School. Student seeks compensatory education from January 8, 2007 to the present for FAPE denial, as well as an order directing the School District to fund Student's enrollment in the APS. For the reasons described below, I find for the Student.

## **Issues**

- Whether or not the School District's proposed program and placement is appropriate.
- Whether or not the School District must fund Student's enrollment in the APS.

## **Findings of Fact**

1. Student is an xx year old resident of the Scranton City School District who has received special education services since her early elementary school years. Student's cognitive abilities are not easily defined, but they appear to be in the low average range. (SD1, p.6; SD14, pp.8-12; N.T. 389)<sup>1</sup> Student has been diagnosed with mental retardation, speech and language delays, auditory processing delays, attention deficit hyperactivity disorder (ADHD) and Pervasive Developmental Disorder (PDD). (SD1; SD14; SD35; N.T. 16)
2. On January 7, 2007, the parties settled a due process dispute by agreeing:

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<sup>1</sup> References to "HO", "P", and "SD" are to the Hearing Officer, Parent and School District exhibits, respectively. References to "N.T." are to the transcripts of the hearing sessions.

- a) To change Student's disability designation from Mentally Retarded to Other Health Impaired;
- b) To develop an IEP by May 15, 2007, for Student's 2007-2008 school year that would, among other things, implement a structured writing program;
- c) That the School District would fund private Wilson Reading tutoring;
- d) That the School District would reimburse Student's parents for an evaluation by Dr. G; and
- e) That the School District would pay Student's reasonable attorney's fees.

(P4)

3. Although Student walked with her chronological peers at a commencement ceremony in spring 2007, the parties anticipate that Student will receive special education programming through the age of 21 years. Between May 28 and August 29, 2007, the parties met to develop an IEP for 2007-2008. (SD35; SD41)
4. For the 2007-2008 school year, the School District proposes that Student attend part of the day in its public high school learning support classes, and part of the day at the Career Technology Center of Lackawanna County (CTC). (SD41, pp.1, 11) CTC offers a three year training program in various vocational disciplines including Family Consumer Science, Horticulture and Landscaping. (N.T. 168, 590)
5. The School District's proposed IEP addresses the following:
  - a) Student's present level of academic achievement in reading fluency is 100 words per minute on a 3<sup>rd</sup> grade level, and reading comprehension is an average of 3.5 correct answers in 5 questions on a 3<sup>rd</sup> grade passage.

(SD41, p.6) The IEP's reading fluency goal is to increase fluency by one word per week for 36 weeks. (SD41, p.15) The reading comprehension goal projects that she will answer five of five questions from materials at that 3.5 grade level. (SD41, p.14)

- b) Student's present level of academic achievement in single digit addition and subtraction fluency without a calculator is 10.5 digits correct per minute (dcpm). (SD41, p.6) Fluency in both single and double digit addition and subtraction fluency without a calculator is 11dcpm. The IEP math goal is to increase fluency by 2.5 dcpm each quarter. (SD41, p.16-17)
- c) Although Student's evaluation report indicates deficits in written expression (SD40, p.20), and although the IEP's specially designed instruction includes a structured expressive writing program (SD41, p.24), the proposed IEP does not include a goal for written expression. (N.T. 105, 552)
- d) Student's employment outcome is competitive employment with support. (SD41, p.11) Activities for achieving this outcome are: 1) attendance at CTC for horticulture and landscaping; 2) corrective reading; 3) mathematics; 4) exploration by Student and her parents of career options available through CTC; 5) meeting with the Office of Vocational Rehabilitation (OVR) to discuss services, options and benefits available to Student; and 6) attendance of a career fair. (SD41, pp. 11-12) Prior to development of the proposed IEP, the School District's Transition

Coordinator conducted an assessment of Student's interests. (N.T. 140-149; SD29) The Transition Coordinator did not administer an "enhanced employability test" because his supervisor did not request it, nor did he assess Student's needs in the area of independent living. (N.T. 148, 173). He did not consider for Student any training options other than those offered at the CTC. (N.T. 151)

- e) Student's Independent Living outcomes on the IEP are living at home with her family, accessing community resources with the support of mental health agencies and family members, and participating in special programs for people with disabilities as well as in community programs with family agency and/or outside support. (SD41, p.12) Activities for achieving these outcomes are Special Olympics dances, Special Olympics sporting events, and family consumer science class at the high school. (SD41, pp.12-13)
- f) The proposed IEP includes speech /language goals in pragmatics and listening skills, to be implemented through the Earobics program as well as twice weekly speech and language therapy. (SD41, pp. 18, 19, 22, 25)
- g) The CTC class that the IEP envisions student would attend next year would consist of six students in the morning session. (N.T. 588) Tests would be administrated orally if needed, inside or outside the classroom, and could be modified as multiple choice, reduced in the number of questions, and answers could be provided verbally rather than in written form. (N.T. 592-593) Textbooks are at the 5<sup>th</sup> grade level. (N.T. 600) The horticulture classroom will be run like a real florist shop, with students

answering the telephone, taking orders, using the cash register, and making change. CTC also provides job interview training. (N.T. 602, 603)

6. Student's parents disagree with the School District's proposed educational program and placement, and they seek placement at Private School, an approved private school (APS) in [town redacted], Montgomery County. (N.T. 12) APS is a private school that accepts students who have neurological impairment. 65 to 70% of its students carry a diagnosis of PDD. (N.T. 304) The school's curriculum is designed to include life skills, community living skills, academics and vocational opportunities. (N.T. 305) APS also has a residential program which offers additional community-based involvement. All APS teachers are certified in special education as well as in their particular class subject matters. The average class size is seven students. The school also has occupational therapists, speech therapists, nurses and two part-time psychiatrists on staff. (N.T. 305-306)
7. Student was accepted at APS after a two-day visit with her parents. (N.T. 338) The admissions team recommended weekly individual and group and family/parent counseling, speech and language therapy, social skills training and nursing and psychiatric services as needed. (N.T. 309-312, 317-318) The vocational program includes career sampling, off campus employment opportunities and vocational activities with 1:1 assistance or group assistance if needed. (N.T. 307, 319-320) Each school building is assigned a clinician, an occupational therapist and a speech pathologist. The upper and lower schools are

- assigned reading specialists. Services are provided in the classroom environment and, if necessary, on an individual basis. Speech pathologists work on social skills groups in the classrooms with the teacher and with the teacher assistant. (N.T. 325-326) The residential component of the program consists of on-campus living units averaging about six students to each unit. They are staffed on a one to three staffing ratio. The focus of the program within each cottage is on daily living skills, social skills, relationships and navigating recreational activities. Students also participate in community-based programs such as participation in the local "Y", Special Olympics, if appropriate, and such activities as visiting libraries, festivals and malls. Students are provided with instruction in the development of skills needed to navigate these activities. (N.T. 327)
8. On August 30, 2007, the parties conducted an unsuccessful resolution meeting. (HO2) Accordingly, I scheduled a hearing to commence on October 4, 2007. (HO2) SD exhibits SD1-SD41 were admitted without objection. (N.T. 616) Parent exhibits P1-P4 were admitted without objection. (N.T. 617)
9. Student offered the expert testimony of Dr. G. She has been a certified school psychologist for 30 years and a licensed psychologist for 10 years. (N.T. 385) She spent 20 years as a social worker and school psychologist for public schools, and the last 14 years as a psychologist in private practice. (N.T. 366-387) She evaluated Student twice, in 1993 and 1996. (N.T. 387; SD1; SD14) Dr. G noted that Student's memory had improved from the deficit range to the moderate range, and that Student was more interactive than three years before, with more direct eye contact. (N.T. 410, 425) Dr. G noted, however, that Student's deficit in

social skills had become more pronounced since her initial evaluation in 2003. (N.T. 424) She observed that, while Student had improved her decoding skills over three years, it had not improved as much as expected, given Student's cognitive ability in the low average range. (N.T. 410-411, 415, 419) Student's word attack skills moved only from a 2.3 grade equivalent to a 3.1 grade equivalent in three years. (SD14, p. 3) Dr. G noted that Student has not improved significantly in writing, with her Writing Sample subtest score moving only from 2.1 to 2.6 in three years. (N.T. 414) Dr. G had suggested APS to Student's parents, as one of several suggested educational placements. (N.T. 478) Dr. G admits that she has never observed the School District's high school or the CTC, nor had she ever spoken to School District personnel about Student. (N.T. 478-480) Further, to the extent that she is concerned about Student's safety at CTC, such concerns also apply to APS. (N.T. 480, 482, 483)

10. Student also offered the expert testimony of Dr. M, who is the special projects director at APS. She holds a doctorate in special education and education psychology, a master's degree in special education, and she is certified in special education and educational psychology. (N.T. 303) Dr. M stressed the importance of Student's need for independent living skills. (N.T. 324) Dr. M has never observed the School District's high school or the CTC, nor had she ever spoken to School District personnel about Student. (N.T. 335, 356) Dr. M's testimony primarily concerned how the APS could meet Student's needs, and she explained that the APS would start with the School District's IEP, perhaps with modifications, during the initial period of Student's enrollment. (N.T. 351)

11. Student's language arts teacher acknowledged that Student's reading skills had remained at the 3<sup>rd</sup> grade level since the time that he first taught her in 9<sup>th</sup> grade. (N.T. 203)
12. Student argues that the School District's proposed IEP fails to address Student's learning disabilities in reading, writing and math. She notes that her IEP contains no writing goal despite her disability in written expression. She argues that the parties' January 2007 settlement agreement providing for a structured writing program (P7) cannot reasonably be interpreted as a request to drop the writing goal from the IEP, and she notes the testimony of a School District witness that "We screwed up there." (N.T. 552) Student also argues that the School District has used the SRA reading program to provide ineffective reading instruction to Student since her 9<sup>th</sup> grade year, with no evidence to support the continued use of that program. (N.T. 81, 91) She further notes that no other reading program has been, or will be, tried with Student because the School District uses the SRA program exclusively. (N.T. 108) She contends that the proposed IEP's transitional services plan does not provide her with the training and support that she needs in order to achieve a reasonable degree of independence.
13. The School District counters that, considering student's cognitive limitations, she has been making meaningful educational progress all along. The School District notes that transitional services have been incorporated into the IEP, and that the School District's proposed placement in a learning support class in the High School, as well as the CTC Vocational Program in Horticulture, are appropriate to meet Student's needs. Acknowledging that the proposed IEP could be improved,

the School District argues that that is not a sufficient reason for ordering a placement at APS. The School District argues that the record does not establish that CTC cannot meet the student's needs. The School District argues that the testimonies of both Dr. G and Dr. M are based on pure speculation, and that no one can state with any degree of certainty that Student should be placed anywhere else. Finally, the School District argues that APS is not the least restrictive environment appropriate for Student.

### **Discussion**

Under the Individuals with Disabilities Education Improvement Act (IDEIA), the School District is required to provide a free appropriate public education (FAPE) to all Students who qualify for special education services. 20 U.S.C. § 1412 The School District program will meet its FAPE obligation if it provides special education and related services at public expense, that meet the standards of the state educational agency, and that are provided in conformity with an individualized education program (IEP.) Stroudsburg Area School District v. Jared N., 712 A.2d 807 (Pa. Cmwlth. 1998)

### **Burden of Proof**

The United States Supreme Court has held that, in an administrative hearing challenging a special education IEP, the burden of persuasion (which is only one element of the larger burden of proof) is upon the party seeking relief, whether that party is the disabled child or the school district. Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005); In Re J.L. and the Ambridge Area School District, Special Education Opinion No. 1763 (2006) If the evidence produced by the parties is completely balanced, or in equipoise, then the non-moving party prevails and the party

with the burden of persuasion (i.e., the party seeking relief) must lose. Schaffer v. Weast, supra. If the evidence is not in equipoise, but rather one party's evidence is preponderant, or of greater weight or more convincing than the other party's evidence, then that party prevails whose evidence tips the scales.

In this case, Student seeks relief (compensatory education and placement at APS) and therefore bears the burden of persuasion. Of course, as I just noted above, where any party has produced more persuasive evidence than the other party (regardless of who seeks relief), then the evidence is not in equipoise, and the Supreme Court's ruling is not at issue – in that case I must simply find in favor of the party with the more persuasive evidence.

**The School District's proposed program and placement is not appropriate**

**a. Written Expression**

Student's IEP contains no writing goal even though her evaluation report indicates deficits in written expression (SD40, p.20), the parties agreed in their January 2007 settlement agreement to a structured writing program (P7), and the IEP's specially designed instruction includes a structured expressive writing program. (SD41, p.24; N.T. 105, 552) Dr. G noted that Student has not improved significantly in writing, with her Writing Sample subtest score moving only from 2.1 to 2.6 in three years. (N.T. 414) I agree with a School District witness who testified that "We screwed up there." (N.T. 552) It is simply not enough for the IEP to anticipate using a structured writing program. The IEP must also describe what Student is expected to accomplish within that writing program. Without a written expression goal in this case, the IEP is inappropriate.

**b. Reading**

Student's present level of academic achievement in reading fluency is 100 words per minute on a 3<sup>rd</sup> grade level, and reading comprehension is an average of 3.5 correct answers in 5 questions on a 3<sup>rd</sup> grade passage. (SD41, p.6) The IEP's reading fluency goal is to increase fluency by one word per week for 36 weeks. (SD41, p.15) The reading comprehension goal projects that Student will answer five of five questions from materials at that 3.5 grade level. (SD41, p.14) Student's language arts teacher, however, acknowledged that Student's reading skills had remained at the 3<sup>rd</sup> grade level since the time that he first taught her in 9<sup>th</sup> grade. (N.T. 203) Dr. G observed that, while Student had improved her decoding skills over three years, it had not improved as much as expected, given Student's cognitive ability in the low average range. (N.T. 410-411, 415, 419)

The IEP fails to recognize, and certainly does not address, Student's inexplicably slow progress in reading. The School District's written closing argument suggests that not much progress should be expected due to Student's "...limitations in regard to educational achievement, not the least of which is an IQ which has been diagnosed within the Mental Retardation range...." (School District Written Closing Argument, p.9) This argument might be more persuasive if there was any evidence in the record to support it. The record, however, lacks any expert evidence of the reading progress rate to be expected of children with Student's IQ. This record also lacks any evidence of Student's own reading progress rates in response to various teaching methodologies. Without first attempting different reading instruction strategies, the School District cannot credibly conclude that Student is incapable of progressing faster in reading. (Student contends

that the School District uses one reading program exclusively. (N.T. 108)) The School District's argument seems to rely simply upon an unfounded assumption that children with Student's IQ can't learn to read past the 3<sup>rd</sup> grade level. I do not accept this because it lacks any evidentiary basis in the record.

Accordingly, I conclude that the School District's proposed IEP is inappropriate because it simply reiterates the same, apparently ineffective, reading instruction that has been used in the past.

### **c. Transition Services**

At age 16, a special education student's IEP must include: 1) Appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and 2) The transition services (including courses of study) needed to assist the child in reaching those goals. 34 CFR §300.320(b) "Transition services" refers to a coordinated set of activities for a child with a disability that: (a) Is designed to be within a results-oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child's movement from school to post-school activities, including postsecondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation; and (b) Is based on the individual child's needs, taking into account the child's strengths, preferences, and interests; and includes: (i) Instruction; (ii) Related services; (iii) Community experiences; (iv) The development of employment and other post-school

adult living objectives; and (v) If appropriate, acquisition of daily living skills and provision of a functional vocational evaluation. 34 CFR §300.43(a)

A transition plan requires an ultimate placement objective, without which a school district cannot establish coordinated activities directed towards desired outcomes. In Re EC and the Philadelphia School District, Special Education Opinion No. 1641 (2005), citing “IDEA, the Courts and the Law of Transition”, McAfee and Greenwalt, 2001. Development of an appropriate transition plan also will include an interest inventory, step-by-step strategies, and disability-related linkages that are sufficiently tailored to the individual student’s disability-related needs. In Re AB and the Lower Merion School District, Special Education Opinion No. 1644 (2005)

Where an IEP states that a student will identify and explore requirements of post-secondary education and training programs, but does not indicate how Student is to go about doing so other than a suggestion that the transition coordinator would provide assistance, that IEP does not provide appropriate transition programming for Student under the IDEA because it fails to describe a coordinated set of activities based on specific goals or outcomes. In addition, mere referrals to outside agencies and other resources deny FAPE in the area of transition. In Re KB and the Sto-Rox School District, Special Education Opinion No. 1639 (2005)

A transition plan is inappropriate if it really is just a random walk where the school district has merely thrown some services on the table that are not really directed towards a goal but simply provide activities. Consideration must be given to Student’s level of independent living skills and how or whether she can compensate for any deficits. Simply exploring opportunities is insufficient, she must be immersed in

activities designed to enhance the likelihood of success in the chosen adult environments.

In Re BC and the Whitehall-Coplay School District, Special Education Opinion No. 1262 (2002)

An IEP team must begin by identifying the environments in which Student is likely to spend her early adult life, then identify the demands of those environments, measure Student's current abilities against them, and finally develop a coordinated set of activities, services and experiences designed to narrow the gap between Student's current functioning and the demands of the chosen environments. In Re BC and the Whitehall-Coplay School District, Special Education Opinion No. 1262 (2002)

In light of the standards provided in the cases cited above, I find the School District's IEP to be inappropriate. The School District's proposed IEP describes Student's employment outcome as "competitive employment with support." (SD41, p.11) Rather than containing a plan that enables Student to achieve this outcome, given her disabilities, however, the proposed IEP simply lists various activities such as: 1) attendance at CTC for horticulture and landscaping; 2) corrective reading; 3) mathematics; 4) exploration by Student and her parents of career options available through CTC; 5) meeting with the Office of Vocational Rehabilitation (OVR) to discuss services, options and benefits available to Student; and 6) attendance of a career fair. (SD41, pp. 11-12) The IEP does not indicate how these activities will enable Student to achieve the expected outcome. Clearly, something besides the activities themselves will be required, such as learning particular skills (rather than simply attending classes), reading at a particular grade level (rather than just taking reading classes), and making actual career decisions (rather than simply attending a career fair.)

Indeed, the School District's Transition Coordinator did not administer an "enhanced employability test" because his supervisor did not request it, nor did he assess Student's needs in the area of independent living. (N.T. 148, 173). He also did not consider for Student any training options other than those offered at the CTC. (N.T. 151) The proposed IEP is inappropriate because its transition plan merely lists generic "opportunities" rather than describing an actual "transition plan."

### **Remedy**

Under IDEA, a disabled student is entitled to a free appropriate public education until she reaches age twenty-one. See 20 U.S.C.A. § 1412(2)(B) An award of compensatory education allows a disabled student to continue beyond age twenty-one in order to make up for the earlier deprivation of a free appropriate public education. See Ridgewood Bd. of Educ. v. N.E. ex rel. M.E., 172 F.3d 238 (3d Cir.1999); M.C. v. Central Reg. Sch. Dist., 81 F.3d 389, 395 (3d Cir.1996); Carlisle Area School District v. Scott P., 62 F.3d 520 (3d Cir.1995) Where a School District failed to offer the Student FAPE, the Parents were entitled to tuition reimbursement and fees for Student's 2004-2005 APS placement. In Re EC and the Philadelphia School District, Special Education Opinion No. 1641 (2005)

In this case, Student seeks compensatory education from January 8, 2007 to the present for FAPE denial, as well as an order directing the School District to fund Student's enrollment in the APS. The January 8<sup>th</sup> date apparently is based upon the fact that the parties settled a previous due process dispute on January 7, 2007. (P4) That settlement agreement, however, anticipated that compliance would take awhile, up to May 15, 2007. (P4) It seems inequitable for Student to agree to the development of an

IEP over the course of an upcoming semester, as she did here, and then later complain that FAPE was denied during that semester of IEP development. In addition, School Districts often are allowed a reasonable period for rectification of FAPE denial, and the spring 2007 semester is a reasonable rectification period in this case. Thus, I will not order compensatory education for the period from January 8, 2007 to the date of the proposed IEP, August 29, 2007.

Student also seeks an order directing the School District to fund Student's enrollment in the APS. The School District argues that the testimonies of both of Student's expert witnesses, offered to support the APS placement, are based on pure speculation, and that no one can state with any degree of certainty that Student should be placed anywhere but CTC. The School District also argues that APS is not the least restrictive environment appropriate for Student.

Dr. M has never observed the School District's high school or the CTC, nor had she ever spoken to School District personnel about Student. (N.T. 335, 356) Similarly, Dr. G never observed the School District's high school or the CTC, nor had she ever spoken to School District personnel about Student. (N.T. 478-480) Further, to the extent that she is concerned about Student's safety at CTC, such concerns also apply to APS. (N.T. 480, 482, 483) The School District is also correct that the APS is not considered a "least restrictive" educational environment. 65 to 70% of its students carry a diagnosis of PDD. (N.T. 304)

On the other hand, the School District's failure in this case was to develop an IEP with appropriate reading and writing goals as well as a coordinated plan of outcome-oriented transition activities. APS is certainly well-equipped to compensate for those

failures. All APS teachers are certified in special education as well as in their particular class subject matters. The average class size is seven students. The upper and lower schools are assigned reading specialists. Services are provided in the classroom environment and, if necessary, on an individual basis. Speech pathologists work on social skills groups in the classrooms with the teacher and with the teacher assistant. (N.T. 325-326) The school's curriculum is designed to include life skills, community living skills, academics and vocational opportunities. (N.T. 305) APS also has a residential program of on-campus living units averaging about six students to each unit with a 1:3 staffing ratio which offers additional community-based involvement. (N.T. 305-306) The focus of the program within each cottage is on daily living skills, social skills, relationships and navigating recreational activities. Students also participate in community-based programs such as participation in the local "Y", Special Olympics, if appropriate, and such activities as visiting libraries, festivals and malls. Students are provided with instruction in the in the development of skills needed to navigate these activities. (N.T. 327) Dr . M stressed the importance of Student's need for independent living skills. (N.T. 324)

Where a School District failed to offer a Student FAPE, the Parents were entitled to tuition reimbursement and fees for Student's 2004-2005 APS placement. In Re EC and the Philadelphia School District, Special Education Opinion No. 1641 (2005) That seems to be appropriate compensatory education in this case for FAPE denial for the 2007-2008 school year. With diligence, the School District may be able to mitigate its liability in future school years by developing an appropriate IEPs. With appropriate

IEPs, the School District might be able bring Student back to a less restrictive environment for her remaining school years. That, however, is for the future.

Accordingly, because the School District's proposed IEP is inappropriate, I will order the School District to fund Student's enrollment in the APS for one school year as compensatory education for FAPE denial for the 2007-2008 school year.

### **Conclusion**

The School District has offered an IEP that is inappropriate because it fails to address Student's reading needs appropriately, lacks any written expression goal, and does not contain an appropriate transition plan. In light of the parties' settlement agreement contemplating development of an IEP over the spring 2007 semester, I will not order compensatory education for the time period of January through August 2007. I will, however, order compensatory education, in the form requested by Student, for FAPE denial for the 2007-2008 school year.

### **ORDER**

The School District's proposed 2007-2008 IEP is inappropriate.

The School District must fund Student's enrollment in the APS for one school year.

*Daniel J. Myers*

Hearing Officer

March 7, 2008  
Student Scranton School District  
ODR #7981/07-08 LS