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## **Decision**

Due Process Hearing for GB

Date of Birth: xx/xx/xx

File Number: 8060/07-08LS

Dates of Hearings:

November 2, 2007; November 28, 2007; November 30, 2007; December 13, 2007;

January 8, 2008

## **CLOSED HEARING**

Parties:

Mr. and Mrs.

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Date Transcript Received:

January 13, 2008

Date Closing Arguments Received

January 25, 2008

Date of Decision:

February 9, 2008

Hearing Officer:

David F. Bateman, PhD

## **I. BACKGROUND**

Student is a xx year-old eligible resident of the Elizabethtown Area School District (District) with a learning disability, whose Parents requested this Hearing on three specific issues. They seek reimbursement for the 2007-2008 school year at the Private School and related transportation costs, reimbursement for the costs of an independent educational evaluation, an award of compensatory education for inappropriate services from 2005 to the present. The District alleges their program is appropriate, is the least restrictive environment, and that since it would provide an appropriate program the various reimbursements sought are unwarranted.

## II. FINDINGS OF FACT<sup>1</sup>

### A. Background

1. Student was born on xx/xx/xx. She is currently xx-years of age (S-1, p. 1).
2. Student is a resident of the District (P-1, p. 1).
3. Student is eligible for special education and related services as a student with a learning disability and emotional disturbance (S-34, p. 1).
4. The District completed a psychological report on October 25, 2002. The report found that Student functioned intellectually within the average range, with significant discrepancy between her verbal and nonverbal abilities. The report found her eligible for special education and related services as a student with a learning disability and emotional disturbance (S-1, p. 7).
5. The District completed an evaluation report on November 11, 2002. This evaluation report found her eligible for special education and related services as a student with a learning disability and emotional disturbance (S-2, p. 7).
6. Student's scores on the PSSA in 2004 indicate below basic scores in reading and math. This was for her fifth grade year (S-3).
7. Progress reports for 2004 indicate progress on most of her goals and objectives, with problems areas in interpersonal skills (S-4).

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<sup>1</sup> References to notes of testimony will be designated "NT" followed by the relevant page number. References to District evidentiary exhibits will be designated "S" followed by the relevant exhibit number. References to Parents' evidentiary exhibits will be designated "P" followed by the relevant exhibit number. Findings of Fact will be designated by "FF" followed by the relevant fact number.

8. An IEP was developed on January 4, 2005 (S-5). This IEP provides for seven hours of learning support services a week.
9. Student had numerous behavior problems in the 2004-2005 school year (P-16). Most of the behavior problems related to missed homework.
10. The District completed a child/adolescent services feedback form on September 9, 2005. The responses on the form indicate Student is not a behavior problem to her teachers, displays independence, and appears to be handling the transition to 7th grade (S-6, p. 2).
11. The District developed a behavior support plan on September 21, 2005. The specific targets of the plan dealt with Student's difficult time with organization, difficult time following directions in the classroom, and difficult time completing class and homework (S-7).
12. Student's teacher completed reports regarding her performance in November 2005. The reports include statements such as: Student is often off-task, homework completion is sporadic (S-8, p. 1); Student has a difficult time with others and is off task a lot (S-8, p. 2); Student has a difficult time interacting with her peers and frequently does not complete homework assignments (S-8, p. 4); Student is unable to complete the on-level work in math class and is not friendly with anyone on the class (S-8, p. 6).
13. The District issued a permission to evaluate on November 16, 2005 (S-9).
14. The District invited the Parents to an IEP meeting on December 1, 2005 (S-10).

15. An IEP was developed on December 1, 2005 (S-11). The IEP calls for TSS service but no TSS services were provided (NT 104, 401). The IEP provides goals in writing, math, and organization skills.
16. On January 11, 2006 the District provided reports on a feedback form to Community Behavioral HealthCare Network of Pennsylvania stating Student is not a behavior problem in class, staying on-task is a concern, and that she does not have any close peer relationships. She also continues to need constant reminders (S-12).
17. In March 2006 the Parents sent an email to the District stating the amount of success Student is experiencing is unacceptable (P-11).
18. On April 12, 2006 the District provided reports on a feedback form to Community Behavioral HealthCare Network of Pennsylvania stating Student is not a behavior problem in class, staying on-task is a concern, and that she does not have any close peer relationships. She also continues to need constant reminders and redirection of daily routines (S-13).
19. On May 1, 2006 the District provided reports on a feedback form to Community Behavioral HealthCare Network of Pennsylvania stating Student is not a behavior problem in class, staying on-task is a concern, and that she does not have any close peer relationships. It is also noted they are disappointed with the consistency of the program (S-14).

20. On May 2, 2006 Student kicked another student and received school detention (P-15).
21. In June 2006 the District created a narrative summary of Student's progress as a part of a report card report (S-15). The narrative indicates inconsistent effort, some improvements, and occasionally oppositional.
22. Student's final grades during the 2005-2006 school year indicate an F in mathematics, D in science, C in social studies, a C in communication arts, and B in physical education (P-1).
23. Student's PSSA scores in 2006 indicate basic performance in reading and math (S-17).
24. A summer report from the Private School indicates improvement in her ability to acknowledge her learning difficulties (P-18).
25. On September 19, 2006 Student stated she wanted to shoot Ms. K and slit another student's throat (P-8).
26. The District sent a letter to the Parents in October 2006 indicating Student would be working in the Gateways Program (S-18). The Gateways Program helps with the Study Island Program.
27. In October 2006 behavioral data on the BASC2 indicate problems with externalizing problems, hyperactivity, aggression, depression, school problems, attention problems, atypicality, withdrawal, behavioral symptoms index, adaptive skills, adaptability, social skills, and study skills (P-13).

28. Quarterly progress reports for the 2006-year indicate Student continues to struggle in writing in all five areas (S-19, p. 1); she had scores in the 60's and occasional 80's in math (S-19, p. 2); she showed inconsistent efforts in organizational skills and task completion (S-19, p. 3); and she is reading on the 5.0 grade level (S-19, p. 4).
29. An IEP meeting was held on November 21, 2006 (S-20). The IEP developed was in place for the remainder of her 8th grade year and the beginning of her 9th grade year. The IEP contained annual goals in writing, reading, math, and organizational skills.
30. On January 4, 2007 the special education teacher stated Student displays immature behaviors in class, does not have many friends, and is functioning below norms for her class (P-20).
31. On January 29, 2007 the District invited Student into the Ninth Grade Academy. The purpose of the Academy is help struggling readers who have scored below basic on the seventh grade PSSA (S-22).
32. The Parents obtained an independent psychological evaluation in February 2007 (P-3). This assessment found a WISC-IV full scale IQ of 68 and made notes regarding her struggles in school.
33. An IEP meeting was held on February 22, 2007. Observations shared included she has increased her time on task, she is completing more homework, has increased her time on task, and they are impressed with her progress in class (S-23, p. 2).

34. An IEP was issued on February 22, 2007 (S-24). The IEP contained annual goals in writing, reading, math, and organizational skills.
35. The District completed a progress-monitoring chart regularly in 2007 (S-27). The quarterly reports indicate some progress in each quarter for reading, math, and organization skills.
36. In June 2007 the District created a narrative summary of Student's progress as a part of a report card report (S-28). The narrative indicates consistent effort and some improvements.
37. The teachers in seventh grade created narrative reports on her progress (S-31). The reports indicate some behavior problems, some off-task problems, her keeping to herself, and other minor misbehaviors (S-31).
38. Student's report card for the 2006-2007 school year indicate grades of a 70 in Family and Cons science, 83 in music, 83 in phys ed, F in pre-algebra, 82 in PSSA reading, a P in Science, an F in social studies, and a P in Spanish (P-6). Grade reports provided to the Parents indicate failing grades through much of the year except in science (P-7).
39. Student's PSSA scores in 2007 for reading and math were both below basic levels (P-5).
40. Student's PSSA scores in 2007 for writing were at the basic level (P-9).
41. A 2007 summer report from the Private School indicates Student had problems completing assigned work and that Student is a student with low self esteem (P-19).



42. The District issued an IEP revision on September 12, 2007 (S-34). The purpose of the revision was a part of the resolution meeting (NT 556).
43. The District issued a permission to reevaluate on September 14, 2007 (S-33). The permission to reevaluate was issued at the request of the Parents.
44. Student's ninth grade schedule would include reading academy, physical education, health, basic foods and nutrition, learning support English, earth science academy, leaning support math, and wildlife management (S-35).
45. The Parents have not received financial assistance for Student to attend the Private School (P-24).

### **III. ISSUES PRESENTED**

Is Student eligible for compensatory education for inappropriate services for a denial of a free appropriate public education for the years of 2005-2006, and 2006-2007?

Is Student eligible for tuition reimbursement (and transportation) for the 2007-2008 school year to the Private School ?

Are the Parents entitled to reimbursement for an independent educational evaluation?

### **IV. DISCUSSION AND CONCLUSION OF THE LAW**

#### **Student's Educational Placement**

The legal standard to which the District is held, in educational matters such as this, is clearly established by statute and the courts. The IDEA, as interpreted by the Supreme Court, does not require states to develop IEP's that "maximize the potential of handicapped children," but merely requires the provision of "some" educational benefit. *See Board of Education v. Rowley*, 458 U.S. 176, 189 (1982). In further defining "some" educational benefit, the Court held IDEA requires that the public school program provide access to specialized instruction and related services which are "reasonably calculated" to provide the student with some educational benefit. *Id.* at 207-208. Further clarified by the Second Circuit, 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). The Third Circuit has adopted this minimal standard for educational benefit, and has refined it to mean that more than “trivial” or “de minimus” benefit is required. *See Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 1179 (3d Cir. 1998), *cert. denied* 488 U.S. 1030 (1989). *See also Carlisle Area School v. Scott P.*, 62 F.3d 520, 533-34 (3d Cir. 1995), quoting *Rowley*, 458 U.S. at 201; (School districts “need not provide the optimal level of services, or even a level that would confirm additional benefits, since the IEP required by IDEA represents only a “basic floor of opportunity”).

Moreover, the Third Circuit has determined that a student’s demonstrated progress in an educational program is sufficient to show that a school district’s IEP allows for significant learning and provides meaningful benefit as necessary to satisfy the *Rowley* interpretation of IDEA’s FAPE standard. *See Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 242 (3d Cir. 1999). Given that actual progress establishes that a student with a disability received an appropriate educational benefit, it is therefore also part of the determination as to whether a reimbursement award is due.

#### Parents Claim for Compensatory Education

Parents make a claim for compensatory education. Compensatory education may be an appropriate equitable remedy only when the responsible educational authority has failed to provide a child with a disability with an appropriate

education as required by the IDEA. The purpose of compensatory education is to replace lost educational services. *See Todd v. Andrews*, 933 F.2d 1576 (11th Cir. 1991). *See also Lester H. v. Gilhool*, 916 F.2d 865 (3<sup>rd</sup> Cir. 1990); (An IDEA eligible student is entitled to an award of compensatory education only if FAPE is denied by the school district); and *M.C. v. Central Regional Sch. Dist.*, 81 F.3d 389 (3<sup>rd</sup> Cir. 1996). Here, Student did not make meaningful educational progress during the school years in question.

This Hearing Officer has reviewed carefully the educational programs in effect for Student.<sup>2</sup> For numerous reasons as described below, this Hearing Officer concludes the IEP and program and services implemented during this period were inappropriate.

A detailed review of the IEP at issue in this case reveals that it is not reasonably calculated to provide meaningful educational benefit. Specific reasons for the conclusion follow:

#### **November 21, 2006 IEP**

Behaviors that impede his/ her learning or that of others is not checked but there is a behavior plan for Student. In addition, there is no mention of challenging behaviors throughout the present levels nor is it mentioned in the needs portion of part B. However, throughout the IEP, organization and time on task are mentioned as an issue or a need.

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<sup>2</sup>The analysis of the content of the IEP is very similar to the analysis and content of the IEP as found in appeals panel decision of September 15, 2003. *In re K.G.*, Pa. SEA no. 1400.

## **Behavior Plan**

The behavior plan targets the following: Time on task, organization, following directions, assignment completion, and responding appropriately to others. These targets are all appropriate however; they are not addressed in present education levels with details that are measurable and observable, nor is there a behavior goal written. Instead, organization is mentioned in the form of a goal but not mentioned in the needs section part B.

## **II. Present Levels of Academic Achievement and Functional Performance**

### **Part A**

Student's personal information is fine in the first paragraph. It enables the team to identify her positive personality characteristics. However, more concrete data is necessary as well. Such as how old, what grade and what school does she attend, and what type of service she is currently receiving. It should include how long she has been receiving special education and any related services.

Overall the present levels are weak and inadequate. This portion contains very little measurable and observable data and contains too many subjective statements with no hard-core data to back it up.

On a more positive note, much of the subjective statements are considered to be specially designed instruction. Such as, "She often requires many cues and prompts to get on task, and to complete the task." Therefore, the information in the present levels coincides with the specially designed instruction.

Also, the present levels do match up with the measurable annual goals. It was

easy to pull out the math goal, writing/spelling goal, reading comprehension goal, and the reading fluency/decoding goal. Again, the information reported needs to be less subjective and more measurable and observable. The reading paragraph of the present levels contained the most measurable and observable data. It should have contained more measurable and observable data. Other than the reading area, no other assessment results were reported in the present levels. Another thing the present levels did not do is report or specify how below grade level Student is functioning and working.

Lastly, the present levels did not contain any information about how Student is functioning in her other middle school subject areas of civics, science, and related arts. However, Student utilizes all of these skills in her other subject areas of civics, science, and related arts as well therefore, these subjects should not be neglected to be reported upon.

## **How the Student's Disability affects involvement and progress in General Education Curriculum**

### **Part B**

For every need there needs to be a strength. For example, if there are five needs then there needs to be at least five strengths.

In addition, when drafting an IEP, Districts need to be careful not to write any old strength and need just for the sake of writing strengths and needs. This is very apparent in Student's IEP. For example, strong sight word vocabulary is listed. Where is the data to back this strength up? Nothing was written/reported within the

present levels. This would be a great opportunity to include more measurable and observable data within the present levels by administering a simple sight words assessment to Student and then report her results in the present levels.

The second statement, good visual memory also seems just thrown into the strengths without any support or backing.

The third statement, willing to help adults should is unclear. She maybe very willing to do this, however, it wasn't reported in the present levels therefore it cannot be used as a strength. Again, strengths and needs must coincide or be supported in the present levels.

### **III. Goals and Objectives**

The first goal, the writing/spelling goal is fine but just needs a few changes. The words "his" and "he" need to be changed to "her" and "she." A rubric needs to be added to the description part of how the child's progress toward meeting this goal will be measured. Basically, the writing/spelling goals is based upon the PA State PSSA writing rubric of focus, content, organization, style, and conventions, therefore rubrics needs to be added because this is how Student's writing progress will be measured.

The second goal, the reading goal, also only needs a few changes. The words, improving her learning, needs to be removed. How do you see this or measure this? This statement is too vague and generalized. The percentages on the short-term objectives need to match up with the percentages in the annual goal.

The third goal, the math goal, needs to be reworked. The math number skills

were not reported in the present levels.

The fourth goal, Work Completion skills, also only needs a few changes. Teacher's monitoring chart needs to be added to how the child's progress towards meeting this goal will be measured. This is attached to the back of the IEP along with the behavior plan and is used to monitor Student's progress throughout her day. It did not state in the present levels that Student does not come to her classes organized or that she doesn't have the appropriate materials when she comes to class. If she already comes to class with these items and they are organized, then this does not need to be a short-term objective. However, if she doesn't do this then it needs to remain as a short-term objective but also be included in present levels.

#### **IV. SDI**

The frequency needs to be changed from "as needed" to something more specific such as daily, or when tests/quizzes are given, or when Student is unfocused.

### **February 22, 2007 IEP for Student**

Overall, there are improvements from the November 21, 2006 IEP to the February 22, 2007 IEP, but not enough.

#### **I. Special Considerations...**

##### **Other Special Considerations**

The behaviors that impede his/ her learning or that of others is checked. Behavior



is addressed by receiving TSS services. When one looks further into the IEP at the present levels it is discovered that the TSS is addressing the areas that are being targeted in the Behavior plan. The behavior plan is the exact same one for November and February.

## **II. Present Levels of Academic Achievement and Functional Performance**

### **Part A**

Again, Student's personal information is fine in the first paragraph. It enables the team to identify her positive personality characteristics. However, more concrete data is necessary as well. Such as how old, what grade and what school does she attend, and what type of service she is currently receiving.

Although there is new information included, overall the present levels are weak and inadequate. This portion still contains very little measurable and observable data and contains too many subjective statements with no hard-core data to back it up.

Also, the present levels do match up with the measurable annual goals. It was easy to pull out the math goal, writing/spelling goal, reading comprehension goal, and the reading fluency/decoding goal. Again, the information reported needs to be less subjective and more measurable and observable. The reading paragraph of the present levels contained the most measurable and observable data. It should have contained more measurable and observable data but it was a step in the right direction. Other than the reading area, no other assessment results were reported in the present levels. Another thing the present levels did not do is report or specify

how below grade level Student is functioning and working.

In addition, the present levels still do not contain any information about how Student is functioning in her other middle school subject areas of civics, science, and related arts. This is another weakness of the present levels. Often data and information is only reported on the subject areas where the student is receiving special education services. In Student's case this is reading, written expression, and math. However, Student utilizes all of these skills in her other subject areas of civics, science, and related arts as well therefore, these subjects should not be neglected to be reported upon.

There are some questions concerning the new information that is reported on the February 22, 2007 IEP. The first issue is pass/fail. Why did the IEP team place Student on pass/fail unless they expect her to only have a certificate of attendance upon graduation? Does her identified disability warrant or make it necessary for Student to have the grade of pass/fail? It appears that the IEP team is purposely lowering the bar and establishing lower expectations for Student in order to gain greater self-confidence. How is this helping Student when she is still expected to take the PSSA test at her grade level? Also, if her grades are pass/fail, then why would the IEP team write goals that reflect the natural grading scale of a general education student who receives 90% accuracy or better. Overall, the pass/fail grading system was an inappropriate recommendation that was made by the IEP team.

The second paragraph of present levels includes all new information relating to Student's behavior and the TSS. This is a good thing, since it further supports

why Student should have a behavior plan and a TSS. In the November 2006. IEP, there was inadequate behavioral information to support the reason why Student had to have a Behavior plan.

The writing present levels paragraph has been improved upon by explaining what the score of 2 actually means. It still neglects to state that a rubric is used.

The math paragraph is still weak. There is little to no measurable or observable information regarding how Student is currently functioning in math. The IEP team should have included math assessment data in the present levels.

## **How the Student's Disability affects involvement and progress in General Education Curriculum**

### **Part B**

Again, for every need there needs to be a strength. For example, if there are five needs then there needs to be at least five strengths.

In addition, when drafting an IEP, special education teachers need to be careful not to write any old strength and need just for the sake of writing strengths and needs. This is very apparent in Student's IEP. For example, strong sight word vocabulary. Where is the data to back this strength up? Nothing was written/reported within the present levels. This would be a great opportunity to include more measurable and observable data within the present levels by administering a simple sight words assessment to Student and then report her results in the present levels.

The second statement, good visual memory also seems just thrown into the

strengths without any support or backing. Student has good visual memory according to whom?

The third statement, willing to help adults should also be removed unless there is data. It doesn't say anywhere in the present levels that Student is willing to help adults. She maybe very willing to do this, however, it wasn't reported in the present levels therefore it cannot be used as a strength. Again, strengths and needs must coincide or be supported in the present levels.

The fourth statement enjoys talking to adults and sharing stories/experiences is reported within the present levels, therefore it may remain.

The fifth statement is new and says states that Student is artistic and creative. Since this information is reported in the present levels, it should remain.

The needs portion of part B is fine for the most part. The five needs match up to the present levels and the annual goals. The IEP team did include a behavioral need for Student, which includes focus/time on task. However, there is one area of improvement. A sixth need, something such as Organizational skills & Work habits should have been included. This is reported within Student's present levels and it is also included as a Measurable Annual Goal. In order for something to be a goal, it needs to be reported as a need in part B. If the IEP team feels that there is a need, it must be either addressed as a goal or SDI.

The effect on Involvement and Progress in General Education Curriculum statement is has been reworked and improved upon.

### **III. Goals and Objectives**

The first goal, the writing/spelling goal is fine but just needs a few changes.

Basically, the writing/spelling goals is based upon the PA State PSSA writing rubric of focus, content, organization, style, and conventions, therefore rubrics needs to be added because this is how Student's writing progress will be measured.

The reading goal has been reworked. There are now two annual goals instead of one annual goal with short-term objectives. One is for decoding/fluency and the other is for reading comprehension. The first annual goal has been improved upon because the IEP team added the 150 words per minute, which makes the goal more observable and measurable. The second annual goal is an entirely new goal based on comprehension.

The third goal, the math goal, still needs to be reworked. One question is where did the math number skills come from? This was not reported in the present levels. The math short-term objectives are fine, however, why the accuracy rate of 95% is so high especially since she will be receiving pass/fail grades for math.

The fourth goal, Organizational Skills and Work habits have not changed from the previous IEP from November 2006. This goal needs only a few changes. Teacher's monitoring chart needs to be added to how the child's progress towards meeting this goal will be measured. This is attached to the back of the IEP along with the behavior plan and is used to monitor Student's progress throughout her day. Is the third short-term objective necessary? It did not state in the present levels that Student does not come to her classes organized or that she doesn't have the appropriate materials when she comes to class. If she already comes to class with these items and they are organized, then this does not need to be a short-term objective. However, if she doesn't do this then it needs to remain as a short-term

objective but also be included in present levels. Also, the fourth short-term objective needs to be continued (only 2 prompts per class) with a fifth and sixth short-term objective.

#### **IV. SDI**

It is obvious the specially designed instruction has been greatly reworked. One of the positive changes of the SDI is that the frequency is more specific instead of written as “as needed” in the November 2006 IEP.

One is left unsure why there are two paragraphs explaining SDI that Student should receive in high school. Again, the decision to give Student pass/fail grades are inappropriate and not in her best academic interest.

#### **VI. Educational Placement**

Under the explanation of the extent statements for regular education class and general education curriculum do not match up. In addition to these statements not matching up, they also do not match to the rest the services stated in the IEP. It states that Student is to receive two out of 8 periods in the school year in Learning Support (English and Math). Is there a need for Student to have an English Learning Support placement? There is a writing goal. But there is also a reading goal for Student as well yet this statement only includes English and Math. Should Reading be in there as well? Therefore it would be three out of 8 periods in the school year. Also, according to the SDI, Student is receiving direct instruction in reading (SRA-Corrective Reading) in the LS classroom for 45 minutes daily. If this

is the case, then Reading should also be included in this statement dealing with the regular education class-unless however, the school district is counting English and Reading as one class period. Regardless, is should be explained better to clear up any confusion.

Also, the second statement dealing with the extent in which Student will not participate with non-disabled children in the general education curriculum does not seem correct. If Student is receiving direct instruction in Corrective Reading and Saxon Math in the LS classroom for 45 minutes daily, then she will not be part of the general education curriculum for all subjects. This statement also needs to be corrected and explained further.

Accordingly, the IEP is also not reasonably calculated to provide meaningful educational benefit.

Additionally, the testimony presented did not indicate she made progress during the two years in question. Her grades were poor and her behaviors got worse.

It is well settled that compensatory education is an appropriate remedy where a school district knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only trivial educational benefit, and the district fails to remedy the problem. *M.C. v. Central Regional School District*, 81 F.3d 389 (3rd Cir. 1996). Such an award compensates the child for the period of time of deprivation of special education services, excluding the time reasonably required for a school district to correct the deficiency.

This Hearing Officer concludes that the District should have provided Student with two hours per day of systematic special education instruction in order to be

properly responsive to her significant learning disabilities. The District has known of these disabilities since long before the 2005 school year yet failed to address them in any meaningful way during the 2005-06 and 2006-07 school years; consequently, no deduction is necessary to allow for a period of reasonable rectification by the District.

Accordingly, the panel shall award 720 hours of compensatory education (2 hours per day for each school day in the two school years) to remedy the deprivation. Additionally, as was explained in *In re B.R.*, Spec.Ed.Op. No. 1102 (2001), certain principles must apply to the compensatory education award.

“First and foremost, compensatory education is a remedy which does not seek to give a student that to which 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 his 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.”

Accordingly, 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, and may occur after school hours, on weekends and during the summer months, when convenient for Student and her 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 that the average cost is below the maximum amount. The Parents also may use fewer hours of expensive services so long as the maximum amount is not exceeded. The Parents may not be required to make co-payments or use personal insurance to pay for these services. Finally, we reiterate the recognized rule 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); *In re R.S.*, Spec. Educ. Opinion No. 1755 (2006).

Parents Request for Reimbursement to the Private School

Under the two-part test for private school reimbursement established by the Supreme Court established in 1985, prior to *Schaffer*, the school district must establish the appropriateness of the education it provided to the student.<sup>3</sup> If the school district is unable to establish the appropriateness of its own educational program, then under the 1985 precedents the burden then shifts to the parents to prove that the private school selected for their child did provide an appropriate education. See *Burlington School Committee v. Massachusetts Department of Education*, 471 U.S. 379 (1985).<sup>4</sup> Since *Schaffer* there have been no known appellate cases addressing the viability of *Burlington's* burden of persuasion aspects, although a logical analysis suggests such burden will fall on parents without altering the substantive requirements.

As *Rowley* principles have been applied in the context of private placements, a disabled child is “not . . . entitled to placement in a residential school merely because the latter would more nearly enable the child to reach his or her full potential.” *Abrahamson v. Hirschman*, 701 F.2d 223, 227 (1st Cir. 1983). In making a determination regarding a school district’s obligation to pay for private placement generally and not simply residential ones, a court must make the following inquiries:

First, the court must ask whether the district’s IEP was reasonably calculated to confer an educational benefit on the student. If

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<sup>3</sup> This Hearing occurred after *Schaffer v. Weast*, 126 S.Ct. 528, and the Parents had the burden of demonstrating the District’s program was inappropriate.

<sup>4</sup> Later, in *Florence County Sch. Dist. v. Carter*, 114 S.Ct. 361 (1993), the Supreme Court reaffirmed the test for private school tuition reimbursement established in *Burlington*, and added that private school placements selected by parents need not be at facilities which are approved by state departments of education for the provision of education to students with disabilities.

the court determines that the IEP was not so calculated, the court must then ask whether the parents' unilateral choice to place a student in a residential setting is the appropriate educational choice for the student. If the answer to the second inquiry is yes, then the parents would be entitled to reimbursement from the school district for the cost of the placement.

*Hall v. Vance County Bd. Of Educ.*, EHLR 557:155.

Importantly, in gauging the appropriateness of the District's actions toward Student, the IEP must be judged as to its appropriateness at the time that it is written, and not with respect to subsequently obtained information about the student. The ideas that "an IEP is a snapshot, not a retrospective," and that the IEP must take into account what was objectively reasonable at the time that the IEP was drafted were recognized by the First Circuit in *Roland M.*, supra, and have been adopted in the Third Circuit. See, e.g. *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 534 (3d Cir. 1995); *Fuhrmann v. East Hanover Board of Educ.*, 993 F.2d 1031, 1040 (3d Cir. 1993). See also *Philadelphia School District*, 22 IDELR 825, 826 (SEA PA 1995). Left unaddressed, though, is the apparent contradiction between this and the concept of actual progress, which is obviously subsequent to IEP creation, establishing meaningful educational benefit.

It is true that school districts have been required to pay for the educational components of private placements, even in cases where the students require those placements solely for medical reasons, when the school district's own educational programming for the student is deemed deficient. See *Board of Education of Oak Park and River Forest High School v. Illinois State Board of Education*, 29 IDELR 52 (N.D. Ill 1998), (Where student's need for private placement was primarily for non-educational reasons, district court limited parents' claim for reimbursement to

the educational component of the private placement given that the school district's educational provisions for the student were inappropriate, and the academic program the student received at the school was appropriate).

In this case there was testimony and comments about the requested private school placement that need be addressed. In that connection, the second part of the Burlington-Carter test is whether the private school placement was "proper under the Act." See *Burlington*, and *Carter*. The program is appropriate given the analysis below.<sup>5</sup>

Tuition reimbursement is an available remedy for parents to receive the costs associated with a child's placement in a private school where it is determined that the program offered by the public school did not provide FAPE, and the private placement is proper. See *Carter* and *Burlington*. Equitable considerations are relevant to making such a determination. *Id.* However, the parents' choice of private placement need not strictly satisfy the IDEA requirements in order to qualify for reimbursement. See *Carter*. The standard is whether the parental placement was reasonably calculated to provide the child with educational benefit or, again, "proper under the Act." *Carter; David P. v. Lower Merion School District*, 27 IDELR 915 (E.D.Pa. 1998).

The Private School is for students with learning differences, and the teachers are trained in working with students who have learning disabilities. The tuition for

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<sup>5</sup> The analysis of the Parent's request for tuition reimbursement is based on the analysis found in the appeals panel decision of December 1, 2006. *In re A.Z.*, Pa. SEA no. 1783.

the school is \$23,500<sup>6</sup> of which the Parents received no financial aid (P-24). The Parents are also seeking transportation to the school.

Why is it an appropriate placement? Student requires the targeted implementation of an intensive small group and individualized educational setting, such as offered by the Private School. The Private School is designed to work with students who have learning disabilities (NT 591) in a small class size (NT 592).

It has already determined that the District did not offer FAPE for the 2007-08 school year. After a review of the record, the private placement is an appropriate one. The private school is a small one that addresses Student's needs. Her schedule includes intensive programming in small classes that addresses her needs for a sequential, research-based program (NT 605). In sum, the program at the private school will address Student's identified educational needs and is clearly appropriate under the applicable standard. Additionally, there is nothing in the record to suggest that any adjustment to the award of tuition reimbursement is necessary based on equitable principles. Accordingly, the District shall be ordered to reimburse the parents for the full amount of the tuition to the private school for Student for the 2007-08 school year plus related transportation costs.

### **Independent Educational Evaluation<sup>7</sup>**

An independent educational evaluation (IEE) is an evaluation "conducted by a qualified examiner who is not employed by the public agency responsible for the

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<sup>6</sup> <http://www.thePrivateSchools.org/financial-aid.html>

<sup>7</sup> 34 C.F.R. § 300.502

education of the child in question.”<sup>8</sup> Parents of a child with a disability have the right to obtain an IEE of their child.<sup>9</sup> Upon request, each LEA must provide information to parents explaining where an IEE may be obtained.<sup>10</sup> Whenever parents obtain an IEE, the public agency must consider the evaluation when making any decision regarding provision of a FAPE to the child with a disability. In the event that there is a due process hearing, the IEE may be presented as evidence.<sup>11</sup>

The "IEE" issue is governed by 34 CFR § 300.502. It provides that, if a parent disagrees with a school district's evaluation and a hearing officer finds the district's evaluation was not appropriate, an independent educational evaluation shall be at public expense. As the case law has evolved, tribunals sometimes also discuss whether the IEE provided useful information, and one court has said that the parent's disagreement with the district's evaluation need not be fully formed before they obtain the IEE.<sup>12</sup> However, no court has said reimbursement for an IEE can be ordered without (sooner or later) an actual parental disagreement, and no court has said that reimbursement for an IEE can be ordered if the school district's evaluation satisfied the regulatory requirements for special education evaluations.

The Parents have not expressed any disagreement with the District's evaluation. Disagreement is the *sine qua non* of IEEs at public expense. At no time – not even at the hearing – did the family express disagreement with the District's evaluation. Nothing in the regulation provides for parents to be reimbursed for an independent

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<sup>8</sup> 34 C.F.R. § 300.502(a)(3)(i)

<sup>9</sup> 34 C.F.R. § 300.502(b)(1)

<sup>10</sup> 34 C.F.R. § 300.502(a)(2)

<sup>11</sup> 34 C.F.R. § 300.502(c)

<sup>12</sup> *Warren G. v. Cumberland County Sch. Dist.*, 190 F.3d 80, 31 IDELR 27 (3<sup>rd</sup> Cir. 1999).

educational evaluation when they silently rush ahead with the independent evaluation rather than waiting for arrangements to be made for the district evaluation that they requested. Thus, an IEE at public expense is not available under § 300.503 in this case.

The legal prerequisites for an IEE at public expense, however, have not been met. The Parents have not disagreed with the District's evaluation. With a request for money but without that disagreement, reimbursement for the IEE is not available under the regulation.

Reimbursement for the independent education evaluation is not warranted.

**V. ORDER**

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** the Elizabethtown Area School District is to reimburse the Parents of Student for tuition and transportation to the Private School for the 2007-2008 school year. Further, Student is to be awarded 720 hours of compensatory education for a denial of a free appropriate public education. Finally, the District is not obligated to pay for the costs of the independent educational evaluation.

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Date

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Hearing Officer