

PENNSYLVANIA

## Special Education Hearing Officer

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Child's Name: R. R.

Date of Birth: xx/xx/xx

File Number: 8061-07-08 KE

Dates of Hearing: October 5, 2007; October 31, 2007; November 9, 2007

CLOSED HEARING

Parties to the Hearing:

Mr. and Mrs.

Souderton Area School District  
760 Lower Road  
Souderton, PA 18965-2311

Representative:

Frederick Stanczak, Esq.  
179 North Broad Street  
Doylestown, PA 18901

Karl Romberger, Esq.  
Fox Rothschild O'Brien Frankel  
P.O. Box 431  
Lansdale, PA 19446-0431

Date Transcript Received:

November 20, 2007

Date Record Was Closed:<sup>1</sup>

November 26, 2007

Date of Decision:

December 9, 2007

Hearing Officer Name:

Gregory J. Smith

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<sup>1</sup> The record was kept open until receipt of the closing briefs from both parties. An electronic copy of the parents' closing brief was dated November 23, 2007 and was received on November 26, 2007. A printed copy of that brief was also received on November 26, 2007. An electronic copy of the District's closing brief was dated November 23, 2007 and was received on November 26, 2007. On November 26, 2007 the record was closed. This decision was issued 13 days after the closing of the record following the receipt of the closing briefs.

## **Background**

Student is a xx-year-old eligible student who resides with his parents within the area served by the Souderton Area School District (District). Student is eligible for special education and related services as a child with a disability who has been identified as having an other health impairment based on a diagnosis of attention deficit hyperactivity disorder (ADHD). Student attended private schools through the 8<sup>th</sup> grade. Student enrolled in the District in the summer of 2005. After his enrollment Student's parents sought an educational evaluation. In March 2007 that evaluation was completed. In April 2007 an individualized educational program was offered to and accepted by Student's parents. That program was implemented in May 2007. In August 2007 Student's parents requested the present due process hearing seeking two years of compensatory education, reimbursement for tuition and transportation for Student to attend a private boarding school, and an independent educational evaluation at District expense.

## **Findings of Fact**

1. Student is a xx-year-old (d.o.b. xx/xx/xx) student who resides with his parents within the area served by the Souderton Area School District (District). (N.T. at 49-50; P-4; P-12, S-2, S-8)
2. Student is eligible for special education and related services as a child with a disability who has been identified as having an other health impairment based on a diagnosis of attention deficit hyperactivity disorder (ADHD). (N.T. at 154; P-4; P-12, S-2, S-8)
3. At the start of kindergarten, Student's parents enrolled him in [redacted] School (Private School), a private school. Student remained at Private School until part way through his 7<sup>th</sup> grade year when he was asked to leave that school because of disciplinary reasons. (N.T. at 50-52, 446)
4. Because of inappropriate behaviors at home, including lying and stealing, after Student was removed from Private School Student went to live with an aunt and uncle in [redacted city, state] where he attended [redacted] High School (High School). Although an evaluation was discussed while at High School, Student left that school before it could be completed. Student exhibited inappropriate behavior in the home while living with his aunt and uncle and after two months of that arrangement his parents decided to place him in a residential treatment facility. (N.T. at 52-55, 151, 222-223)
5. Near the end of his 7<sup>th</sup> grade year Student's parents sent him to [redacted] Residential Treatment Center in [redacted town, state]. Student was first admitted to Residential Treatment Center on April 24, 2004. He remained there through 8<sup>th</sup> grade and was discharged on July 24, 2005. (N.T. at 55-58, 141, 222-223; P-12, S-2)
6. Residential Treatment Center is a residential treatment facility. It provided Student with a behavior modification program, individual and group therapy, and an educational program. Student completed a typical 8<sup>th</sup> grade curriculum while at Residential Treatment Center. (P-12, S-2)
7. When Student was discharged from Residential Treatment Center, Residential Treatment Center reported that Student had demonstrated consistent and acceptable behavior while at the facility. Residential Treatment Center recommended that family and individual therapy be obtained and noted that the biggest threats to Student were idle time and negative peer models. No educational recommendations were made by Residential Treatment Center. (P-12, S-2)
8. In the period since Student's discharge from Residential Treatment Center his family has not engaged in family therapy and Student has not been receiving individual therapy. (N.T. at 142, 147)
9. During the summer of 2005 Student's parents enrolled him in the District. Mrs. (Student's mother) talked with the guidance counselor and informed her about the program at Residential Treatment Center and about Student's ADHD. Mrs. did not provide the District with any records from either Private School or Residential Treatment Center at the time of enrollment. (N.T. at 59-60, 135, 176-177, 445-446)
10. During the summer of 2005 the District requested Student's records from Residential Treatment Center. The District's practice is for records from sending schools and school districts to be received by a District secretary. The

secretary then determines whether or not those records should be filed or should be forwarded for further review by a guidance counselor or the special education department. The records from Residential Treatment Center were not forwarded for further review once received. (N.T. at 409, 471-474, 482, 507; S-2)

11. During the summer of 2005 Mrs. discussed the possibility of an evaluation with the guidance counselor. The guidance counselor suggested waiting to first see how Student functioned in school before conducting an evaluation. No evaluation was completed at that time. (N.T. at 59-60, 148, 446-450)

12. Student started 9<sup>th</sup> grade as a regular education student at [redacted] Junior High School., a District school. For half of the school day Student attended school at Junior High School and for the other half he was at [redacted] Center, a county-wide vocational and technical school. (N.T. at 63, 420, 451-452)

13. By the second marking period Student had a failing grade in two courses, Algebra I and the program at Center. (N.T. at 71-75; P-3, S-23)

14. During 9<sup>th</sup> grade Student was absent or tardy 43 days. (N.T. at 66, 179; S-21, S-22)

15. On April 3, 2006 the guidance counselor at Junior High School telephoned Mrs. to discuss Student's absences. Mrs. mentioned her prior request for an evaluation. The guidance counselor suggested trying a schedule change to improve Student's classroom performance before an evaluation was initiated. An evaluation was not initiated at that time. (N.T. at 452; S-6)

16. Student completed 9<sup>th</sup> grade with the following grades: Algebra I – F, American History – D, Center Music – A, Center – D, Physical Science – C, English – C-. (P-3, S-23)

17. During 9<sup>th</sup> grade Student did not exhibit severe behavior problems. He also did not have difficulties interacting with peers or with adults. Student did have difficulty getting up and getting to school in the morning. On a regular basis that difficulty would result in confrontations between Student and his parents before school. In school his greatest difficulties were with organization and the completion of work assigned outside of class time. (N.T. at 65-67, 177-178, 248-249, 364-365, 453, 465-466; P-3, S-23)

18. Student started 10<sup>th</sup> grade at [redacted] High School, attending school for half day at High School and half day at Center. (N.T. at 422; P-7, S-23)

19. In 10<sup>th</sup> grade Student again did not exhibit severe behavior problems. His greatest difficulties were in organization and the completing assignments given outside of class. (N.T. at 177-178, 248-249, 364-365, 453, 465-466; P-7, S-23)

20. During 10<sup>th</sup> grade Student was absent or tardy 31 days. (S-21, S-22)

21. Student completed 10<sup>th</sup> grade with the following grades: Center – F, Biology – D, Algebra I – D-, Academic English – F, Academic 20<sup>th</sup> Century History – D-, Center PE – D-. At the end of 10<sup>th</sup> grade Student was two course credits behind his graduation class. (N.T. at 269, 306; S-23)

22. During the fall of 2006 Mrs. discussed having an evaluation with the high school guidance counselor and the school psychologist. On December 5, 2006 Mrs. made a written request for an evaluation because of her concern regarding Student's ADHD and to address "learning problems." P-8 at 1 (N.T. at 89-90, 147, 217-219; P-8, S-7)

23. On December 7, 2006 a permission to evaluate was issued. Mrs. gave her permission for the evaluation on December 15, 2006 and that was received by the District on December 19, 2006. (N.T. at 91, 218; P-1, S-7)

24. An evaluation was completed and an evaluation report (ER) was produced on March 22, 2007. (N.T. at 91-92, 241, 517; P-4, S-8)

25. The ER included parental input; background information about his family, early schooling, diagnosis of ADHD, and behavioral difficulties; a report on a brief classroom assessment; summary of grade 9 grades and grades for the first

semester of 10<sup>th</sup> grade; teacher input; and standardized testing including intelligence testing, achievement testing, and a test of behavior/personality functioning. (N.T. at 221-240, 260-262; P-4, P-5, S-8)

26. The findings in the ER were that Student did not have a learning disability, but that:

[Student] has good academic skills... but does not consistently demonstrate those skills in the classroom setting. His performance is significantly impacted by the ongoing symptoms of his ADHD. Notable difficulties with disorganization, inattention, memory and focus remain... [Student] is not successful in the current regular education setting and will require specially designed instruction to meet his needs... (P-4 at 5)

(N.T. at 149, 374; P-4, S-8)

27. The following recommendations to the individualized educational program (IEP) team were contained in the ER:

Extended time for tests. Test taking in the resource room. Class schedule to include co-taught classes in appropriate areas. Resource room and teacher support available at Center. (P-4 at 5)

28. On March 22, 2007 the school psychologist met with Mrs. to review the ER. Mrs. agreed with the ER. (N.T. at 93, 240-241)

29. On April 24, 2007 an individualized educational program (IEP) team meeting was held and an IEP was developed. That IEP included a statement on Student's present levels of academic achievement; a statement of strengths; a statement of needs; a transition services plan based on a questionnaire completed by Student; one annual goal; and three program modifications. The IEP also indicated that Student was not eligible for extended school year services. (N.T. at 95-99, 356-358; P-6, S-9)

30. In the present levels of academic achievement section of the April 24, 2007 IEP it was noted that Student had ADHD and that the primary characteristics were "disorganization, memory, focus, and attention." (S-9 at 12) the following needs were included in that IEP: reading comprehension, comprehension of concepts, assignment/homework completion, accuracy of work completed, math application and problem solving, following directions (in math class), oral expression, independent work completion (in math class), cooperation with peers, demonstrating responsibility, ability to attend to tasks, and leadership abilities. (P-6, S-12)

31. The single goal contained in the April 24, 2007 IEP was:

[Student] will maintain successful placement in mainstream classes within the general education curriculum by earning no less than a C- as his grade in 3 out of 4 classes each semester. (S-9 at 24)

(N.T. at 100-101; P-6, S-9)

32. The three program modifications contained in the April 24, 2007 IEP were: support room assistance for tests and quizzes, extended time testing, and time extended for classroom assignment completion. (N.T. at 342-343; P-6, S-9)

33. Prior to the development of the IEP a request for input was sent to Center. No input was received and no one from Center attended the IEP team meeting. (N.T. 346-347, 351, 378, 530; S-9)

34. A Notice of Recommended Educational Placement (NOREP) was issued on April 24, 2007. The IEP and NOREP called for Student to be educated for half a day at High School and half a day at Center. The April 24, 2007 was agreed to by Mrs. and it was implemented beginning on May 1, 2007. (N.T. at 104, 154, 359, 380; P-6, S-9)

35. In May 2007 the Center completed a vocational assessment of Student (N.T. at 184)

36. During the summer of 2007 Student worked as a junior counselor at a summer camp he had previously attended. Part way through the summer Student was forced to leave because of a disciplinary issue. Because of that and concerns

regarding Student's educational program, Student's parents began to explore residential educational placements for him. (N.T. at 105-108, 173)

37. On August 10, 2007 Student's parents filed an application for Student to attend the [redacted] Military School located in [redacted city], PA. The application was reviewed on August 15, 2007, an interview was held on August 16, 2007, and Student was accepted into Military School on August 27, 2007. (N.T. at 166, 315-317; S-20)

38. Military School is a boarding school serving 180 male students from 6<sup>th</sup> through 12<sup>th</sup> grades. The average class size at Military School is 12 students. The instructional staff consists of 18 teachers, half of whom are certified, none with special education certification. (N.T. at 122, 293-294, 311, 320-321)

39. Military School has a highly structured program. Almost every minute of every day is programmed for the students, with Student having less than one hour of unstructured time during a 24 hour day. Students who fail to complete homework assignments have their unstructured time removed and are assigned to "academic study hall," consisting of marching for an hour. On days assigned to "academic study hall" students do not have time to take care of personal care needs, such as taking a shower. Students who fail to maintain a grade of 90 percent in all subjects are not allowed to engage in extracurricular activities such as sports, going on trips to the mall, going to dances with girls, and going to the movies. (N.T. at 296-299, 305, 326)

40. At Military School all students are provided with the same educational program. Military School has not developed an individual program for Student nor has it provided any accommodations to him. (N.T. at 319-321, 331, 333-334)

41. On August 24, 2007 Student's parents notified the District that they disagreed with the program in the April 24, 2007 IEP through a letter from their attorney requesting the current due process hearing. That letter was sent to the District's superintendent. In that letter Student's parents informed the District of their intent to remove Student from the District and enroll him in a private school placement. In that letter Student's parents requested two years of compensatory education, reimbursement for tuition and transportation for Student to attend a private school, and an independent educational evaluation at District expense. (N.T. at 110,158, 348, 424-415, 439; P-9, S-11, S-12, S-15)

42. The 2007 – 2008 school year began in the District on September 4, 2007. Student attended the first several days of school in the District. (N.T. at 117-118, 514, 545)

43. On September 6, 2007 a resolution session was held. (N.T. at 116, 158-159, 415; P-11, S-12, S-18)

44. A new IEP was developed following the resolution session and, on September 12, 2007, the new IEP and a new NOREP were sent to Student's parents. (N.T. at 116, 126, 432; P-11, S-16, S-17, S-18)

45. Student began to attend Military School on September 11, 2007. (N.T. at 123-124, 313)

## **Issues**

Must the Souderton Area School District provide Student with compensatory education?

Must the Souderton Area School District reimburse the parents of Student for their costs of tuition and transportation for Student's attendance at the Military School?

Must the Souderton Area School District provide Student with an independent educational evaluation at District expense?

## **Discussion**

The Individuals with Disabilities Education Improvement Act of 2004 (IDEA) 20 U.S.C. §1400 *et seq.*, is the Federal Statute designed to ensure that "all children with disabilities have available to them a free appropriate public education," (FAPE) §1400(d)(1)(A). The implementing Regulations for the IDEA can be found at 34 CFR §300 *et seq.* Under the

IDEA, school districts must create an individualized education program (IEP) for each child with a disability. 20 U.S.C. §1414(d). There was no dispute at the present hearing over whether or not Student was a child with a disability as the result of his classification as having an other health impairment related to his ADHD. [Fact 2]

In the present matter Student's parents have challenged the District's child find practices related to Student and the appropriateness of the IEP offered to Student in April 2007. They have sought two years of compensatory education, reimbursement for tuition and transportation for Student's to attend a private boarding school, and an independent educational evaluation at District expense. [Fact 11] The Supreme Court has held that the "burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief... the rule applies with equal effect to school districts: If they seek to challenge the IEP, they will in turn bear the burden of persuasion." *Schaffer v. Weast*, 126 S.Ct. 528, 537 (2005) In so doing the Court found no reason to depart from "the ordinary default rule that plaintiffs bear the risk of failing to prove their claims." *Id* at 534

The *Schaffer* decision by the Supreme Court effectively settled a split, present in the Circuit Courts, in assigning the burden of proof. As noted in *M.S. v. Ramsey Bd. of Educ.*, 435 F.3d 384 (3rd Cir. 2006) the Third Circuit Court had previously placed the burden of proof on the school district. However, in *M.S. v. Ramsey* the Third Circuit Court found *Schaffer* controlling and extended the reach of *Schaffer* writing "It would be unreasonable for us to limit that holding to a single aspect of an IEP, where the question framed by the Court, and the answer it provided, do not so constrict the reach of its decision." at 5

Shortly after the Third Circuit issued its decision in *M.S. v. Ramsey*, the Eastern District Court of Pennsylvania issued a decision in *Greenwood v. Wissahickon*, 2006 U.S. Dist. LEXIS 4274 (E.D. Pa. 2006) concluding that "the burden of persuasion at the administrative level in Pennsylvania is now on the party contesting the IEP." at 7

It should be noted that in their analyses the above referenced courts have limited themselves to the burden of persuasion and have not considered the burden of production. As noted by the Supreme Court, the burden of persuasion addresses "which party loses if the evidence is closely balanced." *Schaffer* at 533-534

Because it is Student's parents who have challenged the appropriateness of the District's educational program for Student, it is Student's parents who carry the burden of persuasion in this matter.

#### Must the Souderton Area School District provide Student with compensatory education?

In their request for the present hearing Student's parents sought two years of compensatory education, [Fact 41] a period covering the time from when Student first began to attend school in the District at the start of the 2005 – 2006 school year through to the end of the 2006 – 2007 school year. A student is entitled to compensatory education services if the student is an eligible student; is in need of special education, related services, and/or accommodations; and, if through some action or inaction of the District, the student was denied FAPE. *Lester H. v. Gilhool*, 916 F. 2d 865 (3d Cir. 1990), *cert. denied* 499 U.S. 923, 111 S.Ct. 317 (1991) In *M.C. v. Central Regional School District*, 81 F. 3d 389, (3d Cir. 1996) the Court recognized that the development and delivery of special education programs can be a complex and complicated process requiring time for a reasonable and appropriate response and therefore excluded from the calculation of compensatory education, the time reasonably required for the school district to rectify the problem.

Student began his education in a private school placement paid for by his parents where he remained through part of the 7<sup>th</sup> grade. [Fact 3] As the result of disciplinary infractions at the private school, coupled with inappropriate behaviors in the home and family members' homes, part way through 7<sup>th</sup> grade Student's parents enrolled him at Residential Treatment Center in [town, state redacted]. [Facts 3, 4, 5] Residential Treatment Center is a private residential treatment facility that provided Student with a behavior modification program, individual and group therapy, and an educational program. [Fact 6] Student completed a typical 8<sup>th</sup> grade curriculum while at Residential Treatment Center. [Fact 6]

During the summer of 2005 Student's parents enrolled Student in the District. Mrs. (Student's mother) talked with the guidance counselor and informed her about the program at Residential Treatment Center and about Student's ADHD. Mrs. did not provide the District with any records from either Private School or Residential Treatment Center at the time of enrollment. [Fact 9]

During the summer of 2005 Mrs. discussed the possibility of an evaluation with the guidance counselor. [Fact 11] It is clear from the accounts of both Mrs. and the guidance counselor that this conversation took place. It is less clear what was actually discussed. Mrs. testified that she explicitly requested an evaluation, the guidance counselor testified that she did not. The parties did agree that the guidance counselor suggested waiting to first see how Student functioned in school before conducting an evaluation and that no evaluation was completed at that time. [Fact 11]

In weighing contradictory evidence a hearing officer must consider the credibility of each witness. In this case there was lack of clarity in the memory of events with both witnesses. Mrs. testified that she first approached the District about enrolling Student in the District during the summer of 2005, yet documents in the record show that she had actually contacted the District and completed paper work as early as April 2005. see S-1 at 3 and 4 She also testified that Student was not accepted into Military School until September 10, 2007, just a few weeks before the start of the present hearing, yet the academic dean from Military School, testifying while looking at the actual acceptance records, testified that Student was actually accepted on August 27, 2007. Lastly, Mrs. had difficulty remembering who she had talked to at various points in time, most importantly identifying the guidance counselor she talked to about the evaluation as possibly a guidance counselor who had worked with her daughter several years ago rather than the actual person who she had contact with.

On the other hand, the guidance counselor testified at one point that during the initial conversation with Mrs. she did not think that an evaluation was necessary because she had already had contacted Residential Treatment Center and learned that there were no educational recommendations being made. Later she testified that she did not make that call until after the conversation with Mrs.

Because the credibility of both witnesses is equally balanced, both having difficulty recalling specific events, and because their testimony was opposite as to whether Mrs. had actually requested an evaluation during the summer of 2005, or whether there had been an agreement to wait to see how Student did, the parents have failed to carry their burden of persuasion under the *Schaffer* standard to prove that an evaluation was requested during the summer of 2005.

That is not the case for the request for an evaluation made in April 2006.

Student started 9<sup>th</sup> grade as a regular education student at Junior High School. For half of the school day Student attended school at Junior High and for the other half he was at Center, a county-wide vocational and technical school. [Fact 12] By the second marking period Student had a failing grade in two courses, Algebra I and the program at Center. [Fact 13] By the end of 9<sup>th</sup> grade Student had the following final grades: Algebra I – F, American History – D, Center Music – A, Center – D, Physical Science – C, English – C-. [Fact 16] During 9<sup>th</sup> grade Student was absent or tardy 43 days. [Fact 14] During 9<sup>th</sup> grade Student did not exhibit severe behavior problems. He also did not have difficulties interacting with peers or with adults. Student did have difficulty getting up and getting to school in the morning. On a regular basis that difficulty would result in confrontations between Student and his parents before school. In school his greatest difficulties were with organization and the completion of work assigned outside of class time. [Fact 17]

Because of his poor academic performance and difficulty completing assignments, on April 3, 2006 Mrs. requested an evaluation. [Fact 15] Here the record is clear on that fact. On that date the guidance counselor at Junior High telephoned Mrs. to discuss Student's absences. Mrs. mentioned her prior request for an evaluation. [Fact 15] As recorded in the guidance counselor's own notes, notes she testified were written within minutes of completing that telephone call:

I called mom to finish the conversation we were having before she stormed out of the office... Mom feels as if though there are no supports available here at school. Mom also said she was upset because I didn't have [Student] tested for ADD sooner as discussed last year. S-6 at 2

In response the guidance counselor suggested trying a schedule change to improve Student's classroom performance before an evaluation was initiated and an evaluation was not initiated at that time. [Fact 15]

At that point, April 3, 2006, the District was clearly on notice that Mrs. wanted to have an evaluation completed. Even if the counselor believed that an agreement had been reached the prior summer not to have an evaluation, after that telephone call she should have known the Mrs. wanted an evaluation the prior summer, believed that she had asked for an

evaluation the prior summer, and still wanted to have an evaluation. At that point an evaluation should have been initiated. 34 CFR §300.301

What the guidance counselor should have done was to ask Mrs. to provide written consent for an evaluation. She did not. Then the District should have completed an evaluation within 60 school days and offered an appropriate program to Student. 34 CFR §300.301(c)(1)(i); 34 CFR §300.323(a) It did not. Because Student was subsequently identified as an eligible child, [Facts 2, 26] the failure to complete an evaluation once clearly requested, coupled with the failure to offer an appropriate program, was a denial of FAPE.

Because there was a denial of FAPE an award of compensatory education is warranted. *Lester H. v. Gilhool*, 916 F. 2d 865 (3d Cir. 1990), *cert. denied* 499 U.S. 923, 111 S.Ct. 317 (1991) To make an award of compensatory education the period of deprivation must first be determined. If it had acted on the parent's request for an evaluation, the District would have been allowed 60 school days to complete that process. 34 CFR §300.301(c)(1)(i) In *M.C. v. Central Regional School District*, 81 F. 3d 389, (3d Cir. 1996) the Court ruled that school districts must be credited with the time it would have taken to rectifying the situation if it had acted appropriately. In this case, that crediting must be balanced with other practices of the District. In particular, the practice of the District to have records from sending schools received and reviewed by a District secretary. The secretary then determines whether or not those records should be filed or should be forwarded for further review by a guidance counselor or the special education department. [Fact 10] In the present matter, the result of that practice was that the records from Residential Treatment Center were not forwarded for further review once received. [Fact 10] It is impossible to determine whether a different result would have been affected if those records had been reviewed by someone who had any experience in education, someone who was not a secretary, but it is possible that an evaluation would have been initiated sooner if those records had been reviewed. Weighing this practice of the District, Student's performance throughout his 9<sup>th</sup> grade year, and the clear request for an evaluation on April 3, 2006, it is the conclusion of this hearing officer that the District should have completed the ER, identified Student as an eligible student, and offered him an appropriate program by at least by the end of the 2005 – 2006 school year.

Because there was no evidence that Student qualifies as a student in need of extended school year programming, the above conclusion that by the end of the 2005 – 2006 school year the District should have identified Student as an eligible student effectively means that the period of deprivation began at the start of the 2006 – 2007 school year, when Student started 10<sup>th</sup> grade.

Student started 10<sup>th</sup> grade at [redacted] High School, attending school for half day at High School and half day at Center. [Fact 18] In 10<sup>th</sup> grade Student again did not exhibit severe behavior problems. His greatest difficulties were in organization and the completing assignments given outside of class. [Fact 19] During 10<sup>th</sup> grade Student was absent or tardy 31 days. [Fact 20] Student completed 10<sup>th</sup> grade with the following grades: Center – F, Biology – D, Algebra I – D-, Academic English – F, Academic 20<sup>th</sup> Century History – D-, Center PE – D-. [Fact 21]

During the fall of 2006 Mrs. discussed having an evaluation with the high school guidance counselor and the school psychologist. On December 5, 2006 Mrs. made a written request for an evaluation because of her concern regarding Student's ADHD and to address "learning problems." P-8 at 1 [Fact 22] On December 7, 2006 a permission to evaluate was issued. Mrs. gave her permission for the evaluation on December 15, 2006 and that was received by the District on December 19, 2006. [Fact 23]

An evaluation was completed and an evaluation report (ER) was produced on March 22, 2007. [Fact 24] The ER included parental input; background information about his family, early schooling, diagnosis of ADHD and behavioral difficulties; a report on a brief classroom assessment; summary of grade 9 grades and grades for the first semester of 10<sup>th</sup> grade; teacher input; and standardized testing including intelligence testing, achievement testing, and a test of behavior/personality functioning. [Fact 25] The findings in the ER were that Student did not have a learning disability, but that:

[Student] has good academic skills... but does not consistently demonstrate those skills in the classroom setting. His performance is significantly impacted the ongoing symptoms of his ADHD. Notable difficulties with disorganization, inattention, memory and focus remain... [Student] is not successful in the current regular education setting and will require specially designed instruction to meet his needs... (P-4 at 5) [Fact 26]

The following recommendations to the individualized educational program (IEP) team were contained in the ER:

Extended time for tests. Test taking in the resource room. Class schedule to include co-taught classes in appropriate areas. Resource room and teacher support available at Center. (P-4 at 5) [Fact 27]

On March 22, 2007 the school psychologist met with Mrs. to review the ER. Mrs. agreed with the ER. [Fact 28]

The purpose of an evaluation is to collect enough information, through a variety of methods, to determine whether or not the student is and/or continues to be a child with a disability, to determine the need for special education and related services, to determine whether or not additions and/or modifications to the IEP are needed, and in general, to inform the IEP team about the content of the IEP. 20 U.S.C. §1414(b)(2)(A); §1414(c)(1)(B) Depending on the student and his or her needs, cognitive, behavioral, physical, and developmental factors are to be considered, §1414(b)(2)(C) and the student must be assessed in all areas of suspected disability. §1414(b)(3)(B) Following an evaluation, the IEP team, informed by that evaluation, as well as other factors, develops the IEP. §1414(d)(3)(A) In short, the evaluation is intended to provide a comprehensive picture of the student's strengths, weaknesses, and specific needs and the IEP should be responsive to those identified needs.

After a review of the ER and consideration of the record as a whole, it is the conclusion of this hearing officer that the March 22, 2007 ER did collect enough information from a variety of sources and that it did provide a comprehensive picture of Student's strengths, weaknesses, and specific needs to adequately inform the IEP team. Therefore the ER was appropriate. In fact, at the present hearing Student's mother testified that she agreed with the ER both at the time it was written and currently.

Following the issuance of the ER, on April 24, 2007 an IEP team meeting was held and an IEP was developed. That IEP included a statement on Student's present levels of academic achievement; a statement of strengths; a statement of needs; a transition services plan based on a questionnaire completed by Student; one annual goal; and three program modifications. [Fact 29] The IEP also indicated that Student was not eligible for extended school year services. [Fact 29]

Having concluded above that the ER was appropriate, the question now becomes was the April 24, 2007 IEP appropriate?

An appropriate program is one that is reasonably calculated to yield meaningful educational benefit. *Rowley v. Hendrick Hudson Board of Education*, 458 U.S. 176 (1982) The Third Circuit Court has interpreted *Rowley* as requiring school districts to offer children with disabilities individualized education programs that provide more than a trivial or *de minimus* educational benefit. *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3rd Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989). Specifically, the Third Circuit defined a satisfactory IEP as one that provides "significant learning" and confers "meaningful benefit." *Id* at 182-184. see also *Board of Education of East Windsor Sch. Dist. v. Diamond*, 808 F.2d 847 (3rd Cir. 1986); *J.C. v. Central Regional Sch. Dist.*, 81 F.3d 389 (3rd Cir. 1996), *cert. denied*, 519 U.S. 866

For the reasons that follow, it is the conclusion of this hearing officer that the IEP developed on April 24, 2007 was not appropriate because it did not provide the opportunity for significant learning, nor did it confer meaningful educational benefit to Student

In the present levels of academic achievement section of the April 24, 2007 IEP it was noted that Student had ADHD and that the primary characteristics were "disorganization, memory, focus, and attention." (S-9 at 12) the following needs were included in that IEP: reading comprehension, comprehension of concepts, assignment/homework completion, accuracy of work completed, math application and problem solving, following directions (in math class), oral expression, independent work completion (in math class), cooperation with peers, demonstrating responsibility, ability to attend to tasks, and leadership abilities. [Fact 30]

Looking at just the above sections of the IEP, and having concluded that the ER was appropriate, it is clear to this hearing officer that the IEP team had a fairly good picture of Student's needs, at least in the High School part of his program, at

the time that the IEP was developed. Unfortunately the team did not go on to develop a program that would address those needs.

The only goal contained in the April 24, 2007 IEP was:

[Student] will maintain successful placement in mainstream classes within the general education curriculum by earning no less than a C- as his grade in 3 out of 4 classes each semester. (S-9 at 24) [Fact 32]

While it is certainly true that Student's grades were of concern, this goal does not address his identified needs. There is nothing that shows how he will improve his grades. In the ER it was noted that Student's primary difficulties were in the areas of disorganization, memory, focus, and attention. It is those areas that must be addressed if Student is to be successful in school. It is those areas that must be addressed if Student is to improve his grades. Because this goal does not address those areas and because no other goals are presented in this IEP, the April 24, 2007 IEP is not appropriate.

Looking further at the April 24, 2007 IEP, a similar problem exists with the three program modifications contained in that IEP. Those program modifications were: support room assistance for tests and quizzes, extended time testing, and time extended for classroom assignment completion. [Fact 32] While those accommodations may be needed for Student to be successful, none of them address the primary areas where he needs intervention: disorganization, memory, focus, and attention. Student needs to be taught strategies to deal with and work with his disability. Because these program modifications do not adequately address his areas of difficulty, and because there are no other program modifications in the April 24, 2007 IEP, that IEP was not appropriate.

Lastly, the IEP that was offered on April 24, 2007 is not appropriate because no input was received from Center prior to the development of the IEP and no one from Center attended the IEP team meeting. [Fact 33] Because Student spends half of his school day at Center [Facts 12, 18] and because his grades reflect difficulty in the Center program, [Facts 13, 16, 21] it would be impossible for an IEP to be appropriate without any input from that program.

Having determined above that the District should have completed an ER in the spring of 2006 and it should have had an appropriate program in place at the start of the 2006 – 2007 school year, and having determined that even once an ER was completed and an IEP was produced, that IEP was not appropriate, it is the conclusion of this hearing officer that the District failed to provide Student with FAPE for the entire 2006 – 2007 school year, his 10<sup>th</sup> grade year. Because of the District's failure to provide Student with FAPE, Student is entitled to compensatory education.

In Pennsylvania the standard for an award of compensatory education, once a deprivation of FAPE is found, is one focused of what it will take to bring the student to the point he or she should have been if not for the deprivation of FAPE, as opposed to an award focused on the period of deprivation. *B.C. v. Penn Manor*, 906 A.2d 642 (Pa. Comwlth. 2006) In *B.C.* Commonwealth Court developed the following standard for determining the amount of compensatory education to be awarded:

We find the Ninth and the District of Columbia's Circuits' standard more persuasive and workable than that of the Third Circuit, as it tailors the equitable award of compensatory education to the particular student's needs, which a one-for-one standard fails to do. Hence, we reject Student's proposed hour-for-hour standard. Rather, we hold that where there is a finding that a student is denied a FAPE and the Panel determines that an award of compensatory education is appropriate, the student is entitled to an amount of compensatory education reasonably calculated to bring him to the position that he would have occupied but for the school district's failure to provide a FAPE. As noted by the District of Columbia Circuit, doing so may require awarding the student more compensatory education time than a one-for-one standard would, while in other situations the student may be entitled to little or no compensatory education, because (s)he has progressed appropriately despite having been denied a FAPE. at 650-651

Applying the *B.C.* Court's standard to the present matter, one impact of the District's failures to identify Student sooner and to provide him with an appropriate program once it did identify him is that Student is now two course credits behind his graduation class. [Fact 21] Because of that, compensatory education that is designed to help Student complete those two course credits by the time of his graduation is warranted.

If Student was still attending school within the District, the District may be able to provide the necessary instruction directly to Student, enabling him to be able to complete those courses prior to graduation. However, he is not. Because the District failed to offer an appropriate program to Student, his parents removed him from the District and placed him in a private boarding school located some distance from the District. [Facts 36, 37, 38] Student should not be penalized or denied the compensatory education that is due to him merely because his parents removed him from an inappropriate program in the District and placed him in a program they believed to be appropriate outside of the District. Because of that, an appropriate mechanism for the provision of this award of compensatory education is for the District to create a fund that Student's parents may use to pay for any appropriate educational services that are designed to achieve the goal of Student completing the two course credits he needs to graduate with his class. Because the two course credits are within the regular education curriculum, that fund must be equal to the cost of two regular education courses that Student would take within the District, calculated as follows: 1) taking the average cost of educating a regular education student in the District for the current school year, 2) dividing that number by six, which is the number of courses Student was enrolled in each of the past two years, [Facts 16, 21] and 3) multiplying that amount by two, which is the number of courses Student must make up to graduate with his class. [Fact 21]

There was a second impact of the District's failure to identify Student sooner or to offer him an appropriate program. For a full year Student did not have the opportunity to learn effective strategies to address his difficulties with organization, memory, focus, and attention. Because of that, compensatory education that is directly focused on addressing those issues is needed to bring Student to the place he would have been if not for the District's failure to provide FAPE. If Student were still in the District it would be reasonable to order the District to provide compensatory education in the form of weekly one-to-one counseling and instruction to Student to address those issues. However, as noted above, he is not. Because of that, an appropriate mechanism for the provision of this award of compensatory education is for the District to create a fund that Student's parents may use to pay for any appropriate educational or counseling services that are designed to help Student in the areas of organization, memory, focus, and attention. That fund must be equal to the actual costs to the District, including salary and benefits, of providing one-to-one counseling for 45 minutes each week for one full school year.

#### Must the Souderton Area School District reimburse the parents of Student for their costs of tuition and transportation for Student's attendance at the Military School?

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). At the Circuit Court level the court wrote that a court may grant "such relief as it determines is appropriate" and that "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).

Following its' decision in *Burlington* the Supreme Court in *Florence County Sch. Dist. Four V. Carter*, 114 S. Ct. 361 (1993) outlined a three-part test for determining whether or not parents may receive reimbursement when they place their child in a private school. The three parts of the test 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.

In 1997, a dozen years after *Burlington*,<sup>2</sup> the IDEA specifically authorized tuition reimbursement for private school placement. Reauthorized in 2005, the IDEA now provides:

(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)

Applying the *Florence County* three-part test, the first part, that of the appropriateness of the District's program, was addressed above when this hearing officer concluded that the IEP offered on April 24, 2007 was not appropriate. That was the IEP in effect when Student's parents notified the District that they were going to remove him from the District and seek tuition reimbursement for a private placement [Facts 34, 41] and that was the IEP in effect when Student first started to attend Military School. [Facts 34, 44, 45] Because the April 24, 2007 IEP has been determined to be not appropriate, this hearing officer can turn to the second part of the *Florence County* test, that of the appropriateness of the program provided at the private placement.

It is well established that a private placement obtained by the parents does not have to be an approved private school, nor does it have to meet all of the state mandated requirements that a public placement must meet to be considered to be appropriate for a student. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999); *Warren G. v. Cumberland Cnty. Sch. Dist.*, 190 F.3d 80 (3rd Cir. 1999) What a private placement must provide is a program that is individualized to meet the child's needs. *Mr. I. v. Maine Sch. Admin. Dist. No. 55*, 416 F. Supp. 2d 147 (D. Me. 2005) *affirmed* U.S. App. LEXIS 5128 (1st Cir. 2007)

Military School is a boarding school serving 180 male students from 6<sup>th</sup> through 12<sup>th</sup> grade. The average class size at Military School is 12 students. [Fact 38] The instructional staff consists of 18 teachers, half of whom are certified, none with special education certification. [Fact 38] Military School has a highly structured program. Almost every minute of every day is programmed for the students, with Student having less than one hour of unstructured time during a 24 hour day. [Fact 39] Students who fail to complete homework assignments have their unstructured time removed and are assigned to "academic study hall," consisting of marching for an hour. [Fact 39] On days assigned to "academic study hall" students do not have time to take care of personal care needs, such as taking a shower. [Fact 39] Students who fail to maintain a grade of 90 percent in all subjects are not allowed to engage in extracurricular activities such as sports, going on trips to the mall, going to dances with girls, and going to the movies. [Fact 39]

It is clear from the above that the program at Military School is one that is punitive in nature, rather than instructive. The District's program was found to not be appropriate because it did not have any goals or specially designed instruction that directly addressed Student's difficulties with disorganization, inattention, memory, and focus. The Military School program fails in those same areas. Nothing in that program is designed to help Student to learn how to become better organized, or to develop better attention, memory, or focus. Moreover, nothing in the Military School program is individualized in any way. All Military School students are provided with the same educational program. [Fact 40] Military School has not developed an individual program for Student nor has it provided any accommodations to him. [Fact 40] Marching as a punishment for not completing homework, whether it is done under the label of "academic study hall" or in any other way, is not an individualized program designed to meet Student's needs.

It is the conclusion of this hearing officer that because Military School has not provided Student with any program that is individualized in any way, nor any program specifically designed to address his identified needs, Military School is not an appropriate program for Student

Having concluded that Military School is not an appropriate program for Student, this hearing officer need not consider the final part in the *Florence County* three-part test, that of the equities. That is the case because even if the equities were to favor the parents in this matter, this hearing officer could not award tuition reimbursement for a placement that he has already determined is not appropriate.

Having concluded that Military School is not an appropriate program for Student, the District will not be ordered to pay for that placement or for Student's transportation to that placement.

Must the Souderton Area School District provide Student with an independent educational evaluation at District expense?

In their initial request for the present due process hearing and at the start of the first session of this hearing Student's parents requested that the District be required to provide an independent educational evaluation (IEE) at District expense. A parent has the right to an IEE at public expense if the parent disagrees with an evaluation obtained by the public agency.

If there is a dispute over the need for an IEE, that dispute may be settled at a due process hearing. 34 CFR §300.502(b)(1)(2)(3)

In the present matter Mrs. agreed with the March 22, 2007 ER when it was first produced [Fact 28] and did not inform the District of any disagreement with that evaluation until her attorney sent a letter to the District informing it of the request for the present hearing. [Fact 41]

At the present hearing the parents presented no evidence to challenge the appropriateness of the ER. In fact, Mrs. testified that not only did she agree with the ER when it was written, she still agrees with it. An independent assessment of the ER by this hearing officer, discussed above, found that the ER was appropriate.

Further, at the present hearing the parents failed to present any evidence regarding what would be included in an IEE if one were to be granted. After a thorough review of the entire record, this hearing officer could not find even a single mention of what type of IEE the parents were seeking.

Because the parents failed to prove that the ER was not appropriate when it was completed and because the parents failed to provide any evidence regarding what would be in an IEE or even what type of IEE they were seeking, the parents request for an independent evaluation at District expense must be denied.

\* \* \*

Above this hearing officer considered the claim for compensatory education and found that the District failed to provide FAPE to Student for the entire 2006 – 2007 school year, Student’s 10<sup>th</sup> grade year. Because of that finding an award of compensatory education is appropriate. This hearing officer also considered the claim for tuition and transportation costs for Student to attend Military School and, finding that Military School did not offer an appropriate program for Student, concluded that tuition and transportation reimbursement was not warranted. Lastly, this hearing officer considered the claim for an IEE and concluded that the parents failed to show that the ER was not appropriate and failed to provide any information regarding the nature of the IEE they were seeking, resulting in the conclusion that the request for an IEE at District expense must be denied.

Above this hearing officer did not consider the appropriateness of the IEP offered after the September 6, 2007 resolution meeting for three reasons: First, that issue was not raised by the parents in their initial request for the present hearing, nor was it raised as an issue by either party at the start of the hearing. Although both attorneys mentioned the post-resolution meeting IEP in their opening statements, and although there was testimony about that IEP given on the record, neither party sought an order relative to that IEP. The parents did not seek compensatory education for the current school year and until the filing of its closing brief, the District did not seek a ruling that its most recent offer was appropriate. Because a hearing officer may only rule on the issues that have been explicitly brought before him and may not make an award that has not been requested, the appropriateness of the post-resolution meeting IEP offered in September 2007 could not be considered by this hearing officer. *In Re the Educational Assignment of B.Y.*, Spec. Educ. Op. 1807 (2007) Second, because the post-resolution meeting was sent to Student’s parents on September 12, 2007, [Fact 44] one day after Student had already begun to attend Military School, [Fact 45] that IEP could not be considered in the determination of whether or not the District must provide tuition and transportation for Student’s attendance at Military School. And, third, because Military School was determined to not be an appropriate program, consideration of the post-resolution meeting IEP would not affect the conclusion that the District is not required to pay for Student’s tuition at and transportation to Military School.

Accordingly we make the following:

## ORDER

The Souderton Area School District must provide Student with compensatory education consistent with this decision. That compensatory education must take the form of:

1. The District creating a fund that Student's parents may use to pay for any appropriate educational services that are designed to achieve the goal of Student completing the two course credits he needs to graduate with his class. The total amount in that fund must be calculated as follows: 1) taking the average cost of educating a regular education student in the District for the current school year, dividing that number by six, and multiplying that amount by two.
2. The District creating a fund that Student's parents may use to pay for any appropriate educational or counseling services that are designed to help Student in the areas of organization, memory, focus, or attention. The total amount of that fund must be equal to the actual costs to the District, including salary and benefits, of providing one-to-one counseling for 45 minutes each week for one full school year.
3. The parties may, by agreement, consolidate the above funds into a single educational fund that may be used by Student's parents to pay for any appropriate educational services and/or counseling designed to address the above goals.

The Souderton Area School District is not required to reimburse the parents of Student for their costs of tuition and transportation for Student's attendance at the Military School.

The Souderton Area School District is not required to provide Student with an independent educational evaluation at District expense.

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Signature of Hearing Officer