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## **PENNSYLVANIA**

# **SPECIAL EDUCATION HEARING OFFICER**

Name of Child: JH  
ODR #8112/07-08 KE

Date of Birth: xx/xx/xx

Dates of Hearing:  
November 8, 2007  
January 18, 2008

CLOSED HEARING

For the Student:  
Parents

Frederick Stanczak, Esquire  
179 N. Broad Street  
Doylestown, Pennsylvania 18901

For the School District:  
Supervisor of Special Education  
Souderton Area School District  
760 Lower Road  
Souderton, Pennsylvania 18964

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Date Record Closed:	January 28, 2008
Date of Decision:	February 6, 2008
Hearing Officer:	Daniel J. Myers

## **Background**

Student is a xx-year-old student resident of the Souderton Area School District (hereinafter School District), with learning disabilities in reading, math and written expression, who is attending private school. His parents request public reimbursement of their private school tuition. For the reasons described below, I find for the School District.

## **Issue**

Whether or not Student's parents are entitled to private school tuition reimbursement for the 2007-2008 school year?

## **Findings of Fact**

1. Student is a xx-year-old (his date of birth is xx/xx/xx) resident of the Souderton Area School District with cognitive ability in the Low Average Range and learning disabilities in reading, math and written expression. He has been attending the Private School at private expense for the last year and one-half (2006-2007 and 2007-2008). (SD-1)<sup>1</sup>
2. On April 20, 2007, a hearing officer reviewed Student's due process hearing request concerning the 2004-2005, 2005-2006, and 2006-2007 school years, and determined that the School District had denied a free, appropriate public education (FAPE) to Student for 2004-2005 and 2005-2006, but not for 2006-2007. (SD-1) Further, the hearing officer determined that the only area of FAPE denial during the 2004-2005 and 2005-2006 school years was in the area of

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<sup>1</sup> References to "P," "SD," and "HO," are to the exhibits of the Parents, School District, and Hearing Officer, respectively. References to "N.T." are to the transcripts of the November 8, 2007 and January 18, 2008 hearing sessions.

- written expression. Consequently, she awarded compensatory education equal to the amount of writing instruction denied (she estimated 45 minutes per day for the two years) and refused to award reimbursement of Private School tuition for the 2006-2007 school year. (SD-1) On June 2, 2007, an appeals panel affirmed the hearing officer's decision. (SD-2; In Re J.H., a Student in the Souderton Area School District, Special Education Opinion No. 1824) Apparently, the appeals panel's decision is now on appeal in federal district court. (Student's Closing Argument, p. 2)
3. During summer 2007, Student's parents secured an occupational therapy (OT) evaluation. A Developmental Test of Visual Perception indicated significantly decreased visual-motor skills which likely impacts Student's handwriting performance. (P-5, p.3) Further, Student's handwriting was observed to be slow and difficult to read. (P-5, p.3-4) The OT evaluation recommends direct OT services once per week to increase Student's handwriting legibility. (P-5)
  4. Also during summer 2007, the School District assessed Student for two days over the summer. The writing assessment included a Woodcock Johnson III (WJ-III) test of written achievement, as well as analysis of a writing sample under the PSSA Writing Assessment rubric. (N.T. 171-172, 205, 211-214, 246-247, 267, 270; S-6, pp. 11, 31-32, 35-37; P-3, p. 32)
  5. On August 28, 2007, Student's IEP team met to develop an IEP in the event that Student returned to the public schools. (P-3; P-4; S-6; N.T. 93-94; SD-4)  
Student's parents informed School District personnel that they had secured an OT

- evaluation over the summer, but did not yet have a written report. (N.T. 95) <sup>2</sup> On August 29, 2007, the School District offered an IEP to Student that would be implemented in its public schools. (P-3; SD-6; N.T. 99) On September 11, 2007, Student's parents rejected the School District's proposed IEP and, on the same date, the School District forwarded to ODR Student's request for due process hearing. (P-4; SD-10) On October 19, 2007, the parties conducted a mandatory resolution meeting and the School District requested permission to conduct its own OT evaluation. (N.T. 118; SD-14; SD-15, p.23; SD-16)
6. The School District's proposed IEP contains present levels of academic performance in language therapy that are based upon information obtained from Private School. (SD-6, p.10) The IEP also provides for monthly consultation between Student's special education teacher and a speech therapist. (SD-6, p.55) It also contains present levels of academic performance in written expression that are based upon WJ-III standardized achievement testing. (SD-6, p.11) In addition to reading and math goals, the IEP contains individualized writing goals that are to be measured through WJ-III and PSSA-rubric-based assessments. (N.T. 111; SD-6, pp. 47-48)
  7. Student's parents are pleased with Student's performance at Private School. (N.T. 149) Private School teaches 102 children with learning disabilities ranging from ages five through fourteen, grades kindergarten through 8<sup>th</sup>, with maximum class sizes of 12 students. (N.T. 24-25, 85) It employs the Framing Your Thoughts

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<sup>2</sup> Student's parents received the final copy of their privately secured OT evaluation report on September 11, 2007, and gave a copy of that report to the School District on October 14, 2007. (SD12)

writing program, which is a part of the Project Read Orton-Gillingham curriculum. (N.T. 41, 87) Part of Private School's educational philosophy is that speech and language instruction is the foundation for the acquisition of academic skills. (N.T. 48) Consequently, it provides speech and language instruction, primarily in receptive language skills, to all students in large and small group settings. (N.T. 27-28, 46, 55, 65, 74-75) Private School does not provide OT. (N.T. 27)

8. Parent exhibits P-1 through P-7, and P-10 through P-15 were admitted into the record. P-12's admission into the record was over the School District's objection. (N.T. 277-278) School District exhibits SD-1, SD-2, SD-4 through SD-7, SD-9 through SD-12, SD-15, SD-18, and SD-19 were admitted into the record. Parents' objections to SD-20 through SD-23 were granted and those exhibits were not admitted into the record. (N.T. 286)

### **DISCUSSION**

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

### **Burden of Proof**

The United States Supreme Court has held that, in an administrative hearing challenging a special education IEP, the burden of persuasion (which is only one element of the larger burden of proof) is upon the party seeking relief, whether that party is the disabled child or the school district. Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005); In Re J.L. and the Ambridge Area School District, Special Education Opinion No. 1763 (2006) If the evidence produced by the parties is completely balanced, or in equipoise, then the non-moving party prevails and the party with the burden of persuasion (i.e., the party seeking relief) must lose. Schaffer v. Weast, supra. If the evidence is not in equipoise, but rather one party's evidence is preponderant, or of greater weight or more convincing than the other party's evidence, then that party prevails whose evidence tips the scales.

### **Tuition Reimbursement**

There are three prongs to the decision to award reimbursement for a unilateral placement of a student at a private school. First, the School District must not have offered Student a FAPE. Second, if the School District has not offered FAPE, Student's parents must establish that the private school is appropriate for Student. Third, if FAPE has not been offered and if the private school is appropriate, I must weigh the equities in the case. Florence County School District 4 v. Shannon Carter, 510 U.S. 7, 126 L.Ed.2d 284, 114 S. Ct. 361 (1993); School Committee of the Town of Burlington, Mass. v. Dept. of Education of Mass., 471 U.S. 359, 105 S. Ct. 1996 (1985); 20 U.S.C. §1412(a)(10)(C)(ii)

To satisfy the first prong of the tuition reimbursement test, Student must establish that the School District did not offer FAPE. The cornerstone of FAPE analysis is an IEP

that need not provide the maximum possible benefit, but must be reasonably calculated to enable the child to achieve meaningful educational benefit. Board of Education v. Rowley, 458 U.S. 176, 73 L.Ed.2d 690, 107 S.Ct. 3034 (1983); Ridgewood Board of Education v. M.E. ex. rel. M.E., 172 F.3d 238 (3d Cir. 1999) It is rare, if ever, that an IEP document can be deemed perfect. In Re R.B. and the Eastern Lancaster County School District, Special Education Opinion No. 1802 (2007)

In this case, a hearing officer determined, less than one year ago, that the School District's IEPs for 2004-2005 and 2005-2006 had appropriately addressed Student's special education needs except in the area of written expression. (SD-1) In that area, the hearing officer determined that, for those school years, the School District had not produced evidence of routine assessment and, consequently, had not produced evidence of measurable progress in written expression. (SD-6, pp.16-17) She further determined, however, that for the then-current 2006-2007 school year, the School District had offered an appropriate IEP. (SD-6, p.17) Noting that the Student's parents clearly considered the Private School program to be superior to the School District's program, and noting that Student's parents have the right to educate their child wherever they wish (but not necessarily at public expense), the hearing officer determined that Student's parents were not entitled to reimbursement of Private School's tuition for the 2006-2007 school year because they had not met their burden of proving that the School District's proposed IEP for 2006-2007 was inappropriate.

Since that hearing officer's decision, nothing has changed except that the School District has strengthened its proposed IEP. The proposed 2007-2008 IEP contains updated present levels of academic performance based upon information obtained from

Private School as well as from standardized achievement testing conducted over the summer. (SD-6, pp.10-11) In addition to reading and math goals, the IEP contains updated and individualized writing goals. (N.T. 111; SD-6, pp. 47-48) The IEP also provides for monthly consultation between Student's special education teacher and a speech therapist. (SD-6, p.55) Immediately upon receipt of Student's privately-secured OT report, the School District revised its IEP to include its own OT screening within 30 days. (SD-14)

Student's parents complain that the proposed IEP addresses neither Student's need for language development nor his need in written expression. (P4; P11) I disagree.

Last year's hearing officer considered and rejected Student's language development argument. (SD-1) (I note that this reasoning works both ways. In other words, I would not permit the School District to relitigate its liability for compensatory education for the 2004-2005 and 2005-2006 school years if, for example, a new evaluation determined that Student did not have any written expression needs two years ago.) There is no new evidence of changed speech and language needs. The fact that Private School's educational philosophy emphasizes speech and language instruction as the foundation for the acquisition of academic skills (N.T. 48) says nothing about Student's own, particular speech and language needs. I conclude that the proposed IEP, which provides for monthly consultation between Student's special education teacher and a speech therapist, is appropriate to meet Student's particular needs. (SD-6, p.55)

As evidence that the proposed IEP does not appropriately address his written expression needs, Student points to his privately-secured OT evaluation report indicating fine motor deficits that affect writing (SD-12; P-5, p. 3), and to the School District's

insistence upon using the PSSA Writing Domain Rubric as an assessment tool. (P-11) He complains that the School District's "scaffolding" approach to writing is, essentially, an ineffective eclectic approach that fails to meet the definition of a required, research-based program. 34 C.F.R. §300.320(a)(4) (N.T. 223, 225-226) Finally, Student complains that the School District's November 7, 2007 revision to its proposed IEP is not timely in light of the requirement that the School District must have an appropriate program in place at the beginning of each school year. 34 C.F.R. § 300.320 I reject these arguments for the following reasons.

The privately secured OT report is equivocal. Although it recommends weekly OT services, it does not explain why such services are required. A Developmental Test of Visual Perception indicated significantly decreased visual-motor skills which likely impacts Student's handwriting performance, and observed that Student's handwriting was slow and difficult to read. (P-5, p.3-4) These may be indicative of some need, but they do not describe needs that necessarily require OT. The School District is justified in requesting permission to perform its own OT evaluation. It is possible that, after further evaluation, it will become clear that Student requires OT services. The privately-secured OT report alone is not enough, however, to demonstrate to me that the School District's IEP is inappropriate.

It is true that the School District persists in insinuating the PSSA writing rubric into its assessment and programming for Student's written expression goals. The Appeals Panel has repeatedly held that the use of such rubrics as a measure of progress is not measurable and is, therefore, inappropriate. See, In re M.B. and the Coatesville Area School District, Special Education Opinion No. 1603 (2005); In re R.U. and the

Pennridge School District, Special Education Opinion No. 1492 (2004); In re J.Z.. and the Central Bucks School District, Special Education Opinion No. 1828 (2007) The School District's proposed IEP, however, also contains a goal requiring improvement of detail, grammar, mechanics and structure in written expression to a 4.2 grade equivalent as measured on the WJ-III. (SD-6, p.47) The School District, therefore, has covered its bases by having two written expression goals, one measured against the PSSA writing rubric and one measured against a nationally normed achievement test. This addresses the single deficiency in the 2004-2005 and 2005-2006 IEPs that was identified by the hearing officer last year. (SD-1)

Nothing prohibits the School District's "scaffolding" approach to writing, nor does the record contain evidence that such an approach is either ineffective or inappropriate for this Student. Finally, the School District's November 7, 2007 revision to its proposed IEP was a timely and appropriate response to the Student's written OT evaluation, which Student's parents did not provide to the School District until October 14, 2007. (SD-12)

Thus, the School District's proposed 2007-2008 IEP was appropriate. Because Student has failed to meet his burden to prove a denial of FAPE, I need not address the remaining two prongs of the Burlington/Carter tuition reimbursement test. Accordingly, I will deny the request of Student's parents for reimbursement of their 2007-2008 private school tuition.

**Conclusion**

The School District offered an appropriate 2007-2008 IEP. It addresses all of Student's needs, including those in written expression. Because the School District has offered FAPE to Student, his parents are not entitled to reimbursement of Private School tuition.

**ORDER**

Student's parents are not entitled to private school tuition for the 2007-2008 school year.

No action is required of the School District.

*Daniel J. Myers*  
Hearing Officer

February 6, 2008

Student  
Souderton Area School District  
ODR #8112/07-08 KE