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PENNSYLVANIA
SPECIAL EDUCATION DUE PROCESS HEARING OFFICER

File: ODR No. 8397/07-08 KE
Name: CS
School District: Upper Perkiomen School District
Type of Hearing: Open

For the Student:
Parent

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Hearing Dates: February 15, March 11, March 18,
March 28, 2008
Receipt of Last Transcript: April 3, 2008
Date Hearing Closed: April 3, 2008
Decision Date: April 13, 2008

Background

Student is a high school senior who plans to attend college next year. He complains that his IEPs have neither been appropriate nor implemented appropriately over the last two years. He seeks compensatory education as well as reimbursement for various privately secured evaluations. For the reasons described below, I find for the Student, but I do not award as much relief as requested.

Issues

- Whether or not Student's current educational programming and placement are appropriate;
- Whether or not Student's educational programming and placement for the past two years were appropriate;
- Whether or not the School District properly implemented Student's educational programming and placement for the past two years;
- Whether or not Student's parents are entitled to reimbursement of various privately secured evaluations; and
- Whether or not Student is entitled to 720 hours of compensatory education services.

Findings of Fact

1. Student, whose date of birth is xx/xx/xx, is a xx year old high school senior who has been identified as gifted and as having a specific learning disability (SLD). (P1; P15; SD93, p.4; SD108; N.T. 197)¹ He is articulate, very self-aware, active in extracurricular activities including debate, the international [civic organization], ultimate [sport redacted], and a part-time job at a [retail] shop, and he plans to attend college and law school. Student has difficulty processing visual information, eye tracking, copying information, and his eyes are sensitive to bright and florescent light. He absorbs information best when listening; he does not absorb information as well when he is simultaneously listening and writing. Reading material often is distorted for Student, with words appearing as wavy, river-like patterns. He often must reread sentences before

¹ References to “P”, “SD”, and “HO” are to the Parent, School District, and Hearing Officer exhibits, respectively. References to “N.T.” are to transcripts of the February 15, March 11, March 18, March 28, 2008 hearing sessions.

comprehending them and, because white paper reflects light that bother his eyes, it easier for Student to read words that are either filtered through blue lenses or that are printed on blue paper. He finds it easier to focus and to find details when things are split up or broken into chunks. He is skilled in the use of computer technology and often compensates for his disability through the use of scanned class notes and tests, which he can then adjust to his needs through font and screen color manipulation. (N.T. 27, 54, 197-201, 585-587, 789; S15, p.3; SD 93, p.4)

2. Specially designed instruction (SDI) in Student's 9th grade, May 18, 2005 Gifted Individualized Education Program (GIEP) included laptop use during tests in lieu of having tests read to Student, having tests and handouts enlarged whenever possible, and audiobooks. (P1 p.4) Around March 2005, Student's parent requested a multi-disciplinary evaluation. (SD4; N.T. 609) At the same time, Student started receiving

privately-secured vision therapy, the total cost of which was \$300. (SD2; SD4; SD5; SD6; N.T. 29, 32, 99)

3. For the first semester of his 10th grade, 2005-2006 school year, Student took gifted English, precalculus, physics I, and accounting I classes. (SD13) Some of these teachers allowed Student the use of his laptop and headphones in class, some enlarged materials sporadically, some used blue paper on occasion, and some highlighted key words on tests. (N.T. 53, 73, 76, 160, 202-204, 206)
4. On November 11, 2005, a School District evaluation report (ER) found that Student has a specific learning disability, but is not in need of specially designed instruction. (SD10) On January 11, 2006, however, Student's IEP team determined that Student is in need of specially designed instruction and developed an IEP. (SD15; N.T. 516) The IEP contained one annual goal, i.e., to maintain a minimal satisfactory performance in all classes, a transition plan consisting of Student's application to a four-year college, and 11 program

modifications and SDI. (SD15, p.9; N.T. 175-177, 654)

Some School District personnel did not understand precisely what “minimal satisfactory performance” meant. (N.T. 270, 654) For the remainder of his 10th grade 2005-2006 school year, Student’s IEP was complied with in Latin and Physics II classes, but blue paper was not used in musical theatre class. (N.T. 57-58, 72, 204-205)

5. For the first semester of Student’s 11th grade, 2006-2007 school year, Student’s parent alleges that he received no accommodations in his advanced placement (AP) history class. (N.T. 84) That teacher, however, credibly testified that some accommodations were provided, while others were not. More specifically, all tests and quizzes were enlarged on blue paper, while handouts were not. (N.T. 395-396) Every calculus test except the first test was on blue paper, enlarged (although not enlarged to #16 font), and limited in the amount of information placed on each page. (N.T. 87, 104-105, 187-188, 246, 248; SD40, p.36) Calculus class notes

were not given to Student, and tests were not highlighted or read to Student. (N.T. 104, 106-107, 247) The IEP was implemented in Latin and AP Language classes. (N.T. 73, 84, 87, 124-125, 205, 210, 215) The virtual high school class was an on-line class accessed through school library computers that, for whatever reason, did not provide a blue screen color. (N.T. 88, 90, 125, 184, 209, 676)

6. In January 2007, Student's IEP team revised his IEP. (SD39)

The single goal was revised from requiring minimal satisfactory performance to 80% achievement. (SD39, p.7)

The original 11 program modifications and SDI were increased to 15, and written with more precision. (compare SD15, p.9 and SD39, p.8) Significant revisions were that enlargements were now defined to be 16 font (N.T. 744, 747), the learning support department was now required to copy handouts on blue paper, all teachers were required to highlight or underline key information for quizzes and tests, Student would use Dragon Speak software, and teacher notes

would be provided via photocopy or email when available.

(SD39, p.8; N.T. 534-535) The transition plan was expanded from simply applying to a four-year college to also taking SAT and ACT exams, attending a community college symposium, and writing specific learning strengths and needs for presentation to classroom teachers. (SD39, p.6)

7. Around January 17, 2007, the School District's Director of Pupil Services (DPS) asked Student to return the dome magnifier that the School District had given him. (P25, p.5; N.T. 100) The School District had borrowed the dome magnifier from another student who now wanted it back. (N.T. 212, 753, 756) Although both Student's January 2006 IEP and his January 2007 IEP contained SDI permitting his use of a dome magnifier (SD15, p.9; SD39, p.8), the DPS considered this to be a trial, to see if it worked. (N.T. 101, 671, 732) While the DPS did not know how well the magnifier was working, he'd been told that Student wasn't using it in class; in addition, the magnifier was bulky, clunky,

low tech, and generally difficult to replace, all of which caused the School District to conclude that Student did not really need a dome magnifier. (N.T. 755-756, 825, 945)

8. For the second semester of Student's 11th grade, 2006-2007 school year, Student's virtual high school class complied with his IEP. (N.T. 215, 227) His AP Calculus tests were on blue paper, enlarged (although not enlarged to #16 font), limited in the amount information placed on each page (N.T. 252), and Student was allowed to use his laptop in class and to copy another student's notes. (N.T. 242-243) After Student's AP Calculus teacher learned sometime during this semester what she was supposed to highlight on tests, she started highlighting key terms on tests as required in the IEP. (N.T. 213, 252) While this teacher did say that the use of blue paper was time-consuming, she never refused to comply with this IEP requirement. (N.T. 261) This teacher was instructed by her principal, however, not to provide class notes to Student because her notes contained the solutions to

all calculus problems in the text book, which apparently compromised the security of these answers. (N.T. 276) No large print books or books on CD were provided to Student. (N.T. 212)

9. Around March 12, 2007, Student's parent discovered that Student was failing his AP Calculus course. (SD25; N.T. 56, 109, 262) Discovering that the AP Calculus teacher had not known what she was supposed to highlight on tests, School District personnel developed a plan for the remainder of the semester by which Student could retake seven AP Calculus tests with appropriately highlighted key terms. (P25, p.11-12; 112, 115, 688) The School District gave Student an Incomplete grade until the tests were retaken. (N.T. 254) Student retook one to three AP Calculus tests, but stopped retaking them when the results were poor. (N.T. 214) On May 25, 2007, the School District offered ten hours of calculus tutoring and test proctoring during the summer to assist in the test makeups. (SD50; SD61; N.T. 121, 900)

Angry both that no one had announced Student's failing grade sooner, and that the only solution appeared to be to retake the tests with accommodations, Student and his parent rejected the plan. (N.T. 113, 122) Student argues that retaking the tests without teaching the course with appropriate accommodations is useless. (N.T. 213) Student believes that the Incomplete grade on his transcript will adversely affect his acceptance into college. (N.T. 214) Student's parent believes the Incomplete disqualified Student from entrance into the National Honor Society and will prevent Student from receiving scholarships. (N.T. 156-157) If the Incomplete is replaced with a letter grade based upon Student's performance to date, his grade will be a D. (N.T. 256)

10. In July and August 2007, the School District paid for an independent neuropsychological evaluation of Student. (P38; SD63; SD64) It recommended continued eligibility for learning support, SDI and gifted programming.

It also suggested eligibility for Section 504 accommodations. (SD64, p.9) It further recommended the use of 16 point font, all textbooks on tape, opportunity for oral answers to test questions, class notes two days in advance of class, a reader for any standardized testing including SAT, ACT and LSAT, and computer scanned notes, work sheets and handouts.

(SD64, p.10) It also recommended a functional vision evaluation, sensory integration assessment, and an assistive technology evaluation. (SD64, p.10; N.T. 133, 874)

11. On August 9, 2007, an occupational therapy (OT) evaluation recommended minimizing handwriting demands by providing class notes to Student, and permitting him to type homework, essays and test answers. It also recommended minimizing eye fatigue and effect of glare by continuing to use blue paper, enlarging font, providing a magnifier, using a note taker or providing class notes, decreasing math problems per page, using books on tape, using natural light, wearing a visor or hat to minimize bright

light glare, allowing frequent breaks, and reading multiple choice questions and answers out loud. (SD67, pp.3-4; N.T. 127-128)

12. On August 31, 2007, Student privately secured an evaluation from the Irlen Clinic in [town redacted, state redacted], which diagnosed Irlen Syndrome/ Scotopic Sensitivity Syndrome, and recommended the use of Irlen glasses that use blue tinted lenses. (SD71; 130) The evaluation itself cost \$100, and the glasses cost \$400. (N.T. 135, 137) The School District originally agreed to purchase the glasses but stated that it would seek reimbursement from Student if he did not use them in school. (N.T. 136) The School District then suggested that Student first try to purchase the glasses through Medical Assistance, rather than having the School District purchase the glasses and lend them to Student. (N.T. 189, 882, 948) The School District did not consider first purchasing the glasses and lending them to Student until Medical Assistance purchased a pair. (N.T. 948)

To date, Student does not have any Irlen glasses. Student anticipates that he will not always need the Irlen glasses, particularly if the information that he is reading is 16 font and on either blue paper or a blue computer screen. (N.T. 222)

The School District is concerned that Student will not wear the Irlen glasses with the fidelity that is called for in the Irlen Clinic's report. (SD71; N.T. 883)

13. On or about October 18, 2007 Student paid \$400 for a private OT evaluation. (N.T. 146, 148; P22; P57)
The report concludes that Student has a sensory modulation disorder and visual hypersensitivity. (P22, pp. 4-5) It recommends consultative OT to assist Student in developing a diet of sensory activities that modulate sensory input. (P22, p.7; N.T. 591) It also suggests an evaluation to rule out auditory processing or language issues. (P22, p.8) I conclude that this OT evaluation provides no additional information that had not already been discovered in previous evaluations. (N.T. 147, 599)

14. On October 29, 2007, Student's IEP team met to revise his IEP. The annual academic goal was changed from requiring 80% achievement to "satisfactory performance." (SD91, p.11; N.T. 149) An OT goal was added to instruct Student in self-modulation. (SD91, p.12; N.T. 933) Twenty program modifications and SDI were included. SDI permitted Student to scan tests, quizzes and handouts. If not scanned, material would be presented to Student on blue paper, at #16 font, with limited information on each page. Tests would be taken on the computer, parent would be emailed every two weeks regarding progress, and an extra set of books would be provided for home if available. (SD91, pp.13-14) OT would be provided twice per month for 5-6 months, and once per month thereafter. (SD91, p.14) The transition plan contained the same post-secondary education outcomes as before with one addition, i.e., that Student will reapply for AP test accommodations. It also added two independent living outcomes, i.e., self-advocacy

and disability education. (SD91, p.9) The School District considers the self-advocacy outcome to be an OT goal. (N.T. 897)

15. After the first OT session, Student's parent asked that the School District stop providing OT unless it is provided one-on-one. (N.T. 147-148, 193) Student's parent believes that Student will not want to act or say anything at his OT therapy session in the presence of another student. (N.T. 148) In response, the School District discontinued OT until the parties could resolve whether the OT services will be provided in a one-to-one or a two-to-one setting. (N.T. 912)

16. Meanwhile, during Student's 12th grade, 2007-2008, school year, Student's economic theory teacher class provides enlarged tests on blue paper, but not consistently; key words on tests and quizzes were not highlighted because that would give away the answer; and after October 2007, bullet point outlines of each day's class have been provided to Student on blue paper and/or

electronically. (N.T. 161, 326, 328, 330, 335, 342-343, 353; SD72; SD103; P63) In AP Literature class, Student does not receive class notes, he has received one large print book so far, and he does receive tests/quizzes on blue paper with highlights. (N.T. 158-159, 220) In Sociology, Student received no class notes in the first semester, but he is receiving them now; and otherwise his IEP is being followed. (N.T. 160, 220) In AP European History, Student's IEP is being followed. (N.T. 158, 219, 221)

17. Sometime around May 2006, while Student was a sophomore, his parent contacted the College Board directly to request accommodations for SAT tests. While it is not clear in the record what accommodations were requested, the College Board approved the use of a large-block answer sheet, but disapproved the use of a computer, extra time for tests, a Reader who would read the tests to Student, the use of a magnifier, and 14 point font. (SD19; SD20; N.T. 442, 740) On November 1, 2006 the College Board reiterated its earlier

refusal to provide additional testing accommodations. (S30; 90, 445) Although Student's learning support teacher was, in fact, reading tests to Student on occasion, she told the guidance counselor that tests were not being read to Student (thinking that the question was whether or not a recently-purchased computer program had been reading the tests to Student), and the School District's DPS would not verify this to the College Board, stating that there were no data supporting this request. (N.T. 67, 81, 564, 734)

18. In October 2007, Student's parent asked the School District's guidance counselor not to provide a recommendation for Student's [redacted] and [redacted] University applications. (N.T. 492; SD89) The guidance counselor not only did what was requested (i.e., not provide a recommendation), but did more than requested (without informing Student's parent) by not filling out any other demographic data on the application, and by adding a note to

alert University that the guidance counselor had been asked not to provide a recommendation. (N.T. 504-506)

19. On December 21, 2007, Student's parent filed a due process hearing complaint. (SD104) Requested relief was: identification as a student with a visual processing disability; OT IEE reimbursement; Irlen glasses; computer scanning of homework, tests and other written materials; voice recognition software; surreptitious breaks during 90 minute classes; free retaking of AP calculus class via the virtual school, and substitution of that grade for Student's current I or D grade; a new IEP; and 720 hours of compensatory education. (SD104, pp.5-6; N.T. 992) Student seeks to amend his complaint to the extent that it did not originally request reimbursement of the 2005 vision therapy report and services. (N.T. 96-99)

20. The mandatory resolution meeting was conducted on December 27, 2007. (SD106) On January 23, 2008, Student's parent requested additional supports to the

IEP. (P18; P54; N.T. 908) The School District provided a magnifier within the next week, and the School District offered to provide one-to-one OT services. (N.T. 908, 948)

21. When Student's parent requested that the School District purchase a particular computer program for Student's computer, the School District's DPS responded that he would look into it and get back to Student's parent. In fact, however, he didn't mean that he would look into it and get back to Student's parent, but rather that he would ask the School District's technology personnel to look into it and get back to Student's parent. (N.T. 816-817) The School District's DPS, however, doesn't know if anyone ever looked into it and got back to Student's parent. (N.T. 817) Student's parent feels that no one in the School District listened to her until she hired an attorney. (N.T. 164) Student told the high school principal that Student would not stand for the School District treating his mother with the disrespect that it has shown her. (N.T. 225; P48) Student's parent wants

compensation for emotional suffering and she wants me to recognize her efforts to ensure IEP implementation while she was simultaneously attending college. (N.T. 163)

22. The School District argues that some teachers did not follow Student's IEP at various times, but everyone makes mistakes. (N.T. 664) The School District argues that Student's excellent grades reflect that he was not harmed by any failures to implement the IEP. At the end of the first semester of this 2007-2008 school year, Student's grade point average was 3.533 on a 4 point scale, and his rank was 40th out of 258 students. (N.T. 471-472) Student's parent argues that Student's grades only reflect his own efforts to compensate for School District FAPE denials. (N.T. 70-71, 207-208)

23. School District personnel did not coordinate the simple act of highlighting key terms on tests and quizzes; regular education teachers thought this was the learning support teacher's responsibility, and vice versa. (N.T. 104,

243-244, 286, 380, 525, 527) Upon learning more about the need for highlighting key words, some School District personnel performed the task appropriately while others rationalized their continued failure to highlight key terms.

(N.T. 244, 286, 693)

24. School District personnel appear resentful toward implementing Student's IEP. Student's Economics teacher testified that he spent two hours per week preparing for Student and gave each hand out to Student in four separate ways, which seemed to that teacher to be above and beyond what was necessary. (N.T. 342-343; SD103) Even in 2008, teachers reported that they still had not seen Student use his dome magnifier in class. (N.T. 909)

25. I conducted hearings on February 15, March 11, March 18 and March 28, 2007. Exhibits SD1-SD114 were admitted into the record, with SD114 admitted over Student's objection. (N.T. 979) Exhibits P1, P8, P11, P12, P15, P18, P22-P25, P34, P38, P41, P44, P48, P50, P52-P67,

P69-P77 were admitted into the record, with Exhibit P72 admitted over the School District's objection. (N.T. 980) Exhibits HO 1 and HO 2 are admitted into the record. On April 3, 2008, I received the final transcript and the record in this case was closed.

Discussion

Under the Individuals with Disabilities Education Improvement Act (IDEIA), the School District is required to provide a free appropriate public education (FAPE) to all Students who qualify for special education services. 20 U.S.C. § 1412 The School District 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)

The United States Supreme Court has held that, in an administrative hearing challenging a special education IEP, the

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

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

case I must simply find in favor of the party with the more persuasive evidence.

The preponderance of evidence demonstrates both that Student's IEPs have been inappropriately designed, and that they have not been implemented appropriately. They are designed more in the nature of Section 504 plans than as IEPs. That is, they list and emphasize accommodations and mechanisms by which Student will access his curriculum, rather than modify the curriculum and/or establish an educational plan with measurable annual goals by which Student will make progress in the curriculum. 34 CFR §300.320

Student's educational programming and placement for the current and past two years were not appropriate.

The January 11, 2006, IEP contained one annual goal, i.e., to maintain a minimal satisfactory performance in all classes. (SD15, p.9; N.T. 175-177, 654) Understandably, some School District personnel did not understand precisely what "minimal satisfactory performance" meant. (N.T. 270, 654) The January 2007, IEP

revised that single goal from requiring minimal satisfactory performance to 80% achievement. (SD39, p.7) In October 2007, the annual academic goal was changed from requiring 80% achievement to “satisfactory performance.” (SD91, p.11; N.T. 149) Nothing about this shifting goal can be considered a “plan” for progress in the curriculum. It simply appears to be some sort of “throw-away” device, with no relationship either to Student’s present educational performance or to his needs.

What is more disturbing about Student’s IEPs, however, is their transition services sections. At age 16, a special education student’s IEP must include transition services (34 CFR §300.320(b)), meaning a coordinated set of results-oriented activities that is to facilitate the child’s movement from school to post-school activities, including postsecondary education. 34 CFR §300.43(a) A transition plan requires an ultimate placement objective, without which a school district cannot establish coordinated activities directed towards desired outcomes. In Re EC and the Philadelphia School District, Special Education Opinion

No. 1641 (2005) An IEP is inappropriate where it merely refers Student to outside agencies and other resources, and states that a student will identify and explore requirements of post-secondary education and training programs, but does not indicate how Student is to go about doing so other than a suggestion that the transition coordinator would provide assistance. In Re KB and the Sto-Rox School District, Special Education Opinion No. 1639

(2005) A transition plan also is inappropriate if it really is just a random walk where the school district has merely thrown some services on the table that are not really directed towards a goal but simply provide activities. In Re BC and the Whitehall-Coplay School District, Special Education Opinion No. 1262 (2002)

In this case, Student's January 11, 2006 IEP transition plan simply stated that Student intended to apply to a four-year college. (SD15; N.T. 516) The January 2007 transition plan was expanded from simply applying to a four-year college to also taking SAT and ACT exams, attending a community college symposium, and writing specific learning strengths and needs for presentation to

classroom teachers. (SD39, p.6) The October 29, 2007, transition plan contained the same post-secondary education outcomes as before with one addition, i.e., that Student will reapply for AP test accommodations. It also added two independent living outcomes, i.e., self-advocacy and disability education. (SD91, p.9) The School District considered the self-advocacy outcome to be an OT goal. (N.T. 897)

These are not sets of coordinated activities directed toward desired outcomes. Appropriate desired outcomes in a transition plan are not simply making applications to colleges, but obtaining actual acceptances from colleges; not simply taking SAT and ACT exams, but receiving appropriate accommodations while taking them, or even achieving particular SAT or ACT scores; not simply attending college symposia, but coming away from those symposia with something having been accomplished.

Further, a great deal of the conflict in this case might have been obviated if the transition plans actually did contain coordinated activities directed toward acquiring the desired grade

point averages, college application materials, and SAT and ACT accommodations that Student needed and wanted. Instead, the parties spent two years in unproductive, uncoordinated activities, with teachers unsure of which job was whose, Student's parent and School District personnel writing independently to colleges and to the College Board, and with no one fully on the same page regarding what accommodations Student needed and what information was necessary to document those needs. (SD19; SD20; S30; N.T. 67, 81, 90, 442, 445, 564, 734, 740)

With a more coordinated approach, Student's learning support teacher might not have told the guidance counselor that tests were not being read to Student when, in fact, they were. The School District's DPS might have been able to verify this to the College Board, rather than stating that there were no data supporting a request for a reader. (N.T. 67, 81, 564, 734) Similarly, with more coordinated IEP transition plans, better communication would have occurred between Student's parent and the guidance counselor in October 2007 regarding the need for various

recommendation for Student's University applications, and the guidance counselor might not have considered it necessary to include unrequested red flags to Student's applications. (SD89; N.T. 492; 504-506)

In summary, Student's educational programming and placement for the current and past two years were not appropriate because the single academic goal was not appropriate and because the transition services were not appropriate.

The School District did not implement properly Student's educational programming and placement for the past two years

Substantial energy has been expended in this case ascertaining when and where specific program modifications and SDI were, or were not, provided, and the degree to which their lack might, or might not, have adversely affected Student's educational performance.

The January 11, 2006, IEP contained 11 program modifications and SDI. (SD15, p.9; N.T. 175-177, 654) That

number increased to 15 in the January 2007 IEP, and to 20 in the October 2007 IEP. (SD15, p.9; SD39, p.8; SD39, p.8) Parental allegations of failure to provide, prior to January 2007, #16 font materials and a blue screen for the virtual high school course are rejected because those particular SDI were not in the IEP before January 2007. Complaints that parent was not timely notified of the failing Calculus grade and that documents were not scanned prior to October 2007 are rejected because these were not required IEP requirements until October 2007.

On the other hand, a magnifier and test/quiz key-word highlighting have been in every one of Student's IEPs. (SD15, p.9; P25, p.5; SD39, p.8) If School District personnel were seriously concerned about the necessity of the magnifier, the IEP team could have designed a protocol for testing its efficacy. Similarly, if the School District was concerned about preserving test security where class notes and highlighted tests were involved, it could have either 1) asked the IEP team to redesign the SDIs so that they do not compromise test security; and/or 2) had School District personnel

redesign their class notes and test designs so as to avoid compromising test security. What is not appropriate is what the School District chose to do in these instances, i.e., unilaterally take the magnifier back, and unilaterally refuse to provide IEP-required class notes or highlighted key words on tests. (N.T. 100-101, 212, 276, 327, 355, 671, 732, 753, 755-756, 825, 945)

The School District agrees that some teachers did not follow Student's IEP at various times, but argues that everyone makes mistakes. (N.T. 664) The School District further argues that Student's excellent grades reflect that he was not harmed by any failures to implement the IEP. At the end of the first semester of this 2007-2008 school year, Student's grade point average was 3.533 on a 4 point scale, and his rank was 40th out of 258 students. (N.T. 471-472) In response to the School District's argument, which I have termed "no harm, no foul," I asked the parties to research whether or not the West Chester Area School District v. Bruce and Suzanne C., 194 F. Supp. 2d 417 (E.D. Pa. 2002) (hereinafter "Chad C") case applies in this matter. (N.T. 854) In

that case, the Court held that, as a matter of law, that it is error to focus on a student's grades while disregarding his potential. I conclude that Chad C is inapposite here because that case is a "child find" case. While there is no precise standard for determining whether a student is in need of special education, and passing grades or even gifted status do not automatically preclude a need for special education (In Re J.K. and the Manheim Township School District, Special Education Opinion No. 1262 (2002)) in this case there is no dispute over Student's entitlement to specially designed instruction.²

I reject the School District's argument that its FAPE denials have been either minimal or harmless. I conclude that the School District's FAPE denials have been consistent and fundamental. Appropriate transition plans since January 2006 would have positively impacted Student's college testing and application activities, not to mention improving the parties' relationships. The

² One might reasonably conclude from the record, however, that the School District's halfhearted IEP compliance indicates passive aggressive disagreement regarding Student's entitlement.

same can be said even with the IEPs as written, if only the School District had complied with greater fidelity to those IEPs' requirements. Accordingly, I conclude that the School District has not appropriately implemented Student's IEPs, and that its FAPE denials have not been either minimal or harmless.

Student is entitled to 66 hours of compensatory education services

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

Penn Manor, 906 A.2d 642 (Pa. Cmwlth. 2006) The B.C. standard 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 he has progressed appropriately despite having been denied a FAPE.

Where FAPE denials came late in a student's academic career and where the deprivation in large measure was directly related to and resulted in hindering the development of skills necessary for a successful transition to post-secondary life, the Appeals Panel has found it to be appropriate to award compensatory education that helps prepare a student for post-secondary endeavors. In In Re D.S. and the Troy Area School District, Special Education Opinion No. 1857 (2007), the Appeals Panel agreed with a hearing officer's order that the school district (1) designate a person experienced in transition services to provide services to Student once every two weeks for one hour each session through to the end of the current school-year, plus one hour

per month for the 12 months following the end of the current school-year, even if Student exits the District at the end of the current school-year; (2) provide Student with one-to-one tutoring for 10 weeks, five hours each week, focusing on skills needed for success in post-secondary activities and provide the tutoring even if Student should exit the District at the end of the current school-year; and (3) provide Student with a laptop computer and a USB thumb drive for use at both school and home for as long as Student is receiving educational programming and services from the District. I find the remedy in D.S., supra, to be an appropriate guide in this case, as well as consistent with the B.C. compensatory education standard. Appropriate transition and tutoring services should bring Student to the point he should have been if not for the deprivation of FAPE.

I assume that there are 8 weeks left of this current school year, and therefore I will order the School District to designate a person experienced in transition services to provide services to Student once every two weeks for one hour each session through to

the end of the current school-year (4 hours), plus one hour per month for the 12 months following the end of the current school-year (4 + 12 = 16 hours). In addition, I will order the School District to provide Student with one-to-one tutoring for 10 weeks, five hours each week, focusing on skills needed for success in post-secondary activities (50 hours). Student does not request a laptop computer or a USB thumb drive, so I see no reason to award that portion of the relief ordered in D.S., supra.

Student's parent is not entitled to reimbursement of various privately secured evaluations

For a privately obtained evaluation to be reimbursable, the parents must first disagree with the School District's evaluation and then their own privately obtained evaluation must answer questions not previously answered or provide essential information not previously known to School District personnel. In Re A. Z., Special Education Opinion No. 1107 (2001); In Re K.C., Special Education Opinion No. 1446 (2004); 34 CFR §300.502(b) Parental failure to disagree with a School District evaluation may

not, however, fully foreclose IEE reimbursement. Warren G. v. Cumberland County Sch. Dist., 190 F.3d 80, 87 (3d Cir. 1999); In Re G.T. and the Palmyra Area School District, Special Education Opinion No. 1808 (2007)

Student's parent requests reimbursement of the \$400 cost of the October 18, 2007 private OT evaluation, as well as the unspecified costs of the 2005 vision therapy report and services. (SD104, pp.5-6; N.T. 96-99, 992) The School District argues that the 2005 vision therapy report and services reimbursement request should be disallowed because it was not specified in Student's complaint. I agree; reimbursement for the vision therapy report and services is not specified in the complaint at SD104 and it will not be allowed after the hearing has begun. Regarding the October 18, 2007 private OT evaluation, I conclude that this report provides no additional information that had not already been discovered in previous evaluations. (N.T. 147, 599) Accordingly, parental requests for reimbursement are denied.

Miscellaneous Remedies

Finally, other relief requested by Student include identification as a student with a visual processing disability; Irlen glasses; computer scanning of homework, tests and other written materials; voice recognition software; surreptitious breaks during 90 minute classes; free retaking of AP calculus class via the virtual school, and substitution of that grade for Student's current I or D grade; a new IEP; and 720 hours of compensatory education.

(SD104, pp.5-6; N.T. 992)

The School District has already agreed to provide the Irlen glasses, albeit with conditions. I will order the School District to provide the Irlen glasses unconditionally. In addition, because the IEP does not contain appropriate transition planning, I will order a new IEP.

Identification as a student with a visual processing disability appears to emphasize a disability label over necessary programming. I will not order this relief because the October 2007 IEP's present educational levels adequately describe Student's

visual processing needs. (SD91) Similarly, computer scanning and voice recognition software are already required in the October 2007 IEP. (SD91, p.13) There was no evidence in the record indicating Student's need for surreptitious breaks during 90 minute classes, so I will not order that relief.

I also will not order free retaking of the AP calculus class and substitution of the current I or D grade. If I conclude that a school district denies FAPE through its course selection and grading policies, I can certainly order compensatory education and possibly other remedies. I am not certain, however, that my authority extends to ordering that particular courses be given in particular ways, or that particular grades be awarded. Furthermore, I do not find that such relief is appropriate in this case. Student retook one to three AP Calculus tests, but stopped retaking them when the results were poor. (N.T. 214) In an obviously tactical and strategic decision, Student and his parent then rejected the School District's May 25, 2007 offer of ten hours of calculus tutoring and test proctoring during the summer to assist in the test makeups. (SD50;

SD61; N.T. 113, 121-122, 900) I see no reason to compensate now for that decision of Student's. If he chooses, Student may want to use all or some of his one-to-one compensatory education tutoring for making up this calculus course.

Finally, Student requests 720 hours of compensatory education. For the reasons explained above, I will order 66 hours of compensatory education.

Conclusion

Since January 2006, Student's IEPs have been substantively inappropriate and not appropriately implemented. Substantively, the single academic goals have been meaningless, and the transition plans have not consisted of coordinated sets of activities directed toward desired outcomes. Further, the School District has not complied with any fidelity to the IEPs as written. Parental requests for reimbursement are denied because the complaint did not include a reimbursement request for the 2005 vision therapy exam and services, and the privately secured OT evaluation provided no useful additional information. I will order

compensatory education and provision of Irlen glasses, but I will not order free retaking of the AP calculus class and substitution of the current I or D grade.

Order

- The School District has denied FAPE to Student since January 2006.
- The School District shall provide 16 hours of compensatory education in the following manner:
 - 1) The School District shall designate a person experienced in transition services to provide services to Student once every two weeks for one hour each session through to the end of the current school-year (4 hours);
 - 2) The School District shall continue to provide transition services to Student one hour per month for the 12 months following the end of the current school-year. (12 hours).
- The School District shall provide another 50 hours of compensatory education in the form of one-to-one tutoring

for 10 weeks, five hours each week, focusing on skills needed for success in post-secondary activities.

- The School District shall provide Irlen glasses to Student immediately and unconditionally.
- The School District shall reconvene Student's IEP team to develop appropriate transition services that are consistent with 34 CFR §§300.320(b) and §300.43(a) At a minimum, this shall include a coordinated set of results-oriented activities that will facilitate Student's movement from school to post-school activities, including postsecondary education. It shall also identify ultimate placement objectives, and describe how Student and the School District shall go about achieving these objectives.

Daniel J. Myers
Hearing Officer

Date: April 13, 2008

File: ODR No. 8391/07-08 KE

Name: Student

School District: Upper Perkiomen School District