

This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

DECISION

Due Process Hearing for MG

ODR File No. 8470/07-08 LS

Date of Birth: xx/xx/xx

Dates of Hearing: March 19, April 14, April 28, June 30,
and July 1, 2008 – Open Hearing

Parties to the Hearing:

Representative:

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Abington School District
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Hearing Officer: Debra K. Wallet, Esq.

Record Closed: July 23, 2008

Date of Decision: August 7, 2008

BACKGROUND:

Student is a teenage student (date of birth xx/xx/xx) who completed Student's ninth grade year at the [redacted] School within the Abington School District [hereinafter School District] in June 2008. Because Student was initially identified as having specific learning disabilities in reading, writing, and math, Student was provided services through an Individualized Educational Plan [hereinafter IEP] in elementary school. In seventh grade, Student was determined to have the additional diagnosis of Attention Deficit Hyperactivity Disorder [hereinafter ADHD].

Student's Parents filed a due process complaint seeking compensatory education from January 2006 through the present, alleging that the School District failed to offer Student a Free Appropriate Public Education [hereinafter FAPE] because Student's IEPs were deficient and because Student failed to make meaningful educational progress. Parents further contend that the IEP which will be in place for the [next school year] is not appropriate and request a more restrictive private placement to address Student's identified learning disabilities. Finally, they seek reimbursement for the costs of a private evaluation.

The School District contends that Student made meaningful progress both behaviorally and academically during the years in question and therefore no compensatory education is due. No private school tuition should be awarded because the offered public school placement in part-time emotional support classes is appropriate and the least restrictive. The cost of the private evaluation must be denied for failure to comply with applicable regulations.

ISSUES:

1. Did the School District provide Student with FAPE between January 2006 and the present?
2. Should the School District reimburse Parents for Student's private school placement, including transportation costs?

3. Should the School District reimburse Parents for their costs associated with the independent educational evaluation?
4. Are Parents entitled to compensatory education?
5. Did the School District err in failing to provide ESY during 2006, 2007, and 2008?

FINDINGS OF FACT:

1. Student currently lives with both Parents within the Abington School District [hereinafter School District].
2. Student has a specific learning disability in reading, writing, and math. (S-25, p. 8). Student also has emotional disturbance and ADHD, an other health impairment [OHI]. (S-25, p. 8; N.T. 33).
3. Parents filed a Due Process Complaint Notice dated January 25, 2008, received January 29, 2008. (HO-2).
4. The School District filed a timely response. (S-51).
5. Both parties participated in a pre-hearing telephone conference on February 22, 2008 during which there was general agreement about what must be decided by the Hearing Officer.
6. The parties elected to have an open hearing. Hearings were held March 19, April 14, April 28, June 30, and July 1, 2008. The parties submitted written briefs on July 23, 2008, at which time the record was closed.
7. The following exhibits were admitted: Hearing Officer Exhibits HO-1 through HO-13. Parents Exhibits P-1 through P-40; P-43 through P-47; P-50 through P-51. School District Exhibits S-1 through S-2; S-4 through S-9; S-11 through S-21; S-25; S-27 through S-40; S-44 through S-55. (N.T. 589-590, 1271, 1274).
8. Parent called four witnesses: Mother, Father, parent advocate, and psychologist.
9. The School District called six witnesses: school psychologist; parent advocate; two special education teachers; assistant principal of the junior high school; and supervisor of special education.

Seventh Grade

10. The School District initially placed Student in a learning support class for reading, English, math, social studies, and science. (S-2, p. 5).

11. Student had a history of behavior and learning issues and exhibited behavior problems at the beginning of seventh grade. (N.T. 602).
12. The October 2005 IEP includes a “positive behavior management plan” requiring the School District to develop a daily “positive point chart” for Student. Parents never saw one. (S-2, pp. 17-18; N.T. 55).
13. At the October 28, 2005 IEP meeting, at which both Parents attended, the team discussed moving Student into an emotional support setting because of the teachers’ concern about Student’s behavioral issues. Parents objected because, in their view, Student had a learning disability and needed specially designed instruction [hereinafter SDI]. (N.T. 44, 603-605; S-2).
14. During this meeting, the School District recommended a psychiatric consultation and discussed the reevaluation of Student. (N.T. 606-607).
15. A certified school psychologist and licensed clinical psychologist, prepared a Reevaluation Report [hereinafter RR] dated February 2, 2006. (N.T. 612-613; S-4).
16. The certified school psychologist administered selected tests from the Woodcock Johnson, Third Edition, and determined that cognitively Student was within the low average range. Student’s scores in reading, math, and writing were in the low average range. Consequently, the School District maintained the classification of specific learning disability. (N.T. 614 - 618).
17. By NOREP dated March 7, 2006, the School District assigned Student to a part-time emotional support classroom. (S-5).
18. The School District prepared another RR on Student dated June 2, 2006. (S-25). It never discussed the results of the RR with Parents during an IEP meeting. (S-25, p. 10; N.T. 96). It found Student suffers from an other health impairment, namely ADHD, and an emotional disturbance in addition to the previously determined specific learning disabilities in reading, writing, and math. Without elaboration, the evaluator recommended that the School District “continue implementing special education instruction [for Student] within the context of an emotional support program,” (S-25, p. 8).
19. The School District prepared an amended IEP for Student dated March 30, 2006. The IEP provided for weekly emotional group support sessions with the school psychologist, the school social worker, and others. No regular education teacher attended the IEP meeting. The IEP notes that the School District administered the Woodcock Johnson Third Edition (WJ-III) to Student on October 28, 2005, at the start of Student’s seventh grade year. On the WJ-III, Student scored, among others, the following grade equivalencies: broad reading - 4.1; reading comprehension - 3.1; math calculation - 3.8; and writing task - 3.0. (S-7, p. 3; N.T. 634-635).

20. The School District conducted another IEP meeting and prepared a new IEP for Student dated April 26, 2006. (S-14).

21. Special Education Teacher produced no progress monitoring data responsive to the annual goals in Student's seventh grade IEPs. (N.T. 866). The only progress monitoring compiled was a vague, two-page "student goal progress report" (P-43, pp. 2-3). The District did not change Student's behavior plan in response to Student's five suspensions by June 2006. (N.T. 867). He failed to explain why he delayed until April 2006 before recommending the School District conduct an FBA on Student. (N.T. 873-874).

22. A May 9, 2006 IEP identified Student's primary needs as emotional support and coping. The AG's remained the same. Student was deemed not eligible for Extended School Year [hereinafter ESY]. Student was reported by Student's teacher to be doing poorly in reading and English. (S-17, pp. 5, 7, 9; S-18, p. 2).

23. The Hearing Officer finds, based upon the totality of the record, that Student failed to make significant academic progress in the seventh grade, but Student was advanced to the eighth grade for the following school year.

Eighth Grade

24. The School District continued Student's part-time emotional support placement during the 2006-2007 school year. (N.T. 904-905).

25. Student commenced Student's eighth grade year with the IEP dated May 9, 2006 in place. (N.T. 905; S-17).

26. Teacher implemented the May 9, 2006 IEP, including specially designed instruction, program modifications, and a behavior plan. There were approximately five students in the class for emotional support science. (N.T. 908-909, 991).

27. During the beginning of the school year, Student's teachers believed that Student had made significant progress compared to the seventh grade. (N.T. 914).

28. The teacher administered the same curriculum for all his students, including Student, but with some difference in materials. (N.T. 991).

29. The School District suspended Student at least three times that year and Student accumulated 51 detentions. (P-39, pp. 1-8).

30. The School District never administered a functional behavior assessment [hereinafter FBA] on Student. The School District promised that its school psychologist would perform one. (S-15, p. 1). The school psychologist never did so. (N.T. 80-81).

31. In the January 3, 2007 IEP, the School District's annual goals and SDI for Student were essentially unchanged from Student's April 26, 2006 or May 9, 2006 IEP. The School

District compiled no progress monitoring data responsive to Student's annual goals. (Compare S-14, pp. 7-8 and S-17, pp. 7-8 with S-30, pp. 7-8).

32. During the February 15, 2007 IEP meeting, the team determined that Student would be placed in general education classes because of the progress Student had made. A written contract provided for Student to "take ownership" of Student's behavior as part of restorative practices used in the emotional support environment. (N.T. 936, 1007-1008; S-33).

33. Student experienced behavior and academic problems during the second half of eighth grade. Student's Parents put Student back on medication and consulted with a psychiatrist. The IEP team made changes to the Positive Behavior Management Plan. (N.T. 940-941, 944).

34. The District contended Student "for the most part progressed very well" at school. (N.T. 977). However, the witness admitted that, as of May 14, 2007, Student had an "F" in social studies, "E's" in mathematics plus, health, PE8, and general music and a "D" in reading. (P-43, p. 6; N.T. 982). He conceded such grades do not indicate progress. (N.T. 983).

35. Toward the end of the eighth grade year, Student was involved in several disciplinary actions. Student was at one point detained by the police department. (N.T. 1074).

Ninth Grade

36. By letter dated July 25, 2007, Parents advised the School District that they were not sending Student to the district high school for the 2007-2008 (9th grade) school year. Parents asked the School District to provide them with a list of private/alternative schools for Student. (S-38, p. 1).

37. The School District returned Student to Student's emotional support placement, with a regular education social studies class. (N.T. 133-134).

38. Ninth grade goals included reading, writing, math, and behavior based upon the February 15, 2007 IEP. These remained essentially unchanged and referenced the same "80% accuracy rate" as before. (N.T. 951; S-36, p. 6).

39. Student began to have increasing numbers of absences and homework was sent home to make up for these absences. (N.T. 954-955).

40. The parents' evaluator is a nationally certified school psychologist and a licensed psychologist in Pennsylvania. (N.T. 402).

41. The parents' evaluator interviewed and evaluated Student during August 2007 and prepared an initial Independent Educational Evaluation [hereinafter IEE] dated September 9, 2007. (P-32). He administered the Stanford Binet 5, which revealed Student has a full-scale IQ of 92. (P-33, p. 3). This figure falls within the average range (30th percentile). However, on the

WJ-III, Student, then entering ninth grade, scored among others the following grade equivalencies: Total achievement: 5.5; broad reading: 5.2; broad math: 5.1; math calculation: 4.1; passage comprehension: 4.1; and calculation: 3.8. (P-32, p. 8). The Hearing Officer finds that all of these test scores are below the level one would expect given Student's average IQ. (N.T. 423-424).

42. The parents' evaluator determined Student suffers from ADHD; chronic, moderate depression; an anxiety disorder (NOS); a conduct disorder; and a disorder of mathematics calculation. (P-33, p. 6). Student also may suffer from an alcohol or marijuana abuse disorder. (N.T. 430-431).

43. The parents' evaluator expressed his opinion that the School District is so focused on Student's behavior that it has stopped trying to educate Student, has oriented toward controlling Student rather than analyzing Student's educational needs. (N.T. 449-450).

44. The School District responded to the parents' evaluator's IEE by RR dated December 10, 2007, six weeks later. (S-45). Parents had no input into the RR. (N.T. 149). The school psychologist determined that, despite Student's multiple suspensions, a full FBA was not necessary. (S-45, p. 15). The school psychologist recommended various SDI, including one-on-one instruction and greater inclusion for Student in the regular education curriculum. (S-45, p. 16).

45. In the emotional support class, the School District teaches Student at the same pace and with the same grade level materials as those used in the regular education class. (N.T. 160).

46. A district witness stated that, during 2007-2008, had Student not had so many absences, Student would have had a "stellar year academically." (N.T. 955; 1012-1013). However, he admitted that Student's "F" in emotional support English 9, Student's "E" in Mathematics Plus and Student's "D" in World Civ I as of November 2007 were less than stellar. (N.T. 1013-1015).

47. The School District prepared a new IEP for Student dated January 14, 2008, keeping Student in an emotional support classroom. (N.T. 164; S-47). Parents pointed out at the IEP meeting that the School District never follows Student's behavior plan. (N.T. 164).

48. The Hearing Officer finds that the School District's annual goals for Student contained in the January 2008 IEP are inappropriate. (S-47, p. 10; N.T. 166). Student is functioning at a fourth or fifth grade level, yet the IEP calls for the School District to educate Student using eighth or ninth grade level materials. (N.T. 166-167).

49. The School District prepared a draft IEP for Student dated February 14, 2008 which it described as proposing no significant changes. (S-50, N.T. 169).

50. Student had many unexcused absences during the 2007-2008 year, particularly in the second half. (N.T. 969-970).

51. Student was involved in a drug incident at the end of ninth grade which resulted in a 45-day alternative placement for disciplinary reasons at the beginning of tenth grade. Upon the conclusion of the alternative disciplinary placement, the School District will recommend a return to an emotional support placement. (N.T. 1190-1192).

52. Parents presented the testimony of educational advocate who holds a master's degree in social work. She has been involved in Student's case as an educational advocate since April 2006. (N.T. 353-354).

53. As of January 14, 2008, the educational advocate was dissatisfied with the School District's handling of Student's education. Student's reading had either stagnated or was regressing. According to the Group Reading Assessment and Diagnostic Evaluation (GRADE) and the WJ-III, Student was functioning at a fourth or fifth grade level. Despite all Student's difficulties, the School District has not changed Student's behavior plan at all since 2005. (N.T. 368-370; S-30, p. 12).

54. The Hearing Officer accepts the opinions of the educational advocate who has extensive experience as a child advocate and has worked with Parents and Student over several years. Her opinion that Student has not made meaningful educational progress in the School District in the eighth and ninth grades is supported by the incontrovertible results of Student's GRADE and WJ-III assessments, administered multiple times over several years by both the independent evaluator and School District personnel.

55. Director of Special Education, has been closely involved with Student's case during seventh, eighth, and ninth grades. She monitored Student's behavioral progress as well as Student's academic progress. (N.T. 1159, 1161).

56. Director of Special Education discounted Student's poor performance on the PSSAs and the GRADE because those tests are "administered as a group." (N.T. 1187). However, she admitted Student took the PSSAs in a group of between five and eight students. (N.T. 1207). She testified that the WJ-III is a better test for Student because "it is administered one-to-one." (N.T. 1187). She asserted that, despite Student's average IQ, Student's below grade level performance on the WJ-III is "commensurate with [Student's] intellectual ability." (N.T. 1208-1209).

Upcoming School Year

57. For tenth grade, the School District intends to educate Student on an eighth or ninth grade level while "backfilling" Student's missing skills. (N.T. 1213-1214). However, the Director of Special Education admits that nothing in Student's IEP sets forth what SDI, if any, the School District will use to "backfill" Student's educational deficits. (N.T. 1215-1216).

58. The School District intends to instruct Student using the "Read 180" program. Director of Special Education conceded that there is no progress monitoring for Student's performance in Read 180 in the IEP. She explained that the School District will prepare these

for Student's Read 180 program if and when Parents approve Student's program. (N.T. 1223-1225).

59. Director of Special Education is opposed to Student's placement in an alternative program because she believes Student has made consistent progress across the past three years. She believes that a more restrictive setting would "not make sense." (N.T. 1193).

60. The school District's psychologist never conducted a mental status examination of Student. (N.T. 710). She claims Student's behaviors improved greatly during eighth and ninth grade (2006-2007 and 2007-2008). (N.T. 689, 694, 714). She reached this conclusion despite admissions by Parents and Student that Student sometimes sees things that are not there, sometimes sets fires and often uses illegal drugs. (S-43, p. 6).

61. The school District's psychologist agrees Student is not functioning at an eighth or ninth grade level. (N.T. 756). She has no idea what the School District means by "teacher-designed/publisher-designed activities" on the progress monitoring section of Student's February 2008 IEP. (N.T. 759). She agrees that an IEP should address a student's needs in all subject areas. (N.T. 761). Despite this, she admits the School District's February 2008 IEP lacks annual goals for Student in writing, science and social studies. (N.T. 762-764).

62. The Hearing Officer finds inappropriate the School District proposal to educate Student on an eighth or ninth grade level even though, according to standardized testing, Student is functioning at a fourth or fifth grade level. (N.T. 1019-1020).

63. The LEA representative has never specifically observed Student in class. (N.T. 1106). He was the LEA representative during Student's IEP meetings. (*See, e.g.*, S-30, S-36 and S-47). Despite this role, he never followed up with the school District's psychologist to ensure she conducted an FBA on Student. (N.T. 1114-1115).

64. The School District intends to place Student in an alternative school known as "[redacted]" (hereinafter Alternative) for the start of the 2008-2009 school year. The LEA representative does not know what special education services, if any, Student would receive there. (N.T. 1136).

65. The January 14, 2008 IEP proposes for the future a reading program called "Read 180" which is advertised as a research based program addressing fluency, comprehension, word recognition, and vocabulary. This would be utilized daily in English and Reading classes. (N.T. 560-561; S-47, p. 14).

66. The advocate does not believe that the Read 180 program would be appropriate for Student because it is a computer program. She believes that Student needs direct involvement with a teacher because of Student's easy distractibility. The IEP does not specifically address how the teacher will monitor and support the program. (N.T. 570-572).

67. The Hearing Officer accepts the opinion of the advocate that Read 180 is not an appropriate program for Student. Based upon the record as a whole, Student is easily distractible and likely needs one-to-one reading attention.

68. The private evaluator is of the opinion that Student needs more emotional and academic support. An alternative private school like Private School could stabilize Student and obtain reasonable levels of academic and behavioral growth in a day setting. Without such a placement, the private evaluator believes that Student cannot receive FAPE. (N.T. 463-464; P-33, p. 7).

69. While the School District believes that a more restrictive setting is not necessary, the Hearing Officer accepts the well-supported opinion of the private evaluator who has given reasons in support of his opinion which are buttressed by the record as a whole. Student needs individualized attention in the areas of reading, writing, and math to make meaningful educational progress. Without an intensive one-to-one reading program, it is likely that Student will fall further behind. The coming grade is a critical time for this Student and without immediate intervention Student will likely regress because of Student's emotional and behavioral problems.

70. Student needs an alternative private school, like Private School, to obtain reasonable levels of academic and behavioral growth.

CONCLUSIONS OF LAW

1. The Hearing Officer has jurisdiction over the placement of Student or the provision of FAPE under the IDEIA to Student.

2. The School District had responsibility for providing FAPE to Student from the 2006-2007 school year to the present.

3. Parents have not met their burden of proof in establishing by a preponderance of evidence that Student was denied FAPE during the 2006-2007 school year.

4. Parents have met their burden of proof in establishing by a preponderance of evidence that Student was denied FAPE during the 2007-2008 school year.

5. Student's proposed IEP for the 2008-2009 school year fails to satisfy the legal requirements of the IDEIA.

6. As a matter of law, a private school placement such as the Private School is an appropriate placement for Student during the 2008-2009 school year.

7. Parents are entitled to reimbursement for tuition to a private school placement such as the Private School for the 2008-2009 school year and to the costs of providing transportation to the private school placement.

8. There are no equitable considerations which would weigh against or reduce tuition reimbursement.

9. Parents are not entitled to reimbursement for the costs of the IEE.

10. Student was entitled to ESY during the summers of 2007 and 2008.

DISCUSSION OF ISSUES

1. Did the School District provide Student with FAPE between January 2006 and the present?

The Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. §1400 *et seq.* [hereinafter IDEIA] does not require states to develop IEPs that “maximize the potential of handicapped children” but merely requires the provision of “some” educational benefit. *See, Board of Education v. Rowley*, 458 U.S. 176, 189 (1982). The Third Circuit has defined that standard to mean that more than “trivial” or “de minimus” benefit is required. *See, Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 179, 184 (3d Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989).

The Third Circuit has determined that a student’s demonstrated progress in an educational program is sufficient to show that a school district’s IEP provides meaningful benefit necessary to satisfy the IDEIA’s FAPE standard. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 242 (3d Cir. 1999). One of the issues in the instant case, then, is whether or not the School District has shown that it provided a “meaningful benefit” to this Student, progress which is gauged in terms of educational improvement commensurate with academic ability.

The Pennsylvania Department of Education’s Annotated IEP describes appropriate,

measurable annual goals [AGs] as follows:

[AGs] are statements in measurable terms that describe what **reasonable expectations** can be accomplished within a twelve month period. In order for a goal to be measurable, the team must be able to answer the following two questions: What do you want the student to do? How well? **There must be a direct relationship between the [AGs] and the PLEP** (Emphasis added.)

In the case at bar, the AGs in Student's IEPs are unacceptably vague. Student's AGs on Student's IEPs from January 3, 2007 and April 26, 2006 are identical. (S-14, p. 7; S-30, p. 7.) Two of the five annual goals are behavioral. The other three goals require Student to score at some "80% accuracy rate" in reading, writing, and math. The goals and the methods are certainly not well explained so that a teacher would understand what the student is to do. Although "separate progress notes" are referenced, they are not attached nor were they ever presented by the School District at hearing. (S-30, p. 7). As the Parents contended all along, the School District presented no progress monitoring to verify any of this. This January 3, 2007 IEP, as slightly amended in February 2007 (S-36) to place Student in a regular education class for Social Studies, was the IEP in place for the first half of the ninth grade year.

This Hearing Officer focused as well on the January 14, 2008 IEP (S-47) and the February 14, 2008 IEP (S-50) in place for the second half of the ninth grade year. Although the annual goals are much more detailed (S-47, pp. 10-12), they are still not directly responsive to Student's present levels of educational performance. According to the WJ-III and the Group Reading Assessment and Diagnostic Evaluation, Student is functioning at a fourth or fifth grade equivalent level. (S-47, pp. 6-7). The PSSA scores demonstrate Student is "below basic" in both math and reading. (S-47, p. 5). Despite this, according to Student's IEP goals from January and February, 2008, the School District plans to educate Student "using instructional materials at an

eighth grade/ninth grade level.” (S-47, p. 10). The School District claims it will somehow “backfill” this four-or-five-year educational gap. However, the IEPs set forth no plan for such remediation and propose no progress monitoring to determine its effectiveness. The only conclusion is that the IEPs for ninth grade fail to offer Student FAPE.

The record reveals that the problems, both behaviorally and academically, arose at the end of the eighth grade year. Although the Hearing Officer has some concern about the fact that the IEP’s from January 3, 2007 and April 26, 2006 appear to be identical, the School District apparently did not become aware that Student was not making meaningful progress until the ninth grade year. However, by the beginning of the ninth grade, it should have been obvious that Student’s inclusion in an emotional support classroom using grade level materials was not working. Inexplicably, the School District continues to claim that Student had a stellar year academically in ninth grade (N.T. 955, 1012-1013), but Student’s grades were less than acceptable. It is hard to understand how the School District could conclude that Student made meaningful educational progress in the ninth grade when Student had failing marks in English, mathematics, and science and a D average in World Civilizations 1. (N.T. 174-175; P-43, pp. 7-19). Even if these cited grades were not final grades but only interim grades, the school psychologist admitted that Student “probably” did not make meaningful educational progress in math calculation and conceded that Student’s struggles in reading fluency were “definitely a concern.” (N.T. 736-737).

The standardized testing confirmed that Student was functioning at a fourth or fifth grade level. Upon this Hearing Officer’s review of the relevant IEP’s, there does not appear to be any direct relationship between the annual goals and the deficiencies shown in the standardized testing. The Hearing Officer must agree with Parents that the IEP goals are so vague that they do

not address the fundamental problems in reading, writing or math. One must wonder why the School District believes that educating Student in an emotional support classroom using grade level materials will allow Student to catch up. The lack of consistent progress monitoring or even a plan for progress monitoring is particularly troubling. Although the School District claims that it will “back fill” (whatever that phrase means), a review of the IEP’s fails to establish any idea of how this will be done.

The advocate does not believe that the Read 180 program would be appropriate for Student because it is a computer program. Student needs direct involvement with a teacher because of Student’s easy distractibility. The IEP does not specifically address how the teacher will monitor and support this reading program. (N.T. 570-572). The Hearing Officer does not believe that Read 180 is an appropriate program for Student. Student is easily distractible and likely needs one-to-one reading attention not a computer program which will require independent action and personal motivation.

The Hearing Officer does not doubt the sincerity of the director of special education and the teachers in addressing both the behavioral and academic problems experienced by this Student. These individuals impressed the Hearing Officer as being intent upon their educational mission. Nevertheless, based on this record, the Hearing Officer simply must agree with the opinion of the private evaluator that the School District has been so focused on Student’s behavior that it has stopped trying to educate Student. (N.T. 449).

Whether or not the eighth grade IEPs were appropriate is a close call. It is doubtful that Student made a great deal of progress in the eighth grade, but this Hearing Officer is not prepared to find on this record that Student was denied FAPE during the 2006-2007 school year. Certainly by the ninth grade, the IEP’s should have described specific SDI’s to address Student’s

deficiencies. The SDI's in all of the documents are very general and state an intent to address the "unique needs" of the child that result from the child's disability, but they do not describe any adaptations to the educational curriculum, either in methodology or delivery, to allow an emotional support teacher to tackle Student's problems. Consequently, the Hearing Officer must conclude that the ninth grade IEP's do not provide FAPE and that compensatory education is an appropriate remedy.

Student is undoubtedly a behavioral challenge. There is no need to address or further comment on Student's behavioral plan or the various suspensions resulting from Student's inappropriate behavior. Once it is determined that an IEP is inappropriate, there is no need to parse every aspect of that IEP. By ninth grade, the School District should have known that Student was receiving nothing more than a de minimus educational benefit. Prompt action should have been taken at the beginning of the ninth grade to address the academic deficiencies.

2. Should the School District reimburse Parents for Student's private school placement, including transportation costs?

The caselaw requires this Hearing Officer to engage in the standard three-step tuition reimbursement analysis set forth in *Florence County School District Four v. Carter*, 510 U.S. 7, 114 S. Ct. 361 (1993), and *Burlington School Committee v. Massachusetts Department of Education*, 471 U.S. 359, 105 S.Ct. 1996 (1985). The three-step Burlington-Carter analysis provides that parents shall be reimbursed for private school tuition if: (1) the School District has failed to offer an appropriate program; (2) the parents' placement is appropriate; and, (3) the balance of the equities favors the parents' placement.

Did the School District offer an appropriate program?

As described in the preceding pages, the Hearing Officer believes that the School District has failed to offer an appropriate program for Student's ninth-grade year. The IEPs (S-36 and S-50) have significant deficiencies, particularly in reading and written expression, as enumerated above. S-50 will be in place until January 13, 2009. These deficiencies compel a finding that Student was not offered FAPE for the upcoming 2008-2009 school year.

Is Student's proposed placement appropriate?

Parents' choice for private school need not satisfy the IDEIA requirements in order to qualify for reimbursement. The standard is whether the placement is "reasonably calculated" to provide Student with educational benefit. *In Re: M.K.*, Special Education Opinion No. 1445 (2004).

The record here is a bit sparse on the details of the private school placement, but the Hearing Officer has no doubt that placement at a private school such as Private School would be "reasonably calculated" to provide Student with the private evaluator in this regard.

The Hearing Officer understands that the test focuses on the appropriateness of the placement at the time the selection was made, *see Rairdan M. v. Solanco School District*, 1998 WL 401637 at 4 (E.D. Pa). At the present time, this kind of placement would be "reasonably calculated" to provide Student with educational benefit.

Do the equities favor reimbursement?

The Hearing Officer heard nothing that would suggest anything other than a good faith effort on the part of the Parents to place their child in a setting which will address both Student's behavioral needs and Student's need to catch up in the basics of reading, writing, and math.

Obviously, these are concerned parents who have placed high priority on the best interest of their child. There are no equitable considerations which would weigh against tuition reimbursement.

For all of these reasons, the Hearing Officer must conclude that the School District has failed to offer FAPE for the upcoming tenth grade year, that a private school such as Private School is appropriate, and that there are no equities which would prevent the award of tuition reimbursement.

3. Should the School District reimburse Parents for their costs associated with the independent educational evaluation?

There is no question that the IDEIA provides for the opportunity for parents to obtain an independent educational evaluation of their child. 20 U.S.C. §1415(b)(1). However, state regulations limit the situations in which an independent educational evaluation is done at public expense. The Hearing Officer must agree with the School District's argument that Student's Parents failed to follow the procedural requirements to obtain an IEE at public expense. Notably, the right to obtain such an evaluation at public expense is limited to those situations where "the parent disagrees with an evaluation obtained by the public agency." 34 C.F.R. §300.502(b)(1). In this case there was no educational evaluation with which Parents expressed disagreement.

Parents cite *Warren G. v. Cumberland County School District*, 190 F.3d 80, 87 (3d Cir. 1999), but this case does not relieve Parents of the obligation to express disagreement with a public agency's evaluation. It simply holds that the disagreement need not be expressed *before* the IEE is obtained; there must necessarily be a disagreement with some evaluation obtained by the public agency.

Parents may, indeed, have difficulty with the District's evaluation and conclusions which came in response to the IEE, but the requirements for public reimbursement are stringent. Parents have not met those requirements and the Hearing Officer is unable to award the costs to Parents. Even so, for reasons expressed elsewhere in this decision, the private evaluator's evaluation and conclusions have been most helpful in enabling Parents to prove both that the current proposed placement is unsuitable and that the program provided in the ninth grade constituted a denial of FAPE.

4. Are Parents entitled to compensatory education?

Compensatory education may be an appropriate equitable remedy only when the responsible educational authority has failed to provide a disabled child with an appropriate education as required by the IDEIA. The purpose of compensatory education is to replace lost educational services. *See Lester H. v. Gilhool*, 916 F.2d 865 (3rd Cir. 1990); (An IDEA eligible student is entitled to an award of compensatory education only if FAPE is denied by the school district); and *M.C. v. Central Regional School Dist.*, 81 F.3d 389 (3rd Cir. 1996).

The Third Circuit Court of Appeals recognized a District's obligation to provide compensatory education under the IDEA as follows:

A school district that knows or should know that a child has an inappropriate IEP or is not receiving more than *de minimis* educational benefit must correct the situation. If it fails to do so, a disabled child is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem.

M.C. v. Central Regional Sch. Dist., 81 F.3d 389, 397 (3rd Cir. 1993).

Part of the legal issue, then, is to determine the beginning and end of the period of time reasonably required to rectify the problem. After the difficulties at the end of eighth grade, by

the beginning of the ninth grade year, the School District should have known that Student had an inappropriate IEP. The IEP process should not have been a complicated one and the first 60 school days would have been ample to allow for the convening of a team and appropriate modification of the IEP. Consequently, the award of compensatory education will begin 60 days after the start of the ninth grade year. For ease of calculation, the compensatory education award will begin November 1, 2007.

Student should have received instruction for at least three hours per day in the major subjects of reading, writing, and mathematics. Student has a recognized learning disability in these three areas. The compensatory education award will be for three hours per day for each day Student actually attended school during the 2007-2008 school year after November 1, 2007.

Parents may decide how the hours should be spent so long as they take the form of appropriate developmental, remedial, or enriching instruction that furthers the goals of the Student's current or future IEP's. These services are to supplement Student's current services, not to substitute for them. The services may occur after school hours, on weekends, and during the summer months at a time convenient to Student and Student's Parents.

The cost to the School District of providing the awarded hours of compensatory education should not exceed the full costs of the services that were denied. Full costs are the salaries and fringe benefits that would have been paid to the actual professionals who should have provided the School District services and the actual costs for salaries, tuition, and transportation for any contracted services. This principle sets the maximum costs of all of the hours or days of instruction of compensatory education awarded. Parents may balance expensive and inexpensive instruction or services so that the average cost is below the maximum amount. Parents may also use fewer hours of expensive services so long as the maximum amount is not

exceeded. Finally, Parents may not be required to make co-payments or use personal insurance to pay for these services.

5. Did the School District err in failing to provide ESY during 2006, 2007, and 2008?

The Parents properly raised the issue of Extended School Year [ESY] but provided very little testimony or other evidence in support of their request. Similarly, the School District did not even address this issue in its brief. The Hearing Officer is puzzled as to why Student, who is several years behind in reading and math, would not have been offered ESY instruction in these areas. The only explanation is that Student is not eligible because of “teacher reports, report card grades, IEP progress report, and parent information there is no evidence of a regression in skills after a break in school services.” (S-36, p. 8; S-31, pp. 3-4; N.T. 1259, 1268).

Parents request that an order issue compensating for ESY for the years 2006, 2007, and 2008. The Hearing Officer will decline to do so for the earlier year of 2006, but it does appear that ESY services should have been provided during the summers of 2007 and 2008 to allow for additional progress in bringing Student’s reading, writing, and math skills up to grade level. These summers are now past history, but compensatory education can be awarded for the failure to provide this instruction and the Hearing Officer will do so. Parents are awarded the number of hours of compensatory education representative of those ESY hours Student would have been provided in the summers of 2007 and 2008 had Student been deemed eligible for ESY.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED that:

1. Student is entitled to compensatory education in the amount of three hours per day for each day Student actually attended school during the 2007-2008 school year after November 1, 2007. The compensatory education may be used as described in the discussion portion of this Decision.

2. The School District shall reimburse Parents for Student's private school placement, including transportation costs, for the 2008-2009 school year.

3. Reimbursement of costs associated with the Independent Educational Evaluation is denied.

4. For failing to provide ESY, Student is awarded compensatory education for those hours Student would have spent in ESY during the summers of 2007 and 2008 had Student been deemed eligible for ESY.

Date: August 7, 2008

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