

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.

PENNSYLVANIA
SPECIAL EDUCATION HEARING OFFICER

DECISION

DUE PROCESS HEARING

Name of Child: Student
ODR #8696/07-08 KE

Date of Birth:
Xx/xx/xx

Dates of Hearing:
May 20, 2008
July 28, 2008
July 29, 2008
October 6, 2008
October 10, 2008

CLOSED HEARING

Parties to the Hearing:

West Chester Area School District
Spellman Administration Building
829 Paoli Pike
West Chester, Pennsylvania 19380

Representative:

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Date Closing Arguments Received:

November 5, 2008

Date of Decision:

November 18, 2008

Hearing Officer:

Linda M. Valentini, Psy.D.

Background

Student is an elementary school aged eligible student residing with Mr. and Mrs. (hereinafter Parents) in the West Chester Area School District (hereinafter District). Student is classified as a child with autism and a speech/language impairment. After attending a preschool early intervention program in the Chester County Intermediate Unit (hereinafter IU), for Kindergarten Student was unilaterally enrolled in the Private School, a private school for students with learning differences where Student remains. The Parents requested this hearing because they want the District to reimburse them for Student's tuition at Private School for the 2006-2007 and the 2007-2008 school years.

Prior to the parties' presentation of their cases in chief, at the direction of the hearing officer the parties presented preliminary testimony as to whether or not either of the exceptions to the IDEIA's two-year limitations period existed since the Parents were asserting claims back to the 2005-2006 school year. (NT 27-123) Finding no evidence that an exception existed the hearing officer limited the scope of the hearing to the 2006-2007 and the 2007-2008 school years. (NT 124-126)

Because the District's proposed IEP for Student was found to be appropriate, as was the evaluation upon which that IEP was based, this hearing officer finds for the District and denies tuition reimbursement for the two school years under consideration, noting as well that, although contributory but not determinative, the evidence does not support a finding that the Parents gave the required advance notice to the District of their intention to enroll Student in private school and seek reimbursement.

Issues¹

The issues for this hearing, as agreed upon by the parties on the record are:

1. Did the West Chester Area School District fail to offer Student a free, appropriate public education?
2. If the West Chester Area School District failed to offer Student a free, appropriate public education, was the placement unilaterally selected by the Parents appropriate?
3. If the West Chester Area School District failed to offer Student a free, appropriate public education, and the placement unilaterally selected by the Parents was appropriate, are there equitable considerations that remove or limit the District's

¹ At the very end of the hearing the Parents attempted to include the 2008-2009 school year as part of the reimbursement. The Hearing Officer sustained the District's objection, but gave the District the option to reconsider its objection for the sake of judicial economy and conservation of District resources. Before the District reported on the result of its deliberations, the Parents withdrew their claim for the 2008-2009 school year without prejudice. (NT 25-26, 680-687)

responsibility for tuition reimbursement for the 2006-2007 and the 2007-2008 school years?

4. Alternatively, if the West Chester Area School District failed to offer Student a free, appropriate public education, and the placement unilaterally selected by the Parents was inappropriate, is Student entitled to compensatory education, and if so, in what kind and in what amount?

Findings of Fact

Parents' Preference for Private School

1. Student is an elementary school aged eligible student, a resident of the West Chester Area School District, who currently attends the Private School, a placement unilaterally chosen by the Parents. Although Student participated in the Chester County IU early intervention preschool program, Student has never attended public school in the District.²(NT 16; S-13)
2. The elementary Special Education Liaison recalled that the Parents “came to every single one of these meetings [with the District] with Private School in mind”. They were strongly focused on Private School and were not open to hearing what the District was offering for Student. (NT 119)
3. As early as January 27, 2005 at the first transition meeting, Parents’ first contact with the District, the Parents sought private school placement for Student wanting Student placed at Private School in a “better environment”. The Parent³ testified that she did not remember the first meeting with the District. (NT 30, 177, 214; S-3)
4. In the spring of 2005 the Parents toured Private School and spoke with Private School’s clinical director. The Parents asked about placement at Private School but there were no spaces available at that time. (NT 256-259)
5. The Parents requested mediation because they were dissatisfied with the District’s evaluation and proposed programming for Student for the 2005-2006 school year. Over the summer of 2005 and at the time of a mediation held on September 20, 2005, Parents were considering private placements such as Private School, [another private school] and [another private school] and brought up the topic of private placement at the mediation. (NT 61-62, 71-72; S-11)
6. After a private evaluation was completed at the [redacted] Institute (November 2005 to March 2006) Dr. K, the psychologist on the Institute team, recommended

² Although the parents expressed their intent to register Student to attend school in the District as early as January 2005, and again in January 2006, they never actually registered Student in the District. (S-4, S-14)

³ When “Parent” is used it refers to Student’s mother who acted of behalf of both parents and testified at the hearing.

- Private School to the Parents and/or endorsed the Parents' desire to send Student to Private School. (NT 194)
7. The Parents made their second visit to Private School in spring 2006 after they met with Dr. K (the first visit was in spring 2005) and they took Student with them. Student went through a process about which the mother was uncertain, "I assume a similar interview type process".⁴ (NT 258-259)
 8. The Parent did not recall a meeting held on May 8, 2006⁵. The Parent was unclear if this meeting she did not recall was convened to discuss the ER or the IEP, but thinks "maybe we didn't even get to the IEP. And that's why I don't remember it because we just didn't agree with the (evaluation) report". (NT 166-168; P-8, P-9)
 9. Although the Parent testified that she didn't know if the IEP was presented at the May 8, 2008 meeting, she later agreed with her counsel who stated that the IEP was proposed on May 8, 2006⁶. (NT 169)
 10. The Parent also later testified that she and her father informed the District at "one of these IEP meetings" which she finally said "could have been" the May 2006 meeting, and then decided that it was the May 2006 meeting, that the Parents were unilaterally placing Student at Private School. (NT 178-182)
 11. Mr. K, the individual who was the special education supervisor for elementary school programs at the time of the mediation session testified that the only discussion of private school placement and tuition reimbursement that may have come up was after the mediation session in September 2005. Student spent the 2005-2006 school year in the IU preschool program. The Parents did not tell the District they were rejecting the NOREP and would be seeking tuition reimbursement for a private placement for Student in an IEP team meeting prior to the 2006-2007 school year. (NT 536-537, 543-544)
 12. The Parents did not send any written ten-day notice to the District that said they were rejecting the District's NOREP and would be placing Student in private school and seeking tuition reimbursement. (NT 536)

⁴ The clinical director could find no notes of this meeting. (NT 696)

⁵ Q from Parent's counsel: "You remember this meeting?" (A) "No I don't actually". (Parent counsel then directs Parent to a sign-in sheet and asks a question about the identity of the school psychologist and Parent answers) Then, Q: "Okay, you were present at the meeting when this evaluation report was presented. Who else was present at that meeting that you recall?" (Parent counsel then asks who else was present at the meeting and Parent answers) Then, Q "So this meeting in Parents' Exhibit 8 for the IEP with the team signatures on page 2, that could have been the meeting where that was presented." A "The evaluation report you mean?" Q "Yes". A "It could have been". (NT 166-167; P-8)

⁶ Q "Now you don't know if this IEP was presented at this meeting?" (Intervening questions about subsequent meeting(s) and their number). Then, Q "Now this IEP was proposed in May of 2006". A: "Okay".

13. After the May 2006 meeting the District issued a Notice of Recommended Educational Placement (NOREP). The Parent did not remember signing it and the District's exhibit copy was unsigned. (NT 220; S-19)
14. As far as mother could recall, there were no subsequent meetings with the District prior to Student's entering the Private School. (NT 184)
15. The Parent in June 2006 contacted Private School to begin the intake procedure, and finalized the Private School placement during the summer prior to the beginning of the 2006-2007 school year. (NT 184)
16. The District re-issued the NOREP under a cover letter dated August 10, 2006. The Parent did not remember receiving the letter or signing and returning the NOREP. (NT 220-221; S-20, S-21)
17. In the NOREP's August 10, 2006 cover letter, the District informed the Parents that it believed it had made an offer of FAPE, but that it was the Parents' unilateral decision to place Student at Private School at their own expense. Procedural safeguards were included in the mailing. (S-20)
18. An IEP meeting was held on December 12, 2006 to revise the IEP solely in the area of transportation. At this meeting the District also re-offered the part-time autistic support classroom. The Parents again rejected the offered IEP. (NT 172, 177, 185, 537-538, 555; S-22, P-8, p. 21)
19. A NOREP issued after the December 2006 IEP meeting to address transportation was never returned to the District by the Parents. (NT 539-540; S-24)
20. The District did not at any time receive a NOREP back from the Parents signed as approved or disapproved. (NT 535-536)
21. The Parent contacted the current director of special education for elementary programs in May 2007 and left a message that she wanted to set up an IEP meeting. The special education director tried to return the call several times, but ended up leaving a message with a suggested date. The Parent called back and said the date did not work for her. The special education director left several messages asking the Parent to give several dates that would work, so that a meeting could be held to update Student's present levels and develop a new IEP. The Parent never called back. (NT 558-559)

District's First Evaluation

22. When Student was in preschool the Parents did not share written reports from Student's physicians, only giving verbal feedback to the teaching staff. The only records available for the District psychologist's review were the current ER and IEP from the preschool. (NT 68-70, 133, 137, 139-140, 150, 216, 468)

23. The District performed an evaluation of Student in May 2005, but did so without benefit of parent input, including their scoring of the Adaptive Behavior Assessment System – Second Edition (ABAS-II) and the Achenbach Child Behavior Checklist (CBCL), despite several contacts and reminders to the Parents to send in the input. (NT 68, 71; P-12)
24. On the Universal Nonverbal Intelligence Test (UNIT) Student achieved Memory, Reasoning, Symbolic and Nonsymbolic Quotient standard scores in the Low Average Range contributing to a Full Scale IQ of 82 in the Low Average Range. (P-12)
25. On the Kaufman Survey of Early Academic and Language Skills (KSEALS) Student received a Composite Early Academic and Language Skills standard score of 83 (Below Average) which was comprised of a standard score of 73 (Well Below Average) in Vocabulary and a standard score of 98 (Average) in Numbers, Letters & Words. These scores were compatible with Student's cognitive functioning at the time. (P-12)
26. The teacher's CBCL endorsements resulted in a score in the Borderline Clinical Range on Emotionally Reactive and Pervasive Developmental scales. (P-12)
27. Without benefit of parental input or access to the (later) CHOP material, but in consideration of the early intervention preschool teacher's input and testing results, the District classified Student as a child with a speech and language impairment, and noted needs in the areas of speech/language, occupational therapy, physical therapy, social interaction with peers and adults, highly structured routines, low distraction, visual cues, demonstration and modeling of new skills and sensory integration opportunities with a Sensory Integration Profile to be completed at the beginning of the next school year. (P-12)
28. Before the District completed its initial evaluation in May 2005 the Parents did not have the medical record from [redacted] Hospital that had diagnosed Student as having Pervasive Developmental Disorder, Not Otherwise Specified (PDD NOS) (September 8, 2005) or the Hospital medical record that noted Student had been given the Autism Diagnostic Observation Scale (ADOS) on 10-10-05 and received a diagnosis of Autism Spectrum Disorder (10-27-05). (S-12, P-1)
29. Dr. K, the Parents' private psychologist, acknowledged in her testimony that "a case can be made" for a diagnosis of a speech/language disorder, and in fact in her report she also noted that Student has a speech/language disorder. (NT 425)
30. The Parent believed that the initial May 2005 evaluation performed by the District was inadequate, that although it "gave an overview" of Student it "toned down Student's needs", that is it presented Student as functioning better than Student actually was. (NT 144, 217; P 12)

31. Interestingly however, on the Mediation Agreement the Parent altered the sentence, “The LEA will review a change in Student’s classification to reflect PDD/Autism” by crossing out the word “Autism”. (NT 74; P-4)
32. Although the District proposed an IEP for the 2005-2006 school year the Parents did not approve it because they thought the District’s evaluation was inadequate, they “did not like that Student was going to be pulled out for Student’s therapies” and also felt that the various classrooms the District was considering did not meet Student’s needs. The kept Student in the IU program. (NT 153; S-11)

Parents’ Private Evaluation

33. The Parents subsequently obtained a private psychological/speech/language/occupational therapy evaluation through the Institute. The Parents told the evaluator⁷ they were disputing a program offered by the District. The Parents supplied the private evaluator with a Hospital medical record noting that an ADOS had been done and that Student had been diagnosed with an autism spectrum disorder (October 2005). The private evaluation was performed in November and December 2005 and in January and March 2006. The Parents informed the District that they were having the evaluation done and that they “would share the report [with the District] if we thought it was relevant”. (NT 161-162, 364-365; S-12, P-1, P-3)
34. The private evaluator used the Wechsler Preschool and Primary Scales of Intelligence – Third Edition (WPPSI-III) to assess Student’s cognitive functioning at the time. Student achieved a Full Scale IQ of 75 (Borderline Range), composed of a Verbal IQ of 64 (Mildly Impaired Range), a Performance IQ of 93⁸ (Average Range), a Processing Speed standard score of 71 (Borderline Range) and a general language standard score of 75 (Borderline Range).⁹ (P-3)

⁷ While the Institute evaluation was completed by a psychologist, a speech/language pathologist and an occupational therapist, the psychologist testified as the Parents’ expert witness. For purposes of simplification the term singular noun “evaluator” will be used throughout this decision.

⁸ The evaluator substituted a Performance supplemental test (Picture Completion) for a core Performance subtest (Picture Concepts). Supplemental tests may be administered “to answer a particular clinical question, if a core subtest were to be invalidated, or in order to gain further information about a child’s skills”. The substitution was made because Student did not successfully complete any of the teaching items on the Picture Concepts task. Had the evaluator not chosen to use the supplemental task Picture Completion on which Student received a scaled score of 12, the Performance IQ score would likely have been lower. The evaluator also administered another supplemental subtest Object Assembly on which Student received a scaled score of 9, but although Student’s functioning on this subtest was described it does not seem to have been used in calculating the composite. Had it been used instead of the Picture Completion task, again, Student’s Performance IQ would have been lower. (P-3)

⁹ In a later administration of a different Wechsler IQ test for older children (Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV) completed April-June 2008 Student’s scores were: Full Scale IQ 62 (Mildly Impaired Range), Verbal Comprehension Index 55 (Moderately Impaired), Perceptual Reasoning Index 92 (Average), Working Memory Index 68 (Mildly Impaired) and Processing Speed Index 62 (Mildly Impaired). The Verbal Comprehension Index showed a decline from two years previously. (NT 402-405; P-19)

35. The private evaluator also used the Test of Nonverbal Intelligence – Third Edition (TONI-3) on which Student scored a (nonverbal) IQ of 100 (Average Range).¹⁰ (P-3)
36. Although she has received training in the Autism Diagnostic Observation Scale (ADOS) the private psychologist did not utilize her own administration in determining whether Student is on the autistic spectrum because it had already been done on October 2005 at Hospital.¹¹ Notably, only the father’s, and not the mother’s or the teacher’s, CBCL endorsements resulted in a Clinically Significant score on the Pervasive Developmental Problems scale of the DSM-Oriented Scales.¹² Although noting that language-based testing supported a “continued severe language disorder” the private evaluator did not specify on what portion of her own testing she or the team relied to diagnose Student with autism (“the tests don’t diagnose, the clinician does”), but she did testify that she agreed with the diagnosis of autism spectrum disorder given by Hospital. In her report she noted that Student has significant social needs and atypical and perseverative behaviors and in testimony stated that “all my clinical observations as well as support from the standardized behavior rating scales supported” the diagnosis of moderate autism spectrum disorder. (NT 263, 283, 285-286, 304; P-1, P-3)

District’s Second Evaluation

37. A second transition meeting was held on January 19, 2006 at which time the Parents signed a Permission to Evaluate. The Institute evaluation was already in progress at that time. (NT 492; S-14)
38. About a week before the District’s reevaluation was due to be completed, the Parents did share the Institute report with the District, in March or April 2006, along with the Hospital medical record. The District was conducting its own reevaluation, including classroom observation in April 2006. The District’s evaluation was completed by a psychologist, a speech/language pathologist and a

¹⁰ For the April-June 2008 reevaluation the private evaluator used a different test of nonverbal intelligence, the Comprehensive Test of Nonverbal Intelligence (CTONI). Student’s scores were: Nonverbal Intelligence Composite 96, Pictorial Nonverbal Intelligence Composite 89, and Geometric Nonverbal Intelligence Composite 104. (NT 343-344; S-12)

¹¹ It is not certain who performed the ADOS that the developmental pediatrician ordered on 9-8-05, and hence whether that evaluator received the two-day ADOS training the psychologist referenced. (NT 263; P-1 p, 10)

¹² However on the CBCL (the same instrument but a different version because of Student’s age), as reported in the April-June 2008 private evaluator’s report, Thought Problems, an analogous scale to Pervasive Developmental Problems was Clinically Significant across three raters (mother, teacher, aide). Of interest, although not germane to the scope of this decision since the appropriateness of Private School will not be examined is the contrast between the teacher’s and the aide’s nonsignificant ratings on Attention Problems and the current teacher’s testimony that Student requires several hundred prompts a day. Also notable is that mother’s CBCL ratings resulted in 5 Clinically Significant scores on the Syndrome Scales and 3 Clinically Significant scores on the DSM-Oriented Scales whereas the teacher’s ratings resulted in 2 Clinically Significant scores on the Syndrome Scales (consistent with mother on Thought Problems) and no Clinically Significant scores on the DSM-Oriented scales. (NT 354-355, 369, 415-417, 442; S-12)

- special education teacher. The District reevaluation largely incorporated the findings of the private psychologist. (NT 164, 477, 518-519, 527-528; P-9)
39. The Parent overall wanted the recommendations of Dr. K and Hospital to be followed, and maintained that the District's April 2006 ER recommendations were "the complete opposite" of Dr. K's recommendations contained in the November to March 2005/2006 Institute report. (NT 176, 230; S-16, P-3)
 40. Both evaluations¹³ found that Student has a diagnosis of moderate autism. (NT 230-231, 425, 477; S-16, P-3)
 41. Both evaluations added the secondary diagnosis of speech/language impairment. (NT 425; S-16, P-3)
 42. Both evaluations note motor delays. (NT 426; S-16, P-3)
 43. Both evaluations indicate needs in the socialization area. (NT 475; S-16, P-3)
 44. Both evaluations indicate some achievement scores in the broad average range. (NT 282-283, 478-482; S-16, P-3)
 45. Both evaluations indicate inconclusive findings regarding cognitive ability. (NT 472-474; S-16, P-3)
 46. The Institute report recommends "a full time autistic support placement". The District report recommends "a small supportive environment" a "full day program...in a classroom specifically designed to meet the needs of children with Autism Spectrum Disorder". The Institute report does not specify the number of children that should be in Student's classroom. (NT 311, 419; 429-430, 487; S-16, S-18/P-8, P-3)
 47. The May 2006 IEP provides for "part time Autistic Support" with inclusion for various non-academic activities (equaling about 83% in special education as opposed to both evaluations' recommendation of "full time Autistic Support) which the Parent and Dr. K interpret as 100% of the time in special education. (NT 232-233, 376-377, 487; S-16, S-18/P-8, P-3)
 48. However, Dr. K in later testimony acknowledged to the District's attorney that she agreed with the statement "Student's school placement should be within a District public school to allow Student access to typically developing peers", "if the individual assistance support facilitation is provided". On further questioning by Parents' attorney she answered "yes" to the question of whether given Student's cognitive ability and other skills "it would still be possibly appropriate for Student to be in an APS". (NT 430, 439-440, 443; S-16)

¹³ Henceforth "both evaluations" refer to the Institute evaluation and the District's reevaluation.

49. Although the Parent objected to the District's listing "average nonverbal and preacademic letter and number skills" as a strength in its evaluation report, as noted above the Institute evaluation resulted in a nonverbal cognitive ability Quotient score as assessed by the Test of Nonverbal Intelligence – Third Edition (TONI-3) as 100, 50th percentile for age and the Institute report also noted on the Bracken Basic Concept Scale – Revised a School Readiness Composite of 84, 14th percentile for age which was described as "on the borderline of Average and Delayed ranges". (S-16, P-3)
50. The Institute report recommends that "(because) Student obtained scores on current nonverbal testing approximate (sic) age-appropriate levels" Student should be "grouped with children with nonverbal cognitive skills approaching or within the average range". The District report recommends that "(because) Student demonstrates average nonverbal cognitive skills" Student's "placement should be within a district public school to allow Student access to typically progressing peers". (NT 237, 312; S-16, S-18/P-8, P-3)
51. Dr. K testified that Student would benefit from interaction with nondisabled peers for the purpose of language modeling and social interactions with direct support during those times and experiences. (NT 380-381)
52. The Institute report recommends "direct instruction of new skills with extensive repetition and practice". The District report recommends "direct instruction of new skills with extensive repetition and practice". (NT 311, 430; S-16, S-18/P-8, P-3)
53. Dr. K testified that both the Institute report and the IEP call for direct instruction. She testified that she was not recommending ABA, and acknowledged that she was advocating "frequent drill and repetition" as found in the IEP's SDI. (NT 381-382, 397-398; S-18/P-8)
54. The Institute report recommends "speech therapy a minimum of four times a week" in an individual setting and then generalizing...in a small group setting". The District report recommends "up to 120 minutes per week (four 30 minute sessions) of speech therapy" with a 45-minute per month consult. (NT 233, 314; S-16, S-18/P-8, P-3)
55. The District recommended four 30-minute speech/language therapy sessions in consideration of the attention span of elementary school students. There is no policy against 60-minute sessions. (NT 572)
56. Dr. K acknowledged in testimony that the Institute report does not specify the length of the sessions recommended and said that the length of the sessions "wasn't the primary concern". Her concern was that group as well as individual sessions were proposed, but also acknowledged that the private evaluators

- contemplated group as well as individual speech therapy. (NT 382-386; S-16, S-18/P-8, P-3)
57. The Institute report recommends occupational therapy “at a level of two times a week, once individually and once within the classroom” to ensure generalization of learned skills within the curriculum”. The District report notes that “Student’s current occupational therapy goals are addressed in a weekly 30 minute session [primarily addressing fine motor and visual perceptual skills]. The IEP team should consider an additional occupational therapy session per week to address potential sensory needs and generalizing Student’s skills in the classroom”. (NT 233-236, 315-316; S-16, S-18/P-8, P-3)
 58. Dr. K testified that she had no concerns about the District’s offer of occupational therapy. (NT 385; S-16, S-18/P-8, P-3)
 59. The Institute report recommends “a comprehensive physical therapy evaluation and subsequent treatment” and notes that Student “will require adaptations and accommodations for safety...including an adaptive physical education program”. The District report recommends “Student currently receives 30 minutes per week of physical therapy [in Student’s preschool program]. Student should continue to receive these services at the same rate as a school age student. The IEP team may also want to consider an adaptive physical education screening for PE class next year”. (S-16, P-3)
 60. Adaptive physical education looks at the child’s needs and determines how much a child can and cannot participate in a gym class. Adaptive PE might pre-teach a skill and reteach a skill the student would use in gym class. (NT 573-574)
 61. Dr. K testified that she did not raise an issue with this program aspect [adaptive PE] at the time (she reviewed the District’s proposed program). (NT 386-388; S-16, S-18/P-8, P-3)
 62. The Institute report recommends ESY programming with a program in place for summer 2006 as well. The District report recommends an evaluation of the need for ESY [for summer 2007] “with a team decision occurring in March 2007 in this regard”, noting that Student remained an Early Intervention student through August 2006 such that the District did not have to provide ESY programming. (NT 318; S-16, P-3)
 63. Dr. K testified that at the time of her evaluation and review she knew that Student was still enrolled in the early intervention program. The District’s current special education director for elementary programs testified that the District becomes responsible for early intervention students transferring into public elementary school in September. (NT 388, 552-553; S-16, P-3)

64. The Institute report recommends that the Parents pursue wraparound services (assessed through the behavioral health/mental health system) to address “Student’s need for safety”. The District evaluation does not include behavioral health/mental health system recommendations. (NT 319, 324, 389-390; S-16, P-3)
65. The Institute report recommends “standardized re-evaluation in one year” “in order to document Student’s progress and plan for the next school year”. The District report recommends that “regardless of Student’s educational placement for the 2006-2007 school year, Student’s progress should be monitored closely to assure Student receives the proper educational placement in 2007-2008 in the interest of providing Student with the least restrictive but most appropriate environment”. (NT 322; S-16, P-3)
66. The Institute report recommends “a high level of consistency across Student’s environments (school and home)”. The District report lists “home/school communication” as recommended specially designed instruction. (NT 323-324; S-16, P-3)
67. The Institute report recommends a gastroenterology referral and a reevaluation by Student’s neurologist. The District report does not make recommendations regarding medical evaluations. (NT 325; S-16, P-3)
68. The Institute report recommends that the report be shared with Student’s educational team and others participating in Student’s care. The Institute report was shared with and largely incorporated into the District’s report. (S-16, P-3)
69. Neither report recommended a Functional Behavioral Analysis (FBA) or a Behavior Intervention Plan (BIP). (NT 398-399, 432, 515-518; S-16, P-3)
70. The Parent objected to the District’s evaluation because it didn’t “say anything about [Student’s] day or how Student would be spending Student’s day”. (NT 238)

Critique of the District’s IEP by the Private Evaluator

71. The Parents had Dr. K, the school psychologist from the Institute, review an IEP¹⁴ offered by the District. Dr. K told the Parent on the telephone that the IEP was not appropriate because it did not take into account the recommendations she had made. (NT 171, 226, 311, 327; P-8)
72. Although the private psychologist said that she had also written a letter after reviewing the IEP, the District did not receive any written communication from Dr. K or the Parents regarding her criticisms of the May 2006 IEP and no letter of

¹⁴ The mother could not remember which IEP; presumably it was the May 2006 IEP which, unchanged except for transportation, was also the December 2006 IEP. (NT 226-228; P-8)

- this sort was introduced as evidence¹⁵. At an unspecified IEP meeting characterized only as “the last IEP meeting we had” the Parent allegedly communicated Dr. K’s recommendations to the District. It is not clear whether the Parent communicated Dr. K’s direct feedback or simply reminded the District of Dr. K’s recommendations following her evaluation of Student. The person who was special education director for elementary schools at the time testified that he recalled no such feedback from the Parent. (NT 171-172, 328, 542, 548)
73. Dr. K testified that she had concerns about the IEP “based on several areas including wording of the goals but also the specially designed instruction and the level of individual speech therapy services”. She later testified that she had no concerns about the measurability of the goals on the IEP. (NT 328, 391)
74. Under social goals the IEP specifies that baseline data will be collected during the first month of school. Dr. K recommended that baseline data for all the IEP goals be collected during the first month of school, not having noticed that the IEP calls for bi-weekly data collection.¹⁶ (NT 330, 391-392, 441; S-18, P-8)
75. Dr. K testified, “We added¹⁷ some areas of additional focus for the academic readiness goals and specifically for the language-based goals (listening to a short story and retelling some information, language concepts such as quantity concepts. So we just had some recommendations on specific goals”. (NT 330, 393-394)
76. Since Dr. K had worked as a school psychologist for six or seven years she is aware that IEPs are revised after students master a goal and has no reason to believe that this would not be the case for Student. (NT 394-395)
77. Dr. K testified that the specially designed instruction did not include the use of a slant board and adaptive seating, “so we again emphasized that”. (NT 330; S-18, P-8)
78. Dr. K noted that “under specially designed instruction there was mention of monitoring during the time spent outside the classroom, specialized classroom. And our recommendation was for a specific staff person to be assigned to Student, not being clear what monitor or close monitor meant, that we wanted a specific individual, one-on-one person responsible for those tasks”. Notably the Institute

¹⁵ Asked by Parents’ counsel, “Did Dr. K ever write down her opinions about the IEP that you had asked her to review?” the mother answered, “No, we talked on the telephone). (NT 226)

¹⁶ Dr. K seemed confused about when data would be collected on the goals versus when data would be reported in a progress report. This may have been due to the layout of the IEP document. (NT 391-392, 434-435, 441)

¹⁷ Given that the Parent testified that Dr. K did not put her critique in writing and the letter Dr. K said she wrote was not in evidence, the record is silent regarding what is meant by “we added”. Given the Parents’ pattern of giving verbal feedback in lieu of documents to the early intervention program and to the District, this hearing officer concludes that Dr. K wrote a letter and that the Parents chose not to share it with the District. (NT 226 vs. 328; NT 68-70, 133, 137, 139-140, 150, 216)

- evaluation had not recommended a specific staff person be assigned to monitor Student because the Institute recommendation had been for 100% time in special education.¹⁸ (NT 330-331, 335, 377-378, 380-381, 434; S-18, P-8)
79. Student did not have a one-to-one aide at Student's early intervention preschool. (NT 240)
80. Student does not have a one-to-one aide at Private School. (NT 240)
81. Dr. K also criticized the May 8, 2006 IEP because the speech and language related services offered "just refers to small group and individual sessions and we were recommending four individual sessions". (NT 331; S-18, P-8)
82. The Institute evaluation report did not specify the duration of the recommended speech and language sessions, reading "**four times a week**" (emphasis in the original). However, in her testimony Dr. K said that "our report was definitely recommending four 60-minute sessions per week" but later acknowledged that the report did not specify that the sessions should be one hour each. Dr. K said that in her critique of the IEP "my discussion at the time was that the four sessions a week needed to be individual". (NT 332, 382; P-3)
83. The Institute evaluation report noted speech therapy sessions should, "focus on developing specific skills in an individual setting, and then generalizing them in a small group setting." (NT 331-332, 383; P-3, S-18)
84. Dr. K testified, "and I think we emphasized our recommendation for the adaptive physical education based on the motor and the language needs". The IEP's related services section calls for Adaptive Physical Education. (NT 331; S-18, P-8)
85. Dr. K testified regarding the SDI contained in the IEP offered by the District. (NT 395; S-18/P-8)
86. Dr. K testified that she did not consider a Sensory Profile/Sensory Diet or sensory preparations prior to beginning challenging activities a primary consideration. (NT 395; S-16, S-18/P-8, P-3)
87. Dr. K agreed with all the other SDI elements in the IEP. She said that her concern was with what was missing. (NT 395-396; S-16, S-18/P-8, P-3)
88. Dr. K then identified the missing elements as adaptive seating and a slant board. She testified that she does not know if Student uses these items at Private School. (NT 396-397; S-16, S-18/P-8, P-3)
89. Dr. K did not identify any other deficiencies in the May 2006 IEP, testifying she

¹⁸ Although the Parents were exhorted to pursue wraparound services. (P-3)

- found the IEP inappropriate “for the reasons I mentioned”. (NT 336)
90. Dr. K testified that she *would not be* concerned if Private School, an Approved Private School that writes IEPs, was not using an IEP for Student because she “felt comfortable that Student and Student’s needs would be easily integrated within that existing format”. She then, however, said that although she did not know Private School was not using an IEP “at that time” there “*would be* concern for that issue. I would want Student’s individual goals obviously addressed”. (NT 390-391)
 91. Although the clinical director at Private School said she “worked with the team in developing Student’s IEP goals” for the 2006-2007 school year, she later said she did not recall if Student had an IEP that year. Later she testified that she had reviewed the IEP for 2006-2007. Even later she testified that she “[did] not believe there was one prepared until we came to the annual review date.” Despite testimony elicited from this witness about development of IEPs at Private School, Private School did not develop its own IEP for Student until June 2007 at the end of the 2006-2007 school year. (NT 255-256, 644-648, 665, 674, 689-690, 701-701, 766-767)
 92. The Parent was not concerned that Private School did not develop an IEP, “since it was an autism support school, I didn’t feel that there was a need for an IEP”. (NT 256)
 93. The Private School teacher for Student’s 2006-2007 school year testified, “When Student arrived at Private School we were presented with a West Chester School District IEP. Typically what we do is work off the current IEP unless it’s outdated, and that’s what we did with Student. We worked off the ’06 maybe—I’m trying to think, 06-07 maybe IEP that was the West Chester School District’s as far as monitoring Student’s progress on Student’s goals”. (NT 766, 802; S-18/P-8)
 94. The Private School teacher testified that if at any time the team felt that the IEP for 2006-2007 was not appropriate for Student the team would decide to revise it. (NT 817-818; S-18/P-8)
 95. The Private School teacher testified that the team didn’t think it was necessary to revise the 2006-2007 IEP. (NT 818, 829-831; S-18/P-8)
 96. The IEP that Private School used to monitor progress on Student’s goals and did not believe had to be revised was the District’s IEP that Dr. K and the Parent had criticized. ((NT 817-818, 836, 838; S-18/P-8)

Critique of the District’s Proposed IEP by the Parent

97. The Parent’s objection to the proposed IEP was that it was a K-2 autistic support classroom, “and there would be a teacher and an aide which meant that one class

would be independently working and Student needed direct instruction because Student zones out...I didn't like that they were all in one classroom and attention would be divided". (NT 173)

98. The Parent objected to Student's being mainstreamed for assemblies, homeroom, lunch and recess. (NT 173)
99. The Parent also offered the following criticism during her testimony, "And then, you know, being pulled out for all of these therapies, you know, when was Student going to actually go to school?" However, soon afterwards mother stated that Student "just really needed to be bombarded with these therapies in order for Student to make progress". The Parent testified that Private School "bombarded Student with therapies". (NT 175-176, 203)
100. The Parent understood that Student "would just be passed. You know, Student would just go from kindergarten, first grade, second grade. And there was a whole different standard". (NT 175, 239-240, 245)

IEP: Program/Placement District Proposed for the 2006-2007 School Year

101. Each of Student's needs as articulated in the District's April-June 2006 evaluation and the private Institute evaluation is addressed in the District's May 2006 IEP through goals and through specially designed instruction. (NT 559-565, 582-586; S-16, S-18/P-9, P-3)
102. Student's May 2006 IEP included thirteen goals specifically related to Student's needs. The two physical therapy goals included a total of ten short term objectives or benchmarks. (NT 559-563; S-18/P-8)
103. All thirteen goals in Student's proposed May 2006 IEP were individualized and measurable. (NT 559-563; S-18/P-8)
104. The proposed May 2006 IEP included twenty-four discrete and specific descriptions of specially designed instruction and modifications tailored to Student's needs. (S-18, P-8)
105. Student's proposed May 2006 IEP included related services of physical therapy for thirty minutes per week, occupational therapy two times per week with one consultation to staff and parents one time per month, an evaluation for adaptive physical education, and speech and language therapy four times per week with one consultation per month to staff and parents. (S-18/P-8)
106. Student's proposed May 2006 IEP included: a) the requirement of highly individualized, structured, predictable routine with small group (2-4 students) instruction; b) use of visual supports; c) cues, modeling and use of a prompt hierarchy; d) use of social stories and visual strategies; e) use of a home/school bridge for communication between home and school with bi-weekly progress

- reporting; f) frequent drill and repetition of newly learned skills; and, g) direct instruction. (S-18/P-8)
107. For school year 2006-2007 Student was recommended for a part-time K-2 autistic support program at [redacted] Elementary School. The program is a full-day program. The classroom has a special education teacher and an assistant and has a maximum of eight students. The year Student would have entered there were five students in the class. Many of the students had either a one-on-one aide or a TSS such that there was a 1-to-1 ratio of staff to students. (NT 567-568-569, 583)
108. In the classroom proposed by the District Student would have done no individual seat work. In the classroom proposed by the District Student would have received direct instruction either one-to-one or two-to-one if Student was working on the same academic level as another student. (NT 570-571)
109. In the District's proposed program, everyone working with Student would be familiar with Student's needs and Student's specially designed instruction. (NT 574-575)
110. The District would have established a home/school communication book to act as a bridge between the two settings. (NT 575-576)
111. The District IEP provided for PT, OT and S/L consult time as supports for the teachers. The District considers this consult time to be very important and to be a collaborative work model. (NT 576-577)
112. The proposed classroom utilized a behaviorally-based classroom management system. (NT 578)
113. The proposed classroom had a "Rifton-type chair and a slant board accessible to Student and if the team had found Student needed them they would have been put into the IEP. (NT 578)
114. The District, in response to the Parent's wanting to know what a typical day might be like, offered for her review the schedule of one of the students in the proposed classroom. The schedule was just to give the Parent an idea of a schedule and was not intended to be Student's actual schedule. (NT 580-581)
115. Student would have been partially included for certain activities (lunch and recess) and would be accompanied to these activities by either the special education teacher or the instructional aide. The recess yard would have been a self-contained space used only by kindergartners. (NT 568)

116. Although Parents' private psychologist Dr. K visited the Private School and observed Student she has not visited the District's proposed program. (NT 418-419)

Conclusions of Law and Discussion

Legal Basis

Burden of Proof

In November 2005 the U.S. Supreme Court held that, in an administrative hearing, the burden of persuasion for cases brought under the IDEA is properly placed upon the party seeking relief. Schaffer v. Weast, 126 S. Ct. 528, 537 (2005). The Third Circuit addressed this matter as well. L.E. v. Ramsey Board of Education, 435 F.3d 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006). The party bearing the burden of persuasion must prove its case by a preponderance of the evidence. This burden remains on that party throughout the case. Jaffess v. Council Rock School District, 2006 WL 3097939 (E.D. Pa. October 26, 2006). As the Parents asked for this hearing, the Parents bear the burden of persuasion. However, application of the burden of persuasion does not enter into play unless the evidence is in equipoise, that is, unless the evidence is equally balanced so as to create a 50/50 ratio. In this case, the evidence was not in equipoise.

Credibility of Witnesses

Hearing officers are empowered to judge the credibility of witnesses, weigh evidence and, accordingly, render a decision incorporating findings of fact, discussion and conclusions of law. The decision shall be based solely upon the substantial evidence presented at the hearing.¹⁹ Quite often, testimony or documentary evidence conflicts; this is to be expected as, had the parties been in full accord, there would have been no need for a hearing. Thus, part of the responsibility of the hearing officer is to assign weight to the testimony and documentary evidence concerning a child's special education experience. Hearing officers have the plenary responsibility to make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses". Blount v. Lancaster-Lebanon Intermediate Unit, 2003 LEXIS 21639 at *28 (2003). This is a particularly important function, as in many cases the hearing officer level is the only forum in which the witnesses will be appearing in person. Credibility of the witnesses upon whose testimony this hearing officer relied will be discussed below as appropriate.

¹⁹ Spec. Educ. Op. No. 1528 (11/1/04), quoting 22 PA Code, Sec. 14.162(f). See also, Carlisle Area School District v. Scott P., 62 F.3d 520, 524 (3rd Cir. 1995), cert. denied, 517 U.S. 1135 (1996).

Special Education: FAPE

Special education issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 (“IDEIA” or “IDEA 2004” or “IDEA”), which took effect on July 1, 2005, and amends the Individuals with Disabilities Education Act (“IDEA”). 20 U.S.C. § 1400 *et seq.* (as amended, 2004). “Special education” is defined as specially designed instruction...to meet the unique needs of a child with a disability. ‘Specially designed instruction’ means adapting, as appropriate to the needs of an eligible child ...the content, methodology, or delivery of instruction to meet the unique needs of the child that result from the child’s disability and to ensure access of the child to the general curriculum so that Student or she can meet the educational standards within the jurisdiction of the public agency that apply to all children. C.F.R. §300.26

In *Board of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034, 3051 (1982), the U.S. Supreme Court articulated for the first time the IDEA standard for ascertaining the appropriateness of a district’s efforts to educate a student. It found that whether a district has met its IDEA obligation to a student is based upon whether “the individualized educational program developed through the Act’s procedures is reasonably calculated to enable the child to receive educational benefits.”

Benefits to the child must be ‘meaningful’. Meaningful educational benefit must relate to the child’s potential. See *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572 (3rd Cir. 2000); *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999); *S.H. v. Newark*, 336 F.3d 260 (3rd Cir. 2003) (district must show that its proposed IEP will provide a child with meaningful educational benefit).

However, a school district is not required to maximize a child’s opportunity; it must provide a basic floor of opportunity. See *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290 (7th Cir.), *cert. denied*, 488 U.S. 925 (1988). In a homespun and frequently paraphrased statement, the court in *Doe v. Tullahoma City Schools* accepted a School District's argument that it was only required to "...provide the educational equivalent of a serviceable Chevrolet to every handicapped student." and that "...the Board is not required to provide a Cadillac..." *Doe ex rel. Doe v. Bd. of Ed. of Tullahoma City Sch.*, 9 F.3d 455, 459-460 (6th Cir. 1993)

The Third Circuit has adopted this minimal standard for educational benefit, and has refined it to mean that more than “trivial” or “*de minimus*” benefit is required. See *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 1179 (3d Cir. 1998), *cert. denied* 488 U.S. 1030 (1989). See also *Carlisle Area School v. Scott P.*, 62 F.3d 520, 533-34 (3d Cir. 1995), quoting *Rowley*, 458 U.S. at 201; (School districts “need not provide the optimal level of services, or even a level that would confirm additional benefits, since the IEP required by IDEA represents only a “basic floor of opportunity”).

Thus, what the statute guarantees is an “appropriate” education, “not one that provides everything that might be thought desirable by ‘loving parents.’” *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

The IEP for each child with a disability must include a statement of the child’s present levels of educational performance; a statement of measurable annual goals, including benchmarks or short-term objectives, related to meeting the child’s needs that result from the child’s disability to enable the child to be involved in and progress in the general curriculum and meeting the child’s other educational needs that result from the child’s disability; a statement of the special education and related services and supplementary aids and services to be provided to the child...and a statement of the program modifications or supports for school personnel that will be provided for the child to advance appropriately toward attaining the annual goals (and) to be involved and progress in the general curriculum...and to be educated and participate with other children with disabilities and nondisabled children; an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class... CFR §300.347(a)(1) through (4)

Tuition Reimbursement Standards

Parents who believe that a district’s proposed program is inappropriate may unilaterally choose to place their child in an appropriate placement. The right to consideration of tuition reimbursement for students placed unilaterally by their parents was first clearly established by the United States Supreme Court. In *Burlington School Committee v. Department of Education of Massachusetts*, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985), the Supreme Court articulated the principle that parents do not forfeit an eligible student’s right to FAPE, to due process protections, or to any other remedies provided by the federal statute and regulations by unilaterally changing the child’s placement, although they certainly place themselves at financial risk if the due process procedures result in a determination that the school district offered FAPE, otherwise acted appropriately, or that the parent selected placement is inappropriate. A court may grant “such relief as it determines is appropriate”. “Whether to order reimbursement and at what amount is a question determined by balancing the equities.”

Florence County Sch. Dist. Four V. Carter, 114 S. Ct. 361 (1993) later outlined the Supreme Court’s test for determining whether parents may receive reimbursement when they place their child in a private special education school. The criteria are: 1) whether the district’s proposed program was appropriate; 2) if not, whether the parents’ unilateral placement was appropriate, and; 3) if so, whether the equities reduce or remove the requested reimbursement amount.

In 1997, a dozen years after *Burlington* and four years after *Carter* the Individuals with Disabilities Education Act (IDEA) specifically authorized tuition reimbursement for private school placement. The IDEIA, that became effective July 1, 2005, is the reauthorized version of the IDEA and contains the same provision:

- (i) In General. – Subject to subparagraph (A) this part does not require a local education agency to pay for the cost of education, including special education

and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such a private school or facility.

(ii) Reimbursement for private school placement. -If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private school without the consent of or referral by the public agency, a court or hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency has not made a free appropriate public education available to the child in a timely manner prior to that enrollment. 20 U.S.C. § 1412(a)(10)(C)(ii)

The IDEIA added the requirement that parents who intend to place their child in a private placement and seek tuition reimbursement must provide the district with proper notice. 34 C.F.R. §300.148(d)(1)(i & ii).

Discussion

A school district's offer of a free appropriate public education to an eligible student is embodied in the IEP proposed for the student. The IEP is based upon a thorough evaluation and is grounded in the needs and strengths documented in the evaluation. If the IEP is inappropriate, that is, if at the time it is written it is not reasonably calculated to produce meaningful educational benefit to the child, parents may recover the funds they expended to privately secure an appropriate education for the child.

In this case, after conducting two evaluations and carefully considering a private evaluation obtained by the Parents, the District prepared an IEP in May 2006 for the 2006-2007 school year. The Parents, having considered a private placement at Private School for Student for at least a year and a half (and in fact seeking a 2005-2006 private placement at Private School to no avail since there was not an available opening) rejected the IEP as inappropriate. Bearing the burden of proof, their task at this hearing was to persuade this hearing officer that the IEP they rejected was inappropriate such that reimbursement for two years at Private School was warranted.

The mother presented as a very clearly loving and concerned parent, and it was moving to observe the support she received from her father, Student's grandfather. The family obviously is concerned about Student's educational opportunities and the Parents and grandparents are committed to providing Student with what they judge to be the best possible program. However, as the legal standard is whether or not what the District offered is appropriate, the Parents' specific objections to the proposed IEP must be closely examined.

The mother testified that her criticisms of the District's proposed program were: 1) it was a K-2 autistic support classroom, such that one class would be independently working and attention would be divided" (FF 97); 2) that Student would be mainstreamed for assemblies, homeroom, lunch and recess (FF 98); 3) that Student would be pulled out for

Student's therapies (although she believed Student needed to be "bombarded with therapies") (FF 99); and 4) that Student would just be passed from kindergarten to first and second grade (FF 100).

Overall, however, it was very clear during testimony that the Parents' real objection to the IEP was that the District was not going to offer it at Private School. Thus, her credibility as it related to her criticisms of the District's proposed program and placement was diminished.

In support of their position that the IEP was inappropriate, the Parents called as a witness Dr. K, a school psychologist who has worked in public schools as well as private settings. Dr. K was on the team that conducted a private evaluation over five months in 2005/2006, and at the Parents' request she reviewed the IEP the District was proposing for Student; she did not observe the proposed placement.

Asked specifically to point out why the May 8, 2006 IEP was not appropriate, with respect to the goals, Dr. K testified that she had concerns about the IEP: 1) "based on several areas including wording of the goals but also the specially designed instruction and the level of individual speech therapy services". (FF 73); 2) She noted that under social goals the IEP specifies that baseline data will be collected during the first month of school, and recommended that baseline data for all the IEP goals be collected during the first month of school; however she then admitted that she had not noticed that the IEP calls for bi-weekly data collection. (FF 74); 3) Dr. K then testified that she had suggested to the Parents some areas of additional focus for the academic readiness goals and specifically for the language-based goals (listening to a short story and retelling some information, language concepts such as quantity concepts, "So we just had some recommendations on specific goals". (FF 75) However, Dr. K was aware that IEPs are revised after students master a goal and had no reason to believe that this would not be the case for Student. (FF 76) Dr. K testified that she had no concerns about the measurability of the goals on the IEP. (FF 73)

With respect to the Specially Designed Instruction and Related Services portions of the IEP, Dr. K testified that although she did not see the need for a sensory profile/sensory diet (FF 86), she agreed with all the elements of the SDI (FF 87) but was concerned with what was missing: 1) the specially designed instruction did not include the use of a slant board and adaptive seating (FF 77, FF 88); 2) she wanted written into the IEP a specific, named, individual, one-on-one person identified who would be responsible for monitoring Student during inclusion activities (FF 78); 3) she wanted clarification of individual versus group speech and language related services offered, and wanted the sessions to be 60-minutes versus 30-minutes. (FF 81, FF 82, FF 83, FF 84).

Overall, during the course of her testimony, it became clear that the private psychologist's main problem with the IEP, as was the Parents', was that the District was not offering Private School as the placement in which the IEP would be offered. This hearing officer does note, as urged by District's counsel in Student's closing statement, the private evaluator's "advocacy" orientation vs. objective evaluation of the need of the

child, and an apparent bias in this case for a full time segregated private school placement over supported, inclusive programming and least restrictive placement in public school. (FF 47, 48) Given that her organization was hired by the Parents this is not surprising, but what was surprising was the length to which this trained and experienced professional stretched her criticisms of the IEP such that on two occasions she mis-stated her own report and overlooked what was in the IEP (FF 74, FF 78, FF 81, FF 82, FF 83).

The private evaluator's two main criticisms bear closer examination. First, this hearing officer absolutely agrees with District counsel's closing argument that it is "unnecessary, inappropriate or impractical" to provide personal identification of the staff who would provide support for Student in inclusive settings, because Pennsylvania and IDEA regulations already establish standards for qualifications and training of "special education staff" (22 Pa. Code Chapter 14.105; 34 C.F.R. §300.18), and "from a practical perspective, if a district was to be too specific in its identification of the particular staff assigned to work with a student, it would leave itself open to disputes when specific persons are promoted, seek different employment or otherwise become unavailable to support the student pursuant to the provisions of an IEP". Second, although Dr. K faulted the IEP because Student's four per cycle speech and language therapy sessions were described as individual *and* small group and were 30 instead of 60 minutes each, the Institute evaluation recommended both group and individual sessions as well, and the Institute evaluation report did not specify that speech/language sessions would each be 60 minutes long. Given Student's other needs including direct instruction, physical therapy, occupational therapy, and socialization and given the attention span of most six year olds, much less Student who would have been six when the IEP was implemented, 30 minute sessions four times a cycle are deemed appropriate unless a speech/language pathologist reevaluates Student and in consideration of Student's total needs and program determines along with the IEP team that Student requires four 60-minute sessions to receive FAPE. Overall, although this hearing officer in general finds that the private evaluator produced an appropriate evaluation report, her testimony regarding Student's IEP and offered placement is given little weight because her credibility was diminished by her obvious bias and the nature of the details which she mustered to support her position.

Finally, although this hearing officer as put forth below finds the District's IEP to be most appropriate, this hearing officer additionally invites the readers' attention to *Derek B. v. Donegal Sch. Dist.*, 47 IDELR ¶ 34, at *142 (E.D. Pa. 2007) wherein the federal district court's comments were as follows:

"This is not to say that the District's IEPs were without flaws...However...flaws in this regard did not render the IEPs inadequate...Plaintiffs have not demonstrated that...the weaknesses in the IEP ... are ... so serious that they prevented [the Student] from receiving FAPE. In fact, the IEPs do not appear vague, nor do they seem to exclude necessary goals. On the contrary, they are relatively detailed, although not as detailed as [an expert witness/independent evaluator's] reports, and appear to have been thoughtfully designed to benefit [the Student]. It is entirely possible that an IEP written by [the expert witness/

independent evaluator] would have been better than the School District's..., [but] the IDEA does not ask the public schools to guarantee the very best."

Student's proposed IEP for 2006-2007 includes statements of Student's present levels based upon objective testing (FF 101). The IEP sets out thirteen measurable annual goals for advancement in Student's areas of need and specific benchmarks related to meeting the goals (FF 102, FF 103). The IEP contains twenty-four separate and specific elements of special education (specially designed instruction), and puts forth the related services (speech/language, physical therapy and occupational therapy) to be provided to Student, as well as a statement of the supports for school personnel and parents that will be provided (FF 104, FF 105, FF 106). It puts forth the extent to which Student will not be educated with nondisabled peers. The IEP offers a program that is reasonably calculated to produce meaningful educational benefit. It is thoughtfully constructed and meshes with all the needs identified in the evaluations performed by the District as well as by the private evaluator. This hearing officer finds the District's IEP quite excellent, and its proposed placement of Student an appropriate setting in the least restrictive environment.

Student participated in a public IU early intervention program, and there is no reason why Student could not have been appropriately educated for 2006-2007 and 2007-2008 in the offered public school setting in the least restrictive environment under the District's proposed IEP. If the Parents do not want Student educated with nondisabled peers, and hold the arguable belief that that Private School offers their child a more appropriate program and setting, that is their choice, but they cannot expect the District to reimburse them for the costs of this private placement.

Having determined that the District offered Student an appropriate program and placement for 2006-2007 and 2007-2008 it is not necessary to examine the appropriateness for Student of the unilateral placement chosen by the Parents (or to examine facts and assertions about whether or not the Parents provided the District with the required notice of their intent to enroll Student in Private School and ask for reimbursement), nor to examine any mitigating equities. It is also not necessary to consider the alternative question of compensatory education.

Order

It is hereby ordered that:

1. The West Chester Area School District offered Student a free, appropriate public education for the 2006-2007 and the 2007-2008 school years.
2. Given that the West Chester Area School District offered Student a free, appropriate public education, no further considerations are necessary regarding the appropriateness of the placement unilaterally selected by the Parents, equities including provision of the required notice, or compensatory education in lieu of tuition reimbursement.
3. The West Chester Area School District is required to take no further action.

November 18, 2008

Date

Linda M. Valentini, Psy.D.

Linda M. Valentini, Psy.D.
Hearing Officer