

*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: RG  
ODR #9162/08-09 KE

Date of Birth:  
Xx/xx/xx

Dates of Hearing:  
October 21, 2008  
December 15, 2008  
December 16, 2008  
January 5, 2009  
January 19, 2009  
March 17, 2009

CLOSED HEARING

Parties to the Hearing:  
Mr. and Mrs.

Downingtown Area School District  
126 Wallace Avenue  
Downingtown, PA 19335

Date Record Closed:

Representative:  
David Thalheimer, Esquire  
1831 Chestnut Street  
Suite 300  
Philadelphia, PA 19103

Andria Saia, Esquire  
1301 Mason's Mill Business Park  
1800 Byberry Road  
Huntington Valley, PA 19006

April 20, 2009

Date of Decision:

May 3, 2009

Hearing Officer:

Linda M. Valentini, Psy.D.

## Background

Student is an xx-year-old eligible student who resides in the Downingtown Area School District (hereinafter District). Although Student attended school in the District for kindergarten and part of first grade, Student's parents (hereinafter Parents) and the District came to an arrangement whereby Student was placed in the Private School (hereinafter Private School)<sup>1</sup> with financial support from the District.

For the 2007-2008 school year the District offered Student a program and placement within the District. The Parents did not approve the District's offer and unilaterally continued the Private School placement on their own. They filed for a due process hearing on August 8, 2008. The issue in this hearing, then, is whether or not the District is required to reimburse the Parents for Student's tuition at Private School for the 2007-2008 school year.<sup>2</sup>

## Issues<sup>3</sup>

1. Was the program and placement the Downingtown Area School District offered to Student for the 2007-2008 school year appropriate?
2. If the program and placement the Downingtown Area School District offered to Student for the 2007-2008 school year was not appropriate, was the placement unilaterally chosen by Mr. and Mrs. appropriate?
3. If the Downingtown Area School District did not offer Student an appropriate program and placement for the 2007-2008 school year, and the placement unilaterally chosen by Mr. and Mrs. was appropriate, are there equitable considerations that would serve to remove or reduce the District's responsibility to reimburse the Parents for Student's tuition for that school year?

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<sup>1</sup> The School has recently changed its name to the [redacted] School, but for purposes of this decision "Private School" will be used. (NT 44)

<sup>2</sup> The current school year, 2008-2009 was specifically excluded.

<sup>3</sup> Prior to the first hearing date, the District moved to dismiss the matter, as the Parents' request for tuition reimbursement was made in August 2008 which was after the school year in question in this hearing had been completed, writing: "In the case at bar parent's only request is for tuition for the 2007-2008 school year. The controlling law in this circuit holds that parents are barred from receiving tuition reimbursement for any time Student was in private school before their request for due process. *Warren G. v. Cumberland County Sch. Dist.*, 190 F.3d 80 (3d Cir.1999). In *Warren G. v. Cumberland County Sch. Dist.*, 190 F.3d 80, 84 (3d Cir.1999), bas[ing] the decision on *Bernardsville Bd. of Educ. v. J.H.*, 42 F.3d 149, 158 (3d Cir.1994), the Third Circuit denied tuition reimbursement for the period of time preceding the parents' request for a due process hearing. The Court explained that a school district should not have to reimburse parents for education expenses before the district receives sufficient notice, through a request for due process, that the parents challenge the adequacy of FAPE provided. 42 F.3d at 158. *See also, Marissa F. ex rel. Mark and Lavinia F. v. William Penn School Dist.*, 199 Fed.Appx. 151, 153, 2006 WL 2769728, 1 (3d Cir. 2006)." This hearing officer denied the District's Motion in the belief that the District was well aware that the Parents wanted Student to remain at Private School and it was patently clear that they would request tuition reimbursement. The District renewed its Motion on the record at the start of the hearing.

## Findings of Fact

### Student

1. Student is an xx year old eligible student who resides in the Downingtown Area School District.
2. Student was born with a severe cleft lip and palate and although the condition was surgically corrected Student presents with articulation difficulties. (NT 613-614; P-1, P-2)
3. Student has holoprosencephaly (HPE), a malformation of the brain in which the left and right hemispheres are not properly divided; Student's corpus callosum, the structure that facilitates the passage of information from one side of the brain to the other, is malformed. (NT 614, 1302-1303)
4. Student's cognitive and academic skills, which range from age level and above to moderately to severely impaired, are scattered and are inconsistent. (NT 588, 1205-1210, 1387; P-15, P-23, P-24, P-83, P-85)
5. Student's consulting neurologist noted that Student's history, condition and course of development are exceptionally unusual, as most individuals with HPE never acquire self-care skills or communication capacity. The neurologist noted that Student's academic skills were "extraordinary" given the HPE and "approach the unique". (P-89, P-102)
6. Student's impulsivity, word retrieval deficits, low performance levels and difficulty generalizing skills interfere greatly with the reliability of standardized assessments. (NT 1309-1312; 1314-1322; 1343-1346; 1385, 1457; P-83, P-101)
7. Student can be expected to progress slowly and Student requires concepts to be taught explicitly and repeatedly. Student is slowly acquiring skills needed to decode (reading) and to encode (spelling, writing), and a private evaluator opined that meaningful progress would be seen in small increments. Once Student learns a skill, Student commits it to long term memory. (NT 1257, 1261, 1341-1342, 1349-1351, 1457; P-58)
8. Student has functional skills greater than would be predicted by Student's low standardized cognitive scores. Student engages others in conversation, helps out around the home, displays self confidence, an appropriate sense of humor, and independence in familiar and non-familiar environments such as home, church and restaurants. Student participates in developmentally typical social activities such as Scouts and sports. (NT 1308-1310, 278, 281-282, 714-715, 735-740, 747-751)

9. During the 2004-2005 school year (kindergarten), Student attended Student's home school, [redacted] Elementary School, in the District where Student was in the Life Skills Program in the morning in a classroom of eight students, and in regular education kindergarten, with a one-to-one aide, in the afternoon. Student's teacher described Student as being very verbal after an initial adjustment period. Student would spontaneously tell stories and recount goings-on in Student's daily life. When Student needed to repeat something however Student needed assistance. <sup>4</sup>(NT 656-657, 927-929)
10. During the 2004-2005 school year in the District Student received 90 and then 150 minutes of speech/language therapy. Student also received private speech/language therapy for the two-month period prior to the February 2005 increase to 150 minutes. (NT 675, 680-682; P-20, P-34)
11. In the beginning of the 2005-2006 school year (1<sup>st</sup> grade), Student's District placement was in a blended Life Skills program at [redacted] Elementary School with inclusion into a first grade homeroom. Student's Life Skills classroom teacher was the same teacher Student had in kindergarten.<sup>5</sup> (NT 666, 926)
12. For the 2007-2008 school year, as Student had been at Private School, the District utilized its prior experience educating Student including educational records from Student's stay in the District, in addition to two independent educational evaluations funded by the District, and the Private School records, to develop the needs to be addressed in Student's proposed IEP. (S-6, S-9, S-10, P-1, P-58, P-65)
13. The IEP goals on the 2007-2008 IEP the District offered to Student were identical or very similar to the goals in the plan from Private School. (NT 1508-1509; P-60, P-72)
14. The Parents had the opportunity to participate in the development of the 2007-2008 IEP, were accompanied by a "Curriculum Broker", were afforded the opportunity to speak and ask questions, and were provided their procedural safeguards. The only request concerning the IEP anyone testified to having been made by the Parents at the August 2007 IEP meeting was that cursive be used; this was added to the IEP. (NT 758-759; 1509; 1615; P-72)
15. The proposed IEP called for 120 minutes of speech weekly, equating to four, thirty minute sessions, in a combination of individual and group. According to the American Speech and Hearing Association (ASHA), this level of service is within the recommended guidelines of three to five 30-minute sessions. The IU

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<sup>4</sup> The Parents never observed the class despite an open-door policy. (NT 946-947)

<sup>5</sup> See above re lack of observation by Parents although the "Curriculum Broker" observed briefly in the special education and the regular education classrooms. This individual's written input to the Parents was clearly biased and as reportedly was her participation in a meeting in October 2005. She was not called to testify at the due process hearing. (NT 951-956, 966-968; P-45)

- therapists would have worked with Student using several approaches rather than a single approach as recommended by ASHA as the “prevalent view” among speech language pathologist practitioners. (NT 1247, 1500-1501, 1565; P-72, S-11)
16. The District recognizes the need to pull together a variety of methodologies rather than one because of the sense of urgency in speech/language development, such that if is not addressed jointly with literacy skills the student will not have the academic skills he/she needs to be a successful communicator. (NT 1492)
  17. Specifically relating to speech/language services and literacy, the District provides a curriculum-based approach to address the clinical weaknesses that it sees in students. There is a wealth of support in the area of reading/literacy that suggests that phonological awareness is both a speech and language concern and a pre-reading skill and that if the child is to expand reading and writing skills, language skill development needs to be embedded within the curriculum where the child is going to use it. Furthermore, the child will only learn and stabilize what he/she uses in a variety of settings and across a variety of people. (NT 1490-1491)
  18. In the District, in addition to formal speech/language therapy, Student’s speech/language needs would be addressed in the classroom, allowing for coordinated, daily, full day implementation of the strategies. The classroom teacher has daily consultation time in order to coordinate related services and instruction, and regularly consults with the speech/language therapy, occupational therapy and physical therapy providers to keep abreast of the skills that need to be practiced and repeated throughout the day in each student’s daily classroom experience as well as the correct method for teaching and reinforcing these skills. (NT 888)
  19. For reading instruction, the District implements Edmark, a scientifically based, highly structured, sight word reading program that is backed with published research supporting its use with students functioning at Student’s level. Supplementary materials from the Harcourt curriculum are also utilized. (NT 893-894, 1405, 1426)
  20. Upon the recommendation of the Parents Curriculum Broker, the District had previously purchased and trained staff on Project Read specifically for Student. (NT 1637)
  21. The Parents’ expert psychologist agreed that Project Read is backed with published research supporting its use with students functioning at Student’s level. (NT 1405, 1426)

22. The 2007-2008 IEP includes goals for sight words, multi-syllable words and CV sound combinations, reflecting both sight word and phonemic approaches to reading. (P-72)
23. The former IEP reflected the addition of a multisensory reading program and staff training, and the 2007 IEP continued to offer the multisensory program (P-48, P-72)
24. Tracing in sand, tracing a projected letter on the wall, and shaping letters from wicky sticks are among the multisensory strategies that would have been used to teach Student reading. (NT 903; P-72)
25. For writing, Student would have been instructed using the Zaner Bloser curriculum. (NT 904).
26. Spelling instruction would have been incorporated in the language arts or reading instructional blocks, using the Edmark program or "100 Word" word lists. (P-72)
27. For math instruction including teaching money skills, the Touch Math curriculum, which incorporates the kinesthetic sense of touching points, would have been implemented for Student. The Parents' expert psychologist agrees that Touch Math is a highly structured curriculum (NT 907, 853, 1426).
28. Using Touch Math was recommended by the Parents' Curriculum Broker. (NT 1006).
29. The 39-page IEP the District offered to Student for the 2007-2008 school year contains in appropriate detail within its "four corners" each element mandated by the IDEIA: a statement of the Student's present levels of educational performance and needs; a statement of measurable annual goals, including benchmarks/short-term objectives, related to meeting Student's needs; a list of the special education (specially designed instruction) and related services and supplementary aids and services to be provided to Student; a statement of the program modifications or supports that will be provided to Student; a statement of additional supports for school personnel such that Student can advance appropriately toward attaining Student's annual goals and be involved and progress in the general curriculum; and an explanation of the extent, if any, to which Student would not participate with nondisabled children in the regular class. (P-72)

#### District's Proposed Placement for Student for 2007-2008

30. For the 2007-2008 school year the District offered Student a part time Life Skills placement with inclusion in regular education as appropriate with support. (P-72)
31. In the Life Skills placement, the curriculum focuses on teaching functional academics at the student's individualized pace for instruction, with individualized

- curricula and plans to monitor progress in order for each child to reach his/her potential. (NT 890)
32. In the class proposed for Student during the 2007-2008 school year, there were seven students, with a teacher and two aides. The aides accompanied students to the regular education classes when required. (NT 830)
  33. All the students in the proposed class were at or above Student's reading and math levels. (NT 818-828)
  34. Like Student, Student's potential classmates required related services and all had speech/language needs. (NT 814, 827)
  35. Many, but not all, of Student's potential classmates fell, as did Student, in the range of mild to moderate mental retardation on standardized testing. Student and Student's classmates needed and would have received repetition, slow paced instruction, and scaffolding of learning IEP goals and objectives. None of Student's potential classmates engaged in disruptive behaviors to the degree that would have been needed to be addressed in an IEP. (NT 809, 819, 911, 1509-1510, 1616)
  36. Student's IEP called for inclusion, and adult support to facilitate the inclusion, in keeping with the IDEIA requirement that children be educated in the least restrictive environment appropriate for their individual needs. (P-72)
  37. The Parents' private psychologist recommended that Student receive "remediation that's designed specifically based on the individual child's specific profile of learning strengths and weaknesses that's administered in [a] format that allows for the instruction and training to be directed at the child at their level with maximum feedback and progress monitoring of their performance". (NT 1427)
  38. The Parents' private psychologist had no reason to believe that this type of educational programming would not be carried out in the District's proposed program, and noted that "there is a lot I don't know about that setting that I can't comment on". (NT 1427-1429)
  39. The Parents' private psychologist has not observed the specific classroom that had been proposed for Student for the 2007-2008 school year. (NT 1444)

#### Private School

40. In 2007-2008 there were four children in Student's class at Private School, ranging in age from six to ten years; there was a six-year-old, two eight-year-olds, and Student who was ten years old. There are nine children in the school this school year (2008-2009). Student has had the same teacher since Student entered Private School in 2005. (NT 47)



41. Student's 2007-2008 classmates included a child with Pervasive Developmental Disorder Not Otherwise Specified<sup>6</sup>, another child with childhood apraxia of speech, and a third child with speech/language, fine and gross motor, and physical weakness issues. Of the four children, Student was second from the top in language abilities. The child at the top had high functional abilities in communication. (NT 56-57)
42. Private School, founded in 2002, is a private academic school licensed to provide special education to students with autistic spectrum disorders, mental retardation, learning disabilities and speech/language impairments. (NT 47)
43. Private School's core method is the Association Method which is carried out 100% of the day. The Association Method was developed over 50 years ago for veteran soldiers with traumatic brain injury and later used with hearing impaired children. (NT 53, 562; P-86)
44. The Association Method is a multi-sensory, phonetics-based incremental program that teaches the written language and how to speak at the same time. (NT 54)
45. The Association Method emphasizes the systematic introduction of the sounds of speech in a sequence tailored to an individual's language weakness as determined on an ongoing basis by a speech and language pathologist. These sounds are practiced at the rate of thousands of repetitions a week, until verifiable mastery and automaticity are achieved. (NT 463, 466, 482-483, 572, 599-600, 1327-1328, 1331, 1151-1155, 1157-1158, 1161)
46. The mastered sounds form the basis of an individualized reading and writing program that utilizes color coding to assist children with phonemic awareness deficits, cursive writing to aid those with fine motor control challenges and "Northampton Symbols," a phonics system in which the sounds of speech which may appear in the written English language in various letter combinations are reduced to a single symbol, not unlike the system found in the pronunciation guide of a dictionary. (NT 61, 131-134, 136, 141, 143, 157, 387-388, 489; P-95)
47. All staff members at Private School know the Association Method and implement it throughout the day. The staff label objects about the school building and display hygiene awareness signs that are color coded and use Northampton symbols<sup>7</sup> in the student bathrooms. (NT 170-172)
48. The Private School Speech School utilizes the integral stimulation method to address articulation errors. It is a technique in which the therapist models the production of a given sound for the student both visually through facial manipulation and through auditory example. The student is then required to repeat the utterance, in Student's case, two hundred time or more per session,

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<sup>6</sup> PDD NOS is an autistic spectrum disorder.

<sup>7</sup> There are 44 sounds represented by the Northampton Alphabet. (NT 581)

- until it is mastered at a 90% proficiency level. (NT 482-483, 497-500, 572, 599-600<sup>8</sup>; P-105)
49. At Private School in the 2007-2008 school year Student received individual therapy from a speech and language pathologist five times per week in 30-minute sessions, and the speech and language pathologist was in the classroom for a total of seven hours per week. (NT 117, 366-368, 467-468, 479-480, 486-488; P-60)
  50. The exceptionally intensive integral stimulation method used at the Private School to address articulation errors lacks robust research to support the use of this technique over others, no robust research other than a one-child case sample and a five-child case study to support its efficacy, and no research to support the existence of any link between the Association Method and literacy. It runs counter to the prevailing view that the use of various strategies is the best approach to speech/language treatment. (NT 544, 1251, 1405, 1413, 1488-1489, 1491-1492, 1531-1534, 1570; S-11)
  51. Experiencing speech correction 100% of the school day, as well as during homework, for eleven months annually for three years, Student now makes three fewer errors<sup>9</sup> than Student did when Student began the Private School program according to Private School's records of Student's Goldman-Fristoe<sup>10</sup> articulation test results. (NT 562-563; P-78, P-85)
  52. Student's tested mean length of utterance has remained the same throughout Student's time at Private School. Student averages two and a half words per utterance on formal language samples used to gauge progress although in spontaneous speech Student's mean length of utterance is longer. (NT 1497-1499, 1520-1521; P-78)
  53. When the Parents' expert psychologist observed Student at Private School at snack time in Student's classroom, Student rarely initiated conversation unless it was facilitated by an adult. (NT 1396-1398; P-83)
  54. With regard to reading, using the Association Method students move through a level system going from letter sounds, to syllables, to words, to articles, to simple sentences, and eventually, to questions. Story levels do not begin until after the question level. Students do not move on until a level is mastered. (P-86; P-95)
  55. Student's teacher at Private School testified that after being at Private School the preceding two years, at no time during the 2007-2008 school year was Student able to read a pre-primer book.<sup>11</sup> (NT 152)

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<sup>8</sup> For the intricacies of the Association Method of teaching speech articulation and how it applies to Student see generally the testimony of the Private School speech/language therapist at NT 466 through 605.

<sup>9</sup> Counting the time Student was in the District, seven fewer errors since September 2005. (NT 589)

<sup>10</sup> The Goldman-Fristoe tests only consonant production; it does not test vowel production. (NT 582)

<sup>11</sup> The teacher also testified that since she started working at Private School, no child has reached the story level of the Association method. (NT 106-107)

56. The Parents' expert psychologist testified that she "wouldn't expect anything" [by way of learning progress] in reading comprehension because "[Student] would have to read a sentence and remember it and demonstrate what [Student] understood...so [Student]'s really not at the level that [Student] can perform that type of task the way it's being measured there". (NT 1392)
57. At age 10 (2007-2008 school year), Student had not yet been given much in the way of printed (as opposed to cursive) materials at Private School as per the Parents' expert psychologist. (NT 1408-1409)
58. There is no published research on the reading program used at Private School with Student. (NT 1405)
59. When questioned about Student's still working on counting items after three years as per Student's Private School IEP and observations at Private School, the Parents' expert psychologist testified that if she had seen this at a public school she "would maybe suggest a change in methodology". (NT 1399-1404, 1411; P-83)
60. There is no published research on the math program used at Private School with Student. (NT 1406)
61. Student's speech/language pathologist at Private School has never been called in to consult with the classroom teacher for language and concepts in math. (NT 595)
62. The Parents' expert psychologist testified that Student has demonstrated static PIAT scores since 2005 in the areas of math, written expression, and general information, "but in the areas in which [Student]'s really being instructed, where [Student] is really being trained, there actually was [progress]. It's not huge, but there is evidence of learning". (NT 1391)
63. The Parents' expert psychologist testified that Student's summary standard scores obtained through structured normed instruments did not evidence progress, although "looking at item analysis<sup>12</sup> and seeing those types of questions that [Student] was able to answer and the extent to which they reflected the skills that [Student] is working on in [Student's] [Private School] program... [Student] is starting to establish the building blocks that [Student] will need if [Student] is going to make more progress in the future". (NT 1448, 1456-1459)

#### Equities

64. The Parents had sought to place Student at Private School as early as the 2004-2005 school year when Student was in kindergarten. In November 2004 Student was evaluated by Private School but was not accepted. (NT 192-198; P-25)

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<sup>12</sup> The psychologist only did an item analysis of her own testing as she did not have or ask for the raw data from previous testings. (NT 1453-1454)

65. After a week trial placement in September 2005, Student was accepted by Private School.
66. The Parents placed Student at Private School on November 15, 2005 after informing the District of their intentions by letter on November 1, 2005. On November 16, 2005 they sent written disapproval of a November 1, 2005 IEP and NOREP.<sup>13</sup> (NT 198, 212; P-47, P-44, P-50)
67. Following receipt of a publicly funded independent educational evaluation update, on July 25, 2007 the Parents provided the District with written notification that they intended to “seek a publicly funded<sup>14</sup> program for [Student] this coming school year”. (P-68)
68. The parties met on August 20, 2007 to review a draft IEP the District was offering for public school placement for the 2007-2008 school year. It was clear that the Parents’ Curriculum Broker wanted Student to remain at Private School for “one more year”. (NT 969, 1616)
69. At the August 2007 IEP meeting, the Parents were accompanied by their Curriculum Broker but did not discuss any changes they wished to be made to the IEP except that cursive writing be included to which request the District acceded. (NT 758-759, 965, 1509, 1615; P-72)
70. The IEP goals on the 2007-2008 IEP the District offered to Student were identical or very similar to the goals in the plan from Private School, as acknowledged by Parent counsel. (NT 24, 1508; P-60, P-72)
71. Neither the Parents nor their Curriculum Broker asked about any of the things that allegedly concerned them about the IEP, one of which, according to the Parents was that the District’s program was “not academic enough” but they did not ask to see any programs or classrooms. (NT 760-769, 787-788).
72. Despite their opportunity to participate with the assistance of their Curriculum Broker in creating the IEP, and its close resemblance to the Private School IEP for transition purposes, the Parents concluded the IEP was not appropriate, and on August 31, 2007 notified the District that Student would be continuing to attend Private School for the 2007-2008 school year. (NT 1509; P-68, P-74)

#### Discussion and Conclusions of Law

Motion to Dismiss: The Parents, having been given a copy of their procedural safeguards, rejected the IEP the District offered on August 20, 2007 for the 2007-2008 school year.

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<sup>13</sup> Although details were not available, the District ultimately provided support for the placement.

<sup>14</sup> This wording is ambiguous, whether accidental or deliberate.

(FF 72) They did not request a due process hearing, maintained Student's placement at Private School, and filed for Due process after the school year was over. (P-72, P-73, P-74) The District now argues that, having failed to request a hearing prior to the end of the year, the Parents are barred from seeking tuition reimbursement and cites Bernardsville Bd. of Educ. v. J.H., 42 F.3d 149, 158 (3d Cir.1994), Warren G. v. Cumberland County Sch. Dist., 190 F.3d 80 (3d Cir.1999) and Marissa F. ex rel. Mark and Lavinia F. v. William Penn School Dist., 199 Fed.Appx. 151, 153, 2006 WL 2769728, 1 (3d Cir. 2006).

Upon this hearing officer's belief that the District had more than a reasonable basis upon which to conclude that the Parents would ask for tuition reimbursement, she denied the District's Motion to Dismiss. The District had supported the Private School placement for several years previously. The Parents informed the District in writing that they were seeking a "publicly funded placement" for the 2007-2008 school year. (FF 67) It is disingenuous of the District to plead surprise, and the District has not successfully argued that there is no difference between the cases it cites and the circumstances of this instant matter. Additionally, this case contrasts with the very recent case of Houston Indep. Sch. Dist. v VP (5<sup>th</sup> Cir. 2009), wherein the Court noted, "*HISD counters that had it known V.P. would seek reimbursement for the 2005-2006 school year, it could have proposed an alternative placement. For example, in an effort to avoid paying for a second year of V.P.'s Parish School costs, HISD could have attempted to develop a new IEP that corrected the deficiencies found by the due process hearing officer. Furthermore, HISD alleges it could have suggested an alternative placement at one of its schools, such as at the Sutton Elementary "oral deaf" program.*" Though not controlling in this Circuit, the 5<sup>th</sup> Circuit Court's commonsense reasoning that the defendant school district should have inferred or anticipated that VP would be asking for reimbursement (in that case because of pending court action) bears notice here. In fact, unlike Houston Independent School District, the Downingtown Area School District did propose an alternative program and placement allowing this instant matter to be decided on the merits.<sup>15</sup> It is naïve for the District, which has been involved in due process hearings in the past, to have thought that Student's family would not seek due process having rejected the proffered NOREP and having written a letter stating their intention to seek a "publicly funded placement". Finally, it was always the option of the District to file for due process to have its 2007-2008 program and placement deemed appropriate by a hearing officer.

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 more recently. 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

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<sup>15</sup> It is still totally unclear, and the parties were rather mysterious and circumspect with the hearing officer, as to why the instant matter involves only the 2007-2008 school year.

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 the instant matter, the evidence was not in equipoise.

Credibility: 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.<sup>16</sup> 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. Although the testimony of all the witnesses was carefully considered, the credibility of the following witnesses will be specifically commented upon here.

Private School Teacher: Student's teacher at Private School received a Bachelor's Degree in 2003 and immediately joined the staff at Private School. She has been working towards a Master's Degree since 2004 but stopped at the end of 2007; she has intentions of finishing it. (NT 38, 41) She holds an Instructional I certificate in special education for grades K through 12. During the course of obtaining her Bachelors Degree she did student teaching for one semester in a first grade learning support classroom and for another semester in a high school resource room. (NT 39-40) She spent a week in training at the Private School Speech School in Jackson Mississippi, a facility with which Private School is affiliated, and also took a one-week 3-credit graduate course at the DuBard School which yielded a certificate in the Association Method. (NT 41) Additionally she receives in-service training and attends conferences to expand her skills. (NT 41-43, 50) This witness was exceptionally tense and anxious, and needed at least two breaks following her bursting into tears during direct examination by Parents' counsel. When queried privately by the hearing officer in the presence of the District's counsel, the Parents' attorney was not aware of any medical condition or other circumstance that would account for the witness' emotionality. Her brief professional career post completion of her Bachelor's Degree has been exclusively with the Private School. She is naturally a strong proponent of the Private School and the Association Method for Student, having no other basis of comparison with other programs and methods. Although this witness' testimony was accepted for its description of the Private School program and the Association Method, her testimony was given little weight as to Student's needs and whether or not Student can be successfully educated in the District's proposed placement. This witness has no knowledge of the capabilities of the District and how the proposed IEP would be implemented.

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<sup>16</sup> 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).

Parents' Expert Psychologist: This witness has impeccable credentials in her field. She has significant experience administering and interpreting psychological tests. Overall this hearing officer found her testimony to be fairly balanced. However, the test results with which she had to work provided little if any definitive support that Student had made educational progress at Private School. Her usefulness in this hearing was limited as she was not at all familiar with the District's proposed placement for Student for 2007-2008.

Private Speech/Language Therapist: This individual's testimony was given very little weight as to what happens with Student at Private School as she has not observed Student at Private School. Her opinions regarding what could have happened in the District's classroom for Student were also given little weight as she did not observe the District's Life Skills classroom. Additionally she seemed to be basing her estimate of Student's needs upon a clinical setting as opposed to an educational setting where the skills are practiced throughout the day. (NT 1271, 1276, 1281, 1503)

Mother: Clearly one could not hope for a more dedicated and loving mother and this hearing officer is profoundly admiring of this parent's relentless pursuit of necessary medical treatment for her [child]. It is also clear that the Parents as a couple were seeking what they were led to believe was the best possible program to address Student's educational needs. However, what is also clear is that once they had secured public funding for Student's program at Private School, the Parents had little if any intention of returning Student to the District during the 2007-2008 school year in question. Their lack of genuine participation in creating the August 2007 IEP suggested that they were not acting in good faith, and this hearing officer did not find the mother's statements to the contrary credible.

Chester County IU Speech/Language Pathologist: The IU speech/language supervisor is a speech/language pathologist with 33 years experience providing direct services to and developing programs for students with disabilities. She is licensed as a speech/language pathologist in the State of Pennsylvania. Of the three speech/language pathologists to testify she is the only one with direct knowledge of the District's program. She credibly testified that the goals set forth for Student in the proposed IEP were appropriate and that the level of speech/language services was appropriate to match Student's need. Additionally she offered credible testimony that in addition to formal speech/language therapy, Student's speech/language goals would be addressed in the classroom daily with all staff being aware of Student's goals.

Special Education Foundations: 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 he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children. C.F.R. §300.26

FAPE is defined as “special education and related services” provided according to the IEP. 20 U.S.C. §1401(9); 34 C.F.R. §300.17

Was the program and placement the Downingtown Area School District offered to Student for the 2007-2008 school year appropriate?

#### 2007-2008 Proposed Program and Placement

Having been found eligible for special education, Student is entitled by federal law, the Individuals with Disabilities Education Act as Reauthorized by Congress December 2004, 20 U.S.C. Section 600 *et seq.* and Pennsylvania Special Education Regulations at 22 PA Code § 14 *et seq.* to receive a free appropriate public education (FAPE). FAPE is defined in part as: individualized to meet the educational or early intervention needs of the student; reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress; provided in conformity with an Individualized Educational Program (IEP).

A student’s special education program must be reasonably calculated to enable the child to receive meaningful educational benefit at the time that it was developed. (Board of Education v. Rowley, 458 U.S. 176, 102 S. Ct. 3034 (1982); Rose by Rose v. Chester County Intermediate Unit, 24 IDELR 61 (E.D. PA. 1996)). The IEP must be likely to produce progress, not regression or trivial educational advancement [Board of Educ. v. Diamond, 808 F.2d 987 (3d Cir. 1986)]. Polk v. Central Susquehanna IU #16, 853 F.2d 171, 183 (3<sup>rd</sup> Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989), citing Board of Education v. Diamond, 808 F.2d 987 (3<sup>rd</sup> Cir. 1986) held that “Rowley makes it perfectly clear that the Act requires a plan of instruction under which educational *progress* is likely.” (Emphasis in the original). The IEP must afford the child with special needs an education that would confer meaningful benefit. The court in Polk held that educational benefit “must be gauged in relation to the child’s potential.” This was reiterated in later decisions that held that meaningful educational benefit must relate to the child’s potential. See T.R. v. Kingwood Township Board of Education, 205 F.3d 572 (3<sup>rd</sup> Cir. 2000); Ridgewood Bd. of Education v. N.E., 172 F.3d 238 (3<sup>rd</sup> Cir. 1999); S.H. v. Newark, 336 F.3d 260 (3<sup>rd</sup> Cir. 2003) (district must show that its proposed IEP will provide a child with meaningful educational benefit). The appropriateness of an IEP must be based upon information available at the time a district offers it; subsequently obtained information cannot be considered in judging whether an IEP is appropriate. Delaware County Intermediate Unit v. Martin K., 831 F. Supp. 1206 (E.D. Pa. 1993); Adams v. State of Oregon, 195 F.3d 1141 (9<sup>th</sup> Cir. 1999); Rose supra.

Districts need not provide the optimal level of service, maximize a child’s opportunity, or even a level that would confer additional benefits, since the IEP as required by the IDEA represents only a basic floor of opportunity. Carlisle Area School District v. Scott P., 62 F. 3d at 533-534.; Hartmann v. Loudoun County Bd. of Educ., 118 F.3d 996, 1001 (4<sup>th</sup>



Cir. 1998); Lachman, supra. In creating a legally appropriate IEP, a School District is not required to provide an optimal program, nor is it required to “close the gap,” either between the child’s performance and his untapped potential, or between his performance and that of non-disabled peers. In Re A.L., Spec. Educ. Opinion No. 1451 (2004); See In Re J.B., Spec. Educ. Opinion No. 1281 (2002)

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). Under the IDEA parents do not have a right to compel a school district to provide a specific program or employ a specific methodology in educating a student. M.M. v. School Board of Miami - Dade County, Florida, 437 F.3d 1085 (11<sup>th</sup> Cir. 2006); Lachman v. Illinois Bd. of Educ., 852 F.2d 290, 297 (7<sup>th</sup> Cir. 1988) If personalized instruction is being provided with sufficient supportive services to permit the student to benefit from the instruction the child is receiving a “free appropriate public education as defined by the Act.” Polk, Rowley. The purpose of the IEP is not to provide the “best” education. The IEP simply must propose an appropriate education for the child. Fuhrman v. East Hanover Bd. of Educ., 993 F. 2d 1031 (3d Cir. 1993). (See also Board of Education v. Murphysboro v. Illinois Bd. of Educ., 41 F.3d 1162 (7<sup>th</sup> Cir. 1994) (Under the IDEA a district must follow the procedures set forth in the act, and develop an IEP through procedures reasonably calculated to enable the child to receive educational benefits. Once the district has done this the court cannot require more; the purpose of the IDEA is to open the door of public education to handicapped children, not to educate a child to his/her highest potential), citing Rowley, 458 U.S. at 206-07.) More recently, the Eastern District Court of Pennsylvania ruled, “districts need not provide the optimal level of services, or even a level that would confer additional benefits, since the IEP required by the IDEA represents only a basic floor of opportunity.” S. v. Wissahickon Sch. Dist., 2008 WL 2876567, at \*7 (E.D.Pa., July 24, 2008), citing Carlisle, 62 F.3d at 534, citations omitted. . See also, Neena S. ex rel. Robert S. v. School Dist. of Philadelphia, 2008 WL 5273546, 11 (E.D.Pa., 2008).

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)

An IEP must be crafted in such a manner that, provided it is implemented, there is a reasonable degree of likelihood that the student will make educational progress. Implementation of an appropriate IEP does not guarantee that the student will make progress.

The District's proposed program for Student and the District's proposed placement for Student for the 2007-2008 school year was appropriate. The proffered IEP contained all the elements required by the IDEIA, and these elements were elaborated in quite sufficient detail. (FF 12 through 29) The proposed classroom placement for Student likewise appropriately met Student's needs. (FF 30 through 39) There were no deficiencies this hearing officer could find that would render the District's offered program and placement inappropriate.

Having established that the District's program and placement offer to Student for the 2007-2008 school year represented a free, appropriate public education (FAPE), it is not necessary to examine the second and third questions regarding the appropriateness of Private School and the equities. However, given the investment in time that the parties made during this hearing, the following questions are being discussed as is the hearing officer's prerogative.

Was the placement unilaterally chosen by Mr. and Mrs. appropriate?

#### Private School

The issue in this case is not whether or not the Private School program was *more* appropriate for Student than the program proposed by the District, but rather whether the District offered Student an appropriate program that provided a basic floor of opportunity. Having found the District's proposed IEP for 2007-2008 appropriate, and indeed providing much more than a basic floor of opportunity, it is not necessary for purposes of this decision to decide whether the Private School program/placement was appropriate or not. However, there are two salient features of Private School that this hearing officer wishes to address for the benefit of the Parents as well as for the District. The first is the issue of Least Restrictive Environment (LRE) as it relates specifically to Private School, and the second is Methodology as it relates to the Association Method.

LRE: IDEIA requires that disabled students be placed in the least restrictive environment that will provide meaningful educational benefit. Congress has expressed a clear intent and preference that disabled children be placed in regular education classes, and that removal of a child from regular education classrooms is permissible "only when the nature and severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C.A. § 1412(a)(5)(A); 34 CFR §300.550. Pennsylvania State regulations adopted by reference from the IDEA state verbatim what an IEP shall contain. 22 Pa. Code § 14.131(b), 22 Pa. Code § 14.102 (a)(2) adopt all federal regulatory requirements, including the requirement that a student be educated in the least restrictive environment.

However, parental placements are not bound by the principles enumerated in IDEIA. This determination is inherent in the two controlling cases on tuition reimbursement- Florence County School District Four v. Carter (1993) and Burlington School Committee v. Massachusetts Department of Education (1985). The Court in Florence County placed a much simpler burden on the parent- Does the parental placement address the student's needs neglected by the LEA?

Although this hearing officer may not base a finding of inappropriateness of Private School upon LRE, it is notable that Student was one of only four children in Student's classroom during 2007-2008 in a school that only has a total enrollment of nine children in the 2008-2009 academic year. (FF 40) In Student's 2007-2008 classroom, Student was the second from the top, with the two lower functioning children having significant impairments. (FF 41) One of the Parents' basic objections to Student's proposed District placement, given their belief that Student is higher functioning than any of Student's standardized test scores would indicate, is that it would have been in the Life Skills Support classroom in the District. This point of view is acknowledged, but this hearing officer would counter that it is likely that the array of Student's classmates in the District's proposed placement would have been both higher functioning and lower functioning than Student was at the time (FF 33, 34, 35), and had the District found through the year that Student indeed belonged in a Learning Support classroom it, unlike Private School, had that higher functioning group placement readily available in addition to continuing to provide Student with planned supported inclusion with regular education students for part of each school day. (FF 36) Student is reported to be talkative and sociable, has an appropriate sense of humor, displays independence in familiar and non-familiar environments and participates in developmentally typical social activities such as Scouts, attending church, eating in restaurants and participating in sports. (FF 8) Student was owed the opportunity to participate with appropriate supports in the larger world of a typical public school environment as Student moved toward pre-adolescence.

Methodology: Although the Parents in the instant matter have not based their case solely on methodology, there was a clear expressed preference for the Association Method such that in its proposed IEP for 2007-2008 the District agreed to add the use of some of the elements of the Association Method, likely in a transitional function, given Student's familiarity with that method.

The leading case on methodology is Lachman v. Illinois State Bd. of Educ., 852 F. 2d 290 (7<sup>th</sup> Cir. 1988), cert. denied 488 U.S. 925 (1998). Lachman involved a dispute between parents and a school district over how best to educate a deaf child. The Parents favored a "cued speech" methodology aimed at training the child to understand spoken language, while the District recommended a "total communication" approach in which the child would have relied primarily on sign language. Given that the school district's proposed placement using the total communication approach satisfied the IDEA, the Circuit Court ruled that the Parents could not force the School District to adopt what they perceived to be an even more effective educational program. The Court recognized, "Once it is shown that the Act's requirements have been met, questions of methodology are for resolution by the responsible authorities."

Lachman at 292. Thus, Lachman holds that an IEP meeting the substantive requirements of the IDEA cannot be defeated merely because the Parents believe a better educational program exists for their child. (See also Blackman v. Springfield R-XII Sch. Dist. 198 F.3d 648 (8<sup>th</sup> Cir. 1999); J.P. v. West Clark Cmty. Sch. 230 F.Supp. 2d 910 (S.D. Ind. 2002); Grim v. Rhinebeck, 39 IDELR 264 (2d Cir. 2003)

As it goes toward the appropriateness of Private School however, this hearing officer believes that the Association Method and its highly idiosyncratic use of Northampton symbols and color-coded cursive writing to teach reading, while it may have been useful earlier, is not now serving Student well at this stage of Student's education. (FF 46, 47, 54, 55, 57) The "real world" both in schools and in the community does not post Northampton symbols, does not color code sounds, and has not since the invention of the printing press published books, highway signs, internet offerings, Scout Handbooks, restaurant menus and/or church bulletins in cursive. Even if Student's functional levels as assessed by standardized testing were accurate, and even more so if Student has higher potential as believed by the Parents and their witnesses, Student needed to begin to be educated in the method of written communication used by the nearly total majority of the community. To deny Student this is certainly to deny Student FAPE.

Additionally, according to Private School's records on the Goldman-Fristoe articulation test, which both the Parents' expert speech/language pathologist and the IU speech language supervisor testified provides an idea of what Student can do under the best circumstances, the integral stimulation method has not been demonstrated to be particularly effective for Student. (FF 50, 51, 52)

Had it been necessary to reach the question of whether the Parents' unilaterally-chosen program was appropriate, based not only on Student's lack of educational progress (FF 56, 59, 62), but particularly on the two factors addressed above, the conclusion would have been that it was not.

Are there equitable considerations that would serve to remove or reduce the District's responsibility to reimburse the Parents for Student's tuition for that school year?

#### History of Unilateral Placement

Although this hearing officer has found the District's program to be appropriate, and Private School's program to be inappropriate, a discussion of the equities is nevertheless here offered for the benefit of the parties.

It was clear that the Parents, abetted by their Curriculum Broker, were wedded to Student's remaining at Private School for the school year in question. (FF 68) They had sought Student's placement at Private School since kindergarten (FF 64), and once Student was accepted there in Student's first grade year they succeeded in securing funding support from the District. (FF 65, 66; Footnote 11) The District provided public funding for the placement for several years. Believing that it could offer Student FAPE for the 2007-2008 school year, in August 2007 the District sat down at an IEP meeting in

good faith, having produced a draft IEP that provided, for purposes of Student's comfort in transitioning, for some of the Private School teaching methods to which Student was accustomed. (FF 68) In fact the IEP was virtually identical to the education plan utilized at Private School in terms of goals and objectives. (FF 13, 70) The Parents attended the IEP meeting with their Curriculum Broker, and added only one suggestion – the use of some cursive writing – to which the District agreed. They did not bring up any other concerns. (FF 69, 71, 72) Even though the Parents, based upon their perceptions from three years ago, said they questioned the level of academics and speech/language targeting in the classroom they did not ask to visit the proposed program (NT 786-787). (FF 71) The Parents' assertion that the District was not cooperating with them is fully rejected. It is the Parents who did not cooperate with the District. Had this decision needed to have reached the question of equities, tuition payment from the District would have been reduced or denied.

Parents' actions can compromise their entitlement to tuition reimbursement. This principle was stated very well by the former PA Appeals Panel in In re the Educational Assignment of P. J., Special. Ed. Op. No. 1271 (2002) (J. Cautilli, concurring opinion), where the panel noted, When "[t]he parents have become so singularly focused on the [private school they have already enrolled their child in] that they appear unwilling to consider the District's proposals in good faith," tuition reimbursement should be denied, and similarly in In re the Educational Assignment of C.S., Special Ed. Op. No. 1658 (2005), "where the parents have predetermined that they will place their child in a private school regardless of the district's ability to program for the child, the equities favor the district."

As the Parents had no intention of returning Student to the District, the equities clearly favor the District and it would have been so found had that level of inquiry been required in this decision.

CONCLUSION: as the District offered Student an appropriate program and placement the Parents' request for tuition reimbursement for the 2007-2008 school year is denied. It is also noted that the Parents' unilateral placement was not appropriate and the equities favored the District.

Order

It is hereby ordered that:

The program and placement the Downingtown Area School District offered to Student for the 2007-2008 school year was appropriate.

May 3, 2009

Date

*Linda M. Valentini, Psy.D.*

Linda M. Valentini, Psy.D.  
Hearing Officer