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PENNSYLVANIA
SPECIAL EDUCATION HEARING OFFICER

DECISION

DUE PROCESS HEARING

Name of Child: CH
ODR #9199/08-09 LS

Date of Birth:
XX/XX/XX

Dates of Hearing:

December 8, 2008, 6:35 pm to 8:53 pm
December 19, 2008, 9 am to 3:39 pm
January 26, 2009, 4:20 pm to 8:02 pm
February 25, 2009, 6:00 pm to 8:38 pm
February 27, 2009, 6:00 pm to 7:54 pm
March 30, 2009, 4:30 pm to 8:21 pm
April 22, 2009, 6:00 pm to 8:42 pm
April 29, 2009, 6:00 pm to 7:37 pm

CLOSED HEARING

Parties to the Hearing:

Ms.

Lower Merion School District
301 E. Montgomery Avenue
Ardmore, Pennsylvania 19003

Representative:

Bessie Dewar, Esquire
Public Interest Law Center of Philadelphia
125 S. 9th Street, Suite 700
Philadelphia, Pennsylvania 19107

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Date Record Closed: June 9, 2009
Date of Decision: June 24, 2009
Hearing Officer: Linda M. Valentini, Psy.D.

Background

Student is a late teen-aged eligible student enrolled in the Lower Merion School District (hereinafter District). Student's mother, Ms. (hereinafter Parent) requested this hearing to address her concerns that Student had been denied a free appropriate public education in the least restrictive environment. Pursuant to this hearing officer's rulings on a pre-hearing motion (HO-1) and because certain information came to light in the pre-hearing conference regarding the lack of timely completion of the publicly-funded Independent Educational Evaluation (NT 14-16), the scope of this hearing was limited to the period from July 30, 2005 through the day before the first day of the 2008-2009 school year; thus the hearing covers Student's 8th, 9th, and 10th grade years.

At the pre-hearing conference counsel discussed their disagreement about whether a particular witness would be allowed to testify, and this hearing officer ruled that the witness would not be permitted to testify. Parent's counsel made a written request for reconsideration of this ruling, and after considering the request and the District's answer, this hearing officer determined that her ruling would stand. (NT 16-17; HO-3)

Because of her work schedule the Parent requested that all hearing sessions be in the evening, but arranged her hours so that one daytime session could be held. This circumstance, combined with the difficulty of matching the calendars of the parties, their counsel and their witnesses, was responsible for the length of time it took this hearing to be completed. Written closing arguments were due on May 29, 2009 but at the request of District counsel, with Parent counsel's concurrence, the deadline was extended one week. Subsequently, as the Parent's counsel changed unexpectedly, Parent's counsel asked for another extension with no objection from District's Counsel.

Issues

1. Did the Lower Merion School District fail to provide Student with a free, appropriate public education in the areas of mathematics, reading and writing?
Specifically:
 - First, did the District fail to conduct appropriate evaluations in these areas and/or fail to consider information from testing that was administered in order to modify the Student's program;
 - Second, were the Student's IEPs inappropriate because goals were dropped in areas where the Student still had needs;
 - Third, were the Student's IEPs inappropriate because they did not address the Student's need for self-advocacy, study and organizational skills;
 - Fourth, were the Student's IEPs inappropriate because goals lacked baselines and measurability;
 - Fifth, were the Student's IEPs inappropriate because the District failed to address lack of progress and subsequently alter the curriculum or teaching strategies;

Sixth, were the Specially Designed Instructions inappropriate because they were not specific to the Student and not altered from year to year to meet Student's changing needs.

2. Did the Lower Merion School District fail to provide Student with an appropriate transition plan to enable Student to access post-secondary education?
3. Did the Lower Merion School District fail to provide Student's special education program in the least restrictive environment?
4. If the Lower Merion School District failed in these regards is Student entitled to compensatory education, and if so in what kind and in what amount?

Findings of Fact

1. Student is currently an eleventh grade eligible student enrolled in the Lower Merion School District. In a June 2003 evaluation when Student was in second grade Student was classified as having a specific learning disability in reading, writing and math. (NT 127; S-4, S-77, P-11)

FAPE – Math, Reading, Writing - Eighth Grade: 2005-2006

2. In June 2005 an IEP was prepared for Student's eighth grade year which was the 2005-2006 school year. (NT 65-67; S-9, P-6)
3. The 2005-2006 IEP included only three goals. Goal 1, When provided with reading passages, spelling lists and content vocabulary, Student will build vocabulary and improve reading comprehension skills to the next grade level; Goal 2, Student will organize and express ideas through writing, following the writing process, 80% of the time; Goal 3, Student will learn and apply organization and study skills for improved class performance 80% of the time. (P-6)
4. The goals as written do not contain baselines and are not measurable. (P-6)
5. The 2005-2006 IEP provided for small group instruction for reading, math and language arts, preferential seating to avoid distractions and multi-sensory approach to instruction, modified testing, study guides, use of a calculator and use of an assignment book monitored by home and school. (P-9)
6. The 2005-2006 IEP does not contain Present Levels of Educational Performance in math and does not contain an Annual Goal related to math. (NT 67-68, 117; P-6)
7. The 2005-2006 IEP does contain Specially Designed Instruction relevant to math despite not having a math goal: small group instruction, multisensory approach,

- use of a calculator, completed sample problem(s) and repeated drill and practice. (NT 115; P6)
8. This eighth grade math class used the seventh grade general education textbook “Foundations of Algebra” with some supplementary material and followed the seventh grade math curriculum rather than the eighth grade curriculum. (NT 133-136, 171-172, 174-175; S-17)
 9. Although Student earned an “A” in the regular education math class and was one of the leaders in the class, often able to demonstrate the problems on the board for the other students, Student was recommended for a summer math class following eighth grade to “catch up with Student’s peers” as Student was then “a grade behind” and to bridge the gap from eighth grade to Algebra I in ninth grade. (NT 130, 133-134, 178-179, 180-187)
 10. In March 2006 a reevaluation was conducted through record review without standardized testing. The reevaluation did not address whether or not Student had a learning disability in math. The prior evaluation done in June 2003 had identified Student as having a specific learning disability in reading, writing and math (NT 128-129; S-4, P-13)
 11. Testing results from June 2005, presented in the 2005-2006 IEP, showed that on the Woodcock Reading Mastery Test (Form G) Student’s abilities fell between the 3.8 and 7.7 grade equivalencies. (S-9)
 12. In eighth grade Student received reading instruction in a learning support classroom with a certified special education teacher using the SRA Decoding program in Book B-2 and the SRA Comprehension program in Book C. (NT 152-153, 156, 161, 166, 213; S-10, S-13)
 13. The SRA program includes small group instruction with choral responses, visual and auditory prompts, vocabulary development, comprehension skills, and independent workbook activities. The District selected the SRA reading program for Student based on Student’s difficulties with working memory and Student’s need for repetition of vowel and consonant pairings. (NT 214, 224, 250-252)
 14. At the start of the 2005-2006 school year, results of a Stanford Diagnostic Reading Test, 4th edition (Form J) indicated that Student’s reading abilities fell between the 6th and 18th percentiles when compared to a national sample, (grade equivalents from 2.7 to 4.9). (S-12)
 15. At the end of the 2005-2006 school year, results of a Stanford Diagnostic Reading Test, 4th edition (Form K) indicated that Student’s reading abilities fell between the 3rd and 8th percentiles when compared to a national sample (grade equivalent range from 3.3 to 3.9). (S-23)
 16. By the end of eighth grade Student had been instructed using the SRA for three

- years, beginning in sixth grade, with negligible improvement.¹ Noting that Student's scores on standardized and curriculum-based assessments in reading during eighth grade clustered around the 3rd grade level, the school psychologist opined that it appeared that Student was progressing with the SRA program. (NT 137-138, 142-144, 148-149, 1302-1303; S-23)
17. The school psychologist opined that Student's scores were low because Student was not putting forth Student's best effort, as Student did not want to do too well and have to leave special education, and also because Student was frightened of standardized tests. The psychologist was not aware of any efforts made to help Student approach standardized tests after she rendered this opinion. (NT 1303-1304, 1309, 1313-1314; S-21)
 18. The IEP team had discussed alternative possibilities, such as placing Student in a regular education reading lab but these options were rejected because, Student would have too much difficulty with word attack, and the program student was receiving, the SRA program, was to specifically address word attack. The IEP team did not consider any other methodologies for addressing Student's decoding deficits, opting to stay with SRA as the "best program" for Student and because the ISL offered an "intense" learning support environment. (NT 139-140, 142-144, 161-164)
 19. Although the IEP team wanted Student to meet with a reading specialist to assist in developing next IEP, they nevertheless recommended continued SRA education. The eighth grade learning support teacher, without any specialized background in the Wilson program testified that it is not appropriate for Student because it is too rule-based and does not focus on repetitive learning. (NT 220-225)
 20. During the 2005-2006 school year, the learning support teacher monitored Student's written expression progress regularly by assessing Student's written products, including daily entries in Student's writing journal. Student's writing improved through prewriting brainstorming, expanded vocabulary and improved organization. (NT 205-207)
 21. During eighth grade Student received instruction from the learning support teacher in the Fundamental Learning Support class for one period each day. NT 182-183)

¹ Results of a Woodcock Reading Mastery Test (Form G) administered in February 2006 yielded reading scores between the 3.8 and 6.3 grade equivalencies when compared to grade-based norms. However, percentile rankings reported on the SRDT compare apples to apples. (S-19)

Ninth Grade: 2006-2007

22. The ninth grade IEP includes three goals. Goal 1, Student will use learned word attack strategies to identify unfamiliar words in a passage 4 out of 5 times; Goal 2, when given a writing prompt, Student will be able to earn a score of 3 according to the PA scoring guide, in the area of organization, through the use of a clear introduction, some evidence of transitions, and a clear conclusion; Goal 3 provided that given a passage on Student's instructional level (unspecified), Student will improve reading comprehension by correctly answering factual questions which include main idea, and inferential/critical thinking questions 4 out of 5 times. (P-7)
23. The goals were not measurable as written and notably contained no baselines. (P-7)
24. There was no math goal for ninth grade. (P-7)
25. On the GMADE, a group math assessment, Student scored at a very low grade level and evidenced gaps in basic math knowledge. The ninth grade learning support teacher explained that neither she nor the math teacher were qualified to assess whether Student had a learning disability in math, and that she did not know at the beginning of the ninth grade year that Student had been identified as having a learning disability in math skills, and that there was never a discussion about reevaluating Student's math abilities (NT 293-294, 311-313)
26. The school psychologist who had reevaluated Student in spring of eighth grade testified she did not consider the need for a math goal in the ninth grade IEP because it was not her job to do so. (NT 1312)
27. Student's decoding strategies were not assessed at the beginning of the ninth grade year to establish a baseline. The word-attack reading goal was assessed through SRA mechanisms only, and the goal was not considered for revision at the end of ninth grade. Likewise no assessments were conducted to measure Student's reading comprehension goal but the goal was retained because it was still an area that needed improvement. (NT 422-24, 429-431, 487-488; P-7)
28. In the fall of ninth grade year, Student began to receive assessment and assistance from a literacy specialist who met with Student a total of 32 times over the course of the ninth grade year. (NT 323-326, 332-333)
29. The literacy specialist "was not aware that [the IEP service of meeting frequently with a reading or literary specialist to interpret testing and discuss additional reports] was in the [IEP], but [she] was told that [she] needed to work with [Student]". (NT 333-334)
30. At ninth grade, a Burns-Roe Individual Reading Inventory showed that Student's word recognition (sight word) abilities were between the fifth and sixth grade

- level. The literacy specialist did not think that Student was not applying self when taking the inventory. In the "present levels of academic achievement" section of Student's ninth grade IEP there was no mention of the Burns-Roe IRI, nor were there any comments from the literacy specialist. (NT 323-328; S-32)
31. Although Student was frustrational at the fourth, fifth, and sixth grade levels in passage, comprehension, and word recognition, Student's alternative reading instruction had been reduced from daily in eighth grade to every-other-day in ninth grade. The literacy specialist testified that she believed this change was proper because Student was receiving reading instruction—but not decoding—in the content area classes. (NT 361-362)
 32. Even though Student's IEP called for 45-minute alternative reading class four days out of an eight day cycle, the literacy specialist was only providing support two of those days. The ISL class, which used the SRA, may have been the additional two days. (NT 356)
 33. Although the literacy specialist testified that Student needed assistance in both decoding and comprehension, the literacy specialist did not do any direct instruction in decoding. She was under the impression that decoding instruction was being done in the SRA class. (NT 359, 360, 365-366)
 34. The ISL teacher assisted Student one-on-one with decoding about 6 to 12 times during ninth grade. (NT 512-514, 527)
 35. In ninth grade, the IEP team did not consider an alternative research-based reading program for Student rather than SRA. The IEP team did not consult with a Wilson or Lindamood Bell trained teacher to explore whether those programs were better suited to Student's needs even though there are three Wilson-certified teachers, and two teachers certified in Lindamood-Bell at Lower Merion High. (NT 416-417, 529-530)
 36. The literacy specialist ascertained what English and history material was being assigned to Student and then assisted Student with Student's assignments. (NT 340-342)
 37. The literacy specialist administered a Degrees of Reading Power post test in April 2007. Student's scores had decreased from the previous time that test had been administered. However, without objective testing, the literacy specialist saw improvements in Student's fluency when reading aloud. (NT 328-329, 350, 355)
 38. The learning support teacher testified that although she believed Student had made some progress in writing, she never scored any of Student's essays against the PA scoring guide, which was the means by which Student's IEP stated the writing goal was supposed to be measured. T. 317-319.

39. Student did not meet Student's writing goal—to score a 3 according to the PSSA rubric on a writing prompt; Student scored a 2.1 and a 1 on the fall and spring assessments administered to the entire ninth grade. No results from any other scorings on any other essays were referenced in the IEP. The team retained the goal for the following year. (NT. 425-427, 428-429; P-7)
40. In English I, the class read various grade-appropriate books. Students used graphic organizers to pre-write essays, and the class covered vocabulary from the novels throughout the year. Student and several other students received adapted versions of the novels to be read in conjunction with the full novels, as well as chapter summaries and prospective vocabulary assistance. Student was given an audio book for one of the six books, and may have read in small groups. (NT 454-457, 526)
41. The English I class also learned how to write three to five paragraph essays; and all projects were group projects. Individual grades were based on contribution and participation. (NT 462, 518-519)
42. The English I co--teacher also compared strategies with Student's ISL and reading teachers. Student typically scored a B or C on most assignments, but Student would require assistance from teachers on some assignments. Student became more independent with Student's writing, and on Student's comprehension skills, according to the District, although no objective evidence of this was offered. Inference-drawing remained problematic. (NT 461-466)
43. The co-taught African/Asian Studies class covered the same curriculum as all the other African/Asian Studies classes in the high school. The co-teacher performed such tasks as further breaking down material, developing alternate assessment tests, and helping struggling students (NT 466-467)
44. Student was administered the Stanford Diagnostic Reading Inventory (SDRT) several times during ninth grade. In November, Student tested at the 5.6 grade level equivalency/33rd percentile. In the spring of ninth grade, Student had moved to the 6.4 grade level/35th percentile. (NT 480-481, 483; S-24, S-38)
45. An IEP meeting was held in April, 2007. As she had at a previous meeting in November, the Parent stated that she wanted Student to continue working with a literacy specialist. (NT 492-493)

Tenth Grade: 2007-2008

46. In April 2007 an IEP was prepared for Student's tenth grade year which was the 2007-2008 school year. (NT 73, 261, 263; P-8)
47. The tenth grade IEP carries stated goals only in word attack strategies (decoding), writing, and reading comprehension. (P-8)

48. The goals are not measurable. (P-8)
49. There is no goal relating to math. (P-8)
50. The goals as written do not contain baselines and therefore are not measurable. (P-7)
51. There was no math goal in the 2007-2008 IEP. (P-7)
52. When Student joined the Algebra I course in November at the request of the Parent, the District added an instructional aide to the class to support Student. (NT 706)
53. For Algebra I accommodations and modifications listed in the November 2007 IEP were provided to Student. (NT 708-713, 720, 724-726)
54. In tenth grade, Student met with a math specialist who worked with Student approximately once each four-day cycle in areas of the Algebra I curriculum where Student struggled, including areas covered before Student joined the course, and reviewed basic math skills needed for success in the Algebra I curriculum. Student passed the Algebra I course. (NT 706, 1238; P-24).
55. In May 2006 Student had been given the Stanford Diagnostic Reading Test (Stanford Reading Test) Fourth Edition and attained grade equivalent 3.3. (NT 72-73; S-23)
56. In the Present Levels of Educational Performance section of the 2007-2008 IEP the results of the May 2006 Stanford Reading Test were not included although the results of the May 2005, September 2005 and September 2006 results with this instrument were included. (NT 73-75; P-8)
57. The tenth grade literacy specialist used novels only to test Student's reading because Student's history text was "very difficult" for Student and therefore the literacy specialist would never use that book to gauge Student's accuracy. She chose novels because Student was more familiar with them. (NT 635-636)
58. The tenth grade Reading II teacher did not specifically assess Student's reading for decoding or fluency. She scored only for factual and inferential critical thinking questions. (NT 786-788, 792-793; S-66, P-8)
59. The tenth grade literacy specialist provided Student a great deal of support when Student needed to write writing papers for Student's content classes. She prompted Student for writing ideas, and helped with the preliminary stages of the writing. This amount of support renders a statement of Student's true writing progress very difficult. (NT 614-616)

Transition:

60. In eighth grade, Student was assigned a social worker/special education teacher as a mentor. Teacher mentors provide one-on-one support for students whenever needed. Student utilized the mentor program and also participated in a self-advocacy group led by Student's mentor. (NT 187-190).
61. In the Fundamental Learning Support class the learning support teacher provided Student with assistance with Student's organizational skills through review of materials from Student's other classes, and instruction in independent time management skills, study skills, organizational skills, self-esteem and self-advocacy skills. Student responded well and made improvement in these areas. (NT 182-188, 196-206)
62. Students are also taught self-advocacy to address current programming as well as Transition in the Instructional Support Labs (ISL). (NT 91-97)
63. At an October 2006 meeting there was a transition discussion responding to Student's expressed interest in cosmetology and a discussion of Student's participation in [sports]. (NT 494-496)
64. Students who aspire to transition to college are assisted in college selection through fairs and guidance and in SAT or ACT testing through applying for accommodations. Special education students, in addition to a school counselor, are also assisted by a school social worker to serve as an adjunct to the school counselor and help students access what they are trying to access. A special education student's case manager also oversees the student's educational plan including the transition activities. (NT 93-96, 98)
65. The parents and the students through the IEP team process have the responsibility to be sure the students are taking the appropriate courses in high school to access the college programs they want. (NT 97)
66. During tenth grade, the District administered the SAGE vocational assessment and reviewed this information with Student and the Parent. (NT 1166, 1209-1210; S-74, S-75)

LRE:

67. In eighth grade (2005-2006) placement pursuant to the IEP was a part-time learning support program that provided Student with supports in the general education curriculum and three periods daily of special education learning support instruction. The Parent approved this placement and program. (NT 160; P-9)
68. In eighth grade Student received language arts and writing instruction in the learning support classroom with the certified special education teacher. Student's language arts curriculum was the same as the general education language arts

- curriculum which utilized the writing process to improve written expression with the help of visual organizers and supports including computer programs such as Inspiration. (NT 162-163, 197, 245-246; S-14, S-15)
69. In eighth grade Student took Fundamentals of Math offering small group (10 to 12 students) instruction. The class was a regular education class but was co-taught by both a regular education teacher and Student's learning support case manager. The class was designed to improve math skills of students who were below grade level in math. (NT 132-136, 170-171, 1307; P-6)
 70. In eighth grade Student also participated in the general education curriculum for social studies, and for specials such as art, physical education, chorus, computers, and family consumer science. (NT at 191-196; S-31)
 71. In eighth grade the learning support teacher provided accommodations and modifications for Student that included using the general education materials to develop independent study skills and writing skills and assisted in breaking down the reading into manageable units. (NT 190-192, 216)
 72. During ninth grade (2006-2007) Student was assigned to the Instructional Support Lab (ISL). The learning support teacher assigned to the ISL provided assistance and supports that were to be used in other classes, such as scaffolding notes for Active Biology. (NT 253, 266-268, 298-300)
 73. The District's practice is that any child with an IEP will have some amount of ISL, although the goal of the program is to move the student towards independence and away from ISL classes. However for ninth grade the team felt that while Student was making progress in decoding and comprehension in the SRA program, Student had not finished the books yet and Student still needed supports such as one-on-one instruction that are more readily available in ISL. (NT 414-415, 418-420)
 74. The IEP team recommended that Student enroll in a new course called academic literacy, designed "to support students' literacy skills using the general education curriculum." (NT 499-500)
 75. For ninth grade the District determined that Student would take regular education co-taught classes in ninth grade for English I, and African/Asian Studies. In co-taught classes, the students use the ninth grade curriculum, and handle their work independently, but the material is covered at a slower pace. In contrast, learning support classes are smaller, the children use modified materials and discuss their work in class. Student was also enrolled in the regular education information technology class. Student's previous science teacher recommended Student for Active Biology; Active science classes are comprised of both special and regular education students. (NT 87-89, 444-450, 453-454)

76. In tenth grade (2007-2008) Student took Reading II, a special education class. (NT 86; P-24)
77. In tenth grade Student took Active Chemistry, a regular education standard college-prep course. The course is activity-based in that instead of using a textbook the students do experiments and do labs. Students referred for this program tend to be those who would struggle with heavy textbook reading to learn the concepts. (NT 82-83; P-24)
78. In planning for Student's tenth grade year, the IEP team discussed Student's deficit in basic computation skills. The team considered both Algebra I and Math Applications II and decided upon Math Applications II because it is geared to address basic skill deficits while incorporating algebra concepts. (NT 497-498)
79. In 2007-2008 Student began in Math Applications II and then at the Parent's request switched to Algebra I, both regular education standard college-prep courses. (NT 84-86; P-24)
80. In 2007-2008 Student took English II, a co-taught standard regular education college-prep course. (NT 84-85; P-24)
81. In 2007-2008 Student took Western Civilization, a co-taught standard regular education college-prep course. (NT 87; P-24)

Discussion and Conclusions of Law

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 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.² 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 forum in which the witnesses will be appearing in person. The testimony of all the witnesses was carefully considered; while most were credible in that they were deemed to be testifying honestly, District witnesses were not persuasive regarding why Student's IEPs lacked math goals, why the goals were not measurable and for the most part why they were not appropriately measured. The Parent amassed considerably more than a preponderance of proof in these areas. The District's witnesses were persuasive in establishing that Student was educated in the least restrictive environment to meet Student's needs. Many supports were in place to assist Student to access the general curriculum in the company of Student's nondisabled peers, and for the most part Student responded to the supports provided. Likewise the District demonstrated satisfactorily that in the school years in question appropriate transitional planning was carried out and that the District was certainly responsive to Student's stated desire to attend college. The Parent did not meet her burden of proof in these areas of LRE and transition planning.

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

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

² 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).

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 (3rd Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989), citing Board of Education v. Diamond, 808 F.2d 987 (3rd 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 (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). 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 (9th 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 (4th 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 (11th Cir. 2006); Lachman v. Illinois Bd. of Educ., 852 F.2d 290, 297 (7th 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 (7th 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.

Compensatory Education: Whether a school district has offered a free appropriate public education to a disabled student is a mixed question of law and fact. Heather S. v. State of Wisconsin, 125 F.3d 1045, 1053 (7th Cir. 1997). The Third Circuit has determined that a student’s demonstrated progress in an educational program is sufficient to show that a school district’s IEP allows for significant learning and provides meaningful benefit as necessary to satisfy the IDEA’s FAPE standard. Ridgewood Board of Education v. N.E., 172 F.3d 238, 242 (3d Cir. 1999). Given that progress is relevant to the determination of whether a student with a disability received an educational benefit, progress or lack thereof is therefore also relevant to determining whether a reimbursement award is due. Having determined that Student was denied FAPE in the areas of reading, math and writing as discussed above, this hearing officer must now decide what form compensatory education will take.

B.C. v. Penn Manor Sch. Dist., 805 A.2d 642 (Pa. Commw. 2006) provides instruction for awarding compensatory education, counseling against a rote hour-for-hour approach in favor of an award that would bring the student to the point where he/she would be had FAPE been offered. Student aspires to apply to, be accepted by, and enroll in a four year college program. Given that Student will be starting senior year in the fall Student requires an intensive program of preparation for college admission and an intensive reading program to ensure Student's success in college-level courses. Accordingly Student's compensatory education will be narrowly focused so as to bring Student well into the expectations for college admission and will also aid Student's success in college. In the unlikely event that Student decides against college at the end of next year, the award of compensatory education for the denial of FAPE in reading will stand Student in good stead in whatever post-secondary training or employment Student chooses.

Discussion

In June 2003 an evaluation identified Student as having a specific learning disability in reading, writing and math. In March 2006 a reevaluation was conducted through record review without standardized testing. The IEP team concluded that Student had reading and writing skills that were significantly below the levels predicted from Student's cognitive abilities. The reevaluation did not address whether or not Student had a learning disability in math. No PLEPs for Math were included in the 2005-2006 IEP and no Goals for Math were included in that IEP either, although SDI for math were included. The Supervisor of Secondary Special Education attempted to explain the absence of math PLEPs and Goals, but her explanation of how a goal might be dropped was not logical and her presentation that math needs could be addressed in SDI seemed to disregard the essential need for PLEPs and Goals to plan for and measure a student's progress. Her credibility on this issue was low and her testimony on this particular issue was assigned little weight. (NT 68-71) Notably all Student's IEPs for the period in question lacked math goals and none of the other sparse goals in Student's IEPs with regard to reading and writing were measurable; notably lacking were baselines. Although the District's many witnesses provided substantial testimony regarding how Student's triple learning disability was accommodated to enable Student to pass Student's classes they did not establish persuasively that the actual skills in the disability areas of math, reading, and/or writing were directly addressed. Had the IEPs been more precisely focused through reading, mathematics and written expression goals that were sufficiently broken down, and crafted with baselines and anticipated outcomes that were measurable, the actual remedial teaching might have occurred in such a way as to demonstrate meaningful progress. Unfortunately this was not the case and Student was therefore denied FAPE.

The District staff satisfactorily established that Student's program was delivered in the least restrictive environment to meet Student's needs. The use of several co-taught regular education classes at the college prep level was an appropriate way to deliver Student's curriculum based program. Given Student's reading and written expression

levels it would have been quite difficult for Student to succeed in classes that did not offer the extra support.

The Supervisor of Secondary Special Education did a competent job of explaining the Transition resources available to regular and special education students. Given what the District knew about Student's post-secondary aspirations and when Student disclosed them the District provided reasonable transitional planning. The issue of whether or not Student's transition plan was adequate for Student to be accepted into, perhaps receive aid toward, and attend a Division I or II school college where Student could play [sport] seemed to be a red herring in this case and virtually no time will be afforded it in this decision. No transition plan assures any student acceptance into particular types of colleges and in Pennsylvania, where gifted education is considered special education, such an expectation would be a slippery slope indeed. First of all Student has taken a casual attitude at times toward Student's sport, for example by missing practices and engaging in [disciplinary incident]. Secondly, Student's talent, which seemed more promising earlier on in the estimation of Student's coach who testified simply and credibly, is not now, going into senior year, at a level where Student would be a highly desired student player recruit. The way this issue did play into Student's educational program was unfortunate, as the IEP team, at the urging of the Parent, tried to shoehorn Student into a tenth grade Algebra class that had already been running for one-third of the year for which Student was ill-suited at the time. To Student's credit and to the credit of the math specialist who worked very hard with Student, Student passed the course. A possible benefit of this exercise is that because of the intense focus Student might do better on the math portion of Student's SAT or ACT testing than Student might otherwise have done.

Note: Although the independent evaluator, who was hired to perform a publicly-funded educational evaluation, testified in this proceeding her data and testimony were not considered in this decision as her report was not provided to the parties in a timely fashion and neither the District nor the Parent had the benefit of any additional information this evaluation might have provided when planning for Student's eleventh grade year.

Order

It is hereby ordered that:

1. The Lower Merion School District failed to offer Student a free appropriate public education in the area of reading for the three years in question. Given Student's age and grade, Student's intention to apply to and enroll in college, and Student's skills deficits in reading, the District must fund a complete reading course in the community for Student, geared for adult learners, through the Lindamood Bell program or with a certified Wilson teacher. The program should begin as soon as it can be arranged, and may continue after high school, during college, and during summers and weekends until the instructor(s) determine that Student has completed the program and derived maximum benefit. Should Student or Student's parent incur mileage and/or parking expenses, the District must reimburse the mileage rate prevalent at the time in the District and pay the parking expenses in full upon receiving proof of paid parking. The total cost of the program may not exceed the specific amount of money the District would have paid in salary and benefits to a certified reading specialist providing either of these structured, systematic programs for students with significant reading deficits over a three-year period for three class periods per week. If Student does not complete this program the unused portion of this award will be forfeited.
2. The Lower Merion School District failed to offer Student a free appropriate public education in the area of mathematics for two and one third years. Given Student's age and grade, Student's intention to apply to and enroll in college, and Student's skills deficits in mathematics, the District must fund a complete commercially-provided group test preparation program including workbooks and other test prep materials for either the SAT or the ACT, followed by individual sessions in Student's areas of weakness as demonstrated by the pre-test and the first retest given in the group program, whether the area be language, math or writing. Should Student or Student's parent incur mileage and/or parking expenses, the District must reimburse the mileage rate prevalent at the time in the District and pay the parking expenses in full upon receiving proof of paid parking.
3. The Lower Merion School District failed to offer Student a free appropriate public education in the area of written expression for three years. As noted above, in the comprehensive approach to compensatory education taken by this hearing officer, the SAT/ACT prep course includes writing as one component and Student will be eligible for the additional individual work in this test area as ordered above.
4. The total cost of the SAT/ACT preparatory program may not exceed the specific amount of money the District would have paid in salary and benefits to a certified special education teacher/math specialist providing special education services in math over a two-and-one-third-year period for three periods per week and a

special education-certified language arts teacher providing special education services in written expression over a three-year period for two periods per week.

5. The Lower Merion School District provided Student with an appropriate transition plan to enable Student to access post-secondary education.
6. The Lower Merion School District provided Student 's special education program in the least restrictive environment appropriate to address Student's needs.

June 24, 2009
Date

[Linda M. Valentini, Psy.D.](#)
Linda M. Valentini, Psy.D.
Hearing Officer

