

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

Decision

Due Process Hearing for A.Z.
Date of Birth: [redacted]
File Number: 6697/05-06AS

Dates of Hearings:
August 18, 2006; August 30, 2006; September 1, 2006

CLOSED HEARING

Parties:
Parent[s]

Mrs. Jill Hackman
Warwick School District
301 W. Orange Street
Lititz, PA 17643-1814

Representatives:
Amy Slody, Esq.
41 E. Orange St
Lancaster, PA 17602

Jeffrey Champagne, Esq.
100 Pine Street
PO Box 1166
Harrisburg, PA 17108-1166

Date Transcript Received:
Date Closing Response Received:
Date of Decision:
Hearing Officer:

September 8, 2006
September 15, 2006
September 30, 2006
David F. Bateman, PhD

I. BACKGROUND

[Student] is a [teenaged] resident of the Warwick School District eligible for special education and related services as student with a learning disability. The Parents requested this Hearing and had four specific issues. First, the Parents are seeking compensatory education for a denial of a free appropriate public education for the 2004-2005 and the 2005-2006 school years. Second, during that the summer of 2005 the Parents paid for private tutoring and seeking reimbursement for the costs. Third, the Parents are seeking to be reimbursed for an independent educational evaluation obtained in April of 2006. Fourth, the Parents are also seeking reimbursement for the 2006-2007 school year to the [redacted private] School. The District alleges their program is appropriate, and the District placement is the least restrictive environment. The District stated it has at all times satisfied the requirements of the IDEA and has offered an appropriate program for [Student], that reimbursement for costs of the tutoring and the independent educational evaluation are not warranted, and the Parents are not entitled to reimbursement for the tuition to the [private] School.

II. FINDINGS OF FACT¹

A. Background

1. [Student] was born on [redacted]. [Student] is currently [teenaged] (P-2, p. 1).
2. [Student] is a resident of the District (NT 15).
3. [Student] is eligible for special education and related services as a student with a disability (NT 15).
4. The District completed a comprehensive evaluation report (CER) on April 21, 1998 (S-1). This CER found the student eligible for special education and related services as a student requiring learning support. The specific areas of need were in reading comprehension and math reasoning.
5. The District completed a CER on April 24, 1990 (S-2). This CER found the student's continuing eligibility for special education as a student requiring learning support.
6. In November and December 2000 school psychologist Mr. B completed an independent psychological evaluation (S-3). He obtained a WISC-III full-scale IQ score of 106 and provided 21 pages of suggestions for working with [Student]. Most of the suggestions relate teaching [Student] to monitor [Student's] work, improve [Student's] organization, dealing with perfection, and broad recommendations for teachers working with [Student] in school.

¹ References to notes of testimony will be designated "NT" followed by the relevant page number. References to District evidentiary exhibits will be designated "S" followed by the relevant exhibit number. References to Parents' evidentiary exhibits will be designated "P" followed by the relevant exhibit number. Findings of Fact will be designated by "FF" followed by the relevant fact number.

7. The District completed an IEP on May 16, 2001 (P-4). This IEP was in place for [Student] sixth grade year and provided services as a student with a learning disability.
8. The District completed an evaluation report on [Student] on March 24, 2003 (P-2; S-4). The team found [Student]'s continued eligibility for special education and related services as a student with a learning disability (P-2, p. 6). Teacher's reports include that [Student] is very conscientious (P-2, p. 12), participates in class daily (P-2, p. 11), has good work habits (P-2, p. 11), and is organized with a good attitude (P-2, p. 13).
9. The District completed an IEP on [Student] on April 10, 2003 (S-6). This was the IEP in place for eighth grade. This IEP provided for an educational placement of itinerant learning support (S-6, p. 9).
10. The District completed a Notice of Recommended Educational Placement (NOREP) on April 10, 2003 (S-7). This NOREP recommended the educational placement of itinerant resource.
11. TerraNova testing was completed on April 28, 2003 (S-8). Scores on the TerraNova indicate [Student]'s functioning level was in the average range for reading and language arts, and below average for mathematics.
12. [Student]'s final grades for seventh grade, the 2002-2003 school year, indicate [Student] received A's and B's in all of [Student's] classes except math where [Student] received a C+ (S-9).
13. The District completed an IEP on May 25, 2004 (S-10). This IEP again provided for educational placement in itinerant learning support.

14. The District completed a NOREP on May 25, 2004 (S-11). This NOREP provided for educational placement in itinerant learning support.
15. [Student]'s final grades for eighth grade, the 2003-2004 school year, indicate [Student] received A's and B's in all of [Student] classes except math where [Student] received a C+ (S-12).
16. The District completed an IEP on April 28, 2005 (S-13). This IEP again provided for educational placement in itinerant learning support.
17. The District completed an IEP on April 28, 2005 (P-6). This IEP again provided for educational placement in itinerant learning support. A NOREP was also issued on that same day for itinerant learning support (P-6, p. 16; S-14).
18. [Student]'s final grades for ninth grade, the 2004-2005 school year, indicate [Student] received A's and B's in all of [Student's] classes (S-15).
19. On September 20, 2005 the District completed an extended school year eligibility form on [Student]. The form indicates [Student] was able to begin instruction at the level indicated by the current IEP in all goal areas (P-7; S-17).
20. The District completed a reevaluation report (RR) on March 21, 2006 (S-18). The RR found [Student]'s continued eligibility for special education and related services as a student with a learning disability. The report indicated [Student] continued to receive specially designed instruction in reading and language arts, that [Student] has appropriate social interactions

with [Student's] peers and adults, and [Student] is a willing participant in most of [Student's] classes.

21. The District developed an IEP on March 28, 2006 (P-10; S-19). Additional meetings on this IEP were held on June 7, 2006 and July 12, 2006 (S-29). This IEP provides for continued support on an itinerant basis for [Student].
22. A NOREP was issued on March 28, 2006 indicating [Student] would receive itinerant learning support (P-8, p. 2; S-20).
23. Dr. K completed an independent educational evaluation on [Student] on April 26-27, 2006 (P-9). On the WISC-IV she found a full scale IQ of 78. On the Kaufman Brief Intelligence Test-Second Edition Dr. K found an IQ composite of 94. On the Test of Non-Verbal Intelligence-3 [Student] received a standard score of 97. On the Woodcock-Johnson Psycho-Educational Battery-III [Student] received a reading fluency grade equivalent of 3.0, a writing fluency grade equivalent of 7.1, and a math fluency grade equivalent of 6.1, with an academic fluency grade equivalent of 4.6. On the WIAT-II [Student's] reading composite standard score was 85, [Student's] mathematics composite score was 91, [Student's] written language composite score was 84, [Student's] oral language composite score was 85, and [Student] total composite standard score was 84. Dr. K recommended a comprehensive language processing evaluation and also recommended a small learning environment where instruction would be delivered at the pace that [Student] could process the information (P-9, p. 34).

24. The District completed curriculum based assessments on the student on June 7, 2006 (P-3, S-26). Results indicate instructional levels were obtained at both the 7th and 8th grade levels. The conclusion of the report was [Student] is demonstrating difficulty in both word reading and reading comprehension.
25. Progress reports during the 2005-2006 school year (S-21) indicate scores of mostly A's and B's.
26. An IEP meeting was held on June 7, 2006 (S-25). The purpose of the meeting was to discuss the independent educational evaluation and the recent curriculum based assessment (S-26).
27. [Student]'s final grades for tenth grade, the 2005-2006 school year, indicate [Student] received B's and C's in all of [Student] classes (S-22).
28. [Student]'s grades over the past two years indicate [Student] made mostly A's and B's on [Student's] report card for the 2004-2005 school year (P-13, p. 46), and B's and C's for the 2005-2006 school year (P-13, p. 47).
29. An IEP meeting was held on July 12, 2006 (S-28). An IEP was developed and [Student] would continue to receive itinerant learning support (S-29; S-31).
30. The District issued a NOREP on July 26, 2006 providing support for [Student] on an itinerant basis for [Student's] learning support needs (P-11; S-29, p 17; S-32). The Parents rejected the NOREP requesting a due process hearing.

31. On July 26, 2006 The District sent a letter to the Parents regarding changes to the IEP as a result of the recent resolution session (S-30). Specific changes included adding Dr. K's information to the present levels of educational performance, an addition of related services to include psychological counseling, and changes to the support for school personnel.
32. [Student] attended the [private school] in the summer of 2006 (P-12, p. 3). A report of [Student's] progress indicated [Student] had difficulty with problem solving, but improved in [Student's] accuracy in both arithmetic and algebra.
33. Tuition for the 2006-2007 school year to [private school] is \$29,800 (P-12, p. 2). [Student] would also be required to participate in additional tutoring. The tutoring costs \$8,000 (NT 181).
34. If [Student] were to attend school in the District for the 2006-2007 school year [Student] would take Algebra II, Chemistry, English II-Level 2, Personnel Money Management, Physical Education, Plane Geometry, and World History Level 2 (S-33).
35. [Student] is currently attending the [private school] for the 2006-2007 school year (NT 228).

III. ISSUE PRESENTED

Was [Student] provided a free appropriate public education for the 2004-2005, and the 2005-2006 school years?

Is [Student] eligible for tuition reimbursement for the 2006-2007 school year to the [private school]?

Are the Parents entitled to reimbursement for an independent educational evaluation from Dr. K?

Are the Parents entitled to reimbursement for tutoring fees paid to Ms. S?

IV. DISCUSSION AND CONCLUSION OF THE LAW

A Due Process Hearing was requested because [Student]'s Parents are seeking the following relief for their child: compensatory education for inappropriate services for the 2004-2005 and the 2005-2006 school years, and tuition reimbursement for the 2006-2007 school year to the [private school]. The Parents are also seeking reimbursement for summer tutoring in 2005 and for a recently completed independent educational evaluation. The District maintains that it has at all times satisfied the substantive and procedural requirements of the IDEA and Pennsylvania special education law with regard to the provision of special education and related services to [Student], the private placement is not the

least restrictive environment, and therefore, that there are no legal grounds to justify the relief sought by the Parent in this proceeding.

[Student]’s Educational Placement

Before there is a discussion regarding [Student]’s educational placement, a review of the necessary components of the law is appropriate. The educational standard to which the District is held is clearly established by the courts. The IDEA does not require states to develop IEP’s that “maximize the potential of handicapped children” and merely requires the provision of “some” educational benefit. *See Board of Education v. Rowley*, 458 U.S. 176, 189 (1982). The IDEA requires that the public school program provide access to specialized instruction and related services which are “reasonably calculated” to provide the student with some educational benefit. *Id.* at 207-208. What the statute guarantees is an “appropriate” education, “not one that provides everything that might be thought desirable by ‘loving parents.’” *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989). The Third Circuit has adopted this minimal standard for educational benefit, and has refined it to mean that more than “trivial” or “de minimus” benefit is required. *See Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 1179 (3d Cir. 1998), *cert. denied* 488 U.S. 1030 (1989). *See also Carlisle Area School v. Scott P.*, 62 F.3d 520, 533-34 (3d Cir. 1995), quoting *Rowley*, 458 U.S. at 201; (School districts “need not provide the optimal level of services, or even a level that would confirm additional benefits, since the IEP required by IDEA represents only a “basic floor of opportunity”).

Moreover, 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. *See 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, it is therefore also relevant to determining whether a reimbursement award is due.

The issues in this case are whether [Student] was provided a free appropriate public education for the period of 2004 to 2006, tuition reimbursement to the [private school] for the 2006-2007 school year, and reimbursement for summer tutoring in 2005 and for a recently completed independent educational evaluation by Dr. K. Subsequent to that request, testimony was taken in this case on August 14, 2005, August 30, 2006, and September 1, 2006. Closing arguments were provided to the Hearing Officer on September 15, 2006.

Parents Claim for Compensatory Education

Parents make a claim for compensatory education. Compensatory education may be an appropriate equitable remedy only when the responsible educational authority has failed to provide a child with a disability with an appropriate education as required by the IDEA. The purpose of compensatory education is to replace lost educational services. *See Todd v. Andrews*, 933 F.2d 1576 (11th Cir. 1991). *See also Lester H. v. Gilhool*, 916 F.2d 865 (3rd Cir. 1990); (An IDEA eligible student is entitled to an award of compensatory education only if FAPE is

denied by the school district); and *M.C. v. Central Regional Sch. Dist.*, 81 F.3d 389 (3rd Cir. 1996). Here, [Student] did make meaningful educational progress during the 2004-2005 and the 2005-2006 school years.

The District feels it has provided [Student] with a free, appropriate public education throughout [Student's] enrollment in District schools. The District presented testimony and evidence that it has provided significant learning and a meaningful benefit to [Student], gauged in respect to [Student's] potential. See *Ridgewood Board of Education v. N.E.*, 172 F.3d 238 (3d Cir. 1999); see also *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3d Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989).

This Hearing Officer has reviewed carefully the educational programs in effect for the 2004-2005 and the 2005-2006 school years and the programs offered since then.² For numerous reasons as described below, this Hearing Officer concludes the IEP and program and services implemented during this period were appropriate. Accordingly, this Hearing Officer holds that [Student] was provided a free appropriate public education (FAPE) during the period at issue.

During the 2004-2005 school year [Student] was in ninth grade. All of the classes [Student] took were regular education classes (NT 510). [Student] did have learning support with a focus on helping [Student] in the regular education classes (NT 531). During [Student's] ninth grade year [Student's] final grades were A' and B's in all [Student's] classes (FF:18). This alone should indicate [Student] was making satisfactory progress in the general education curriculum. A teacher

²The analysis of the content of the IEP is very similar to the analysis and content of the IEP as found in appeals panel decision of September 15, 2003. *In re K.G.*, Pa. SEA no. 1400.

also added [Student] is enjoyable to have in class (S-15). There was no indication there was any problems with the progress [Student] made, there was no indication [Student] needed additional assistance, and there is no indication that additional assistance would have been beneficial to [Student's] educational progress. [Student] did receive a D on a Final Exam Grade in Earth Science, but still received a B for the final grade.

The Parents argue the IEP was inappropriate, and the accommodations were generic (Parents Closing at 12-13). The Parents also argue there was no standardized testing and the District simply measured [Student's] progress via [Student's] test scores (Parents Closing at 12), and the test scores indicate [Student] was failing (Parents Closing at 12-13).

However, the evidence presented at the hearing indicates [Student's] final grades were not only passing, but were A's and B's. There was no real evidence or testimony presented during the hearing to indicate [Student] had problems that were not addressed by the District. Importantly, in gauging the appropriateness of the District's actions toward [Student], the IEP must be judged as to its appropriateness at the time that it is written, and not with respect to subsequently obtained information about the student. "An IEP is a snapshot, not a retrospective," and that the IEP must take into account what was objectively reasonable at the time that the IEP was drafted. *Roland M. v. Concord School Committee*, 910 F.2d 983, 992 (1st Cir. 1990), cert. denied, ___ U.S. ___, 111 S.Ct. 1122, 133 L.Ed 2d 230 (1991)

The District presented ample evidence at the hearing in this matter which not only indicates that [Student] was receiving a reasonable educational benefit

consistent with the standard required under *Rowley* while in the District; [Student] was actually achieving and performing at a level commensurate with [Student's] intellectual abilities. This is largely evident in [Student]'s ninth grade report.

Passing from grade to grade is one common measure of a reasonable educational benefit and progress. [Student]'s educational decline would have to have been much more severe and pervasive before it would have been considered to be indicative of the need for a more restrictive placement for educational purposes.

Another measure of [Student]'s educational benefit in the District is also revealed in test scores [Student] received, which did not indicate any regression in [Student's] skills and abilities. For example, the educational evaluation administered to [Student] indicated that [Student] was achieving close to [Student's] expected level of achievement in all areas except reading (see FF 13). Parents failed to produce any clear and convincing evidence to the contrary.

Turning to [Student's] program for [Student's] tenth grade year. The issue in this hearing related to whether the 2005-2006 school year IEP was appropriate and whether [Student] made progress.

This hearing officer feels the IEP offers [Student] the level of services that [Student] needed in order to make educational progress and provided [Student] with academic support in a way that has already proven to lead to successful results in the past. This IEP was designed to address [Student]'s areas of identified need. Goals and strategies were established to help [Student] address these deficits and the goals and objectives are measurable in accordance with the standards. Specially

designed instruction and related services have also been provided to assist [Student] in meeting these goals and objectives.

Grades [Student] received during the tenth grade year again indicate [Student] made progress in the general education curriculum. [Student's] final grades indicate B's and C's in all [Student] classes (FF: 27). This does indicate a drop from [Student's] previous years grades and A' and B's, however, it again indicates [Student] was passing from grade to grade in the regular education curriculum.

During [Student's] tenth grade year [Student] received an independent educational evaluation from Dr. K and the District commenced a reevaluation. Scores from Dr. K indicate a student with a full scale IQ of 78. On the Kaufman Brief Intelligence Test-Second Edition [Dr. K] found an IQ composite of 94. On the Test of Non-Verbal Intelligence-3 [Student] received a standard score of 97. On the Woodcock-Johnson Psycho-Educational Battery-III [Student] received a reading fluency grade equivalent of 3.0, a writing fluency grade equivalent of 7.1, and a math fluency grade equivalent of 6.1, with an academic fluency grade equivalent of 4.6 (P-9).

The District's reevaluation found a student still in need of learning support services, but one who was making progress in the regular education curriculum. There were comments from the teachers that [Student] does have a problem with the tests, but that [Student] spends time before school with the Biology teacher (S-18, p. 2). Other comments from teachers describe [Student] as not needing any special accommodations this year (English teacher), that [Student] work habits are excellent (Algebra teacher), and that [Student] is a responsible student who

completes all [Student's] assignments (Spanish I). At the time of the reevaluation the Algebra teacher did note [Student]'s current grade was an F due to a failed test. [Student]'s final grade for the class was a C (S-22).

The evidence does not support the Parent's claim for compensatory education for denial of FAPE for the tenth grade year. The independent educational evaluation indicates a student with a full-scale IQ of 78. This should not be taken as the most important measure, however, when taken in conjunction with [Student's] scores on the Kauffman Brief Intelligence Test and the Test of Non-Verbal Intelligence indicate a student who would be expected to be performing below average. [Student] is passing from grade to grade in the regular education curriculum. [Student] is making adequate academic progress and no evidence or testimony was presented indicating otherwise.

Parents Request for Reimbursement to the [Private] School

Under the two-part test for private school reimbursement established by the Supreme Court, the school district must establish the appropriateness of the education it provided to the student.³ If the school district is unable to establish the appropriateness of its own educational program, the burden then shifts to the parents to prove that the private school selected for their child did provide an appropriate education. See *Burlington School Committee v. Massachusetts*

³ This Hearing occurred after *Schaffer v. Weast*, 126 S.Ct. 528, and the Parents had the burden of demonstrating the District's program was inappropriate.

Department of Education, 471 U.S. 379 (1985).⁴

As *Rowley* principles have been applied in the context of private placements, a disabled child is “not . . . entitled to placement in a residential school merely because the latter would more nearly enable the child to reach his or her full potential.” *Abrahamson v. Hirschman*, 701 F.2d 223, 227 (1st Cir. 1983). In making a determination regarding a school district’s obligation to pay for private placement, a court must make the following inquiries:

First, the court must ask whether the district’s IEP was reasonably calculated to confer an educational benefit on the student. If the court determines that the IEP was not so calculated, the court must then ask whether the parents’ unilateral choice to place a student in a residential setting is the appropriate educational choice for the student. If the answer to the second inquiry is yes, then the parents would be entitled to reimbursement from the school district for the cost of the placement.

Hall at 1527. (citations omitted).

Importantly, in gauging the appropriateness of the District’s actions toward [Student], the IEP must be judged as to its appropriateness at the time that it is written, and not with respect to subsequently obtained information about the student. The ideas that “an IEP is a snapshot, not a retrospective,” and that the IEP must take into account what was objectively reasonable at the time that the IEP was drafted were recognized by the First Circuit in *Roland M. v. Concord School Committee*, 910 F.2d 983, 992 (1st Cir. 1990), and have been adopted in the Third Circuit. See, e.g. *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 534 (3d Cir. 1995);

⁴ Later, in *Florence County Sch. Dist. v. Carter*, 114 S.Ct. 361 (1993), the Supreme Court reaffirmed the test for private school tuition reimbursement established in *Burlington*, and added that private school placements selected by parents need not be at facilities which are approved by state departments of education for the provision of education to students with disabilities.

Fuhrmann v. East Hanover Board of Educ., 993 F.2d 1031, 1040 (3d Cir. 1993).
See also *Philadelphia School District*, 22 IDELR 825, 826 (SEA PA 1995).

It is true that school districts have been required to pay for the educational components of private placements even in cases where the students require those placements solely for medical reasons when the school district's own educational programming for the student is deemed deficient. See *Board of Education of Oak Park and River Forest High School v. Illinois State Board of Education*, 29 IDELR 52 (N.D. Ill 1998), (Where student's need for private placement was primarily for non-educational reasons, district court limited parents' claim for reimbursement to the educational component of the private placement given that the school district's educational provisions for the student were inappropriate, and the academic program the student received at the school was appropriate). However, the evidence presented by the School District clearly establishes that it has at all times provided [Student] with an appropriate education based on the information available to it at the time it made these decisions.

The appropriateness of the District's actions toward [Student] must be evaluated both retrospectively, and prospectively. [Student]'s past education, [Student's] tenth grade year, will be considered first. The District presented ample evidence at the hearing in this matter which not only indicates that [Student] was receiving a reasonable educational benefit consistent with the standard required under *Rowley* while at [the] High School; [Student] was actually achieving and performing at a level commensurate with [Student's] intellectual abilities. This is largely evident in [Student]'s passing grades in tenth grade prior to [Student's]

removal from the District, which included all regular education classes. [Student]'s record of academic success through tenth grade speaks for itself, and not much more needs to be said regarding [Student's] educational. The offer by the District for [Student's] eleventh grade year is a reasonable response in light of [Student] educational achievements, at that time. To the extent that [Student] was simultaneously experiencing any academic difficulties, they were not apparent at school and were certainly not reflected in [Student's] academic performance.

Passing from grade to grade is one common measure of a reasonable educational benefit and progress. See *Rowley*, 458 U.S. at 207 n.28 ("When the [disabled] child is being educated in the regular classrooms of a public school system, the achievement of passing marks and advancement from grade to grade will be one important factor in determining educational benefit.") and *Walczak v. Florida UFSD*, 142 F.3d 119 (2d Cir., 1998), 142 F.3d at 130; ("[T]he attainment of passing grades and regular advancement from grade to grade are generally accepted indicators of satisfactory progress.") and *Sylvie M. v. Board of Educ. of Dripping Springs*, 31 IDELR 28 (W.D. Tex. 1999), (Unilateral placement at private school for student who performed at or above grade level in every subject was for personal reasons, not educational ones.) [Student]'s educational decline would have to have been much more severe and pervasive before it would have been considered to be indicative of the need for a private placement for educational purposes. See *Muller v. Committee on Special Education of the East Islip Union Free Sch. Dist.*, 145 F.3d 95 (2d Cir. 1998), (Court ordered reimbursement for private placement for student

who had been unable to learn for several years, failed the majority of her classes, and who had repeatedly attempted suicide and arson).

Another measure of [Student]'s educational benefit in the District is also revealed in test scores [Student] received from the IEE, which were consistent with [Student's] performance and did not indicate any regression in [Student's] skills and abilities. See *M.C. v. Central Regional School District*, 81 F.3d 1114, 25 IDELR 1181 (3d Cir. 1996). In 1998 [Student] standard score in reading comprehension was 79 and in math reasoning it was 81 (S-1). In 2006 [Student's] standard score in reading comprehension was 85 and in math reasoning was 83 (P-9). These scores are remarkably consistent and do not indicate any deterioration in skills and abilities as a result of the education [Student] received in the District. These scores are also proof that [Student] was still able to achieve and perform commensurate with [Student's] intellectual capabilities during the time [Student] spent in the District and the Parents failed to produce any clear and convincing evidence to the contrary.

Turning to [Student]'s current program for [Student's] eleventh grade year, which is presently underway at the time of this proceeding. The Parents claim the IEP offered by the District is vague and not individualized. The IEP is the same format proffered by the PaTTAN web site (http://www.pattan.net/files/Forms/English/IEP_040106.pdf). Specifically, the Parents claim the lack of short-term objectives and ill-defined specially designed instruction makes this IEP defective. However, the District's IEP offers [Student] the high level of services that [Student] needs in order to make educational progress and provides [Student] with academic support in a way that has already proven to

lead to successful results in the past. This IEP is designed to address [Student]'s areas of identified need. Specially designed instruction and related services have also been provided to assist [Student] in meeting these goals and objectives, including skill instruction, text adaptations, assigned journal, alternate test locations, verbal prompting, and explicit directions. (S-31) Finally, the IEP allows for transition planning preparing for [Student's] post-secondary life.

In this case, there was testimony and comments about the requested private school placement that need to be addressed. The program and placement as offered by the District has been deemed appropriate, the second part of the Burlington-Carter test is the appropriateness of the private school placement. See *Burlington School Committee v. Massachusetts Department of Education*, 471 U.S. 379 (1985). The program may be appropriate given the analysis below.⁵

Tuition reimbursement is an available remedy for parents to receive the costs associated with a child's placement in a private school where it is determined that the program offered by the public school did not provide FAPE, and the private placement is proper. *Florence County School District v. Carter*, 510 U.S. 10 (1993); *School Committee of Burlington v. Department of Education*, 471 U.S. 359 (1985). Equitable considerations are relevant to making such a determination. *Id.* However, the parents' choice of private placement need not satisfy the IDEA requirements in order to qualify for reimbursement. *Carter*. The standard is whether the parental placement was reasonably calculated to provide the child with

⁵ The analysis of the Parent's request for tuition reimbursement is based on the analysis found in the appeals panel decision of April 20, 2004. *In re C.B.*, Pa. SEA no. 1472.

educational benefit. *Carter; David P. v. Lower Merion School District*, 27 IDELR 915 (E.D.Pa. 1998).

The [private school] is for students with learning differences, and the teachers are trained in the Orton-Gillingham approach for language instruction (NT 182, 184). It is not a licensed special education school (NT 195). The tuition for the school is \$29,800 (NT 181) and [Student] would require an extra language class that would cost in excess of \$8,000 (NT 181). The Parents are also seeking transportation to the school, which is located in [redacted]; a 47-minute train ride each way (NT 220). The monthly pass is \$184/month, for nine months plus one week (NT 222).

The [private school] is deemed inappropriate given that it fails to respond to the IDEA's least restrictive environment requirement. A parallel goal of the IDEA is that disabled children be educated in classrooms with non-handicapped children "to the maximum extent appropriate." 20 U.S.C. § 1401(33). The IDEA's mainstreaming requirement has been construed to "prohibit a school from placing a child with disabilities outside of a regular classroom if educating the child in a regular classroom with supplementary aides and support services can be achieved satisfactorily." *Oberti v. Board of Education*, 995 F.2d 1204, 1207 (3d Cir. 1993). The IDEA requires states to "educate handicapped children with non-handicapped children whenever possible." *Rowley v. Board of Education of Hendrick Hudson Central School District*, 458 U.S. 176, 202 (1982). Therefore, a school district is obliged to balance the goal of providing a student with some educational benefit

with a goal of providing that benefit in the least restrictive environment. *Hall v. Shawnee Mission Sch. Dist.*, 856 F.Supp. 1521, 1528 (D. Kan. 1994).

Private placements are among the most restrictive on the IDEA's spectrum of placements. Given their restrictive nature, removal of a student with disabilities to a private setting has only been held to comply with the LRE mandate in extremely limited situations for students with severe disabilities who prove themselves unable to function in a more mainstream environment. In *Carlisle*, the Third Circuit recognized:

Residential placement at MSB is not, of course, the least restrictive educational environment. The least restrictive environment is the one that, to the greatest extent possible, satisfactorily educates disabled children together with children who are not disabled, in the same school the disabled child would attend if the child were not disabled. *See* 20 U.S.C. § 1412(5)(B) (requiring maximal educational integration of disabled children with children who are not disabled, and restricting separate schooling to situations when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily).

Id. at 1024 (citations omitted; emphasis supplied).

Clearly then, a private placement can be consistent with the IDEA's LRE requirement for some students with disabilities. Here, however, we have a student who is doing well in the regular education curriculum and the Parents are seeking to send [Student] to a private placement.

Factors to consider in determining whether this can occur are as follows:

A. Steps taken by the school to try to include that child in a regular classroom.

B. The comparison between the educational benefit the child would receive in a regular classroom --social and communication skills, etc.-- and the benefits the child would receive in a segregated classroom. Thus, a determination that a child would make greater academic progress in a segregated program may not warrant excluding that child from a regular classroom.

C. Possible negative effect inclusion may have on the education of other children in the classroom.

Additionally, if placement outside of a regular classroom is necessary for the child to receive educational benefit, a school district may still be violating IDEA if it has not made sufficient efforts to include the child in school programs with non-disabled children whenever possible.

Independent Educational Evaluation⁶

An independent educational evaluation (IEE) is an evaluation “conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question.”⁷ Parents of a child with a disability have the right to obtain an IEE of their child.⁸ Upon request, each LEA must provide information to parents explaining where an IEE may be obtained.⁹ Whenever parents obtain an IEE, the public agency must consider the evaluation when making

⁶ 34 C.F.R. § 300.502

⁷ 34 C.F.R. § 300.502(a)(3)(i)

⁸ 34 C.F.R. § 300.502(b)(1)

⁹ 34 C.F.R. § 300.502(a)(2)

any decision regarding provision of a FAPE to the child with a disability. In the event that there is a due process hearing, the IEE may be presented as evidence.¹⁰

The most significant practical issue involving IEE's concerns the question of who must bear the cost of obtaining the evaluation- the district or the parents. According to the regulations:

A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency. If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either— Initiate a hearing under to show that its evaluation is appropriate; or Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing that the evaluation obtained by the parent did not meet agency criteria.

If the public agency initiates a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.¹¹

Under this procedure, a school district can be required to pay for an IEE if, after receiving the IEE, it declines to initiate a hearing to show that the IEE is essentially

¹⁰ 34 C.F.R. § 300.502(c)

¹¹ 34 C.F.R. § 300.502

duplicative of an already appropriate evaluation conducted by the LEA.¹² Parents are not required to notify the LEA before obtaining an IEE.¹³

An LEA may apply appropriate criteria when determining whether it will pay for an IEE. These criteria, however, must be the same as those utilized when the LEA initiates an evaluation.¹⁴ An LEA may not refuse, however, to fund an IEE that does not meet its criteria, if the student's unique circumstances justify such an evaluation.¹⁵

Ultimately, the question of whether an LEA must pay for an IEE of a child with a disability must be resolved on a case-by-case basis. A school district's financial responsibility turns on facts unique to the particular situation being addressed, such as whether the LEA evaluation is appropriate, whether the IEE is appropriate,¹⁶ and whether the IEE merely duplicates or corroborates existing LEA evaluation.

¹² See, e.g., OSEP Policy Letter, 16 EHLR 1363 (1990) (LEA may adopt evaluation obtained by parent without incurring obligation to reimburse parent where parent does not disagree with evaluation conducted by the LEA).

¹³ OSEP Policy Letter, 18 IDELR 352 (1992) (while it is reasonable for a public agency to require prior notification, it may not refuse to pay for an IEE due to lack of such parental notice. OSERS Policy Letter, 18 IDELR 427 (1991) (parents are not required to notify LEA that an IEE is being sought, and LEA may not refuse to pay for IEE due to lack of prior notice).

¹⁴ 34 C.F.R. § 300.502(e)

¹⁵ OSEP Policy Letter, 16 EHLR 1078.

¹⁶ See e.g., *Mullen v. District of Columbia*, 16 EHLR 792 (D.D.C. 1990) (where LEA psychological evaluation concluded that child did not have a learning disability and independent neuropsychological evaluation determined that child did not have a learning disability, hearing officer's finding that child had a learning disability entitled parents to reimbursement for costs of IEE).

In this instance, instead of paying for an IEE, the District is attempting to show that the evaluation performed on [Student] is appropriate and that the evaluation by Dr. K is inappropriate (P-9). However, the District relied heavily on the testing provided by Dr. K.

The District's evaluation did not contain standardized testing, and choose to use curriculum-based measures (S-26) because of the testing that was been completed by Dr. K. Dr. K's evaluation was the basis for much of the present levels of educational performance in the IEP and that served as the basis for the accommodations listed.

Specifically, the only standardized assessments reported in the July 2006 (S-30) are those from Dr. K's evaluation. The District also stated as a part of this hearing that it would not duplicate what Dr. K did, and give supplemental tests instead. Specifically, (NT 405) the District school psychologist testified:

We decided, given the information, that some, what I would call objective standardized testing had already occurred, that it would not be beneficial to re-administer that. And in fact, the tests generally that Dr. K administers are the same ones that I do. I may not give the entire battery that she gives, but we do overlap in terms of what we use. So I could not re-administer those tests (NT 405).

There was a clear reliance on the information from Dr. K. The District's using only curriculum-based measurements to determine eligibility is not inherently wrong, but the extensive reliance on the independent evaluation of Dr. K merits reimbursement.

Tutoring Reimbursement

The Parents claim for reimbursement for the summer of 2005 based on a need for [Student] to have extended school year services is also rejected. Pennsylvania law provides that an eligible student is entitled to ESY if regression caused by interruption in educational programming and limited recoupment capacity or other factors makes it unlikely that a student will attain or maintain those skills and behaviors relevant to the established IEP goals and objectives (22 Pa. Code §14.132). Pennsylvania law further recognizes that ESY shall not be based on a desire or need for day care or respite services; the desire or need for a summer recreation program; or the desire or need for other programs or services, which, while they may provide educational benefit, are not required to ensure the provision of a free appropriate education. Given that there was no evidence presented that [Student] regressed, had difficulty with recoupment, or met the criteria for other factors, reimbursement for the tutoring program provided by Ms. S cannot be justified as part of an extended school year program for [Student].

There is no evidence that [Student] suffered, or would have suffered regression/recoupment problems because of the summer break. Therefore, the request for reimbursement for summer tutoring by Ms. S is denied.

V. ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that [Student] was provided a free appropriate public education for the 2004-2005 school year, and for the 2005-2006 school year. It is ordered that the District is not obligated to pay for tuition and transportation to the [private school] for the 2006-2007 school year. The District is not responsible for the summer of 2005 tutoring costs incurred by the Parents. Finally, the Parents are entitled to reimbursement for the cost of the independent educational evaluation from Dr. Margaret K.

Date

Hearing Officer