

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

PENNSYLVANIA
SPECIAL EDUCATION HEARING OFFICER

Re: ODR No. 8175/07-08 AS
AM
Philadelphia School District

Type of Hearing: Open

For the Student:

For the School District:

Mimi Rose, Esq.
Office of General Counsel
School District of Philadelphia
440 North Broad Street, 3rd Floor
Philadelphia, PA 19130-4015

Hearing Date:	December 3, 2007
Date of Receipt of Transcript:	December 14, 2007
Decision Date:	December 19, 2007
Hearing Officer:	Daniel J. Myers

BACKGROUND

Student is a current 6th grade resident and former student of the School District's public schools from kindergarten through 4th grade. Student then enrolled in a private school for 5th and 6th grades. When Student was in 3rd grade, a hearing officer ordered a comprehensive reevaluation, which the School District conducted. Student contends that the School District did not implement the hearing officer's decision, and that his 4th and 5th grade IEPs were not appropriate. Student also argues that the School District's proposed transfer of Student to a different elementary school constituted illegal retaliation for his exercise of his disability related rights. Finally, Student contends that he is entitled to an individual educational evaluation at public expense.

For the reasons described below, I find that Student's 4th grade IEP was inappropriate and warrants compensatory education. I also agree that the 5th grade IEP was inappropriate, but I do not award compensatory education specifically for that IEP. On all other issues, I find for the School District.

ISSUES

- Whether the School District's IEPs since 2005-2006 have been appropriate;
- Whether the School District implemented Student's IEP appropriately;
- Whether the School District implemented a 2005 Hearing Officer Decision;
- Whether the School District's proposed transfer of Student constituted illegal retaliation for his exercise of his disability related rights; and
- Whether Student is entitled to an individual educational evaluation at public expense.

FINDINGS OF FACT

1. Student, whose date of birth is xx/xx/xx, is a xx year old resident of the Philadelphia School District (School District). (P2) ¹
2. Student attended the School District's (A) Elementary School from kindergarten through his 4th grade (2005-2006) school year. (N.T. 62, 69-70)
3. In October 2002, while in first grade, Student was identified with a specific learning disability and began receiving Resource Room Level Learning Support services. (P2, p.2)

¹ References to SD, P and HO, are to the School District, Parent, and Hearing Officer exhibits, respectively. References to N.T. are to the transcript of the December 3, 2007 hearing session.

Second Grade (2003-2004)

4. In November 2003, Student's parent moved out of the (A) Elementary School boundary. She received permission from the (A) Elementary School principal, however, for her children to continue attending (A) Elementary School. (N.T. 54, 65, 69, 78) Although the (A) Elementary School principal does not remember that particular discussion, she does not deny that it occurred, noting that she has had many conversations with many parents over her 20 years as principal. (N.T. 60-61, 64)

Third Grade (2004-2005)

5. On November 22, 2004, Student's parent requested a comprehensive reevaluation. (P23; N.T. 78) Her request further stated that she wanted an independent educational evaluation at public expense if the School District could not perform the requested reevaluation in a timely manner. (P23)
6. On or about December 29, 2004, a School District Attendance and Truancy Officer visited Student's home to verify Student's address. (P14; N.T. 78)
7. On February 13, 2005, Hearing Officer Valentini issued a Decision and Order resolving a dispute between the parties regarding the appropriate scope of Student's educational evaluation. (P2) Hearing Officer Valentini ordered a comprehensive test battery specifically designed to address areas of suspected need and to derive information useful for creating the Student's next IEP. The well-written opinion also included a full page of helpful "dicta" regarding potential improvements to Student's next IEP, including three bullet points specifically referring to Student's decoding skills and phonics. (P2, p.6)
8. Over the next month, the School District conducted numerous assessments consistent with the February 13, 2005 decision. These assessments included a Wechsler Individual Achievement Test (WIAT-2), OT/PT, hearing and vision screenings, and a speech and language evaluation. (SD2; SD3; SD4; P 17; P20; N.T. 85, 87, 93, 96-97)
 - a. Student's WIAT-II word reading subtest standard score was 81, resulting in a grade equivalent score of 2:8. (P17, p.3)
 - b. Student had recently progressed to a beginning 3rd grade reading level on the Developmental Reading Assessment (DRA). (N.T. 91, 93-94) His word reading skills were found to be at a 2nd grade level while his reading comprehension skills were at a 4th grade level. (N.T. 115)
 - c. Student's listening comprehension skills were relatively high. (N.T. 115)
 - d. His Math skills were within the 3rd grade level, with math computation at the 2nd grade level and math reasoning at 3rd grade. (N.T. 91, 93-94, 115)
 - e. Student was reported to be overly playful, and he sometimes focused on minor events for inordinate time, but he was easily redirected. (N.T. 91-92)

9. On March 16, 2005, the School District issued a comprehensive reevaluation report. (N.T. 48; P17) Among other things:
 - a. The report genuinely attempted to comply with all of the requirements of the February 13, 2005 hearing officer order. (N.T. 86, 90, 94, 177)
 - b. The report concluded that Student did not have clinically significant behavior problems overall. It also concluded that Student's fine motor and speech/language skills did not require either occupational therapy or speech and language services (N.T. 94, 96-97);
 - c. The report found that Student continued to need special education services due to a specific learning disability in the areas of reading decoding, written expression, math computation, math reasoning, and spelling;
 - d. The report suggested goals in mastering sound-symbol associations in reading, writing a paragraph on a single topic, and computing math problems that involve regrouping during addition and subtraction; and
 - e. The report recommended small group instruction, individual attention, verbal reminders and cues to space properly between words when writing, repetition, clear directions, visual aids to take advantage of Student's visual memory strengths, extended time, modeling of skills, multi-modal instruction, and daily reading. (N.T. 92-93)

10. On or about March 23, 2005, the School District demanded proof of Student's residency. (P13; N.T. 78-79)

11. On April 13, 2005, Student's IEP team developed an IEP. This IEP was revised on June 6, 2005 following receipt of a vision and visual processing evaluation by Dr. V., O.D., of the [redacted] Institute, [redacted] College of Optometry. (N.T. 97-98; P5; P9)

12. The 2005 IEP had two reading goals: to make inferences/draw conclusions from text; and to read and understand works of literature. (P5, pp.9, 11)
 - a. The School District's psychologist testified that, while these are not actual decoding goals, they are the equivalent of decoding goals because they require teachers to give Student assistance in decoding before he can understand works of literature. (N.T. 102, 106-107) The School District's psychologist further testified that 10 year old children usually do not have actual decoding goals in their IEPs. (N.T. 103) He testified that Student's progress in decoding can be inferred from his progress in reading comprehension. (N.T. 107)
 - b. The School District's special education case manager disagreed with the School District psychologist that older children with decoding needs don't usually receive decoding goals and objectives in their IEPs. (N.T. 188-189) While acknowledging that the March 2005 reevaluation report recommends a sound-symbol IEP goal, she does not remember why the IEP does not contain such a goal. (N.T. 194) She believes, however, that Student did not need decoding assistance, and that the proper IEP focus

was on reading comprehension. (N.T. 188-189) She noted that, while Student did confuse his letters and mispronounce words, he also pronounced abstract words (apparently indicating skills in decoding), and thus he appeared to need more work on reading comprehension. (N.T. 190) She further noted that Student's parent did not bring up decoding as a need at the time of the IEP. (N.T. 190)

13. I find that the explanations of both the School District's psychologist and its case manager, as to why the IEP lacks explicit reading decoding goals, lack credibility. Both witnesses appeared to be offering contrived, after-the-fact rationalizations for a failure in the IEP to address explicitly Student's reading decoding needs.
- a. The psychologist's opinion that 10 year old children do not usually have actual decoding goals in their IEPs is contradicted by my own experience as a hearing officer, as well as credible testimony to the contrary by the School District's case manager. (N.T. 188-189) The psychologist's testimony is further contradicted by his own March 16, 2005 reevaluation report, which states that "Goals on the IEP should...include mastering sound-symbol associations in reading...." (P17, p.8)
 - b. The case manager's testimony that Student did not need decoding assistance, and that the proper focus was on reading comprehension (N.T. 188-190), was not credible because it is not supported by objective evidence in the record. The March 16, 2005 reevaluation report specifically states that "Goals on the IEP should...include mastering sound-symbol associations in reading...." (P17, p.8) That reevaluation report also explicitly finds a specific learning disability in the area of reading decoding. (P17) In addition, the IEP's present levels of educational performance state that Student's WIAT-II grade level scores in reading comprehension and word reading were 4.2 and 2.8, respectively (P5, p.8), suggesting that Student's decoding needs exceeded his comprehension needs. Finally, although it is only dicta and not objective evidence, Hearing Officer Valentini's decision containing three bullet points specifically referring to Student's decoding phonics needs, lends credence to the reevaluation report's subsequent conclusions that Student has a specific learning disability in the area of reading decoding. (P2)

4th Grade (2005-2006)

14. During summer 2005, Student's parent received a call from the School District asking for much more proof of residency than she had ever previously been required to provide, including notarized letters and PennDot records. (N.T. 66)
15. Student's 4th grade classroom was an inclusion model classroom, containing both a regular education and a special education teacher. (N.T. 127, 135, 141)
16. Student's parent and grandparent testified that, during the school year, they met with Student's teachers after he had failed a class. They allege that Student's

- regular education teacher Ms. B said she had never seen Student's IEP. (N.T. 34-35, 68) They further allege that Student's special education teacher, Ms. J (who no longer works at the (A) Elementary School), told them that Student was just lazy and did not try. (N.T. 34-35, 67, 127, 172)
- a. I find that the testimony of Student's parent and grandparent regarding these statements by Student's 4th grade teachers lacks credibility. Student's 4th grade regular education teacher (Ms. B) credibly testified that, while she probably said Student did not work up to his potential, she doesn't recall saying Student was lazy. (N.T. 145) She also testified that she never said she did not see his IEP (N.T. 145), and I believe her, based upon her credible testimony regarding how she implemented Student's 4th grade IEP. (N.T. 143, 147, 150-151)
 - b. Although the 4th grade special education teacher (Ms. J) did not testify, I assign no credibility to the allegation that she told Student's parent that Student was just lazy and did not try. This is because I have already found similar testimony regarding Ms. B to not be credible, and so I will not believe this testimony regarding Ms. J absent corroborating testimony (which is not in the record.)
17. Student's 4th grade regular education teacher testified that phonics and decoding instruction were not in Student's IEP. (N.T. 147) She stated that Student began the school year on a 3rd grade reading level, but that he made a full year's growth in that year, so that he was reading on a beginning 4th grade level by the end of the 4th grade. (N.T. 143)
 18. On February 10, 2006, the School District conducted a Woodcock Reading Mastery Test indicating that Student's Readiness and Basic Skills cluster scores were in the below average range, while his Reading Comprehension cluster score was in the average range. (P3, p.2) Subtests indicated difficulties in visual-auditory learning, letter identification, and word identification. (P3, p.4)
 19. On May 3, 2006, Student's IEP indicated that his reading level had progressed from Level M, which is beginning 3rd grade, to Level O, which is end of 3rd grade/beginning of 4th grade. (P6; 172-173)
 20. Both Student's 2005 and 2006 IEPs also indicate reading and math "benchmarks," but they are apparently useless indicators because witnesses were unable to describe what reading skills they signify. (N.T. 137, 149, 152; P5, p.8; P6, p.7) Student's teacher can't remember whether she used IEP benchmarks to determine whether Student was grasping a particular skill. (N.T. 150-151)
 21. On May 16, 2006, the School District issued a NOREP recommending resource level learning support services with related psychological services. (N.T. 36-37, 42; P8) School District officials credibly testified that the NOREP's reference to psychological services was a typographical error. (N.T. 174-175)

5th Grade (2006-2007)

22. On June 12, 2006, the School District sent notice that Student would be transferred to the School District's (B) Elementary School in September 2006. (N.T. 54; P 11; P18)
23. Student's parent alleges that (B) Elementary School is a lower quality school than (A) Elementary School, because (B) Elementary School's reading achievement scores are lower, and because (B) Elementary School has been determined to be less effective than (A) Elementary School in implementing IEPs. (P19; N.T. 57-58, 71)
24. On July 22, 2006 Student's parent responded to the transfer notice, alleging that the School District was retaliating against Student because his family was vocal in asserting Student's disability rights. (P12; P16; P18)
25. School District officials counter that (B) Elementary School is Student's home school based upon his actual residence. (N.T. 71) They also testified credibly that the transfer was simply triggered by the results of other public schools closing and the consequent transfers of children among the remaining, open public schools. (N.T. 163, 165)
26. Rather than fight the transfer, Student's parent unilaterally enrolled Student into a private Christian school for his 5th grade, 2006-2007 school year. (N.T. 62, 71-72)

6th Grade (2007-2008)

27. Student continues to attend the private Christian school for the 2007-2008 school year. (N.T. 62, 69-72)
28. On October 9, 2007, Student's parent filed a request for due process hearing.
29. The parties conducted an unsuccessful resolution meeting on November 8, 2007. (N.T. 35)
30. I conducted a due process hearing on December 3, 2007. In prehearing correspondence I had determined the issues to be litigated, based upon a telephone conference call with the parties. (HO 2) At the hearing, I denied Student's request to expand the scope of his compensatory education claim by an additional four years. (N.T. 17, 22-24)
31. A List of Exhibits P1-P24 and SD1-SD5 is as follows:

- P1 – February 1, 2005 due process hearing transcript
- P2 – February 13, 2005 decision of Hearing Officer Valentini

- P3 – Woodcock Reading Mastery Tests, Form G
- P4 – KeyMath Revised Diagnostic Inventory of Essential Mathematics
- P5 – (6/6/05) IEP with handwritten date in upper right corner
- P6 – (05/03/2006) IEP with typewritten date in upper right corner
- P7 – (1/30/06) NOREP with handwritten date in upper right corner
- P8 – (05/02/2006) NOREP with typewritten date in upper right corner
- P9 – Miscellaneous, including April 22, 2005 vision and visual processing evaluation by Dr. V., O.D., of the [redacted] Institute, [redacted] College of Optometry
- P10 – May 14, 2007 Therapist letter
- P11 – June 11, 2006 correspondence regarding residency from (A) Elementary School
- P12 – July 22, 2006 correspondence from Student’s parent to School District
- P13 – March 23, 2006 correspondence from Student’s parent to principal of (A) Elementary School
- P14 – December 29, 2004 correspondence from Student’s parent to School District counsel
- P15 – Two letters regarding lease
- P16 – July 22, 2006 correspondence from Student’s parent to School District (same as P12)
- P17 – Evaluation Report
- P18 – September 7, 2006 Notification of Pupil Transfer
- P19 – Great Schools comparisons
- P20 – March 16, 2005 Report for OT and/or PT Screen
- P21 – 22 Pa. Code §4.11, and Q&A #11
- P22 – Lease Agreement
- P23 – November 22, 2004 correspondence from Student’s parent to principal of (A) Elementary School
- P24 – January 30, 2006 prehearing conference
- SD1 – Evaluation Report
- SD2 – School District Speech and Language Evaluation
- SD3 – March 16, 2005 Report for OT and/or PT Screen
- SD4 – School District H3 Vision and Hearing Screening
- SD5 – Attendance Data

32. I sustained the School District’s objection to the admission of P10 because it was not relevant. (N.T. 44) P15 was withdrawn by Student at the hearing. (N.T. 205) I sustained the School District’s objection to the admission of P24 because it was not disclosed to the opposing party at least 5 days before the hearing. (N.T. 211) I overruled the School District’s 5-day disclosure objection to the admission of P23. (N.T. 210-211) SD 1 was withdrawn. (N.T. 112) SD5 was not admitted into the record because it was not disclosed to the opposing party at least 5 days before the hearing. (N.T. 218-219)

33. Thus, Exhibits P1-P9, P11-P14, and P16-P23, were admitted into the record. SD2, SD3 and SD4 were admitted into the record. (N.T. 211)

DISCUSSION

Under the Individuals with Disabilities Education Improvement Act (IDEIA), the School District is required to provide a free appropriate public education (FAPE) to all Students who qualify for special education services. 20 U.S.C. § 1412 The School District program will meet its FAPE obligation if it provides special education and related services at public expense, that meet the standards of the state educational agency, and that are provided in conformity with an individualized education program (IEP.) Stroudsburg Area School District v. Jared N., 712 A.2d 807 (Pa. Cmwlth. 1998)

The United States Supreme Court has held that the burden of proof in an administrative hearing challenging a special education IEP is upon the party seeking relief, whether that party is the disabled child or the school district. Schaffer v. Weast, ___ U.S. ___, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005); In Re J.L. and the Ambridge Area School District, Special Education Opinion No. 1763 (2006) Because Student's parent seeks relief in this administrative hearing, she bears the burden of proof in this matter, i.e., she must ensure that the evidence in the record proves each of the elements of her case. The U.S. Supreme Court has also indicated that, if the evidence produced by the parties is completely balanced, or in equipoise, then the party seeking relief (i.e., Student's parent) must lose because the party seeking relief bears the burden of persuasion. Schaffer v. Weast, *supra*. Of course, where one party has produced more persuasive evidence than the other party, the evidence is not in equipoise, and I must simply rule, for each issue, for the party that produced the more persuasive evidence.

The IDEIA makes it clear that due process hearings may not include issues not raised in the due process complaint notice. 20 U.S.C. § 1415(f)(3)(B) Thus, it was proper for me to deny Student's last-minute request to expand the scope of his compensatory education claim by an additional four years. (N.T. 17, 22-24)

The School District's 4th grade (2005-2006) and 5th grade (2006-2007) IEPs were not appropriate

An appropriate program is one that is reasonably calculated to yield meaningful educational benefit. Rowley v. Hendrick Hudson Board of Education, 458 U.S. 176 (1982) The Third Circuit Court has interpreted Rowley as requiring school districts to offer children with disabilities individualized education programs that provide more than a trivial or de minimus educational benefit. Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3rd Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989) Specifically, the Third Circuit defined a satisfactory IEP as one that provides "significant learning" and confers "meaningful benefit." *Id* at 182-184; *See also Board of Education of East Windsor Sch. Dist. v. Diamond*, 808 F.2d 847 (3rd Cir. 1986); J.C. v. Central Regional Sch. Dist., 81 F.3d 389 (3rd Cir. 1996), *cert. denied*, 519 U.S. 866

Student's Parent alleges that decoding and phonics needs were not addressed in his IEPs. (N.T. 51) There is very little dispute on this point. Student's 4th grade regular

education teacher admitted that phonics and decoding instruction were not in Student's IEP. (N.T. 147)

Other School District witnesses offered two inconsistent theories to explain the failures of Student's IEPs to address explicitly his reading decoding needs. The School District's psychologist testified that the IEPs did address Student's decoding and phonics needs, albeit indirectly through its literacy and comprehension goals. (N.T. 102, 106-107) The School District's special education case manager testified that Student did not need decoding assistance, that the proper IEP focus was on reading comprehension, and she further noted that Student's parent did not bring up decoding as a need at the time of the IEP. (N.T. 188-190)

I find that the School District psychologist's testimony on this issue is not credible because even the School District's case manager admitted that children Student's age with decoding and phonics needs do, indeed, have explicit reading decoding goals in their IEPs. (N.T. 188-189) The psychologist's testimony is further contradicted by his own March 16, 2005 reevaluation report, which states that "Goals on the IEP should...include mastering sound-symbol associations in reading...." (P17, p.8)

The School District case manager's testimony that Student did not actually have decoding needs is not credible because it is contradicted by substantial evidence in the record. Student's spring DRA indicated that his word reading skills were at a 2nd grade level while his reading comprehension skills were at a 4th grade level. (N.T. 115) The March 16, 2005 reevaluation report specifically states that "Goals on the IEP should...include mastering sound-symbol associations in reading...." (P17, p.8) That reevaluation report also explicitly finds a specific learning disability in the area of reading decoding. (P17) In addition, the April 2005 IEP's present levels of educational performance state that Student's WIAT-II grade level scores in word reading at the end of 3rd grade were 2.8. (P5, p.8) Also, a February 10, 2006, Woodcock Reading Mastery Test indicated that Student's Readiness and Basic Skills cluster scores were in the below average range, while his Reading Comprehension cluster score was in the average range. (P3, p.2) Subtests indicated difficulties in visual-auditory learning, letter identification, and word identification. (P3, p.4) Finally, although it is only dicta and not objective evidence, Hearing Officer Valentini's decision containing three bullet points specifically referring to Student's decoding phonics needs, lends credence to the objective data indicating Student has a specific learning disability in the area of reading decoding. (P2)

In addition, both Student's 2005 and 2006 IEPs refer to reading "benchmarks," but they are apparently useless indicators because witnesses were unable to describe what reading skills they signify. (N.T. 137, 149, 152; P5, p.8; P6, p.7) Student's teacher could not remember whether she used IEP benchmarks to determine whether Student was grasping a particular skill. (N.T. 150-151)

When read as a whole, the record indicates that Student had needs in reading decoding that should have been addressed explicitly in an IEP. The record further indicates that neither the School District's 4th grade (2005-2006), nor its proposed 5th

grade (2006-2007), IEPs contained goals explicitly addressing Student's decoding needs. Accordingly, I find in favor of Student, and I conclude that Student's IEPs since 2005-2006 were not appropriate.

The School District implemented Student's IEPs appropriately

This issue differs from the previous issue because the argument here is that, even if the 4th grade IEP was appropriate, it was not implemented appropriately. For the reasons described above, I found the IEP inappropriate. For the reasons described below, I find that regardless of the inappropriateness of the 4th grade IEP, it was implemented as written.

The basis for Student's argument on this issue is that his regular education teacher Ms. B said she had never seen Student's IEP (N.T. 34-35, 68), and his special education teacher, Ms. J (who no longer works at the (A) Elementary School), said that Student was just lazy and did not try. (N.T. 34-35, 67, 127, 172) I find this argument, and the testimony of Student's parent and grandparent regarding these statements by Student's 4th grade teachers, to lack credibility. Student's 4th grade regular education teacher (Ms. B) credibly testified that, while she probably said Student did not work up to his potential, she doesn't recall saying Student was lazy. (N.T. 145) She also testified that she never said she did not see his IEP (N.T. 145), and I believe her, based upon her credible testimony regarding how she implemented Student's 4th grade IEP. (N.T. 143, 147, 150-151) Although the 4th grade special education teacher (Ms. J) did not testify, I assign no credibility to the allegation that she told Student's parent that Student was just lazy and did not try. This is because I have already found similar testimony regarding Ms. B to not be credible, and so I will not believe this testimony regarding Ms. J absent corroborating testimony (which is not in the record.)

I find that the School District did implement Student's 4th grade IEP appropriately, even though the IEP itself was inappropriate. Student's 4th grade classroom was an inclusion model classroom, containing both a regular education and a special education teacher. (N.T. 127, 135, 141) Student's 4th grade regular education teacher (Ms. B) was credible, admitting that phonics and decoding instruction were not in Student's IEP (N.T. 147), and describing how she implemented Student's IEP. (N.T. 143) Student's 4th grade teacher implemented the IEP she had – it just wasn't an appropriate IEP. Thus, while I have already found that the 4th grade IEP itself was not appropriate, the School District did not compound its error (as alleged by Student) by failing to implement that 4th grade IEP.

The School District implemented the 2005 Hearing Officer Decision

Student's Parent alleges that the February 13, 2005 Hearing Officer decision was not implemented by the School District. The bases for this argument are not clear to me. After reviewing that decision, however, as well as the School District's behaviors in implementing that decision, I find for the School District on this issue.

The February 13, 2005 Hearing Officer decision resolved a dispute between the parties regarding the appropriate scope of Student's educational evaluation. (P2) The Hearing Officer ordered a comprehensive test battery specifically designed to address areas of suspected need and to derive information useful for creating the Student's next IEP. (P2) The Hearing Officer ordered that the reevaluation be completed within 45 calendar days of receipt of the February 13, 2005 Order. (P2, p.7)

Over the next month, the School District conducted numerous assessments, including a WIAT-II, OT/PT, hearing and vision screenings and a speech and language evaluation. (SD2; SD3; SD4; P 17; P20; N.T. 85, 87, 93, 96-97) On March 16, 2005, the School District issued a comprehensive reevaluation report. (N.T. 48; P17) The report genuinely attempted to comply with all of the requirements of the February 13, 2005 hearing officer order. (N.T. 86, 90, 94, 177)

The Hearing Officer's decision also included a full page of helpful "dicta" regarding potential improvements to Student's next IEP, including three bullet points specifically referring to Student's decoding skills and phonics. (P2, p.6) It is possible that Student is arguing that the School District failed to implement the Hearing Officer's decision because it failed to include in Student's IEP the Hearing Officer's decoding and phonics recommendations. I reject this argument.

The February 13, 2005 Decision and Order is very clear with respect to what was required and what was merely suggested. The Hearing Officer absolutely expected the School District to conduct a comprehensive evaluation within 45 calendar days. The School District did so, conducting its reevaluation within a month and issuing a report within 31 calendar days of the issuance of the decision.

The Hearing Officer only suggested that the IEP team consider her bullet points specifically referring to Student's decoding skills and phonics. In hindsight, it might have been prudent for the School District to have treated the Hearing Officer's dicta as more than a suggestion. In that way, IEPs might have contained explicit goals addressing Student's decoding and phonics needs. The School District was not required, however, to treat the dicta as mandatory.

The Hearing Officer required the School District to conduct a comprehensive evaluation within 45 calendar days, and the School District did so. Thus, I conclude that the School District performed all actions that the Hearing Officer's Order required.

The School District's proposed transfer of Student did not constitute illegal retaliation for his exercise of his disability related rights

Student argues that the School District transferred Student to a less desirable public elementary school in retaliation for his parent's exercise of his rights as a child with a disability. To support this argument, Student notes that, despite an agreement that his parent and the School District had reached, back in November 2003, when Student's parent moved out of the (A) Elementary School boundary, that Student and his sister

could continue attending (A) Elementary School (N.T. 54, 65, 69, 78), the School District attempted to move Student out of (A) Elementary School at least 4 times since his mother first starting asserting Student's disability-related rights.

Specifically, a School District Attendance and Truancy Officer visited Student's home just a month after the November 2004 request by Student's parent for a reevaluation of Student. (P23; P13; N.T. 78) The School District demanded proof of Student's residency just a month after the Hearing Officer's February 2005 decision and order. (P13; N.T. 78-79) A few months later, during summer 2005, Student's parent received a call from the School District asking for much more proof of residency than she had ever previously been required to provide, including notarized letters and PennDot records. (N.T. 66) Finally, on June 12, 2006, the School District sent notice that Student would be transferred to the School District's (B) Elementary School in September 2006. (N.T. 54; P 11; P18)

Student's parent alleges that (B) Elementary School is a lower quality school than (A) Elementary School, because (B) Elementary School's reading achievement scores are lower, and because (B) Elementary School has been determined to be less effective than (A) Elementary School in implementing IEPs. (P19; N.T. 57-58, 71) Obviously, this perceived distinction between elementary schools is the reason Student's parent wanted her children to remain at (A) Elementary School after she moved. Student's parent also argues that the School District perceives the same distinction, and the School District is attempting to inflict the lower quality of (B) Elementary School upon Student as "punishment" for exercising his rights.

School District officials counter that (B) Elementary School is Student's home school based upon his actual residence. (N.T. 71) They also credibly testified that the June 2006 transfer was simply triggered by the closings of other public schools and the consequent transfers of other children among the public schools that remained open. (N.T. 163, 165)

There is no per se right to a neighborhood school placement under the IDEIA. This reasoning applies where the dispute between parents and a school district concerns which elementary school building a child will attend. In Re A.G. and the Wissahickon School District, Special Education Opinion No. 1455 (2004) In addition, the factual evidence consists only of coincidental events, with nothing persuading me that the June 2006 transfer had any retaliatory motive.

The agreement between Student's parent and the School District was first arranged in November 2003. (N.T. 54, 65, 69, 78) An entire year elapsed with no School District inquiry into Student's residence. Within a month of Student's request for reevaluation, the School District began inquiring into Student's residence. Three times over the next six months, the School District sent a truancy officer to check on Student's address, and demanded increasingly more onerous proofs of residence. P13; P23; N.T. 66, 78-79) The demands then stopped, however, and an entire year elapsed before the

next residency-based event, which was the June 2006 notice of transfer. (N.T. 54; P 11; P18)

What I find significant is that an entire year elapsed between the last residency inquiry in June 2005 and the June 2006 notice of transfer. Because an entire year elapsed between the last inquiry and the notice of transfer, the record convinces me that the inquiries and the transfer notice were unrelated and simply coincidental.

It is possible that the six month flurry of inquiries from December 2004-June 2005 was triggered by Student's request for a reevaluation. A trigger, however, is not the same as a decision to retaliate. For example, if my request for a tax refund triggers a tax audit, that does not automatically mean that the tax audit is a retaliatory act. It might have been motivated by a desire to retaliate, or it might simply have been triggered without any particular discriminatory intent. Further, in a bureaucratic system as large as this School District's, it seems quite realistic that a residency investigation, once triggered in November/December 2004, would continue in fits and spurts over the next six months until it was finally concluded in June 2005.

I cannot determine from this record whether or not the six months of residency inquiries in 2004-2005 were motivated by a desire to retaliate, or were simply triggered without any particular discriminatory intent. I can determine, however, as I found above, that the June 2006 transfer notice was unrelated and simply coincidental to the residency inquiries that had already ceased one year before.

I further conclude that the June 2006 transfer notice itself was not motivated by any retaliatory intent. It is undisputed that (B) Elementary School is Student's home school based upon his parent's actual residence. (N.T. 71) School District witnesses testified credibly that the June 2006 transfer was simply triggered by the closings of other public schools and the consequent transfers of other children among the public schools that remained open. (N.T. 163, 165) Thus, the record does not establish that the transfer in June 2006 constituted illegal retaliatory discrimination.

Student is not entitled to an individual educational evaluation at public expense

An "independent educational evaluation" is "an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education in question..." 34 C.F.R. 300.502 "At public expense" means that the public agency either pays for the full cost of the evaluations or ensures that the evaluation is otherwise provided at no cost to the parents. 34 C.F.R. § 300.502 Parents have the right to obtain an independent educational evaluation of their child if they disagree with an evaluation obtained by the public agency and they request an independent educational evaluation at public expense. If that occurs, the public agency must, without unnecessary delay, either grant the request or file a due process complaint to request a hearing to show that its evaluation is appropriate. A parent is entitled to only one independent educational evaluation at public expense each time the public agency conducts an evaluation with which the parent disagrees. 34 C.F.R. 300.502 (a)(2)-(3)

The record in this case does not indicate that the regulations applicable to IEEs has been followed yet. More specifically, there is no evidence that: 1) Student's parent disagreed with a School District evaluation; 2) Student's parent requested an IEE at public expense; and 3) the School District denied that request. In the absence of this chain of events, I have no regulatory basis for ordering an IEE for Student. Thus, because Student has not already indicated his disagreement with a School District evaluation report, requested an IEE at public expense, and been denied, I must find that Student is not entitled at this time to an IEE at public expense.

Student is entitled to 180 hours of compensatory education services

In Pennsylvania the standard for an award of compensatory education, once a deprivation of FAPE is found, is focused on what it will take to bring the student to the point he should have been if not for the deprivation of FAPE, as opposed to an award focused on the period of deprivation. B.C. v. Penn Manor, 906 A.2d 642 (Pa. Comwlth. 2006) In B.C., Commonwealth Court rejected an hour-for-hour standard for determining the amount of compensatory education to be awarded, preferring instead an award of compensatory education reasonably calculated to bring the student to the position that he would have occupied but for the school district's failure to provide a FAPE. This may require awarding the student more compensatory education time than a one-for-one standard would, while in other situations the student may be entitled to little or no compensatory education, because he has progressed appropriately despite having been denied a FAPE.

In this case, at the time that Student's inappropriate 4th grade IEP was drafted in spring 2005 (while he was still in 3rd grade), his WIAT-II word reading subtest standard score was 81, resulting in a grade equivalent score of 2:8, and his word reading skills were determined to be at a 2nd grade level. (P17, p.3; N.T. 115) I conclude that, but for the school district's failure to provide a FAPE, Student's reading decoding achievement level would have been brought to grade level within one year.

The reason for my conclusion is that Student's 4th grade regular education teacher testified that, even though phonics and decoding instruction were not in Student's IEP, Student began the school year on a 3rd grade reading level and made a full year's growth in that year, so that he was reading on a beginning 4th grade level by the end of the 4th grade. (N.T. 143, 147) I conclude from this that, had Student's IEP actually provided FAPE, and included explicit decoding and phonics goals that addressed his needs, Student would have made more than a full year's growth, and would, in fact, have been decoding at an end-of-4th grade level by the end of 4th grade.

Thus, I shall order an award of 180 hours of compensatory education reasonably calculated to bring Student to grade-level in reading decoding.² Student's compensatory education must be designed to accomplish the following benchmarks:

- utilize syllable types (closed, open, vowel-consonant-e, vowel team, diphthong, r-controlled, and consonant-le) to accurately decode phonetically regular multi-syllable words
- divide multi-syllable words to aid in decoding
- read fluently a large repertoire of common irregularly spelled sight words
- use knowledge of root words, prefixes, suffixes, compound words and contractions to aid in decoding
- understand the meaning of the accent mark (') and how it effects pronunciation
- understand that changing the accented syllable in a word can change the meaning of a word (e.g. con' tent / con tent')
- read grade level text with accuracy

Further, to determine whether Student has achieved grade-level reading decoding skills, his reading decoding achievement level must be measured by an objective, standardized test, such as the WIAT-II that was administered to Student during his March 2005 reevaluation.

Although the School District did not offer an appropriate IEP for Student's 5th grade, I will not award compensatory education with respect to that IEP. This is because Student's parent chose to send Student to a private religious school for reasons unrelated to the proposed IEP. Rather than fight the June 2006 transfer, Student's parent unilaterally enrolled Student into a private Christian school for the 2006-2007 school year. (N.T. 62, 71-72) I have already concluded that the proposed transfer was not discriminatory. Accordingly, there is no basis for awarding compensatory education with respect to the proposed 5th grade IEP.

CONCLUSION

Because due process hearings may not include issues not raised in the due process complaint notice, it was proper for me to deny Student's last-minute request to expand the scope of his compensatory education claim by an additional four years. When read as a whole, the record indicates that Student had needs in reading decoding that should have been addressed explicitly in an IEP. The record further indicates that neither the School District's 4th grade (2005-2006), nor its proposed 5th grade (2006-2007), IEPs contained goals explicitly addressing Student's decoding needs. Accordingly, I will award 180 hours of compensatory education.

I further find that the School District did implement Student's 4th grade IEP appropriately, even though the IEP itself was inappropriate. Because the Hearing Officer

² I computed the amount of the award to be 180 hours, because I estimate that a year's worth of appropriate phonics and decoding instruction should require one hour per day for 180 school days.

required the School District to conduct a comprehensive evaluation within 45 calendar days, and the School District did so, I conclude that the School District performed all actions that the Hearing Officer's February 2005 Order required. I further conclude that the record does not establish that the transfer notice in June 2006 constituted illegal retaliatory discrimination. Finally, because Student has not already indicated his disagreement with a School District evaluation report, requested an IEE at public expense, and had that request denied by the School District, I must find that Student is not entitled at this time to an IEE at public expense.

ORDER

The School District shall provide to Student 180 hours of compensatory education services that are reasonably calculated to bring Student to his grade level reading decoding achievement.

To determine whether Student has achieved grade level reading decoding skills, his reading decoding achievement level must be measured by an objective, standardized test, such as the WIAT-II.

Student's compensatory education must be designed to accomplish the following benchmarks:

- utilize syllable types (closed, open, vowel-consonant-e, vowel team, diphthong, r-controlled, and consonant-le) to accurately decode phonetically regular multi-syllable words
- divide multi-syllable words to aid in decoding
- read fluently a large repertoire of common irregularly spelled sight words
- use knowledge of root words, prefixes, suffixes, compound words and contractions to aid in decoding
- understand the meaning of the accent mark (') and how it effects pronunciation
- understand that changing the accented syllable in a word can change the meaning of a word (e.g. con' tent / con tent')
- read grade level text with accuracy

Daniel J. Myers

Hearing Officer

Date: December 19, 2007

ODR File No.: 8175/07-08 AS

Student: Student

School District: Philadelphia