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PENNSYLVANIA

## Special Education Hearing Officer

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Child's Name: B. Y.

Date of Birth: xx.xx.xx

File Number: 7002/06-07 LS

Dates of Hearing: October 30, 2006; December 12, 2006;  
December 14, 2006; January 26, 2007

CLOSED HEARING

Parties to the Hearing:

Mr. and Mrs.

Cumberland Valley School Dist.  
6746 Carlisle Pike  
Mechanicsburg, PA 17050-1711

Representative:

Vivian Narehood, Esq.  
Gibbel, Kraybill, & Hess  
41 East orange Street  
Lancaster, PA 17602

Mark Fitzgerald, Esq.  
Sweet Stevens Katz Williams  
P.O. Box 5069  
New Britain, PA 18901

Date Transcript Received:

February 5, 2007

Date of Decision:<sup>1</sup>

February 16, 2007

Hearing Officer Name:

Gregory J. Smith

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<sup>1</sup> The record was kept open until receipt of the transcript. This decision was rendered in 11 days, within the 15 days of the closing of the record required by law.

## **Background**

Student is an eligible xx-year-old student who resides with his parents within the area served by the Cumberland Valley School District (District). During the 2005-2006 school year Student attended The [redacted] School (Private School) at District expense. Private School is a private day school located outside of the District. In May 2006 the District proposed a program and placement in the District for the 2006-2007 school year. Student's parents rejected that proposal and, after initially requesting mediation, requested the present hearing seeking an order requiring the District to pay for tuition and transportation to Private School.

## **Findings of Fact**

1. Student is a xx-year-old (d.o.b. xx/xx/xx) student who resides with his parents within the area served by the Cumberland Valley School District (District). (N.T. at 366; J-1, J-5, J-12, J-27)
2. Student is eligible for special education and related services as a child with a disability who has been identified as having pervasive developmental disorder (PDD), other health impairment, attention deficit hyperactivity disorder (ADHD), speech and language impairment, and specific learning disability (SLD) in reading and math. (N.T. at 368, 371, 648-649; J-1, J-5, J-12, J-27)
3. Starting in 1998, Student attended preschool and kindergarten at the [redacted], a private preschool. (N.T. at 369; J-1, S-27)
4. In October 2002 an Independent Educational Evaluation (IEE) was completed by Dr. K. Dr. K concluded that Student met the diagnostic criteria for PDD, ADHD, non-verbal learning disorder, reading disorder, disorder of written language, and phonological disorder. (N.T. at 457-458; J-27)
5. In March 2003 the Capital Area Intermediate Unit (CAIU) evaluated Student. He was found eligible for special education as a child with developmental delays in speech and language, cognitive skills, sensory-processing skills, and personal-social skills. The CAIU concluded that Student did not meet the criteria for autism. (N.T. at 369; J-1, J-27)
6. In May 2003 the CAIU developed an Individualized Educational Program (IEP). (J-1)
7. Because Student's parents and teachers thought that that he was not ready for a more academic curriculum, Student began to repeat kindergarten at the [private preschool] at the start of the 2003-2004 school year. (J-1, J-27).
8. In September 2003 Dr. K completed another IEE and recommended that Student be placed in a full-time autistic support program with particular emphasis on spelling, reading, and math. (J-1, J-27)
9. As the result of Dr. K's evaluation, an IEP was developed and, in December 2003, Student began to attend a full-time autistic support program in the District. (N.T. at 370-371; J-1, J-27)

10. Student initially did well in the District's autistic support classroom. In spring 2004 there were several personnel changes in Student's program. After those changes, Student's functioning in the autistic support classroom began to deteriorate. Student's performance continued to decline during the 2004-2005 school year. (N.T. at 372-376; J-27)

11. In fall 2004 Dr. K completed another evaluation of Student. Dr. K concluded that Student was not making reasonable progress in the District program and recommended that he be placed at The Private School (Private School). (J-27)

12. In November 2004 Student's parents removed him from the District and placed him at Private School. Private School is a private school primarily providing programs for students with learning disabilities. Not all students who attend Private School are identified as learning disabled, but all students who attend Private School have been identified as having a disability. (N.T. at 139, 187, 272, 325, 379, 484; J-1)

13. During the 2004-2005 school year Student showed deficits in almost all academic areas. In addition he exhibited significant behavioral problems. Student lectured others, was manipulative, did not engage in reciprocal behaviors, and became oppositional in response to requests and to academic challenges. When his behavior escalated he might run from the room or, if he remained, he would become more physical and aggressive. "Some actions were directed at adults and property; but he would also make verbal threats, swear, rip paper, and break pencils." J-27 at 14. The interventions used at Private School had limited effectiveness. (N.T. at 150-152, 165-169, 175-171, 212-213, 277-278, 283, 286-290; J-3, J-27)

14. In March 2005 the District completed a reevaluation. Student was found to continue to be a child with a disability in need of specially designed instruction. It was concluded that Student met the criteria for PDD/autism, other health impairment, speech and language impairment, and SLD, non-verbal type in reading and math. The evaluation report (ER) contained specific recommendations for Student's program derived from reports from Dr. K, an autism consultant, and Student's parents. (N.T. at 381, 642-643; J-1)

15. The District did not offer an IEP to Student and his parents after the March 2005 reevaluation. (N.T. at 381)

16. Student's parents elected to keep Student at Private School for the 2005-2006 school year. (N.T. at 382; J-27)

17. In fall 2005 the parties entered into an agreement whereby the District agreed to pay for tuition and transportation to Private School for the 2005-2006 school year. (N.T. at 641-642; J-2)

18. In May 2006 the District completed a reevaluation. Members of the reevaluation team were Student's parents, Ms. W (a consultant hired by the District to develop an autistic support program, who is also certified as a special education teacher), Ms. L (school psychologist), Ms. K (a District principal, who is also certified as a regular education teacher), Ms. L2 (speech therapist), and Ms. D (occupational therapist). (N.T. at 400, 543, 648; J-5)

19. In preparation for the reevaluation, District staff visited Private School to observe Student and meet with Private School staff. Private School staff and Student's parents were interviewed and completed evaluative checklists. Reports on Student's performance at Private School and evaluations completed at Private School were received. Other reports in the possession of the District were reviewed. (N.T. at 543, 640, 651-660; J-4, J-5, J-7, J-8)

20. Ms. W interviewed Private School staff and Student's parents using a form titled "Developing an IEP for students with autism spectrum disorders." (J-7, N.T. at ) That form specifies principles to be followed in selecting goals for autistic students:

1. Will the skill help the student in the current or future environments?
2. Will the skill help the student access more reinforcement in natural settings?
3. Is the skill age appropriate?
4. Is the skill socially valid?
5. Does the skill enhance special interests and talents of the student?
6. Will the skill assist the student in becoming a productive contributor to the community? J-7 at 1 (N.T. at 660-662)

21. The conclusion of the May 2006 reevaluation was that Student continued to be a student with a disability, with a primary disability of autism and secondary or related disabilities in speech and language impairment, SLD, and other health impairment as the result of his ADHD. (J-5)

22. Recommendations in the May 2006 ER included the following for academics and the classroom:

- Direct Instruction programs for Reading, Language Arts, Math, Social Communication, self regulation that use a visual/concrete approach.
- Structured learning environment with clear expectations with limited auditory and visual stimuli.
- Reduce visual clutter.
- Advance preparation for transitions, especially for transitions that are not routine.
- Advance comprehensive planning for major transitions – grade to grade, school to school.
- Use of an individualized schedule to aide in daily transitions.
- Use of error correction procedures in Reading and Math. The use of an "errorless" learning approach will provide Student with prompting to ensure a correct response. This method may reduce anxiety, is more reinforcing and reduces the possibility of learning an error. This method should be used for skill acquisition.
- The use of Behavior momentum to increase fluency.
- Data collection system for behaviors and response to interventions to ensure data driven decisions.
- Use of goal selection principles to develop individual program.
  - o Will the skill help the student in the current or future environments?
  - o Will the skill help the student access more reinforcement in natural settings?
  - o Is the skill age appropriate?
  - o Is the skill socially valid?
  - o Does the skill enhance special interests and talents of the student?

- o Will the skill assist the student in becoming a productive contributor to the community?
- Observations of student across all settings by AS teacher, AS consultant, OT, Behavior Specialist, or SLP.
- Principles of ABA: Use of prompt hierarchy, prompt fading, task analysis, differential reinforcement, reinforcer surveys, forward and backward chaining, data collection, etc.
- Opportunity to practice skills across all environments for generalization of skills.
- Use of curriculum matrix for planning the generalization and integration of all targeted goals.
- AS program implementation as a team approach to include the planning of instruction, skills practice, generalization, etc.
- Team planning meetings (SDI and Supports for School Personnel).
- If behaviors increase, a Functional behavior assessment should be conducted to determine the antecedents, consequences and function of the behavior. A behavior support plan should then be developed based on the results of the assessment. The behavior support plan should include a more appropriate behavior to replace the behavior of concern.
- Ensure opportunities for success throughout the day to reduce frustration and anxiety. The use of task analysis, forward and backward chaining may be effective strategies.
- The use of the principles of Applied Behavior Analysis. J-5 at 12-13 (N.T. at 667-675)

23. On May 10, 2006 an IEP team meeting was held to discuss the ER and to develop an IEP. The membership of the IEP team was identical to the individuals who participated in the development of the reevaluation, except that Ms. L, the school psychologist, did not participate on the IEP team. (N.T. at 400-402, 436-437, 676; J-10, J-11, J-12, J-13)

24. The IEP contained the following academic, developmental, and functional needs:

- Direct Instruction programs for Reading, Language Arts, Math, Social Communication, self regulation that use a visual/concrete approach.
  - o To improve reading skills to include sound symbol recognition, decoding, sight vocabulary.
  - o Improve math skills to include operations, place value, time and money concepts.
  - o To improve writing skills and written expression.
  - o To improve social communication skills.
- Structured learning environment with clear expectations with limited auditory and visual stimuli.
- Reduce visual clutter.
- Advance preparation for transitions, especially for transitions that are not routine.
- Advance comprehensive planning for major transitions – grade to grade, school to school.
- Use of an individualized schedule to aide in daily transitions.
- Use of error correction procedures in Reading and Math. The use of an “errorless” learning approach will provide Student with prompting to ensure a correct response. This method may reduce anxiety, is more reinforcing and reduces the possibility of learning an error. This method should be used for skill acquisition.
- The use of Behavior momentum to increase fluency.

- Data collection system for behaviors and response to interventions to ensure data driven decisions.
- Use of goal selection principles to develop individual program.
- Observations of student across all settings by AS teacher, AS consultant, OT, Behavior Specialist, or SLP.
- Principles of ABA
  - o Use of prompt hierarchy, prompt fading, task analysis, differential reinforcement, reinforcer surveys, forward and backward chaining, data collection, etc.
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- Use of curriculum matrix for planning the generalization and integration of all targeted goals.
- AS program implementation as a team approach to include the planning of instruction, skills practice, generalization, etc.
- Team planning meetings (SDI and Supports for School Personnel).
- If behaviors increase, a Functional behavior assessment should be conducted to determine the antecedents, consequences and function of the behavior. A behavior support plan should then be developed based on the results of the assessment. The behavior support plan should include a more appropriate behavior to replace the behavior of concern.
- Ensure opportunities for success throughout the day to reduce frustration and anxiety. The use of task analysis, forward and backward chaining may be effective strategies.
- The use of the principles of Applied Behavior Analysis. J-12 at 13

25. A transition note in the IEP states that Student's parents had visited an autistic support classroom in the District and "If [Student's parents] approve his placement a transition plan will be developed..." J-12 at 14 (N.T. at 686-687, 863-864; J-12)

26. The IEP included seven goals addressing reading, math, hand-writing, self-regulation, social skills, conversation skills, and emotions. (J-12)

27. Goal one in the IEP, regarding reading and language skills, provides no levels at which those skills will be attempted. (J-12)

28. Goal four in the IEP, regarding self-regulation, references the use of engine levels. (J-12)

29. The rubric referenced as being attached to the IEP in goal five was not part of the IEP when it was offered to Student's parents. (N.T. at 917-918; J-12)

30. The social skills short term objectives for goal five in the IEP were not part of the IEP when it was offered to Student's parents. (N.T. at 807; J-2, J-34)

31. Goal seven in the IEP, regarding emotional state, provides for the use of an emotional thermometer and emotional toolbox. (J-12)

32. Student's parents did not approve of the proposed program and placement. They first requested mediation and then, in September 2006, requested the present hearing seeking an order requiring the District to continue to pay for tuition and transportation for their son to attend Private School. (N.T. at 445-446, 694; J-16, J-17)

33. During most of the 2005-2006 school year Student continued to exhibit inappropriate behavior, made inappropriate comments, was non-compliant, avoided academic work, and required prompting to remain on task. He also continued to have academic difficulties. (N.T. at 96-97, 153-156, 166-167, 205, 213 298, 382-390, 482-483; J-3)

34. By the end of the 2005-2006 school year Student's behaviors had improved at Private School, although he still continued to exhibit some inappropriate behaviors. Academically his progress was minimal. Best practice in the field of evaluation is to use standard scores to compare two different points in time. That practice allows direct comparison from year to year and was endorsed by Dr. K, the psychologist Student's parents' have chosen to evaluate Student numerous times. see J-27 at 24. The direct comparisons available from the Private School records show that between December 2004 and April 2006. Student's standard scores in story comprehension and reading comprehension both decreased by five points and that between April 2005 and April 2006 his standard score on basic math concepts decreased by 9 points, his standard score in math operations remained stable, and his standard score in math applications increased by three points. (N.T. at 67-68, 77-78, 190-192, 195, 234-238, 300, 305-306, 392-393; J-6, J-24)

35. In August 2006 Student was evaluated by Dr. R. In her evaluation Dr. R criticized the District's proposed program for three reasons: 1) The number of children (six) and adults (up to four) in the classroom would be difficult for Student to tolerate. 2) The program was designed for too high of functioning of autistic or Asperger syndrome children. And, 3) The program would not allow for enough interaction with typically developing peers, which Dr. R felt was needed in order for Student to learn appropriate language and social interactions. (N.T. at 118-119; J-26)

36. Another IEE was completed by Dr. K in October 2006. Among other assessments, Dr. K evaluated Student's academic achievement and compared that to her prior evaluations, concluding:

This examiner has been tracking [Student's] progress academically using the WIAT-II as an outcome measure and results indicate that, although he has made measurable progress with mathematics calculation, he continues to struggle with basic reading, reading comprehension, math reasoning, spelling, writing expression and listening comprehension. His strengths are most evident when he is verbally describing facts and details in areas of adaptive behavior and orthographic processing which have inhibited his ability to learn to read, write, spell and complete mathematics problem solving tasks. J-27 at 33

37. Dr. K concluded that Student required teaching:

Using evidence-based instructional practices and effective interventions that are applied with increasing amounts of intensity beyond which The Private School has been able to afford thus far. J-27 at 34

Dr. K also concluded that Student required better use of direct instruction and more academic engagement with special educators than he has received at Private School. She also concluded that the District's proposed IEP failed to meet Student's needs. (J-27)

38. In her report Dr. K also concluded that the District's proposed IEP failed to meet Student's needs. She opined that the program proposed by the District was "skimpy" and that the recommendations to use a visual, concrete approach in all subjects was not appropriate due to Student's visual-spatial processing problem. (J-27)

39. Dr. K did agree with the District's proposal to place Student in a full-time autistic support classroom where Applied Behavior Analysis (ABA) could be employed to improve Student's behavior and social skills. (J-27) She also agreed with the District's conclusion that Student required:

Specially-designed instruction in a highly-structured learning environment with a low student-to-teacher ratio: direct and explicit instruction for reading, math, social communication and self-regulation; and support for transition and sensory processing. J-27 at 34

40. Dr. K also noted Student's parents' concerns with the proposed placement in a classroom that may aggravate Student's visual-spatial processing deficits. To address that concern, Dr. K recommended that a vision specialist should be consulted regarding the physical characteristics of proposed classroom placement. Dr. K also recommended that a functional behavior assessment be completed and a positive behavior modification plan be implemented. (J-27)

## **Issues**

Must the Cumberland Valley School District pay for tuition and transportation so that Student may attend The Private School during the 2006-2007 school year?

## **Discussion**

As indicated above, Student's parents have challenged the District's proposed program and have sought reimbursement for and continued payment of tuition and transportation to allow their son to attend Private School. To determine whether or not the District must pay for tuition and transportation for Student to attend Private School this hearing officer must conduct a three step analysis, commonly referred to as the Burlington-Carter analysis. *Burlington Sch. Comm. v. Dept. of Educ.*, 471 U.S. 359 (1985); *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993), 114 S.Ct. 361 (1993) This hearing officer must first consider whether or not the program and placement offered by the District are appropriate. If they are not, then this hearing officer must consider whether or not the program at Private School is appropriate. Lastly, only if the District's program is not appropriate and the Private School program is appropriate, this hearing officer must move on to consider the equities in the matter and then determine whether or not tuition reimbursement is an equitable remedy.



Because Student's parents requested the present hearing, they carry the burden of proof in this matter. In *Schaffer v. Weast*, 126 S.Ct. 528 (2005) the Supreme Court held that the "burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief... the rule applies with equal effect to school districts: If they seek to challenge the IEP, they will in turn bear the burden of persuasion." at 537 In so doing the Court found no reason to depart from "the ordinary default rule that plaintiffs bear the risk of failing to prove their claims." at 534

That decision effectively settled a split in assigning the burden of proof present in the Circuit Courts. As noted in *M.S. v. Ramsey Bd. Of Educ*, 435 F.3d 384 (3d Cir. 2006) the Third Circuit Court had previously placed the burden of proof on the school district. However, in *M.S. v. Ramsey* the Third Circuit Court found *Schaffer* controlling and extended the reach of *Schaffer* writing "It would be unreasonable for us to limit that holding to a single aspect of an IEP, where the question framed by the Court, and the answer it provided, do not so constrict the reach of its decision." at 5

Shortly after the Third Circuit issued its decision in *M.S. v. Ramsey*, the Eastern District Court of Pennsylvania issued a decision in *Greenwood v. Wissahickon*, 2006 U.S. Dist. LEXIS 4274 (E.D. Pa. 2006) concluding that "the burden of persuasion at the administrative level in Pennsylvania is now on the party contesting the IEP." at 7

It should be noted that in their analyses the above referenced courts have limited themselves to the burden of persuasion and have not considered the other element of burden of proof, the burden of production. As noted by the Supreme Court, the burden of persuasion addresses "which party loses if the evidence is closely balanced." *Schaffer v. Weast* at 533-534

Because it is the parents who have challenged the appropriateness of the proposed program and placement, it is the parents who carry the burden of proof in this matter. In order to prevail, Student's parents must prove the following: 1) the proposed program is not appropriate, 2) the private school program at Private School is appropriate, and 3) the equities favor the parents and payment of tuition is an equitable remedy.

#### I. Is the program proposed by the Cumberland Valley School District appropriate?

The Individuals with Disabilities Education Improvement Act of 2004 (IDEA) 20 U.S.C. §1400 *et seq.*, is the Federal Statute designed to ensure that "all children with disabilities have available to them a free appropriate public education," (FAPE) §1400(d)(1)(A). Under the IDEA, school districts must create an "individualized education program" (IEP) for each child with a disability. §1414(d). An appropriate program is one that is provided at no cost to the parents, is provided under the authority of the District, is individualized to meet the educational needs of the student, is reasonably calculated to yield meaningful educational benefit, and conforms to applicable federal requirements. *Rowley v. Hendrick Hudson Board of Education*, 458 U.S. 176 (1982); 20 U.S.C. §1401(8). 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, 180-85 (3d 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." 853 F.2d at 182-184. see also *Board of Education of East Windsor Sch. Dst. V. Diamond*, 808 F.2d 847 (3d Cir. 1986); *J.C. v. Central*

*Regional Sch. Dst.*, 23 IDELR 1181 (3d Cir. 1996)

Student's parents have asserted that procedural violations during the reevaluation and IEP processes were significant and should result in the conclusion that the IEP is not appropriate. In particular, they have asserted that the use of a consultant hired by the District to develop the autistic-support program who also happens to be a certified special education teacher and a principal in the District who also happens to be a certified regular education teacher [Facts 18, 23] violates the required composition of the IEP team. 34 C.F.R. § 300.321(a)(2), 34 C.F.R. § 300.321(a)(3), 34 C.F.R. § 300.324(a)(3), and 34 C.F.R. § 300.324 (b)(3)

In the past, rulings by Appeals Panels in the Commonwealth have sometimes taken a strong stance on procedural errors, ruling that full compliance with all procedural requirements is mandatory. *In Re the Educational Assignment of W. L.*, Spec. Educ. Op. 655 Some courts have also found procedural violations to be enough to rule that an IEP was not appropriate. *Hall by Hall v. Vance Cty. Bd. of Educ.*, 774 F.2d 629 (1985) and *W.G. v. Board of Tr. of Target Range School District*, 789 F.Supp. 1070 (1991) However, more recently the requirement is that the procedural violation is only fatal if it prevented the child from receiving a FAPE because it impeded the child's right to FAPE, prevented the parents from participating in the process, or caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2) In the present matter it was a close call as to whether or not the alleged procedural violations rose to the level of a denial of FAPE. Of particular concern was the failure of the District to include a current special education or regular education teacher in either the reevaluation or the development of Student's IEP. However, the evidence was not convincing enough for me to conclude with any certainty that the failure to have those individuals present was a denial of FAPE. Because this was a close call and because Student's parents carried the burden of persuasion in this matter, I must conclude that the ER and IEP cannot be found inappropriate merely on procedural grounds.

Turning to the substantive components of the ER and IEP, I have limited my review of testimony and exhibits to testimony about events and materials produced prior to the May 10, 2006 reevaluation and IEP team meeting. Specifically, I have not considered exhibits J-24, J-25, J-26, J-27, or J-32 in my determination of the appropriateness of the ER and IEP because, having been produced after the IEP was developed, they were not available to the IEP team.

Because the reevaluation and ER are intended to inform the IEP team in its development of the IEP, I first looked at the ER. Although with just a cursory review the ER it may appear to be appropriate, it is lacking in several areas. To its credit the District did attempt to collect the information necessary to complete the reevaluation. District staff reviewed records and reports it had, visited Private School, observed Student at Private School, interviewed Student's parents and Private School staff, and had Student's parents and Private School staff complete evaluative checklists. [Fact 19] With all of that information, it is unfortunate that the ER does not appear to be individualized for Student. Specific sections of the ER are clearly boilerplate. For example, in the academic recommendations sections it states:

- Use of goal selection principles to develop individual program.
  - o Will the skill help the student in the current or future environments?
  - o Will the skill help the student access more reinforcement in natural settings?
  - o Is the skill age appropriate?

- o Is the skill socially valid?
- o Does the skill enhance special interests and talents of the student?
- o Will the skill assist the student in becoming a productive contributor to the community? [Fact 22]

Not only is that a very generic listing of principles that could guide goal development for almost any child, it is taken verbatim from the guiding principles contained in an interview form used by Ms. W when she interviewed Student's parents and Private School staff. [Fact 20] Because it was part of the form itself, not one of the answers given by the interviewees, and because it is so generic as to apply to almost any child, that statement is not specific to Student and should not be part of his ER.

Later in the academic recommendations section of the ER it recommends the use of ABA (i.e. Applied Behavior Analysis). [Fact 22] While ABA may be appropriate for Student, [Fact 39] in this context its inclusion appears to be more boilerplate. Later in that same section it states "The use of the principles of Applied Behavior Analysis." J-5 at 13 [Fact 22] What appears to have happened is the individual or individuals who actually wrote the ER kept putting in things that they thought might be good for any child with autism. Another example from the same section of the ER are the suggestions that are part of the use of ABA that task analysis and forward and backward chaining be used. [Fact 22] Again, just a few lines later there is the recommendation that "The use of task analysis, forward and backward chaining may be effective strategies." J-5 at 13 [Fact 22]

From the above examples, and the ER is replete with these and other indicators of boilerplate material, I must conclude that the reevaluation and subsequent ER are not appropriate because they are not individualized for Student. What is needed is a new reevaluation for Student

Because the reevaluation and ER provide the foundation for the development of the IEP, it is impossible for an IEP to be appropriate when the reevaluation and ER are not appropriate. In this case the IEP is not appropriate, in part, because it is replete with boilerplate, incorporating much of the language of the ER into the IEP, including the boilerplate discussed above (compare Fact 22 with Fact 24).

The IEP developed for Student included seven goals addressing reading and language skills, math, hand-writing, self-regulation, social skills, conversation skills, and emotions. [Fact 26] Some of those goals are unclear, another fails for its lack of specificity, and another is incomplete as presented in the IEP.

Goal four in the IEP, regarding self-regulation, references the use of engine levels. [Fact 28] After listening to witnesses in four hearing sessions and reading all 1004 pages of transcript, I still have no idea what is meant by the reference to engine levels in the IEP. Similarly, goal seven in the IEP, regarding emotional state, provides for the use of an emotional thermometer and emotional toolbox. [Fact 31] There was little if any mention of either an emotional thermometer or an emotional toolbox during the present hearing and I still have no idea what those terms are referring to. More importantly, it is not clear that either all the members of the IEP team or the teachers who would implement the IEP understand those terms. Frankly, both the reference to engine levels and the references to the emotional thermometer and toolbox appear to be more boilerplate, put down because they work with

some autistic children. They may, in fact, be appropriate for Student, but it is impossible to tell that from the ER and IEP that have been produced by the District.

Goal one in the IEP, regarding reading and language skills, provides no levels at which those skills will be attempted. [Fact 27] Without specific appropriate levels being included in this goal, it is impossible for this goal to be implemented. It is also impossible to conclude that it is appropriate.

The rubric referenced as being attached to the IEP in goal five was not part of the IEP when it was offered to Student's parents. [Fact 29] In addition, the social skills short term objectives for goal five in the IEP were not part of the IEP when it was offered to Student's parents. [Fact 30] Without a complete IEP Student's parents could not have understood what was being offered. With an incomplete IEP offered to the parents, the IEP must be found to be inappropriate.

Lastly, the district knew that Student had extensive behavioral, emotional, and academic difficulties in prior placements in both the District and at Private School. [Fact 10, 13, 33] The District also knew that Student required help with transitions. In fact, the District included the recommendations of advanced preparation for transitions and comprehensive planning for major transitions, including transitions from school to school in both the ER and IEP. [Facts 22, 24] Knowing that transitions were difficult for Student and that transition planning was necessary for him to successfully return to the District from Private School, the only mention of transition planning that the District included in the IEP was a transition note that stated that once Student's parents had visited the autistic support classroom in the District and "If [Student's parents] approve his placement a transition plan will be developed..." J-12 at 14 [Fact 25] As Student's parents' attorney noted, this is merely a promise of a transition plan, not an actual transition plan. I must agree. When a school district knows that a child requires a transition plan to return to that district from a private school placement and that school district does not include a transition plan in the IEP, the IEP is not appropriate. *In Re the Educational Assignment of S.K.*, Spec. Educ. Op. 1769 (2006)

Considering all of the above, it is my conclusion that the IEP developed on May 10, 2006 and offered to Student's parents was not appropriate.

In conclusion, neither the reevaluation, the ER, nor the subsequent IEP were appropriate. Because of that, I must conclude that the program proposed by the District and offered to Student's parents was not appropriate.

Having found that the District's program was not appropriate, I will next consider the appropriateness of the private school program at Private School.

## II. Is the program provided at The Private School appropriate?

In discussing the IEP I limited myself to consideration of evidence produced prior to the development of the IEP. Similarly, in considering the appropriateness of the Private School program, I have limited that consideration mostly to items produced prior to Student's parents filing for the present hearing and have excluded any consideration of the current school year. The one exception is the IEE completed by Dr. K. I have given great consideration to that IEE for the following reasons: 1) it is an IEE completed by a psychologist of the parents' choosing, 2) it was completed by someone who has

evaluated Student three other times, 3) it was completed within about two weeks of the filing for the present hearing, and 4) the evaluator is extremely familiar with Private School and its program.

Private School is a private school that has a primary mission of providing programs to students with learning disabilities. [Fact 12] Although Private School does have some students with other disabilities, including autism and Asperger syndrome, Student has not done well there. [Facts 13, 33] Near the end of the 2005-2006 school year Student showed some improvement and some learning, but his difficulties in both areas continued. [Fact 34] Comparing across the time that Student has been at Private School he has made minimal progress at best and has shown a decline in several areas. [Facts 34, 36]

While Private School is appropriate for many children, it is not appropriate for Student. Student requires better use of direct instruction, more academic engagement with special education educators, and more effective and intensive interventions than Private School can provide. [Fact 37] He requires a full-time emotional support class, [Fact 39] not a program pieced together in a school primarily providing for learning disabled students. Student also requires a program that will afford him the opportunity to interact with typically developing peers. [Fact 35] Something Private School cannot provide because all of its students have some identified disability. [Fact 12]

Considering all of the above, it is my conclusion that Private School has not and cannot provide an appropriate program for Student and must be found to be inappropriate.

### III. Remedy:

Having found that neither the program proposed by the District nor the program provided by Private School are appropriate, I need not consider the equities in this matter. What must be considered is how to correct the failure of the District to propose an appropriate program for Student and how to provide an appropriate program for Student in the future.

In the present matter, the District should have known that the program was not appropriate at the time that it was offered. Compensatory education is an appropriate remedy where a school district knows, or should know, that the proposed program is not appropriate. *Lester H. v. Gilhool*, 916 F.2d 865 (3rd Cir. 1990); *cert denied*, 111 S.Ct. 1317 (1991); *M.C. v. Central Regional School District*, 81 F.3d 389 (3rd Cir. 1996) The period of compensatory education is equal to the period of deprivation, excluding the time reasonably required for the school district to act accordingly. *id.*, see also *Ridgewood Board of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999) Because the District provided for Student's tuition and transportation for the entire 2005-2006 school year, in the present matter the period of deprivation is from the start of the 2006-2007 school year until the date on which an appropriate program is offered to Student

What is needed is for the IEP team to be convened to discuss appropriate options for compensatory education. Until the current award of compensatory education is fully provided to Student it will be necessary for District staff, with their educational expertise, to regularly meet with Student's parents to identify appropriate options for compensatory education. Informed by those discussions, Student's parents may then make the final determination regarding the exact nature and timing of the compensatory education. That compensatory education may take the form of any appropriate

developmental, remedial, or enriching educational service, product, or device that furthers the goals of Student's current or future IEPs and/or will otherwise assist him in addressing the effects of his disability. Any compensatory service must be provided in addition to services contained in Student's then-current IEP and may not be used to supplant such services. The timing of the compensatory education shall be at the parents' discretion; it may be provided as a supplement to the normal school day program, after school hours, on weekends, or during the summer.

There are financial limits on Student's parents' discretion in selecting appropriate developmental, remedial, or enriching educational services, products, or devices. The costs to the District of providing the compensatory education cannot exceed the full cost of the services that were denied. *In re The Educational Assignment of A. O.*, Spec. Educ. Opin. 1227 (2002) As defined in *A. O.*:

Full costs are the salaries and fringe benefits that would have been paid to the actual professionals who should have provided the District services and the actual costs for salaries, tuition and transportation for contracted services. This principle sets the maximum cost of all the hours or days of instruction of compensatory education awarded. at 8

Student's. parents may select some services that are more expensive and others that are less expensive, so long as the total cost for those services does not exceed the full cost for the award of compensatory education. As stated by the Appellate Panel in *A. O.*:

The parents may balance expensive and inexpensive instruction or services so that the average cost is below the maximum amount. The parents also may use fewer hours of expensive services so long as the maximum amount is not exceeded. The parents may not be required to make copayments or use personal insurance to pay for these services. at 9

In the present matter the total cost must be equivalent to the full costs to the District of providing an appropriate program from the start of the 2006-2007 school year until the date on which an appropriate program is offered to Student

In addition to meeting to discuss compensatory education, Student's parents and the District will have to work together to develop an appropriate program for Student. In order to do that, a new reevaluation is required. The focus of both the reevaluation and the subsequent IEP should first be on program, not on where that program will be implemented. The team should make use of all available information on Student, including input from Student's parents, input from District staff, input for the Private School staff, observations of Student, Student's academic records, and evaluations. The team must consider the evaluations of Dr. R and Dr. K. see Facts 35, 36, 37, 38, 39, 40 It is also strongly recommended that the IEP team that completes the reevaluation and develops the IEP include a regular education and a special education teacher who are currently serving in those capacities. Following the completion of the reevaluation, a new IEP must be developed for Student. The parties are instructed that only after the programmatic components of the IEP have been developed may they begin to consider a placement for Student. It may be that a placement outside of the District will be required, but, if that is the case, it has already been decided above that the placement should not be at Private School.

\* \* \*

In conclusion, after considering all of the evidence on the record, both the testimony of witnesses and all of the exhibits, I first concluded that the program proposed by the District was not appropriate. I then considered the program provided by Private School and the extent of Student's progress in that program, both behaviorally and academically, and concluded that the Private School program was also not appropriate. Because the District failed to propose an appropriate program for the current year the District must correct that wrong by providing compensatory education to Student. As the parties move forward they will need to work together to develop programs that are appropriate for Student. Those programs must be individualized to meet Student's needs.

Accordingly I make the following:

### **ORDER**

1. The Cumberland Valley School District is not required to pay for tuition and transportation so that Student may attend The Private School during the 2006-2007 school year.
2. The Cumberland Valley School District must provide compensatory education to Student equivalent to the full costs of providing an appropriate program to Student from the start of the 2006-2007 school year until the date on which an appropriate program is offered to Student. The process for deciding on the compensatory education and the specific nature of that compensatory education must be consistent with the guidelines provided in this decision.
3. Upon receipt of this decision, the Cumberland Valley School District must complete a reevaluation, prepare a new Individualized Education Program, and offer a Notice of Recommended Educational Placement. Those must be completed following the procedures and timelines required under the law.

*Gregory J. Smith*

Signature of Hearing Officer