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

Student's Name: D.E.

Date of Birth: xx/xx/xx
O.D.R. #5727/05-06

Dates of Hearing: September 27, 2005; September 28, 2005; November 18, 2005

Type of Hearing: Closed

Parties to the Hearing:

Parents	Represented by:	Date Final Transcript Received:
Parent	Yvonne Husic 2215 Forest Hills Drive Harrisburg, PA 17112	November 23, 2005
School District	**Represented by:**	**Date of Decision:**
Cumberland Valley S.D. 6746 Carlisle Pike Mechanicsburg, PA 17050	Gina DePietro 331 Butler Pike New Britain, PA 18901	December 30, 2005* **Hearing Officer:** Linda J. Stengle

* Decision delayed to allow for receipt of written closings and to research impact of *Schaffer. v. Weast.*

Background

The student's date of birth is xx/xx/xx. He resides within the geographical boundaries of the Cumberland Valley School District. He moved to the district in 2004 and attended there for the 2004-2005 school year. He is eligible for special education supports and services under IDEA.

Just prior to the last session of this case, the Supreme Court issued its ruling in *Schaffer v. Weast* (USSC, #04-698, 2005), which switched the burden of persuasion to the party requesting the hearing, a significant change in the way Third Circuit cases had been handled previously. The impact of *Schaffer v. Weast* on this case is described in the Discussion section below:

Findings of Fact

1. The student's date of birth is xx/xx/xx. He resides within the geographical boundaries of the Cumberland Valley School District, which is responsible for his education. (Stip. at N.T. 17-18)
2. He is eligible for special education services and supports. (Stip. at N.T. 18)
3. The student only attended school in the district for the 2004-2005 school year. Previously, he had been living in and attending school in another district. (N.T. 20)
4. The district convened a meeting with the parent in August 2004. It reviewed the previous school's IEP and an evaluation report. (SD 21)

Comparable Facilities

5. The student's part time learning support class was located in one of six trailers. Five of six trailers are regular education classrooms. (N.T. 25)
6. The Pennsylvania Department of Education reviewed the trailers to insure appropriateness. It determined that the trailer being used for the special education classroom was comparable to the other trailers being used for regular education students and that it was in the ebb and flow of regular education. (N.T. 25-26)

Free Appropriate Public Education

7. The team developed an IEP for the 2004-2005 school year, which was a modification of the IEP offered by the previous district. (SD 3; N.T. 21-23)
8. The mother informed the district that student had been placed in regular education social studies and science the previous school year. She understood that this placement would continue at [the District]. (N.T. 469-470, 472-474)
9. Also on August 27, 2004, the district issued a Notice of Recommended Placement regarding the student. It called for OT services to be delivered directly for 40 minutes per month. (S 3
10. The NOREP recommended placement in part time learning support. (SD 3)
11. The NOREP identified a need to gather additional information and screenings and stated

that the team would reconvene to develop a new annual IEP prior to 12/11/04. (SD 3)

12. The student informed the parent that he was not included for regular education. She called his teacher, who stated that he left the "trailer" several times a day. The student persisted that he was not being included with typical peers, and the parent called a second time. The teacher said she would "get back to' the parent and never did. (N.T. 476-477)

13. In September, the parent contacted the principal who said she herself questioned the placement. (N.T. 477)

14. On September 23, 2004, the teacher sent home a list of thirteen problematic behaviors that she observed in her class. (N.T. 481, P 2)

15. The parent called a meeting with the principal and the teacher on October 6, 2005, asked to see the placement, and complained about the teacher's instructional methods. (N.T. 482, P 2)

16. The district did not develop a new IEP prior to 12/11/04, due to administrative error. (N.T. 28-29)

17. Occupational therapy was not provided in accordance with the IEP. (N.T. 26)

18. The team determined that the student was owed four occupational therapy sessions, and those sessions were provided. (N.T. 28, SD 8)

19. On January 17, 2005, the team met to discuss inclusion in regular education social studies. The student was to start participating in regular education social studies on January 24, 2005. (SD 8; N.T. 32-33)

20. The team reconvened on February 16, 2005, and developed a new IEP for the student. (SD 9)

21. The new IEP noted that the student would not be included with typical children for English, math, reading, and science on a unit by unit basis. (SD 9)

22. The district's occupational therapist, when evaluating the student, compared his handwriting to that of other learning support students and not to that of typical eighth grade students. She did not think such a comparison to typical students was "pertinent." (N.T. 129)

23. She recommended that occupational therapy be discontinued for the student. (S 4)

24. Also on January 17, 2005, the parent obtained a private occupational therapy evaluation of the student. The evaluation recommended ongoing occupational therapy and noted significant issues with visual motor integration, visual motor control, and upper limb speed and dexterity. (S 4)

25. The 2/2005 IEP stated that a decision regarding occupational therapy was "on hold" until the next IEP meeting because the mother had presented a copy of the private OT evaluation and the OT for the district was not present at the meeting. (SD 9; N.T. 34)

26. Though no NOREP was provided to document the parent's consent, the district implemented the IEP. (N.T. 34)

27. In April 2005, the parent requested a comprehensive reevaluation "in all areas related to [the student's] suspected disabilities." At the same time, she requested an "Interim IEP meeting" until the results of the evaluation were obtained. (SD 10, SD 11; N.T. 35)

28. Though the parent clearly stated that she was requesting the evaluation, the district did not

begin to adhere to the timeline for completing the evaluation until the parent signed a district generated form for consent on April 26, 2005. The district told the parent that her letter did not constitute "informed consent". (N.T. 41, SD 10)

29. The team convened a meeting on April 26, 2005. Among the many issues discussed were accommodations and supports for writing and inclusion in regular education for science. The parent also expressed concern about transition planning. (SD 11; N.T. 35-36, 38-39)

30. A new IEP was issued which included participation in regular education science. (SD 13)

31. It also included thirty minutes of emotional support per week. (SD 13)

32. A NOREP was issued on May 26, 2005, which stated that the student had recently begun to participate in the less restrictive environment for social studies and science. (SDD 15)

33. The district issued its evaluation report on 6/1/05. It concluded that the student qualified as a student in the areas of reading comprehension, calculation, math reasoning, and written expression. (SD 16)

34. The district's occupational therapist concluded that he did not need occupational therapy. (SD 16)

35. The district invited the parent to an IEP meeting scheduled for June 8, 2005. (SD 17; N.T. 43)

36. The parent notified the district on June 7, 2005, that she would not be attending the IEP meeting because she disagreed with the evaluation results. (N.T. 43; SD 18)

37. The district convened the IEP meeting on June 8, 2005, without the participation of the parent (N.T. 43-44)

38. The district developed a draft IEP on June 8 and finalized it over the summer months, ultimately resulting in its offer of August 9, 2005. (SD 26)

39. The new IEP called for less time in regular education, increasing the student's participation in segregated settings to 61% or more of the school day. The district stated that it considered the rigors of the high school environment, the content modifications required in eighth grade, other external supports, and the amount of assistance provided by the parent at home. The team "really felt that he would be – his instructional level would be better addressed in the part time learning support class for all instructional content areas." (N.T. 44-45, SD 26)

40. The parent's privately retained psychologist reported that the student was making reasonable progress in the [Redacted] School District. (P 11)

41. The parent's privately retained psychologist reviewed the IEP offered for the 2005-2006 school year and agreed that direct instruction in reading, written expression, and math was certainly appropriate and that the goals and objectives contained within the IEP were "also generally appropriate." (P 11)

42. Occupational therapy should be added to the IEP, and it should be provided at the rate of 30 minutes per week via direct therapy. (S 4; N.T. 426)

43. School periods are approximately 40 minutes long. Science and social studies occur every day. (P 1)

Independent Evaluation

44. The same psychologist, working for two different districts, tested the student in 2004 for one district and again in 2005 for the [Redacted] School District. (SD 2, SD 18, N.T. 294)
45. In 2004, she was an intern and could not recall why no psychologist had signed that her results had been reviewed. (N.T. 300, SD 2)
46. There was a significant difference in cognitive ability scores identified in the winter of 2004 and those identified in May of 2005. The psychologist opined that the 2004 scores were an underestimate of the student's intelligence. (N.T. 294-295, SD 2, SD 16)
47. The previous evaluation report identified the student as having a secondary disability category of emotional disturbance, while the 2005 evaluation did not. (SD 2; SD 16)
48. The parent requested two independent evaluations on June 7, 2005, to be conducted by a psychologist and a speech therapist. (SD 18)
49. The district denied the request in writing on July 8, 2005. (N.T. 43; SD 24, SD 33)
50. At a resolution meeting in August, the parent only requested reimbursement for an independent educational evaluation conducted by Dr. K., a psychologist. (SD 33)
51. At the hearing, the parent stated that she required the independent evaluation because she did not trust the significantly different evaluation reports rendered by the same psychologist who had completed the most recent school evaluation. The parent stated that an IEE was the only way to determine if the student was being tested appropriately. (N.T. 545)
52. The private psychologist tested the student on August 24, 2005, and rendered her report later that fall. (P 11)
53. The private psychologist stated that she agreed with the district's evaluation that the student should be classified as learning disabled and not as emotionally disturbed, as listed in the 2004 Evaluation Report. (P 11, SD 2, SD 16)
54. The school's psychologist had reviewed the IEE and said that it "seems to be, you know, very reliable, very professional." (N.T. 324)

Tuition reimbursement

55. On August 4, 2005, the parent notified the school's attorney that the student would be attending the [Redacted] School, a private school for students with disabilities, for the 2005-2006 school year. The student was to start school on August 29, 2005. (SD 33)
56. The student's performance deteriorated over the course of his short enrollment at [Redacted] School. He had difficulties with peers. Eventually, the school discharged him over the objections of the parent. (N.T. 539-543)
57. The student's last day of school at [Redacted School] was November 3, 2005. (N.T. 543)

Extended School Year - 2005

58. In February 2005, the team decided the student was eligible for Extended School Year services for the summer of 2005. (SD 9; N.T. 36)
59. The district did not issue a NOREP for ESY in February 2005. (N.T. 34)
60. The team met on April 26, 2005, and discussed ESY services. The team determined the student was eligible for English, math, and written expression and that the student needed

one on one instruction. The amount of services was twelve hours total, twelve hours of twenty minutes of instruction for each of three subjects. (SD 11; N.T. 36)

61. A NOREP was issued for extended school year services on May 26, 2005. The parent agreed with the recommendation. (SD 15; N.T. 37)

62. On June 8, 2005, the parent notified the district that the student would not be participating in the ESY program because she felt the level of service was inadequate. (SD 20)

Issues

Did the district provide the student with FAPE for the 2004-2005 school year?

Subsumed within in this issue will be the consideration of the allegation of unnecessary segregation of the student (per S 25, p 2, Parent Amended Complaint item 18)

Is the student entitled to compensatory education for ESY for the summer of 2005?

Is the parent entitled to tuition and associated travel reimbursement for the student's placement at the [Redacted] School for the period from August 29, 2005 to November 3, 2005?
If so, should the district be required to pay the transportation provider directly for Student's transportation for the remainder of the year?

Is the parent entitled to reimbursement for an IEE performed by Dr. K.?

Credibility Assessments

I found Mr. T., Ms. W., Ms. G., Ms. S., and Ms. S. to be reasonably credible and forthcoming in their appearance at the hearing. I found Ms. W. to be highly credible. I found Parent to be highly credible. I found Ms. B. to be reasonably forth coming. I weighted the testimony of Ms. N., the private occupational therapist more heavily than the testimony of the district's occupational therapist, Ms. V., because of their relative familiarity with the student, their relative command of the facts, and the way they responded to questions at the hearing. For similar reasons, I reduced the weighting of the testimony of Ms. H., when facts she asserted conflicted with renditions offered by other participants.

Discussion

Burden of Proof

The parents, in this case, bear the burden of persuasion on most issues raised as they are the party that requested the hearing. *Schaffer* was silent on the issue of burden of production, which is a moot subject in this case.

In Pennsylvania, all special education due process proceedings are conducted in accordance with the due process hearing requirements identified in IDEA, so this case, which

encompasses rulings under Section 504 of the Rehabilitation Act of 1973 and the IDEA, is affected by *Schaffer*. Arguably, placing the burden of persuasion on the parent has always been the intention in Pennsylvania. Explicit language in the PARC Consent Decree (1973) states that districts could very easily fulfill their burdens of production by presenting their reports (IEPs, ERs), and then outlines several parent-directed "rights," or opportunities, for the presentation of evidence.

> "Introduction by the school district or intermediate unit of the official report recommending a change in educational assignment, provided a copy of such report was given to the parent at the time notice was given, shall discharge its burden of going forward with the evidence, thereby requiring the parent to introduce evidence (as contemplated in paragraphs f, r, s, and t herein) in support of his contention." (id at 22)

It should also be noted that while the Decree originally conceived that decisions were to be based on substantial evidence, IDEA has expressly lowered the standard to a "preponderance" of the evidence. This record was reviewed, and the decision written in accordance with *Schaffer* and the explicit review requirements of IDEA, as required by Chapter 14 of 22 PA Code. The parents, for the most part, bore the burden of persuading me that the district denied the student a free appropriate public education.

An exception to the above posture is when IDEA's mainstreaming requirement is specifically at issue. Very recently, PDE entered into a settlement agreement regarding implementation of least restrictive environment obligations under IDEA, Section 504 of the Rehabilitation Act of 1973, and Title II of the Americans with Disabilities Act. In *Gaskin v. Pennsylvania*, No. Civ. A. 94-4048, (E.D. Pa. September 16, 2005), PDE agreed to require school districts to adhere strictly to the IDEA and the case law "including *Oberti v. Board of Education*, 995 F.2d 1204, (3d Cir. 1993) when making placement decisions." In *Oberti*, the Court decided that "it is appropriate to place the burden of proving compliance with IDEA on the school. Indeed, the Act's strong presumption in favor of mainstreaming would be turned on its head if parents had to prove that their child was worthy of being included, rather than the school district having to justify a decision to exclude the child from the regular classroom." The *Oberti* Court held that the district court had correctly placed the burden of proof on the school district to prove that a proposed segregated placement was in compliance with IDEA. When the issue of placement in the least restrictive environment arose in this case, the burden was shifted to the party proposing the more restrictive placement, in accordance with *Gaskin* and the Pennsylvania Department of Education's obligation to adhere to *Oberti*.

Compensatory Education

Section 504

As explicitly asserted by the parent, students who are eligible under the IDEA are also protected handicapped students under Section 504 of the Rehabilitation Act of 1973. *Chad C. v. the West Chester Area School District* where the Court required a Hearing Officer to render two decisions in a case, one under IDEA and one under Section 504, a clear indication that such orders and considerations are appropriate and at times, necessary. In further support of this concept, I invite attention to *LC vs. Olmstead* (Eleventh Circuit, Docket No. 1:95-CV-1210-MHS), a case which discusses community programming and institutionalization of people with disabilities, affirmed by the Supreme Court in 2000 and offers further insight into Section 504 and the ADA. *Olmstead* requires that states apply Section 504 in all cases. Hearing Officers cannot simply ignore 504. To do so would defy the clear directive of *Olmstead*.
34 C.F.R. 104 is the section of the Rehabilitation Act addresses education.

Reg. Sec. 104.33 which identifies a public school's obligations to provide a free appropriate public education states:

(a) General. A recipient that operates a public elementary or secondary education program shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.

(b) Appropriate education.

(1) For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that
(i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and

(c) Free education.

(1) General. For the purpose of this section, the provision of a free education is the provision of educational and related services without cost to the handicapped person or to his or her parents or guardian, except for those fees that are imposed on non-handicapped persons or their parents or guardian. It may consist either of the provision of free services or, if a recipient places a handicapped person in or refers such person to a program not operated by the recipient as its means of carrying out the requirements of this subpart, of payment for the costs of the program. Funds available from any public or private agency may be used to meet the requirements of this subpart. Nothing in this section shall be construed to relieve an insurer or similar third party from an otherwise valid obligation to provide or pay for services provided to a handicapped person.

By authority of the Rehabilitation Act, the Office of Civil Rights has awarded compensatory education to a student with a disability who had been denied appropriate education services. (*Chicago Board of Education*, EHLR 257:526, OCR 1984).

Fundamental Concepts

The Third Circuit first awarded compensatory education in *Lester H. v. Gilhool* [916 F.2d 865, 872, (3rd Cir. 1990)] reasoning that compensatory education required school districts to belatedly pay expenses that they should have paid all along. *M.C. v. Central Regional School District*, 23 IDELR 1181 (3rd Cir. 1996), further clarified that a grant of compensatory education did not require a showing of bad faith or gross violations of IDEA on the part of the district. This case indicated that a child is entitled to compensatory education if a district knew or should have known that a child had an inappropriate IEP or was not receiving more than a de minimis educational benefit and did not correct the situation. The period for which compensatory education can be granted is equal to the period of deprivation minus time reasonably required to rectify the problem.

Denial of an appropriate education is specifically differentiated from the denial of an appropriate IEP. The denial of an appropriate education results in an award of compensatory education. The denial of an appropriate IEP may or may not, though the two are, of course, very closely related. To determine whether or not an appropriate education has been provided, one must determine whether the program has provided the student with educational benefit.

Reasonable Progress

In this case, the parent's unilaterally selected private psychologist found that the student made reasonable progress while at [the District]. Moreover, she stated that much of the IEP offered for the 2005-2006 school year was appropriate. (FF 40, 41) The preponderance of the evidence clearly supports the conclusion that the student made progress during 2004-2005 and that the goals and objectives of the 2005-2006 IEP were similarly the result of reasonable calculation to afford the student with educational progress for the upcoming school year.

Comparable Facilities

The parent asserted that the district inappropriately conducted classes for the student in inadequate facilities and unnecessarily segregated him. The latter will be dealt with in the section regarding least restrictive environment. The record shows that the trailer used by the district is a "comparable facility" as defined by the Office for Civil Rights. A similar situation was reviewed by OCR in Red Oak (1A) Community School District, IDELR 224 (OCR 1991) OCR concluded that a trailer for special education students was a comparable facility to one used for regular education students on the same school property. FF 5 and FF 6 show that regular education students and special education students both used the trailers in this district. The special education trailer was a comparable trailer and was placed in the ebb and flow of regular education.

Unnecessary Segregation

The parent explicitly asserted that the student was unnecessarily segregated away from typical peers in the 2004-2005 school year. She asserts dual claims under IDEA and Section 504. The remedy for unnecessary segregation is compensatory education, as demonstrated by ample case law and Appeals Panel Opinions.

Cypress-Fairbanks Independent School District v. Michael F., 26 IDELR 303, 118 F.3d 245 (5th Cir. 1997) established a four part test for determining whether or not educational benefit has been provided. One of those four prongs asks whether or not the program was administered in the least restrictive environment.

If the district fails to offer the student program and placement which occurs in the least restrictive environment, it has failed to offer FAPE. The two concepts (LRE and FAPE) are inextricably intertwined. Children who are not provided with educational services in the LRE appropriate to their needs are not provided FAPE. *Millersburg Area School District v. Lynda T.*, 707 A.2d 572 (1998).

Daniel R.R. v. State Board of Education is one of the leading cases opening the door to increased inclusion of children with disabilities in regular education classes. The U.S. Court of Appeals for the Fifth Circuit noted that Congress created a strong preference in favor of "mainstreaming," educating the student in the regular education classroom with supports. The case stated that in determining whether it is appropriate to place a student with disabilities in regular education, the student need not be expected to learn at the same rate as the other students in the class. … Also, in looking at whether it is "appropriate" for the child to be in regular education, in other words, whether the student can benefit educationally from regular class placement, the district must consider the broader educational benefit of contact with non-disabled students, such as opportunities for modeling appropriate behavior and socialization…Finally, the court emphasized that if full-time placement in regular education

cannot be achieved satisfactorily, the district must ensure that the child is educated with non-disabled students to the maximum extent appropriate during the school day.

The Ninth Circuit, in *Sacramento City School Dist. v. Rachel H.*, determined that the appropriate placement for a child with an IQ of 44 was full-time regular education with some supplementary aids and services. The court found that the academic and non-academic benefits weighed in favor of placing the student in full-time regular education classes. The court noted that "all of her IEP goals could be implemented in a regular education classroom with some modification to the curriculum and with the assistance of a part time aide."

The expectation of least restrictive environment is so rigorous that the courts have held, for example, that a school district is prohibited from placing a child with disabilities outside of a regular classroom if educating the child in the regular classroom with supplementary aids and support services can be achieved satisfactorily. *Oberti* instructs that factors to consider in determining whether this can occur are as follows:

A. Steps to be 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 the 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 the 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. [*Oberti v. Board of Education, 995 F.2d 1204 (3rd Cir. 1993) 19 IDELR 908*] By inference, it is concluded that the burden for proving that a more restrictive environment is necessary falls on the party which is proposing the more restrictive placement. As mentioned previously, the administrative due process hearing system is now obligated by the *Gaskin* Settlement Agreement to require schools to adhere to the *Oberti* decision.

A more recent decision, *Girty v. School District of Valley Grove*, 163 F.Supp.2d 257 (W.D. Pa. 2001), builds upon the *Oberti* test for determining when a child should be placed within a more restrictive environment. It states, “The IDEA does not require disabled children to receive the same educational experience as nondisabled children, and recognized that disabled children may benefit from regular education differently than nondisabled children. Stated differently, the relevant focus is whether [the student] can progress on his IEP goals in a regular education classroom with supplementary aids and services, not whether he can progress at a level near to that of his non-disabled peers.”

Appeal Panel Opinion Number #1012 sagaciously determined that a hearing officer was "clearly correct in finding the placement issue inextricably intertwined with that of compensatory education." Acknowledging a close call on burden of proof, the panel found that the District did not meet its burden of proving that it sufficiently used supplementary aids and services in meeting the IDEA's presumption for the least restrictive environment.

Appeals Panel Opinion Number #1102 affirmed a Hearing Officer's decision to award compensatory education largely because of a failure to provide services in the least restrictive environment. The forward thinking Opinion found that the student in that case was included with peers to the mimimal extent possible and that compensatory education was an appropriate remedy for unnecessary segregation. The Panel noted unnecessary segregation as the primary reason for an award for the fourth grade year for the student and cites an abundance of case law and flawless reasoning to support its ruling.

The parties are widely discrepant on their views of the ambiguously worded NOREP which solicited consent from the parent for the student's placement for the start of the 2004-2005 school year. (FF 10) I found the parent to be more credible for a whole host of reasons on this point. The district did not heed her notification that the student was included to a greater extent during the previous school year. (FF 8) Even if it could possibly be argued that the parent did not notify the district on August 27, 2004, about the inclusion of the student in regular social studies and science, the district still failed to conduct its own review of the placement and assumed that the student required a higher level of segregation than necessary. The district was required to ensure that services and supports were rendered to this student in the least restrictive environment, and it did not. Using the district's own terminology, the placement in social studies and science was "less restrictive" but did not occur until late January and May respectively. (FF 19, 30)

The process for developing the 2005-2006 school year was marginally better, likely due to the parent's persistent complaints during the previous school year. The district here did conduct, without the parent, a discussion of the student's participation in regular education. (FF 39) Unfortunately, it did not properly consider important aspects of the student's performance before unilaterally deciding to segregate him even further. Part time learning support is a designation which states that the student may be excluded from twenty to sixty percent of the school day. The process in this case suggests that part time learning support in this district is not really an individually determined range of time. The process in this case suggests, instead, that part time learning support is a "one size fits all" predetermined schedule with regard to inclusion and exclusion. Rather than determining whether or not the student could make progress on his IEP goals, the district considered such things as the "rigors of the high school environment." It did not present evidence that it considered a full range of supplementary aids and services, for example, there was no mention of whether or not co teaching, a service explicitly identified in *Girty* would have adequately supported this student in the regular education environment. It also fallaciously used "content modifications" as a reason to segregate the student. There was no

assertion or even awareness that the student's modifications could have consisted of his IEP goals and that he was not required to meet the obligations of regular education students. The district has the burden of proof in matters of placement in the least restrictive environment and utterly failed to meet its burden here.

The placement for the student was unnecessarily restrictive in that it inappropriately segregated him away from typical students for social studies and science for much of the school year. The placement suggested in the 2005-2006 IEP is similarly inappropriate because it is unnecessarily restrictive. The district knew about the inappropriate placement on August 27, 2004, when it was notified by the parent of the less restrictive placement which occurred the previous school year. (FF 8)

Extended School Year

The parent did not meet the burden of persuasion that the proposal by the district for Extended School Year was inadequate. Other than her own unsupported impressions, no evidence was provided to refute the appropriateness of the district's proposal or to even explain her own approval of the proposal earlier in the school year. (FF 61) Based on a preponderance of the evidence, I find the district's proposal is appropriate.

The student is entitled to compensatory education because the district unnecessarily segregated him for social studies and science during the 2004-2005 school year.

Calculation and Form of Compensatory Education

The student is entitled to receive a partial award for each school day between the start of school in August 2004 through the date of the NOREP changing the science placement on May 26, 2005. Science and social studies occurred daily for 40 minutes each. (FF 43) The student is awarded 80 minutes per school day up to January 24, 2005, the best estimate of the date on which he began participating in regular education social studies (FF 19), and an additional 40 minutes per school day for the period from February 17, 2005, to May 26, 2005, to remedy the unnecessary segregation of the student from science class. (FF 30)

The district knew or should have known that the student needed occupational therapy when it canceled the services in February 2005. The district's occupational therapist did not assess the student's needs properly or by the appropriate criteria. (FF 22) The district had access to a private, more superior, evaluation on the subject but chose to follow the recommendations of its own therapist instead. The student is awarded 30 minutes per week for the failure to provide occupational therapy for the period from February 2005 for each week of school through the end of the school year in June 2005. (FF 42)

No additional amount is awarded for extended school year programming due to the finding that the offer by the district is appropriate. The parent may decide how the hours should

be spent, as long as they take the form of any appropriate developmental, remedial, or enriching instruction that furthers the goals of the student's pendent or future IEPs. Such hours must be in addition to the student's then current IEP and may not be used to supplant such services. These services may occur after school hours, on weekends, and during the summer months, when convenient for the parent and the student. Reimbursement for the services shall be at the rate that the parent is obligated to pay, not a district determined rate. This provision shall remain in effect until the student's 21st birthday, but it is urged that the parent attempt to provide this student with compensatory services and supports as soon as possible. The hours are not to be used for college tuition, unless the parties both agree. Should the parties agree, the district may set up a fund with a set dollar amount that the parent may draw upon for educational services and equipment.

Tuition Reimbursement

There are three prongs to the decision to award reimbursement for a unilateral placement of a student at a private school. First, one must determine whether or not the district offered the student a free appropriate public education. Second, the parents, if the district does not prevail on the first prong, must show that the private school selected is appropriate for the student, and third, the Hearing Officer must weigh the equities in the case. [*Burlington School Committee v. Massachusetts Department of Education*, 1984-85 EHLR 556:389 (1985); *Florence County School District 4 v. Shannon Carter*, 510 U.S. 7 126 L.Ed.2d 284, 114 S.Ct. 361 (1993)]

Cleveland Heights-University Heights City School District v. Boss, [144 F.3d 391, 399-400 (6th Cir. 1998)], rejected what was essentially an either/or dilemma posed by the district to the parents in that particular request for tuition reimbursement. Of relevance to the discussion here, the Court was operating under the assumption that the *only* placement more suitable to the child's needs was the segregated private school:

> From these cases it is clear that the IDEA was intended to provide both a free and appropriate education for disabled children and that the Act should not be read to provide one of these benefits at the expense of the other See Burlington, 471 U.S. at 372. This is exactly what the District is asking us to do in this case. The District would have us read the IDEA to say, in effect: "If we fail to provide a disabled child with an appropriate education, the parents must pay for a private education, or let their child languish in our institution *if the only placement more suitable to her needs and more closely approximating the ideal envisioned by the IDEA* [emphasis added] than what we offer is a specialized private school that admits only learning disabled students.

Application

The district's offer of FAPE was inappropriate because it proposed an unnecessarily

restrictive setting for this student. The parent prevails on the first prong of the three prong test for tuition reimbursement, but fails to pass the second prong. Similar to the determination that the district's proposal is inappropriate, the parent failed to meet her burden that the private school is appropriate. The parent proposes an even more restrictive setting than what the district proposed and asserts that it is appropriate for the student. To obligate the district to pay for tuition in this situation would simply be unfair.

The parent's presentation on this subject lacks cogency. It is illogical to ask that the district's proposal be struck down, in part, because of unnecessary segregation and then to claim that a highly restrictive setting like the [Redacted] School is appropriate for reimbursement. No persuasive evidence was provided that the [Redacted] School is the only possible placement for this student. The parent's own expert points out in her report that the student can and did make reasonable progress in the much more inclusive environment of the public school. The district's unnecessarily restrictive proposal is better than this highly restrictive alternative offered by the parent. In sum, if the parent passes the first prong of the test for tuition reimbursement, then the parent's claim must fail on the second prong, for the same reasons the district's proposal is considered inappropriate. If a placement is unnecessarily restrictive, it simply cannot be found to be appropriate.

There are other reasons to find the [Redacted] School inappropriate. The student was unilaterally dis-enrolled under questionable circumstances. (FF 56) The school was always cautious in its acceptance of the student; a look at early admission documents shows that it prefaced assertions that it would be able to serve the student with qualifiers. The student, after initial excitement, deteriorated quickly in the program. Adjustments were made to his program, which were ultimately ineffective. The school itself said that it could not serve the student in early November.

The parent is denied tuition reimbursement.

Independent Educational Evaluation

Schaffer v. Weast strikes down the oft cited considerations in IEE reimbursement cases. Earlier this year, the USSC stated:

> They [parents] also have the right to an "independent educational evaluation of the[ir] child." *Ibid*. The regulations clarify this entitlement by providing that 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." 34 CFR §300.502(b)(1) (2005). IDEA thus ensures parents access to an expert who can evaluate all the materials that the school must make available, and who can give an independent opinion. They are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition.

Contrary to much of the case law in the Third Circuit, the USSC, with its new interpretation that the burden of persuasion falls on the party requesting the hearing, states that parents have a right to an independent educational evaluation, and moreover, that such is undeniably linked to the parent's ability to have a reasonable opportunity to challenge the school and exercise his or her rights to due process. Condensing this portion of *Schaffer* results in a clear obligation to grant requests for independent educational evaluations. Denying reimbursement for an Independent Educational Evaluation would equal a denial of the parent's due process rights.

Even absent this stunning, and arguably internally inconsistent, aspect of *Schaffer*, the IEE in this case was essential to the due process hearing and greatly informed the process of determining whether or not this student was provided with FAPE. The discrepancy in the 2004 and the 2005 evaluations is significant and worrisome, particularly when one considers that the same evaluator performed both. (FF44, 46, 47) The parent was right to be concerned, and she was right to seek a different evaluator to address the discrepancy. (FF 51) The district benefited greatly by the involvement of the independent evaluator because the report was highly weighted in the above considerations.

The parent, therefore, is entitled to reimbursement for the Independent Educational Evaluation conducted by Dr. K.

Order

Hereby:

1. Student is entitled to compensatory education for the district's failure to provide a Free Appropriate Public Education in accordance with IDEA.
2. Student is entitled to compensatory education for the district's failure to provide a Free Appropriate Public Education in accordance with the Rehabilitation Act of 1973.
3. The [Redacted] School District is ordered to provide Student with compensatory education in the form and amounts above.
4. The [Redacted] School District is ordered to convene the IEP team and develop an appropriate IEP for the student within two weeks of receiving this Order. Specifically, the district will consider the full range of supplementary aids and services to support the student in an appropriate placement and add occupational therapy as a related service.
5. The [Redacted] School District is not obligated to reimburse the parents for any expenses associated with the student's participation at the [Redacted] School.
6. The [Redacted] School District is ordered to reimburse the parent for the

cost of the Independent Educational Evaluation issued by Dr. K.

December 30, 2005
Date

Linda J. Stengle
Hearing Officer