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## PENNSYLVANIA

# SPECIAL EDUCATION HEARING OFFICER

### DECISION DUE PROCESS HEARING

Name of Child: D.H.  
ODR #5871/05-06 KE

Date of Birth: xx/xx/xx

Dates of Hearing:  
December 1, 2005  
January 13, 2006  
January 30, 2006  
March 14, 2006

### CLOSED HEARING

Parties to the Hearing:

Parent(s)

Director of Special Education  
Pennsbury School District  
134 Yardley Avenue, PO Box 338  
Fallsington, Pennsylvania 19058

Last Transcript Received:

Record Closed

Date of Decision:

Hearing Officer:

Representative:

Ilene Young, Esquire  
Law Office of Ilene Young, Esquire  
50 E. Court Street, Main Floor  
Doylestown, Pennsylvania 18901

Claudia Huot, Esquire  
Wisler, Pearlstine & Talone  
484 Norristown Road, Suite 100  
Blue Bell, Pennsylvania 19422

March 20, 2006

April 3, 2006

April 19, 2006\*

Linda M. Valentini, Psy.D.

\*The hearing officer requested an extra day due to the Good Friday and Easter holidays.

## Background

Student is a [teenaged] student who is eligible for special education and classified as having an autistic disorder. He also has been found to have an attention deficit hyperactivity disorder and a disorder of written expression. Student resides with his parents, (hereinafter Parents) within the Pennsbury School District (hereinafter District). From the beginning of the 2000-2001 school year until the end of the 2004-2005 school year he had been educated in autistic support classes operated by the [redacted] Intermediate Unit (hereinafter IU) under contract with the District. For the current 2005-2006 school year the Parents have unilaterally placed Student in [redacted], a private school.

The Parents assert that because of procedural and substantive violations of the IDEA Student was not provided a free appropriate public education (FAPE) in the least restrictive environment (LRE) for the 2003-2004 and the 2004-2005 school years, and seek compensatory education as a remedy for this deprivation. The Parents also assert that the District failed to offer Student an appropriate educational placement for the 2005-2006 school year, and that therefore they are entitled to reimbursement for tuition they paid to [the private school].

The District maintains that it offered Student FAPE in the LRE for the two school years in question; it does not owe Student compensatory education, and if compensatory education is owed it is only for one year under Montour. The District also maintains that it did offer an appropriate placement for Student for the 2005-2006 school year, that it is not required to reimburse the Parents for Student's tuition to [the private school], that [the private school] is not an appropriate placement for Student and that equitable considerations favor the District.

Prior to convening the hearing the parties and the hearing officer conferred and the hearing officer established 1) that the IDEIA allows Parents a two-year window for compensatory education, and that the IDEIA effectively trumps Montour in cases filed after July 1, 2005<sup>1</sup>; and 2) although Schaffer v. Weast speaks only to the burden of persuasion, the burden of production also lies with plaintiff parents, as fairness to the defendant school districts dictates that evidence presented against them be put forth prior to their mounting a defense.

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<sup>1</sup> *“Rather and fortunately, Congress specifically adopted a statute of limitations for both the hearing officer and judicial stages in its 2004 amendments to the IDEA, effective 7/1/05; for the hearing officer stage, as we have already applied to cases filed after 7/1/05, the period is two years”*. Special Educ. Opinion No. 1680 (2005); *“... as of its effective date of 7/1/05, this new statutory provision effectively preempted Montour”*. Spec. Educ. Opinion No. 1696 (2006).

### Issues

1. Did the District fail to provide Student with a free appropriate public education in the least restrictive environment for the 2003-2004 and/or the 2004-2005 school years?
2. If the District failed to provide Student with a free appropriate public education in the least restrictive environment for the 2003-2004 and/or the 2004-2005 school years is he entitled to compensatory education, and in what amount?
3. Did the District fail to offer or propose an appropriate program and placement for Student for the 2005-2006 school year?
4. If the District failed to offer or propose an appropriate program and placement for Student for the 2005-2006 school year, was the placement unilaterally chosen by the Parents appropriate?
5. If the District failed to offer or propose Student an appropriate program and placement for the 2005-2006 school year, and if the placement unilaterally chosen by the Parents was appropriate, are there any equitable considerations that would reduce or eliminate the District's responsibility for tuition reimbursement?

### Findings of Fact

#### Background

1. Student is a [teenaged] eligible student living with his parents in the District. (NT 42)
2. Student has been classified as a student with Asperger's Syndrome<sup>2</sup> and also has been diagnosed as having an attention deficit hyperactivity disorder and a disorder of written expression. (NT 44, P-1, P-8)
3. According to the Wechsler Intelligence Scale for Children - Fourth Edition (WISC-IV) administered in March 2005 Student functions in the Average Range of cognitive functioning overall (Full Scale IQ 102) with variability in the WISC-IV Indices: Verbal Comprehension 106 (Average Range), Perceptual Reasoning 115 (High Average Range), Working Memory 88 (Low Average Range) and Processing Speed 85 (Low Average Range). (P-1)

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<sup>2</sup> An Autistic Spectrum Disorder. See the Diagnostic and Statistical Manual of Psychiatric Disorders Fourth Edition (DSM-IV); See also *Educating Children with Autism*, OSEP's Research to Practice Division, National Academy Press, 2001: "Children with any autistic spectrum disorder, regardless of their level of severity of function, should be eligible for special educational services in the category of autistic spectrum disorders" [as opposed to other terminology used by school systems, such as emotionally disturbed, neurologically impaired, etc.]

4. In first grade, Student attended the District's Elementary School and received learning support services for language arts and mathematics and also received speech/language services. (NT 47-48, 147; P-5).
5. From the beginning of the 2000-2001 school year until the end of the 2004-2005 school year Student was educated in autistic support classes operated by the [redacted] IU under contract with the District. (NT 148, 186, 367)
6. In second grade, Student was placed outside the District in an autistic support program operated by the IU located at School in [another] School District. He was placed with other children diagnosed with Asperger's Syndrome or high functioning PDD NOS. (NT 359-60, 367-68).
7. For the 2001-02 school year, Student was again placed in an autistic support classroom in the [other] School District, but this time his classroom was located at another elementary school, his third elementary school in as many years. (N.T. 368; SD-1).
8. During the 2001-2002 school year Student was included in regular education science and social studies and in specials. (NT 198)
9. During the 2002-2003 school year Student was included in regular education science and social studies and in specials. (NT 199)
10. Student participated in [redacted] classes in the community and also participated in youth activities [redacted]. His mother discussed the family's methods of addressing Student's social skills development with his teachers during the 2003-2004 and the 2004-2005 school years. (NT 65-66)
11. In summer 2003 the Parents obtained private Wilson reading tutoring for Student and the tutoring continued through the 2003-2004 school year, the summer of 2004 and the 2004-2005 school year. Frequency ranged from two to three times a week in the summers to one to two times a week during the school years. Currently it continues about once a month. (NT 195-196)

#### 2003-2004 School Year – Provision of FAPE

12. No regular education teacher was present for or participated in Student's IEP meeting for the 2003-2004 school year.<sup>3</sup> (S-2, S-9, P-7)
13. Prior to the 2003-2004 school year, Student had just completed third grade. He was reading at a 2.7 grade level on word identification, at the 4.4 grade level on word attack, at the 4.6 grade level on word comprehension, and at the 4.7 grade

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<sup>3</sup> The sign-in sheets for Student's IEP meetings of 6/27/00, 10-2-00, 9-26-01, 9-24-03, 9-20-04 and 8-23-05 do not have signatures indicating the attendance/participation of a regular education teacher. The IEP sign-in sheet of 9-27-02 has the signature of a regular education teacher. (P-7, S-30)

- level on passage comprehension. The special education teacher spoke to the previous special education teacher and learned that Student had reading problems in the areas of word recognition and phonics. (NT 653)
14. In drafting the IEP for 2003-2004 the special education teacher did not include a specific structured reading program, despite Student's needs and despite this teacher's having been trained in the Wilson Reading Program. (NT 461; S-2)
  15. The special education teacher did start using some Wilson techniques for spelling and word recognition with Student to assist in his reading instruction once she observed him struggling with a Harcourt Trophy Series 3.2 level book<sup>4</sup>. She used some of the Wilson methods in her class on a day-to-day basis. (NT 195-196, 460-461, 467-469, 481)
  16. During the 2003-04 school year, Student completed the second half of the third grade reading book such that he started the following year at the beginning fourth grade reading book having made six months' progress in reading over the 2003-2004 school year<sup>5</sup>. (NT 522-24).
  17. Regarding written expression, the 2003-2004 IEP carries an annual goal that, "Student will increase his reading and language arts skills" with the following short-term objectives: Student will improve written expression (expected level 3 out of 4 as evaluated by the Rubric), Student will complete weekly book reports (same level and criterion) and Student will complete daily journal activities (Same level and criterion). (S-2)
  18. Regarding social skills, the 2003-2004 IEP carries an annual goal of "Student will increase appropriate social skills in all school settings" with the following objectives: Student will increase interactive skills with peers (expected level 80% assessed by charting), Student will increase interactive conversation skills (same level same criterion), Student will increase appropriate play skills (same level same criterion). (S-2)
  19. Student's 2003-2004 IEP also carries speech/language goals and objectives. Two of the objectives toward improvement in social/pragmatic language relate to the previous social skills goal and are: identify and

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<sup>4</sup> Given his ending third grade with a 2.7 reading level it is unclear how or when the use of a 3.2 level book occurred.

<sup>5</sup> The record cannot reliably yield a more precise statement regarding progress. The District used the Woodcock Reading Mastery Revised and the Key Math in the 2002-2003 school year and the new version of the KTEA (second edition) in the 2003-2004 school year. (NT 519-520) Student's scores were lower on the second administration, but it is impossible to deduce from the data in the record whether this was a function of the change in test instruments or a deficit in progress. This hearing officer, a clinical and school psychologist, affirms from her own professional experience that when a test yielding cognitive or achievement scores is updated, test subjects generally fare less well with the new edition than with older editions of the same test and older comparable tests.

- eliminate off the topic comments/questions during a conversation or activity and maintain a conversation for at least four exchanges. Both these objectives are to be accomplished at the 80% level as assessed by data collecting and charting by the speech/language therapist. (S-2)
20. The 2003-2004 IEP does not contain any specially designed instruction. (S-2)
  21. During the 2003-2004 school year, Student was placed in an autistic support class with other students who were all 5<sup>th</sup> graders<sup>6</sup>. At the September 2003 IEP meeting it was explained to the Parents that, as there was only one aide to accompany the class to mainstream classes, he went to 5<sup>th</sup> grade mainstream social studies and science with the rest of his autistic support class instead of going to 4<sup>th</sup> grade mainstream classes. (NT 71-72, 78)
  22. The Parents did not ask for any alternative mainstreaming plan but also were not made aware of an alternative. (NT 85)
  23. At no time did anyone from the District or the IU suggest to the Parents that Student could be mainstreamed at his 4<sup>th</sup> grade level. (NT 87)
  24. When he was mainstreamed with the 5<sup>th</sup> graders all the autistic support students sat in a group in one section of the regular education classroom and were assisted by the aide. (NT 80)
  25. Student could not read the science textbook, and his Parents did a considerable amount of work at home helping him with his science (constellations) and his social studies (continents) worksheets. (NT 82, 86)
  26. The special education teacher was unaware of what assistance Student was receiving from the aide for science and social studies in regard to assignments and was unaware of whether Student received any modifications on his science and social studies tests. She was unsure of what assistance Student required or received in the area of organization. (NT 492, 494)
  27. Student never received the complete 4<sup>th</sup> grade science or social studies curriculum, although the Parents questioned how he would receive the instruction/information. (NT 72, 78)
  28. During the following year, the special education teacher presented “some of the same concepts because it was a mixture of 4<sup>th</sup> and 5<sup>th</sup> grade. So, I did some 4<sup>th</sup>

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<sup>6</sup> This classroom was chosen because the previous spring the Parents objected to the makeup of the group of students Student was with, citing behavioral and social problems in the class as reported by Student, and asked that he not be with this group the following year. (NT 161-166)

- grade concepts, which Student didn't have the year before. And (in) the 5<sup>th</sup> grade we just did it in a different way.” (NT 535).
29. Although his Parents did not believe that Student was receiving academic educational benefit from the mainstreaming in 2003-2004 they thought that perhaps he was receiving social benefit. (NT 84-85)
  30. Student received speech/language therapy one day each week to work on improving his social skills. Specific areas addressed included “receptive and expressive language, written language, and his social skills.” (N.T. 783-785, 788-789).
  31. The Parents asked that Student be allowed to sit with regular education students during lunch. However, the special education teacher didn't think that he would be comfortable “with other kids, if he would make any progress with social skills” so nothing was done. (NT 502-503)
  32. Although the special education teacher noted that in the lunchroom Student didn't talk to the students at his table, and sometimes faced the wall [redacted] she did not initiate a strategy for increasing Student's socialization in the lunchroom and there is no evidence that she attempted to involve the speech/language therapist who worked on social skills in the classroom. (NT 507)
  33. According to his special education teacher, Student was not a behavior problem at all<sup>7</sup>, but he did have difficulty tolerating the other students “when they got a little out of hand”. (NT 497)
  34. The last year that Student participated in academic mainstream classes was the 2003-2004 school year, his 4<sup>th</sup> grade year, when he received 5<sup>th</sup> grade curriculum content in science and social studies. (NT 70)

#### 2004-2005 School Year – Provision of FAPE

35. No regular education teacher was present for or participated in Student's IEP meeting for the 2004-2005 school year. (S-2, S-9, P-7)
36. At the September 2004 IEP meeting the Parents were informed that it had been decided that Student would not be mainstreamed for academic subjects, as mainstreaming had not been successful the previous year, the course content would be the same and the teacher would be the same one as the previous year<sup>8</sup>. (NT 88, 168)

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<sup>7</sup> However, in the IEP there is an annual goal related to increasing appropriate school behaviors, which seems to be pertinent to another student, “[name redacted]”. The special education teacher surmised that this may have been a computer error. If “[name redacted]” is a member of Student's class this may violate [that child's] FERPA rights.

<sup>8</sup> In other words, as Student had participated in 5<sup>th</sup> grade social studies and science the previous year as a 4<sup>th</sup> grader, now as a 5<sup>th</sup> grader he would have been assigned to the same 5<sup>th</sup> grade science and social studies

37. The previous year was deemed unsuccessful by the IU staff because Student had required a high level of support in the mainstream subjects and had not grasped any of the concepts even with the aide. (NT 92-94, 97, 169)
38. The Parents were “shocked” that the mainstreaming had been deemed unsuccessful, as Student had obtained A’s and C’s on his report card in science and social studies. (NT 168-170)
39. Although they were told that the ultimate decision was up to them as to whether or not Student would be mainstreamed for a repeat in the 5<sup>th</sup> grade science and social studies classes, they were not given any other options for Student to be mainstreamed academically when they asked. (NT 170-171)
40. For the 2004-2005 school year Student was not mainstreamed for science or social studies. (NT 87)
41. During the 2004-2005 school year Student was only mainstreamed for specials. He went to specials first period. Depending on the day of the week the special might only be for a half-hour and if the bus were late the time also would be cut short. (NT 100-101, 158)
42. The special education teacher testified that she did not do the Wilson reading program with Student during the 2004-2005 school year other than to remind him to use his skills. (NT 550, 656-658)
43. Because Student progressed through half of the curriculum during the 2003-2004 school year, a six-month benchmark for progress was used in his IEP for the 2004-05 year. (N.T. 524; SD-9).
44. During the 2004-2005 school year, (fifth grade) Student covered the second half of the fourth grade math book and covered portions of the fourth grade reading book. (NT 524, 526-27)
45. Testing with the Kaufman Tests of Educational Achievement, Second Edition (KTEA-II) administered in September 2004 and readministered in June 2005 by District personnel indicated academic progress in all areas

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class with the same curriculum with the same teacher. (NT 96-100) As reflected in the record, the hearing officer allowed the Parents’ attorney to lead the witness on this particular point, over the objection of the District’s attorney, as the witness was extraordinarily anxious and difficult to examine on direct and cross. Although the written record does not reflect this, during this witness’s testimony there were long pauses between many of the questions and answers, some as long as one or two minutes, and the first hearing session was being conducted at night. This difficulty continued into the second session to the point where the hearing officer called a sidebar conference with the two attorneys to try to ascertain what the difficulty was and what might help (NT 155-156)



- expressed in grade equivalents<sup>9</sup> as follows (9/04//6-05): Letter and Word Recognition 3.1//3.8; Reading Comprehension 4.10//6.8; Nonsense Word Decoding 3.5//6.2; Word Recognition Fluency 3.1//3.5; Written Expression 1.10//2.2; Spelling 1.10//2.2; Math Concepts and Applications 5.5//7.6; Math Computation 3.8//5.2. (S-32)
46. Testing done in March 2005 for a parentally-obtained IEE included administration of the Wechsler Individual Achievement Test, Second Edition (WIAT-II). Grade equivalents<sup>10</sup> are as follows: Word Reading 4.2; Pseudoword decoding 5.2; Reading Comprehension 8.7; Written Expression 3.2; Spelling 1.9; Numerical Operations 5.2; Math Reasoning 7.2. (S-17)
47. Each evaluator acknowledged that the scores she obtained were comparable to the scores obtained by the other evaluator. Notably, at the end of the 2004-2005 school year the patterns revealed at or above grade level ability in math, above grade level reading comprehension, below grade level reading decoding, and significantly below grade level written expression and spelling<sup>11</sup>. (NT 613-614; 733-736, 750, 767-68; S-17, S-32)
48. Student took the fifth grade PSSA test in reading and math during the 2004-05 school year, scoring at the proficient level in both subjects. (S-41).
49. Regarding written expression, Student's 2004-2005 IEP carries the annual goal, "Student will increase his written expression skills" with three short-term objectives: Student will write complete sentences (expected level of achievement was "3 out of 4" as evaluated by the Rubric), Student will increase spelling skills (90% on spelling tests), Student will use appropriate capitalization and punctuation (no expected level or evaluation criterion). (S-9)
50. Under a speech/language goal geared toward improved comprehension and use of vocabulary and concepts, there is one short term objective that relates to written expression: use two sources in order to gain information to construct a five sentence paragraph including a topic sentence, three details and a closing sentence. (S-9)

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<sup>9</sup> Grade equivalents are not as robust an indicator of academic status as are standard scores or percentile ranks, but in a pre-post testing set they can provide useful information regarding progress.

<sup>10</sup> See above. Although standard scores and percentile ranks are recorded, grade equivalents are used here for purposes of comparison with the District's measures.

<sup>11</sup> An ability-achievement discrepancy analysis performed by the independent evaluator revealed that Student performs significantly below expectations academically, given his cognitive level, in the areas of Word Reading, Written Expression, Spelling, and Numerical Operations. (S-17)

51. Regarding social skills, Student's 2004-2005 IEP carries the annual goal, "Student will increase appropriate social skills" with three short term objectives: Student will increase appropriate interactive skills (80% evaluated by teacher observation), Student will increase conversation skills (no level, assessed by charting), Student will increase appropriate play skills (no level, no assessment criterion). (S-9)
52. Under a speech/language annual goal related to improvement in pragmatic/social language skills, several objectives address interactive skills, conversation skills, and play skills: initiate a conversation using open-ended questions in order to identify a similarity between conversation partners, accept constructive criticism and rejection during large group activities, and use and comprehend nonverbal communication signals – body language, facial expression, gestures, tone of voice and appropriate eye contact. These objectives are pitched to an 80% level as assessed by data collection and charting by the speech/language therapist. (S-9)
53. Unlike the previous IEP, the 2004-2005 IEP did contain specially designed instruction, albeit limited. There is no provision, related to the stated Needs (improve basic reading skills, improve spelling skills, improve written expression), for a structured reading program or a structured writing program. (S-9)
54. Although the 2004-2005 IEP notes that Student's disability affects his involvement and progress in the general education curriculum, in among other things, a "need for (a) high level of structure and routine" and "difficulties with attending" the specially designed instruction does not include specially designed strategies to assist Student with structure and organization, or with improving his attention. (S-9)
55. Although the 2004-2005 IEP provides for a "token economy" with "earned points/45 minute periods" there is no indication on the IEP regarding for what behaviors Student will earn points, nor is there a behavior plan to assist/structure Student in earning points, nor is there a demonstrated need in the record for a behavior modification program. (S-9)

#### 2005-2006 School Year – Tuition Reimbursement

56. In December 2004 the Parents asked the District for a meeting to discuss Student's programming for the coming academic year. Up to this point, since placement under the auspices of the IU, District personnel had not participated in any of Student's IEP meetings and the Parents had only had interactions with the IU staff. (NT 112-114, 185)
57. The Parents felt that the program "was not working" as they were having Student tutored privately in reading and were working with him themselves on his other subjects. (NT 115-116)

58. The meeting took place on January 7, 2005. It was not an IEP meeting, but rather a meeting where the Parents hoped to express their concerns and to explore where Student's placement for the next year would be. (NT 117-118)
59. Attendees at the January 2005 meeting were the Parents, the IEP team members from the IU program and the District's Supervisor of Special Education for grades 5 through 8. (NT 118, 844)
60. The IU special education supervisor informed the Parents that there was a class available for Student at Middle School in the District, which contained a mixture of children with Asperger's Syndrome and Pervasive Developmental Disorder, there was an existing Asperger's level class at Middle School in [another] School District that might be a suitable placement, and the IU might be opening an additional Asperger's class in the District. (N.T. 384, 385).
61. Parents knew that each of these placements represented an option to place Student in an autistic support classroom in a middle school. (NT 193, 387).
62. The Parents had objections to the placement at Middle School. (NT 193)
63. The Parents asked the District's special education supervisor if they could look at programs outside the District and he said that they could. (NT 121)
64. In February the IU special education supervisor advised the Parents that the program discussed in January to which the Parents had objections was not going to work for Student, but that another autistic support program would be available at another school, and the Parents should arrange to visit because it would be a good fit for Student if a new Asperger's classroom was not opened up in the District. (NT 121-122, 390-391)
65. The IU special education supervisor gave the Parents, "the caveat that if ... a classroom in the District ... was available, [] might not be the placement for the next year, but it would be similar in terms of the type of students, the type of instruction, the type of materials, the set-up of the classroom, et cetera, to [the] classroom if [the IU] established it in [the District]." (NT 391)
66. The IU special education supervisor, on four different occasions, recommended that the Parents visit (February 8 and 24, April 12 and May 17). (NT 390- 392, 395).
67. Although the Parents arranged a visit, just before the scheduled visit in early April the IU special education supervisor telephoned and told the Parents that the program was not going to take students outside the [other] School District. The Parent cancelled the visit. (NT 123-124, 136)

68. The IU learned that a new Asperger's level autistic support classroom was opening in the District on May 4, 2005, and a teacher for the classroom was hired on May 13, 2005. (NT 393-394).
69. On May 17, 2005, the IU special education director notified Parents that Student would be placed in the new autistic support classroom to be located in the District. (NT 395)
70. In the meantime the Parents had been investigating and visiting about five schools on their own and at the beginning of June they informed the District by email that they were considering [the private school] for Student. (NT 137-138, 142)
71. The Parents' criteria for selection of a school were the capacity to address Student's reading and math needs, to address core content in science and social studies and to address his socialization needs. (NT 142)
72. On June 1, 2005, Parents notified the District that they had enrolled Student at [the private school] and requested a meeting to "formally disapprove Student's placement for the 2005-2006 school year." (S-21; P-15)
73. The District's director of special education responded by e-mail to the Parents on June 3, 2005, stating that Student's current placement was appropriate, the District would not pay for tuition at [the private school], and Student's recommended placement for the 2005-06 year was an autistic support placement at a middle school in the District. (S-22)
74. A NOREP was issued to Parents on June 3, 2005, advising that Student would be placed in the IU autistic support program at a middle school in the District for the 2005-06 school year. (S-24)
75. The Parents rejected the NOREP on June 16, 2005, on the basis that the District "had not proposed an appropriate program," and requested a pre-hearing conference. (S-23, SD-24; P-12).
76. On June 23, 2005, Parents were notified that Student's classroom would be located at the Middle School and were provided with the name of the teacher. (S-40)
77. A final placement letter confirming Student's placement for the 2005-06 school year was sent to Parents on August 1, 2005. (S-29).
78. The District's 2005-2006 school year began on August 30, 2005. (NT 138, 277-278)

79. An IEP meeting was conducted on August 23, 2005<sup>12</sup>. (S-30; P-14).
80. No regular education teacher was present for the August 23, 2005 IEP meeting to plan Student's program for the 2005-2006 school year. (S-30, P-7)
81. At the IEP meeting, the District presented the 2004-2005 IEP as a working draft and the District's special education director made handwritten notes to amend the draft. (S-30)
82. The 2005-2006 proposed IEP included some appropriate additions. However, insofar as any element of the 2004-2005 IEP critiqued above was not modified or eliminated, the 2005-2006 proposed IEP remained deficient. (S-9; S-30)
83. Student's proposed program did not include specialized reading instruction and did not include specialized instruction related to his written expression needs. (S-30)
84. As during the 2004-2005 school year, the District's proposal for 2005-2006 provided that Student would receive all his academic instruction within the self contained autistic support classroom, with his being included in regular education only for special subjects. (S-30)
85. The District issued a NOREP, which the parents received in early September and disapproved on September 8, 2005. (S-31)

[The private school]– Parents' Unilateral Placement

86. [The private school], whose parent company is [redacted] is licensed as an alternative placement for disruptive youths. (NT 916)
87. [The private school] is a licensed private academic school but it is not licensed as a special education school. However, about 40% of [the private school's] students would qualify for special education. (NT 917, 941)
88. Students with varying disabilities are placed at [the private school] through school districts and some other students are placed privately. (NT 917)
89. Most of the district-placed students are disruptive youths who require an alternative placement. (NT 963-64)

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<sup>12</sup> A pre-hearing conference was scheduled for July 7, 2005, but the conference did not take place because the District had not previously been advised that Parents' attorney would be attending and an attorney for the District was not present. (N.T. 870-71).

90. On September 15, 2005 the coordinator of the special education department at [the private school] informed the District's psychologist that Student was the youngest student in [the private school], that there were 65 students, that students ranged from 6<sup>th</sup> through 12<sup>th</sup> grade<sup>13</sup>, and that there were only three middle school-age children in the school.<sup>14</sup> (NT 730)
91. [The private school] implements IEPs for students placed by their school districts through [the private school but it] does not create its own IEPs for privately placed youths. (NT 918)
92. At [the private school] the students are placed in a large room subdivided into individual study carrels, and many different activities take place simultaneously in the room. The District's psychologist found the room noisy for a child such as Student, who is easily distracted. (NT 727)
93. In Student's educational program at [the private school] he is alone or with just one other student for most of his classes (he is with one student for language arts, one student for zoology, two students for social studies, and two students for gym). (NT. 589, 626-27, 725, 920, 948-949).
94. Student receives no speech and language therapy and no formal social skills instruction at [the private school]. There is no speech/language therapist on staff at [the private school]. Social skills instruction is limited to once or twice a month when the special education coordinator might take the Asperger's students in small groups for direct social skills instruction.<sup>15</sup> (NT 923-924, 943-944, 948-952)
95. [The private school] does not use any specific program for language instruction<sup>16</sup> for Student. (NT 925)
96. [The private school] does not have a specific writing program for Student; he uses a computer and at this point is encouraged to, "just get his thoughts out". (NT 925)
97. The [private school's] special education coordinator opined that Student has exhibited anxiety and stress, and is being taught to use yoga as a preventative

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<sup>13</sup> Student is a 6<sup>th</sup> grader.

<sup>14</sup> Currently, according to the witness from [the private school], there are approximately 15 students in the junior high grades. (NT 918, 946)

<sup>15</sup> In agreement with the District, the Parents' independent evaluator believes that Student continues to require direct social skills instruction to communicate and interact with his peers. (NT 626)

<sup>16</sup> The special education coordinator from [the private school] obviously interpreted Parent counsel's question as being related to communication other than reading and writing, as she avowed being a "follower of Greenspan" noting [the private school] doesn't "use like a Lovaas treatment or anything like that here. We don't do the trial and error kind of thing here with them". (NT 925)

measure when he feels overwhelmed. Although there is a social worker, there is no psychologist on staff. (NT 930-931, 952-953)

### Credibility of Witnesses

The witnesses who appeared for both parties were credible, with the exception of the witness from [the private school] (see below). The testimony of the IU psychologist and the Parent's independent psychologist was particularly focused and helpful, as was that of the IU speech/language therapist.

### Discussion and Conclusions of Law

#### Legal Parameters

Special education programming and placement issues are currently governed by the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA"), which took effect on July 1, 2005, and amends the Individuals with Disabilities Education Act ("IDEA"). 20 U.S.C. § 1400 *et seq.* (as amended, 2004). The events in the instant matter occurred during a time period spanning the IDEIA and the previous statute, IDEA 1997. There are no substantive differences between the IDEIA and the IDEA in the relevant provisions governing this matter.

In November 2005 the U.S. Supreme Court held that, in an administrative hearing, the burden of persuasion regarding the appropriateness of an offered IEP and program is properly placed upon the party seeking relief. *Shaffer v. Weast*, 126 S. Ct. 528, 537 (2005). The Third Circuit addressed this matter as well more recently. *L.E. v. Ramsey Board of Education*, 435 F.3d. 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006). The party bearing the burden of persuasion must prove its case by a preponderance of the evidence. *See* 20 U.S.C. § 1415(i)(2)(C)(iii). Thus, in this hearing the Parents had to convince the hearing officer by a preponderance of the evidence that the District did not provide FAPE to Student during the 2003-2004 and the 2004-2005 school years and that the District failed to propose an appropriate program and placement for him for the 2005-2006 school year. Additionally, having unilaterally enrolled Student in a private placement, the Parents also bore the burden of demonstrating that the private placement is appropriate.

With this legal basis in mind, an examination of the issues follows.

#### Provision of FAPE during 2003-2004 and 2004-2005

*Did the y School District fail to provide Student with a free appropriate public education in the least restrictive environment for the 2003-2004 and/or the 2004-2005 school years?*

Having been found eligible for special education, Student is entitled by federal law, the Individuals with Disabilities Education Act as Reauthorized by Congress December 2004, 20 U.S.C. Section 600 *et seq.* and Pennsylvania Special Education Regulations at 22 PA Code § 14 *et seq.* to receive a free appropriate public education (FAPE). FAPE is defined in part as: individualized to meet the educational or early intervention needs of the student; reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress; provided in conformity with an Individualized Educational Program (IEP).

A student's special education program must be reasonably calculated to enable the child to receive meaningful educational benefit at the time that it was developed. (Board of Education v. Rowley, 458 U.S. 176, 102 S. Ct. 3034 (1982); Rose by Rose v. Chester County Intermediate Unit, 24 IDELR 61 (E.D. PA. 1996)). The IEP must be likely to produce progress, not regression or trivial educational advancement [Board of Educ. v. Diamond, 808 F.2d 987 (3d Cir. 1986)]. Polk v. Central Susquehanna IU #16, 853 F.2d 171, 183 (3<sup>rd</sup> Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989), citing Board of Education v. Diamond, 808 F.2d 987 (3<sup>rd</sup> Cir. 1986) held that "Rowley makes it perfectly clear that the Act requires a plan of instruction under which educational *progress* is likely." (Emphasis in the original). The IEP must afford the child with special needs an education that would confer meaningful benefit. Additionally, the court in Polk held that educational benefit "must be gauged in relation to the child's potential."

Districts need not provide the optimal level of service, or even a level that would confer additional benefits, since the IEP as required by the IDEA represents only a basic floor of opportunity. Carlisle Area School District v. Scott P., 62 F. 3d at 533-534. What the statute guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving parents.'" Tucker v. Bayshore Union Free School District, 873 F.2d 563, 567 (2d Cir. 1989). If personalized instruction is being provided with sufficient supportive services to permit the student to benefit from the instruction the child is receiving a "free appropriate public education as defined by the Act." Polk, Rowley. The purpose of the IEP is not to provide the "best" education or maximize the potential of the child. The IEP simply must propose an appropriate education for the child. Fuhrman v. East Hanover Bd. of Educ., 993 F. 2d 1031 (3d Cir. 1993).

The IEP for each child with a disability must include a statement of the child's present levels of educational performance; a statement of measurable annual goals, including benchmarks or short-term objectives, related to meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum and meeting the child's other educational needs that result from the child's disability; a statement of the special education and related services and supplementary aids and services to be provided to the child...and a statement of the program modifications or supports for school personnel that will be provided for the child to advance appropriately toward attaining the annual goals (and) to be involved and progress in the general curriculum...and to be educated and participate with other children with disabilities and nondisabled children; an explanation of the extent, if any, to which



the child will not participate with nondisabled children in the regular class... 34 CFR §300.347(a)(1) through (4)

An IEP must be crafted in such a manner that, provided it is implemented, there is a reasonable degree of likelihood that the student will make educational progress. Implementation of an appropriate IEP does not guarantee that the student will make progress. However, in examining Student's 2003-2004 IEP on its face, considering the "four corners of the document" so to speak, this hearing officer has concluded that the IEP was not appropriate in the specific areas of written language and social skills, and does not contain any specifically designed instruction.

Regarding written expression, the 2002-2003 annual goal to "increase reading and language arts skills" is a goal that applies to any child in any school in any grade. Further, the short-term objectives involving "improv(ing) written expression", "complet(ing) weekly book reports" and "complet(ing) daily journal activities" can apply to any child in any grade. Moreover the expected level of achievement, "3 out of 4" is meaningless and the method of evaluation, "Rubric" is equally meaningless.

Regarding social skills, the 2003-2004 IEP carries an annual goal that Student will "increase appropriate social skills in all school settings". Again this is a praiseworthy target for any child in any school in any grade. The objectives, "increas(ing) interactive skills with peers", "increas(ing) interactive conversation skills" and "increas(ing) appropriate play skills" are diffuse and non-specific and the expected level of 80% assessed by charting does not provide a framework within which the educational staff, let alone the Parents, can gauge progress. Although the 2003-2004 IEP also carries speech/language goals and two of the objectives relate to the social skills goal (identify and eliminate off the topic comments/questions during a conversation or activity and maintain a conversation for at least four exchanges), neither the "80%" expected level of achievement nor the "data collecting and charting by the speech/language therapist" provide a robust method of assessing and reporting progress.

It is particularly notable that the 2003-2004 IEP does not contain any specially designed instruction. Given Student's deficits in reading decoding and encoding (spelling), and in written expression, to be appropriate the IEP would have had to specify an organized sequential program designed to address these needs. Although the teacher was Wilson-trained there is no evidence that she systematically provided the program. There is no suggestion that Student was exposed to a specific sequential writing program.

Although an IEP needs to be judged on its merits at the time it was written, a lookback at Student's progress could be helpful. Unfortunately, there is no reliable set of pre-post data assessment data in reading or writing that discretely

covers the 2003-2004 school year. Confounding the problem is the fact that the Parents independently provided the Wilson reading program for Student, and although they maintain that any reading progress he made was solely due to their private efforts and not to the District's program, this position is not defensible and contradicts common sense. Therefore, as regards reading progress, the only concrete information that is credible is that during the 2003-04 school year, Student completed the second half of the third grade reading book such that he started the following year at the beginning fourth grade reading book having made six months' progress in reading over the 2003-2004 school year.

Turning to the 2004-2005 school year, an examination of the IEP reveals specific concerns that render it inappropriate on its face.

As was the case in the 2003-2004 IEP regarding written expression, Student's 2004-2005 IEP carries an annual goal, "Student will increase his written expression skills" and three short-term objectives: write complete sentences (expected level of achievement was "3 out of 4" as evaluated by the Rubric), increase spelling skills (90% on spelling tests), and use appropriate capitalization and punctuation (no expected level or evaluation criterion) that are so vague as to be applicable to any child in any school in any grade, and defy measurement, as for example, the length of the sentences is not specified nor whether they are to be simple, complex, or compound; the level of the spelling words is unspecified and the particular punctuation rules and capitalization rules to be taught are not specified. As previously the "3 out of 4" level is inscrutable, and is no better than the absence of a level and a criterion regarding mechanics.

Under a speech/language goal geared toward improved comprehension and use of vocabulary and concepts, there is one short term objective that relates to written expression: use two sources in order to gain information to construct a five sentence paragraph including a topic sentence, three details and a closing sentence. Although this appears at first glance to be specific, there is no information about the type of sentence, the grade level of expected performance and criteria for mastery.

Regarding social skills, Student's 2004-2005 IEP carries the annual goal, "Student will increase appropriate social skills" and three short term objectives: increase appropriate interactive skills (80% evaluated by teacher observation), increase conversation skills (no level, assessed by charting), and increase appropriate play skills (no level, no assessment criterion). These are general and vague and not measurable, as were the goals and objectives for the previous year. However, under a speech/language annual goal related to improvement in pragmatic/social language skills, several objectives address interactive skills, conversation skills, and play skills: initiate a conversation using open-ended questions in order to identify a similarity between conversation partners, accept constructive criticism and rejection during large group activities, and use and comprehend nonverbal communication signals – body language, facial expression, gestures, tone of voice and appropriate eye contact. These objectives are appropriate and specific, although the meaning of the "80% level" is not clear.

Unlike the previous IEP, the 2004-2005 IEP did contain specially designed instruction, but it is limited. As in the previous year, there is no provision, related to the stated Needs (improve basic reading skills, improve spelling skills, improve written expression), for a structured reading program or a structured writing program. Additionally, although the 2004-2005 IEP notes that Student's disability affects his involvement and progress in the general education curriculum, in among other things, a "need for (a) high level of structure and routine" and "difficulties with attending" the specially designed instruction does not include specially designed strategies to assist Student with structure and organization, or with improving his attention. It is possible that the "token economy" with "earned points/45 minute periods" could address these concerns, there is no indication on the IEP regarding for what specific behaviors Student would earn points, nor is there a behavior plan to assist/structure Student in earning points, nor is there a demonstrated need in the record for a behavior modification program.

Having addressed Student's program as articulated in his 2003-2004 IEP and his 2004-2005 IEP, we now turn to the question of placement. IDEA sets forth the presumption that a child must be educated in the least restrictive environment appropriate for the child, and mandates that states ensure that:

To the maximum extent appropriate, children with disabilities are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S.C. Section 1412(a)(5)(A)

This requirement was unequivocally enforced in Oberti v. Board of Education of the Borough of Clementon, 995 F.2d 1204, 1215 (3d Cir. 1993), a landmark case. Under Oberti, in deciding whether a school district has included an eligible child in regular education to the maximum extent appropriate, consideration must be given to: 1) the efforts of the school district to include the student in a regular education classroom with supplementary aids and services; 2) the educational benefits available to the child in the regular classroom, and 3) any possible negative impact on the education of the other students. The burden of proof rests with the school district to prove that its proposed program complies with the mainstreaming requirement. Before moving a student into a more restrictive setting, it must first be determined that placement in the regular education classroom cannot be achieved satisfactorily. Even if such is the case, the district must still include the student in regular education programming to the maximum extent appropriate. *Id.* at 1218.

The range of supplementary aids and services includes

resource rooms and itinerant instruction, speech and language therapy, special education training for the regular teacher, behavior modification programs, or any other available aids or services appropriate to the child's particular disabilities. *Id.* at 1216, quoting Greer, 950 F.2d at 696.

In Girty v. School District of Valley Grove, 163 F.Supp.2d 257 (W.D. Pa. 2001), the district court held

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 nondisabled peers.

Further, a child with a disability may not be removed from education in age-appropriate regular classrooms solely because of needed modifications in the general curriculum. 34 C.F.R. § 300.552(e) If a School District has given no serious consideration to including the child in less restrictive classes with supplementary aids and services, and to modifying the curriculum to accommodate the child, then it has most likely violated the IDEA's mainstreaming, or LRE, directive. Oberti, 995 F.2d at 1216. The LRE presumption is rebutted only if it is objectively determined that no set of services can feasibly be established to allow the child to succeed in the regular class. In making this determination, factors such as class disruption, distortion of the curriculum for the class as a whole and cost can be taken into account.

The IDEA does not permit schools to make mere token gestures to accommodate handicapped students; its requirement for modifying and supplementing regular education is broad. Girty, *supra*.

This hearing officer finds that for the 2003-2004 and the 2004-2005 school years, the District failed to provide Student with a special education program in the least restrictive environment. There was no evidence supporting the proposition that Student could not be educated with typically developing peers, with supports and services, in the regular education environment in his home school. Although behavior problems would not serve to exclude a child from regular education unless they were extreme, it is nonetheless notable that Student's classroom behaviors were appropriate and that he was not disruptive. There was no evidence that, for the 2003-2004 school year or for the 2004-2005 school year the District<sup>17</sup> made any attempts to accommodate Student in a grade appropriate regular classroom, or that anyone at all involved in planning Student's programming even gave consideration to any alternatives to his continuing to be placed in the self-contained autistic support classroom. Notably and in a procedural violation that exemplified the District's entire approach to LRE for Student, no regular education teacher was present for the IEP meeting for either year. The law requires that a regular education teacher be included in IEP meetings if a child is or may be participating in the regular education environment to help in development of the regular education environment and general curriculum aspects of the IEP. 34 CFR 300.346(d) The law also mandates the IEP team include an LEA or school district representative who is

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<sup>17</sup> This hearing officer understands that the IU was the District's partner in educating Student. However as the agent ultimately responsible for provision of FAPE to this student, and the defendant party in this hearing, the District alone is referenced in the discussion.

knowledgeable about both the general curriculum and school district resources, and who is authorized to make decisions on behalf of the school district. 34 CFR 300344(a)(4). Even if the District were correct in determining that a self-contained autistic support classroom represented the least restrictive environment appropriate for Student, the District demonstrated disregard for the gravity of its obligation to include Student with nondisabled peers to the maximum extent appropriate by its failure to ensure that the IEP team included a regular education teacher, or an LEA representative familiar with the regular education programming available in the host school.<sup>18</sup>

Given the situation that Student was removed from his home school and his home District and placed in IU autistic support classrooms, albeit with the Parents' agreement, there is no persuasive evidence that supports the proposition that once the IEP team determined that for the 2003-2004 school year he should be placed in mainstream science and social studies he could not have attended a fourth grade regular education class for those subjects and learned the content presented there with supports and services, specifically a one-to-one aide or inclusion teacher and a modified textbook and modified worksheets. The District and its partner, the IU, simply placed Student in 5<sup>th</sup> grade science and social studies for the sake of convenience and logistics, produced not a shred of evidence as to why the aide could not be deployed separately with Student at another time to a fourth grade classroom for science and social studies.

For the 2004-2005 school year, having already for no good reason other than convenience having taken the fifth grade science and social studies curriculum, Student should then have been afforded an individually tailored opportunity to access fourth grade science and social studies in a mainstream classroom with support, or to at the very least attend fifth grade science and social studies in a regular education classroom with a teacher other than the one he had the previous year for those subjects.

Failing to provide Student with access to the Least Restrictive Environment appropriate to meet his individual needs, the District deprived Student of the benefits of associating with typically developing peers. It is particularly unfortunate that he was deprived of meaningful contact with nondisabled peers in the fourth and fifth grade school settings, as the record reflects that he is a student with socialization deficits and those years are important for transitioning from childhood to preadolescence. The benefits of which Student was deprived include, among other things, the opportunity to profit from behavior modeling by typical peers, the opportunity to practice social interactions with typically developing peers, the opportunity to make social mistakes and learn from the natural consequences that would follow, and the opportunity to become a familiar presence in his peer group. Education is more than academics, and a district's failure to promote socialization and appropriate behavior for an Asperger's Syndrome student constitutes a significant failure to provide FAPE.

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<sup>18</sup> Notably, and of no little import, the IEP team for the 2003-2004 school year did not include any school-based members who were familiar with Student other than the speech/language therapist who had worked with him two years before..

Although the District relied on the IU to provide FAPE to Student on its behalf, with the IU representing and standing in the place of the District when it operates programs for the District's students, the District should have been vigilant to ensure that the demands of LRE were met as the District remained responsible for Student's educational program and placement. As the IU clearly is a "guest" in various school districts' buildings, it is absolutely necessary for the IU to establish with the administrations of these school districts and these buildings clear expectations with regard to providing inclusion opportunities for students in the IU-operated special education programs.

As regards the mandate to proactively discern and create the LRE for a student, the District's attention is invited to the Settlement Agreement in Gaskin v. Pennsylvania Department of Education, No. 94-CV-4048 (E.D. Pa), a civil action filed by a certified class of plaintiffs on June 30, 1994 and settled last year for the purposes of finally resolving the lawsuit. Briefly, the Gaskin Settlement affirms the following understandings: 1) The IDEA and related case law, including Oberti, require special education students to be educated with students who do not have disabilities to the maximum extent appropriate; 2) It is desirable that school districts increase their capacity to provide appropriate specially designed instruction, related services, supplementary aids and services and support to special education students placed in regular education classrooms; 3) When the law requires that special education students receive supplementary aids and services in order to be educated with students who do not have disabilities to the maximum extent appropriate, such supplementary aids and services should be a) available to all students in need of them, b) designed to provide meaningful educational benefits, and c) provided in a manner sensitive to the need to avoid stigmatizing special education students who receive them; 4) Pennsylvania school districts educate all children and welcome children with special needs.

Part of the Gaskin Settlement terms, conditions and undertakings is that: The Pennsylvania Department of Education will require school districts<sup>19</sup> to adhere to the requirements of the IDEA and case law, including Oberti, when making placement decisions, including the following – 1) Students may not be removed from regular education classrooms merely because of the severity of their disabilities; 2) When students with disabilities, including students with severe cognitive disabilities, need specially designed instruction or other supplementary aids and services to benefit from participating in regular education classrooms, school districts have an obligation to ensure that those services are provided; 3) Students' IEP teams must determine whether the goals in the Student's IEP can be implemented in regular education classrooms with supplementary aids and services before considering removal from the regular education classroom environment; 4) School districts will consider the full range of supplementary aids and services in regular education classrooms, based on peer-reviewed research to the extent practicable, including modification of curriculum content, before contemplating removal.

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<sup>19</sup> As per the Settlement, on an annual basis the Pennsylvania Department of Education will review statewide data on all 501 Pennsylvania school districts to identify districts having data factors indicating a need to improve in the area of LRE and will apply one of three levels, or tiers, of LRE monitoring.

*If the School District failed to provide Student with a free appropriate public education in the least restrictive environment for the 2003-2004 and/or the 2004-2005 school years is he entitled to compensatory education, and in what amount?*

As it has been established, in the opinion of this hearing officer, that the District failed to offer Student FAPE in the LRE for both the 2003-2004 and the 2004-2005 school years, we now examine the issue of compensatory education.

Compensatory education is a remedy designed to provide a student with the services he should have received pursuant to a free appropriate public education (FAPE). When a student has been denied the due process rights or an appropriate educational program that he should have received, compensatory education is an in-kind remedy. [Lester H. v. Gilhool, 916 F. 2d 865 (3d Cir. 1990), cert. denied 499 U.S. 923, 111 S.Ct. 317 (1991)] A child is entitled to compensatory education services if the child is exceptional and in need of services and/or accommodations and if through some action or inaction of the District the child was denied FAPE.

This hearing officer has above examined the deficiencies in Student's program and in his placement for the 2003-2004 and the 2004-2005 school years. In fairness to both parties, consideration is also given to the fact that while there were deficiencies in the IEP and in the placement; Student also derived some meaningful educational benefit during the two years in question. This benefit is most clearly demonstrated in the pre-post results of the KTEA-II administered in September 2004 and June 2005 by the District, the results of the WIAT-II administered by the independent evaluator chosen by the Parents, and the results of the PSSA administered at the end of the 2004-2005 school year.

Testing with the Kaufman indicated some academic progress in all areas. Although there is no bright line, this hearing officer has determined that Student made meaningful progress in the areas of reading comprehension and phonics and in math concepts and computation. Student did not make meaningful progress in letter and word recognition, word recognition fluency, written expression or spelling. Although the grade equivalents obtained by the independent evaluator using the WIAT-II tended to be higher than those obtained by the District, the same patterns of achievement repeat themselves, as do the areas of pronounced deficit, with word reading, spelling, and written expression being depressed. Each evaluator acknowledged that the scores she obtained were comparable to the scores obtained by the other evaluator. Notably, therefore, at the end of the 2003-2004/2004-2005 school years the patterns revealed at or above grade level ability in math, above grade level reading comprehension, below grade level reading decoding, and significantly below grade level written expression and spelling. It is also of note that Student took the fifth grade PSSA test in reading and math during the 2004-2005 school year, scoring at the proficient level in both subjects. Although an IEP does not guarantee progress, the areas in which Student did not make progress are directly related to the areas of deficiency identified in the IEP

(absence of a structured reading program including encoding and absence of a structured writing program).

Education is more than academics. For Student, social skills training and practice is an essential component of an appropriate educational program. An examination of the IEP found a deficit in the goals and objectives for social skills, although there were some speech/language objectives during the 2004-2005 school year that were appropriate. Moreover, the written program deficits aside, there is little to no evidence that the special education teacher or the aide or the speech/language pathologist attempted creatively to coerce, to manipulate, to instigate or to otherwise effect Student's interaction with non-disabled peers in such a manner as to enhance his social skills and prepare him for self-sufficiency. Although the Parents presented Student as having above average social skills given his Asperger's, there was credible evidence that he did have social skills deficits that needed to be addressed and were not.

Of critical importance is Student's deprivation of a placement in the least restrictive environment, as exhaustively discussed above. Aside from there being no evidence that the District even considered not placing Student into an autistic support class, the gestures toward academic inclusion in 2003-2004 (where he was placed a grade above his own grade, using texts and worksheets written at several reading levels above his own reading level, with no evidence of modification of materials) and the exclusion from academic classes in 2004-2005 constitute a serious denial of FAPE in the LRE.

Each school week is the equivalent of twenty-five hours, translating into five hours per day. 22 PA Code §11.3 (a). In consideration of the above analysis of Student's IEPs, his progress or lack thereof in academic areas, his needs for socialization and his not being offered a placement or programming in the least restrictive environment, compensatory education will be awarded for four hours per day for every day Student was present in school for the entire 2003-2004 and 2004-2005 school years. These four hours represent daily academic deprivation in the areas of science/social studies, portions of reading including encoding and written expression, as well as daily social skills training and practice deprivation, including not being placed in the least restrictive environments appropriate for his needs.

The form of the compensatory education will be chosen by the Parents, and may include any educational, tutorial, developmental, recreational or therapeutic activity that will contribute toward the needs identified in Student's private and school District evaluations. The hours may not be used to substitute for services that Student should be receiving through his IEPs should he re-enter the District or another school district. The hours may be taken singly or in blocks and may be used after school, in the evening, on weekends, and/or in the summer but must be used before Student turns twenty-one. The District has the right to question the reasonableness of the cost of a service if it is not in



line with the usual and customary rate for the service in the geographical area. The total cost of all the services must not exceed the total cost the District would have borne (salaries and benefits) if it were providing Student with the appropriate program and services.

### Tuition Reimbursement

It is now necessary to turn to the question of tuition reimbursement. In order for Parents to be fully reimbursed for tuition they have paid to a private school, three conditions must be present: 1) The program and placement offered by the District must be inappropriate; 2) The placement unilaterally chosen by the Parents must be appropriate. 3) Equitable considerations must favor the Parents.

Parents who believe that a district's proposed program is inappropriate may unilaterally choose to place their child in an appropriate placement. The right to consideration of tuition reimbursement for students placed unilaterally by their parents was first clearly established by the United States Supreme Court in Burlington School Committee v. Department of Education, 471 U.S. 359, 374 (1985). A court may grant "such relief as it determines is appropriate". "Whether to order reimbursement and at what amount is a question determined by balancing the equities." Burlington, 736 F.2d 773, 801 (1<sup>st</sup> Cir. 1984), *affirmed on other grounds*, 471 U.S. 359 (1985).

In 1997, a dozen years after Burlington the Individuals with Disabilities Education Act (IDEA) specifically authorized tuition reimbursement for private school placement. The IDEIA, effective July 1, 2005, is the reauthorized version of the IDEA and contains the same provision:

(i) In General. – Subject to subparagraph (A) this part does not require a local education agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such a private school or facility.

(ii) Reimbursement for private school placement. -If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private school without the consent of or referral by the public agency, a court or hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency has not made a free appropriate public education available to the child in a timely manner prior to that enrollment. 20 U.S.C. § 1412(a)(10)(C)(ii)

Florence County Sch. Dist. Four V. Carter, 114 S. Ct. 361 (1993) had earlier outlined the Supreme Court's test for determining whether parents may receive reimbursement when they place their child in a private special education school. The criteria are: 1) whether the district's proposed program was appropriate; 2) if not, whether the parents' unilateral placement was appropriate, and; 3) if so, whether the equities reduce or remove the requested reimbursement amount.

*Did the School District fail to offer or propose an appropriate program and placement for Student for the 2005-2006 school year?*

During the hearing, evidence and testimony regarding the District's program and placement proposal for the 2005-2006 school year centered on two factors – the timeliness of the offer and the appropriateness of the offer. Considerably more attention was given to the timeliness of the offer and this will be addressed first.

The IDEA and its 1999 implementing regulations provide that

At the beginning of each school year, each public agency shall have an IEP in effect, for each child with a disability within its jurisdiction. Each public agency shall ensure that an IEP is in effect before special education and related services are provided to an eligible child under this part...". 34 CFR Section 300.342(a)(b)(1)(I).

However, under the IDEIA, a district is not required to identify a specific building or classroom within which an appropriate program is to be delivered. *See* 20 U.S.C. § 1401(9).

Examining the chronology of events as put forth in the Findings of Fact above, it is clear that the District at all times was intending to provide a program and placement for Student for the 2005-2006 school year. The District told the Parents that there were three possibilities – an autistic support classroom at the Middle School (a placement that the Parents did not favor), an autistic support classroom at the Middle School, and a placement in a new classroom to be located in the District. The Parents were encouraged to visit the classroom, as even if Student were placed in the new classroom the program and set-up would be virtually identical. As early as January the Parents signaled their intention to look for a placement outside the District, and pre-empted the District by announcing their decision to place Student in a private school before the District finalized its plans. The Parents' argument in this regard fails, and it is the finding of this hearing officer that the District offered Student a placement in a timely manner, well before the start of the next school year.

We now must look to the program and placement the District offered. When the Parents came to the August IEP meeting they had committed to [the private school] and it is highly unlikely that they would have accepted an IEP offered by the District unless the location of the implementation of the IEP was going to be [the private school]. If the

District were to offer an appropriate IEP, the Parents' claim for tuition reimbursement would fail, as there would be a timely IEP that offered an appropriate program and placement. As District's counsel cited in her closing argument, when "[t]he parents have become so singularly focused on the [private school they have already enrolled their child in] that they appear unwilling to consider the District's proposals in good faith," tuition reimbursement should be denied. *In re the Educational Assignment of P. J.*, Special Ed. Op. No. 1271 (2002) (J. Cautilli, concurring opinion). Similarly, where the parents have predetermined that they will place their child in a private school regardless of the district's ability to program for the child, the equities favor the district. *In re the Educational Assignment of C.S.*, Special Ed. Op. No. 1658 (2005).

The question then rests solely on whether the District's program and placement offer for 2005-2006 was appropriate. For purposes of the August IEP meeting, the District brought the existing 2004-2005 IEP (which was based largely upon the 2003-2004 IEP) to the table as a working draft and the District's special education director made handwritten notes to amend the draft, creating the 2005-2006 IEP. As explained above, this hearing officer found that neither the 2003-2004 nor the 2004-2005 IEP was appropriate. Although the resultant 2005-2006 proposed IEP included some appropriate additions, insofar as any element of the 2004-2005 IEP critiqued above was not modified or eliminated, the 2005-2006 proposed IEP remained deficient. Incorporating the discussion of the 2003-2004 IEP and the 2004-2005 IEP, this hearing officer finds of major importance that the 2005-2006 IEP, representing Student's proposed program, did not include a program of specialized scientifically based reading instruction and did not include specialized scientifically based instruction related to his written expression needs.

As was the case in 2003-2004 and 2004-2005, no regular education teacher was present for the August 23, 2005 IEP meeting to plan Student's program for the 2005-2006 school year, a serious procedural violation given requirements for LRE. As during the 2004-2005 school year, the District's proposal for 2005-2006 provided that Student would receive all his academic instruction within the self contained autistic support classroom, with his being included in regular education only for special subjects. In the realm of what should have been expected at a minimum from the District is consideration of placing Student in regular education for science and social studies as he had been included in these classes during the 2002-2003 and the 2003-2004 school years. There is no evidence that the District considered having Student receive science and social studies in the regular education classroom with an aide and there is no reason in evidence as to why the District failed to give this option consideration. Again, as in all prior years from second grade onward, the District planned to place Student in a self-contained autistic support class. Again, there was no evidence that the District entertained this possibility. It cannot be overemphasized that even if Parents are in agreement with a placement that is not the LRE, and even if Parents campaign for a placement that is not the LRE (which these Parents did not), districts still bear the burden of providing the LRE. For these reasons, therefore, although the District offered a program and placement in a timely manner, the program and placement that it offered was inappropriate programmatically and in regard to location of intervention.

The facts in this matter are strikingly similar to those in Special Education Opinion No. 1670, wherein the Pennsylvania Appeals Panel wrote in regard to a student with Asperger's educated in a self-contained classroom in a different Intermediate Unit,

*“In our opinion, there are two levels to the District’s failure in this regard. First, an attempt to include the student to the maximum extent possible was never attempted by the District...[I]n both the decision to place the student in a full-time special education placement and the lack of interest in helping the student enter a regular education setting with aids/supports/services, the District has failed to pursue a LRE. Second, the lack of supports for the student’s socialization skills/needs as outlined above has a LRE aspect. The student’s interaction with peers in any meaningful way was constrained and then consistently pared back. In short, the District failed in its duty to include the student by not attempting to find a less restrictive environment either in terms of the location of the placement, or in the curriculum, or in the ability of the student to interact with non-disabled peers”.*

Having found that the District did not offer an appropriate program and placement we turn to the next step.

*If the School District failed to offer or propose an appropriate program and placement for Student for the 2005-2006 school year, was the placement unilaterally chosen by the Parents appropriate?*

Case law has established that the private school placement selected by a parent, where the District’s program is inappropriate, does not need to conform to federal or state IDEA regulations. Florence County 4 School District v. Shannon Carter, 126 L.Ed.2d 284 (1993). Therefore the teachers do not have to meet state requirements and the students do not have to have IEPs generated by the school. Under the federal IDEA as interpreted by the United States Court of Appeals for the Third Circuit in Oberti v. Board of Educ. of Borough of Clementon School Dist., 995 F.2d 1204 (3d Cir. 1993) Student is presumed to be entitled to the least restrictive environment, that is, the educational setting appropriate to her needs that maximizes interaction with nondisabled students. However, when a District has failed to provide an appropriate program, the fact that the private school is not the least restrictive environment is not relevant. See, for example, Rose v. Chester County I.U., No. 95-239 (E.D. of Pa., May 6, 1996), aff’d. 114 F.3d 1173 (3<sup>rd</sup> Cir. 1997) and Rairdan M. v. Solanco School District, 97-CC-5864 (E.D.Pa. 1998).

Even given these relaxed standards, an examination of the [the private school], based squarely upon the testimony of the [private school’s] special education coordinator, leads to the inescapable conclusion that the placement chosen by the Parents is not appropriate.

[The private school] is licensed as an alternative placement for disruptive youths and district-placed students are disruptive youths who require an alternative placement. [The

private school] is not licensed as a special education school. When Student entered [the private school] he was the youngest student in a student body of 65 students ranging from 6<sup>th</sup> through 12<sup>th</sup> grade, and that there were only three middle school-age children in the school. The students are placed in a large room subdivided into individual study carrels, and many different activities take place simultaneously in the room. In Student's educational program at [the private school] he is alone or with just one other student for most of his classes. Student receives no speech and language therapy and no formal social skills instruction at [the private school]. There is no speech/language therapist on staff at [the private school]. Social skills instruction is limited to once or twice a month when the special education coordinator might take the Asperger's students in small groups for direct social skills instruction. [The private school] does not use any specific program for language instruction<sup>20</sup> for Student. [The private school] does not have a specific writing program for Student. Although the [private school's] special education coordinator opined that Student has exhibited anxiety and stress, and is being taught to use yoga as a preventative measure when he feels overwhelmed, there is no psychologist on staff.

Hearing officers are charged with determining credibility of witnesses. The [private school] witness did not establish credibly that the program and placement was appropriate for Student and, disturbingly, did not establish credibility regarding her personal knowledge of the needs of students with Asperger's (e.g. "like they have these little quirks") or her knowledge of appropriate instructional interventions that Student needs (e.g. "Student...is basically writing with the computer, so you know, we're really big on, for Student especially, just to get their thoughts out, and right now<sup>21</sup> that's the point where we are at with Student"). Overall [the private school] presents with most of the deficits that made the District's program inappropriate for Student, and with other negative factors as well. There is no specialized research based reading or writing program, there is virtually no inclusion with an appropriate group of non-disabled peers<sup>22</sup> either by age or by interest, who could provide role modeling<sup>23</sup>, and within a total student body of 65 to 67 students there is a cadre of disruptive older youths who require alternative placement. Although there are no doubt certain youths who need and could thrive in a niche at [the private school], a 6<sup>th</sup> grade Asperger's student with a learning disability, attention issues, and possibly anxiety issues who has been raised in a loving, supportive and close environment is highly unlikely to thrive there. It would be entirely

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<sup>20</sup> The special education coordinator from [the private school] obviously interpreted Parent counsel's question as being related to communication other than reading and writing, as she avowed being a "follower of Greenspan" noting that [the private school] doesn't "use like a Lovaas treatment or anything like that here. We don't do the trial and error kind of thing here with them". (NT 925)

<sup>21</sup> Note the date of testimony is March 14<sup>th</sup>, seven months into the school year.

<sup>22</sup> Although the [private school] witness testified that about 40% of the students would qualify for special education, the majority of the students are placed under the "disruptive" youth category, or the category of students needing an alternative educational setting, and some of the privately placed students did not find the public school challenging enough and a group of them are "very much into theater, very much into art". (NT 917)

<sup>23</sup> "There's a whole bunch of boys with the same quirks as Student. (so he can) find someone who's into the same kinds of things without standing out or seeming weird...He's actually found peers who are similar to him". (NT 933)

against Student's educational, social and emotional interests for the District or this hearing officer to sanction placement at [the private school] for Student.

As the Parents' unilateral placement is not appropriate, they are not entitled to tuition reimbursement. Therefore, it is not necessary to consider the last issue,

*If the School District failed to offer or propose Student an appropriate program and placement for the 2005-2006 school year, and if the placement unilaterally chosen by the Parents was appropriate, are there any equitable considerations that would reduce or eliminate the District's responsibility for tuition reimbursement?*

#### ORDER

It is hereby ORDERED that:

1. The School District failed to provide Student with a free appropriate public education in the least restrictive environment for the 2003-2004 and/or the 2004-2005 school years.
2. As the School District failed to provide Student with a free appropriate public education in the least restrictive environment for the 2003-2004 and/or the 2004-2005 school years he is entitled to compensatory education, in the amount of four hours per day for each day that he was present for the 2003-2004 and the 2004-2005 school years, in accord with the conditions set forth above.
3. The School District failed to offer or propose an appropriate program and placement for Student for the 2005-2006 school year.
4. Although the School District failed to offer or propose an appropriate program and placement for Student for the 2005-2006 school year, the placement unilaterally chosen by the Parents was not appropriate and the Parents are not entitled to tuition reimbursement.
5. Although the School District failed to offer or propose Student an appropriate program and placement for the 2005-2006 school year, the placement unilaterally chosen by the Parents was inappropriate, so there is no need for consideration of the equities as the District has no responsibility for tuition reimbursement.

April 19, 2006  
Date

*Linda M. Valentini, Psy.D.*

Linda M. Valentini, Psy.D.  
Hearing Officer