

PENNSYLVANIA  
SPECIAL EDUCATION HEARING OFFICER

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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.

5764/05-06 AS

File Number

E.G

Child's Name

Xx/xx/xx

Date of Birth

12/06/05, 1/27/05, 1/30/06, 1/12/05, 2/06/06

Dates of Hearing

Open

Type of Hearing

**For the Student:**

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Dates of Hearing: December 6, 2005, January 27 and 30, and February 6, 2006  
Date Record Closed: March 20, 2006  
Date of Decision: April 4, 2005  
Hearing Officer: Daniel J. Myers

## **BACKGROUND**

Student is a xx-year old resident of the Wissahickon School District with severe autism. For the last year and one-half, he has attended a private school. His parents seek reimbursement of tuition and home program costs, contending that the School District has failed to offer a free and appropriate public education. For the reasons described below, I find for the School District.

## **ISSUES**

1. Whether or not the School District has offered a free and appropriate public education to Student since the 2004-2005 school year?
2. If not, whether or not Student's parents are entitled to tuition reimbursement and/or reimbursements of the costs of a home program?

## **FINDINGS OF FACT**

1. Student (Student) is a xx-year old resident of the Wissahickon School District (School District) with severe autism. He is functionally nonverbal and considered apraxic. (N.T. 1186) He communicates primarily through simplified sign language, although the record includes testimony that he is capable of stringing 4-5 words into sentences. (N.T. 118, 604-605, 817, 1076-1077) It is not clear whether or not Student recognizes the emotional states of others. While Student's attentional and language deficits make it difficult to measure his cognitive abilities, he is estimated to fall within the first percentile on all levels. Student's stereotypical autistic behaviors include vocalizations [and other behaviors]. He requires substantial repetition, he has difficulty generalizing skills that he has learned, and he needs a great deal of 1:1 instruction. (N.T. 91-92, 117-119, 130, 143, 152-153, 230-231, 624-625, 633-634, 674, 677, 708, 1188, 1211, 1227-1240, 1265-1266; SD 34; SD 35) <sup>1</sup>

### **Student's Home Program**

2. At all times relevant to this case, Student has received Verbal Behavior (VB) programming at home. Student's mother has 500 to 600 hours of training in VB methodology. (N.T. 1156) She believes that VB methodology must be the primary component of Student's program and that it must be strictly applied in Student's educational setting. (N.T. 1156-1158) Since summer 2003, the School District and Student's parents have disagreed in various ways over whether or not the School District should fund any part of Student's home-based VB program. (SD 34; SD 35) In Re the Educational Assignment of E.G., Special Education Opinion No. 1463 (2004)

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<sup>1</sup> References to SD, P and HO are to School District, Parent and Hearing Officer exhibits, respectively. References to N.T. are to the transcripts of the December 6, 2005, January 27 and 30, and February 6, 2006 hearing sessions.

### **2003-2004, Student's First Due Process Hearing**

3. In September 2003, Student's parents unilaterally placed him in a private nursery school and day-care center where, accompanied by an aide from his home VB program, he attended regular kindergarten for four hours per day. (N.T. 864)
  - a. In the meantime, the parties litigated a due process hearing regarding a proposed summer 2003 IEP while simultaneously negotiating a new IEP.
  - b. On December 8, 2003, the parties agreed upon a new IEP with the exception of the present education levels, the personnel supports, the weekly data collection, and the absence of a publicly-funded home VB program. (N.T. 864-867) In Re the Educational Assignment of E.G., Special Education Opinion No. 1463 (2004)
  
4. On January 27, 2004, a special education due process hearing officer ordered the School District to change the December 2003 IEP's data collection requirements from weekly to daily, and to provide 105 hours of compensatory education as a result of failure to provide extended school year (ESY) services. She also held that the IEP need not include a home VB program, and that the School District was not required to reimburse Student's Parents for the unilateral Nursery School placement or for some privately-secured independent educational evaluations. (N.T. 864-867; SD 34; SD 35) In Re the Educational Assignment of E.G., Special Education Opinion No. 1463 (2004)
  
5. On March 24, 2004 the Special Education Appeals Panel decision affirmed the hearing officer's decision. It noted that the dispute between the parties, when carefully examined, was about methodology, and the clear weight of case law authority in autism methodology cases favored the District. The Appeals panel also noted an arguable over reliance on inclusion, given Student's extensive need for intensive functional life-skills instruction. (SD 34; SD 35) In Re the Educational Assignment of E.G., Special Education Opinion No. 1463 (2004)

### **Spring 2004, Public School 2<sup>nd</sup> Grade**

6. In the meantime, the parties had already initiated a cooperative, gradual transition of Student from Nursery School to the School District's public school. (SD 33, pp.1-7) Student's Parent provided the School District with a list of signs that Student was currently using as well as a video of Student's home program. (N.T. 122, 891-892, 888-889) Student's private home program assistant came to the public school to assist the teachers with signs and strategies, and to provide feedback as the public school teachers became acquainted with Student. (N.T. 72-73, 107, 864, 882-884, 1138)
  
7. On April 22, 2004 the parties developed an IEP for Student, agreeing upon goals and objectives, but still disagreeing over whether Student's home program should be included as part of the IEP. (SD 36; N.T. 864-865, 871, 879, 882-884)

8. Under the April 2004 IEP, Student was assigned to Ms. F's 2<sup>nd</sup> grade regular education classroom. Ms. F is certified in elementary school regular education and guidance counseling, with a masters' degree in elementary school guidance and counseling. She has 19 years experience as a regular education teacher for the School District. (N.T. 32-33, 145) Her 2<sup>nd</sup> grade regular education classroom had 21-22 other students, none of whom had been diagnosed with autism. Student was the most impaired child in her class. (N.T. 32-33, 66, 145)
9. The School District also provided a full-time 1:1 classroom aide, who was Ms. F's daughter, and whose supervisor was the school principal. The aide was a college graduate with some sign language background. (N.T. 48, 173, 232, 238, 257)
10. The training that Ms. F received in preparation for Student's inclusion into her classroom (N.T. 66, 106) included a two-day clinic by autism expert Vincent Carbone, training from Student's home program instructor, seven hours of training in autism and verbal behavior techniques by a [Redacted] County Intermediate Unit certified behavior analyst (N.T. 894-896), and three and a half hours of training in Boardmaker and Writing With Symbols computer software programs. (N.T. 50-51, 100-102, 171, 175-176, 892-896) Although Ms. F had previously taken two sign language courses, the 1:1 aide was much more fluent in sign language than she was. (N.T. 119)
11. The April 2004 IEP provided for a combination of instruction in a part-time learning support classroom and in a regular education 2<sup>nd</sup> grade classroom. It contained goals in attention skills and learning classroom routine, social skills, writing, reading readiness, math, communication, receptive and expressive language, fine and gross motor skills. (SD 36; P 12)
  - a. In the area of attention skills and classroom routine, Ms. F and Student's aide utilized a reward system to maintain and increase attention. By the end of the second grade school year, Student had improved in extending the amount of time necessary between rewards. (N.T. 47, 57-59) Student learned to get off the swing at recess and head for the class line, without prompting from an aide, when he heard the recess whistle. (N.T. 95)
  - b. In social skills, Student attended field trips with his regular education 2<sup>nd</sup> grade class, participated in the second grade play by saying something into the microphone, participated in songs for a school heritage festival, gained more confidence in his interactions with peers, and was accepted by his peers. (N.T. 108-109, 147-149, 190, 193)
  - c. In academic skills, a very large gap existed between Student's skills and those of his regular education peers. Student worked on learning to write his name, to write letters, to recite numbers, and to recognize letters and colors. (N.T. 46-48, 108-111, 150)
  - d. In communication skills, Student could engage in a two or three word utterance in second grade. (N.T. 118) When a new sign was taught to Student, the School District informed Student's Parent to ensure consistent use at home. (N.T. 122)
  - e. Where behaviors were concerned, the School District did not conduct a functional behavioral assessment or develop a written behavioral plan. (N.T. 90-91, 112-115,

899-900) Student's [behavior including] spontaneous vocalization behaviors improved in 2<sup>nd</sup> grade, and his aide was very successful at calming him down. (N.T. 92-93, 151, 1246) He would become agitated in loud situations, such as the cafeteria. (N.T. 113-114) School District personnel did not believe that Student's behaviors were disruptive to the class. (N.T. 900-903)

12. On one of Student's first days in Ms. F's class, he and his aide were introduced to his classmates in the front of the classroom and his classmates asked questions about him. Student's parent felt that this improperly accentuated Student's differences in front of his typically developed peers. (N.T. 157, 184; SD 5, pp.5-8) In addition, Student's parent felt that Student's obvious differences from his classmates, with his stereotypical [behaviors], were accentuated during a class [redacted] presentation to parents. (N.T. 1035-1036)
13. Ms. F testified that Student made meaningful educational progress in the short time in which he was in her class. She testified that Student adjusted very nicely to the class and was happy most of the time. This testimony was based upon her observations of Student's demeanor, attitudes, and apparent comfort or frustration under various conditions in class. (N.T. 145-150, 193)
  - a. Ms. F and Student's learning support teacher, Ms. T, maintained separate records as to prompting levels. (N.T. 61-62, 69, 79, 86-87) Student's teachers and aide communicated often regarding daily data. (N.T. 169) Although Ms. F kept daily data in a binder, these data no longer exist. (N.T. 61-62, 116, 180, 904-906) School District personnel sent a daily communication log home with Student for parent-teacher communication, and Student's parent and Ms. F communicated via email. (SD 4; SD 6; N.T. 183, 185, 1142)
  - b. Ms. F testified that a consultant sent by Student's Parent to observe her classroom at the end of the second grade school year remarked that Ms. F was following the correct protocol, working with Student exactly the way she should, and had no suggestions for improvement. (N.T. 190-191)
  - c. Ms. F did not track statistical data regarding Student's progress on individual IEP goals and objectives. (N.T. 128-129, 145) Student's progress was reported on the regular grade report applicable to all 2<sup>nd</sup> grade students. (N.T. 137-138)
14. During the summer of 2004, the School District funded Student's home program at approximately 20 hours a week of 1:1 support at \$12/hr. (N.T. 1022-1024)

### **Preparations for 2004-2005 School Year**

15. On August 12, 2004, the parties met to discuss options for the 2004-2004 school year including: 1) the School District and IU were developing a local VB classroom; 2) Student's parent had applied for Student's admission to Private School; and 3) the parties still disagreed over whether or not Student had an educational need for, and therefore was entitled to, a publicly-funded home program. (N.T. 907-908, 915, 1143- 1146, 1150-1158)

16. On August 23, 2004 Student's parent sent notice to the School District stating that Student would be unilaterally enrolled at Private School, and requesting tuition reimbursement. (N.T. 910-911, 1041; P 23) Student's parent contended that Student did not benefit from his 2<sup>nd</sup> grade public school placement and that public school staff were not sufficiently trained. (N.T. 911-915) The School District denied the request for tuition reimbursement and it appears that neither party requested a due process hearing. (N.T. 915-916, 918, 926-927; P 25)

### **Private School, 2004-2005 and 2005-2006**

17. Private School educates 7-9 children, all autistic, aged 7-12. (N.T. 328, 615, 639, 794-795, 805, 1108) It has three classrooms that are generally grouped as "high functioning," "moderately impaired," and "severely impaired." (N.T. 638) Student is one of the three students with the most severe autism. (N.T. 615)
- a. Private School's basic philosophy is called Relationship Development Intervention ("RDI") which is described as "relationship building between the students and people in their lives." (N.T. 636-637, 836) Private School uses applied behavioral analysis (ABA) techniques, VB, and the Association method to address apraxia. (N.T. 637)
  - b. Private School employs six teachers. (N.T. 616-617) Its staff includes a full-time behavior analyst, and it offers speech and occupational therapy on site, and physical therapy off site. (N.T. 794-95)
  - c. Private School tuition for 2004-2005 was \$50,000 per year. (P 27) Private School tuition for 2005-2006 is \$55,000 per year. (P 28) Student's family is on a deferred payment plan and they have paid \$20,000 so far. (N.T. 1079)
18. Although there was testimony alleging that Private School has a written IEP for Student, the testimony itself was vague and the record does not contain a copy of any Private School IEP. (N.T. 611-613, 1121, 1129) Private School works upon 35-40 needs that are identified on his Assessment of Basic Language and Learning Skills (ABLSS) sheet. (P 31; N.T. 429-430, 836, 1050, 1108, 1118-1120) Teachers record and analyze copious data regarding Student's behaviors and the successful rewards and techniques that extinguish specific undesirable behaviors. (N.T. 807-809, 1031; P 32)
19. Private School communicates daily with Student's parents, sending data to the family so that they can work on skills at home. (N.T. 806, 838) Private School officials believe that, in addition to a school-based educational program, Student requires a home-based educational program to assist him in generalizing skills. (N.T. 600, 794-795, 803-805, 845-850)
20. Student's primary teacher, Ms. B, has a B.A. from Penn State University and is pursuing a board-certified associate behavior analyst (BCABA) certification. (N.T. 790-91795-797, 840) At present, Ms. B does not hold any Pennsylvania teaching certification. (N.T. 841) She has been employed by Private School since August of 2004. (N.T. 791) She has prior experience working with children with autism, including previous service with school districts as a 1:1 aide. (N.T. 792, 841-842) Student's speech and language

services provider at Private School is Ms. L, a BCBA who also provides privately-secured consultation services for Student's home program. (N.T. 585-586, 600, 627-632, 639) She is not certified or formally trained in sign language. (N.T. 625)

21. One-half of Student's typical school day at Private School is in a 1:1 setting, and the other half is with two other severely disabled autistic students and four adults. (N.T. 618-622, 845) Student does not have an aide assigned to him at the school. (N.T. 638) Teachers consult with each other daily, but not on a pre-scheduled basis. (N.T. 593, 635-636). Student does not interact with any non-disabled peers at Private School. (N.T. 933) Private School officials do not believe that it would be appropriate for Student to be included in a mainstream program. (N.T. 833, 840) Private School does not offer formal social skills training. (N.T. 636)
22. Student's parents and Private School officials believe that Student has made, and is making, meaningful educational progress at Private School. (N.T. 837, 1133) In the last school year, Private School reports the following educational progress:
  - a. Student's self-stimulatory and aggressive behaviors decreased, his frustration tolerance increased, and his [other] behaviors were eliminated by learning more acceptable "replacement" behaviors. (N.T. 590-592, 811-813)
  - b. Student's prompts have become less intrusive and less necessary, providing more time for learning. (N.T. 818, 821-823) Student has learned "many more" independent skills this year. (N.T. 824-28) Student has learned to unpack his backpack independently. (N.T. 1076)
  - c. While expressive communication is still Student's greatest weakness, he has progressed from one-word utterances to 4-5 word sentences. (N.T. 604-605, 817, 1076-77)
  - d. Student's group participation has improved. (N.T. 830)

### **Preparations for 2005-2006 School Year**

23. In May 2005, the parties began discussing the development of a public school program for Student for the 2005-2006 school year. (P 41; N.T. 200, 918-919)
24. During the summer months of June, July and August, the parties met and exchanged information and documents. Relationships were tense. School District officials allege that Student's parents surreptitiously audiotaped meetings and obstructed School District efforts in obtaining information from Private School. Student's parents allege that School District officials ended a meeting prematurely to prevent parental tape-recording and that the School District bureaucratically required Student to re-register with the School District in order to avoid some undefined liability. (N.T. 78, 200, 213-214, 469-475, 919-927, 982, 988, 1046, 1161-1165, 1085; P 47; SD 10; SD 29; SD 38)
25. On August 24, 2005, the School District issued a reevaluation report (RR). (P 71)
  - a. It noted that Student has learned to identify, expressively and receptively, 14 phonemes, and he can write one phoneme. He can write 12 upper case letters. He

writes his first name, but only the first two letters are recognizable. He can point to the title of a book, and he tracks words in a book from left to right. At Private School, he had learned 26 new intraverbal signs and 48 new labels. He rote counts to 10, and he can label numbers 1-15. He excels in imitation of adults. His attention and eye contact is inconsistent. (P 71, p.2)

- b. The RR was issued by Ms. M, who has a Bachelor's Degree in Psychology, a Master's Degree in counseling, is certified in school psychology, board certified in school neuropsychology, and who has 23 years experience as a school psychologist. (N.T. 1233-1234)
  - c. Ms. M had no serious concerns in regard to inappropriate behaviors by Student that would impact his ability to make meaningful educational progress or impact the ability of other students in the class to make such progress. (N.T. 1242-1243, 1302) She noted that Student's Parent feels that Student is compliant and can be motivated. (N.T. 1301-1302)
  - d. Ms. M testified that IEP of September 2005 is appropriate for Student and consistent with her RR findings and the Student's established needs. (N.T. 1259-1260) Specifically, the proposed IEP addresses Student's basic needs in reading and math readiness, speech and language, occupational therapy and physical therapy and the issue of behavior. (N.T. 1260) She notes that Student is able to learn or develop math and reading readiness skills in a setting other than a full-time autistic support classroom. (N.T. 1261) She notes that Student's reading and math skills are beginning to emerge and need to be addressed in an appropriate school environment. (N.T. 1261-1262)
26. On September 1, 6, and 8, 2005, the parties conducted IEP meetings, each lasting 3-4 hours. (N.T. 476-477, 480, 1167-1168)
- a. School district personnel were happy and excited to see Student's progress over the time that he had been attending Private School. (N.T. 217-218, 276-277, 279-282, 1089; P 70)
  - b. Student's Parent supplied instructional goals that were incorporated into the IEP. (N.T. 475-476)
  - c. Student's Parent had expressed interest in a verbal behavior program with peer integration. (N.T. 500-501) The parties jointly considered, and rejected, a full-time autistic support program operated in the School District's public schools. (N.T. 460-462, 483, 560)

### **School District's September 2005 Proposed IEP**

27. On September 13, 2005, the School District issued a proposed IEP that is similar in design to Student's spring 2004 (2<sup>nd</sup> grade) program and placement, with a combination of instruction in a part-time learning support classroom and inclusion in a regular education 4<sup>th</sup> grade classroom. (SD 9; N.T. 462)
28. If the September 2005 IEP had been implemented, Student's regular education 4<sup>th</sup> grade teacher would have been Ms. D. (N.T. 510, 520, 551)

- a. She is certified in both special education and elementary education, with 17 years experience in the School District as a regular education teacher, and five years experience in New Jersey teaching a special education learning disability class at the middle school level. (N.T. 549-550)
  - b. She has received seven hours training in autism, seven hours in inclusion of students with severe disabilities in the regular education class, and seven hours of training on behavioral techniques with ongoing support. (N.T. 540-541, 557-558) She has previously taught two students who have been classified as autistic, both of whom were “highly verbal” and did not use sign language. (N.T. 511, 550)
  - c. She attended each of the three IEP meetings held in September 2005, spoke with Student’s previous 2nd grade teacher, Ms. F, watched DVDs of Student at Private School, and reviewed the reevaluation report. (N.T. 550-551, 556, 576-577)
  - d. Her classroom uses cooperative learning, teaming students together in groups of four. She would emphasize peer modeling for Student to develop his socialization skills and ability to interact with the class. (N.T. 560-562)
  - e. She would use a daily log book for communication with Student’s parents. (N.T. 559-560)
  - f. Ms. D would also utilize errorless teaching techniques. (N.T. 564) Ms. D would utilize parallel learning, so that Student would be working on the same topic as his classmates, but he would be doing different things. (N.T. 563) For example, when his classmates are reading chapter books, Student would be looking at pictures, and when his classmates are studying electrical circuits and connecting wires, Student might be “trying a switch.” (N.T. 547, 554-555)
29. If the September 2005 IEP had been implemented, Student’s learning support teacher would be Ms. K. (N.T. 1181, 1183, 1205) She would teach Student language arts and math. (N.T. 551-554, 564) Ms. D and Ms. K spent significant time discussing curriculum modification for Student. (N.T. 553-554)
30. If the September 2005 IEP had been implemented, Student’s speech and language teacher would be Ms. M.
- a. She has a Bachelor’s degree in Communication Disorders and a M.S. in Speech pathology. (N.T. 1180) She has 13 years total year experience in public schools, 8 of which have been in elementary schools with 10-12 higher functioning autistic children. (N.T. 1176-1179, 1216) She has taught apraxic children. (N.T. 1199-1200) She has no experience with the Association method utilized by Private School. (N.T. 1205) She is experienced in sign language. (N.T. 1202)
  - b. Ms. M would provide individual services three times per week for 30 minutes, and one group session per week for 30 minutes, with no more than 4 students in the group. (N.T. 1190-1193) She would work on answering questions, labeling, core vocabulary, functional communication, social interaction within a group, and generalization of skills within the classroom and home. (N.T. 1188-1194, 1230-1231; SD 9, pp.24-26)
  - c. She has attended a three day Carbone clinic, seven hours training in inclusion of students with severe disabilities in the regular education class, and seven hours of training on behavioral techniques (N.T. 1181-1183, 1202)

31. If the September 2005 IEP had been implemented, Student would have with him at all times a 1:1 aide with a bachelor's degree, and who is working on a master's degree. (N.T. 485-486, 897-899, 1231) The aide would share Student's sign language signs with other persons, including the other children in the class. (N.T. 1231-1232) Ms. D and the aide would work closely with each other. (N.T. 556, 562)
32. On September 13, 2005, Student's parents rejected the School District's proposed IEP and Student continues to attend Private School for the 2005-2006 school year. (N.T. 489, 492-93)

### **Student's Expert Witnesses**

#### **Dr. V**

33. Dr. V is a behavioral analyst and Director of Consultation Services for [Redacted] School, with a Ph.D. in Developmental and Child Psychology, who has consulted to school districts in New Jersey and Pennsylvania. (N.T. 300-301; P 111) She worked as an undergraduate in Dr. Lovaas' Young Autism Project and has worked with autistic children spanning the full spectrum of functioning levels. (N.T. 305-306) Dr. V is neither a regular education teacher nor a special education teacher. (N.T. 376)
34. Dr. V testified that Student needs systematic teaching, and that he does not learn simply from being in the physical presence of typically developed children. (N.T. 422) She further testified, however, that Student could benefit from interacting with non-disabled neighborhood school peers, who could serve as behavioral models for Student as well as opportunities to develop peer relationships. (N.T. 420-421)
35. Dr. V testified that Private School is appropriate for Student and that the School District's September 2005 proposed program and placement is not appropriate. (N.T. 374, 398) Dr. V observed systematic training of Student during her two hour observation at Private School. (P 45 N.T. 349, 375, 396, 401, 1132-1133, P-111) She observed good pacing, the use of prompt fading, consistency, prompting and redirection, good reinforcement, corrective teaching procedures, promotion of generalization, and data collection. (N.T. 350-374, 394, 424)
36. Dr. V testified that the School District's proposed September 2005 IEP was not appropriate. (N.T. 330-331, 337-342, 412; P 93) She observed, for one hour, 20 minutes the public school classrooms to which Student would be assigned under that IEP. (N.T. 327-328, 403, 408) She believes that their academic content was too far advanced above Student's comprehension and skill levels. (N.T. 330-331, 337-342, 412; P 93) She also believes that Student's loud vocalizations and behaviors would disrupt the classroom. (N.T. 337-338, 413)
37. I give no weight to Dr. V's testimony for the following reasons.

- a. Dr. V knew very little about either Private School or the proposed public school classrooms.
  - A. She did not know whether or not Private School had an IEP for Student. (N.T. 382) She did not know the composition of the Private School student body, either in numbers or disabilities. (N.T. 416) She did not know whether Student had a teacher at Private School, nor did she know the qualifications and training of Private School personnel. (N.T. 394, 419)
  - B. There is no reason to believe that Dr. V observed anything resembling what Student would experience in the public school classrooms. Student, of course, was not present during the observation. (N.T. 406) Because Dr. V had not reviewed the School District's proposed September 2005 IEP, she did not know whether that IEP provided for the highly structured environment with small groups and 1:1 teaching that she believes Student needs, nor did she know how the academic content that she observed would be modified for Student. (P 45; N.T. 381-382, 396-397, 412-413)
- b. Dr. V's opinion seems to be heavily biased toward the use of the VB teaching methodology for children with severe autism to the exclusion of other methodologies.

### **Mr. H**

- 38. Mr. H is a board certified behavioral analyst and Assistant Special Education Director for [an out of state] School District, with an M.A. in clinical psychology. He is not a certified teacher. (N.T. 648, 658, 736, 738, 758-759, 1132, 1134; P 39; P 99).
  - a. Mr. H observed Student at Private School. He testified that Private School employs consistent, good quality VB teaching to Student, mainly in one on one sessions. (N.T. 692-700, 763-764) He also testified that the other children at Private School serve as good language models for Student because most of them are higher functioning than Student. (N.T. 692-700, 763-764)
  - b. Mr. H also observed a public school classroom, but it was not the public school classrooms to which Student would be assigned under the School District's proposed September 2005 IEP. (N.T. 663-664)
  - c. Mr. H also believes that a home program is a very important requirement of Student's program. (N.T. 708)
- 39. Mr. H does not believe Student is an appropriate candidate for inclusion. (N.T. 665) He believes that the cost of inclusion to Student would be incalculable. (N.T. 678-79) He believes that the academic content of the public school classrooms to which Student would be assigned was too far advanced above Student's comprehension and skill levels. (N.T. 777)
- 40. I give no weight to Mr. H's opinion regarding the School District's proposed September 2005 IEP because 1) Mr. H's opinion is based upon speculations regarding what and how Student will be taught in public school and 2) Mr. H's opinion seems to be heavily biased

toward the use of the VB teaching methodology for children with severe autism to the exclusion of other methodologies.

### **Equitable Considerations**

41. I believe that both parties have engaged in various forms of gamesmanship in this dispute. I further believe, however, that neither party has seriously interfered with the other's full participation in the development of Student's educational program and placement. I note that, despite their heartfelt opposing viewpoints, the parties have persistently met, and indeed cooperated, in discussing Student's needs. Examples of such persistence and cooperation are the Spring 2004 transition to public school, the Spring/Summer 2005 observations, and the September 2005 IEP meetings. (P 52; N.T. 200-205, 210, 258, 920-921, 969-970, 1053, 1055, 1161-1163)
42. I believe that Student's parents have been inconsistent in their positions regarding what constitutes an appropriate public education for Student. I suspect that this may be related to some internal inconsistencies in their expectations.
- a. On one hand, they have agreed with the School District and rejected more intensive and restrictive public school programs in favor of the highly inclusive settings described in the April 2004 and September 2005 IEPs. (SD 36; N.T. 460-462, 483, 560, 1124)
  - b. On the other hand, the Private School placement with which they are satisfied, and for which they seek public funding, is highly intensive, and completely non-inclusive with typically developing peers.
    - A. Yet, Student's parents have expressed concern when Student appeared conspicuous among his non-disabled peers and they argue that Student's loud vocalizations and disruptive behaviors are among the reasons the September 2005 IEP is inappropriate, and they argue that the content in regular education classes is above Student's comprehension level. (N.T. 337-338, 413, 1044, 1104-1105, 1140-1141, 1268)
  - c. Considering Student's severe impairments, I think it is reasonable to expect that he will appear conspicuous in inclusion settings and that he will not comprehend much of the academic content that his non-disabled peers are learning.
  - d. I suspect that one of the fundamental, underlying differences between the School District and Student's parents is that Student's behavioral conspicuousness and his obvious cognitive differences from his nondisabled peers is acceptable to the School District but not to Student's parents.

### **Methodology**

43. Two years after the Appeals Panel's decision in SD 35, I believe that the fundamental disagreement in this case continues to be a dispute regarding methodologies.
- a. The parties' dispute in this case is not over the specific goals and objectives in the School District's September 2005 proposed IEP. Rather, their arguments concern the approaches to be used in teaching Student. In a nutshell:

- A. Student's parents, their expert witnesses, and Private School, emphasize teaching functional behaviors such as requesting, signing, and speaking above either inclusion with non-disabled peers or teaching core academic subject matters; while
- B. The School District believes that inclusion and teaching core academic subject matters must be emphasized as much as teaching functional behaviors. (N.T. 932-933, 1258)

### **Due Process**

- 44. Student originally requested a due process hearing on August 5, 2005. (P 1, p.3) He withdrew that request on September 22, 2005. (P 1, p.1; N.T. 1314-1315) On October 19, 2005, Student filed another due process hearing request, which was assigned to a different hearing officer. (P 1, p.1; N.T. 1315-1316) On November 4, 2005, for reasons that are not in the record and that are unknown to me, this case was reassigned to me. (N.T. 1316)
- 45. Hearing sessions were conducted in this matter on December 6, 2005, January 27 and 30, and February 6, 2006. Post hearing briefs were received, and the record closed, on March 20, 2006.
- 46. Student's exhibits P 1 – P 114 were admitted into the record. (N.T. 1311) School District exhibits SD 1 – SD 43 were admitted into the record. (N.T. 1311)
- 47. This decision is issued:
  - a. 167 days after the October 19, 2005 due process hearing request;
  - b. 151 days after my assignment to the case;
  - c. 57 days after the last due process hearing session;
  - d. 15 days after receipt of post hearing briefs; and
  - e. 15 days after the record was closed.

### **DISCUSSION**

Reimbursement of the cost of a unilateral parental placement is to be analyzed under a three-pronged test. Burlington v. Department of Education of Commonwealth of Massachusetts, 471 U.S. 359, 105 S.Ct. 1996 (1985); Florence County School District Four v. Carter, 510 U.S. 7 (1993) The Burlington/Carter reimbursement analysis requires a showing that: 1) the School District's proposed IEP, either procedurally or substantively, is inadequate to afford the child a free and appropriate education, 2) the private education services obtained by the parents were "appropriate" to the child's needs, and 3) equitable considerations do not bar or diminish the requested relief. This is consistent with the provision in the Individuals with Disabilities Education Improvement Act (IDEIA) that school districts need not pay for the cost of education of a child with disabilities at a private school if the school district made a free and appropriate

public education available to the student and the parents nevertheless elected to place the child at such private school. 20 U.S.C.A. §1412(a)(10)(C); 118 STAT. 2682

To avoid liability in this case, the School District's proposed IEP must be designed to provide meaningful educational benefit to Student. Board of Education v. Rowley, 458 U.S. 176, 107 S.Ct. 3034 (1984); Rose by Rose v. Chester County Intermediate Unit, 24 IDELR 61 (E.D.PA.1996) The appropriateness of the IEP is based upon information known at the time it is drafted. Fuhrmann v. East Hanover Board of Education, 993 F.2d 1031 (3d Cir. 1993) Among the factors to consider in reviewing the appropriateness of the School District's proposed IEP is the extent to which it offers to educate Student, to the maximum extent appropriate, with children who are not disabled. 20 U.S.C.A. §1412(a)(5)(A); Oberti v. Board of Education, 995 F.2d 1204 (3d Cir. 1993)

In this case, the School District had offered Student an IEP in April 2004, under which he attended the School District's public 2<sup>nd</sup> grade classrooms for three months. This IEP was based upon an earlier IEP that had been determined to be appropriate after review and modification by a hearing officer and appeals panel. At the beginning of Student's 3<sup>rd</sup> grade, 2004-2005 school year, the School District was prepared to continue implementing that IEP. At that time, Student's parents elected to educate Student privately at Private School.

I believe the School District's April 2004 IEP, and its intention to implement that IEP for the 2004-2005 school year, were appropriate to meet Student's needs. It started in April 2004 as an appropriate IEP and School District personnel testified as to the progress that Student made during the three months that he attended public 2<sup>nd</sup> grade.

Student's parents were perfectly within their rights to elect to educate Student privately in the fall of 2004, particularly where they disagreed with the School District regarding fundamental educational methodology. Student's parents, however, were not entitled to public funding of that private education.

As fall 2005 approached, the School District reevaluated Student and the parties met three times to develop an IEP. Again, they mutually rejected more restrictive placements in favor of inclusion. And again, Student's parents exercised their right to choose between the Private School's VB-based program and the School District's mixed academic/behavioral program.

As I analyze this case I must keep in mind that school districts have substantial discretion in choosing teaching methodology. R.C. and North Penn School District, Special Education Opinion No. 1417 (2003). My function is not to arbitrate a dispute about the appropriate educational methodology for educating autistic children. J.P. v West Clark Community Schools, 2002 WL 31618493, \_\_ F.Supp. 2d. \_\_ (S.D. Ind. 2002) Rather, I simply must determine whether the School District's proposed September 2005 IEP is reasonably calculated to confer meaningful educational benefits upon Student.

I conclude that the School District's proposed September 2005 IEP was reasonably calculated to confer meaningful educational benefits upon Student. The School District had

updated information regarding Student's needs, based upon observations of Student at Private School and Student's Private School progress reports. The parties met several times in September 2005 to develop goals and objectives. The School District planned, and described in detail at the hearing, the manner in which it's September 2005 IEP would be implemented. I find no basis for the contention of Student's Parents that the School District was not ready, willing and able to address Student's needs. (N.T. 21) Finally, I find no basis in the record upon which to order reimbursement of home program costs.

### CONCLUSION

For the last year and one-half, Student has attended a private school and received home-based programming to address impairments related to his autism. His parents seek reimbursement of tuition and home program costs, contending that the School District has failed to offer a free and appropriate public education. For the reasons described above, I find that the School District offered to Student a free and appropriate public education for both the 2004-2005 and 2005-2006 school years. Accordingly, Student's request for reimbursement of tuition and home program costs is denied.

### ORDER

- The School District offered to Student a free and appropriate public education for 2004-2005.
- The School District offered to Student a free and appropriate public education for 2005-2006.
- Student is not entitled to reimbursement of private school tuition.
- Student is not entitled to reimbursement of home program costs.

*Daniel J. Myers*

Daniel J. Myers  
Hearing Officer

April 4, 2006

Re: Due Process Hearing  
File Number 5764/05-06 AS  
Student

[Redacted] School District