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PENNSYLVANIA
SPECIAL EDUCATION HEARING OFFICER

ODR File No.: 7779/06-07 LS
Student: FC
School District: Philadelphia
Type of Hearing: Open

For the Student:

Mr. and Mrs.

David T. Painter, Esq.
McAndrews Law Office
30 Cassatt Avenue
Berwyn, PA 19312

For the School District:

Kenneth Cooper, Esq.
Office of General Counsel
School District of Philadelphia
440 North Broad Street, Third Floor
Philadelphia, PA 19130-4015

Due Process Hearing Request Date:	June 13, 2007
Hearing Date:	September 25, 2007
Date transcript received:	October 1, 2007
Decision Date:	October 15, 2007
Hearing Officer:	Daniel J. Myers

BACKGROUND

Student is a [over 21] year old resident of the School District, with multiple disabilities. The School District owes Student three years of compensatory education. Although the School District is willing to pay for Student's choice of compensatory education services, it refuses to develop and sign an IEP as part of the particular compensatory education program that Student desires. Student contends that, at least in this case, Student's compensatory education entitlement includes a requirement that the School District serve as the LEA on an IEP that facilitates Student's choice of compensatory education. For the reasons described below, I find for the School District.

ISSUE

Whether the School District is required to issue an IEP to implement Student's compensatory education award?

FINDINGS OF FACT

1. Student is a [over 21] year old resident of the Philadelphia School District (date of birth is xx/xx/xx) with multiple disabilities that include autism, pervasive developmental disorder, and speech and language deficits. (N.T. 9; P6; P8) ¹
2. Because her IQ falls within the first percentile, it is very difficult to assess accurately Student's cognitive ability. (N.T. 121) Student has not developed essential basic skills for communication, behavior management and social interaction. She needs highly structured, systematic instruction, broken down into manageable components specifically keyed to her developmental levels and rate of learning, with an emphasis on educational instruction, social skills, and communication skills. (N.T. 109-110, 112) Student experiences significant regression in skill acquisition, including communication skills. (N.T. 111)
3. Last year, Student received the type of education that she requires. (N.T. 42, 47, 49, 65; P4) She attended the [redacted] School (hereinafter, "APS"), which is an approved private school in Pennsylvania. (N.T. 39, 57, 64-65) Student has been attending APS for three years. (N.T. 36) Last school year, i.e., 2006-2007, was the school year during which Student turned 21 years old. (N.T. 8; P6; P8)
4. APS's corporate parent, [redacted], provides special services for individuals from birth through geriatrics who have special needs.

¹ References to P and HO are to Parent and Hearing Officer exhibits, respectively. References to N.T. are to the transcript of the September 25, 2007 hearing.

- a. APS, as one of [redacted]'s several divisions, provides services to school age children. (N.T. 46, 58) Other divisions provide services to people who are younger than, and older than, school age (i.e., birth to kindergarten, and adult to geriatrics.) (N.T. 45, 61) APS does not provide adult training services, and none of the adult divisions provide academic instruction. (N.T. 44, 62, 69)
 - b. Among the services that APS provides are biannual reevaluation reports, IEP team meetings, and draft IEPs. (N.T. 36, 44, 46) APS does not, however, serve as or sign IEPs as the LEA. APS requires the students' school districts to serve the LEA function. (N.T. 39-40, 46)
 - c. APS's student body comes from 55 school districts, with the Commonwealth paying 60% of tuition and the school districts paying 40%. (N.T. 35, 46, 61) APS does not accept private pay students. (N.T. 46, 58) Last year, APS had one out of state, school-age student from Delaware who was funded 100% by her school district. (N.T. 66-67)
 - d. APS believes that it has one student from Philadelphia, who may be 23 years old, who is attending APS during a compensatory education year, with an IEP. (N.T. 54) School District officials could not confirm at the hearing whether or not that 23 year old student actually has an IEP. (N.T. 72-74)
5. Student's family and the School District have been through due process several times regarding Student's education. (P6; P7; P8; N.T. N.T. 99-101) See, e.g., In Re a Student in the School District of Philadelphia, Special Education Opinion No. 677 (1995) As a result, the School District has created a trust fund for Student and, in addition, the School District owes Student three years of compensatory education. (P6; P7; P8; N.T. 8) The School District agrees that it owes three years of compensatory education, and it is prepared to pay for the compensatory education services that Student chooses for the next three years. (N.T. 98, 136) This school year, i.e., 2007-2008, is the first year in which the School District must start providing Student's three years of compensatory education. (N.T. 8)
 6. For the last ten months, the parties have been disputing the conditions under which the School District will provide its three years of compensatory education.
 - a. On January 3, 2007, the School District determined that, while it will continue paying for APS as compensatory education after this school year, it will not provide an IEP that prescribes FAPE because, as a 21 year old, Student should be able to participate in graduation or receive either a diploma or certificate of graduation. (P1; N.T. 26, 39, 48)
 - b. On January 22, 2007, APS informed the School District that before it graduated Student, it wanted assurance that the School District had satisfied any and all compensatory education obligations to Student. (P2; P3)

- c. On May 3, 2007, APS reiterated its January 22, 2007 message to the School District and APS informed the School District that APS will not enroll Student as a private pay student after she has graduated. (P3)
 - d. On June 20, 2007, APS informed the School District that it will provide educational services to Student after her 22nd birthday, if it is pursuant to a compensatory education arrangement and if the School District agrees in writing to pay for 100% of the cost of the services. (P4)
 - e. On August 27, 2007, APS informed the School District that it will not allow Student to return for 2007-2008 unless a new IEP is developed that “recognizes that [Student] is receiving compensatory education services as a part of FAPE.”² APS also informed the School District that the School District must pay 100% of the cost, must remain as LEA, must participate in Student’s IEP, and must award a diploma upon completion of the compensatory education period. (P5; N.T. 59)
7. Because Student’s parents lack the necessary training and experience, they are not capable of devising the type of compensatory education program that Student needs to meet her needs. (N.T. 113) Dr. H, Student’s highly credible expert witness,³ believes that a public special education program would be in the best position to provide the necessary ongoing oversight of Student’s compensatory education program. (N.T. 114, 116) Dr. H does not believe Student necessarily needs an IEP, but she does need a comprehensive, well-designed road map of services. (N.T. 120)
8. Student’s parents want APS to provide to Student the three years of compensatory education to which she is entitled. (N.T. 12) Student wants the School District to develop and sign the IEP that APS requires in order to provide Student with the services that she seeks. Student also notes, however, that it would not be acceptable for the School District to develop an IEP with which Student disagrees. (N.T. 137)
- a. Student argues that, while the Third Circuit Court of Appeals has never decided whether compensatory education requires an IEP team, Pennsylvania administrative appeals panel opinions are split on that issue. (N.T. 10) Student also argues that IDEIA gives broad remedial authority to courts to fashion the relief they consider appropriate, which in this case would include the IEP conditions required by APS. (N.T. 10-11)

² I do not know what the phrase “compensatory education services as a part of FAPE” means. I suspect it is intended to mean “something more akin to FAPE than what we customarily think of as compensatory education.”

³ Dr. H has a doctorate in education, with a major in school psychology. He is certified in teaching, school psychology, supervision of psychological services, and supervision of pupil personnel services. He has over 20 years experience as a school psychologist, a supervisor of school psychology services, and as an educational consultant with the states of Pennsylvania and Hawaii. (N.T. 105-106)

- b. Student also notes that one of the bases for her compensatory education award, administrative Appeal No. 677, awarded one year, not a number of hours, of compensatory education, somehow indicating that the appeals panel envisioned that the School District would retain a role as LEA in providing compensatory education to Student after 21. (P6; 12-13)
 - c. Student also notes that another of the bases for her compensatory education award is a settlement agreement reached at a due process hearing in which the parties agreed to an additional year of “eligibility.” (N.T. 92; P7)
 - d. Student also argues that the School District has failed to offer any compensatory education alternative to APS. (N.T. 14) Student notes that she is currently without a compensatory education program. (N.T. 13)
 - e. Student also argues that, for a person whose needs are as complex as hers, and where there is such a long history of FAPE denial, it is necessary in this particular case for the School District to remain involved after Student’s 22nd birthday and to provide compensatory education pursuant to an IEP. (N.T. 126)
9. The School District is willing to fund three years of compensatory education programs of Student’s choice. (N.T. 86, 88) The School District believes APS has provided an appropriate education to Student in the past and is capable of providing appropriate compensatory to Student in the future. (N.T. 80) While the School District is willing to pay for APS to provide three years of compensatory education, the School District is not willing to develop and sign an IEP for any of those three years. (P1; N.T. 26, 39, 48) The School District’s concern in this case is not with the appropriateness of the APS program. (N.T. 80) Rather, the School District does not believe that it is obliged to provide IEPs to residents over 21 years old, and the School District is concerned that if compensatory education IEPs are required for Student in the future, they may lead to future programming disagreements, future due process hearings, and more compensatory education awards. (N.T. 136)
10. Student also requests a Hearing Officer’s order that Student have access to her educational records. (N.T. 22) The School District appears to refuse to provide Student access to her records because she is 21, which allegedly relieves the School District of any record-producing obligation to Student. The School District’s record production refusal is also based upon the allegations that Student’s records are extensive, record collection would be burdensome, the reasons for Student’s request are unknown, and record production would serve no purpose. (N.T. 15-16)
11. I conducted a due process hearing in this matter on September 25, 2007. Exhibits HO 1 and HO 2 were admitted into the record. (N.T. 123) Exhibits P1, P2, P3, P6, P7 and P8 were admitted without objection. Exhibits P4 and P5 were admitted over School District objection. (N.T. 123-124)

DISCUSSION

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

IDEIA requires that a FAPE is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school. 20 U.S.C. 1412(a)(1)(A) State and federal regulations reiterate this “Part B, ages 3-21” FAPE obligation. 34 CFR §300.102; 22 Pa. Code §14.102(a)(2)(vi) (adopting federal regulations relating to FAPE and federal exceptions to FAPE for certain ages)

Compensatory education serves to make up for a prior deprivation of service and it may be utilized after Student’s 21st birthday. Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990), cert. denied, 499 U.S. 923 (1991) Some appeals panels have determined that parents alone are entitled to determine a child’s compensatory education services, so long as the selection is appropriate and reasonable under the circumstances. In Re a Student in the Colonial School District, Special Education Opinion No. 1619 (2005) Other administrative appeals panels have determined that compensatory education should be determined by an IEP team (of which the parents are members). In Re a Student in the Neshaminy School District, Special Education Opinion No. 1238 (2002)

In arguing that she is entitled to an IEP for compensatory education services in this case, Student notes generally the line of administrative appeals panel decisions supporting her position, as exemplified by the Neshaminy case, supra. Student also points to Blackman v. District of Columbia, 374 F. Supp. 2d 168 (D.D.C. 2005); Melvin v. Town of Bolton School District, 1996 U.S. App LEXIS 2905, 20 IDELR 1189 (D. Vt. 1993), aff’d mem. 100 F.3d 944 (2d Cir. 1996); and State of Connecticut Unified School District No. 1 v. Connecticut Department of Education, 699 A.2d 1077 (Conn. Super. Ct. 1996) (N.T. 127)

In Blackman, supra, the District Court granted the plaintiff’s request for an injunction requiring the school district to hold an MDT/IEP meeting to determine the appropriate scope and amount of compensatory education to which the student was entitled. 374 F. Supp. at 172 In that case, however, the issue appeared to be whether to issue the requested injunction or not. The issue does not appear to be whether an IEP is required as part of compensatory education in the first place.

Melvin, supra, does not appear relevant to the instant case, other than to support the undisputed propositions that: 1) compensatory education can extend beyond age 22;

and 2) courts are authorized to grant such relief in IDEIA cases as they determine is appropriate.

In State of Connecticut, supra, the Court determined that a hearing officer cannot predetermine, two years in advance, the location of a child's post-21 compensatory education program. Noting that childrens' educational needs change, and that that particular child's future educational needs were not immediately knowable at the time of the hearing officer's decision, the Court determined that it would be necessary to convene a planning and placement team two years later to evaluate Student's abilities and needs at that time so that an IEP could be developed that fully met those needs. 699 A.2d at 1090 This certainly indicates that the Connecticut Superior Court expected an IEP for that child's post-21 compensatory education services. It is not clear, however, that the Court was squarely resolving the issue of whether the law requires an IEP team to determine compensatory education, or simply that no one (IEP team or not) can determine a child's compensatory education program two years in advance.

On the other hand, the School District refers to Letter to Riffel, an August 22, 2000 opinion of the Director of the federal Office of Special Education Programs, 34 IDELR 292, 101 LRP 85, which states that, while graduation relieves school districts of their obligation to provide FAPE to eligible children, graduation does not relieve school districts of their obligations to provide compensatory education services. The School District argues that Riffel indicates that, while a student can retain a compensatory education entitlement after age 21, she cannot retain an entitlement to an IEP and all of its FAPE implications. Once again, Riffel is of limited use in this case because it does not address the specific issue concerned here.

The School District also refers to In Re a Student in the Hazleton Area School District, Special Education Opinion No. 1246 (2002), which concluded that while the Pennsylvania Department of Education can voluntarily extend its special education subsidies to school districts for the entire July 1 to June 30 period in which a child's 21st birthday falls, such voluntary subsidy policies do not create a FAPE obligation beyond the federal legally mandated 21st birthday. Apparently because it was troubled by the facts of that particular case, in which the parents appeared to receive conflicting agency advice after several good-faith inquiries, the appeals panel's decision included some dictum suggesting that, in some cases, parents might have some contractual, detrimental reliance, or even 14th Amendment, arguments to support their claims for post-21 FAPE.⁴ Hazleton, however, does not directly address the specific issue concerned here.

To dispose of a pre-hearing issue in this case, I relied upon Board of Education of Oak Park & River Forest High School District 200 v. Illinois State Board of Education and Todd A, 79 F.3d 654 (7th Cir. 1996), to determine that Student was not entitled to

⁴ This dictum is irrelevant in this case, however, because Student is not arguing that she is entitled to all of the FAPE entitlements contained in Part B to which a pre-21 disabled child is entitled.

remain at APS under the IDEIA's stay-put or pendency provision. (HO 2) In Oak Park, a United States District Court ordered the local school district to continue funding a 21 year old's education at a private autism program pending resolution of the student's compensatory education dispute with the school district. On appeal, Chief Judge Posner of the Seventh Circuit determined that, "We think that the stay-put provision does indeed cease to operate when a child reaches the age of 21. Except for the judge-created remedial exception for claims for compensatory education, the entitlements created by the Individuals with Disabilities Education Act expire when the disabled individual turns 21." 79 F.3d. at 659 I noted that Oak Park has been followed in other cases denying the same stay-put relief sought by Student in this case. Cosgrove v. Board of Education of the Niskayuna Central School District, 175 F. Supp. 2d 375 (N.D.N.Y. 2001); Washington Township Board of Education, 102 LRP 11891 (NJ SEA 1999)⁵

In this particular case, the School District frames the issue as one in which the Student is seeking to maintain all of her pre-21, Part B, FAPE entitlements for the next three years, from ages 22 to 25. (N.T. 134) Student, however, does not go so far, seeking instead a more modest list of Part B FAPE entitlements – Student wants an IEP, and a due process hearing if the IEP is not implemented, but she does not want the School District to be able to recommend particular services for the IEP with which she disagrees. (N.T. 137-138)

It is beyond question that Student is entitled to compensatory education services for the next three years, which is roughly from ages 22 to 25.⁶ In addition, no one argues that the full complement of statutory, pre-21, Part B FAPE entitlements continue to apply to Student now that she is 22 years old. The question is whether Student is entitled to something more than just the School District's credible promise that it will write a check to pay for whatever compensatory education program Student can find. In this case, Student reasonably asks only that the School District be required to comply with whatever conditions the APS imposes in order to continue the educational services that Student has already been receiving.

While Student's request is not unreasonable, it is not supported by law. Once again, I rely upon Oak Park, supra, in reaching my conclusion. Chief Judge Posner wrote that, "Except for the judge-created remedial exception for claims for compensatory education, the entitlements created by the Individuals with Disabilities Education Act expire when the disabled individual turns 21." 79 F.3d. at 659 As applied to this case,

⁵ Student appealed my prehearing decision that she was not entitled to pendency at APS and I have not received the Appeals Panel's complete decision. Although Student courteously emailed a copy of the Panel's decision to me today, I was unable to download it into a legible copy before I issued this decision. As best I could read some of the Panel's opinion, I tried to address its apparent concerns here.

⁶ I say "roughly" because Student [is xx], and because it may take awhile before all appeals and other wrinkles are ironed out. Student's three years of compensatory education services may not commence for a few weeks, in which case her entitlement may extend beyond her 25th birthday.

Student has a judge-created entitlement to three years of compensatory education services. She does not, however, have additional statutory entitlements to an IEP or pendency or due process.

Student's further argument that judges, hearing officers and appeals panels, have the equitable power to order appropriate relief also does not support the relief requested in this case. It would be easy to wave my hearing officer's wand and order the School District to just do the one or two little things that APS is requesting in this case, particularly since everyone seems to agree that APS would be an appropriate compensatory education program and placement for Student. But ordering appropriate relief under equitable powers should be based upon some principles, and Student does not offer sufficient principles or bases for the relief that she seeks in this case.

I believe that the administrative and judicial cases delegating compensatory education decisions to IEP teams are based upon the principle that experts on those teams should know best how to program for the particular child's needs. They do not appear to be based upon the distinctly different underlying principle that compensatory education awards require legally binding IEPs and/or all or some of the due process procedures that typically accompany IEPs.

Obviously, compensatory education is more than simply check-writing; that is the purpose of a trust fund. It is logical that some administrative conditions would be appropriate for a compensatory education provider to request (and for a hearing officer to order in the event of school district refusal) while other conditions would not be appropriate. Examples of conditions that might be appropriate would be requiring proof of contracting authority from a Board of Directors, paying invoices by a certain date, or purchasing incidental supplies. Examples of conditions that might be inappropriate for a compensatory education provider to request (and for a hearing officer to order) would be the hiring (or firing) of particular people, the leasing of particular facilities, or the purchase of expensive, specialized equipment.

On which end of this spectrum fall the APS's requirements of: 1) a new IEP that "recognizes that [Student] is receiving compensatory education services as a part of FAPE;" and that the School District 2) must remain as LEA; 3) must participate in Student's IEP; and 4) must award a diploma upon completion of the compensatory education period? (P5; N.T. 59) I believe they fall on the end of the spectrum containing inappropriate conditions. These are more than just administrative conditions precedent to providing compensatory education – they are clearly conditions that are intended to fix (or perhaps in APS's view, shift) substantive rights and responsibilities. While nothing prevents the School District from voluntarily taking on such conditions, the question is whether or not the School District is obligated to comply with such conditions if a compensatory education provider chooses to impose them.

Judicial principles of equity, fairness and accountability extend the non-statutory entitlement of compensatory education beyond 21. For whatever reason, however, Congress has determined that IDEIA's statutory entitlements shall end at age 21. See Oak

Park, supra.⁷ Nothing other than sympathetic facts justifies my determining, in this particular case, that the School District's compensatory education obligation for the next three years must include the provision of an IEP, continued status as the LEA, participation in development and signing of the IEP, and a diploma. Mr. Justice Holmes stated, that "[m]en must turn square corners when they deal with the Government." Rock Island, Arkansas and Louisiana Railroad v. United States, 254 U.S. 141, 143, 41 S.Ct. 55, 56, 65 L.Ed. 188 (1920) In this case, I find no legal bases for bending or stretching the School District's compensatory education obligation so as to include the conditions required by APS.

I also do not agree with Student that either Appeals Panel Opinion No. 677 (1995) or the parties' 2001 settlement agreement requires a different result (P6; P7). First, there is no indication that either the Panel in its decision, or the parties in their settlement agreement, had any idea that they were establishing Student's right in 2007 to a post-21 compensatory education IEP. It is clear enough to me that the parties in the 2001 settlement agreement were agreeing that the School District would owe compensatory education in 2007, after she turned 22, with their language that "one year will be added to [Student's] eligibility for Special Education, with the understanding that the District will assume responsibility for this relief, even if the family no longer resides in the District at the time that [Student] turns 21." (P7, p.2) It is unclear, however, what else the parties intended an additional year of "eligibility" to mean.

Although she argues that she is entitled to an additional year of "eligibility," Student does not ask that she be treated as a 20 year old child with disabilities, who is entitled not only to an IEP, but also to FAPE, ERs, NOREPs and, of course, due process hearings requestable by either party in the event of a dispute. See N.T. 137 (It would not be acceptable to Student for the School District to develop an IEP with which Student disagrees.) Rather, Student argues that her additional year of eligibility is a sort of "FAPE-lite" where she can pick and choose which parts of the statutory FAPE provisions applicable to 20 years olds she would like to apply to her at 22. While I don't criticize Student for wanting to cherry-pick the FAPE conditions that will apply to her three years of compensatory education, I do not agree with her that the parties bound themselves to this back in 2001 when they agreed to an additional year of "eligibility." I believe this is an issue of first impression that was not anticipated and settled by the parties back in 2001.

Student also argues that the School District has failed to offer any compensatory education alternative to APS and that she is currently without a compensatory education program. (N.T. 13-14) Student is apparently suggesting that, therefore, the School District is required by default to comply with whatever IEP conditions Student's

⁷ Of course, the age 21 cut-off is simply an arbitrary device, probably based upon some type of bureaucratic funding system. Nothing in this Student's background – nor in the backgrounds of many of our children with disabilities – establishes that the need for special education magically ends at 21. It is only the statutory entitlement that ends at that age.

compensatory education provider may require. I disagree. The School District is willing to fund three years of compensatory education programs of Student's choice. (N.T. 86, 88) The School District's concern in this case is not with the appropriateness of the APS program, but rather, with its requirement that the School District develop and sign an IEP for the compensatory education. (P1; N.T. 26, 39, 48, 80) The School District is in compliance with its part of the deal – i.e., it is willing and able to fund the compensatory education. As I noted above, it is also reasonable to expect the School District to comply with certain administrative conditions attached to the compensatory education, such as proof of contracting authority, purchase of incidental supplies, etc. In this case, however, the Student's compensatory education provider insists upon substantive obligations that I do not believe the School District is required to accept. The School District's refusal to accept voluntarily, certain conditions that it is not required to accept, is not the equivalent of a School District failure to provide any compensatory education at all.⁸

Finally, Student requested at the hearing an Order that the School District provide to Student all of her educational records. Apparently, Student has been represented by several counsel over the years, and Student may not have a complete set of her own educational records. (N.T. 22) The School District refuses to provide Student access to her records because it does not believe it has any obligation to her, now that she is 22 years old. The School District also complains that Student's records are extensive, record collection would be burdensome, the reasons for Student's request are unknown, and record production would serve no purpose. (N.T. 15-16) I sympathize with Student's request and I am offended by the School District's callous response. Nevertheless, access to education records, and due process relating to access denial, are governed by regulations over which I lack jurisdiction. 34 CFR §§300.613, 300.619

CONCLUSION

This is a case that tugs at heart strings. Student is a [over 21] year old resident of the School District who is indisputably entitled to three years of compensatory education services and has found a compensatory education provider with whom everyone otherwise seems pleased. Although the School District is willing to pay for Student's preferred compensatory education services, it refuses to comply with that provider's condition that the School District develop and sign an IEP as part of the particular compensatory education program that Student desires. Student, therefore, asks me to order the School District to comply with the provider's conditions. I conclude however, that Student has aged out of the IDEIA's statutory requirements, that the conditions at issue are not statutorily required, and therefore the School District is not required to comply with the provider's conditions. I also conclude that Student's reasonable complaint regarding the School District's refusal to provide access to her educational records is outside my jurisdiction. Accordingly, I find for the School District.

⁸ I also note, once again, that Student does not believe the School District has the right to propose a compensatory education program and placement with which Student disagrees. (N.T. 137) How, then, can the School District simultaneously be faulted for not offering any compensatory education alternative to APS?

ORDER

- The School District is not required to issue an IEP to implement Student's compensatory education award.
- This matter is DISMISSED and considered CLOSED.

Daniel J. Myers

Hearing Officer

October 15, 2007

ODR File No.: 7779/07-08 LS
Student: Student
School District: Philadelphia