

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.

Decision

Due Process Hearing for K.T.
Date of Birth: xx/xx/xx
File Number: 5702/05-06

Dates of Hearings:
October 7, 2005; November 14, 2005; November 16, 2005;
November 21, 2005; December 22, 2005

CLOSED HEARING

Parties:
Parent(s)

Upper Moreland School District
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Willow Grove, PA 19090-1431

Representatives:
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Date Transcript Received:
Date Closing Response Received:
Date of Decision:

December 28, 2005
December 29, 2005
January 9, 2006

Hearing Officer:

David F. Bateman, PhD

I. BACKGROUND

Student is an xx old resident of the Upper Moreland School District (hereinafter District) eligible for special education and related services as a student with autism and pervasive developmental disorders. The Parents requested the present Hearing seeking compensatory education for a denial of a free appropriate public education for the 2003-2004 school year, and tuition reimbursement for the 2005-2006 school year for the [Private] School. Student attended the [Private] School for the 2004-2005 school year but the Parents are not seeking tuition reimbursement for that year. The District alleges the desire by the Parents for Student to attend the [Private] School is a dispute over methodology, their program is appropriate, and the District placement is the least restrictive environment. The District stated it has at all times satisfied the requirements of the IDEA and has offered an appropriate program for Student.

II. FINDINGS OF FACT¹

A. Background

1. Student was born on xx/xx/xx. He is currently xx-years of age (NT 26-27).
2. Student is a resident of the District (NT 26-27).
3. The District completed a comprehensive evaluation report on March 26, 2001 (S-1). Needs identified include: receptive and expressive language skills, improve socialization, improve ability to categorize objects, improve his self-help skills, increase his attention, improvement in fine motor skills, decrease oral sensitivity, and improve modulation of sensory input (S-1, p. 7).
3. A Notice of Recommended Educational Placement (NOREP) was issued on January 10, 2003 (S-2). An IEP was issued on December 11, 2002 (S-2, p. 3).
4. The [Redacted Hospital] developed a report on Student's progress for speech and language pathology on August 27, 2003 (S-4). The report recommended continued efforts in language needs.
5. The [Redacted] Intermediate Unit completed a reevaluation on January 12, 2004 (S-5). This evaluation found Student continually eligible for special education and related services as a student with autism. Student was described as high functioning autism (NT 215).
6. The District issued a NOREP on February 27, 2004 (S-6). The IEP was issued on February 5, 2005 (S-6, p. 3). The placement was for an autistic support classroom in a neighboring district.

¹ References to notes of testimony will be designated "NT" followed by the relevant page number. References to District evidentiary exhibits will be designated "S" followed by the relevant exhibit number. References to Parents' evidentiary exhibits will be designated "P" followed by the relevant exhibit number.

7. A curriculum-tracking sheet was used to keep track of the progress Student made in reading, speech, math, social studies, and science for the 2003-2004 school year (S-7).
8. The District issued a NOREP on March 25, 2004 (S-9). This NOREP was for extended school year services for the summer of 2004.
9. The [Private] School accepted Student for placement in July 14, 2004 (S-10). Tuition for the 2004-2005 school year was \$50,000.
10. The Parents sent a letter to the District notifying that Student would attend the [Private] School on July 23, 2004 (S-11). The Parents stated one of the main reasons was for the Relationship Developmental Intervention method.
11. The District sent the Parents a letter on October 8, 2004 acknowledging Student was attending a private school and that if Student were to attend they requested notice (S-13).
12. The Parents requested an IEP meeting on October 13, 2004 for purposes of discussing placement (S-14).
13. Ms. K. completed an occupational therapy evaluation in October 2004 (S-12). She recommended continued occupational therapy intervention at a frequency of 60 minute per week of individual therapy; 30 minutes integrated therapy in the classroom with Student's teachers to carryover techniques in the classroom environment; sensory diet for the classroom; and Handwriting without Tears approach is recommended for handwriting instruction.
14. The District denied the Parents' request for applying funds paid to the intermediate unit to the 2004-2005 tuition on November 9, 2004 (S-16).

15. An IEP meeting was held on December 13, 2004 (S-17, p. 3). A NOREP was issued on December 22, 2004 (S-17, p. 1). The placement recommended by the District is for a full-time autistic support classroom in a neighboring school district. The Parents rejected the NOREP stating the [Private] School was the most appropriate placement, and that occupational therapy skills were not addressed. The present education levels are the same from previous years IEP found at S-6 (NT 310).
16. The [Private] School provided an assessment on Student's program after January 2005 (S-19). The report indicates Student's progress is significant.
17. A prehearing conference was held on March 7, 2005 (S-20).
18. The [Private] School provided results of testing on Student's progress on March 10, 2005 (S-21). The report indicates Student is making progress towards independence and knowledge of math concepts.
19. The District sent a letter to the Parents on March 13, 2005 summarizing the pre-hearing conference (S-22).
20. The District provided a NOREP on May 23, 2005 (S-24). This NOREP provided a full-time autistic support in an alternative regular school in a neighboring school district. The Parents disagreed with the NOREP stating the placement should be the [Private] School (S-24, p. 2). Most of the present levels of educational performance are from IEP's of earlier.
21. The [Private] School created an IEP for the 2004-2005 school year (S-33). The IEP is different from the IEP developed by the District.

22. The [Private] School used the District's IEP for the 2004-2005 school year and reported the progress on goals in June 2005 (S-34).
23. Student's pediatrician in April 11, 2005 recommends Student continue attending the [Private] School for the 2005-2006 school year (S-40).
24. Student's neurodevelopmental pediatrician in July 25, 2005 recommends Student continue attending the [Private] School for the 2005-2006 school year (S-41).
25. The [Redacted] MH/MR Center completed an evaluation on May 17, 2005 finding Student as in the average range of functioning (S-39).
26. The director of the [Private] School reviewed Student's educational record and stated Student did not make appropriate progress (S-38).

III. ISSUE PRESENTED

Was Student provided a free appropriate public education for the 2003-2004 school year?

Is Student eligible for tuition reimbursement for the 2005-2006 school year to the [Private] School?

IV. DISCUSSION AND CONCLUSION OF THE LAW

A Due Process Hearing was requested because Student's Parent's are seeking the following relief for their child: compensatory education for inappropriate services for the 2003-2004 school year, and tuition reimbursement for the 2005-2006 school year to the [Private] School. The District maintains that it has at all times satisfied the substantive and procedural requirements of the IDEA and Pennsylvania special education law with regard to the provision of special education and related services to Student, the dispute is over educational methodology, the private placement is not the least restrictive environment, and therefore, that there are no legal grounds to justify the relief sought by the Parent in this proceeding.

Student's Educational Placement

Before there is a discussion regarding Student's educational placement, a review of the necessary components of the law is appropriate. It is appropriate to clarify the applicable law related to how far back the parents can potentially claim.

The recent reauthorization of IDEA contains specific information about how far back a party can claim for the purpose of compensatory education.

§300.507 Filing a due process complaint.

(a) General.

(1) A parent or a public agency may file a due process complaint on any of the matters described in §300.503(a)(1) and (2) (relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child).

(2) The due process complaint must allege a violation that occurred not more than two years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the due process complaint, or, if the State has an explicit time limitation for filing a due process complaint under this part, in the time allowed by that State law, except that the exceptions to the timeline described in §300.511(f) apply to the timeline in this section.

In Pennsylvania, the *Montour* decision (*Montour School District v. S.T.*, 805 A.2d 29, Pa. Cmwlth. Ct. 2002); *see also Carlynton School District v. D.S.*, 815 A.2d 666, Pa. Cmwlth. Ct. 2003) closes the “statute of limitations” gap left open by *Bernardsville. Bernardsville Bd. of Educ. v. J.H.*, 42 F.3d 149 (3d Cir. 1994). *Montour* now applies the one, possibly two, year period to the start of administrative proceedings, looking back from the date of the hearing request. Admittedly, some

appeal panel decisions have chosen not to follow *Montour's* controlling holding,² an appeals panel decision found claims for compensatory education and liability predicated even on a “child find” failure, are barred. *In re Gregory R.*, Pa. SEA no. 1301 (Nov. 11, 2002).

The legal basis for the holding in *Montour* is the refined point between initiating due process proceedings and initiating litigation in court. The Commonwealth Court considered the various Third Circuit cases addressing “statute of limitations” issues. The court noted *Bernardsville* applied a limitations period to initiating due process proceedings. Although the case involved a claim for tuition reimbursement, the issue was whether the parents sought due process in a timely manner. In contrast, the Commonwealth Court noted, stands *Ridgewood*. The district in that case, however, did not raise an issue with respect to timely initiation of due process, but rather litigation in court under 20 U.S.C. §1415(i)(2). Accordingly, the Third Circuit in *Ridgewood* addressed the time to file in court. Thus, the Commonwealth Court in *Montour* concluded *Ridgewood* did not apply to the question of timely initiation of due process proceedings.

Montour does not contain exceptions: it requires parents to initiate proceedings timely. Recently, the appeals panel made this quite clear. This limitation applies regardless of the type of claim pressed or the nature of the relief sought. Thus, even claims for compensatory education based on events occurring outside the permissible time frame, including child find, are barred.³

² *In re J.K. v. Mt. Pleasant*, Pa. SEA no. 1481, *In re R.S. v. Philadelphia*, SEA no. 1517.

³ *In re: G.R. v. Penn Delco*, Pa. Sea no. 1301.

While it is still beyond question that compensatory education “require[s] school districts to belatedly pay expenses that they should have paid all along;” that an award of compensatory education requires only a “simple finding that a child has received an inappropriate education;” *M.C. v. Central Reg. Sch. Dist.*, 81 F.3d 389, 397 (3d Cir.), *cert denied*, 519 U.S. 866 (1996) and that the “right to compensatory education accrues when the school knows or should know that the student is receiving an inappropriate education,” those rules apply only to viable claims based on events within the one or two year period.

Parents’ proof of mitigating circumstances was an issue. *Montour* clarified that, in special education matters, an administrative claim is barred for more than one year before the date of the hearing request, unless mitigating circumstances are present. In order to go beyond one year, whether under *Montour* or *Bernardsville*, the parents bear the burden of showing such mitigating circumstances justifying relief beyond one year.

Mitigating circumstances could include failure to provide what is readily conceded to be due. *Lester H v. Gilhool*, 916 F.2d 865 (3d Cir. 1990), *cert. denied*, 499 U.S. 923 (1991). In other situations, it may be evidence of an environment permeated with discrimination or neglect so severe or pervasive that it creates a hostile environment. *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 250 (3d Cir. 1999). Evidence that district officials intentionally mislead the parents would probably also be relevant to the consideration of mitigating circumstance. In contrast, for example, the mere failure to evaluate is not itself a sufficient mitigating circumstances. *In re Gregory R.*, Pa. SEA no.1301.

The Parents as a part of their case presented information that they were not told that Student did not meet the goals and objectives of his previous IEP's (NT 583, 584). However, testimony came out through the speech language teacher contracted with by the intermediate unit, who did remember reporting to the Parents Student's progress on Student's goals and objectives of Student's IEP (NT 546).

As such, this Hearing Officer is bound to follow the precedent set by the Commonwealth Court in *Montour* and this is consistent with recent Appeals Panel Decisions (1642, 1668)⁴ addressing this issue.

The educational standard to which the District is held is clearly established by the courts. The IDEA does not require states to develop IEP's that "maximize the potential of handicapped children" and merely requires the provision of "some" educational benefit. See *Board of Education v. Rowley*, 458 U.S. 176, 189 (1982). The IDEA requires that the public school program provide access to specialized instruction and related services which are "reasonably calculated" to provide the student with some educational benefit. *Id.* at 207-208. 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). The Third Circuit has adopted this minimal standard for educational benefit, and has refined it to mean that more than "trivial" or "de minimus" benefit is required. See *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 1179 (3d Cir. 1998), *cert. denied* 488 U.S. 1030 (1989). See also

⁴ *In re: T.G. v. East Stroudsburg*, PA SEA no. 1642, September 20, 2005. *In re: M.C. v. Philadelphia*, PA SEA no. 1668, November 8, 2005.

Carlisle Area School v. Scott P., 62 F.3d 520, 533-34 (3d Cir. 1995), quoting *Rowley*, 458 U.S. at 201; (School districts “need not provide the optimal level of services, or even a level that would confirm additional benefits, since the IEP required by IDEA represents only a “basic floor of opportunity”).

Moreover, the Third Circuit has determined that a student’s demonstrated progress in an educational program is sufficient to show that a school district’s IEP allows for significant learning and provides meaningful benefit as necessary to satisfy the IDEA’s FAPE standard. *See Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 242 (3d Cir. 1999). Given that progress is relevant to the determination of whether a student with a disability received an educational benefit, it is therefore also relevant to determining whether a reimbursement award is due.

The issue in this case is whether the Parents can seek compensatory education for two years given the recent court cases relating to a statute of limitations. In July 2005, the Parent filed a request for due process. One of the requests was for compensatory education. Subsequent to that request, testimony was taken in this case on October 7, 2005, November 14, 2005, November 16, 2005, November 21, 2005, and December 22, 2005.

Parents Claim for Compensatory Education

Parents make a claim for compensatory education. Compensatory education may be an appropriate equitable remedy only when the responsible educational authority has failed to provide a child with a disability with an appropriate education as required by the IDEA. The purpose of compensatory education is to replace lost

educational services. *See Todd v. Andrews*, 933 F.2d 1576 (11th Cir. 1991). *See also Lester H. v. Gilhool*, 916 F.2d 865 (3rd Cir. 1990); (An IDEA eligible student is entitled to an award of compensatory education only if FAPE is denied by the school district); and *M.C. v. Central Regional Sch. Dist.*, 81 F.3d 389 (3rd Cir. 1996). Here, Student did not make meaningful educational progress during the 2003-2004 school year. This Hearing Officer found no mitigating circumstances allowing a claim of more than one year. In any case, as acknowledged by the Hearing Officer, the Parents' claim for compensatory education prior to June, 2004 (one year prior to the Parents' request for due process) is barred pursuant to *Montour School District v. S.T.*, 805 A.2d 29 (Pa. Cmwlth. Ct. 2002); *see also Carlynton School District v. D.S.*, 815 A.2d 666 (Pa. Cmwlth. Ct. 2003).

The District feels it has provided Student with a free, appropriate public education throughout [Student's] enrollment in District schools. The District presented testimony and evidence that it has provided significant learning and a meaningful benefit to Student, gauged in respect to Student's potential. *See Ridgewood Board of Education v. N.E.*, 172 F.3d 238 (3d Cir. 1999); *see also Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3d Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989).

This Hearing Officer has reviewed carefully the educational programs in effect since June 2003 and the programs offered since then.⁵ For numerous reasons as described below, this Hearing Officer concludes the IEP and program and services

⁵The analysis of the content of the IEP is very similar to the analysis and content of the IEP as found in appeals panel decision of September 15, 2003. *In re K.G.*, Pa. SEA no. 1400.

implemented during the 2003-2004 were not appropriate. Accordingly, this Hearing Officer holds that Student was denied a free appropriate public education (FAPE) during the period at issue. Specifically, Student's teacher during the 2003-2004 school year, Ms. M., testified Student started the year with 40 sight words (NT 270) and ended with 100 words (NT 272). Student's teacher testified Student made progress in reading through the use of the Edmark Reading program (NT 271-271), and the use of Explode the Code (NT 281).

It was clear repetition was a big part of the program, and it appears Student did well through it's use in comparing the present levels of educational performance from S-2, the IEP of 2003-2004, and the present levels of educational performance from S-6, the IEP for 2004-2005, and the testimony of Student's teacher, Ms. M. However, if one compares Student's reported progress on Student's short-term objectives or benchmarks, it does not look like Student made progress beyond the primer level (S-26, p. 1), and that Student did not meet the short-term objectives in Student's IEP.

There is indication Student did not meet the goals of the IEP as a part of S-26, which raises a question about the placement (NT 350-354). She testified that the placement recommended by the District might not be appropriate for Student (NT 351).

There was abundant testimony that Student did not attain the short-term objectives of the IEP's in place during the 2003-2004 school year (NT 206-211, 346-350). There was testimony that Student actually regressed on some of the goals and objectives (NT 206-208, 347-348). Given that the IEP goals and objectives were not

being mastered, the IEP should have been revised or the placement was incorrect (NT 351). This Hearing Officer has reviewed extensively the IEP's in place during the time in question, and it is clear Student did not make adequate progress.

In the summer of 2004 there was an indication Student regressed (S-8), but Student received a summer program at a camp, not academic services (NT 385). The services Student received during the summer of 2005 for ESY services were an issue at the onset of this hearing, but was resolved during off the record discussions that occurred during the hearing (NT 974).

Finally, there was no evidence that regular education teachers attended the IEP meetings as a part of the December 2002 IEP (S-2), or other IEP's from the Parent's perspective (NT 582).

However, since the 2003-2004 period is beyond the scope of this due process hearing, no award of compensatory education is due for that year.

Appropriateness of the IEP

The District feels it has offered Student with a free, appropriate public education. The District presented testimony and evidence that it has offered significant learning and a meaningful benefit to Student, gauged in respect to Student's potential. *See Ridgewood Board of Education v. N.E.*, 172 F.3d 238 (3d Cir. 1999); *see also Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3d Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989).

Student has not attended school in the District since the end of the 2003-2004 school year. During the 2004-2005 school year Student attended the [Private] School.

The District's placement proposal attempts to satisfy the IDEA's LRE requirement at 20 U.S.C. § 1412(5)(A) because it incorporates elements of mainstreaming in the regular education program in conjunction with Student's special education program. Although it recognizes Student's needs to be instructed in a group of peers who have similar difficulties during a portion of Student's school day, the District's program also provides Student with opportunities to interact with typically developing peers during Student's day. The District maintains that the educational program it has offered to Student appropriately balances the IDEA's dual principles of FAPE and LRE.

This Hearing Officer has reviewed carefully the IEP proposed in May 2005.⁶ For numerous reasons, this Hearing Officer concludes this IEP was not appropriate. The annual goal and short-term instructional objectives for reading are inappropriate in establishing a standard of progress within a year's time as acceptable. This Hearing Officer agrees with the Parents in that the IEP offered by the District does not show how the IEP would move Student from Student's present educational levels to the proposed goals and objectives.

The IEP does not contain updated present educational goals and objectives. The District stipulated that the present educational levels were the same (NT 507-508), and it is written on the IEP (S-17, p. 6). It is clear the present educational goals and objectives are the same from previous years IEP's. This Hearing Officer is left unsure of the how this IEP would benefit Student; it does not contain present

⁶The analysis of the content of the IEP is very similar to the analysis and content of the IEP as found in appeals panel decision of September 15, 2003. *In re K.G.*, Pa. SEA no. 1400.

or recent information to assist in planning for Student's goals and objectives. Since it lacks specificity and relevance in Student's present levels of educational performance calls into question every IEP goal and objective contained in the IEP. The same can be said of the May 2005 IEP (S-24, pages 5, 6, 7, 8, 9). The District stipulated these are the same pages from previous IEP's.

Additionally, the specially designed instruction of (S-17, p. 20) is missing. After an extensive review of the IEP, this Hearing Officer could not locate the specially designed instruction in this IEP. The specially designed instruction in the May 2005 IEP (S-24) appears extensive and well-founded.

The IEP's developed by the District while Student was in the [Private] School contain the same present levels of educational performance that were in previous IEP's (NT 309-313). They contain little if any information about the progress Student has made in the year Student spent at the [Private] School (NT 315). The previous IEP's, S-2 and S-6 have essentially the same goals with very little progress being demonstrated between the goals (NT 315-316).

This Hearing Officer concludes that the IEP proposed for Student is inappropriate. Therefore, we need to turn to the Parent's request for tuition reimbursement.

Parents Request for Tuition to the [Private] School

In this case, there was testimony and comments about the requested private school placement that need to be addressed. The program and placement as offered by the District has been deemed inappropriate, the second part of the Burlington-

Carter test is the appropriateness of the private school placement. See *Burlington School Committee v. Massachusetts Department of Education*, 471 U.S. 379 (1985). One is left unsure of whether it is appropriate or not, given that there was very little research on the implementation of RDI in an educational environment.⁷

Tuition reimbursement is an available remedy for parents to receive the costs associated with a child's placement in a private school where it is determined that the program offered by the public school did not provide FAPE, and the private placement is proper. *Florence County School District v. Carter*, 510 U.S. 10 (1993); *School Committee of Burlington v. Department of Education*, 471 U.S. 359 (1985). Equitable considerations are relevant to making such a determination. *Id.* However, the parents' choice of private placement need not satisfy the IDEA requirements in order to qualify for reimbursement. *Carter*. The standard is whether the parental placement was reasonably calculated to provide the child with educational benefit. *Carter; David P. v. Lower Merion School District*, 27 IDELR 915 (E.D.Pa. 1998).

Before evaluating the District's actions in this regard, the educational standard to which the District is held must be briefly addressed. The IDEA does not require states to develop IEP's that "maximize the potential of handicapped children." *Board of Education v. Rowley*, 458 U.S. 176, 189 (1982). 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); See also *Carlisle Area School*

⁷ The analysis of the Parent's request for tuition reimbursement is based on the analysis found in the appeals panel decision of April 20, 2004. *In re C.B.*, Pa. SEA no. 1472.

District v. Scott P., 62 F.3d 520, 533-34 (3d Cir. 1995) (School districts “need not provide the optimal level of service, or even a level that would confirm additional benefits, since the IEP required by IDEA represents only a “basic floor of opportunity”) (quoting *Rowley*, 458 U.S. at 201). In making a determination regarding a school district’s obligation to pay for placement, a court must make the following inquiries:

First, the court must ask whether the district’s IEP was reasonably calculated to confer an educational benefit on the student. If the court determines that the IEP was not so calculated, the court must then ask whether the parents’ unilateral choice to place a student in a setting is the appropriate educational choice for the student. If the answer to the second inquiry is yes, then the parents would be entitled to reimbursement from the school district for the cost of the placement. *Hall* at 1527. (citations omitted).

Importantly, in gauging the appropriateness of the District’s actions toward the [Private] School, the IEP must be judged as to its appropriateness at the time that it is written, and not with respect to subsequently obtained information about the student. It is important to note that “an IEP is a snapshot, not a retrospective,” and that the IEP must take into account what was objectively reasonable at the time that the IEP was drafted. *Roland M. v. Concord School Committee*, 910 F.2d 983, 992 (1st Cir. 1990), cert. denied, ___ U.S. ___, 111 S.Ct. 1122, 133 L.Ed 2d 230 (1991) and have been adopted in the Third Circuit. See, e.g. *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 534 (3d Cir. 1995); *Fuhrmann v. East Hanover Board of Educ.*, 993

F.2d 1031, 1040 (3d Cir. 1993). See also *Philadelphia School District*, 22 IDELR 825, 826 (SEA PA 1995).

Least Restrictive Environment

Student's placement at the [Private] School is questionable given that it fails to respond to the IDEA's mainstreaming requirement. A parallel goal of the IDEA is that children with disabilities be educated in classrooms with non-handicapped children "to the maximum extent appropriate." 20 U.S.C. §1412(5). The IDEA's mainstreaming requirement has been construed to "prohibit a school from placing a child with disabilities outside of a regular classroom if educating the child in a regular classroom with supplementary aides and support services can be achieved satisfactorily." *Oberti v. Board of Education*, 995 F. 2d 1204, 1207 (3d Cir. 1993). The IDEA requires states to "educate handicapped children with non-handicapped children whenever possible." See *Rowley*. Therefore, a school district is obliged to balance the goal of providing a student with some educational benefit with a goal of providing that benefit in the least restrictive environment. *Hall v. Shawnee Mission Sch. Dist.*, 856 F. Supp. 1521, 1528 (D.Kan. 1994).

Factors to consider in determining whether this can occur are as follows:

- A. Steps taken by the school to try to include that child in a regular classroom.
- B. The comparison between the educational benefit the child would receive in a regular classroom --social and communication skills, etc.-- and the benefits the child would receive in a segregated classroom. Thus, a

determination that a child would make greater academic progress in a segregated program may not warrant excluding that child from a regular classroom.

C. Possible negative effect inclusion may have on the education of other children in the classroom.

Additionally, if placement outside of a regular classroom is necessary for the child to receive educational benefit, a school district may still be violating IDEA if it has not made sufficient efforts to include the child in school programs with non-disabled children whenever possible.

Finally, a school district must consider the whole range of supplementary aids and services and must also make efforts to modify the regular education program to accommodate a child. If a school has not given any consideration to including the child in a regular classroom with supplementary aids and services and to modifying the regular curriculum, then it has most likely violated the IDEA's mainstreaming directive. "The Act does not permit states to make mere token gestures to accommodate handicapped students; its requirements for modifying and supplementing regular education is broad." See *Oberti*.

Separate placements are among the most restrictive on the IDEA's spectrum of placements. Given their restrictive nature, removal of a student with disabilities to a non-public school setting has only been held to comply with the LRE mandate in

extremely limited situations for students with severe disabilities who prove themselves unable to function in a more mainstream environment.⁸

Clearly then, a separate placement can be consistent with the IDEA's LRE requirement for some students with disabilities. However, the placement selected by Student's Parents violates the IDEA's LRE requirement because it removes Student to a more restrictive location.

The [Private] School has as its main education methodology the use of RDI in a school based setting. As a specific methodology, one is left unsure of the RDI research base. The staff at the [Private] School could not think of any other school or program implementing the RDI program.

The leading case on methodology is *Lachman v. Illinois State Bd. of Educ.*, 852 F. 2d 290 (7th Cir. 1988), cert. denied 488 U.S. 925 (1998). *Lachman* involved a dispute between parents and a school district over how best to educate a deaf child. The Parents favored a "cued speech" methodology aimed at training the child to understand spoken language, while the District recommended a "total communication" approach in which the child would have relied primarily on sign language. Given that the school district's proposed placement using the total

⁸ In *Carlisle*, the Third Circuit recognized: Residential placement at MSB is not, of course, the least restrictive educational environment. The least restrictive environment is the one that, to the greatest extent possible, satisfactorily educates disabled children together with children who are not disabled, in the same school the disabled child would attend if the child were not disabled. See 20 U.S.C. §1412(5)(B) (requiring maximal educational integration of disabled children with children who are not disabled, and restricting separate schooling to situations when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily). *Id.* at 1024 (citations omitted; emphasis supplied).

communication approach satisfied the IDEA, the Circuit Court ruled that the Parents could not force the School District to adopt what they perceived to be an even more effective educational program. The Court recognized, “Once it is shown that the Act’s requirements have been met, questions of methodology are for resolution by the responsible authorities.” *Lachman* at 292. Thus, *Lachman* holds that an IEP meeting the substantive requirements of the IDEA cannot be defeated merely because the Parents believe a better educational program exists for their child.

The staff at the [Private] School described in detail the components of the [Private] School. The main component and foundation of the [Private] School is the RDI model. Student also receives flexibility training and instruction through ABA.

RDI stems from the research of Dr. Stephen Gutstein.⁹ The purpose of RDI is to treat the core deficits of autism. The program is designed for students who have skipped normal developmental milestones, and then help them work on the ones that have been skipped. Specifics of the program work to deal with emotional sharing and social referencing. The difference between RDI and other programs is that other programs are described as skipping over developmental stages, and the staff feels it is essential to take the students back to stages that are missed to help them develop. RDI singles out social skills and then employs verbal behavior with an emphasis on academics and cognitive behavioral social integration.

From the [Private] School website, the program and its relationship to RDI is described as:¹⁰

⁹ *Autism asperger’s: Solving the relationship puzzle*, by Steven Gutstein

¹⁰ [Website redacted.]

Relationship Development Intervention (RDI™) / Social Skills Development

The premise of RDI is simple: Social development is innate for neurotypical (NT) children but not for children within the autism spectrum. RDI begins with an in depth assessment of a child's social development which looks at skills that NT children develop in chronological order. Deficiencies are addressed in developmental order with games and exercises that are specifically designed to develop the missing skills.

At the beginning of the school year, a certified RDI consultant assesses each child's social abilities. Next, parents and school staff are trained to implement the RDI program for each child. While RDI has principally been an at-home therapy program, each child's social development can be accelerated, by incorporating RDI into The [Private] School's curriculum and having parents also execute RDI at home. Parent commitment to continuing this therapy at home is critical.

Utilizing this approach, [Private School] staff, together with parents, help children learn the joys and rewards of social interaction and development of relationships. Making friends and keeping friends requires flexibility and sharing control. It is an infectious process.

From the RDI website, the RDI program is described as:¹¹

The RDI™ Program is:

a parent-based clinical treatment program where parents are provided the tools to effectively teach Dynamic Intelligence skills and motivation to their child.

about the joy in connecting: a path for people on the Autism Spectrum to learn friendship, empathy, and a love of sharing their world and experiences with others.

about changing neurology: a way for people on the spectrum to become flexible thinkers and creative problem solvers who enjoy the challenges of change and who desire to expand their world.

based on over 20 years of research by world's experts on typical development as well as scientific studies on people with autism.

developmental & systematic: a step-by-step program that focuses first on building the motivations so that skills will be used & generalized; followed by carefully and systematically building the skills for competence and fulfillment in a complex world.

realistic: a program that can be started easily, and implemented seamlessly

¹¹ <http://www.rdiconnect.com/RDI/WhyRDI.asp>

into regular, day-to-day activities to enrich the life of the whole family.

precise: a method that measures and begins at the edge of each person's capability and then carefully but continually raises the bar.

effective: within 18 months, over 70% of children in our initial study improved their diagnosis based on the Autism Diagnostic Observation Schedule (ADOS). The majority of children also moved from a special education to a regular classroom without needing an aide.

The [Private] School was started in August 2004 for the purpose of implementing the RDI model for students with autism and autism spectrum disorders. It is a licensed private academic school for students with autism PDD (S-30). There are currently eight students in the school with a faculty of nine (NT 678). The school is designed for children on the spectrum, and a new child would have to fit into the makeup of the current classroom structure. One classroom for kids who are apraxic, one classroom for a two children in a transition classroom but still need development in language, and the social development classroom who have the ability to converse with adults and peers (NT 678-679). The whole school uses the relationship development intervention program (NT 679-680). They evaluate what the child is missing and then go back and change those behaviors, based on social referencing (NT 681). The problem with the use of RDI is the [Private] School is one of the first schools to use the RDI method (NT 714). Additionally, there is no research base for using this in an educational setting (NT 715).

There is only one teacher employed by the [Private] School who currently holds special education certification, Student's teacher (NT 733-734). Teachers are trained in the implementation of the RDI principles, though the staff for the 2005-2006 school year lacks any member of the faculty who is currently certified in RDI.

The RDI specialist for the school is not certified in RDI 9NT 781-782), and as a part of her certification procedures is not required to have any direct supervision of children (NT 785).

Student's current classroom has three students in the class, with an age range of 9-11 (NT 804). The title of the classroom is the social development classroom (NT 800). Student receives RDI, flexibility training and ABA in this classroom (NT 765-766). However, the main component of the school is the RDI program. RDI as noted above is a home-based program. It has no research base to support its use in a school based setting. Even it was appropriate for a school, it is not being implemented by individuals certified in its use.

Student has needs as clearly described above. However, this Hearing Officer is unsure of how the RDI program addresses Student's specific needs. After extensive research, this Hearing Officer was unable to determine the appropriateness of the RDI model in an educational setting. This is consistent with the testimony of the principal of the school (NT 715). As was noted above, RDI is a home-based program. The [Private] School is not a home-based program, though it does have a parental component. The [Private] School has as its stated purpose to implement RDI in the school. There is no staff member certified in the program. There is no research base to justify its use in a school. There is no evidence the program is working.

Given the above, one is left unsure of specifics of the program and whether it would meet Student's unique needs. It has not been used in a school setting before. There is no staff member certified in RDI to work with Student. Additionally, the

speech therapist at the school holds no speech therapy certifications (NT 851-852). Even if the RDI program is effective, it may not be delivered in the fashion expected, nor may the speech therapy services.

The Parents in this Hearing are seeking tuition reimbursement. Tuition at the [Private] School for the 2005-2006 school year is \$55,000 (NT 641-642). However, there was no evidence presented that the Parents have paid the tuition for the 2005-2006 school year. In fact, the opposite appears to be true (NT 657).

Therefore, the District is not obligated to pay for tuition for the [Private] School for the 2005-2006 school year. The Parent's may choose to continue to send him for services, however, they should demand independent research of the program's effectiveness, ensure it is individualized, and is tied to the specific needs of their child.

V. ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that Student was not provided a free appropriate public education for the 2003-2004 school year. However, since this is past the time frame allowed by law, no compensatory education is due. Further, it is ordered that the District is not obligated to pay for tuition to the [Private] School for the 2005-2006 school year.

Date

Hearing Officer