

PENNSYLVANIA
SPECIAL EDUCATION HEARING OFFICER

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.

5793/05-06 KE File Number

S., E.
Child's Name

Xx/xx/xx Date of Birth

10/10/05, 10/20/05
Dates of Hearing

Open
Type of Hearing

For the Student:

Parents

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Dates of Hearing:	October 10 and 20, 2005
Receipt of Transcript:	October 25, 2005
Date Record Closed:	November 10, 2005
Date of Decision:	November 25, 2005
Hearing Officer:	Daniel J. Myers

BACKGROUND

Student is a xx year old; tenth grade resident of the Springfield School District (School District) with attention deficit hyperactivity disorder (ADHD) and a specific learning disability in written expression. Last year, he attended a private school at public expense as part of a settlement agreement between the parties. This year, the School District has proposed an educational program and placement at its public high school, with which his parents, who prefer that Student remain at the private school at public expense, disagree. For the reasons described below, I find for the School District.

ISSUES

- Whether or not the School District's proposed individualized education program (IEP) is appropriate with respect to, block scheduling and transition planning;
- Whether or not the School District has complied with a pendent placement, or settlement, agreement;
- Whether or not the School District has provided to Student a completed evaluation report; and
- Whether or not the School District has authorized and behaved appropriately with respect to an independent educational evaluation (IEE).

(HO 1; N.T. 11, 52-53)¹

FINDINGS OF FACT

1. Student, whose date of birth is xx/xx/xx is an xx year old, tenth grade resident of the School District. (SD 1; P 7; N.T. 477) Student has attention deficit hyperactivity disorder (ADHD) and a specific learning disability in written expression. (SD 6)
2. Student has never attended the School District's public schools, and he did not have an IEP before January 2003. (N.T. 482)
 - a. During his 6th grade, 2002-2003 school year, he attended the private [First Redacted] School.
 - b. In his 7th grade, 2003-2004 school year, Student began attending the private [Second Redacted] School when [First Redacted School] recommended that Student attend a smaller school.

(P 1; SD 1; N.T. 410, 484, 518, 520, 527)

3. [Second Redacted School] has Middle States accreditation and it is licensed by the state's Private Academic Schools Board. (N.T. 433) At all times relevant, Student has received at [Second Redacted School] the following educational accommodations:

¹ References to "P," "SD," and "HO" are to the Parent, School District, and Hearing Officer exhibits, respectively. References to "N.T." are to the transcript of the October 11, 2005 hearing session.

- a. Daily half-hour mentoring sessions during which an adult mentor monitors Student's academic activities, gives him organizational support, ensures that assignments are performed, checks his assignment book, and helps break large assignments into smaller parts. (N.T. 398, 421)
 - b. Group counseling twice per week, with one-on-one counseling as needed, although it is unknown how often Student has actually needed one-on-one counseling. (N.T. 415)
 - c. Extra time on tests and assignments, oral examinations, the opportunity to dictate answers for tests, and modified assignments. (N.T. 400, 418)
 - d. 40 minute class periods that are broken into even smaller periods to help Student maintain focus. (N.T. 400)
 - e. Student's [Second Redacted School] mentor does not believe that Student requires a behavior management plan, and she thinks that [Second Redacted School's] mentoring program was sufficient to deal with behavioral issues. (N.T. 254)
 - f. Although [Second Redacted School] administers annual assessments of student achievement, it was unable to explain credibly why Student's achievement in reading comprehension appeared to have decreased in the last school year from the 88th percentile to the 34th percentile, and why his achievement in math appeared to have decreased from the 52nd percentile to the 34th percentile. (N.T. 412)
4. Student's parents pay privately for tutoring in writing, and research-type activities once per week outside of school. (N.T. 485, 520-521)
5. Student's parent observes impulse control problems with Student at home. Because stimulants do not address Student's ADHD symptoms, his psychiatrist has prescribed Welbutrin for the purpose of calming Student and thereby addressing ADHD symptoms. (N.T. 489, 494, 528)
6. Apparently, the parties disagreed during the 2003-2004 school year regarding Student's program and placement because, in January 2004, they settled their dispute by agreeing, among other things:
- a. To pay Student's past and current tuition at the [Second Redacted] School; (P 1, page 5)
 - b. To destroy a December 2003 evaluation report (ER) and all copies of that report, but to keep the raw and standard scores from particular standardized assessments that were administered as part of that December 2003 ER; (P 1, page 7; N.T. 469-470) and
 - c. To permit a neuropsychological, independent educational evaluation (IEE) at public expense.
(P 1; SD 1; N.T. 484, 518, 520, 527)
7. In February 2004, Dr. L conducted the neuropsychological IEE to which the parties had agreed as part of their settlement. (SD 6, page 48)
- a. Dr. L noted Student's history of ADHD, his varying cognitive ability test scores that ranged historically from average to high average, and his

- deficient written expression skills in terms of spelling, punctuation, fluency and elaboration of ideas;
- b. She concluded that Student's symptoms were consistent with ADHD and Written Expression Disorder diagnoses; and
 - c. She recommended:
 - i. continued need for a very small and highly structured educational program that provides intensive one-to-one support, both behaviorally and academically, in a self-contained setting;
 - ii. Medical evaluation to address ADHD symptoms;
 - iii. Wrap-around services at home for completion of homework assignments, chunking of complicated tasks, and impulse/behavior control;
 - iv. Use of a computer for written work;
 - v. Extended time; one-to-one assistance; and verbal testing;
 - vi. Psychotherapy to address frustration, impulse control, and goal setting; and
 - vii. Vocational exploration.
 - d. The School District's school psychologist testified that, while not necessarily agreeing with all of Dr. L's recommendations, Dr. L's report itself is complete and appropriate. (N.T. 323-324)
8. Apparently, the parties disagreed during the 2004-2005 school year regarding Student's program and placement because, on or about September 30, 2004, they settled their dispute by agreeing, among other things:
- a. To pay \$28,375 for tuition at the [Second Redacted] School for 2004-2005;
 - b. That Student's parents would permit the School District to conduct its own reevaluation of Student in January 2005;
 - c. To conduct an IEP meeting before April 1, 2005 for developing an IEP for Student's 2005-2006 school year; and
 - d. To consider [Second Redacted] School, and transportation thereto, to be Student's pendent placement in the event of disagreement regarding Student's 2005-2006 program and placement.
- (SD 1; P 1)
9. On or about December 6, 2004, the School District initiated the reevaluation process contemplated in the September 2004 settlement agreement.
- a. The School District unilaterally decided to contract for the reevaluation with [Redacted] Associates, an outside provider, rather than perform the reevaluation internally. (N.T. 57-58, 148)
 - b. The School District issued to Student's parents a request for written Permission to Evaluate Student. (SD 3; N.T. 69)
 - c. On or about January 13, 2005, the School District issued another request for written Permission to Evaluate. (P 2)
 - d. Student's parents signed the requested Permission to Evaluate form on January 26, 2005. (P 4; SD 2)

- e. Student's Parents then were confused as to why [Redacted] Associates would call to set up an appointment for the reevaluation, and they told [Redacted] Associates that they must call their lawyer before scheduling an exam. (N.T. 498)
 - f. Student's parents then sought to schedule the examination on one of Student's days off school, testifying that [Second Redacted] School officials had indicated that Student was being tested so often that he was falling behind in his classes and becoming frustrated with the amount of work that he needed to make up. (N.T. 498-500)
 - g. On or about February 9, 2005, [Redacted] Associates informed the School District that it would not conduct the reevaluation. (SD 4; N.T. 77)²
 - h. On March 18, 2005, Student's parents gave the School District permission to perform an in-house reevaluation. (N.T. 298)
10. On March 16, 2005, the School District's Director of Special Education and the School District's high school special education facilitator observed Student at [Second Redacted] School. (SD 6; N.T. 242, 298)
 11. On March 18, 2005, the parties conducted an IEP meeting. (N.T. 95; SD 7) At that meeting, School District personnel indicated that Student's public high school classes could be broken down into smaller groups and shorter time periods based upon his needs. They also indicated willingness to gradually transition Student into the public high school, possibly by having him attend both [Second Redacted] School and the public high school for a few days each week. (N.T. 169-171)
 12. In April 2005, administrators at [Second Redacted School] believed that Student would return for the 2005-2006 school year. (N.T. 420)
 13. On April 14, 2005, the School District issued its reevaluation report. (N.T. 298, 306; SD 6; P 6)
 - a. The evaluator, Ms. J, has been a school psychologist for five years. During that time, she has performed approximately 450 educational evaluations. (N.T. 296)
 - b. On the March 19 test date, Student and Ms. J did not finish WIAT II subtests in math reasoning, written expression, pseudoword decoding and numerical operations. (N.T. 302-303)

² At the hearing, Student objected to the double hearsay nature of the exhibit purporting to explain why [Redacted] Associates refused to conduct the evaluation. I sustained the objection, and determined that I would not consider the explanation for the truth of the matter asserted. I determined, however, that I would consider exhibit for a nonhearsay purpose, i.e., to establish the basis for the School District's subsequent behavior upon receiving the explanation, regardless whether or not the facts alleged in the explanation were true. (N.T. 74-76)

- i. On April 7, 2005, Student's illness prevented Ms. J from observing Student and administering the remaining WIAT II subtests, as scheduled. (N.T. 300)
 - 1. [Second Redacted] School's own student testing later that week made it difficult for Ms. J to reschedule any time soon. (N.T. 298)
 - 2. Ms. J decided to issue her ER based upon the information that she already had. (N.T. 301)
 - c. The April 2005 ER assumed that Student was not taking any medication for his ADHD, based upon written parental indication that stimulants had been tried but were not being used. Ms. J did not ask Student's parents specifically regarding his medication. (N.T. 239)
 - d. The April 2005 ER summary states:
 - i. that Student possesses an average to high average degree of intellectual ability,
 - ii. that he exhibits significant weaknesses in the area of writing,
 - iii. that he continues to struggle with math problem solving,
 - iv. that Student is in very small classes at [Second Redacted School],
 - v. that he is still struggling to maintain his grades, and
 - vi. that Student has a history of not following through on assignments, being disruptive in class and a demonstrated lack of motivation in some classes.
 - e. The April 2005 ER concludes that Student has ADHD, and a specific learning disability in the area of written expression. (N.T. 301-302) The specific learning disability conclusion is based on Dr. L's February 2004 IEE. (MT. 304, 370)
 - f. The ER recommends
 - i. Opportunities for small group settings for additional help with study skills, organization or homework completion
 - ii. Use of a computer writing program to help organize essays, and use of computer for written assignments and tests
 - iii. Opportunity for verbal answers to test questions, and extended time on tests and assignments
 - iv. Preferential seating away from distractions
 - v. Redirection and cuing as needed in classroom, and frequent breaks
 - vi. Individual or group therapy at school
 - vii. Vocational exploration
 - viii. Study guides
 - ix. Math support
 - x. Chunking of long term assignments
 - xi. Repetition and review
14. On June 13, 2005, the parties met again for an IEP meeting.
- a. At that time they discussed, among other things, block scheduling and transitioning Student from [Second Redacted] School back to the public school. (N.T. 95, 97-98, 103, 121, 132-133, 224; SD 10; P 7)

- i. The School District offered to develop a plan for transitioning Student's move from [Second Redacted] School to the public high school. (N.T. 229)
 - b. The School District's high school employs block scheduling, in which core academic classes such as math, language arts, science and social studies are taught in blocks of 87 minutes at a time. (N.T. 330-331)
 - i. To address Student's attention deficit needs, the School District proposed that Student's 87 minute blocks could be broken up in various ways. (N.T. 180, 189, 224-225; SD 7, page 7, 9)
 - ii. Ordinarily, the School District does not include actual class schedules as not part of its IEPs. (N.T. 223)
 - c. The School District proposed that Student would attend Adapting Curriculum Ensuring Success (ACES) classes, which are team teaching classes with regular education and special education teachers in the same classroom. (N.T. 185-188, 201-205, 252, 263-265, 327-328)
 - d. Based upon difficulties that Student was purported to have in maintaining his daily assignments at [Second Private] School, the School District proposed that Student would have access to the public high school's learning center where learning assistants would help Student with organization and time management. (N.T. 236)
 - e. The School District did not offer one-to-one support to Student because he was not receiving it at [Second Private] School. (N.T. 251)
 - f. The School District proposed weekly group counseling, which Student had been receiving at [Second Private School]. (N.T. 218-219)
- 15. On June 20, 2005, the School District issued a Notice of Recommended Educational Placement (NOREP). (SD 7; P 7) The proposed IEP contained the following:
 - a. A Writing goal to acquire knowledge and skills to use various types of writing at a fifth grade level including
 - i. Sentence and paragraph structure
 - ii. Multi-paragraph composition
 - iii. Sequencing and organizing skills for reports
 - iv. Use of reference materials
 - b. A Math goal to increase numeration, computation and application skills at a 7th grade level, including
 - i. Use of decimals
 - ii. Fractions
 - iii. Computation of perimeter geometry
 - iv. Rational numbers
 - v. Probabilities
 - c. The proposed IEP offered the following modifications and specially designed instruction:
 - i. daily advisory period for touching base with content area teachers for assistance with classroom assignments
 - ii. Counseling program comparable to the program offered at [Second Private School]

- iii. Computerized writing assistance programs
 - iv. Assessments to be combination of multiple choice , short answer and essay
 - v. Pre-test study guides
 - vi. Oral tests
 - vii. Cuing and prompting
 - viii. Math manipulatives for math calculation
 - ix. Computer assisted math drills
 - x. Books on tape, frequent breaks within 87 minute block period
16. On or about June 30, 2005, Student's parents rejected the NOREP and requested an independent educational evaluation (IEE) at public expense. (SD 10)
17. On or about July 11, 2005, the School District agreed to pay up to \$1,500 for an IEE. (SD 11)
18. On August 20, 2005, Student's lawyer sent an email message to School District's lawyer indicating that:
- a. Student rejects the School District's proposed IEP;
 - b. The School District is not in compliance with its pendent placement agreement;
 - c. Block scheduling is but one deficit of the proposed IEP;
 - d. A parental request remains outstanding for a completed evaluation report;
 - e. A parental request remains outstanding for a prehearing conference; and
 - f. A parental request remains outstanding for an independent educational evaluation.
- (HO 2)
19. On or about August 20, 2005, the School District filed with the Office for Dispute Resolution a complaint on behalf of Student's parents, based upon the email from Student's lawyer. (HO 2)
20. On or about August 23, 2005, the School District issued written notification that it believed Student's August 20, 2005 complaint was insufficient. (SD 9; HO 2) I concluded that it was insufficient, but I considered Student's August 24 correspondence (responding to the School District's August 23 written notification of insufficiency) to constitute a sufficient amendment of the complaint. (HO 2)
21. On September 13, 2005, the parties conducted a meeting. The parties agree that this meeting constituted a resolution meeting, which is required under the Individuals with Disabilities Education Improvement Act (IDEIA), but they disagree over whether or not the meeting also qualified as an IEP team meeting. The School District invited the entire IEP team for the purpose of conducting an IEP meeting as well as a resolution meeting. [Second Private] School officials were invited to the meeting, but they did not attend. The meeting did not result in

any substantive changes to the School District's June 2005 proposed IEP. (SD 7; P 14; N.T. 97-98, 100, 113, 124, 130, 138, 158-159, 166, 178, 225, 227, 262)

22. At the September 13, 2005, meeting:
 - a. The School District agreed to increase its offer from \$1,500 to \$1,800 to pay for an IEE. (N.T. 84; SD 11; SD 12)
 - b. The parties agreed that the School District would make monthly tuition payments to [Second Private] School for 2005-2006. (SD 15; SD 23; N.T. 86, 89)
 - i. [Second Private School], however, was not part of that agreement, and it does not have a monthly tuition payment policy. (N.T. 403-404)
 - c. The School District verbally proposed a plan for gradual transition of Student [from Second Private School] to public school.
 - i. The verbal plan was flexible and intended to ease Student into school setting over period of up to nine weeks. (N.T. 134)
 - ii. The School District was prepared to implement its verbal plan immediately. (N.T. 132)
 - iii. Student's parents requested that the plan be written and placed in the IEP. (N.T. 97-98; SD 7)
 - iv. School District officials did not believe the plan must be in the IEP, but they agreed to put it in writing and include it in the IEP. (N.T. 139-140)
 - v. Other than requesting a written plan as part of the IEP, Student's parents did not provide input into what Student's transition needs were. (N.T. 102, 128, 158, 174-175, 227-228)

23. Student's [Second Private] School mentor does not believe Student can make meaningful educational progress in classes with twenty students in them and/or in classes that last 80 minutes. (N.T. 402)

24. Sometime between September 13, 2005, and the October 10, 2005 hearing session, Student's parent and attorney were reviewing School District records and saw several copies of the December 16, 2003 evaluation report that was required by the January 2004 settlement agreement to have been destroyed. (N.T. 511)

25. I conducted an evidentiary hearing in this matter on October 10 and October 20, 2005.
 - a. I indicated in my prehearing correspondence that I expected to conduct a two day hearing and I expected the parties to ask for a prehearing conference if they disagreed. (HO 2; N.T. 267, 272)
 - b. On the second day of hearing, I was 15 minutes late from lunch. (N.T. 435)
 - c. One of the Student's witnesses did not respond to a subpoena. (N.T. 435; P 31)
 - d. Tensions in the hearing room were high and the lawyers were clearly prepared to be aggressive toward each other. (N.T. 28, 30, 81, 136, 141) Although I had occasion to admonish both parties' lawyers, Student's

lawyer was responsible for most of my difficulties in conducting an orderly hearing.

- i. In the beginning of the hearing, Student's lawyer interrupted direct examination several times simply to state that he did not object to the introduction of an exhibit. (N.T. 55, 59) When I asked him to allow me to assume from his silence that he did not have an objection, and not to tell me every time he did not have an objection, Student's lawyer responded in a passive-aggressive manner with a lowered voice that sounded sarcastic to me. (N.T. 59-60)
 - ii. Student's lawyer objected to my strict time-keeping methods for remaining on our two-day hearing schedule. (N.T. 275, 281)
 - iii. Student's lawyer, however, either did not have or refused to reveal to me any plan for cross-examination even after he had asked a substantial number of cross-examination questions of a witness. (N.T. 143-144)
 - iv. In addition, his own extended cross-examination of a School District witness on the second morning of hearing resulted in very little time for his own [Second Private School] witness to testify. (N.T. 283, 391-396)
 - v. Student's counsel stated that he believed he could request another due process hearing on any issue that he had not raised during this proceeding. (N.T. 278)
- e. I believe that the foot-dragging and grand-standing behavior of Student's counsel at hearing was intended to delay resolution of this dispute for the purpose of extending Student's pendent placement at [Second Private] School.
26. All exhibits offered by both the School District and Student's parents are admitted into the record. School District Exhibits SD 1-23 are admitted into the record. Parent Exhibits 1- 10, 14, 23-28, and 31 are admitted into the record. There were no Parent Exhibits 11-13, 15-22, and 29-30.
27. The parties were permitted to submit written concluding statements by November 10, 2005. (N.T. 540-541) The record in this matter was closed on November 10, 2005.
28. This decision is issued:
- a. 97 days after the due process hearing request was filed;
 - b. 91 days after my assignment as Hearing Officer to the case;
 - c. 36 days after the last hearing session; and
 - d. 15 days after the record was closed.

DISCUSSION

The Individuals with Disabilities Education Act (IDEA) and its successor, the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA), and their implementing regulations, require the School District to provide a free appropriate public education (FAPE) to all students who qualify for special education services. 20 U.S.C. §1412; Section 612(a) (1) of IDEIA, 118 STAT. 2676; 34 CFR §300.304 et seq.; 22 Pa. Code § 14.102 et seq. This entitlement is delivered by way of the IEP, i.e., a detailed written statement arrived at by the IEP team, which summarizes the child's abilities, outlines goals for the child's education, and specifies the services the child will receive.

In creating a legally appropriate IEP, however, a School District is not required to provide an optimal program, nor is it required to "close the gap," either between the child's performance and his untapped potential, or between his performance and that of non-disabled peers. In Re A.L. v. Laurel School District, Special Education Opinion No. 1451 (2004) ; See In Re J.B. v. Pennsbury School District, Special Education Opinion No. 1281 (2002) A School District is simply required to provide a program that confers more than trivial, or minimal benefit. Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3d Cir. 1988), cert. denied, 488 U.S. 1030 (1989); Board of Education v. Diamond, 808 F.2d 987 (3d Cir. 1986)

Further, children eligible for special education services are to be educated within the regular classroom "to the maximum extent appropriate." 20 U.S.C. § 1412(a) (5); 34 C.F.R. § 300.550; 22 Pa. Code §14.102(a) (2) (xxiv); Oberti v. Board of Education of Clementon School District, supra. The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief. Schaffer v. West, U.S. ___, Dkt. No. 04-698 (Nov. 14, 2005)

The School District's proposed IEP is appropriate with respect to block scheduling and transition planning

Student contends that the School District's proposed June 2005 IEP is inappropriate, specifically with respect to block scheduling and planning for Student's transition from [Second Private] School to the public high school. I disagree.

With respect to block scheduling, Student's mentor from [Second Private] School does not believe that Student will make meaningful progress in 80 minute blocks of class time. (N.T. 402) In fact, Student had to have [Second Private] School's 40 minute class periods broken into even smaller periods to help Student maintain focus. (N.T. 400) The School District's proposed June 2005 IEP, however, adequately addresses this concern in two ways. First, it proposes to place Student in ACES classes, where special education teachers are teamed with regular education teachers so that adults can address Student's attentional needs during the 87 minute class periods. (N.T. 185-188, 201-205, 252, 263-265, 327-328) Second, it proposes to permit Student to take breaks during the 87 minute blocks, as needed, and it proposes to permit those 87 minute blocks to be broken into classroom time and time at the high school's learning center. (N.T. 180-182)

With respect to a transition from [Second Private] School to the public high school, the June 2005 proposed IEP does not explicitly state that Student will be transitioned in any systematic way from [Second Private] School to the public school, nor does it state how such transition might occur. School District officials credibly testified, however, that such transitioning was the subject of both the March and June 2005 IEP meeting discussions. (N.T. 98, 128, 171, 173) Frankly, it is not clear from the record that Student even needs such a plan. This appears to be something that Student's parents wanted and that School District officials thought would be a good idea. (N.T. 97) It is not, however, something that either the School District's April 2005 ER nor Dr. L's earlier IEE indicated as a need for Student (SD 6), and no witness testified that Student actually needs such a plan. Thus, I conclude that the IEP team's verbal discussion of a plan to gradually transition Student from [Second Private] School to the public high school, without actually reducing that plan to writing and inserting it into the June 2005 proposed IEP, is adequate to meet Student's needs. Accordingly, I find that the June 2005 proposed IEP is appropriate with respect to transition planning.

Further, although other aspects of the June 2005 proposed IEP have not been placed at issue, I note that it is, overall, reasonably designed to produce meaningful educational benefit. The proposed June 2005 IEP contains counseling, adult assistance in organization and time management, frequent breaks, and learning assistance from certified teachers where needed. It is clear that School District IEP team members sincerely listened to a description of Student's program at [Second Private] School, and replicated it. Accordingly, I find that the June 2005 proposed IEP offers a free and appropriate public education to Student.

The School District has complied with a pendent placement, or settlement, agreement

Student contends that the School District has not complied with three obligations contained in a September 2004 settlement agreement:

- 1) To evaluate Student in January 2005;
- 2) To develop an IEP in April 2005; and
- 3) To consider [Second Private] School to be Student's pendent placement in the event of disagreement regarding Student's 2005-2006 program and placement. (SD 1; P 1)

Apparently, Student contends that these obligations were not complied with because:

- 1) The School District's evaluation report was issued in April 2005;
- 2) The IEP was proposed in June 2005; and
- 3) The School District has sent, but [Second Private] has rejected, monthly tuition payments (SD 15; SD 23; N.T. 86, 89, 403-404)

Taking the last obligation first, there is no evidence that the School District has not complied with the pendent placement portion of the September 2004 settlement

agreement. Student is attending [Second Private] School pending this dispute, and the School District has proffered payment for his attendance, albeit not in the manner proffered in the past, and not in a manner consistent with [Second Private] School's payment policies. It is undisputed by both parties, however, that [Second Private] School is Student's pendent placement and, therefore, the School District has not violated this settlement agreement obligation.

With respect to the School District's two other obligations described above, the School District was obviously three months late in producing its ER and it was two months late in proposing an IEP. This is not surprising, considering the context of these parties' relationship. The School District's unilateral decision to utilize its contractor for the ER, rather than one of its own school psychologists, provided an opportunity for delay. (N.T. 57-58, 148) Many other opportunities for delay also occurred, such as Student's illness on the day that the School District's psychologist was scheduled to finish her testing, and [Second Private] School's subsequent testing schedule that prevented further follow-up by the School District's psychologist. (N.T. 298-300)

Fortunately, the parties prudently anticipated in their September 2004 settlement agreement that there might a dispute regarding Student's 2005-2006 program and placement, and therefore they agreed upon the solution in such event, i.e., Student's pendent placement at [Second Private] School pending dispute. To the extent that Student raised the issue of compliance with the settlement agreement for the purpose of establishing a denial of FAPE and a basis for a compensatory education award, I conclude that no such award is warranted. Thus, as far as the settlement agreement is concerned, therefore, there is no harm suffered by Student by the School District's late ER and proposed IEP.

The School District has provided to Student a completed evaluation report

It is difficult to understand from Student's written closing argument exactly why he believes the April 2005 ER should be considered incomplete. It appears, however, that this allegation is based upon the facts that:

- 1) The ER should have been completed sooner;
- 2) The evaluator was not present at the June 2005 IEP team meeting to explain the report;
- 3) It includes only one classroom observation;
- 4) All standardized assessments were not completed;
- 5) The evaluator assumed that Student was taking no medication for his ADHD when, in fact, he was taking Welbutrin; and
- 6) The evaluator relied upon Dr. L's conclusion that Student had a specific learning disability, rather than verifying it herself.

The April 2005 ER is consistent with Dr. L's IEE and with testimony describing Student's needs. More specifically, both Dr. L's IEE and the April 2005 ER identified student's needs as involving ADHD and a specific learning disability in written expression. (N.T. 304, 370) They both recommended small settings and more structure, use of a computer to assist with writing requirements, services for chunking and keeping track of assignments, counseling and vocational exploration. (SD 6) Indeed,

these are needs that were described and accommodated by Student's [Second Private] School mentor. The April 2005 ER, noting that Dr. L recommended a one-to-one assistant, but that Student's experience at [Second Private] School indicated that formal one-to-one assistance was not necessary, concluded that Student actually needed small group settings with additional help in study skills, organization or homework completion. (SD 6; N.T. 254, 398-421)

It is not alleged that the April 2005 ER failed to identify any suspected needs or misled the IEP team into designing a faulty educational program. Frankly, Student's arguments regarding the incompleteness of the 2005 ER appear disingenuous, and they appear intended simply to prolong any dispute between the parties and thereby to extend Student's pendency at [Second Private] for as long as possible. I conclude that the 2005 ER is sufficiently complete.

The School District has authorized and behaved appropriately with respect to an independent educational evaluation (IEE)

When Student's parents rejected the School District's proposed June 2005 IEP, they requested an IEE at public expense. (SD 10) The School District responded by agreeing to pay up to \$1,500 for an IEE. (SD 11) The School District subsequently increased that offer to \$1,800. (SD 12; N.T. 84) Student's post hearing brief admits that the IEE is pending. Student's only argument on this issue is that the School District waited until September 13, 2005, to authorize Student's parents to contact the independent evaluator. (Student's Brief at 70)

Because the IEE does not yet exist, it is impossible for me to review the appropriateness of the IEE itself. The only issue that I can review regarding the June 29 IEE request is whether or not the School District has granted the request, and whether or not Student has been denied FAPE in the manner in which that request was granted. Student complains that the dilatory manner in which the School District responded to the IEE request is a denial of FAPE because it effectively prevents the IEP team from developing an IEP for the 2005-2006 school year.

First, Student has requested, and the School District has granted the request for, an IEE. Thus, I conclude that there is no dispute regarding the School District's actual provision of an IEE. Second, Student's complaint that the School District was dilatory in responding to the IEE request, and therefore prevents the IEP team from developing an IEP soon enough for the 2005-2006 school year, lacks credibility in light of the fact that the Student waited until June 29, 2005, to request the IEE in the first place. This was several months after the School District's April 2005 ER and only two months before the start of the 2005-2006 school year. Third, there is no reason that an IEE cannot be concluded, and an IEP developed, in time for the second half of Student's 2005-2006 school year, assuming of course, that both parties genuinely desire prompt development of an IEP.

Accordingly, I conclude that the School District has authorized and behaved appropriately with respect to an independent educational evaluation (IEE).

CONCLUSION

As Student's counsel stated at the hearing, there has been a festering dispute between these parties since January 2004. (N.T. 16) This due process hearing request is the latest manifestation of that festering dispute. This year, the School District has issued an evaluation report and proposed an educational program and placement at its public high school, with which Student's parents disagree. I conclude that the School District's April 2005 evaluation report, and its June 2005 IEP, are appropriate. I further conclude that the School District's failure to comply with time lines listed in the parties' September 2004 settlement agreement do not negatively impact Student's entitlement to a free and appropriate public education, and therefore do not warrant any compensatory education award. Finally, I conclude that the School District has complied with its obligations regarding a request for an IEE at public expense. Accordingly, I find for the School District on all counts.

ORDER

For the reasons described above, I ORDER that:

- The School District's April 2005 evaluation report is appropriate.
- The School District's June 2005 proposed IEP for 2005-2006 is appropriate.
- The School District has complied with its September 2004 pendent placement, or settlement, agreement.
- The School District has authorized and behaved appropriately with respect to Student's June 2005 request for an IEE at public expense.
- No further action is required of the School District.

Daniel J. Myers
Hearing Officer

November 25, 2005

Re: Due Process Hearing
File Number 5793/05-06 KE
[Student]

[Redacted] School District