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**HEARING OFFICER DECISION/ORDER  
CHILD'S NAME: STUDENT (FILE No. 5907/05-06 KE)  
INDIANA AREA SCHOOL DISTRICT**

**Date of Birth:** [redacted]

**Type of Hearing:** Closed

**Dates of Hearing:** 10/28/05; 11/14/05; 11/16/05; 11/30/05; 12/2/05; 12/9/05

**I. PARTIES TO THE HEARING**

**PARENT**

Mrs. Parent

**DATE TRANSCRIPT RECEIVED:**

December 14, 2005

**PARENT REPRESENTATIVE:**

Charles Jelley, Esquire  
Tremba, Moreman, & Jelley  
229 South Maple Avenue, Suite 201  
Greensburg, PA 15601  
724-838-7600

**HEARING OFFICER:**

Dorothy J. O'Shea, Ph.D.

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**Signature: Hearing Officer**

**DISTRICT CONTACT:**

Mr. Patrick Scanlon  
Indiana Area School District  
501 East Pike  
Indiana, PA 15701  
724-463-8713

December 20, 2005

**Date of Decision/Order**

**DISTRICT REPRESENTATIVE:**

Christina Lane, Esquire  
Andrews & Price  
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**HEARING OFFICER DECISION/ORDER**  
**CHILD'S NAME: STUDENT (FILE No. 5907/05-06 KE)**  
**INDIANA AREA SCHOOL DISTRICT**

**II. BACKGROUND INFORMATION**

Student, a resident of the Indiana Area School District (i.e., the District), was born [ ] (School District Exhibit 1: SD 1). Student, an eligible student under 22 Pennsylvania Code, Chapter 14, was an 8th grader during the 2005-2006 school year. Student's Parents made a due process hearing request in September 2005.

Student's hearing initiated October 28, 2005 and continued through December 9, 2005. While the scheduling of hearing sessions extended beyond the regulatory deadline of 45 days, this Hearing Officer exercised her authority to grant all continuances at the parties' requests, pursuant to 34 CFR §300.511(c). (Hearing Officer Exhibit 1: HO 1; HO 2, HO 3, HO 4).

**III. FINDINGS OF FACT**

1. Student, a District resident, was born [ ] (SD 1).
2. The District identified Student as an eligible student, with conditions of Other Health Impairment ([redacted]) and Speech and Language Impairment (SD 1, page 1).
3. On January 10, 2003, Student received a reevaluation of his educational needs (i.e., his pendent reevaluation) (P3, pages 1-6).
4. As reported on his January 10, 2003 reevaluation, Student's current educational program named his "Life Skills Support and Speech/Language Support" programs (P3, page 1).
5. Student's IEP Team determined that no additional data were required (P3, page 4).
6. Student's IEP team met May 27, 2003 to devise his IEP for the 2003-2004 school year (SD 1, pages 1-22).
7. Student's May 27, 2003 IEP lacked report of progress records on Student's annual goals in speech and language support (SD 1).
8. Student's May 27, 2003 IEP failed to include appropriate expected levels of achievement (SD 1).
9. Student's May 27, 2003 IEP lacked objective methods of evaluation and monitoring related to goals (SD 1).
10. Student did not participate in any district-wide assessments in 6<sup>th</sup> and 7<sup>th</sup> grades (SD 1; SD 5; P6).
11. Student did not take the PSSA Assessment in the areas of reading and math as planned for in his IEP (P6).
12. On May 24, 2004, the District invited Student's mother to an IEP team meeting to discuss, review, and revise Student's IEP as needed (SD 4, pages 1-2).
13. On June 4, 2004, the District sent to Student's mother a "Notice of Recommended Educational Placement" (NOREP) recommending a "Part-time Life Skills Support with Speech and Language Service" (SD 4, pages 3-4).
14. Student's mother approved the NOREP recommendation June 4, 2004 (SD 4, pages 3-4).
15. Student's IEP team met May 26, 2004 to devise his IEP for the 2004-2005 school year (SD 5, pages 1-34).
16. Student's May 26, 2004 IEP team kept reports of progress records on Student's annual goals in reading, numeration and math skills, social/adaptive behaviors, prevocational and independent skills, keyboarding, and computers (SD 10, pages 1-12).
17. Student's "Type to Learn" teacher kept a progress chart on Student's typing accuracy and speed (SD 11).
18. During the 2004-2005 school year, the District and Student's Parent kept a "Communication Log Book" between home and school (SD 8).
19. During the first quarter of the 2004-2005 school year, the District named Student to the "Honor Roll" due to a 3.0 average. He received a "Pass" in Functional Math, Functional English, and Reading. The District made curricular adaptations and accommodations in Reading (P7).

20. Student did not participate in the Technology Education program in a regular class, although he received a "B" in Technology Education on his District report card. (P7; NT 391).
21. On November 17, 2004, using the Communication Log, Student's mother notified the teacher that Student had fallen at home and needed assistance in carrying his lunch tray (NT 282).
22. On November 17, 2004, when Student arrived at school that day his arm was not red, swollen, or tender to the touch (NT 283).
23. On November 17, 2004, Student's mother observed that Student pushed a book off his desk and then kicked it (NT 283).
24. On November 17, 2004, in response to Student's pushing and kicking the book, the teacher directed Student to pick up the book from the floor (NT 283).
25. On November 17, 2004, upon arriving home, Student complained that his wrist hurt. His mother noticed that his wrist was swollen, red, and sensitive to the touch (NT 408-417).
26. On November 17, 2004, Student made a visit to the Indiana Regional Medical Center-Emergency Department for [an injury to the wrist]. (P 9, pages 1-3).
27. [Redacted.]
28. Student's teacher instructed her students to make "*rain-sticks*," in a lesson, using household and recycled items that were to include toothpicks, wrapping tubes, rice, and tissue paper (SD 9, pages 1-10).
29. Student's teacher did not follow the instruction to safely create the "*rain stick*," instead using pushpins, rather than toothpicks as called for in the project instructions (NT 276-277; SD 9).
30. Student's "*rain stick*" broke at a seam and Student was injured when he stepped in the pushpins that had scattered on the floor when the "*rain stick*" broke (SD 9; P 10; P11).
31. On January 4, 2005, Student made a visit to the Indiana Regional Medical Center-Emergency Department for the [incident with the rain stick]. (P11).
32. Although the Parents did not indicate disagreement with the District's reevaluation, on February 21, 2005, Dr. K provided an independent educational evaluation (IEE) of Student (P17, pages 1-45).
33. On March 10, 2005, Dr. K sent a letter to the District stating she was enclosing the IEE she had recently completed of Student (P 12, page 1).
34. During the 2004-2005 school year, the District's schedule indicated a school opening at 7:30 a.m., and dismissed at 2:36 p.m. (P5, page 1).
35. During the 2004-2005 school year, Student's learning support teacher kept a schedule of her class subjects and subject times for students in her class (P 5, pages 2-4).
36. The classroom schedule provided by Student's learning support teacher called for Student to attend keyboarding in a regular education class (NT 260, P5).
37. After Student attended several keyboarding classes, the learning support teacher unilaterally decided not to send Student to the regular education class for keyboarding (NT 262).
38. The learning support teacher never convened an IEP meeting to review why Student was not attending the regular education keyboarding class (NT 262).
39. Student's 2004-2005 IEP called for Student to participate in a Learning Support reading class a minimum of one time per week (NT 263; SD 5, page 24).
40. Student's teacher did not send Student to the Learning Support class for reading (NT 264).
41. Student's teacher did not convene an IEP meeting to review why Student was not attending the Learning Support class for reading (NT 263-265).
42. Student's teacher did not send Student to the "*Type to Learn*" keyboarding class during his Life Skills Class and did not convene an IEP meeting to review why Student was not attending the class (NT 266-267).
43. As part of Student's behavior management program, Student would earn dimes for positive performance, based on a "*dime board, response cost system*" (SD 3, pages 1-2; SD 7; NT 267-268).
44. [Despite Student's disability], Student would have dimes taken away from him for day dreaming, stalling, and staring (SD 5; NT 283).

45. Stalling and daydreaming are manifestations of [Student's disability]. (NT 284).
46. Student's mother became concerned about Student's behavior after reading the Communication Log book (NT 399-400).
47. Throughout the 2004-2005 school year, Student [engaged in specific problematic behaviors] yet still received positive progress reports regarding his school behaviors (SD 5; NT 399-402).
48. Student's behavior management program received changes without convening another IEP meeting (NT 269-270).
49. On March 21, 2005 the Bureau of Special Education, Pennsylvania Department of Education received a complaint from Student's mother, who contended the District failed to implement Student's 2004-2005 IEP, (i.e., the May 26, 2004 IEP) (P 13, pages 1-4).
50. Student's mother first learned that Student was not attending learning support reading when she received his first report card noting Student's 32 days of absence from learning support reading but still receiving a passing grade (NT 387-390; P 6; P 7).
51. Student's 2004-2005 report card, second quarter, indicated that Student received an "A" in physical education and health, as well as an Academic Excellence Award (SD 12, page 4; NT 419-423).
52. During the second quarter of the 2004-2005 school year, Student did not take health or physical education having been excused because of his [injury]. (NT 417- 427).
53. Student's 2004-2005 report card; second quarter revealed that Student earned "Passing" grades in his courses that included "*Family and Consumer, Art, Functional Math, Functional English, and Reading.*" Student received curricular adaptations/modifications in his courses that included "*Family and Consumer, Art, and Reading.*" Student earned an "A" in Physical Education (SD 12, page 1).
54. On April 18, May 17, and July 31, 2005, the Bureau of Special Education issued a "Complaint Investigation Report" finding that the District failed to implement the pendent May 26, 2004 IEP (SD 6; pages 1-7).
55. The Bureau of Special Education determined that because of the busing schedule, Student's special education classroom received a 15-minute earlier dismissal than all other students in the school (NT 267-268).
56. The Bureau of Special Education found that Student missed 90 minutes of instruction per week through May 2, 2005 and cited the District for violating Student's right to a FAPE due to the District's early dismissal policy (SD 6, page 3; P 13, pages 1-14).
57. The Bureau of Special Education ordered the District to provide Student with 48 hours of compensatory education due to the denial of FAPE, owing to the District's early dismissal policy (SD 6, page 4).
58. The Bureau of Special Education found that the District failed to provide Student with one weekly period of reading instruction in the Learning Support Classroom as designated in his pendent May 26, 2004 IEP (SD 6, page 3).
59. The Bureau of Special Education found that the District failed to provide Student with the amount and type of instruction using Type to Learn as per his pendent May 26, 2004 IEP (SD 6, pages 3-4).
60. The Bureau of Special Education found that the District failed to provide Student with Keyboarding as designated on his pendent May 26, 2004 IEP and ordered the District to provide Student with 36 hours of compensatory education (SD 6).
61. On May 24, 2005, Student's mother sent a letter to the District's Junior High School Principal concerning an investigation of Student [redacted] and "*requesting a copy of your findings in writing*" (P14, pages 1-2; NT 432).
62. [Redacted].
63. [Redacted].
64. [Redacted].
65. On May 25, 2005, the District's Junior High School Principal responded to Student's mother request on findings of the inquiry [redacted]. (P14, pages 3-4).

66. On May 26, 2005 the District provided Student's Parents a "*Compensatory Education Agreement*" that the Parents did not sign (SD 16).
67. On June 8, 2005, Student's mother sent a letter to the District's Coordinator of Special Programs stating, "*I am concerned I did not receive a copy of my son's new IEP documentation*" (P15, page 1).
68. On July 8, 2005, Student's mother sent a letter to the District's Coordinator of Special Programs stating, "*you presented us with documents that I've never seen before, the IEP team has never discussed or reviewed and wanted me to sign such documents...My attorney...sent a letter dated June 22, 2005 requesting a pre-hearing conference and he has yet to hear from him*" (P16, pages 1-2).
69. On July 18, 2005, the District responded to a Pennsylvania Department of Education, Special Education Advisor's request, describing "*events and actions relevant to the issue of entitlement of compensatory education*" (SD 17, pages 1-2).
70. On July 29, 2005 a Special Education Advisor from the Pennsylvania Department of Education wrote a letter to the District's superintendent, stating, "*The Complaint Investigation Report...dated 5/17/05 did not contain the specific amount of compensatory education in relation to keyboarding instruction.... An amended report is attached...An extension of the timeline is noted...*" (SD 6, pages 1-7).
71. On October 25, 2005 the District counsel sent to the Parent's counsel a FAX stating, "*The District has attempted to locate the 7<sup>th</sup> grade PASA scores on Student. Unfortunately, since it was considered a pilot program individual scores were not kept on the students. The results were combined scores only. The District never received a report on the combined scores. I have sent the data progress sheets listed on my 5 day which you did not appear to have in your packet*" (SD 15, page 1).
72. On October 26, 2006, the Parties stipulated to the application of a "*Montour* limitations decision" as a result of a status conference (P1, pages 1-2).
73. On November 16, 2005, the District by Motion raised a burden of proof issue requesting that the Hearing Officer take the Supreme Court's *Schaffer* ruling into account in her review of Student's case. *Schaffer v. Weast, \_S.Ct.\_, 2005 WL 3028015 (November 14, 2005). (HO 5).*
74. On December 6, 2005, Mr. K provided an IEE report to the District based on the Hearing Officer's December 2, 2005 directive (P18, NT 633-634; 638-643).

#### IV. ISSUES

The parties agreed to the hearing issues on the record (NT 15-16). The agreed upon hearing issues, at the start of the hearing, were based on the following questions:

- Did the District provide an appropriate IEP for the 2003-2004 school year?
- Did the District provide an appropriate IEP for the 2004-2005 school year?

#### V. DISCUSSION AND CONCLUSIONS OF LAW

Student's Parents initiated a pre-hearing conference by letter dated June 22, 2005, with a follow-up letter dated September 8, 2005 requesting that a due process hearing be scheduled (Notes of Transcript, page 7: NT 7; P16, pages 1-2). Both parties stipulated that the June 22, 2005 letter initiated due process proceedings, but the Parents did not actually request a due process hearing until September 8, 2005 (NT 7-8; Parent Exhibit 1: P1).

On December 1, 2005, a Special Education Appeals Panel determined that the application of *Montour* (*Montour School District v. S.T.*, 805 A.2d 29 (Pa.Commw. Ct. 2002) is moot in light of an express statute of limitations, as a result of the 2004 Amendments to the IDEA. *Special Ed. Opinion No. 1672* (December 1, 2005).

Therefore, the scope of Student's hearing review is subject to the two-year limitations period, effective July 1, 2005, as a result of the 2004 Amendments to the IDEA. 20 U.S.C.A. 1415(f) (3) (C) (2005). Despite the parties' stipulations at Student's hearing initiation, and in light of the December 1, 2005 *Special Ed. Opinion No. 1672*, this Hearing Officer has determined that the application of *Montour* to Student's case is moot in light of the IDEA 2004 statute of limitations.

At the start of Student's first hearing session, both counsel to the District and counsel to the Parents stated that it was the District's burden of proof to show that it had offered Student a free appropriate public education (FAPE) (NT 10). Prior to the close of the District's case in chief, the Supreme Court issued its decision on the burden of proof in administrative proceedings under the IDEA. *Schaffer v. Weast*, \_\_S.Ct., 2005 WL 3028015 (November 14, 2005). The *Schaffer* court held that in a hearing held pursuant to the IDEA, the burden of proof is properly placed upon the party bringing the complaint. (Therefore, it would be the Parents' burden to prove that Student has been denied a FAPE.)

On November 16, 2005, the District by Motion raised the burden of proof issue requesting that this Hearing Officer take the Supreme Court's November 14, 2005 ruling into account in her review of Student's case (HO 5). The Parents argued that Student's case did not have retrospective application. However, Student's hearing was not over and the District had not even completed its case in chief. Moreover, the District argued that the District's Motion was for the Hearing Officer to recognize the burden of proof in her analysis of the case and was not requesting that the case begin anew (NT 331-332).

At the time the District raised the Motion on November 16, 2005, this Hearing Officer stated, "*I am going to rule in favor of the law of this case, that the District does have the burden*" (NT 332). However, pursuant to the December 1, 2005 decision by the Pennsylvania Special Education Appeals Panel citing the *Schaffer* Court, this Hearing Officer has come to recognize that Student's case at the time of the District's Motion was in the "evidentiary equipoise" required of *Schaffer* and the burden of proof should be upon Student's Parents. *Special Ed. Opinion No. 1672* (December 1, 2005).

In support of their case in the instant hearing, Student's Parent presented the reports and testimony of two expert witnesses, Dr. K and Mr. K (NT 512-598; 644-727). The IDEA and Chapter 14 of the Pennsylvania Code allow for independent evaluations at public expense *if the parent disagrees with an evaluation obtained by the agency*. See 22 Pa. Code Chap. 14; 300 C.F.R. § 300.502(b) (1) adopted by reference. This Hearing Officer has found in her analysis of Student's case, the Parents did not disagree with an evaluation by the District. Rather, the Parents commissioned the independent evaluation(s) on their own and upon advice of their counsel (P 17; P18).

Thus, this Hearing Officer did not rely on either the testimony or the reports of the Parent's two expert witnesses in the Hearing Officer's analysis of Student's case. Pursuant to *Schaffer*, this Hearing Officer relied solely on the information that the District had at the time it developed Student's programs (*Fuhrmann v. E. Hanover Bd. of Educ.*, 993 F.2d 1031, 1040 (3<sup>rd</sup> Cir. 1993)).

The decision and Order, below, were based on recognizing the Parents' burden of proof in the Hearing Officer's analysis of Student's case. This decision was based on the substantive issue of whether Student actually received a FAPE. The Parents' claim in this review was limited to the two-year period from the time of the date that the Parents knew or should have known (i.e., from September 8, 2003 to September 7, 2005).

#### *Student's January 10, 2003 Reevaluation and Progress Determinations*

In determining whether or not the Parents met their burden of proof regarding Student's substantive provision of a FAPE, via his May 27, 2003 IEP for the 2003-2004 school year and his May 26, 2004 IEP for the 2004-2005 school year, this Hearing Officer reviewed and relied on Student's January 10, 2003 reevaluation (P3), (i.e., his pendent reevaluation on September 8, 2003); and the District's method(s) to determine Student's IEP progress, including teacher reports, use of grades, observations, and curriculum-based assessments.

As reported in his January 10, 2003 reevaluation, Student's current educational program named his "*Life Skills Support and Speech/Language Support*" programs. The reason for referral was stated, "*Student is due for his triennial reevaluation*" (P3, page 1). Although the IEP Team determined that no additional data were required (P3, page 4), Student's January 10, 2003 reevaluation did not provide objective data regarding Student's regression or recoupment of academic, educational, behavioral, social, adaptive behaviors, prevocational or emotional skills (P3, pages 1-6). Student's January 10, 2003 reevaluation team did not meet to review or discuss the necessity of collecting additional assessments or evaluation data as part of Student's January 10, 2003 reevaluation (NT 384-386).

According to federal regulations "*in evaluating each child with a disability under §§300.531-300.536, the evaluation must be sufficiently comprehensive to identify all of the child's special education and related service needs.*" In a review of the record and with consideration given to the Parents' burden of proof, Student demonstrated severe adaptive behavior problems, low intellectual functioning, and receptive and expressive language difficulties during the time period from September 8, 2003 to September 8, 2005 that should have alerted Student's reevaluation/IEP team to update Student's evaluation with a comprehensive reevaluation to identify all of Student's special education and related service needs. While a student with a disability must be evaluated at least every three years unless the parent and district agree to waive this requirement, the district must reevaluate school-aged students with mental retardation in Pennsylvania at least every two years.

The District in Student's case had sufficient data to suspect Student's functioning in the mental retardation range, including the past evaluation, teacher reports, use of grades, observations, and curriculum-based assessments. The District knew Student had a need for a life skills support classroom, had a sub-average intellectual functioning, and had problems in adaptive behavior (P 3, page 1, 5). While the District did go through the motions of completing a reevaluation on Student, the reevaluation was insufficient and incomplete. Student demonstrated passing grades (SD 12), and Student was reported by his IEP team to be "*making progress toward IEP goals. At this time, no additions or modifications to special education/related services are needed*" (P 3, page 5). However, Student's reevaluation noted below average ability and Student displayed obvious disability-related adaptive behavior deficits (P 3, page 5), although Student's grades and teacher reports appeared to indicate progress.

The Third Circuit determined that passing grades are not in themselves sufficient to establish that FAPE has been provided, particularly where the grades do not match educational progress. *Montgomery Township Board of Education v. S.C. ex rel. D.C.*, 135 Fed. Appx. 534, 43 IDELR 186 (3<sup>rd</sup> Cir. 2005). Because of a flawed reevaluation, the District failed to explain how the District assessed and programmed for Student's designated disabilities, *Other Health Impairment* and his *Speech and Language Impairment*. Student's progress, as set forth by his January 10, 2003 reevaluation report that included his IEP team reviews of Student's progress, was seriously over generalized regarding Student's functional use of reading skills, math skills, appropriate social skills, behavior, speech and language skills, and participation with regular education peers. The reevaluation report provided to Student's Parents should have been within 60 school days of the District's receipt of the District's determination that Student's reevaluation was needed. Student's mother did not receive a copy of Student's January 10, 2003 Reevaluation Report until May 21, 2003 (NT 383). During the two year time period from September 8, 2003 through September 7, 2005, the Parents presented sufficient data that the District's reevaluation efforts should entail more than a cursory review of data, as was done January 10, 2003. Because of a flawed reevaluation and a lack of a reevaluation update between the relevant time period from September 8, 2003 to September 7, 2005, the Parents showed that the District failed to explain how the District assessed and programmed for Student's unique needs, via his resulting IEPs.

#### *Student's IEPs*

In determining whether or not the Parents met their burden of proof regarding Student's provision of a FAPE, this Hearing Officer reviewed and relied on the IEP offered to Student May 27, 2003 when Student attended the 6<sup>th</sup> grade (SD 1), and Student's May 26, 2004 IEP when Student attended the 7<sup>th</sup> grade (SD 5).

Attending Student's May 27, 2003 IEP meeting were Student's mother, father, and stepparent; a regular education teacher, special education teacher, and school counselor; and a local educational agency (LEA) representative (SD 1, page 1). Student's May 27, 2003 IEP named his disabilities: "*Other Health Impaired and Speech and Language Impaired*" (SD 1, page 1). Although Student's May 27, 2003 IEP identified his "*Other Health Impairment*" disability, there was no person knowledgeable about his "*Other Health Impairment*" [redacted] present at Student's May 27, 2003 IEP meeting (e.g., a school nurse/related service personnel). Although Student's May 27, 2003 IEP named his "*Speech and Language*" Impairment, there was no Speech and Language clinician present at Student's IEP meeting (SD 1, page 1). Student's IEP team meeting should have included persons knowledgeable about Student's recognized disabilities.

The May 27, 2003 IEP contained substantive errors that prevented Student from receiving a FAPE. Although Student's IEP team identified Student's special considerations, naming "*Communication Needs*" (SD

1, page 2), the May 27, 2003 IEP did not address appropriately Student's Communication needs as these needs pertain to his Speech and Language Impairment. Student's present levels of educational performance did not identify any objective measures of Student's Speech or Language Impairment. The May 27, 2003 IEP failed to describe how Student's Speech and Language Impairment affected his involvement and progress in the general education curriculum (SD 1, pages 2-3). Student's Speech and Language clinician did provide goals and objectives that were stapled to his May 27, 2003 IEP (SD 1, page 4). However, there was no indication of the Parents' report of progress on the annual goals in the area of Speech and Language for the 2003-2004 school year (SD 1, page 4; SD 1, pages 23-35). The speech and language clinician did not provide written progress reports during Student's sixth grade school year (NT 350-353). However, Student's teacher reported that Student regressed in the areas of speech, language, and behavior (NT 345, 347, 353).

Although Student's IEP team identified Student's other special considerations, naming "*Behaviors that Impede His Learning and That of Others*," (SD 1, page 2), the May 27, 2003 IEP did not address appropriately Student's behavioral needs, as these pertain to his Other Health Impairment. The IEP did not identify how Student's [disability] affected his involvement and progress in the general education curriculum (SD 1, pages 2-3). As part of Student's behavior management program, Student would earn dimes for positive performance, based on a "*dime board, response cost system*" (SD 3, pages 1-2; SD 7; NT 267-268). Although he was diagnosed with [a specific disability], Student would have dimes taken away from him for day dreaming, stalling, and staring (SD 5; NT 283). Stalling and daydreaming are manifestations of [Student's disability] (NT 284).

Student's May 27, 2003 IEP did not address appropriately Student's "*Expected Level of Achievement*" in all of the named annual goals. His May 27, 2003 IEP lacked objective methods of evaluating and monitoring goals (i.e., SD 1, pages 4, 5, 16). Student did not participate in any district-wide assessment (SD 1, page 19). Student's May 27, 2003 IEP lacked details of specially designed instruction, including the mandated components of frequency, location, duration, or beginning dates. Although the May 27, 2003 IEP named Student's "*Adapted PE*" and "*Speech ad Language*" as Related Services, the May 27, 2003 IEP did not name the location for Student's "*Adapted PE*" and "*Speech ad Language*" services. There were no goals for Student's Adapted PE (SD 1, page 18).

In attendance at Student's May 26, 2004 IEP meeting were Student's mother and step parent; and a number of LEA personnel, including special education teachers, regular education teachers, guidance counselors, and the coordinator of special programs (SD 5, page 1). Student's May 26, 2004 IEP named his disabilities: "*Other Health Impaired and Speech and Language Impaired*" (SD 5, page 1). Student's May 26, 2004 IEP addressed Student's special considerations, naming "*Communication Needs, Behaviors That Impede His Learning or That of Others, and Transition Services*" (SD 5, page 2). Student's May 26, 2004 IEP did not address Student's Health Impairment [redacted] (NT 284). Student's speech and language clinician noticed regression in Student's overall behaviors. Student's behavior management program was not working and did not receive revisions in Student's May 26, 2004 IEP (NT 352- 355). Student's mother became concerned about Student's behavior after reading the Communication Log book (NT 399-400). Throughout the 2004-2005 school year, Student [engaged in specific problematic behavior], yet still received positive progress reports regarding his school behaviors (SD 5; NT 399-402). Student's behavior management program received changes without convening another IEP meeting (NT 269-270). Student did not respond to a response cost system in that he lost a quantity of dimes throughout the school year. In light of Student's [disability], and his communication difficulties, Student demonstrated severe behaviors that should have warranted a review and consideration of Student's behavioral needs by his IEP team, especially given behavioral incidents at the time of Student's hospital visits (SD 3; P 9, pages 1-3; SD 9; P10; P11; NT 276-277; 283; 407-417). It appeared that the District was not accountable to Student until Student's mother filed a complaint to the Bureau of Special Education in March 2005 (SD 6;P 13). The District violated Student's right to a FAPE in IEP accountability, 34 C.F.R. §§ 300.8(d), 300.300, 300.16, 300.350. (SD 6, page 3; P13).

Each child identified as eligible for special education must have a written IEP. 34 C.F.R. §300.342(a) and 22 Pa. Code § 14.131. IEPs have to be reasonably calculated to provide meaningful educational benefit. The annual goals must be reasonable. In developing the child's IEP, the Team must consider the child's strengths, parental concerns, and the results of the evaluations of the child. 20 U.S. C. §1414(d)(3).



However, Student's May 27, 2003 IEP and his May 26, 2004 IEP were incomplete, inadequate, and insufficient. Student's IEPs did not have "measurable" goals designed to meet Student's needs and to help Student participate and progress, to the extent appropriate in the general education curriculum, (e.g., in reading, keyboarding, speech and language, behavior). The IEPs did not explain sufficiently how Student's progress towards his goals would be measured and when progress reports would be issued-especially in the areas of speech, language, and behavior (SD 1; SD 5).

Student's May 27, 2003 IEP and his May 26, 2004 IEP contained substantive errors that indicated Student's lack of a FAPE. See also *Assignment of S. B.*, Special Education Opinion 916 (June 4, 1999). *Black River Falls School District*, 40 IDELR 163 (WI. January 5, 2004). *Escambia County Pub. Sch. System*, 42 IDELR 248 (SEA AL 2004). *Evans v. BOE of Rhinebeck Cent. School District*, 930 F. Supp. 83 (S.D.N.Y. 1996). *Lascari V. BOE Ramapo Indian Hills Reynolds High School*, 116 N.J. 30, 48-49 (1989). *In Re: Assignment of W. L.*, Special Education Opinion 655 (January 20, 1995).

Accordingly, both IEPs denied Student a FAPE. 34 C.F.R. §§300.346, 300.347, *et seq.* This Hearing Officer agreed with the Parents: the District used the Reevaluation ER process and the Bureau of Special Education complaint process to ignore and cover up readily apparent deficits. *Assignment of J.S.*, Special Education Opinion No. 1633 (SEA PA July 29, 2005).

### **Is Student Entitled To Compensatory Education As Of September 8, 2003?**

The Parents have met their burden of proof in establishing that Student did not receive a FAPE due to substantive errors in his May 23, 2003 and May 26, 2004 IEPs. The District offered and implemented flawed IEPs. Where the IEP is flawed substantively, a student is denied a FAPE. The remedy for denial of a FAPE is compensatory education. The IDEA provides that the Hearing Officer has the authority to grant "appropriate relief" to correct the denial of a FAPE. 34 C.F.R. §§ 300.509, 510, 511, 512. This Hearing Officer is awarding compensatory education for Student's full school day hours, as of September 8, 2003 through September 7, 2005.

### **CONCLUSIONS OF LAW**

As based on the substantial weight of the evidence, including the oral testimony on the record and most of the exhibits, this Hearing Officer was able to conclude the following:

1. Student was denied a FAPE for the 2003-2004 school year.
2. Student was denied a FAPE for the 2004-2005 school year.

**HEARING OFFICER DECISION/ORDER**  
**IN RE: STUDENT v. SCHOOL DISTRICT**  
**(FILE No. 5907/05-06 KE)**

AND NOW, this 20 day of December 2005, the School District is ordered to take the following action:

1. Within 30 school days of the receipt of this Order, the District must perform, at District expense, a comprehensive and in-depth reevaluation relative to Student in terms of his ability, adaptive behavior, speech and language skills, motor skills, transition needs, functional achievement, and functional behavioral needs.
2. Within 10 school days of the receipt of the reevaluations, the District must revise Student's ER. The ER must consider results of the reevaluation (i.e., of No. 1 above) relative to Student's disability determination and needs for special education and related services.
3. Within 15 school days of the receipt of the evaluations in No. 1 above, Student's IEP team must reconvene for the purpose of developing Student's diagnosis, program, and placement. The IEP team must consider all information available to it in making determinations.
4. Student is entitled to compensatory education for Student's full school day hours, as of September 8, 2003 through September 7, 2005. Student's Parents shall decide how the compensatory education hours should be spent so long as they take the form of appropriate developmental, remedial or enriching instruction that furthers Student's needs and furthers the goals of Student's pendent or future IEPs. These services may occur during the weekday, on weekends and during the summer months, when convenient for Student and Student's Parents.

\_\_\_\_\_  
**Dorothy J. O'Shea, Ph.D.**  
**Hearing Officer**

**DECISION DATE:** \_\_\_\_\_