

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.

PENNSYLVANIA

## Special Education Hearing Officer

---

Child's Name: Student

Date of Birth: xx/xx/xx

File Number: 7630-06-07 AS

Dates of Hearing: July 30, 2007; July 31, 2007; September 12, 2007;  
September 14, 2007; September 26, 2007; October 13, 2007

CLOSED HEARING

Parties to the Hearing:

Troy Area School District  
310 Elmira Street  
Troy, PA 16947-0067

Representative:

Yvonne Husic, Esq.  
Husic Law Office  
2215 Forest Hills Drive, Suite 35  
Harrisburg, PA 17112

Sharon Montayne, Esq.  
Sweet, Stevens, Katz, and Williams  
P.O. Box 5069  
New Britain, PA 18901

Date Transcript Received:

October 23, 2007

Date Record Closed:

October 29, 2007

Date of Decision:<sup>1</sup>

November 12, 2007

Hearing Officer Name:

Gregory J. Smith

---

<sup>1</sup> The record was kept open until receipt of the closing briefs from both parties. An electronic copy of the parents' closing brief was dated October 26, 2007 and was received on October 29, 2007. An electronic copy of the District's closing brief was dated October 26, 2007 and a printed copy of the District's closing brief was postmarked October 26, 2007. Both copies of the District's closing brief were received on October 29, 2007. On October 29, 2007 the record was closed. This decision was rendered 14 days after the closing of the record following the receipt of the closing briefs.

## **Background**

Student is an xx-year-old student who resides with her parents within the area served by the Troy Area School District. Student is eligible for special education and related services as a child with a disability who has been identified as having an other health impairment. Student developed cerebral palsy when she was two weeks old. Her cerebral palsy resulted in both fine and gross motor deficits. Student's parents requested the present hearing seeking compensatory education, reimbursement for an independent educational consultation, reimbursement for an independent transition evaluation, changes to Student's individualized educational program, provision of related services, completion of several independent evaluations, an inclusive program, assistive technology, and the provision of a laptop and related software.

## **Findings of Fact**

1. Student is an xx-year-old (d.o.b. xx/xx/xx) student who resides with her parents within the area served by the Troy Area School District (District). (P-10, P-11A, P-18, P-21, S-3, S-47)
2. Student is eligible for special education and related services as a child with a disability who has been identified as having an other health impairment. Student developed cerebral palsy when she was two weeks old. Her cerebral palsy has caused both fine and gross motor deficits. (N.T. at 261-263, 465; P-10, P-11A, P-16, S-3, S-47)
3. Student has received special education and related services throughout her educational career. (N.T. at 465; P-10, P-18, P-19, P-20, P-21, S-3, S-28, S-47)
4. On February 20, 2004 a reevaluation was completed and an evaluation report (ER) was produced. At that time Student was an eighth grade student participating in all regular education classes with the exception of math, which was taught in the resource room; she was working with a vision specialist on keyboarding skills, typing at 14 words per minute with a few mistakes using only her left hand; she was accompanied in school by a personal care aide who helped her with personal needs and also took notes; and she used a wheel chair to move throughout the school. As part of the reevaluation the Ekwall/Shanker reading test was given. Student was found to have an independent reading level for sight words of fifth grade, and instructional level for oral reading of fourth grade, and an independent level for silent reading of third grade. Student was also given the Brigance to determine math ability and scored at the 5.2 grade level. It was noted that due to her physical disability, Student had poor point to point focus and that she required extended time to complete most tasks. It was concluded that Student continued to be eligible for and in need of special education. Student's mother signed the ER and indicated that she agreed with that report. (P-10, S-3)
5. On March 7, 2005 an Individualized Education Program (IEP) team meeting was held to review and revise Student's existing IEP. In the IEP that was developed at that meeting it was noted that Student had a visual impairment, but that she did not need instruction in Braille or the use of Braille. In the IEP it was also noted that Student did require assistive technology. In that IEP Student's needs were listed as: "Rephrasing of directions to check for understanding. Frequent checks for understanding. Adapted study guides, Chunking of test information, use of a scribe, hard copy of notes, use of a calculator, tests read and directions explained as needed, extra time on tests, use of an agenda, hard copy of notes provided by teacher, use of a computer for essay response, small group instruction, use of reading tapes for books, adapted tests with word bank as needed, reduced assignment load, small group instruction." P-17 at 2 (N.T. at 847; P-17; S-4)
6. The transition plan in the March 7, 2005 IEP noted that Student was unsure of her post secondary education and that she would explore those options with the guidance office, that she was somewhat interested in the health field and that she would explore those options with the guidance office, and that there was not a need for assistance with community living at the present time. It was further noted that Student would

participate in the regular curriculum during the next school year, except for math class and that during free time she would explore possible career choices. (P-17, S-4)

7. The March 7, 2005 IEP included two annual goals. The first goal was to increase typing speed to 20 words per minute. The short-term objectives that accompanied that goal called for progressively faster typing speeds. The second goal was to improve functional math skills. Short-term objectives that accompanied that goal included correctly solving 5<sup>th</sup> grade level math word problems; solving problems dealing with basic home expenditures, for example rent, electric bills, and phone bills; and computing weekly and annual wages. (P-17, S-4)

8. The program modifications and specially designed instruction provided in the March 7, 2005 IEP consisted of adapted study guides, rephrasing directions, chunking of test information, use of a scribe, hard copies of notes, use of a computer for essay responses, small group instruction, use of reading tapes for books, adapted tests with word bank, reduced assignment load, use of an agenda, extra time on tests, tests read and directions explained, use of a calculator, and use of a scribe. (P-17, S-4)

9. Related services listed in the March 7, 2005 IEP were a personal care aide and vision support. Frequencies for those service were not noted in the IEP. (P-17, S-4)

10. Student was listed as not in need of extended school year (ESY) services in the March 7, 2005 IEP. (P-17, S-4)

11. In June 2005 Student's parents began to explore placement in the District's Blended Schools program. The Blended Schools program is an online instructional program that is available to all high school students in the District. Students may participate in the Blended Schools program on a part-time basis, while continuing to take courses at the high school, or they may participate in that program on a full-time basis and take all of their courses online. For eligible students in the Blended Schools program a learning support teacher is available for consultation and support through e-mail and telephone contact. (N.T. at 120, 670, 673, 680-681, 847-848, 896; S-6)

11. Student started the 2005 – 2006 school year in the Blended Schools program. The sign-up for the Blended Schools program was completed by Student and her parents on September 7, 2007. (N.T. at 485-486, 632, 850; S-9, S-18, S-22)

12. On September 7, 2005 an IEP team meeting was held to develop an IEP for Student's full-time participation in the Blended Schools program where she would receive all of her instruction at home from the online program and through e-mail contact with a supervising teacher. Student's parents chose to have Student participate full-time in the Blended Schools program because they did not approve of the District's choice of aide for Student (N.T. at 632, 694, 849-850; P-18, S-8)

13. In the September 7, 2005 IEP it was noted that Student had been tested on the Ekwall/Shanker reading test and was found to have an independent reading level above ninth grade and that she could read eighth grade materials at 116 words per minute. It was also noted that Student needed to develop her writing skills, including punctuation, word usage, and grammar. In math it was noted that Student was calculator dependent, but that she was able to do multi-step problems with the aide of a calculator. (P-18, S-8)

14. The transition plan in the September 7, 2005 IEP noted that Student was unsure of her post secondary education and that Student In the area of employment it was noted that Student was somewhat interested in the health field, possibly with computers, and also that she was interested in massage therapy. Lastly, it was noted that there was no need for independent living planning at that time. (P-18, S-8)

15. The September 7, 2005 IEP included three annual goals. The first goal was to improve reading comprehension. The second goal was to improve practical math skills. The third goal involved language arts. (P-18, S-8)
16. The program modifications and specially designed instruction provided in the September 7, 2005 IEP consisted of rephrasing directions, chunking of test information, use of a computer for essay responses, adapted tests with word bank, reduced assignment load, extra time on tests, tests read and directions explained, use of a calculator, and use of a scribe. (P-18, S-8)
17. Related services listed in the September 7, 2005 IEP included vision support, provided one time per week in the home, and occupational therapy, provided in the home, but the frequency of occupational therapy was not listed. (P-18, S-8)
18. Student was listed as not in need of ESY services in the September 7, 2005 IEP. (P-18, S-8)
19. On January 24, 2006 Student began to receive all of her instruction at the high school. Between March 23, 2006 and April 24, 2006 Student did not attend school due to a medical condition. From April 24, 2007 through to the end of the 2005 – 2006 school year Student again received her instruction at home through the Blended Schools program. (N.T. at 850, 858-860; S-18, S-20, HO-6)
20. On April 21, 2006 an IEP team meeting was held to develop an IEP for Student to return to participation in the Blended Schools program. (P-19)
21. In the April 21, 2006 IEP it was noted that Student would receive all of her instruction, except in math, through the Blended Schools program. Because Student continued to have difficulty with pre-algebra, she was to receive her math instruction through Academy of Math, another online program. (P-19)
22. At the end of the second semester of the 2005 – 2006 Student was interviewed to determine her post-secondary interests. At that time she indicated that she would like to have a job working with computers and that she might like a job in the medical field. The transition plan in the April 21, 2006 IEP had a plan for Student to explore career options using the online Bridges.com program. In the area of employment it was noted that Student was somewhat interested in the health field, possibly with computers, and also that she was interested in massage therapy. Lastly, it was noted that there was no need for independent living planning at that time. (P-19)
23. The April 21, 2006 IEP included three annual goals. The first goal was related to the accurate completion of oral and silent reading assignments. The second goal was to improve understanding of math operations and to be able to complete problems with whole and non-whole numbers. The third goal involved the acquisition and application of skills to be successful in the Blended Schools program. (P-19)
24. The program modifications and specially designed instruction provided in the April 21, 2006 IEP consisted of receiving assistance from a learning support teacher. (P-19)
26. Related services listed in the April 21, 2006 IEP consisted of vision support provided one time per week in the home. (P-19)
27. Student was listed as not in need of ESY services in the April 21, 2007 IEP. (P-19)
28. During the 2005 – 2006 school year Student completed 7.5 course credits. Most of that work, except for a course in web design, was completed through the Blended School program. Student received passing grades in Physical Education, Art, 10<sup>th</sup> Grade English, 10<sup>th</sup> Grade Social Studies, 10<sup>th</sup> and 11<sup>th</sup> Grade Math, Web Design, and Physical Science. (N.T. at 862, 897; S-14, S-49)

29. During the late spring and early summer of 2006 several Notices of Recommended Educational Placement (NOREP) were sent to Student's parents. In June 2006 Student's parents informed the District that they disagreed with the goals and objectives in the proposed IEP and requested a special education due process hearing. They also informed the District that they did agree with the proposed continuation of instruction through the Blended School program. Student's parents' request for a due process hearing was withdrawn in November 2006. (N.T. at 861-863; S-23, S-24, S-38, S-39)

30. In the spring or early summer of 2006 Student's parents contacted Mr. K and requested that he complete a review of available records and evaluate the appropriateness of Student's program and placement. Mr. K reviewed records provided to him by Student's parents and their attorney, observed Student in two classes, and interviewed Student, her parents, and her aide. On November 7, 2006 Mr. K produced a report titled "Independent Educational Consultant Evaluation" In his report and in his testimony he made it clear that he approached his task and wrote his report "from a child advocacy perspective." N.T. at 201 Student's parents did not provide the District with a copy of Mr. K's report until they produced it as part of their complaint for the present due process hearing. At that time Student's parents' attorney sent a copy of the report to the Office for Dispute Resolution and copied the District's attorney on that electronic transmission of the report. A copy of Mr. K's report was not provided directly to the District. (N.T. at 118, 189-190, 194, 201, 630, 915-916; P-4, S-54)

31. On August 9, 2006 Student's parents notified the District that Student would return to the high school for all of her instruction at the start of the 2006 – 2007 school year. They also informed the District that Student would be accompanied by a full-time personal aide provided by [redacted] Services. (N.T. at 634-635, 863; S-27)

32. On August 25, 2006 an IEP team meeting was held and an interim-IEP was developed for use until the completion of an independent educational evaluation (IEE) and the receipt of the IEE report. (N.T. at 501, 864; P-20, S-28)

33. In the August 25, 2006 IEP it was noted that Student had been tested on the Ekwall/Shanker reading test on March 20, 2006 and was found to have an independent reading level above ninth grade and that she could read eighth grade materials at 116 words per minute. It was also noted that Student needed to develop her writing skills, including punctuation, word usage, and grammar. In math it was noted that Student was calculator dependent, but that she was able to do multi-step problems with the aide of a calculator. (P-20, S-28)

34. The transition plan in the August 25, 2006 IEP noted that Student was unsure about post secondary education. In the area of employment it was noted that Student was somewhat interested in the health field, possibly with computers, and also that she was interested in massage therapy. Lastly, it was noted that there was no need for independent living planning at that time. (P-20, S-28)

35. The August 25, 2006 IEP included four annual goals. The first goal was to improve reading comprehension. The second goal was to improve practical math skills. The third goal involved language arts. The last goal involved developing successful academic habits. (P-20, S-28)

36. The program modifications and specially designed instruction provided in the August 25, 2006 IEP consisted of rephrasing directions, chunking of test information, use of a computer for essay responses, adapted tests with word bank, reduced assignment load, extra time on tests, tests read and directions explained, use of a calculator, and use of a scribe. (P-20, S-28)

37. Related services listed in the August 25, 2006 IEP included vision support and occupational therapy. (P-20, S-28)

38. Student was listed as not in need of ESY services in the August 25, 2006. (P-20, S-28)

39. Prior to the start of the 2006 – 2007 school year, Student and her parents participated in selecting the courses Student would take during that school year. The practice of allowing students and their parents to participate in the selection of courses is a practice used by the District with all high school students. (N.T. at 886; S-69)
40. On September 12, 2006 an IEE was completed by Dr. K, a licensed psychologist and nationally certified school psychologist. The IEE was paid for by the District. Student’s parents brought Student to Dr. K’s office. Among other information collected for the IEE, Dr. K completed the following assessments: Wechsler Intelligence Scale for Children-IV (WISC-IV), Test of Non-Verbal Intelligence-3, Expressive Vocabulary Test, Developmental Test of Visual-Motor Integration, Career Assessment Inventory, Kaufman Brief Intelligence Test-II, Peabody Picture Vocabulary Test, Wechsler Individual Achievement Test-II (WIAT-II), and the Comprehensive Test of Phonological Awareness. The total time for actual testing was about 3 hours and 6 minutes. In addition, Dr. K took three breaks while working with Student (N.T. at 28-29, 38, 44-48, 510, 532-538, 546-547, 846; P-2, S-29)
41. Following her evaluation, Dr. K completed an IEE report. She reviewed that with Student’s parents on September 28, 2006. That report was received by the District on October 2, 2006. In her report Dr. K recommended that Student be classified as physically impaired, other health impaired, speech and language impaired, and as having a specific learning disability in reading fluency, reading comprehension, written expression, and math calculation.
42. Dr. K made 12 program recommendations for improving reading fluency, 18 program recommendations for improving reading comprehension, recommendations for improving written expression, the use of Saxon math for improving math reasoning and calculation, social skills training, and 22 recommendations for accommodations. Dr. K also recommended assistive technology, occupational therapy, physical therapy, functional vision, and speech and language therapy evaluations. (N.T. at 50, 539, 865; P-2, S-29)
43. Following receipt of Dr. K’s report an IEP team meeting was convened. At that October 9, 2006 meeting the District was informed that Student was not attending school due to medical reasons and arrangements were made for “in home instruction.” Shortly after Student began to receive her instruction in the high school again, but health related absences continued to persist through the remainder of the 2006 – 2007 school year. In total, Student was absent 51 days during the 2006 – 2007 school year. (N.T. 865-867, 875; S-30, S-50)
44. In October 2006 a vision support services evaluation was completed by a teacher of the visually impaired. The evaluator considered Student’s visual difficulties, reading, near vision, distance vision, and the use of technology. The evaluator recommended that Student continue to receive vision support services to address educational visual difficulties. The evaluator also recommended the following accommodations: extra time for reading assignments longer than 500 words, extra time to complete tasks that require point-to-point focus, extra time on tests, seating within 8 feet of the board and using 2 inch letters or larger on the board, provide most materials in Student’s near vision space, dark markers for the white board, 16 point font for typing, Sticky Keys on the computer, Zoom Caps on the computer, digital materials provided to Student through a USB drive, hard copies of teacher’s notes if they are not available electronically, continued practice on keyboarding, and a reminder that on days when Student is physically slower her visual focusing will also be slower. (S-47)
45. On October 3, 2006 the District requested permission to complete a re-evaluation consisting of a review of records, a physical therapy evaluation, an occupational therapy evaluation, and a vision support services evaluation. Student’s parents never returned the form requesting permission to complete the re-evaluation. (N.T. at 867, 870; S-31, S-42)
46. On October 4, 2006 an assistive technology team meeting was held. The meeting was chaired by an assistive technology consultant who authored a report on the team’s findings. The team reviewed Student’s prior uses of assistive technology and current assistive technology needs. It was noted that Student was

concerned about developing independence in doing her school work. To facilitate that the team recommended that Student's teachers begin to create all hardcopy assignments, notes, and worksheets in electronic format so that they can be e-mailed to Student; begin to receive assignments from Student via e-mail; and that a laptop be provided for Student's use. (P-12, S-47)

47. On October 27, 2006 a physical therapy evaluation was completed by a physical therapist. The evaluator made observations of Student's performance and present levels in the following areas: adaptive equipment, desks, transportation, wheelchair, ambulation, transfers, personal care, stairs, balance, and endurance. The evaluator recommended that Student receive 30 minutes of direct and consultative services every other week. The evaluator also recommended two IEP goals, each with several short-term objectives: Student would be able to attend school for full days with minimal discomfort and Student would be able to propel herself to all of her classes. (P-16, S-47)

48. In November 2006 a speech and language evaluation was completed by a speech therapist. That evaluation consisted of administration of the Comprehensive Assessment of Spoken Language core subtests and an informal language screening. The evaluator concluded that Student had below average skills with regard to language comprehension, especially when required to draw conclusions and understand the meaning of non-literal language; had difficulty with tasks requiring Student to give an explanation or provide clarification; and had difficulty with language processing tasks, including explaining idioms, defining words, categorizing, and repairing absurdities in sentences. The evaluator noted some memory difficulties, especially in the context of remembering classroom material in order to answer questions about that material. The speech and language evaluator recommended the following accommodations for Student: "frequent checks for understanding, explanations and examples of non-literal meanings, graphic organizers to facilitate organization of information, visual representations of concepts when available, guided questioning techniques to organize information, and highlighting important information in reading material ahead of time." P-13 at 1 (P-13, S-47, S-53)

49. On November 6, 2006 an occupational therapy evaluation was completed by an occupational therapist. The evaluator reviewed Student's current levels in the areas of fine motor coordination, writing skills, visual skills, transportation, classroom/school management, self-care skills, and behavior. The evaluator noted Student's strengths and weaknesses and made four recommendations: That Student receive occupational therapy on a direct/consultative basis four times per year, for 30 minutes each time; that Student be provided with a laptop or word processor for use in taking notes, doing homework, and taking tests; that a tray be provided for Student's wheelchair to use as a writing surface and to hold a laptop (or word processor), allowing her to be better positioned in the classroom and also allowing her to "carry" her own lunch tray providing greater independence in the cafeteria; and providing a button-hook to assist with fastening clothing independently. (P-14, S-47)

50. In December 2006 a school psychologist from the intermediate unit (IU) attempted to complete standardized testing with Student. Student's parents did not approve of the proposed testing and when the school psychologist attempted to observe Student in the school setting, Student was removed from school by her parents. Student's parents also did not provide transition information requested by the school psychologist. (N.T. at 380, 392, 407-408; S-41)

51. On March 21, 2007 a re-evaluation was completed and an ER was produced. Student's parents did not participate in a meeting held to discuss the ER. The ER consisted of background information, mention of Dr. K's IEE, teacher reports, and summaries of the various evaluations and assessments completed during the fall 2006. (P-11, S-47)

52. On April 2, 2007 an IEP team meeting was held and an IEP was developed. (P-21, S-47)

53. The transition plan in the April 2, 2007 IEP was left blank. A notation was added stating "Student's family has sought transition counseling through a source outside of the school district and the district has requested a copy of the report from the parent." S-47 at 20 (P-21, S-47)

54. The April 2, 2007 IEP included annual goals in five areas. The first goal was to increase keyboarding skills. The second goal addressed comprehension of written material when reading both orally and silently. The third set of goals involved occupational therapy. The fourth set of goals involved physical therapy. The last goal addressed success in the regular education environment. (P-21, S-47)
55. The program modifications and specially designed instruction provided in the April 2, 2007 IEP consisted of Zoom Caps for the keyboard, sticky keys, seating within 8 feet of the whiteboard, extra time for reading assignments, dark color markers for the white board, 1 to 1 testing for regular class subjects, small group instruction for science and social studies classes, enlarged print books in regular English class, reduced assignment load for regular class subjects, and study cards. (P-21, S-47)
56. Related services listed in the April 2, 2007 IEP included vision support provided one time per week, assistive technology provided on a consultative basis, occupational therapy provided four times per year, and physical therapy provided 30 minutes every two weeks. (P-21, S-47)
57. Student was listed as not in need of ESY services in the April 2, 2007 IEP. (P-21, S-47)
58. The program proposed in the April 2, 2007 IEP called for Student to receive instruction in science and social studies in the resource room and the remainder of her education in the regular education classroom. (P-21, S-47)
59. A NOREP was sent to Student's parents on April 13, 2007 and again on April 27, 2007. Student's parents did not return a signed NOREP until June 19, 2007, at which time they indicated that they did not approve of the District's proposed program. (N.T. at 871; S-47, S-48, S-51)
60. On May 1, 2007 Student's parents first requested the current due process hearing. On June 6, 2007 Student's parents filed an amended complaint. (P-32, P-34)
61. During the 2006 – 2007 school year, when teachers would attempt to complete curriculum based assessments or when a school psychologist would attempt to observe Student, the private aide working with Student would call Student's parents and they would remove Student from school. (N.T. at 407-408, 890)
62. During the 2006 – 2007 school year Student had a full-time private aide who accompanied her to school every day. The aide assisted Student with mobility issues, toileting issues (specifically undoing and re-doing clothing), retrieving materials (such as books from a book bag and lunch in the cafeteria) and the scribing of material presented in classes. The aide selected the location and position for Student in the classroom and worked with her during instructional time. On occasion the aide also transported Student to and from school. (N.T. at 246-251, 257-264; P-16)
63. During the summer of 2007 Dr. R, professor of Special Education at the Pennsylvania State University, was contacted by Student's parents' attorney and was asked to complete a transition evaluation for use during possible litigation. Dr. R completed that evaluation and on July 23, 2007 prepared an "Independent Evaluation of Transition-Related Services" report. As part of his evaluation Dr. R interviewed Student, her parents, and her private aide. Dr. R also reviewed some records provided to him, including prior IEPs, the consultation evaluation completed by Mr. K, the IEE completed by Dr. K, and both parent and teacher responses on the SIR Self Determination Profile. On that same date the parents' attorney sent a copy of the report to the District's attorney, who then provided a copy of the report to the District. Student's parents never gave a copy of the report directly to the District. (N.T. at 915, 1055; P-6, S-68)
64. When the District attempted to hold an IEP team meeting to discuss Dr. R's transition-related services report, Student's parents indicated that they would not participate until after the current due process proceeding had been completed. (N.T. at 925)



65. During Student's educational career she has never been provided ESY programming. (N.T. at 481, 508)

66. For several years Student was provided occupational therapy and physical therapy by the District. After Student's parents requested that those services be discontinued and refused to provide permission for those services to be provided by the independent contractor's used by the District, occupational therapy and physical therapy were no longer provided. (N.T. at 503, 636, 469-470, 899-900)

### **Issues**

Must the Troy Area School District provide Student with compensatory education for the denial of a free appropriate public education in the least restrictive environment and for the denial of extended school year services?

Must the Troy Area School District reimburse Student's parents for the cost of the independent educational consultation completed by Mr. K?

Must the Troy Area School District reimburse Student's parents for the cost of the independent transition evaluation completed by Dr. R?

Must the Troy Area School District provide Student with the specially designed instruction and accommodations identified in the independent educational evaluation completed by Dr. K?

Must the Troy Area School District provide Student with the following services identified in the independent educational evaluation completed by Dr. K: speech and language services, physical therapy, occupational therapy, vision support, and social skills development?

Must the Troy Area School District pay for the following independent educational evaluations of Student: speech and language, occupational therapy, physical therapy, and vision support?

Must the Troy Area School District provide Student with an inclusive educational program for the 2007 – 2008 school year?

Must the Troy Area School District provide Student with assistive technology support, services, and devices?

Must the Troy Area School District purchase a laptop computer for Student and/or reimburse Student's parents for the cost of a laptop computer, including all appropriate state-of-the-art software?

### **Discussion**

The present hearing was originally requested by Student's parents in a complaint dated May 1, 2007. Exhibit P-32. Following a motion by the Troy Area School District (District) to limit the issues in this matter, on May 30, 2007 this hearing officer limited the issues. Exhibit HO-1 Following the decision to limit the issues, on June 6, 2007 Student's parents filed an amended complaint. Exhibit P-34 The District renewed its motion to limit the issues and on June 20, 2007 this hearing officer limited the issues. Exhibit HO-4 The discussion of the issues, the rationale behind this hearing officer's decision to limit the issues, and the specific limitations imposed on the issues are presented in the referenced exhibits and need not be repeated here except to state that all of the issues, except for the claim for a computer, were limited to a two year period prior to June 6, 2007, the date of the parents' amended complaint. The above listing of the issues is based on the parents' amended complaint, their statement of the issues at the first session of this hearing, clarification of those issues and agreement to the issues by both parties at the first session of this hearing, and further clarification of one issue at the fifth session of this

hearing. see N.T. at 9 – 24, 991 – 993 Again, those discussions need not be repeated here because they can be found in the referenced exhibits and pages of transcripts.

The Individuals with Disabilities Education Improvement Act of 2004 (IDEA) 20 U.S.C. §1400 *et seq.*, is the Federal statute designed to ensure that "all children with disabilities have available to them a free appropriate public education," (FAPE) §1400(d)(1)(A). The implementing Regulations for the IDEA can be found at 34 CFR §300 *et seq.* In Pennsylvania there is a parallel requirement for FAPE and the provision of quality special education services to children with disabilities. 22 Pa Code §14.102 Under the IDEA, school districts must create an individualized education program (IEP) for each child with a disability. 20 U.S.C. §1414(d). An appropriate program is one that is provided at no cost to the parents, is provided under the authority of the District, is individualized to meet the educational needs of the child, is reasonably calculated to yield meaningful educational benefit, and conforms to applicable federal requirements. *Rowley v. Hendrick Hudson Board of Education*, 458 U.S. 176 (1982) The Third Circuit Court has interpreted *Rowley* as requiring school districts to offer children with disabilities individualized education programs that provide more than a trivial or *de minimus* educational benefit. *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3rd Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989). Specifically, the Third Circuit defined a satisfactory IEP as one that provides "significant learning" and confers "meaningful benefit." *Id* at 182-184. see also *Board of Education of East Windsor Sch. Dist. v. Diamond*, 808 F.2d 847 (3rd Cir. 1986); *J.C. v. Central Regional Sch. Dist.*, 81 F.3d 389 (3rd Cir. 1996), *cert. denied*, 519 U.S. 866

In the present matter Student's parents have challenged the appropriateness of the program provided by and proposed by the District and have sought compensatory education, payment for private evaluations that have been completed, and the provision of specific evaluations and services at District expenses. The Supreme Court has held that the "burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief... the rule applies with equal effect to school districts: If they seek to challenge the IEP, they will in turn bear the burden of persuasion." *Schaffer v. Weast*, 126 S.Ct. 528, 537 (2005) In so doing the Court found no reason to depart from "the ordinary default rule that plaintiffs bear the risk of failing to prove their claims." *Id* at 534

The *Schaffer* decision by the Supreme Court effectively settled a split, present in the Circuit Courts, in assigning the burden of proof. As noted in *M.S. v. Ramsey Bd. of Educ*, 435 F.3d 384 (3rd Cir. 2006) the Third Circuit Court had previously placed the burden of proof on the school district. However, in *M.S. v. Ramsey* the Third Circuit Court found *Schaffer* controlling and extended the reach of *Schaffer* writing "It would be unreasonable for us to limit that holding to a single aspect of an IEP, where the question framed by the Court, and the answer it provided, do not so constrict the reach of its decision." at 5

Shortly after the Third Circuit issued its decision in *M.S. v. Ramsey*, the Eastern District Court of Pennsylvania issued its decision in *Greenwood v. Wissahickon*, 2006 U.S. Dist. LEXIS 4274 (E.D. Pa. 2006). The *Greenwood* Court concluded that *Schaffer v. Weast* "effectively overturned the Third Circuit's holding in *Oberti v. Bd. Of Educ. Of Borough of Clementon Sch. Dist.*, 995 F.2d 1204, 1207 (3rd Cir. 1993), which had placed the burden of proving compliance with the mainstreaming requirement upon the school district regardless of who brought the action." at 2 The *Greenwood* Court went on to state that "the burden of persuasion at the administrative level in Pennsylvania is now on the party contesting the IEP." at 7

Because it is Student's parents who have challenged the appropriateness of past and present programs and services provided to Student and because it is Student's parents who have sought compensatory education, payment for evaluations, and the provision of specific evaluations and services, it is Student's parents who carry the burden of persuasion in this matter for each of the issues discussed below.

Must the Troy Area School District provide Student with compensatory education for the denial of a free appropriate public education in the least restrictive environment and for the denial of extended school year services?

The claim for compensatory education made by Student's parents included multiple components, each will be discussed below. It included a broad claim of denial of FAPE across the past two years, a claim that Student had been denied physical access to her program resulting in a denial of FAPE, a claim that FAPE was not provided in the least restrictive environment (LRE), and a claim that Student should have received extended school year (ESY) programming.

Considering first the broad claim that Student has been denied FAPE for the past two years, that claim is supported (in part) by the record and an award of compensatory education is warranted. In the following analysis this hearing officer will first consider the general program that was offered to Student during the 2005 – 2006 and 2006 – 2007 school years, he will then consider whether or not a specific component of that program, namely whether or not the provision of a computer for Student was necessary for her to receive FAPE and whether it was actually provided, and then he will consider whether or not the transition planning contained in the various IEPs was appropriate.

Student has received special education and related services throughout her educational career. For the period in question at the current hearing, the last evaluation report (ER) that was completed was completed on February 20, 2004. At that time Student was an eighth grade student participating in all regular education classes with the exception of math, which was taught in the resource room. Student was reported as working below grade level in reading and math. In March 7, 2005 an individualized education program (IEP) team meeting was held and an IEP was developed. Included in that IEP were two annual goals, one to increase typing speed and the other to improve functional math skills. Given the reading difficulty noted in the February 2004 ER it is surprising that there was no goal for reading in the March 7, 2005 IEP. However, by the start of the 2005 – 2006 school year that deficiency had been corrected.

In June 2005 Student's parents began to explore placement in the District's Blended Schools program. The Blended Schools program is an online instructional program that is available to all high school students in the District. Students may participate in the Blended Schools program on a part-time basis, while continuing to take courses at the high school, or they may participate in that program on a full-time basis and take all of their courses online. On September 7, 2005 an IEP team meeting was held to develop an IEP for Student's full-time participation in the Blended Schools program where she would receive all of her instruction at home from the online program and through e-mail contact with a supervising teacher. In the September 7, 2005 IEP it was noted that Student had been tested on the Ekwall/Shanker reading test and was found to have an independent reading level above ninth grade and that she could read eighth grade materials at 116 words per minute. It was also noted that Student needed to develop her writing skills, including punctuation, word usage, and grammar. In math it was noted that Student was calculator dependent, but that she was able to do multi-step problems with the aide of a calculator. The IEP included three annual goals: to improve reading comprehension, to improve practical math skills, and to improve language arts.

Based on a review of the record developed at the current hearing and consideration of what was known or should have been known by the IEP team at the time that the September 7, 2005 IEP was developed, and also considering the choice allowed of all parents to enroll their children in the District's Blended Schools program, it is the conclusion of this hearing officer that the IEP that was developed on September 7, 2005 was appropriate.

Student remained in the Blended Schools program until January 24, 2006, when she began to receive all of her instruction at the high school. However, by March 23, 2006 she had stopped attending school due to a medical condition. On April 21, 2006 an IEP team meeting was held to develop an IEP for Student to return to participation in the Blended Schools program. In the April 21, 2006 IEP it was noted that Student would receive all of her instruction, except in math, through the Blended Schools program. Because Student continued to have difficulty with pre-algebra, she was to receive her math instruction through Academy of Math, another online program. The April 21, 2006 IEP included three annual goals. The first goal was related to the accurate completion of oral and silent reading assignments. The second goal was to improve understanding of math

operations and to be able to complete problems with whole and non-whole numbers. The third goal involved the acquisition and application of skills to be successful in the Blended Schools program.

Based on a review of the record developed at the current hearing and consideration of what was known or should have been known by the IEP team at the time that the April 21, 2006 IEP was developed, and also considering the choice allowed of all parents to enroll their children in the District's Blended Schools program, it is the conclusion of this hearing officer that the IEP that was developed on April 21, 2006 was appropriate.

In August 2006 Student's parents informed the District that Student would return to the high school for all of her instruction at the start of the 2006 – 2007 school year. They also informed the District that Student would be accompanied by a full-time personal aide provided by Services. On August 25, 2006 an IEP team meeting was held and an interim-IEP was developed for use until the completion of an independent educational evaluation (IEE) and the receipt of the IEE report.

The IEP that was developed on August 25, 2006 was nothing more than a (slightly modified) carbon copy of the IEP that had been offered Student a year before on September 7, 2005. Although it is claimed in the IEP that testing was done on March 20, 2006 and that on the Ekwall/Shanker reading test Student was found to have an independent reading level above ninth grade and that she could read eighth grade materials at 116 words per minute, that claim is not credible. In the September 7, 2005 IEP the exact same reading level and the exact same 116 words per minute at the eighth grade level were reported. It would be impossible to get such an exact result both prior to the September 7, 2005 IEP and during testing in March 2006. Likewise, the needs in both language arts and math are reported using identical language.

More concerning is the fact that the first three goals in the August 25, 2006 are identical, word-for-word, with the three goals listed in the September 7, 2005 IEP. Given the facts that a full year had passed since that previous IEP and that Student had received passing grades in Physical Education, Art, 10<sup>th</sup> Grade English, 10<sup>th</sup> Grade Social Studies, 10<sup>th</sup> and 11<sup>th</sup> Grade Math, Web Design, and Physical Science during that year, it is impossible for this hearing officer to believe that the goals in the August 25, 2006 that are identical to the goals in the September 7, 2005 IEP could have been appropriate to meet Student's needs. Similar problems can be seen in the transition plan, which will be discussed at greater length below, the program modifications and specially designed instruction, and related services. In short, it appears that the District did nothing more on August 25, 2006 than to pull out the September 7, 2005 IEP from a year before, make a few minor changes and additions, and offer that as the interim IEP for Student. Because of that, it is the conclusion of this hearing officer that at the start of the 2006 – 2007 school year Student's entire program was not appropriate, denying Student FAPE.

During the fall of 2006 an IEE was completed by Dr. K. Following the receipt of the IEE report a meeting was held to discuss that report. During the fall of 2006 an assistive technology team meeting was also held and vision support, physical therapy, speech and language, and occupational therapy evaluations were completed. But, it was not until April 2007 that another IEP was finally offered to Student. It is inexcusable that it took until April 2007 to offer a new IEP to Student. Even with the lack of cooperation shown by Student's parents and the sometimes obstructive actions taken by them and the private aide working with Student, the District still had the responsibility to develop and offer an appropriate program. Having started the 2006 – 2007 school year using a virtual clone of the 2005 – 2006 IEP, the District should have known that it needed to act quickly to review the new information received from the various evaluations and to correct the deficiencies in that IEP. It did not and not doing so was a denial of FAPE.

On March 21, 2007 a re-evaluation was completed and an ER was produced. Student's parents did not participate in a meeting held to discuss the ER. The ER consisted of background information, a mention of Dr. K's IEE, teacher reports, and summaries of the various evaluations and assessments completed during the fall 2006. While the summaries of the various evaluations and assessments could have been useful, they were clouded with the clear failure in the ER to distinguish the current Student from past, often incorrect, pictures of Student. For example, the same Ekwall/Shanker score of 116 words per minute at the eighth grade level that

surfaced in the September 2005 IEP, was claimed to have been obtained again in March 2006, was reported in the August 2006 IEP, and was again reported in this ER. Even with the flaws in the ER, the subsequent IEP prepared on April 2, 2007 does appear to offer FAPE in most areas.

The April 2, 2007 IEP included annual goals in five areas. The first goal was to increase keyboarding skills. The second goal addressed comprehension of written material when reading both orally and silently. The third set of goals involved occupational therapy. The fourth set of goals involved physical therapy. The last goal addressed success in the regular education environment. It is the conclusion of this hearing officer that these goals were responsive to the evaluations and other information available to the IEP team and were appropriate at the time that they were developed. Likewise, the program modifications and specially designed instruction were, with one exception, appropriate. That exception is the use of a computer was no longer included in the IEP. That area will be addressed separately below.

Related services listed in the April 2, 2007 IEP included vision support provided one time per week, assistive technology provided on a consultative basis, occupational therapy provided four times per year, and physical therapy provided 30 minutes every two weeks. Those related services are appropriate because they are responsive to the evaluations that had been completed, the results of which were available for the IEP team to consider.

The program proposed in the April 2, 2007 IEP called for Student to receive instruction in science and social studies in the resource room and the remainder of her education in the regular education classroom. While caution must be exercised whenever a program is proposed outside of the regular education program, in this case the purpose was to be able to work with Student on comprehension of this material through providing these subjects in a small group setting. This was necessary because of the noted difficulties Student has in the areas of reading comprehension. The added benefit of instruction in the resource room for these two subjects would be that progress could be made on her reading comprehension goal, something necessary for post-secondary success.

Although most of the April 2, 2007 IEP was appropriate, two areas were not: the transition plan and the failure to include computer use as a program modification. The transition plan will be discussed below, here the issue of the computer will be addressed. At the start of the 2006 – 2007 school year, the August 25, 2006 IEP called for the use of a computer for essays. However, the use of a computer was not made available to Student in all of her courses. At the hearing the District's response seemed to suggest that it did not understand the importance of Student developing the habit of using a computer to complete her assignments, both in and out of class, for her to become more independent in the future. The District's defenses variably centered around arguments such as there was a computer somewhere in the classroom, no students had access to a computer, the teachers gave Student notes, the aide scribed for Student, or Student didn't want a laptop, but preferred a full-size keyboard. Those defenses miss the point that if Student had a computer that she was actually using in all of her classes, she would begin to develop one set of skills needed to become more independent in the future.

In October 2006 Ms. W, an Intermediate Unit employed teacher of the visually impaired, completed a vision support services evaluation at District request. In her evaluation report Ms. W wrote:

One of the advantages of using a computer for a person with a physical/vision impairment is that the computer allows most or all visual materials to be presented in a "near vision" area. As classroom teachers become more technologically versed, power point, smart board and overhead presentations can be provide (sic) on a personal computer. Digital worksheets and handouts can be delivered to an individual's computer via a USB thumb drive or email and a student can type into each document, as well as type in personal notes as needed. Hard copies of classroom notes are available through the exchange of a thumb drive and a person with physical impairments has less paperwork to shuffle. (Student) is a great candidate for this digital/electronic process. S-47 at 45

Following that recommendation the District should have made attempts to provide Student with a laptop computer she could use in all of her classes. With a laptop computer and materials provided either through an exchange of USB thumb drives or through e-mail, even when Student had to miss school due to health and disability related reasons, Student would have been better able to keep up with the work. But, more importantly, and this is the point the District seems to fail to comprehend, the provision of a laptop would have helped Student develop skills necessary for her to achieve greater independence. It is the conclusion of this hearing officer that the District's failure to consistently provide a computer during the most of the 2006 – 2007 school year when it was called for in her IEP, coupled with the District's removal of that component from the April 2007 IEP, was a denial of FAPE.

Another failure with the August 25, 2006 IEP, is the failure to adequately incorporate transition planning and services into Student's IEP. As required in 34 C.F.R. § 300.29 regarding transition services:

(a) As used in this part, transition services means a coordinated set of activities for a student with a disability that—

(1) Is designed within an outcome-oriented process, that promotes movement from school to post-school activities, including postsecondary education, vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation;

(2) Is based on the individual student's needs, taking into account the student's preferences and interests; and

(3) Includes—

(i) Instruction;

(ii) Related services;

(iii) Community experiences;

(iv) The development of employment and other post-school adult living objectives; and

(v) If appropriate, acquisition of daily living skills and functional vocational evaluation.

(b) Transition services for students with disabilities may be special education, if provided as specially designed instruction, or related services, if required to assist a student with a disability to benefit from special education.

The August 25, 2006 IEP fails in this area because it does not have any “coordinated set of activities” that Student will undertake during the year to explore post-secondary options. The IEP merely states that Student is unsure of her post secondary education then lists some reported interest areas for employment. This can be contrasted with the March 2005 IEP in which career exploration was to be pursued with the guidance counselor and the April 2006 IEP, while Student was enrolled in the online Blended Schools program, in which career exploration was to be undertaken online through the Bridges.com program. The failure to provide for any coordinated set of activities related to transition planning continued through the 2006 – 2007 school year when in the April 2, 2007 IEP that section of the IEP was left blank except for the notation that “Student's family has sought transition counseling through a source outside of the school district and the district has requested a copy of the report from the parent.” S-47 at 20 It is the conclusion of this hearing officer that the District's failure to include any transition activities in Student's IEPs for the 2006 – 2007 school year was a denial of FAPE.

Turning to the claim that Student has been denied physical access to her program resulting in a denial of FAPE, that claim is not supported by the record. While much of the testimony and many of the exhibits introduced at the current hearing, including approximately 48 photographs taken by Student's parents, were directed toward this claim, nothing in the record proves that Student was denied FAPE as the result of accessibility issues.

There was virtually no testimony regarding accessibility during the 2005 – 2006 school year, a time in which Student was primarily educated in the District’s Blended Schools online program. Most of the testimony regarding accessibility, as well as most of the exhibits, was focused on the 2006 – 2007 school year. Ms. S, the private aide that accompanied Student during the 2006 – 2007 school year, testified about the difficulty maneuvering through the extensive construction at the high school, times in which the chair lift did not work or did not work properly, difficulty she had opening doors, concerns that Student’s wheelchair might fall off the sidewalk, and other accessibility issues. However, she did not testify that Student was denied FAPE because of accessibility issues. In fact, the testimony that does exist regarding FAPE suggests the opposite conclusion. For example, Ms. S testified that when the chair lift did not work she would usually assist Student up the stairs to the aviation science classroom, but that five or six times she took Student to another classroom and the aviation science teacher would bring the educational program to Student and Student “would do whatever the rest of the class was doing.” N.T. at 332

There was also a concern raised regarding the positioning of Student in the classroom. Here too the evidence does not support a conclusion that FAPE was denied. In fact, it was Ms. S, the private aide, who decided where Student would sit in each classroom and how she would be positioned. see N.T. at 372 At the start of the 2005 – 2006 Student’s parents opted to have Student participate in the Blended Schools program at least partially because they did not agree with the District’s choice of aide for Student. When Student returned to school at the start of the 2006 – 2007 school year she was accompanied by a private aide, Ms. S. Student’s parents were within their rights to have a private aide accompany Student, but they cannot now claim that somehow that private aide’s choices of location or position for Student in the classroom was a denial of FAPE by the District.

Turning to the claim that Student should be awarded compensatory education for the District’s failure to provide Student’s education in the LRE, that claim is denied. At the current hearing Student’s parents failed to show that either the program that was provided to Student in the past or the program proposed for the current school year failed to provide Student with an appropriate education in the LRE.

The IDEA requires that:

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S.C. §1412(a)(5)(A)

Nearly identical language can be found at 34 C.F.R §300.144.

During the 2005 – 2006 school year Student was mostly educated in the District’s Blended Schools program. That is an online program available to all students. The fact that the District allowed Student’s parents to choose to enroll Student in that program merely means that the District was treating Student like all other students and cannot be construed as a denial of FAPE in the LRE. Similarly, during the 2006 – 2007 Student was enrolled in courses selected by Student and her parents, again a process available to all students. Nothing in the record suggests that either that program or the program proposed for the 2007 – 2008 school year is not in the LRE. In light of the recent ruling in *Greenwood*, it is the conclusion of this hearing officer that Student’s parents failed to carry their burden to show that Student’s past and proposed placements were not in the LRE.

Lastly, turning to the claim that Student should be awarded compensatory education for the denial of extended school year (ESY) services, that claim is denied. The parents presented no evidence that Student met the criteria for ESY as required in 22 Pa Code §14.132:

This section sets forth the standards for determining whether a student with disabilities requires ESY as part of the student's program.

(1) At each IEP meeting for a student with disabilities, the school districts shall determine whether the student is eligible for ESY services and if so, make subsequent determinations about the services to be provided.

(2) In considering whether a student is eligible for ESY services, the IEP team shall consider the following factors, however, no single factor will be considered determinative:

(i) *Regression*--whether the student reverts to a lower level of functioning as evidenced by a measurable decrease in skills or behaviors which occurs as a result of an interruption in educational programming.

(ii) *Recoupment*--whether the student has the capacity to recover the skills or behavior patterns in which regression occurred to a level demonstrated prior to the interruption of educational programming.

(iii) Whether the student's difficulties with regression and recoupment make it unlikely that the student will maintain the skills and behaviors relevant to IEP goals and objectives.

(iv) The extent to which the student has mastered and consolidated an important skill or behavior at the point when educational programming would be interrupted.

(v) The extent to which a skill or behavior is particularly crucial for the student to meet the IEP goals of self-sufficiency and independence from caretakers.

(vi) The extent to which successive interruptions in educational programming result in a student's withdrawal from the learning process.

(vii) Whether the student's disability is severe, such as autism/pervasive developmental disorder, serious emotional disturbance, severe mental retardation, degenerative impairments with mental involvement and severe multiple disabilities.

In the current matter, Student's parents have failed to meet their burden to show that Student has exhibited any regression during interruptions in her educational programming, difficulty with recoupment of any skills that may have been lost due to interruptions in her educational programming, or that any of the factors in 22 Pa Code §14.132(2)(iii) through §14.132(2)(vii) apply to Student. Because of that, the request for an award of compensatory education for the District's failure to provide ESY services must be denied.

In summary, this hearing officer has concluded that the District failed to provide FAPE when it failed to provide an appropriate program to Student during the 2006 – 2007 school year, when it failed to provide Student with a laptop computer that would help her achieve greater independence, and when it failed to provide adequate transition planning and services.

When, as in the current situation, a student is denied FAPE either through some action or inaction of a school district, that student is entitled to compensatory education. *Lester H. v. Gilhool*, 916 F. 2d 865 (3d Cir. 1990), *cert. denied* 499 U.S. 923, 111 S.Ct. 317 (1991); *M.C. v. Central Regional School District*, 81 F. 3d 389, (3d Cir. 1996)

In the present matter the parents requested an "enhanced award" of compensatory education and suggested that Student should be awarded two full years of compensatory education for a claimed complete deprivation of FAPE for the two years prior to the filing of their amended due process complaint. see Exhibit P-36 In Pennsylvania the standard for an award of compensatory education is focused on what it will take to bring the student to the point he or she should have been if not for the deprivation of FAPE, as opposed to an award



focused on the period of deprivation. *B.C. v. Penn Manor*, 906 A.2d 642 (Pa. Comwlth. 2006) In *B.C.* the Commonwealth Court developed the following standard for determining the amount of compensatory education to be awarded:

We find the Ninth and the District of Columbia's Circuits' standard more persuasive and workable than that of the Third Circuit, as it tailors the equitable award of compensatory education to the particular student's needs, which a one-for-one standard fails to do. Hence, we reject Student's proposed hour-for-hour standard. Rather, we hold that where there is a finding that a student is denied a FAPE and the Panel determines that an award of compensatory education is appropriate, the student is entitled to an amount of compensatory education reasonably calculated to bring him to the position that he would have occupied but for the school district's failure to provide a FAPE. As noted by the District of Columbia Circuit, doing so may require awarding the student more compensatory education time than a one-for-one standard would, while in other situations the student may be entitled to little or no compensatory education, because (s)he has progressed appropriately despite having been denied a FAPE. at 650-651

Adopting the *B.C.* Court's standard for the present matter, the appropriate award is one that will help Student be at the level of independence that she would have been if not for the deprivation of FAPE. Because the period of deprivation came so late in Student's academic career and because the deprivation in a large measure was directly related to and resulted in hindering the development of skills necessary for a successful transition to post-secondary life, it is appropriate that the award help prepare Student for her post-secondary endeavors. It is the conclusion of this hearing officer that in order to bring Student to the level she would have been if not for the District's failure to provide FAPE, the District must provide the following as compensatory education:

First and foremost is the need for Student to be provided with appropriate transition planning and services. Student is 18 years old, on track to graduate in less than a year, and must be provided with this support immediately. In order to bring Student to the position she would have occupied but for the failure of the District to provide FAPE in this area, she must be provided these services for the remainder of the current school year and for one additional year after, even if she should exit the District at the end of the current school year. Specifically, the District must designate one person, experienced in transition planning and the provision of transition services, to work with Student. That person may be a District employee, an Intermediate Unit employee, or a private consultant. That person must initially explore with Student potential work experiences she could engage in, possible career choices, and various options for post-secondary education. This step is necessary because, although Student has apparently informed private evaluators about her interest in attending college, her parents have not allowed Student to directly share that information with the District. After the initial explorations, the designated person must assist Student with whatever is necessary in order to achieve her desired post-secondary outcomes. That may include helping Student obtain job sampling opportunities; it may include helping Student and her family plan visits to colleges, arrange pre-college testing, or complete college applications; it may be connecting Student with other staff in the District or Intermediate Unit who have particular expertise that could assist Student; it may be connecting Student with other service providers; or it may include any other appropriate transition activities related to Student's desired post-secondary outcomes. These transition services must be provided once every two weeks for one hour each session through to the end of the current school year and one hour per month for the 12 months after the end of the current school year. Because Student's parents will likely be an integral part of Student's post-secondary life, they must be allowed to participate in these meetings if they choose to do so.

Second, during the summer of 2008 the District must provide Student with one-to-one tutoring for 10 weeks, five hours each week, focusing on skills needed for success in Student's desired immediate post-secondary activities. If Student's plans are for entry into the workforce, the focus must be on skills appropriate for that endeavor. If Student's plans include attending college, the focus must be on skills appropriate for that endeavor. As with the transition services above, this tutoring must be provided to Student even if she should exit the District at the end of the current school year.

Third, the District must immediately provide a laptop computer and USB thumb drive to Student for her to use both at school and at home. The District must continue to provide both the laptop and the USB thumb drive for as long as Student continues to receive educational programs and services from the District. The provision of the laptop and USB thumb drive during that period will compensate Student for the District's failure to provide them in the past and will enable Student to develop the skills necessary to have a greater degree of independence in the future.

Must the Troy Area School District reimburse Student's parents for the cost of the independent educational consultation evaluation completed by Mr. K?

In their June 6, 2007 amended complaint Student's parents proposed that this hearing officer award "Reimbursement for an Independent Educational Consultation Evaluation by [Mr.] K." P-34 at 9 For the reasons that follow, Student's parents request for reimbursement for Mr. K's consultation evaluation must be denied.

First, under 34 C.F.R. § 300.502(b)(1) a parent has the right to "an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency." In *Lauren W. v. DeFlaminis*, 480 F.3d 259 ( 3<sup>rd</sup> Cir. 2007) the court held that where the parents have, in fact, agreed with the school district's last evaluation and have not informed the school district of any disagreement with that evaluation, the parents are not entitled to reimbursement for that evaluation. In the present matter, the last evaluation that was completed by the District prior to Mr. K's consultation evaluation was completed on February 20, 2004. Student's mother signed that evaluation and indicated her agreement with that evaluation at that time. There is nothing in the record to suggest that Student's parents informed the District that they disagreed with or no longer agreed with the February 2004 ER prior to the completion of Mr. K's consultation evaluation. Therefore, they cannot be reimbursed for Mr. K's evaluation.

Second, under 34 C.F.R. § 300.502(a)(3)(i) an IEE is an evaluation conducted by a qualified examiner. While Mr. K is certainly qualified to perform many roles in an educational capacity, nothing in the record establishes that he is a qualified examiner to conduct any educational evaluation.

Third, the "consultation evaluation" completed by Mr. K was not an IEE at all. Mr. K was first approached by the parents' attorney either during or in anticipation of a prior due process dispute. By his own admission, Mr. K's evaluation consultation and the subsequent report he produced were prepared and written from "a child advocacy perspective." N.T. at 201 It is clear to this hearing officer that Mr. K did not complete an educational evaluation as it is commonly understood and as it is defined under 34 C.F.R. § 300.15 and 34 C.F.R. § 300.502, rather, he completed a consultation for Student's parents and their attorney for the purpose of preparing for a due process hearing. This conclusion is not only supported by the timing of when Mr. K was first approached for his evaluation consultation and by the fact that it was the parents' attorney who first approached him, it is also supported by the fact that the District was not provided a copy of Mr. K's report, which was completed on November 7, 2006, until May 1, 2007 when it was provided only as part of the parents' filing for the current due process hearing. Even then the District was not directly provided a copy of Mr. K's report. On May 1, 2007 the parents' attorney provided Mr. K's report to the Office for Dispute Resolution (ODR). The District only received a copy of the report because the electronic transmission to ODR, with the report attached, was copied to the District's attorney. Neither the parents nor their attorney ever provided a copy of Mr. K's report directly to the District.

The conclusion that Mr. K's consultation evaluation was not an IEE is further supported by the clear title on Mr. K's report: "INDEPENDENT EDUCATIONAL CONSULTANT EVALUATION." P-4 at 1 While there is nothing wrong with a parents' attorney using the services of an educational consultant in order to prepare for a due process hearing, there is nothing in the law that requires a school district to reimburse parents for the expense of a consultant evaluation.

Because Student's parents had not disagreed with the District's evaluation prior to obtaining Mr. K's evaluation consultation, because Mr. K is not qualified to conduct an educational evaluation, and because the consultation evaluation was not an independent educational evaluation, Student's parents' request for reimbursement for that evaluation is denied.

Before closing this section, this hearing officer must add that due to the reasons given above, he gave no weight to Mr. K's testimony or report in the remainder of this decision. Of particular concern were the facts noted above that Mr. K's consultation evaluation and report were obviously developed for the purpose of litigation and that his approach was as a child advocate. Furthermore, although 34 C.F.R. § 300.502(c)(2) allows an IEE obtained by the parents to be presented at a due process hearing, having concluded above that Mr. K's report was not an IEE, this hearing officer finds it neither required that he consider that report further nor that he give that report any weight.

Must the Troy Area School District reimburse Student's parents for the cost of the independent transition evaluation completed by Dr. R?

In their June 6, 2007 amended complaint Student's parents proposed that this hearing officer award "Reimbursement for an Independent Transition Evaluation/Assessment by Dr. R." P-34 at 9 At the time of making that request Dr. R had not completed his evaluation. Now that he has, it is unfortunate that Dr. R's report has many of the same deficiencies as that of Mr. K. Dr. R's evaluation and subsequent report were clearly conducted and completed for the sole purpose of litigation. While that in itself does not invalidate an evaluation or report, the circumstances surrounding this particular report, coupled with the data Dr. R relied on, do invalidate his report.

At the time he was first contacted by Student's parents' attorney, Dr. R was informed that he would likely be called as a witness in the present matter. (N.T. at 1055) Dr. R's report was not completed until just one week prior to the start of the current hearing. When it was completed, it was not directly provided to the District, but rather was provided by the parents' attorney to the District's attorney. It was only from its' own attorney that the District ever received a copy. Once it had received a copy the District attempted to hold an IEP meeting to discuss its contents, but Student's parents refused to do so until the current due process hearing was over. It is simply not appropriate for Student's parents to seek reimbursement for an evaluation that they failed to provide directly to the District and that they have refused to discuss with the District. Reimbursement is appropriate when an IEE has provided new and useful information that will help the IEP team develop an appropriate program. Here, because the evaluation was clearly developed for litigation purposes, because it was not shared directly with the District, and because Student's parents have refused to discuss it with the District, the report has clearly not provided new and useful information and there is no basis on which to award reimbursement.

The sources of information that Dr. R relied on in his evaluation are also problematic. The only interviews he conducted were with Student, her parents, and her private aide. Although Dr. R did receive written responses from teachers on rating forms, no one from the District was interviewed. In addition, Dr. R's evaluation appears to have been greatly influenced by the reports produced by Mr. K (who also only interviewed Student, her parents, and her private aide) and Dr. K. As stated by Dr. R:

The K and K evaluations are particularly complete and provide enormously useful information regarding deficiencies and possible solutions. For example, on page 13 of the K report, [Mr.] K indicates that the District see (sic) Student as "indifferent about her goals regarding post-secondary education and training and because she is unsure about continuing her education after high school, the District proposed no services at all except to place the responsibility upon Student and her parents. P-6 at 3

As was discussed above regarding Mr. K's report and as will be discussed below regarding Dr. K's report, this hearing officer did not find either report to be particularly credible or helpful. Because of that and because of Dr. R's reliance on those reports, coupled with both Dr. R's clear bias as a potential witness as he prepared his own

report and Student's parents refusal to discuss the report with the District, the request for reimbursement for the cost of Dr. R's report must be denied.

Must the Troy Area School District provide Student with the specially designed instruction and accommodations identified in the independent educational evaluation completed by Dr. K?

In their June 6, 2007 amended complaint Student's parents proposed that this hearing officer "Order the District to provide Student with the 'Specially Designed Instruction' and 'Accommodations' as identified in the Parents' IEE performed by Dr. K, to address Student's learning disabilities." P-34 at 9 What Student's parents are asking for is that this hearing officer order the District to provide the 12 program recommendations for improving reading fluency, 18 program recommendations for improving reading comprehension, recommendations for improving written expression, a recommendation that Saxon math be used to improve math reasoning and calculation, several recommendations regarding social skills training, and 22 recommendations for accommodations suggested by Dr. K. For the reasons that follow, that request is denied.

This hearing officer has four major concerns with Dr. K's evaluation: the length of the testing session, the large number of measures employed by Dr. K, the large number of specially designed instructions and accommodations listed in her report, and Dr. K's interpretation of response to intervention (RTI) in the determination of a disability. Student attended five of the six sessions of the current hearing. Because of Student's obvious fatigue and discomfort, the current hearing was conducted with frequent breaks that occurred about every hour, often even more frequently, with the typical break lasting 10 to 15 minutes. After directly observing Student at the current hearing, it is the opinion of this hearing officer that the results of Dr. K's testing and the conclusions and recommendations based on those results are not valid given Student's physical limitations and tendency towards fatigue. Student traveled for several hours with her parents to the testing site and then underwent over three hours of testing. With three breaks the total time would be even longer. Dr. K testified that Student was exhausted after completion of the Writing Assessment portion of the WIAT-II. N.T. at 48 Knowing that Student had cerebral palsy that could make it difficult for her to write, it is surprising that Dr. K chose to give the WIAT-II as the first test given in the series of tests administered. Dr. K did note that she had observed Student's fatigue so gave more frequent breaks than she normally would have. N.T. at 538 Given Student's obvious physical limitations and proneness to fatigue, it may have been better to more selectively limit the number of tests given and/or to split the single testing session into two or more sessions.

This hearing officer is also concerned with the large number of assessments completed by Dr. K. In *In Re the Educational Assignment of G.T.*, Spec. Educ. Op. 1808 (2007) the Appeals Panel wrote:

we conclude that the IEE falls below the general professional norms for an appropriate evaluation for several cumulative reasons.<sup>82</sup> 1) Dr. K cherry-picked the highest of the four major components of the WISCIV, even using this verbal comprehension index for the discrepancy analysis for math calculation,<sup>83</sup> while the norm for this purpose is the full-scale IQ<sup>84</sup>; 2) she ran an excessive number of discrepancy analyses, which further increased the risk of "false positives,"<sup>85</sup> whereas the IDEA only provides for eight areas for SLD eligibility<sup>86</sup>; 3) her IEE relied on the Parents for her AD/HD rating scales, whereas DSM-IV makes clear that the designation requires evidence in at least two domains<sup>87</sup>; and 4) continuing the consistent skew toward false positives,<sup>88</sup> she applied the IDEA's RTI and S/L eligibility elements much more broadly than would be reasonably expected for an IEE specialist.<sup>89</sup>

82 We do not rely on any one of these reasons but rather their cumulative effect, which does not meet the general standards for even a minimally acceptable IEE.

83 See *supra* note 25.

84 See, e.g., *Jaffess v. Council Rock Sch. Dist.*, 46 IDELR ¶ 246 (E.D Pa. 2006); *Bellflower Unified Sch. Dist.*, 33 IDELR ¶ 262 (Cal. SEA 2000); *Bd. of Educ. of Allegan Sch. Dist.*, 42 IDELR ¶ 158 (Mich. SEA 2004).

85 See *supra* note 24. "False positives" in this context refers to students determined to meet the legal criteria for SLD who in fact do not qualify.

86 34 C.F.R. § 300.309(a)(1)(i)-(viii).

87 See *supra* note 24.

88 By way of dicta, we note that—not surprisingly due to her 150-200 IEEs per year (NT at 481)—that this appeals panel has had Dr. K’s IEEs and testimony in several previous cases and has noted a rather striking similarity in the skew of her eligibility determinations and in the long list of her generically sound recommendations that is contrary to the individualized orientation of the IDEA...

89 See *supra* note 25. Additionally, her failure to acknowledge, much less ameliorate, the fatigue factor in subjecting a third grader with attention and anxiety problems to approximately 15 tests within one day put the validity of the results in question and, depending on the sequence of the tests, may also have had a false-positive effect. at 12, 13

Similar problems can be noted in Dr. K’s evaluation of Student Dr. K has appeared before this hearing officer at several hearings and he has had the opportunity to read several of her evaluation reports. Her tendency to use large numbers of tests runs the risk of over identification of disability. Her evaluation in this case does not appear to match Student’s performance in school. Moreover, the extensive listing of what may be useful specially designed instruction and may be useful accommodations are so broad and overlap so extensively as to make them meaningless for any direct application in the educational setting. The fact that her lists can apply so broadly to Student and to so many other students makes those lists generic rather than individualized. The request of Student’s parents that all of the specially designed instructions and accommodations in Dr. K’s IEE be provided to Student is simply not reasonable and is not supported by the evidence as a whole presented at the present due process hearing.

Lastly, in her report Dr. K discusses RTI as follows: “*Response-to-Intervention (RTI) can be objectively ascertained by examining standard scores on the **Wechsler Individual Achievement Test-II.***” P-2 at 24 Under 34 C.F.R. § 300.307(a)(2) States must allow the use of the determination of a specific learning disability through a process based on the child’s response to a child’s scientific, research-based intervention. That is what RTI is referring to. In order to assess RTI, some research-based intervention must occur and some response of the student must be observed. The administration of the WIAT-II, as used by Dr. K in the context of RTI, does not even come close to the methods that make up RTI.

For all of the above reasons, this hearing officer finds that Dr. K’s report, as it relates to her recommendations for specially designed instruction and accommodations, is flawed. Because of that, he will not order the District to provide all of the specially designed instruction and accommodations recommended by Dr. K.

Must the Troy Area School District provide Student with the following services identified in the independent educational evaluation completed by Dr. K: speech and language services, physical therapy, occupational therapy, vision support, and social skills development?

In part, for the reasons discussed above relative to the specially designed instruction and accommodations recommended by Dr. K, Student’s parents’ request that the District be required to provide the various services identified by Dr. K is denied. In addition, because nothing in Dr. K’s report or testimony provides a sound basis for her conclusions or convincing reasons for her recommendations that either speech and language services or social skills development services are needed by Student, the request for those services must be denied. Considering the requests for physical therapy and occupational therapy, those services had been provided by the District and were only discontinued when Student’s parents insisted that they no longer be provided. Those services are also included in the April 2, 2007 IEP offered to Student and her parents and there are goals for both occupational and physical therapy contained in that IEP. Student’s parents need not seek an order to have occupational therapy and physical therapy provided, they need only give the District permission to allow those services to begin. Lastly, vision support is already offered in the April 2, 2007 IEP, along with goals for vision support. An order from this hearing officer is not required for Student to obtain vision support.

Must the Troy Area School District pay for the following independent educational evaluations of Student: speech and language, occupational therapy, physical therapy, and vision support?

In part, for the reasons discussed above relative to the specially designed instruction and accommodations recommended by Dr. K, Student's parents' request that the District be required to provide several independent evaluations recommended by Dr. K is denied. In addition, Dr. K's report lacks the strong justification that would be required before a hearing officer could order those evaluations to be completed at public expense. Lastly, and most importantly, following the completion of Dr. K's IEE the District held a meeting to discuss the IEE. After a review of the IEE the District arranged to have all of the evaluations recommended by Dr. K completed. In October 2006 a vision support services evaluation was completed by a teacher of the visually impaired, on October 27, 2006 a physical therapy evaluation was completed by a physical therapist, and in November 2006 a speech and language evaluation was completed by a speech therapist. At the current hearing Student's parents failed to carry their burden to prove that those evaluations were not appropriate. They also failed to prove that those evaluations were not exactly what Dr. K had recommended. Because of that the District will not be ordered to pay for additional evaluations to be completed.

Must the Troy Area School District provide Student with an inclusive educational program for the 2007 – 2008 school year?

Above, under the discussion of the claim for compensatory education, this hearing officer concluded that nothing in the record suggests that either prior programs or the program proposed for the 2007 – 2008 school year is not in the LRE. As with the conclusion above, in light of the recent ruling in *Greenwood*, it is the conclusion of this hearing officer that Student's parents failed to carry their burden to show that Student's proposed placement is not in the LRE. Because of that, no order relative to inclusion is warranted.

Must the Troy Area School District provide Student with assistive technology support, services, and devices?

In the April 2, 2007 IEP, assistive technology consultative services were provided. Student's parents failed to carry their burden to prove that other services are required. They also failed to present any evidence regarding what other devices are needed by Student for her to receive a FAPE. Therefore, the District will not be required to provide additional assistive technology support, services, or devices.

Must the Troy Area School District purchase a laptop computer for Student and/or reimburse Student's parents for the cost of a laptop computer, including all appropriate state-of-the-art software?

In the first section of this discussion, that addressing compensatory education, this hearing officer discussed the District's failure to provide Student with a computer during the 2006 – 2007 school year and the reasons why the provision of a computer was necessary for Student to receive a FAPE. That discussion need not be repeated here, except to say that it is as applicable to the current school year as it was to the 2006 – 2007 school year. In order for Student to receive a FAPE, the District must provide a laptop computer for Student to use both at school and while working on school related assignments and projects at home. Following the suggestion found in the vision support evaluation, the District must also provide Student with a USB thumb drive to use for the exchange of materials with her teachers.

Although the District will be required to provide a laptop and USB thumb drive for Student to use, the District will not be required to purchase a laptop for Student or to reimburse Student's parents for the cost of a laptop. In other words, the laptop, as well as the USB thumb drive, will remain District property, it is not a gift to Student or her parents. The District will also not be required to pay for "all appropriate state-of-the-art software." Student's parents failed to carry their burden to even show what the term "all appropriate state-of-the-art software" meant and they didn't prove that Student required that for her to receive FAPE. In fact, the evaluation completed by Ms. W made it clear that, while Student required a laptop, she was able to use it using commonly available word processing software and common adaptations such as sticky keys available on all computers.

\* \* \*

Accordingly we make the following:

## **ORDER**

The Troy Area School District must designate one person, experienced in transition planning and the provision of transition services, to provide transition services to Student. The transition services must be provided once every two weeks for one hour each session through to the end of the current school year, plus one hour per month for the 12 months following the end of the current school year. These transition services must be provided to Student even if she should exit the District at the end of the current school year.

During the summer of 2008 the Troy Area School District must provide Student with one-to-one tutoring for 10 weeks, five hours each week, focusing on skills needed for success in Student's desired immediate post-secondary activities. This tutoring must be provided to Student even if she should exit the District at the end of the current school year.

The Troy Area School District must provide Student with a laptop computer for use at both school and at home. The District must continue to provide Student with a laptop until such time as Student is no longer receiving educational programming and services from the District.

The Troy Area School District must provide Student with a USB thumb drive for use at both school and at home. The District must continue to provide Student with a USB thumb drive until such time as Student is no longer receiving educational programming and services from the District.

---

Signature of Hearing Officer