

*This is a redacted version of the original hearing officer decision. Select details may have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.*

## DECISION

Due Process Hearing for T.F.

ODR File No. 5747/05-06 AS

Date of Birth:           xx/xx/xx

Dates of Hearing:       October 6, November 28, December 9, 2005 – Closed Hearing

Parties to the Hearing:

Representative:

Parent(s)

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Doylestown, PA 18901

New Foundations Charter School  
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Hearing Officer:       Debra K. Wallet, Esq.

Date of Decision:       January 21, 2006

BACKGROUND:

Student [hereinafter Student] is [a/an xx-year-old (date of birth redacted) student] who is in the fourth grade at New Foundations Charter School [hereinafter School] where she has attended since kindergarten.

Student experienced speech and vision problems at a very young age after the insertion of a shunt to treat hydrocephalus. There is a question as to whether or not Student is mildly mentally retarded or has specific learning disabilities with severe perceptual processing problems (auditory/visual). (*Compare* Exhibit 9, pp. 3-4, with Exhibit 35, p. 7).

In the fourth grade, Student is in the regular education classroom but is pulled out for academic support and for physical, occupational, and speech therapies. This pull-out constitutes less than 21% of the school day. (Exhibit 42, p. 7).

Parents argue that Student's lack of progress is due to the failure of the School to evaluate Student properly and to provide an appropriate educational program. They request compensatory education at the rate of five hours per day for the years since 2<sup>nd</sup> grade and ask that the Hearing Officer order the School to place Student at public expense at the [Redacted] School [hereinafter Private School] in [another state].

The School maintains that any relief before two years prior to the filing of the due process request is time barred. It contends that the IEPs for the repeated second grade and the third grade years were appropriate and constituted a free appropriate public education (FAPE). The School further maintains that the current IEP is appropriate, no evaluation is needed, and that the Private School does not constitute the least restrictive environment for Student.

ISSUES:

1. Are the requests for relief back to the 2000-2001 school year time barred?
2. Did the School provide Student with a free appropriate public education (FAPE) during the 2003-2004 and 2004-2005 school years?
3. Is Student in need of an appropriate evaluation?
4. Is the present Individualized Education Program (IEP) for the fourth grade appropriate?
5. If the IEP is not appropriate, is Student entitled to tuition, transportation, and other expenses at the Private School?

FINDINGS OF FACT:

Background

1. Student is xx-year-old (date of birth xx/xx/xx) fourth-grade student currently enrolled at the School.
2. On August 4, 2005, by letter from their legal counsel, Parents gave notice that they were requesting a due process hearing and asked that the School pay an appropriate private school's tuition and transportation. (Exhibit 60).
3. The ODR Request Form is dated August 8, 2005. (Exhibit 61).
4. Within the initial thirty-day period, no resolution had been reached and the first hearing was scheduled for October 6, 2005.
5. Both parties participated in a pre-hearing telephone conference before the undersigned Hearing Officer on September 29, 2005. The parties generally agreed on the legal issues with the exception of the relevant statute of limitations.
6. Closed hearings were held on October 6, November 28, and December 9, 2005, at which time the record was closed for the submission of evidence but held open for the submission of closing arguments on or before a January 6, 2006 due date. Both parties submitted written arguments.
7. The Hearing Officer heard testimony from three School witnesses including the CEO of the School, the fourth grade regular education teacher, and the special education teacher

who has worked with Student since kindergarten. Mother testified and presented testimony from Student's evaluating psychologist as well as the head of the Private School.

8. The Hearing Officer admitted Exhibits 6 through 9, 11 through 28, 30 through 45, 57 through 62 (including an extra page for Exhibit 58), and 65 through 69. P-1 was also admitted. (N.T. 464-471).

9. The parties stipulated that a dash in the blocks on Exhibit 57 represents a weakness in an area. It does not mean that there was no evaluation of this item. (N.T. 429-430).

10. The parties stipulated that Student is entitled to 18 sessions of occupational therapy. (N.T. 8-10; 30-31).

#### Evaluation of Student by School and IEP's

11. Based upon classroom performance, the School requested permission to perform psychoeducational testing, physical therapy screening, and speech and language screening of Student. This request was granted by Parents on February 7, 2001. (Exhibit 6).

12. On March 7, 2001 the School issued an Evaluation Report assessing Student's academic potential and the impact of her medical condition upon her cognitive development. On the Wechsler Preschool and Primary Scale of Intelligence (WPPSI-R), Student obtained a performance I.Q. of 74, a verbal score of 67, and a full scale score of 68. According to the evaluator, these results placed her in the "mildly mentally retarded range." The lowest scores were on manipulation and solution of problems abstract in nature. The Adaptive Behavior Assessment System (ABAS), using teacher and parent forms, established that she had gross and fine motor skill deficits, and that her communication skills were inconsistent. As a result of the evaluation, Student was identified as eligible for special education services with sub-average general intellectual function and deficits in adaptive behavior. (Exhibit 9).

13. In March 2001 the IEP team met and concluded that Student would participate in the full-time regular education kindergarten but may be pulled out for speech services, one-to-one tutoring, or physical therapy. Goals included increasing the skills of letter recognition, letter recall, letter reproduction, the ability to count out loud with accuracy, and the ability to recognize numbers 0 through 10. In addition, Student's sight word vocabulary was to increase by six sight words. The IEP also called for part-time speech and physical therapy services. (Exhibit 11).

14. In October, 2001 new academic goals were added for the first grade. These included writing, reading, and math goals. Student was to reach a 1.8 grade equivalent. (Exhibit 13).

15. An IEP for the 2002-2003 (second grade year) called for regular education with one-to-one special education four times per week for 30 minutes, physical therapy one time per week for 30 minutes, and speech therapy two times per week for 30 minutes. Goals addressed increasing motor planning skills required for coordination, increasing math skills to a level of

1.5, completing classroom activities in a timely manner, correctly producing target phenomes, increasing expressive language skills to promote sentence formulation skills, improving auditory processing/association skills to facilitate classroom skills, writing a sentence, and reading at a 1.5 level by April 2003. (Exhibit 16).

16. An adaptation to the 2002-2003 IEP provided for additional program modifications such as giving written tests orally, using symbols and manipulatives for math skills, using the computer, extra tutoring, and adapting homework. (Exhibit 19).

17. A Reevaluation Report dated May 1, 2003 concluded Student continued to be eligible for, and in need of, special education services, but the report contained little other useful information. It stated that no additional data was required. (Exhibit 23).

18. The IEP for the 2003-2004 school year, in which Student repeated second grade, recommended 30 minutes weekly of physical therapy to work on motor planning skills required for coordination. This IEP called for a full-time inclusion classroom with itinerant speech and learning support with the special education teacher and physical therapy one time per week. It continued to call for less than 21% of time outside the regular education classroom. The goals were to increase Student's sight word vocabulary by mastering the first grade list, write a complete sentence, read literature at grade level 1.5, increase math skills to a level of 1.5, correctly produce certain sounds in spontaneous speech, increase expressive language skills to improve sentence formulation skills, and improve auditory processing skills in order to follow classroom oral directions. Some short term objectives and benchmarks were included under these general goals. She was to use a calculator and authentic looking coins/money. (Exhibit 24).

19. Even though Student continued to fall further behind, the Notice of Recommended Educational Placement (NOREP) continued to recommend full-time inclusion class with itinerant speech, physical therapy, and one-to-one learning support only three times per week with a special education teacher. (Exhibit 26).

20. The 2004-2005 IEP (third grade) recommended one time weekly physical therapy, three times weekly pull-out for academic support, and three times weekly speech therapy. This IEP called for a full-time inclusion classroom with itinerant speech and learning support less than 21% of time outside the regular education classroom. The document reported "drastic improvements in both reading and math and spelling." (Exhibit 31, p. 3). Goals included: write 4 to 6 sentence stories, increase reading fluency to 50 words on the first grade level (baseline 4 to 7 words), improve sentence formulation skills, increase auditory processing skills in order to follow classroom oral directions, and increase math skills to a grade equivalent of 3.4. Some short term objectives and benchmarks were included under these general goals. (Exhibit 31).

21. The June 17, 2005 speech and language progress report showed some improvements in producing multi-syllabic words correctly but continued difficulty with certain sounds. (Exhibit 38).

## Parent Evaluation

22. Dr. G. holds a Ph.D. in counseling and educational psychology. He is certified as a school psychologist and has more than 20 years in psychological practice. His current practice involves the evaluation of children with disabilities, primarily those with learning disabilities. (N.T. 179-180). His examination of Student was conducted on the 7<sup>th</sup> and 19<sup>th</sup> of August, 2004. (N.T. 186-187; Exhibit 35).

23. Student was evaluated by Dr. G. to determine current aptitude and achievement levels. Using a Wechsler Intelligence Scale for Children (WISC-IV), Student achieved a full scale I.Q. of 81. Testing revealed severe deficiencies in short term memory and concentration causing her to work slowly and affecting her ability to maintain attention and concentration for extended periods of time. She showed a significantly below average range in working memory. She placed at less than one percentile in the ability to decode words at her age and grade level. In mathematics she placed at or below the first grade level, nearly two to three years behind her expected grade level. She was also at the kindergarten level in spelling, and at the first grade level in listening comprehension and oral expressive language skills. Dr. G. found that Student's "achievement scores are significantly discrepant from the aptitude scores, in particular her verbal abilities (39<sup>th</sup> percentile), which most accurately reflect her true ability." He deemed the problems "severe" and recommended a number of interventions such as a much smaller classroom setting, home tutoring, and computer-enhanced learning opportunities. Dr. G. classified Student as having a specific learning disability with severe perceptual processing problems (auditory/visual). (Exhibit 35; N.T. 210-214).

24. Dr. G. testified that the working memory and processing speed difficulties reduces Student's full scale I.Q. score. He opined that the score should be closer to 90 taking these factors into consideration. (N.T. 194-195). The Hearing Officer accepts this opinion because it is both reasonable and appears to be based upon sound objective testing.

25. According to Dr. G., Student's expressive language skills are her strongest area but she has severe deficiencies in reading, decoding, spelling, math processing, and written reading comprehension. (N.T. 201).

26. Because Student's spelling skills are so low and there is difficulty with processing and word recognition, Dr. G. did not formally assess Student's written language. (N.T. 207).

27. Dr. G. recommends a very structured environment in small groups using a method such as Orton Gillingham, Wilson, or Lindamood-Bell. (N.T. 209-210).

28. Dr. G. did not render the opinion that only a private school could provide appropriate programming for Student. In giving a recommendation for a class no larger than 14 students, he stated that he had in mind a learning support class in a public school. (N.T. 243-244).

## Fourth Grade IEP

29. The IEP for services beginning May, 2005 (fourth grade year) recommended a continuation of weekly physical therapy sessions for 30 minutes each, speech therapy two times per week for 30 minutes, and occupational therapy one time per week for 30 minutes. (Exhibit 42, p. 5). Pull-out for academic support is increased to 5 times per week. Primary placement remained in the regular education classroom. (Exhibit 42, p. 7).

30. In this IEP, the “present levels of educational performance” include: “she is now able to sound out words with blends and certain long vowels,” “reading 75/100 1<sup>st</sup> grade sightwords on Fry’s list,” and “adds/subtracts with and without regrouping . . .”. (Exhibit 42, p. 3).

31. The goals and objectives in the fourth grade IEP are better framed. For example, the math goals include: “will learn basic multiplication and division skills w/ 85% accuracy” and “solving multi-digit multiplication problem (sic) at 85% accuracy given a times tables chart or other tools.” The reading fluency goal provides a baseline of 14 words and provides for increasing to 25-30 words. The objectives under this goal are very precise with decoding objectives which are measurable. (Exhibit 42, multiple pages 4).

32. Dr. G. was critical of the fourth grade IEP (Exhibit 42) because it continued to provide little evidence of the base line where Student started the year. (N.T. 216-221).

## School Witness Testimony

33. Mr. S. has served six years as the CEO and Principal of the School. He has a Master’s Degree in special education and elementary education. He has approximately 30 years of experience in teaching and being a principal. (N.T. 17-19).

34. Although the first evaluation identified Student as a student with mild mental retardation, there has been no agreement within the IEP team whether Student is now a child with a specific learning disability. Nevertheless, the CEO is in agreement that she should be considered learning disabled. (N.T. 78).

35. No meeting concerning the [Dr. G.] August 2004 evaluation occurred until May 2005, a meeting which was described as “very contentious.” (N.T. 79).

36. The CEO of the School testified that a laptop computer was given to Student in May 2005. He also testified that computers are available in the regular classrooms as well as in the special education classroom. (N.T. 438-439).

37. The computer initially given to Student by the School was not able to access the internet. This problem was later corrected with a different computer. (N.T. 39).

38. Student's IEPs did not incorporate the use of a computer as part of her special education program. (N.T. 449). The use of a computer is not mentioned in the 2005 IEP. (Exhibit 42; N.T. 450-451).

39. Mr. S. testified that Student is currently being pulled out of regular education classes for special education five times a week, as well as for speech, occupational therapy, and physical therapy. The pullout time with Mr. L. has been increased from three to five times per week. (N.T. 445).

40. A teaching assistant was hired to assist with the two fourth grade classes and this person was scheduled to begin work in December 2005. (N.T. 447-448).

41. The School concedes that they use an "eclectic" approach with Student. (N.T. 142; 457).

42. Ms. T. is Student's current regular education fourth grade teacher. She is working on a Master's Degree and a Pennsylvania certification as a reading specialist. She has approximately 15 years' experience as a teacher. (N.T. 92-93). At the time she testified in October 2005, there were 21 students plus Student in Mrs. T.'s classroom and no teacher's aide. (N.T. 94-95). The regular classroom teacher stated that the special education pullout occurs three days per week from 9:20 a.m. to 10:10 a.m. In addition, Student is pulled out for physical therapy and occupational therapy. (N.T. 95-96).

43. In the regular classroom Student uses an intervention book in the Harcourt Series for reading. Although the book is designed at the fourth grade level, the teacher testified that the "read alouds" are varied. (N.T. 98-99).

44. In mathematics, the Harcourt curriculum is used and the teacher pulls from the second grade materials on the same topic. (N.T. 99-100).

45. Mr. L. is the special education teacher. He has been at the School since 1999. He previously had 2½ years experience as a teacher prior to his employment with the School. He holds a Master's Degree in education and is certified in special education and elementary education. He has been Student's special education teacher since kindergarten. (N.T. 103-104).

46. Mr. L. testified that every year Student has made improvements in math, reading, and language arts. (N.T. 107).

47. The special education teacher testified that Student has a learning disability in reading and mathematics but stated: "I don't know if there's an exact name for what her disability is." (N.T. 118).



48. The special education teacher testified that he used various methods to help Student learn to count such as flash cards, game formats, and screens on the computer. With respect to reading, he borrowed part of the Wilson Program in the second grade year but he did not use any Wilson assessments. (N.T. 123-125).

49. Mr. L. conceded that he was not able to say exactly what her grade level is in mathematics and described her skill level in reading as “very minimal” at the time of the 2002-2003 IEP (Exhibit 24). (N.T. 127). He conceded that the reading goals in the 2003-2004 IEP (Exhibit 24) addressed only sight word vocabulary but had no decoding or spelling goals. (N.T. 130-131). The special education teacher referenced a rubric for first grade writing such as capital letters and punctuation marks which he developed, but no such rubric was produced. (N.T. 132-133).

50. The teacher believes Student’s best year was the 2004-2005 school year. (N.T. 130).

51. Mr. L. testified that the IEP references to 1.5 grade level goals assumed approximately one year of jump. This would mean that the baseline was the kindergarten or primer level in reading and about the same for math. (N.T. 133-134; Exhibit 24, multiple pages 4).

52. As of the next year’s IEP (Exhibit 31), Student was still not at the 1.5 grade level in reading. (N.T. 137). The special education teacher testified that the math goal in the IEP calling for increasing math operations to grade equivalent 3.4 was based upon the results of a key math test he administered showing that she had a grade equivalent of 2.4 without prompts and 2.9 with prompts. (N.T. 138-140). There is no specific goal in the IEP for spelling. (N.T. 141).

53. The special education teacher also described his approach as eclectic for math. (N.T. 142).

54. The special education teacher described his input on the third grade report card (Exhibit 57) as “very informal.” He would consult with the regular education teacher when the teacher would ask for some input. (N.T. 144).

55. Student’s “dramatic improvement” in spelling was described as inventive spelling of sounding out words and putting down letters for those sounds, but not necessarily a correct spelling. (N.T. 149-150).

56. The Hearing Officer was not impressed with the testimony of the special education teacher and declines to accept any opinions regarding academic progress offered by him. This teacher seemed entirely unable to articulate Student’s skill level in any academic subject. *See* N.T. 128. This, in and of itself, would not be so startling if the goals and objectives in the IEPs had been written in terms other than grade levels.

57. Most troubling was the special education teacher's description of decoding goals and decoding skills. In spite of the fact that Student is making apparently very little progress in decoding, the same "eclectic" approach is being used. (N.T. 154-155). Mr. L. agreed that in the fourth grade he was still seeing Student three times per week as opposed to the five times set forth in the IEP. (N.T. 156).

58. At the time he testified, Mr. L. was working with Student in a two-person group three days a week for approximately one hour per day. This included reading, writing, and spelling. (N.T. 161).

59. Math instruction has been left to the regular education classroom teacher. The special education teacher will "every once in a while" modify something for the regular classroom teacher in the area of mathematics. (N.T. 152-153).

60. The Hearing Officer declines to accept the special education teacher's opinion that Student will never be at grade level. (N.T. 164).

#### Private School

61. Ms. G. is the head of the Private School located in [another state]. This is a school for children with language-based learning differences. (N.T. 249-250). The school opened in September 1999 and currently has 25 children from kindergarten through eighth grade. (N.T. 252). Nine children are in the third and fourth grade program. However, children are grouped by instructional ability or need rather than grade. (N.T. 253).

62. The Private School uses a multi-sensory approach. Teachers are trained as Wilson instructors and in the use of the Wilson Lindamood-Bell programs. (N.T. 254-256).

63. The Private School engaged in a two-day evaluation of Student, including meetings with the Private School speech pathologist and occupational therapist. (N.T. 260-261). The Private School determined that they could provide services to Student. (N.T. 263). She would be in a group of four or five children with a certified special education teacher with a Master's Degree and training in various Lindamood-Bell programs. (N.T. 264; 293). Tuition at the Private School would be \$29,000 for 183 school days. An extended school year consisting of a six-week summer program costs \$3,900. (N.T. 283). The Private School is slightly less than 15 miles from the School. (N.T. 290).

#### Mother's Testimony

64. Parent is Student's mother. She testified that a shunt was placed in Student's head after the pediatrician diagnosed her with hydrocephalus. Student received preschool services and enrolled in the School in March 2001. (N.T. 319-320).

65. Mother insisted that Student repeat second grade because she believed the child could not do the work from the prior year. (N.T. 339).

66. Mother complained that she was promised adaptive equipment for Student as a result of the psychological report done by Dr. G., but that Student had not received it. (N.T. 331). She also complained about monotonous homework which consisted primarily of seek and find puzzles. Mother wanted different challenges for her child. (N.T. 333-334). For example, Student was not provided with access to a computer even after the IEP dated October 2002 provided for it. (Exhibit 19, p. 5; N.T. 335-336). Mother also stated that while she received standard report cards she did not receive regular progress reports explaining exactly what progress was being made on the goals and objectives. (N.T. 337-338).

67. Mother credibly described the nature of the monotonous homework. She stated that each day of the week would be the same. (N.T. 352-353). Mother did not observe the kind of drastic improvement in reading, mathematics, and spelling reported by the School. (N.T. 352-353, *see* Exhibit 31).

68. Mother testified that the third grade year, 2004-2005, was an even worse year than before. Student would wake up in the middle of the night and make excuses as to why she should not go to school. (N.T. 361-362).

69. Because Mother did not believe Student was making significant progress in math or reading, she obtained a private tutor. (N.T. 366-367).

70. Student receives this private tutoring from a special education teacher twice a week for 45 minutes each. (N.T. 398-399).

## CONCLUSIONS OF LAW

1. This case is governed by The Individuals With Disabilities Education Improvement Act of 2004 [hereinafter IDEA 2004], 20 U.S.C. §1415 *et seq.*
2. Violations of IDEA 2004 which occurred prior to August 2003 are time barred by the statute of limitations contained in IDEA 2004.
3. Student's IEP for the 2003-2004 school year failed to satisfy the legal requirements of IDEA 2004 and the relevant regulations.

4. Student's IEP for the 2004-2005 school year failed to satisfy the legal requirements of IDEA 2004 and the relevant regulations.
5. Evaluation of a student's needs is a fundamental element in the provision of FAPE. 34 CFR §§300.320, 300.531.
6. Student is in need of a current evaluation which is sufficiently comprehensive to identify all of Student's special education and related services needs and to assess her academic ability and achievement, particularly in the area of reading.
7. Student's IEP for the 2005-2006 school year satisfies the legal requirements of IDEA 2004 and the relevant regulations.
8. Parents are not entitled to tuition (and other reasonable fees) and transportation to the Private School for the 2005-2006 school year.

#### DISCUSSION OF ISSUES

##### **1. Are the requests for relief back to the 2000-2001 school year time barred?**

IDEA 2004, effective July 1, 2005, sets forth a limitation on due process hearing requests by requiring the filing of a notice:

which sets forth an alleged violation that occurred not more than 2 years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint or, if the State has an explicit time limitation for presenting such a complaint under this part, in such time as the State law allows . . .

20 U.S.C. §1415(b) (6) (B).

Specific exceptions may toll this limitation period, such as in the case of specific misrepresentation that the complaint had been resolved or withholding of required information to

the parent. *See* 20 U.S.C. §1415 (b)(3)(D).

The initial letter from Parents' attorney to the School was dated August 4, 2005 (Exhibit 60) and the actual ODR request form was dated August 8, 2005 (Exhibit 61). Without question, both of these dates are after the effective date of IDEA 2004. As a result, there can be no argument that IDEA 2004 is fully applicable to this case.

This Hearing Officer concludes that there is no explicit time limitation set by Pennsylvania's legislature for presenting a complaint. Consequently, in this case, violations occurring more than two years before August 2005 will not be considered; they are barred by the statute of limitations in IDEA 2004. Further, the Hearing Officer finds no specific misrepresentation or withholding of information that would toll the limitations period. Although Parents did not receive the kind of progress reports that should have been provided, they were generally aware of Student's educational program at the School. Consequently, this decision will consider only the period of time within two years of the filing of the August 2005 complaint, namely the 2003-2004 and 2004-2005 IEPs.

**2. Did the School provide Student with a free appropriate public education (FAPE) during the 2003-2004 and 2004-2005 school years?**

The educational standard to which the School's action must be compared is established by our state and federal courts. The IDEA, and now IDEA 2004, does not require states to develop IEPs that "maximize the potential of handicapped children" but merely requires the provision of "some" educational benefit. *See Board of Education v. Rowley*, 458 U.S. 176, 189 (1982).

The Third Circuit has defined the standard to mean that more than "trivial" or "de

minimus” benefit is required. *See Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 179, 184 (3d Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989). Moreover, the Third Circuit has determined that a student’s demonstrated progress in an educational program is sufficient to show that a school district’s IEP provides meaningful benefit necessary to satisfy the IDEA’s FAPE standard. *See Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 242 (3d Cir. 1999). The issue, then, is whether or not the School has shown that it provided a meaningful benefit to this Student, gauged in terms of demonstrated progress within the educational program.

The IEP for each child with a disability must include certain information which is spelled out by federal regulation, including a statement of the child’s present levels of educational performance; a statement of measurable annual goals, including benchmarks or short-term objectives; a statement of the special education and related services and supplementary aids and services to be provided to the child, and a statement of the program modifications or supports for school personnel that will be provided for the child to advance appropriately toward attaining the annual goals; and an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class. 34 CFR §300.347(a)(1) through (7). Nevertheless, it is not enough simply to contain these seven required sections.

The problems with the second (repeated) and third grade IEPs (Exhibits 24 and 31) are a lack of individualization for Student. While this child has well-recognized problems with decoding, significant problems with recognizing phenomes, and nearly negligible abilities in spelling, Student’s goals and objectives appear copied from some formbook. There is insufficient review of the progress from the last IEP and focus on the skills that will assist Student in making one grade level of progress—or at least some significant progress.

Even if the IEP's themselves were adequate—which they are not—an equally reasonable explanation of why Student has done so poorly is the failure to provide appropriate instruction. It is pretty clear that Student has the need for a very structured approach to learning. Certainly, the teaching should be focused, consistent, and systematic. The Hearing Officer agrees with Parents that the “eclectic” approach admittedly used by the Special Education teacher for both reading and mathematics is not suitable. (*See* N.T. 142, 457).

The Hearing Officer is troubled by the testimony of the special education teacher who has been involved with Student since kindergarten. Not only does he appear to be confused about Student's reason for eligibility, the teacher admitted that he does not expect Student ever to reach grade level. (N.T. 164). Some degree of realism about educational progress is commendable, but this teacher presents himself as wholly uninspired to press Student to progress as much as possible. Student apparently has some math skills that could certainly be developed. The limited amount of pull-out time does not begin to meet Student's needs and allows her to flounder in a large regular classroom far too much.

Math instruction has been left largely to the regular education classroom teacher. (N.T. 152-153). This seems particularly deficient for a child so significantly below grade level. This is probably one area where she could progress with some dedicated efforts.

The Hearing Officer concludes that the two IEP's in question are vague, fail to contain baselines from which progress can be measured, and fail to individualize the education to this child. In addition, they fail to provide for a structured, systematic approach to teaching, something unquestionably needed by Student. Finally, they do not provide for sufficient pull-out time with a special education teacher competent in a systematic, sequential, research-based

program. In short, these IEP's were not reasonably calculated to enable Student to receive educational benefit.

Compensatory education is a remedy designed to provide a student with the services he should have received. When a student has been denied an appropriate educational program, compensatory education is an in-kind remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990), *cert. denied*, 499 U.S. 923 (1991). This Hearing Officer finds that the School failed to offer or implement a program designed to provide more than *de minimus* progress. Consequently, the Hearing Officer will award compensatory education for the full 2003-2004 and 2004-2005 school years.

Parent is awarded compensatory education at the rate of three hours per day for those days Student actually attended school in these years. This should represent the amount of pull-out time which should have been spent on an appropriate program of reading, spelling, and mathematics.

### **3. Is Student in need of an appropriate evaluation?**

The most recent School evaluation was conducted in May 2003 (Exhibit 23), but it essentially adds nothing to the March 7, 2001 Evaluation Report done during kindergarten. (Exhibit 9, N.T. 45). No new testing was done in 2003. (Exhibit 23).

As a result of the Dr. G. evaluation in August 2004, there is a question as to whether or not Student is mildly mentally retarded or has specific learning disabilities with severe perceptual processing problems. (Exhibit 35, pp. 6-7). Under IDEA, these are distinctly different diagnoses and are mutually exclusive. *See* 34 CFR §300.7(c)(10)(ii); 34 CFR §300.541(b).



A full and comprehensive evaluation is warranted to resolve the dispute and to test Student's current achievement. Without a good, current evaluation, it may be impossible to create a truly appropriate IEP. After the evaluation, an IEP team meeting must be convened promptly to consider the results of the evaluation, particularly to determine if a research based, systematic, sequential program of reading is needed.

**4. Is the present Individualized Education Program (IEP) for the fourth grade appropriate?**

The Hearing Officer has some reservations about the current IEP for the fourth grade (Exhibit 42), but finds that it is minimally appropriate--at least until a new evaluation is conducted. However, the School must provide those elements specifically contained in the IEP. For example, the School must ensure that the full five-times per week pull-out for academic support actually occurs. (Exhibit 42, p. 5).

In this IEP, the "present levels of educational performance" are more precise: "she is now able to sound out words with blends and certain long vowels," "reading 75/100 1<sup>st</sup> grade sightwords on Fry's list," and "adds/subtracts with and without regrouping . . .". (Exhibit 42, p. 3).

The goals and objectives in this IEP are better framed and better individualized. For example, the math goals include: "will learn basic multiplication and division skills w/ 85% accuracy" and "solving multi-digit multiplication problem (sic) at 85% accuracy given a times tables chart or other tools." At least the reading fluency goal provides a baseline of 14 words and this goal provides for increasing to 25-30 words. The objectives under this goal are very precise with decoding objectives which are measurable. *See* multiple pages 4 in Exhibit 42.

Speech, occupational, and physical therapies are provided weekly. Additional pull-out support is to occur five times per week for 45 minutes each. (Exhibit 42, p. 5). A more structured and less eclectic approach would obviously benefit Student.

A placement in regular education classes with pull-out academic support together with appropriate occupational, physical, and speech therapies does seem most appropriate to maintain Student's socialization skills. The Hearing Officer is not convinced that a private school placement is necessary. Even the Parents' expert, Dr. G., did not state that only a private school could provide appropriate programming for Student. When he gave a recommendation for a class no larger than 14 students, he stated that he had in mind a learning support class in a public school. (N.T. 243-244).

Such private school placement does not represent the least restrictive environment if Student can continue to benefit from the regular education program at the School with sufficient pull-out time to concentrate on reading, math, and spelling deficiencies.

**5. If the IEP is not appropriate, is Student entitled to tuition, transportation, and other expenses at the Private School?**

The Hearing Officer will not engage in the customary three-step analysis set forth in *Florence County School District Four v. Carter*, 510 U.S. 7, 114 S. Ct. 361 (1993), and *Burlington School Committee v. Massachusetts Department of Education*, 471 U.S. 359, 105 S.Ct. 1996 (1985). This three-step Burlington-Carter analysis is one for tuition *reimbursement* and provides that parents shall be *reimbursed* for their private school tuition if: (1) the School District has failed to offer an appropriate program; (2) the parents' placement is appropriate; and, (3) the balance of the equities favors the parents' unilateral placement.

First, the Hearing Officer believes that the School has offered an appropriate program for the fourth-grade year. Of course, after a comprehensive evaluation this conclusion may change, but a conclusion about a private school placement would be premature. At the present time both the recommended placement and the IEP in issue (Exhibit 42) are appropriate. On this record, the Hearing Officer cannot say that the School failed to offer an appropriate fourth-grade program.

More important, Parents chose not to enroll Student in Private School. Having failed to do so, they are not entitled to reimbursement for any costs because they have incurred no tuition costs for which they may be reimbursed.

### ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED that:

1. Parents are entitled to compensatory education services equaling three hours per day for those days Student actually attended school after August 8, 2003 but before August 8, 2005. Parents are entitled to compensatory education services equal to the two hours per week of pull-out time provided in the 2005-2006 IEP but not actually given to Student. The School shall provide Parents with a written accounting of the calculation of the hours. Parents may select the form of the compensatory education so long as it represents any appropriate developmental, remedial, or enriching instruction that furthers the goals of Student's 2005-2006 IEP or future IEP's. Such hours must be in addition to Student's then current IEP and may not be used to supplant IEP services. The costs for the School to provide this compensatory education may not exceed a special education teacher's salary (including fringe benefits) for the period in which Student was deprived of special education services.

2. As stipulated by the parties, Student is entitled to 18 sessions of occupational therapy.

3. Because evaluation of a student's needs is a fundamental element in the provision of FAPE and because Student is in need of an evaluation sufficiently comprehensive to identify all of Student's special education and related services needs and to assess her academic ability and achievement, particularly in the area of reading, the School shall complete such an evaluation not later than sixty (60) school days after the date of this Order. This evaluation of

Student shall be done by a professional or professionals selected by the School and at School expense. The School will ensure that any standardized tests given to Student are validated, are conducted under standard conditions, and are administered by trained and knowledgeable personnel in accordance with 34 CFR §300.532.

4. Parents will make Student available for evaluation on the date or dates selected by the School and will not delay the evaluation process.

5. After the evaluation, an IEP team meeting must be convened within fifteen (15) school days to consider the results of the evaluation and to determine exactly what services and programs are needed by Student.

6. Parents are not entitled to tuition and transportation for the Private School.

Date: January 21, 2006

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