



# Due Process Digjest News from the Office for Dispute Resolution

January 2005

## In this issue...

**Hearing Officer Decisions** .....1-3

**Appeals Panel Decisions** .....3-5

## Hearing Officer Decisions

**ODR #3489/03-04**  
***In Re The Educational Assignment of a Student in the Central Bucks School District, Before Joy Waters Fleming, Esquire, Hearing Officer, January 21, 2005.***

**Issues Addressed:** Compensatory Education, IEP, Tuition Reimbursement

Student, a fourteen year old tenth grader attending an out-of-state private school, has struggled with reading, writing, decoding, processing, and working memory since starting school, although Student's verbal reasoning is high average to superior and oral skills are average. After a May 2002 meeting to develop a middle school IEP, Parent rejected the resulting placement, but agreed to a learning support resource room. In seventh grade, standardized scores fell, and subsequently Student was found ineligible for 2003 ESY. Through seventh and eighth grades, the 2002 IEP remained in effect as Parent had rejected the subsequent ones. By January 2004, Parent was dissatisfied and requested a hearing alleging failure to provide FAPE. The District responded with a motion to limit the issues pursuant to limit compensatory education to one year under Montour, which the Hearing Officer granted. In June, Parents provided written notice of Parent's intention to place Student in the out-of-state private school for students with language-based learning disabilities. The Hearing Officer found that for various procedural reasons the 2002 IEP was inappropriate as was the subsequent evaluation report since meaningful educational progress was not made, and the ESY determination was improper. Likewise, the subsequent proposed eighth grade IEP was ruled inappropriate due to content deficiencies, omission of information on regression, lack of progress suggesting a more intense reading program, and comparison test scores were unavailable. As a result, compensatory education was ordered for the time under Montour that Student was in District classes, and tuition reimbursement for the private school.

**ODR #3827/03-04**  
***In Re The Educational Assignment of a Student in the Sto-Rox School District, Before Dorothy J. O'Shea, Ph.D., Hearing Officer, January 17, 2005.***

**Issues Addressed:** Compensatory Education, FAPE

In July 2002, Parent approved an emotional support placement with resource room support. In August 2003, Parent requested a hearing

concerning development and implementation of an IEP for the following school year. At an October meeting, an IEP was developed, notwithstanding Parent's absence due to illness and Parent's counsel's departure from it, which provided for itinerant emotional support. Over Parent's objection, the Hearing Officer in that proceeding endorsed and an Appeals Panel affirmed that IEP, except as to transition planning which Panel ordered developed at a meeting within 30 days. These proceedings were requested when Parent had similar concerns as to 2004-2005. The Hearing Officer denied the District's res judicata motion to dismiss which was subsequently affirmed by an Appeals Panel. During the course of the hearing, the July 2002 placement was found pendant, and the aforementioned IEP meeting was ruled not to have been timely convened. In Hearing Officer's decision, Hearing Officer found that the District had neither developed nor implemented an appropriate IEP for 2004-2005, and a court appeal of the Panel decision was not time-barred as Parent had two years to file it. The Hearing Officer then ordered compensatory education from the time when the District should have held the IEP meeting until Hearing Officer's decision, for that portion of the school day when Student should have received special education services.

**ODR #4014/03-04**  
***In Re The Educational Assignment of a Student in the Lower Merion School District, Before Kenneth Rose, Hearing Officer, December 6, 2004.***

**Issues Addressed:** Gifted

Student attended private kindergarten in 1999-2000, where a private evaluation found an IQ of 135. The next year Student was found eligible for gifted programming. The resulting GIEP provided for specialized instruction, in the form of reading and math enrichment. Parents agreed for the current year and the next year, with the addition of a small pull-out literature group, continuing to express specificity concerns. The GIEP for third grade was more to Parents liking in that respect, although Parents did have implementation concerns around scheduling, and progress was made under this as well as the fourth grade version. During fourth grade, Parents arranged for another private evaluation that showed a full-scale IQ of 129, and differential small-group instruction was provided that year. The document proposed for sixth grade contained detailed present educational levels, along with revised goals and objectives. Parent rejected this which resulted in a hearing at which the proposal was

The OFFICE FOR DISPUTE RESOLUTION (ODR), funded through the Pennsylvania Department of Education, is responsible for the operation and management of Pennsylvania's Special Education Dispute Resolution system. ODR is located in the Pennsylvania Training and Technical Assistance Network (PaTTAN) Harrisburg offices and is administered by Lancaster-Lebanon Intermediate Unit 13. Lancaster-Lebanon Intermediate Unit 13 is an equal opportunity employer.

**Kerry Voss Smith, Esquire**  
Due Process  
Office for Dispute Resolution

**Linda A. McKay, Esquire**  
Mediation  
Office for Dispute Resolution

**Cindy Judy, Legal Assistant**  
Office for Dispute Resolution

**Editors:**  
Kerry Voss Smith, Esquire  
Edward G. Titterton, III, Esquire

Administrative Support by  
Cindy Judy, Legal Assistant

Designed by  
**CommunicationLink**

A service of Lancaster-Lebanon Intermediate Unit 13

Questions or comments regarding the material contained in this document may be directed to  
**Kerry Smith, Due Process Director, at [ksmith@pattan.k12.pa.us](mailto:ksmith@pattan.k12.pa.us)**



## HEARING OFFICER DECISIONS *(continued)*

found appropriate, after the duration of consideration was limited by Montour. A preponderance of the evidence, the Hearing Officer held, established that the GIEPs for both third and fourth grade were procedurally correct and appropriate, although perhaps not examples of best practices.

### **ODR #4333/04-05**

***In Re The Educational Assignment of a Student in the West Chester Area School District, Before Donald J. Bohince, Hearing Officer, January 14, 2005.***

**Issues Addressed:** Tuition Reimbursement

Student, who has always been in special education, was diagnosed with Autism, ADHD, and Bipolar Disorder. Student also had progress hampered by speech, language, behavioral, and academic deficits. Parents, displeased with Student's educational progress, requested private school placement during grade three, and unilaterally placed Student in such a school for fourth grade. A hearing later that year denied Parents reimbursement for that same year and an Appeals Panel reversed and granted reimbursement. A settlement agreement was entered into by the parties thereafter establishing the placement for the following 2003-2004 year, grade five, at District expense. Parents consented to a District evaluation with an IEP that would be completed prior to May 14, 2004, and that the private school would be the 2004-2005 placement if needed. This proceeding was initiated to determine, after the NOREP was rejected, if the program and placement proposed by the District for 2004-2005 was appropriate and, if necessary, to assess the appropriateness of the private school placement. At the time of the hearing, Student was receiving OT, was bussed to a nearby private school for contact with typical peers. Student's performance was inconsistent, and Student had a behavior plan. The Hearing Officer found the District's proposed IEP appropriate and denied tuition reimbursement.

### **ODR #4443/04-05**

***In Re The Educational Assignment of a Student in the Springfield Township School District, Before Joseph G. Rosenfeld, Ph.D., Hearing Officer, January 21, 2005.***

**Issues Addressed:** Evaluations, Extended School Year, Residential Placement

Student attended a private residential school after being in District classes through 2003-2004. Student had no academic problems, and peer-related difficulties were reported as no greater than those of others Student's age. Parents, however, saw ADHD and depression-related problems at home, including violence, although Parents did not provide written documentation until spring 2003, after a partial hospitalization. A 1999 evaluation had found Student was not gifted. In March 2003, the District offered a Section 504 Service Agreement relative to ADHD, and later for special education pursuant to which an IEP was developed for services in the neighborhood school. During 2003-2004, Student was variously diagnosed with ADHD, Bipolar Disorder, Oppositional Defiant Disorder, Intermittent Explosive Disorder, Adjustment Disorder and Developmental Disorder. The District staff asserted that Student made a good transition back to school after the hospitalization. Student was placed at the residential school that summer after a violent incident, and the District agreed to pay for the school component. In June 2004, Parents raised safety issues, and requested a more restrictive emotional

support placement while rejecting the IEP and NOREP in favor of a hearing. The Hearing Officer found the District's evaluation appropriate as to timing, approach, and content, while the same was found true of the proposed IEP. Noting the availability of wrap-around services during the summer, the Hearing Officer also found Student ineligible for ESY, and denied IEE reimbursement.

### **ODR #4558/04-05**

***In Re The Educational Assignment of a Student in the Nazareth Area School District, Before Daniel J. Myers, Esquire, Hearing Officer, December 29, 2004.***

**Issues Addressed:** Jurisdiction, Procedure

Student is a nine year old fourth grader who was registered in the District in April 2003. Student was found eligible in November 2003 due to a leaning disability, a month after which an IEP was developed. In January 2004, District records indicated Student was at another address though still within District boundaries. By the time of the hearing, no one in Student's family was living within the District, although Student's father was looking for a house there. In the meantime, the District apparently proposed two alternative locations, each of which the Hearing Officer found capable of implementation. The Hearing Officer found he had no jurisdiction over assignment to a particular school and, therefore, dismissed the case.

### **ODR #4559/04-05**

***In Re The Educational Assignment of a Student in the Nazareth Area School District, Before Daniel J. Myers, Esquire, Hearing Officer, December 29, 2004.***

**Issues Addressed:** Jurisdiction, Procedure

Student is an eight year old second grader who, according to a May 2003 evaluation, had speech/language and OT needs. In January 2004, District records indicated Student was at another address though still within District boundaries. By the time of the hearing, no one in Student's family was living within the District, but Student's father was looking for a house there. In the meantime, the District apparently proposed two alternative locations, while there had not been an evaluation to formally assess eligibility, each of which the Hearing Officer found capable of implementation. The Hearing Officer found he had no jurisdiction over assignment to a particular school and, therefore, dismissed the case.

### **ODR #4565/04-05**

***In Re The Educational Assignment of a Student in the Nazareth Area School District, Before Daniel J. Myers, Esquire, Hearing Officer, December 29, 2004.***

**Issues Addressed:** Jurisdiction, Procedure

Student is a five year old kindergartner. In January 2004, District records indicated Student was at another address though still within District boundaries. By the time of the hearing, no one in Student's family was living within the District, but Student's father was looking for a house there. In the meantime, the District apparently proposed two alternative locations, while there had not been an evaluation to formally assess eligibility, each of which the Hearing Officer found capable of implementation. The Hearing Officer found he had no jurisdiction over assignment to a particular school and, therefore, dismissed the case.



## HEARING OFFICER DECISIONS (continued)

### **ODR #4566/04-05**

***In Re The Educational Assignment of a Student in the Nazareth Area School District, Before Daniel J. Myers, Esquire, Hearing Officer, December 29, 2004.***

**Issues Addressed:** Jurisdiction, Procedure

Student is a five year old kindergartener who, in January 2004, District records indicated Student was at another address though still within District boundaries. By the time of the hearing, no one in Student's family was living within the District, but Student's father was looking for a house there. In the meantime, the District apparently proposed two alternative locations, while there had not been an evaluation to formally assess eligibility, each of which the Hearing Officer found capable of implementation. The Hearing Officer found he had no jurisdiction over assignment to a particular school and, therefore, dismissed the case.

### **ODR #4704/04-05**

***In Re The Educational Assignment of a Student in the Millcreek Township School District, Before David Y.K. Lee, Hearing Officer, December 27, 2004.***

**Issues Addressed:** Evaluations

Student is a fifteen year old attending a District high school under a Chapter 15 Service Agreement. An October 2003 evaluation report found Student ineligible under IDEA. Parent disagreed, but an initial hearing request was resolved with an agreement to secure an outside evaluation and reconvene the team. A summary and Parental redaction of the outside evaluation report was received by the District, parts were included in its subsequent evaluation report, but Student was still identified as ineligible thereafter. The evaluation forming the basis of that report was, apparently, never completed. Parent renewed the hearing request asserting the agreement had not been adhered to by the District. The Hearing Officer ruled that, aside from weighing the testimony provided, a redacted copy of an evaluation report, conducted by a certified school psychologist and provided for school programming considerations, was not proper. Likewise, the Hearing Officer attributed any delay to the Parent, and concluded that the District had not violated the agreement. Further, Parent had focused on a perceived need for Student to have annual goals as a determinant of eligibility, which was rejected by the Hearing Officer. Hearing Officer also held that what was produced from the outside evaluator did not conclude in favor of eligibility either. The Hearing Officer also suspected that Parent misunderstood the outside evaluation to be an evaluation report. Finally, the District's claim of harassment was also rejected.

### **ODR #4752/04-05**

***In Re The Educational Assignment of a Student in the Hempfield Area School District, Before Dorothy J. O'Shea, Ph.D., Hearing Officer, January 23, 2005.***

**Issues Addressed:** Evaluations

Student is a sixth grader who was diagnosed in 2002 with ADHD. Parents believed diagnosis adversely effected Student's learning while the District did not. Student received "A's" or "B's", according to Student's teachers, did well in school without needing accommodations, and scored average or above on standardized tests. Specifically, Parents claimed

data cited by the District do not accurately represent the scope of Student's difficulties. Parents also claim significant assistance at home was required for years, that homework assignments had to be corrected/directed, that there were retention issues, and that the resulting ADHD documented by two physicians rendered Student eligible under Chapter 15/Section 504. The District did not dispute the diagnosis but contended, as did the Student's team after an evaluation, that Student's ability to learn was not impaired as per the Section 504 regulations. Parents requested a hearing challenging that evaluation. The Hearing Officer found that while Parents argued that the major life activity of learning was impaired by Student's ADHD, that such was not supported by performance as documented on the record. Further, the Hearing Officer ruled that the District's evaluation used had established non-discriminatory procedures, drawing from required and reliable sources. ■

## Appeals Panel Decisions

### **Special Education #1549**

***In Re The Educational Assignment of a Student in the Greater Erie Community Action Charter School, January 3, 2005.***

**Issues Addressed:** Compensatory Education

Student is a fourteen year old with historic academic difficulties and significant behavior problems back to first grade, according to a 1998 evaluation/functional behavioral assessment during which the behavior also deteriorated. This included difficulty remaining on task, distractibility, need for redirection, and academic struggling. Parent agreed to IEPs for that year through fifth grade, addressing these needs through goals and objectives. Just as the fifth grade IEP was starting to be implemented, in October 2001, the District requested permission for a three-year re-evaluation. District felt no need to revise the IEP commensurate with its results and the contents remained largely unchanged through seventh grade, although Student's usual problems persisted. Between October and April of seventh grade, Student received sixteen in-school and six out-of-school suspensions for disruptive behavior, as well as numerous detentions, and a "Daily Progress Report" system was instituted. Believing these behavioral issues had not been adequately addressed, Parent requested a hearing and the Hearing Officer ordered compensatory education, a functional behavioral assessment, a new IEP, and in-service staff training. Parent appealed.

Affirming with modification, the Panel agreed with the Hearing Officer's basic reasoning, but expanded the compensatory education award. Panel noted the District had been well aware of the Student's behavioral difficulties for quite some time. Therefore, the Panel expanded the compensatory education award to cover the number of days and hours the Student would have participated in the program at issue, from the beginning of seventh grade until the end of 2003-2004, with a sixty-day allowance for incorporation into and implementation of an IEP.



## **APPEALS PANEL DECISIONS (continued)**

### **Special Education Opinion #1557**

#### ***In Re The Educational Assignment of a Student in the Cumberland Valley School District, January 18, 2005.***

**Issues Addressed:** Evaluations, Hearing Officer, Impartiality  
Student is a twelfth grader who has a history of academic performance, behavioral, organizational, and disciplinary difficulties. A District evaluation found Student did not qualify for special education since there was no discrepancy to support a learning disability, nor a need for specialized instruction. Parents produced a private evaluation which, while it contained the same test scores, concluded that Student did have a severe discrepancy between ability and achievement, thereby indicating a learning disability. When the parties could not resolve their differences, Parents requested a hearing. Hearing Officer agreed with the District, also finding no limited strength, vitality, or awareness need to support an Other Health Impaired classification. Finally, the Hearing Officer found no evidence to support the need for Chapter 15 services, or the lack of Hearing Officer impartiality. Parents appealed.

Affirming, the Panel held that pursuant to Carlisle there was not support for reversing the Hearing Officer. Indeed, the Panel found, neither the regulatory standards nor the resulting need for special education had been established on the record as to learning disabilities and to ADHD as an element of the Other Health Impaired classification. Panel also held the impartiality issue to be a question of law in that the legal criteria for establishing it had not been met.

### **Special Education Opinion #1559**

#### ***In Re The Educational Assignment of a Student in the West Chester School District, January 18, 2005.***

**Issues Addressed:** Compensatory Education, FAPE, Hearing Officer, Recusal

Student is a thirteen year old who, for Student's entire academic career, has been enrolled in a private out-of-state school for students with learning disabilities. For 2003-2004, the parties reached a settlement as to that private school, as well as timelines for a spring evaluation/assessment and IEP. The settlement resulted in an evaluation report finding of eligibility based on a specific learning disability requiring specially-designed instruction. Parents did not approve of the resulting IEP and requested a hearing. Hearing Officer denied a recusal request and, when Parents' counsel failed to attend the second hearing session, a decision was requested on the then existing record. The Hearing Officer denied compensatory education, finding that the program offered by the District was appropriate, and Parents appealed.

Affirming, the Panel found no need for the Hearing Officer to have recused herself, since Hearing Officer described at the outset a professional relationship with both parties counsel which did not by itself, nor in conjunction with other allegations, requires such action anyway. Further, the Panel held that the proposed IEP was reasonably calculated to provide Student with meaningful educational benefit based on identified educational needs, and that Parents failed to express, during the hearing or in their exceptions, their reasons for rejecting the program. Likewise, in response to specific exceptions, the Panel ruled that the evidence contradicted Parents' claim that Parents were not permitted to inspect the middle school, and as to other exceptions it was simply not possible to discern the reasoning behind them.

### **Special Education Opinion #1562**

#### ***In Re The Educational Assignment of a Student in The School District Of Philadelphia, January 25, 2005.***

**Issues Addressed:** Independent Educational Evaluations, Tuition Reimbursement

Student is in middle school in the District, served under a Section 504 Service Agreement for accommodations necessitated by attention and distractibility related to epilepsy. In summer 2003, an evaluation found Student eligible as Other Health Impaired with epilepsy that affected executive functioning. As a result, the Student received learning support and, because of inappropriate behavior involving aggression and boundary-crossing, the IEP included a behavior support plan. Before the next IEP meeting could take place, however, there was a behavior incident that led the District to seek a forty-five day alternative education placement, to which Parents objected. At the expedited hearing, the Hearing Officer ordered that Student remain in the middle school placement and that a re-evaluation continue. Almost simultaneously, Parents undertook their own evaluation. The former found an emotional disturbance with a speech/language impairment, which Parents as well as their evaluation disagreed with, and the IEP proposed by the District had serious flaws. In August 2004, Parents informed District that beginning in September Student would be attending a private school specializing in ADHD, and thereafter requested a hearing seeking tuition and independent evaluation reimbursement. The Hearing Officer ruled in the District's favor and Parents appealed.

Affirming, the Panel agreed with the Hearing Officer that the re-evaluation was appropriate, as the private evaluator's findings did not play a significant role in the District's re-evaluation, and they both were contemporaneous, therefore, reimbursement for it was denied. Since the IEP was appropriate, the Panel also sustained denial of tuition reimbursement.

### **Special Education Opinion #1563**

#### ***In Re The Educational Assignment of a Student in the Upper Merion Area School District, January 24, 2005.***

**Issues Addressed:** Compensatory Education, FAPE, Tuition Reimbursement

Student, a seventeen year old with an emotional disturbance, depression, and ADD, has received special education since eighth grade. Student's behavior, work completion, and attendance deteriorated significantly during high school, resulting in an out-of-school suspension by January of Student's junior year. School counseling and monitoring were then added to Student's IEP, as was private counseling. By the spring of that year, Student was moved from itinerant learning support to emotional resource room support three periods per day, and slightly more than a year later expected performance was lowered in yet another IEP. In summer 2004, Student attended an out-of-state wilderness program directed towards family reconciliation, after which Student was admitted to another out-of-state school for the following year. In July, Parents requested a hearing seeking compensatory education as well as reimbursement for IEEs, psychological counseling, and tuition reimbursement for the two out-of-state private schools. The Hearing Officer limited the compensatory education claim under Montour granting one hour per day, found that the District had denied FAPE, awarded



## APPEALS PANEL DECISIONS (continued)

reimbursement for certain counseling sessions as well as the private programs, but not the IEEs. Both parties appealed.

Affirming in part and revising in part, the Panel accepted application of Montour and then found FAPE was denied absent proper evaluation reports, failure to offer a summer 2004 program after finding one was needed, and an inappropriate IEP from at least January 2001. Among other things, Panel noted in this connection that behavior management was not addressed despite obvious need in that area. Ruling, therefore, that compensatory education was proper, the Panel further held that the Hearing Officer's award was not sufficient to address the denial of FAPE. Finally, the Panel concluded that the standards for tuition reimbursement had been satisfied and awarding it was, therefore, proper.

### **Special Education Opinion #1568 In Re The Educational Assignment of a Student in the Methacton School District, January 20, 2005.**

**Issues Addressed:** Compensatory Education, Independent Educational Evaluation, Other Health Impaired, Procedure, Statute of Limitations

Student, who has various medical conditions including asthma, allergies, sleep disturbance, and severe eczema, also has a history of difficulties in language arts and inconsistent academic progress. Parents rejected third grade tutoring, because Parents did not want Student singled out, as well as a pre-referral process for intervention services, and arranged for reading camp services in the summer of 2003. The following school year, the same difficulties persisted, as did Student's medical conditions. In January, Parents applied to a private school for students with learning disabilities while also making arrangements for a private evaluation. That February, Parents provided the District with an IEE diagnosing a specific learning disability and a qualification as Other Health Impaired due to his eczema and allergies. The District agreed with the latter, adding as a basis ADHD, but Parents rejected the resulting IEP and sought tuition reimbursement for the private school. The Hearing Officer denied tuition reimbursement, since evidence as to appropriateness of the IEP was scant, but did order reimbursement for the IEE and compensatory education for the difference between the small group instruction actually received versus resource room services that would have been provided under the proposed IEP. Parents appealed.

Affirming, the Panel noted some difficulties with the IEE award, but observed that IEE had not been appealed. As to tuition reimbursement, the Panel agreed that there was insufficient evidence to determine appropriateness of the IEP, but also found the need for special education at the private school was totally geared to the learning disability rather than at addressing the Other Health Impaired issues. Indeed, the Panel further ruled that in any event balancing of the equities would not favor Parents, since Parents had failed to cooperate in development of the District's proposed IEP. Finally, challenges to calculation of the compensatory education award were rejected since Montour limited consideration to one year, and even within that year there was no support for Parents' contention that the award should have been in full days.

### **Special Education Opinion #1569 In Re The Educational Assignment of a Student in the Lebanon School District, January 19, 2005.**

**Issues Addressed:** Compensatory Education, FAPE, Procedure

Student attended District classes until relocating to another district in 2003-2004. In July 2003, Student was identified as eligible with an Other Health Impairment. An IEP was developed for the subsequent year providing learning support, OT, and a behavior service plan. Parents' IEE the following winter found ADD, anxiety and obsession, as well as Tourette's Syndrome. Other services were added, but the spring 2004 evaluations were never completed because the family relocated. Unable to resolve Parent's differences with the District, Parents requested a hearing asserting that Student had been denied FAPE and was discriminated against, for which Parents sought compensatory education. Since the Hearing Officer found neither denial of FAPE nor discrimination, the compensatory education claim was denied and Parents appealed.

Affirming, the Panel first ruled Panel had no authority to address Section 504 discrimination claims, and then that Parents had never really objected to the content of the IEP as written. In fact, the Panel continued, all the exchanges pointed towards implementation as the basis for Parents' concerns, and in particular, adaptation of the behavior plan. Further, the Panel disagreed with the assertion of Parents' counsel, late in the hearing, that IEP content was a newly discovered issue. Challenges to implementation of the IEP, Panel continued, involve whether the Student was unable to receive benefit from the IEP because of alleged harassment or exclusion from the classroom during periods of behavioral difficulty, all of which went straight to determinations of credibility that the Carlisle standard did not justify reversing. Finally, the Panel concluded, removal from the classroom during periods of behavioral difficulty was appropriate, and since neither in that respect nor otherwise was there a denial of FAPE, compensatory education was not a proper remedy. ■