



# Due Process Digest

News from the Office for Dispute Resolution

Volume 12

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## Hearing Officer Decisions/No Appeal Filed

### **ODR #4659/04-05**

#### ***In Re The Educational Assignment of a Student in the Montgomery County Mental Health/Mental Retardation System, Dr. Ambrose Finnegan, January 27, 2005***

Parents Pro Se  
Barbara Harrington-Hladik, Esquire - County Attorney

Child is two years old and being served by the Montgomery County Early Intervention Program. Parent requested due process, seeking primarily for the County to purchase a Boardmaker program to help enhance Child's communication skills. The parties stipulated to Child having a disability of apraxia with a severe speech delay.

The first issue as identified by the HO was whether the Boardmaker program needed to be purchased in order for Child to receive an appropriate communication program employing the PECS system. While noting that "... EI services are clearly 'family focused' and must assist the family in fostering or enhancing a child's development, there was absolutely no evidence rendered which would indicate the Boardmaker program is necessary in order for [Child] to benefit from his IFSP interventions." Both the speech pathologist and the behavior consultant testified consistent with this premise. To the extent the Boardmaker program would be helpful to the family in implementing PECS, it was readily available through a loan option. The HO found the evidence preponderant that Child's speech pathologist provided Parent with requested pictures for PECS implementation from many sources, inclusive of the Boardmaker program.

The last issue was whether Montgomery County Early Intervention committed a procedural violation of Child's due process rights by not scheduling an administrative meeting with the prescribed timeline. The evidence was uncontested that a meeting was scheduled within the prescribed seven days but was postponed to a later date at Parent's request. No procedural violations occurred.

### **ODR #5132/04-05 | Opinion #1649**

#### ***In Re The Educational Assignment of a Student in the Bristol Township School District, Marcie Romberger, Esquire, Hearing Officer, August 8, 2005***

Donna Davis, Esquire – Parent Attorney  
Andria Saia, Esquire - School District Attorney

Student is entering 8th grade and is eligible due to a SLD in reading. At issue was whether Student's current IEP was appropriate to meet Student's needs without additional reading support and ESY. An IEE in March 2004 yielded a diagnosis of dyslexia.

Although the record suggested that the IEE examiner was not permitted to go into detail about her report at the April 2004 IEP meeting, the HO could not state with certainty that the IEE recommendations were not considered. Therefore, HO could not agree that the current IEP was inappropriate as a result of not considering the IEE results.

Regarding ESY, District's ER stated that Student needed constant review and reinforcement to remember and maintain skills. It was also clear that Student had been unable to master and consolidate important skills crucial to reading and Student's fluency rate had vacillated and not improved over the many years of instruction. Moreover, District's ER as well as Parent spoke to Student exhibiting attention getting behaviors in the classroom as a new behavior so that no one would realize that Student could not read. Therefore, the HO determined that ESY was an essential component of the IEP. The IEP was also deemed to be inappropriate for its lack of supplementary reading support.

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.

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**HEARING OFFICER DECISIONS/NO APPEAL FILED** (continued)

**Special Education Opinion No. 1649**

***In Re The Educational Assignment of a Student in Bristol Township School District, Panel Members Lorraine Heeter, Constance Lyttle, James McAfee, September 22, 2005***

Lorraine Heeter - Appeal Author

District filed exceptions regarding ESY and supplemental services offered to Student. In support thereof, District referred to the 2004 ER, stating the HO referred to the math teacher's comments, with the District claiming such comments were not to be referred to as a basis for ESY since comments did not refer to reading. The Panel found it to be irrelevant which class was referred to as reading was a common denominator in all subjects. District also asserted that Student had not been tutored for many years; however, the Panel noted Student had a one-on-one tutor over the summer of 2004 and at least through January 2005 plus had received 3.83 hours per week of small group instruction in the SRA reading program throughout the year. During that time, Student made slow progress and reading fluency according to the IRI stayed at 25% at the 4th grade level, meaning little meaningful progress had been made. District further asserted that there was no evidence of regression and recoupment; however, the District had no evidence to the contrary. More importantly, the Panel noted that the District had failed to conduct a systematic evaluation for ESY, which accounted for the dearth of evidence. "We can not say that such systematic evaluation would make this child eligible for ESY; rather since the District did not conduct a systematic review as to the factors that would determine such services, the Student is entitled to ESY services for 2005." District's exception as to ESY 2005 was dismissed, with ESY 2006 being premature to order such services.

The District's second exception regarding the ordering of supplementary reading services lacked supporting evidence. The Panel noted that District's reading specialist testified that Student had peaks and valleys in progress monitoring, needed a lot of encouragement and prompting when reading, progression was slow, and Student could not read tests independently. The witness also stated that Student not only needed supplemental reading services, but needed them for longer periods of time than was being offered. District's exception regarding supplemental reading services was also dismissed.

Finally, District asserted that HO erred in ordering a different methodology be implemented. Finding that the HO's Order, if left as written, would preclude the IEP team from reaching an agreement as to an appropriate reading program for Student, the Panel modified the Order in that the IEE independent reading evaluation was to be done at District expense by Bryn Mawr College Child Study Institute prior to reconvening the IEP team.

**ODR #5132/04-05 (Remand Decision)**

***In Re The Educational Assignment of a Student in the Bristol Township School District, Marcie Romberger, Esquire, Hearing Officer, May 9, 2006***

Donna Davis, Esquire - Parent Attorney  
Andria Saia, Esquire - School District Attorney

District appealed the decision of the Special Education Appeals Panel to District Court. The Court remanded the case to the HO to determine whether Student would still prevail if the burden of proof was born by Student as per Schaffer v. Weast and L.E. v. Ramsey Bd. of Educ. After reviewing the record, HO's decision remained the same.

**ODR #5801/05-06**

***In Re The Educational Assignment of a Student in the Great Valley School District, Linda Stengle, Hearing Officer, April 10, 2006***

Heidi Konkler-Goldsmith, Esquire – Parent Attorney  
Hollie John, Esquire – School District Attorney

Student is in 9th grade and currently attending a private school. Parent requested due process to challenge District's finding that Student was ineligible for supports and services under a Section 504 Service Agreement. Parent sought an eligibility determination, compensatory education, and IEE reimbursement.

In 4th grade, District conducted a screening for ADHD and found in Student the pattern of observations indicative of factors associated with ADHD. A subsequent FBA listed several "problem behaviors" and a behavior management plan was developed.

Parent persuaded the HO that District failed to follow required evaluation processes for Student in a timely manner. District waited until 2005 to perform an evaluation. "The process of asking around and deciding unilaterally that an evaluation was not needed because the [S]tudent was 'doing very well' does not adhere to the regulatory guidelines for the evaluation process." The HO was persuaded that once the evaluation was completed, District came to the wrong conclusion. District's own testimony and documents showed that Student's non-verbal learning disability and his ADHD substantially limited his ability to access the general curriculum in a way that was deemed to be consistent with his disabilities. Parent's evaluator was found to be more credible. Student was found to be entitled to compensatory education for the time period sought. An hour per day was awarded.

Appealed directly to Commonwealth Court; record sent June 5, 2006.



## HEARING OFFICER DECISIONS/NO APPEAL FILED (continued)

### **ODR #5952/05-06**

#### ***In Re The Educational Assignment of a Student in the Keystone Central School District, Kenneth Rose, Hearing Officer, March 28, 2006***

Parent Pro Se  
Karl Romberger, Esquire – School District Attorney

Student is sixteen years old and eligible due to a severe learning disability. Student has bilateral hearing loss, but does not wear hearing aides. Student has received special education services since 1st grade and has been identified as having ADHD and CAP. Parents have been having Student tutored at Sylvan Learning Center.

Parent raised numerous issues. Parent agreed with the three IEPs in question, the underlying ERs, and the resulting placements. Parent questioned whether the IEPs from 2003-2006 documented completion or progress of the IEP goals. The HO found that each IEP had present levels listed and measurable goals. Progress was seen in both reading and math, and if results of testing by Sylvan were used, learning growth was even greater.

Various procedural violations were alleged with the following determinations by the HO: 1) The two extra days taken to complete the re-evaluation did not constitute a denial of FAPE. 2) The IEP was, in fact, revised after the January 2005 ER. The delays in completing the IEP were attributable to Parent's schedule. 3) The IEP team was found to be properly constituted.

Issues were raised regarding implementation of Student's program, with the following determinations by the HO: 1) The Kurzweil 3000 software system was implemented in a timely fashion. 2) The lack of a District-funded laptop was not found to be either a hindrance to Student achieving his IEP goals or a denial of FAPE. 3) Regarding District-funded tutoring, the District offered tutoring to Student, but tutoring is not listed on the IEPs. 4) Student's academic program is at an appropriate level to permit him to progress in the general curriculum. 5) Parents received progress reports as stated in the IEPs. 6) There was no evidence to suggest that District sought to mislead Parent on Student's capability to participate in the regular classroom. 7) The trial placement in regular education history class was not a change in placement.

In sum, Parent failed to meet the burden of establishing a denial of FAPE. Any procedural errors were found to be harmless and of no effect on FAPE.

### **ODR #6192/05-06**

#### ***In Re The Educational Assignment of a Student in the Anville-Cleona School District, Gregory Smith, Ph.D., Hearing Officer, April 12, 2006***

Parent Pro Se  
Mark Fitzgerald, Esquire – School District Attorney

Student is thirteen years old with a SLD in basic reading and written expression. During the school year, Student was subject to incidents of mistreatment and bullying. Thereafter, a program on bullying was presented to the middle school students, and Student experienced a great deal of anxiety watching the film, and stopped attending school the day after the program. Student was subsequently admitted to a partial hospitalization program and then placed on homebound instruction. Parent requested due process, seeking placement outside the District, requested that a planned psychiatric evaluation be completed by a psychiatrist familiar with Student, one-to-one instruction to address Student's dyslexia, and compensatory education.

Regarding placement, once the MDE was completed, the HO noted that the IEP might determine that an out-of-district placement was warranted, but the evidence before the HO did not compel that conclusion. None of the evidence presented suggesting that such a placement was necessary was found to be credible; reports recommending out-of-district placement were entered into the record, but the makers of the documents did not testify; the individuals did not appear to have contact with the District before reaching their conclusions; the documents were hearsay; at least one of the reports was produced by Student's family physician, who described himself as Student's "advocate," thus calling into question the credibility of the report; some documents were not provided to the District prior to the hearing, as required; and, finally, the reports were contradicted by another report submitted by Parent, from the partial hospitalization treatment team. Parent failed to meet the burden of proof regarding an out-of-district placement.

The HO found no evidence to support the suggestion that Student would be harmed if he were to be evaluated by a psychiatrist unfamiliar to him; on the contrary, the evidence suggested that Student had done well with multiple evaluations completed by various examiners. District was not required to use a psychiatrist known to Student when it completed the psychiatric portion of the MDE.

Regarding one-on-one instruction, there was no evidence presented to support this request.

The homebound instruction Student had been receiving was a regular education, rather than special education, placement, obtained as the result of a medical professional's recommendation. As such, the HO did not have authority to rule on matters outside special education, and the compensatory education Parent sought could not be granted. Even if the



**HEARING OFFICER DECISIONS/NO APPEAL FILED (cont'd) & HEARING OFFICER DECISIONS/APPEAL FILED**

HO had jurisdiction, however, an award would not have been forthcoming, as District tried to determine whether or not changes were needed to the IEP but Parent slowed down the evaluation process.

**ODR #6204/05-06**

***In Re The Educational Assignment of a Student in the Centennial School District, Marcie Romberger, Esquire, Hearing Officer, April 10, 2006***

Charles Weiner, Esquire – Parent Attorney  
Andria Saia, Esquire – School District Attorney

Student is in 10th grade. The parties entered into a settlement agreement in November 2005. Prior to settlement negotiations, District issued a PTE, and Student consented to a re-evaluation. The settlement agreement did not address any timelines in which the ER and IEP were to be completed. Due process was requested, alleging that District did not complete the ER within 60 days of the request. HO determined that the claim could not be addressed, based upon the terms of the settlement agreement. The next claim was that District did not abide by the settlement agreement by not completing the ER “as soon as practical” after the settlement agreement. The HO determined that District followed the mandated timelines and no compensatory education was owed.

**ODR #6309/05-06**

***In Re The Educational Assignment of a Student in the Ambridge Area School District, Dorothy O’Shea, Ph.D., Hearing Officer, March 29, 2006***

Parent Pro Se  
Jocelyn Perry, Esquire – School District Attorney

Student and his father are not residents of the District. Parent requested due process concerning Student’s educational program in the District. District challenged the sufficiency of the request, asking for information on Student’s residency and specificity regarding Parent’s request for due process. District subsequently filed a Motion to Dismiss. Parent chose not to attend the scheduled hearing and District’s Motion was granted.

**HEARING OFFICER DECISIONS/APPEALS FILED**

**ODR #5490/05-06 | Opinion #1736**

***In Re The Educational Assignment of a Student in the Centennial School District, Marcie Romberger, Esquire, Hearing Officer, April 27, 2006***

Judith Gran, Esquire – Parent Attorney  
Andria Saia, Esquire – School District Attorney

Student is in 7th grade, and was diagnosed with ADHD in kindergarten. Student has had difficulties in writing and written expression for a few years, but has not been found to be eligible.

In 5th grade, Student was provided with a Service Agreement. Parent requested due process, alleging that Student was eligible due to disability in written expression, as reported in an IEE.

District’s 2003 ER was found to have both procedural and substantive faults. It was not timely, and it did not evaluate every suspected area of disability. A FBA or attention or behavior rating scales were not done to determine whether Student qualified as having a disability under OHI. The ER did address whether Student had SLDs, and concluded that he did not. The HO concurred, as Parent did not refute District’s evidence.

Although the District committed a procedural violation regarding the IEE, reimbursement was not awarded because the IEE was not appropriate. The evaluator did not conduct attention or behavior rating scales, although Student’s attitude, attention, work completion, and behavior difficulties progressively became worse during the years. The evaluator also did not determine eligibility due to a SLD based upon more than one test.

Student’s 504 Plan was inappropriate to meet his needs. District knew since 5th grade that Student had issues with work completion in school and at home, motivation, frustration, confidence, social skills, organizing his thoughts for written assignments, and writing fluency, but no accommodations or counseling were offered. Parent training was not offered to address homework struggles. A Service Agreement was not in place from September 2004 to February 2005. Compensatory education was awarded. Student’s retaliation claim was dismissed.

***Special Education Opinion #1736  
In Re The Educational Assignment of a Student in the Centennial School District, Panel Members Joseph Rogan, Cathy Skidmore, Perry Zirkel, June 12, 2006***

Perry Zirkel - Appeal Author

Both parties filed exceptions. The Panel concluded that the initial evaluation, “albeit marginal rather than optimal, was appropriate.” Although in addition to the evaluator’s failure to assess OHI, the ER lacked evidence of the classroom observation required, the defects amounted to harmless error. This was so, because the ER ultimately relied on the second essential element for eligibility, which applies to the various recognized classifications including OHI and SLD, concluding that Student did not need special education. Based on the information available at the time, the evidence supported the ER’s ultimate eligibility determination.



**HEARING OFFICER DECISIONS/APPEAL FILED** (continued)

**ODR #5515/04-05 | Opinion #1713**

***In Re The Educational Assignment of a Student in the Exeter Township School District, Joy Waters Fleming, Esquire, Hearing Officer, February 28, 2006***

Elizabeth Kapo, Esquire – Parent Attorney  
Sharon Montanye, Esquire – School District Attorney

Student is nineteen years old and eligible by virtue of mental retardation. Parent requested due process alleging a denial of FAPE during the 2003-2004 and 2004-2005 SYs. Due to the applicability of *Montour*, the case was limited to the 2004-2005 SY. HO determined that FAPE was not provided.

Regarding ESY, District was unable to establish with specificity the programming offered to Student and how it met her individual needs. Technically, the District fulfilled its FAPE obligation in conducting a re-evaluation within the mandated two-year time frame; however, procedural irregularities existed. Many of the IEP goals were vague and not measurable. Student's need for a behavior management plan was not met. Based upon all of these factors, HO concluded that compensatory education was warranted.

**Special Education Opinion #1713**

***In Re The Educational Assignment of a Student in the Exeter Township School District, Panel Members Lorraine Heeter, Constance Lyttle, James McAfee, April 20, 2006***

James McAfee - Appeal Author

Both parties filed exceptions. The Panel first upheld the application of *Montour*. Neither a speech and language evaluation, nor a systematic behavioral evaluation was conducted. Hence, the Panel found the IEP to be fundamentally flawed in that it was unresponsive to Student's needs. ESY services should have been based upon an appropriate IEP, and without data to support responsiveness of any claimed benefit to Student's IEP goals, the Panel assumed that it did not confer meaningful benefit. The Panel affirmed HO's calculation of compensatory education for ESY.

The Panel affirmed the award for the 2004-2005 IEP and agreed with Parent that compensatory education was due for 2005-2006 SY in the same manner as ordered for the prior year. District's offer for 2005-2006 SY was found to be essentially the same as the IEP for the previous year, containing the same fatal flaws and was "merely a continuation."

**ODR #5564/04-05 | Opinion #1683**

***In Re The Educational Assignment of a Student in the Boyertown Area School District, Joy Waters Fleming, Esquire, Hearing Officer, November 19, 2005***

Frederick Stanczak, Esquire - Parent Attorney  
Karl Romberger, Esquire - School District Attorney

Student is twelve years old and eligible due to a SLD in reading and written expression. Student became eligible in 1st grade, and entered District schools in 4th grade. Parent alleged a denial of FAPE from 5th grade (SY 2003-2004) on. Applying *Montour*, the claim was begun with the 2004-2005 SY.

Parent contended that the District did not properly evaluate and assess Student's basic reading skills, specifically in the areas of decoding and word attack, and as a result, Student failed to make progress. Based on the evidence presented, the HO found that District failed to establish by a preponderance of the evidence that FAPE was provided during the SY at issue. Several irregularities with respect to the technical elements of the September IEP interfered with the delivery of the program to Student and resulted in a loss of educational opportunity during the 2004-2005 SY. Despite the acknowledgement of Student's needs in organization, spelling and time management, the IEP contained only one reading and one writing goal. The reading goal was insufficient as drafted. Although reading needs were in the area of comprehension, the goal was intended to address fluency. The writing goal had no baseline data, was not measurable and was unsupported by any information in the PELs. District did not conduct any formal writing assessments as a basis for determining Student's writing needs.

In the November IEP, the idea of fluency improvement was largely abandoned, and instead the IEP focused on increasing Student's independent reading level. The writing goal was also changed to increase Student's expectations. This IEP was deemed by the HO to be vastly improved, particularly in the area of reading as it was intended to specifically target Student's independent reading needs; however, it still failed to include separate goals for reading comprehension, organization and spelling. In January/February 2005, the IEP team reconvened and an IEP with both reading and writing goals was drafted. Now SDI was expanded to cover even more areas. This IEP, according to the HO, while an improvement, would have been even more effective had separate goals for each of Student's known reading and writing needs been drafted.

Although not all of the IEPs were procedurally deficient, the HO then turned to whether Student made progress, and concluded that he did not. Although instructional levels did improve, Student's independent reading levels, "arguably the more crucial as he prepares to enter middle school," remained "woefully below" a 3rd grade level even by the end of Student's 6th grade year. The goals regarding written expression were vague, did not contain baseline data and was not subject to measurement. A determination regarding progress was difficult. HO determined that District did not meet its burden of establishing FAPE in



## HEARING OFFICER DECISIONS/APPEAL FILED (continued)

either reading or written expression during the 2004-2005 SY. Compensatory education was awarded.

As to the 2005-2006 SY, Student's needs were lengthier, although the IEP contained only a reading goal. The HO found several problems with the IEP: 1) District's witness stated that Student's needs lay almost exclusively in the area of reading comprehension, the overriding goal in the IEP was improvement to Student's instructional reading level; 2) a goal was needed regarding independent reading levels; 3) the IEP did not incorporate the District witness' recommendation that Student participate in an intensive, supervised daily reading program tailored specifically to him; and 4) no goal was developed to meet several different writing needs. The HO concluded that the IEP was not calculated to confer meaningful educational benefit to Student.

Having found the District failed to offer an appropriate program, the HO then turned to an analysis of whether the private school was appropriate. The HO concluded that it was, and tuition reimbursement was awarded.

### **Special Education Opinion #1683**

***In Re The Educational Assignment of a Student in the Upper Darby School District, Panel Members Jeffrey Gonick, Cathy Skidmore, John Salvia***

Parties settled prior to Appeals Panel decision.

### **ODR #5593/05-06 | Opinion #1729**

***In Re The Educational Assignment of a Student in the Hanover Area School District, Linda Stengle, Hearing Officer, April 5, 2006***

Charles Jelley, Esquire – Parent Attorney  
Robin Snyder, Esquire – School District Attorney

Student is fifteen years old and eligible as a student with OHI. Various stipulations were reached, and the remaining issue before the HO was whether or not Student was entitled to compensatory education for biology, English, history, computer applications, and social skills for the 2004-2005 SY. There was no dispute regarding the number of hours that were supposed to be provided and were not. Student was found to be owed 50 hours per month for each of nine months. District argued unsuccessfully that it was not obligated to provide the hours because it alleged that Parent prevented District from evaluating Student. HO believed, however, that District's documentation stated that it already had all the information and data necessary to make decisions regarding Student's educational placement throughout the school year. Further support for a compensatory education award existed in the finding that Student had to repeat 9th grade courses and that District failed to provide progress information or report cards until well after the hearing started. Parent presented persuasive evidence that Student was denied FAPE.

### **Special Education Opinion #1729**

***In Re The Educational Assignment of a Student in the Hanover Area School District, Panel Members Lorraine Heeter, Constance Lyttle, James McAfee, May 23, 2006***

James McAfee – Appeal Author

Parent filed exceptions regarding the compensatory education award and the application of a limitations period. The Panel found that Parent alleged no mitigating circumstances that should have led to an extension of the one-year limit of *Montour*; rather, Parent challenged *Montour* itself. The Panel was bound by *Montour*. When declining to address Parent's compensatory education claim for 2005-2006 SY, the Panel referred the parties' stipulation to limit issues before the HO.

### **ODR #5607/04-05 | Opinion #1714**

***In Re The Educational Assignment of a Student in the Pocono Mountain School District, Elaine Stanko, Esquire, Hearing Officer, March 1, 2006***

Phillip Drumheiser, Esquire – Parent Attorney  
John Freund, Esquire – School District Attorney

Student is nineteen years old and the parties agree Student is eligible. Student has attended school in the District since Student was in the 2nd grade. Student received reading support in 2nd grade and math support in 3rd grade. Student's family regards itself as having a Spanish culture. Student repeated 7th grade and the District placed him in an ESOL program. Student was not evaluated for special education until fall 2005 when Parent requested due process. The resulting ER indicated Student met the criteria for a student with a learning disability manifested in reading comprehension. The team recommended, and Parent approved, placement in full-time learning support while Student participated in the general education curriculum for all of Student's academic classes and electives, and in an intensive reading class to address Student's areas of deficiency in reading. Issues at hearing were child find and compensatory education.

When Parent counsel initially filed for due process, he purported to do so on behalf of Student's sibling, and "all other [District] students for whom English is their dominant language, but who have been assigned to English as a Second Language classes and have not been evaluated for special education services." Parent counsel, with counsel from the Public Interest Law Center of Philadelphia, then filed a Motion for Class Determination. The HO declined to certify the case as a class action.

District argued that it had no reason to suspect Student had a disability. The HO concluded that, although it was impossible to accurately determine the precise moment in time when the District knew or should have known that Student had a disability,



## HEARING OFFICER DECISIONS/APEAL FILED (continued)

and despite the fact that Student's disability may have made its detection difficult, she was satisfied that the 'red flags' that required Student's retention for a second 7th grade year and which apparently led to Student's placement in the ESOL program were compelling enough for her to conclude that District failed in its duty to identify and evaluate Student. Compensatory education was awarded.

### **Special Education Opinion #1714**

#### ***In Re The Educational Assignment of a Student in the Pocono Mountain School District, Panel Members Panel Members Joseph Cautilli, Madeleine Kaufman and Michael McElligott, April 11, 2006***

Madeleine Kaufman – Appeal Author

District filed exceptions. The Panel agreed that the HO erred in concluding that Student was denied FAPE by virtue of placement in an ESOL program, but nonetheless affirmed an award of compensatory education for a denial of FAPE. The Panel applied *Montour* and reduced the compensatory education award from six and one-half years to two years. It was found to be an error that the HO did not prescribe a precise amount of time as a guide for the award. The Panel added a qualitative standard to the award and added a specific date of termination of the award.

### **ODR #5661/05-06 | Opinion #1721**

#### ***In Re The Educational Assignment of a Student in The School District of Philadelphia, Joy Waters Fleming, Esquire, Hearing Officer, March 18, 2006***

Tanya Alvarado, Esquire – Parent Attorney  
Kenneth Cooper, Esquire – School District Attorney

Student is sixteen years old and in 9th grade in a private school. Student attended District schools from 1st through 8th grades. Student is eligible by virtue of a learning disability manifesting itself as a reading disorder. Parent requested due process, alleging a denial of FAPE since 1999. Applying IDEA's statute of limitations, the relevant periods under review were SY 2003-2004, summer of 2004, and SY 2004-2005. The evidence did not establish that Student was provided FAPE. Although Student made progress under the auspices of the District-provided program, Student did so only in spite of the denial of FAPE that had occurred. The HO further stated that the deficiencies in the IEPs coupled with the lack of individualized programming resulted in a denial of FAPE. Compensatory education was awarded. ESY was not warranted.

### **Special Education Opinion #1721**

#### ***In Re The Educational Assignment of a Student in The School District of Philadelphia, Panel Members Lorraine Heeter, James McAfee, Constance Lyttle, April 27, 2006***

Lorraine Heeter - Appeal Author

Both parties filed exceptions. The Panel honored District's request to follow IDEA 2004 as decided by the HO. Parent's child find claim was dismissed. Parent offered no evidence that the determination of the IEP team on the need for ESY was erroneous, and this exception was also dismissed. The Panel also disagreed with the Parent's argument that reimbursement for educationally-related tutoring/therapeutic expenses while a student remains in public schools was tantamount to recovery for compensatory education. Parent did not establish a factual basis for an educational need for counseling services.

The Panel upheld the HO's finding that the IEPs were inappropriate based on a lack of or insufficient present levels as well as lack of goals to address all of Student's needs. Both IEPs addressed needs in one catch-all goal rather than breaking down the needs into specific goals. Thus, District failed to appropriately articulate the needs to create an appropriate education. The Panel also concurred with the HO regarding "meaningful educational benefit" and its applicability to the facts of the case. Compensatory education was not extended to cover the entire school day, as Parent failed to present evidence as to how Student's need was pervasive and affecting the entire day.

### **ODR #5747/05-06 | Opinion #1701**

#### ***In Re The Educational Assignment of a Student in the New Foundations Charter School, Debra Wallet, Esquire, Hearing Officer, January 21, 2006***

Frederick Stanczak, Esquire – Parent Attorney  
Kevin McKenna, Esquire – School District Attorney

Student is eleven years old and in the 4th grade at the Charter School, where Student has attended since kindergarten. Student is in the regular education classroom but is pulled out for academic support and for physical, occupational, and speech therapies. Parent alleged that Student's lack of progress was due to the failure of Charter School to evaluate Student properly and to provide an appropriate educational program. Parent sought compensatory education and an order to place Student at public expense at the Orchard Friends School in New Jersey.

The HO concluded that Charter School did not provide FAPE during 2003-2004 and 2004-2005 SYs. The HO determined that the problems with the 2nd (repeated) and 3rd grade



## HEARING OFFICER DECISIONS/APPEAL FILED (continued)

IEPs were a lack of individualization. There was found to be insufficient review of the progress from the last IEP and focus on the skills that would assist Student in making one grade level of progress, or at least some significant progress. HO believed there was also a failure to provide appropriate instruction, all of which lead to a finding that the IEPs were not reasonably calculated to enable Student to receive educational benefit. Compensatory education was awarded. A full evaluation was ordered to resolve the dispute as to whether Student was mildly mentally retarded or had specific learning disabilities with severe perceptual processing problems.

The HO had some reservations about the current IEP for 4th grade, but found that it was minimally appropriate, at least until a new evaluation is conducted. The goals and objectives were found to be better framed and individualized in this IEP. The HO was not convinced that a private school placement was necessary. Even Parent's expert, Dr. Gumerman, did not state that only a private school could provide appropriate programming; 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.

### **Special Education Opinion #1701**

#### ***In Re The Educational Assignment of a Student in the New Foundations Charter School, Panel Members Lorraine Heeter, Constance Lyttle and James McAfee, March 9, 2006***

Constance Lyttle – Appeal Author

Parent filed exceptions, questioning first the finding that the 2005-2006 IEP was appropriate and second, the HO's refusal to order the Charter School to provide an appropriate placement. Parent also disagreed with the compensatory education award, and, asked the Panel to enter an Order directing School to place Student at the private school and to maintain that placement until School offered Student an appropriate IEP.

The HO found the IEP "minimally appropriate—at least until a new evaluation is conducted." Because the HO found it necessary to order the immediate completion of an appropriate evaluation, the Panel believed this undermined any assumption or finding that the ER it was replacing could itself be appropriate. Therefore, the Panel found that because the ER was inappropriate, the School failed to provide FAPE. In the absence of a comprehensive evaluation and appropriate ER, the IEP team had unsubstantiated and incomplete data upon which to fashion the 2005-2006 IEP, or determine placement. The Panel extended the HO's compensatory education award of 3 hours a day, based upon the inappropriateness of the 2003-2004 and 2004-2005 IEPs, to the 2005-2006 academic year until an appropriate IEP and placement were established.

Regarding Parent request for an Order regarding placement, because the ER was found to be inappropriate, not only was there no basis for designing an appropriate IEP, there was also no foundation upon which to base any decision on placement, private or public. HO's decision was affirmed in part, and reversed and modified in part.

### **ODR #5779/05-06 | Opinion #1727**

#### ***In Re The Educational Assignment of a Student in the Easton Area School District, Linda Stengle, Hearing Officer, March 23, 2006***

Elizabeth Kapo, Esquire – Parent Attorney  
Kristine Roddick, Esquire – School District Attorney

Student is seventeen and eligible by virtue of PDD-NOS . At issue was Student's 8th grade and 10th grade SYs (2003-2004 and 2005-2006) through October 4, 2005, the date of the pendency agreement reached between the parties. HO concluded that Student's program was not individualized on the basis of her assessment and performance. Annual goals were vague and not linked to baseline information; a school psychologist did not attend the IEP meetings and the LEA noted that he was unable to interpret the test scores on the ER; progress reports were a "fruitless exercise" and members of the team disputed Student's exceptionality; behavioral issues were not addressed; a social stories goal was abandoned but not replaced; report cards were not useful in reflecting progress; and FOCUS program data was in error.

For 2003-2004 SY, the evidence was deemed abundant that District was on notice that Student's time in regular education should be increased and that her special education environment was contributing to Student behavioral issues. District did not engage in the required review process to determine if Student was included to the maximum extent appropriate or to discuss the full range of supplementary aids and supports that might benefit Student. The program was not delivered in the LRE.

District stipulated that Student was owed compensatory education for the 2004-2005 SY. In 2003-2004 and 2005, poorly written IEPs made the coordinated and collaborative delivery of services impossible. Positive and non-academic benefits were not demonstrated. District failed to properly assess Student for ESY. Compensatory education was awarded. The pendent IEP was found to be vastly improved over earlier editions, and was largely appropriate. District was ordered to convene the team to address an appropriate placement.



**HEARING OFFICER DECISIONS/APPEAL FILED** (continued)

**Special Education Opinion #1727**

***In Re The Educational Assignment of a Student in the Easton Area School District, Panel Members Cathy Skidmore, Jeffrey Gonick, Sam Lonich, May 18, 2006***

Sam Lonich - Appeal Author

Both parties filed exceptions. The record was clear that Student had significant needs, and many of those needs were not addressed in the 2003-2004 IEP. Student clearly had emotional and behavioral needs that were not addressed either. The Panel agreed that the 2005-2006 IEP contained appropriate goals, SDI, and a systematic BMP; however, failure to provide an appropriate transition plan was not seen as a trivial omission. Compensatory education was awarded by the Panel for this omission. The Panel could not sustain the ESY award under the applicable burden of proof.

**ODR #5871/05-06 | Opinion #1732**

***In Re The Educational Assignment of a Student in the Pennsbury School District, Linda Valentini, Psy. D., Hearing Officer, April 19, 2006***

Ilene Young, Esquire – Parent Attorney  
Claudia Huot, Esquire – School District Attorney

Student is thirteen years old and classified as having an autistic disorder. Student also has ADHD and a disorder in written expression. From 2000 through 2005 SY, Student was educated in an IU-operated autistic support classroom. For SY 2005-2006, Parents unilaterally placed Student in New Hope Academy, a private school. Parents alleged a denial of FAPE in the LRE for 2003-2004 and 2004-2005 SYs, and asserted entitlement to tuition reimbursement.

Student's 2003-2004 IEP was found to be inappropriate in the specific areas of written language and social skills, and devoid of SDI. There was no reliable set of pre/post data assessment in reading or writing that covered the school year. Likewise, the 2004-2005 IEP was also found to be inappropriate on its face. Again, most goals were vague and not measurable. This IEP contained limited SDI.

Regarding LRE, the HO concluded that for 2003-2004 and 2004-2005, District failed to provide a program in the LRE. There was no evidence supporting the proposition that Student could not be educated with typically developing peers, with supports and services, in the regular education environment in his home school. Compensatory education was awarded, with the HO

noting, that while there were deficiencies in the IEP and the placement, Student did derive some meaningful educational benefit during the two years in question. The HO further concluded that the unilateral placement by Parent was not appropriate: "...a 6th grade Asperger's student with a learning disability, attention issues, and possibly anxiety issues who has been raised in a loving, supportive and close environment is highly unlikely to thrive there. It would be entirely against [Student's] educational, social and emotional interests for the District or this hearing officer to sanction placement at New Hope Academy..." Concerns included: New Hope is licensed as an alternative school for disruptive youths, not a special education school; Student was the youngest student, with only three middle school-aged children in the entire school; Student was alone or with just one other student for most of his classes; Student received no speech/language therapy and no formal social skills instruction; there is no speech/language therapist or psychologist on staff; and Student did not receive a specific program for language instruction or writing.

**Special Education Opinion #1732**

***In Re The Educational Assignment of a Student in the Pennsbury School District, Panel Members Joseph Rogan, Cathy Skidmore, Perry Zirkel, May 22, 2006***

Perry Zirkel - Appeal Author

Both parties filed exceptions. District exceptions were dismissed as being untimely filed, although the Panel indicated in dicta that District would not have prevailed in any event. The Panel likewise rejected Parent arguments that the HO erred in concluding that the private placement was inappropriate and declined to award compensatory education in the alternative (the latter argument was dismissed, as having no legal support). The Panel found no evidence that the private placement was reasonably calculated to yield progress with regard to the individual eligibility needs of the Student, including social interaction and written expression.

**ODR #5993/05-06 | Opinion #1740**

***In Re The Educational Assignment of a Student in the Council Rock School District, William Culleton, Jr., Esquire, Hearing Officer, April 27, 2006***

Sarah Davis, Esquire – Parent Attorney  
Joanne Sommer, Esquire – School District Attorney

Student is ten years old and attending 4th grade at the private Cambridge School. He was identified as having a SLD in reading, after a referral for evaluation at the end of his 2nd grade year. Parent filed for due process, alleging a child find violation, and a denial of FAPE. Remedies sought included compensatory education; tuition reimbursement; IEE reimbursement; and reimbursement for private tutoring services provided by Parent from the beginning of Student's 1st grade year to the present.



## HEARING OFFICER DECISIONS/APPEAL FILED (continued)

District challenged the credibility of Parent's IEE witness. While testifying to a "very impressive background in educational psychology," the HO found that the expert revealed a "paucity of knowledge" regarding District's program. The HO concluded that the expert's knowledge of the facts of the case was inadequate to support the judgments and opinions he offered about the District's program. The expert's evaluation was also deemed to be unreliable in that he appeared to have deviated from the Administration Manual in administering the WISC-IV, without revealing it in his report. District's November 2005 ER found that these substitutions created an inaccurate interpretation of Student's cognition and of the discrepancies between Student's cognition and Student's academic achievement. As to the Cambridge School, "the expert's report reveals a bias against that District that is simply unfounded based upon the methodology he revealed in testimony and in his reports."

The HO found that District was on notice that Student was demonstrating a deficit in reading decoding skills as early as September 2002, when his 1st grade teacher referred him for a literacy evaluation, citing problems with word decoding and writing. These deficits were exhibited throughout 1st grade. Student was not referred for evaluation until the middle of 2nd grade. However, District's program of educational support and screening was comprehensive. While the District's "well qualified" educators knew Student's skill deficit full well, they did not suspect the need for special education services, as they concluded that Student did respond to intervention. Test data, however, was conflicting, although two psychologists concluded, despite the conflict, that Student had made substantial progress. This testimony was given great weight by the HO. Parent failed to establish a child find violation and District proved the opposite by a clear preponderance of the evidence.

The 2004 and 2005 IEPs were found to be at least minimally adequate, and if there were deficiencies, the HO found no evidence that they caused a denial of meaningful opportunity for Student to benefit from District's educational program. There was not a denial of FAPE so compensatory education was disallowed. Parent also failed to carry their burden of persuading HO that the Cambridge placement was appropriate, so tuition reimbursement was denied. Parent did not introduce sufficient evidence to challenge District's prevailing ER, and on this ground alone the claim for IEE reimbursement failed. Finally, Parent presented little evidence that the tutoring they provided privately to Student substantially contributed to his success in decoding. It was provided once a week, as contrasted with the daily decoding instruction provided by District, and was mostly supportive of District's program. Reimbursement was denied.

### **Special Education Opinion #1740**

#### ***In Re The Educational Assignment of a Student in the Council Rock School District, Panel Members Joseph Rogan, Cathy Skidmore, Perry Zirkel, June 23, 2006***

Perry Zirkel - Appeal Author

Parent filed exceptions regarding child find, IEP issues, and tuition reimbursement. The Panel first found that the two-year limitation period of IDEA 2004 clearly applied, and thus the child find claims for 1st and 2nd grade were not viable. Even if they were, District did not have reason to believe that Student was eligible. Instead, the successive use of supplemental reading services and the IST process were "prudently proactive." The Panel reached the same conclusion regarding the remainder of the child find claim (from October of 3rd grade until the initiation of the initial evaluation in February 2004). "Although the pre-referral screening process of IST should not serve as a substitute for evaluation, much less special education, in this case it continued to produce more than 'little or no' improvement and thus was justifiably continued..." The Panel believed that it was not until the first IEE, which included a diagnosis of ADHD, that the District might have had reason to suspect a recognized classification. Although the question was deemed to be "closer" for this limited remaining period, the Panel's objective assessment was that District's posture was not unreasonable.

Regarding the IEPs, the Panel deferred to the HO's credibility determinations regarding Parent's expert. The Panel agreed with the HO's analysis of the IEPs. HO was affirmed.

### **ODR #5996105-06 | Opinion #1710**

#### ***In Re The Educational Assignment of a Student in the Lower Merion School District, Daniel Myers, Esquire, Hearing Officer, February 13, 2006***

Parents Pro Se

Lawrence Dodds, Esquire – School District Attorney

Student is thirteen years old, with ADD, a speech/language impairment, deficits in visual processing and working memory, and a SLD in written expression and math. Parent rejected District's proposed educational program and placement in its middle school, and enrolled Student in Delaware Valley Friends School, and sought tuition reimbursement. HO found for the District.

The HO found little dispute regarding Student's educational needs. District was found to have offered a program/placement to meet those needs, specifically, District recommended a part-time learning support placement for three periods per day (reading, language arts, and resource room) to focus on written expression and reading comprehension, as well as 30 minutes of weekly speech and language therapy. Neither



## HEARING OFFICER DECISIONS/APPEAL FILED (continued)

party disputed the need for a small learning environment and both the private school and the District-proposed placement has small class sizes. A major difference between schools was the overall size of the school buildings. There was no evidence in the record, however, that Student required a small building, as long as he received small class instruction. Nonetheless, District responded to parental concerns about the size of the school with a social worker's services to help in transition. The District program and placement for 2005-2006 SY was found to be appropriate.

### **Special Education Opinion #1710**

#### ***In Re The Educational Assignment of a Student in the Lower Merion School District, Panel Members Joseph Cautilli, Madeleine Kaufman, Michael McElligott, April 7, 2006***

Michael McElligott - Appeal Author

Parent filed exceptions. The Panel affirmed the HO. The HO correctly applied the legal standard when analyzing tuition reimbursement claims. Both the non-testimonial evidence and the record taken in its entirety supported the conclusion that the District proposed IEPs were appropriate.

### **LEGEND OF TERMS**

ADHD	Attention Deficit Hyperactivity Disorder
BMP	Behavior Management Plan
CAP	Central Auditory Processing Disorder
CBA	Curriculum-Based Assessment
EI	Early Intervention
ER	Evaluation Report
ESOL	English for Speakers of Other Languages
ESY	Extended School Year
FAPE	Free Appropriate Public Education
FBA	Functional Behavior Assessment
HO	Hearing Officer
IDEA	Individuals with Disabilities Education Act
IEE	Independent Educational Evaluation
IEP	Individualized Education Program
IFSP	Individualized Family Service Plan
IST	Instructional Support Team
LEA	Local Education Agency
LRE	Least Restrictive Environment
LS	Learning Support
MDE	Multi-Disciplinary Evaluation
OHI	Other Health Impairment
OT	Occupational Therapy
PDD-NOS	Pervasive Developmental Disorder Not Otherwise Specified
PECS	Picture Exchange Communication System
PELs	Present Education Levels
PT	Physical Therapy
PTE	Permission to Evaluate
SBBH	School-Based Behavioral Health
SDI	Specially Designed Instruction
SLD	Specific Learning Disability
SY	School Year
WISC-IV	Wechsler Intelligence Scales for Children