



# Due Process Digest

News from the Office for Dispute Resolution

Volume 17

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## Due Process Digest Information

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## Hearing Officer Decisions/Appeal Filed

**ODR #7094/06-07 | Opinion #1800**

***In Re The Educational Assignment of a Student in the Lake Lehman School District, Before Daniel Myers, Esquire, Hearing Officer, January 9, 2007***

Parent Pro Se  
Charles Coslett, Esquire – School District Attorney

Student, 20, with autism, alleged denial of FAPE for up to four years; District argued a maximum of one year under Montour. HO cited AP holdings that IDEA 2004 two-year limitations period trumped Montour. Student was always aggressive, volatile and unpredictable, and beginning at age 10 was hospitalized five times, the first for four months, to address severe aggression/self-injury. During 2002-2003 and 2003-2004 SYs, Student attended full-time IU autistic support class and received wrap-around services (47 hours weekly of TSS, 35 of those hours at school), and BSC services.

Student showed significant increase in disruptive behavior from beginning of 2003-2004 SY, and at times, Parents were called to take Student home as Student presented danger to self and others. The District took no action with regard to a FBA or additional specialized supports. In mid-September 2004, Student's behavior in school necessitated psychiatric hospitalization. Student returned to school mid-October 2004, but on the first day back the Parents were called to retrieve Student. Psychiatrist recommended residential placement at an intensive neurobehavioral treatment facility for persons with autism and severe aggression/self-injury. **CASSP** meeting concluded Student required residential placement in NJ, but immediate public funding was not available, because in-state residential placements had not been exhausted. Also, consultation and supervision by a specific behavior analysis expert based in PA was recommended, but no public agencies would authorize payment for this service.

Student remained at home, heavily sedated, either asleep or, when awake hitting self and/or others. District contacted six PA programs, but Student was rejected by every PA facility, due to acute level of aggressive behaviors. In mid-November 2004, District offered to send a teacher to the home while awaiting residential placement, but Parents declined because Student was so heavily medicated that education efforts would have been of limited value. Parents made clear to District, that they did not believe the behaviors were related to an acute "medical condition," and requested an IEP meeting. In mid-November, BSC considered Student's behaviors so extremely aggressive and self-injurious that they were beyond the BSC's professional limits and competence, recommended placing no demands upon Student at all, and terminated Student's wrap-around services. In early December 2004, the District referred Student's case to the RIC for intensive interagency coordination pursuant to PDE BEC "Intensive Interagency Coordination," (the Cordero BEC). In mid-January 2005, PDE approved District's request to fund an out-of-state placement for Student. Finally, in mid-February 2005, public funding for the NJ placement was approved. District paid for educational component of NJ placement where Student remained for one year. Student was discharged and transferred to a full-time life skills education program at a placement that was not in dispute at the hearing.

Parents filed for a due process hearing. HO found that although Student was difficult, District should have known how to program for Student. Student remained at home, under heavy sedation and without educational programming "for a very long time and for reasons that were not related to an acute need to stabilize his behaviors," but rather "for reasons related to professional competence, public funding, and bureaucratic authorizations." HO cited that PA Departments of Education, Public Welfare, Labor and Industry, and Health entered

The Office for Dispute Resolution

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## HEARING OFFICER DECISIONS/APPEAL FILED

into a memorandum of understanding in May 2002, establishing that in the event of funding disputes of necessary services, school districts shall provide or pay for necessary services and then claim reimbursement from the appropriate agency ([www.pde.state.pa.us/special-edu/lib/special-edu/semou.pdf](http://www.pde.state.pa.us/special-edu/lib/special-edu/semou.pdf)). Also, at least as early as December 2002, PDE had issued the Cordero BEC providing for a system of intensive interagency coordination for children who have waited, or are at risk of waiting, more than 30 days for an appropriate educational placement. HO found Student was denied FAPE, and awarded two and a half months (250 hours) of compensatory education.

### Special Education Opinion #1800

#### ***In Re The Educational Assignment of a Student in the Lake Lehman School District, February 13, 2007***

Panel Members James Nevant, Cathy Skidmore, Perry Zirkel  
Perry Zirkel – Appeal Author

Both sides' exceptions were limited to the applicable limitations, or "look back," period. Therefore, the AP did not address other issues such as the specific calculation of compensatory education or the overlapping jurisdiction of PDE.

The AP found the District misapplied B.C. v. Penn Manor School District, the fatal problems being that B.C. was limited to PA Chapter 16 gifted education regulations, rather than PA IDEA-based Chapter 14 special education regulations, and, in B.C. the Parents filed for a due process hearing prior to the 7/1/05 effective date of the 2004 amendments to the IDEA. The AP again made clear that the two-year limitations period of the amended IDEA applies to cases in which the filing for a due process hearing was—as it was in this case—after 7/1/05, and that the previous case law interpretation in Montour does not qualify for the IDEA exceptions for different limitations periods in explicit state law, i.e., state legislation or regulations.

The AP also rejected Parents' assertion that the exceptions in the IDEA amendments covered their case and that the HO erred as a matter of law by purportedly refusing to allow Parents to submit evidence to show this coverage. The AP found this contention fatally flawed because HOs have wide discretion in the admission of evidence, with attention to the efficiency of dispute resolution; the Parents did not provide any specific support for the purported refusal in terms of citations to the transcript, and—quite the contrary—a review of the transcript readily revealed the Parents' unrestricted testimony that the District did not engage in such conduct as to trigger the exceptions; and documents submitted that purported to support the Parents' claiming of the existence of the exceptions did not do so. The AP found that law was quite clear that the HO's application of the IDEA's two-year limitations period was correct.

### ODR #7131/06-07 | Opinion #1801

#### ***In Re The Educational Assignment of a Student in the Upper Dauphin Area School District, Before Lynda Cook, Ed.D., Hearing Officer, January 17, 2007***

Parent Pro Se  
Stephen Russell, Esquire – School District Attorney

Student, 9, 2nd grade, enrolled in District in August 2006, has cerebral palsy, orthopedic impairment, S/L and visual impairments, with varying opinions on cognitive ability. Parties disagreed over whether at time of enrollment Parents informed District of extent of Student's disabilities. Parents had Student evaluated privately before enrollment, but did not provide report/results to District. District issued NOREP proposing diagnostic program at Capital Area Intermediate Unit; Parents disapproved, wanting Student to be tried in regular education, with a 30-day review. District developed Chapter 15 Service Plan: help with transfers for toileting, lunch assistance, recess assistance, to carpet for reading time; assisted PE as deemed necessary; aide/teacher intervention only as for any non-disabled child or if safety at issue. Past records came in October, including ER of 6/03, agreed-upon IEP of 9/04, and disapproved IEP of 4/06. Previous HO had found 4/06 IEP inappropriate, and ordered evaluation, but Parents did not make Student available. District filed for hearing in November to determine whether it has the right to conduct comprehension evaluation.

Teacher testified Student's DIBELS were at the beginning of 1st grade, Student required more time to complete work, if Student produced correct verbal response tended not to be able to provide the correct response several minutes later, did not know all letters of the alphabet, written responses often did not match verbal/oral responses, had difficulty tracking/keeping place on papers. Parents acknowledge need for evaluation, but will permit only if they can observe evaluation and exercise visitation rights. School psychologist said Parents observing evaluations "typically skews reliability of the data."

HO considered Parents' right to be involved, and provide/refuse consent in certain circumstances (in this case that previous districts, evaluators and practitioners did not hold high expectations for Student), and balanced District's assertion of right to conduct the evaluation. HO found evaluation necessary to develop appropriate education program, as no clear statement of Student's disabilities/eligibility was available to District.



## HEARING OFFICER DECISIONS/APPEAL FILED

### **Special Education Opinion #1801**

#### ***In Re The Educational Assignment of a Student in the Upper Dauphin School District, February 26, 2007***

Panel Members Constance Lyttle, James McAfee, Barry Smith  
Barry Smith – Appeal Author

HO granted District right to evaluate Student despite Parents' objections. Parents filed three exceptions. 1) There had not been a resolution session. AP dismissed exception, noting neither IDEA, federal regulations, nor state regulations pertain to a resolution meeting prior to hearing requested by a school district. 2) HO made verbal promise prior to the hearing that first session would be limited to opening statements. The record did not address this issue; absent any record on this matter, AP had no basis for consideration and dismissed exception. 3) District failed to make witnesses Parents requested available; District said witnesses the Parents wanted were paraprofessionals and had no relevant testimony to provide concerning issue. As a HO has wide discretion to determine if a witness' testimony is relevant to the issues and if the information the witness could provide is necessary for the record, AP dismissed the exception.

AP held: 1) IDEA requires identification of all children needing special education; mechanism for identification is multidisciplinary evaluation. Parents cannot abrogate order of one PA HO to conduct an evaluation by moving to another district to "shop for a friendly venue." Previous HO decisions were based on commonwealth law, not local practice, so change in venue has no impact on applicability of a previous order when the order is not based on a local condition, but a general application of the statute. 2) IDEA provides benefits which accrue to the child; Parents cannot waive child's right to such benefits. Parents have the option to withdraw child from public education, but cannot eliminate child's entitlement to such benefits while child is enrolled in public education. 3) When a HO reaches a decision, which is not appealed, decision applies to the child no matter where the Parents take residence in the commonwealth. "To do anything else would make a mockery of the system, as has happened in this case." Three HOs over a two-year period determined Student is entitled to/in need of evaluation. Student continues to perform below expectations; Student's disability is impacting learning. The Districts have met their burden of demonstrating before HOs that Student requires extensive multidisciplinary evaluation. Finally, AP did not accept Parents' contention that they must be present physically in the room where the evaluation takes place in order for them to participate as equal partners, noting most standardized tests have strict protocols that prohibit such presence and Parents' presence would likely produce invalid results. District need not accede to the Parents' demand unless there is a viewing room where Student cannot see or hear the Parents while the evaluations occur, but District is not required to find such a facility for the evaluations. If the Parents disagree with the

evaluation findings they can present the evaluations they have already done for consideration, or object to the evaluation and request an IEE at public expense; District then has the option of requesting a hearing to defend its evaluation or fund an independent evaluation.

### **ODR #6972106-07 | Opinion #1802**

#### ***In Re The Educational Assignment of a Student in the Eastern Lancaster County School District, Before Daniel Myers, Esquire, Hearing Officer, January 19, 2007***

Vivian Narehood, Esquire – Parent Attorney  
Michael Connolly, Esquire – School District Attorney

Student, 14, has multiple disabilities, including autism and mental retardation, and behavioral difficulties more prominent at home than at school. In May 2006, parties executed agreement inter alia to educate Student in local public schools under a March 27, 2006 IEP (March IEP) until a particularly-funded (60/40) vacancy became available at a specific private school. In August 2006, Parents learned that no APS placements would be available at private school for a very long time, but that a non-APS residential placement was available immediately, and unilaterally enrolled Student at the School even though the particularly-funded vacancy had not yet become available. In September 2006, Parents requested a due process hearing alleging both that the District did not comply with its settlement agreement, and that the March IEP is inappropriate because Student made no meaningful educational progress while at the District between March and August 2006. Parents sought tuition reimbursement and transportation costs.

HO considered whether District's proposed program and placement were appropriate and whether Parents were entitled to reimbursement for tuition and transportation. Private school tuition and costs are \$98,835 for six months, or \$197,670 per year. Since August 22, 2006, private school has not experienced Student's self-injurious and aggressive behaviors, and Student's IEP at private school does not contain a BP because Student is not presenting problematic behaviors. Private school was programming for Student's low motivation and lack of initiative, and providing Student with skills to become more functional within the environment. Since attending private school, Student has had three home visits, and on those visits no longer tantrums or soils/wets the bed. HO found the District's proposed program and placement to be appropriate, as the parties agreed that the March IEP was appropriate, and the settlement agreement precludes Student from now arguing that the March IEP is not appropriate. HO also found the March IEP was appropriate on its own, and implemented appropriately. HO found the private school inappropriate, using the criteria that Student's educational and non-educational needs were not so inextricably intertwined that the residential services must be



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considered an essential prerequisite for learning, and noting that no educational professionals had ever stated that a residential program was an essential prerequisite to Student's learning. HO also found the equities favored the District in that it complied with all provisions of the settlement agreement whereas Parents unilaterally chose not to continue operating under that settlement agreement by unilaterally moving Student from the public schools.

### **Special Education Opinion #1802**

#### ***In Re The Educational Assignment of a Student in the Eastern Lancaster County School District, March 3, 2007***

Panel Members Madeleine Kaufman, Michael McElligott, Vincent Quinn  
Madeleine Kaufman – Appeal Author

AP noted that parties were represented by competent counsel when executing the settlement agreement. AP noted that Student's program pursuant to the March IEP primarily consisted of some functional academics, daily living skills and communication, and starting in late May 2006, consultative services from a behavior analyst. AP noted Student's private school IEP was "not tremendously different" from the District's March IEP, although it offered slightly more S/L therapy and OT than the District placement.

AP affirmed HO as he correctly interpreted the significance of the settlement agreement, which is viewed as a contract, and the terms and provisions contained in that agreement in making his decision. AP noted the agreement was well drafted and the terms and provisions were stated clearly, in plain unambiguous language capable of being understood by both parties; there was consideration given; both parties were represented by competent counsel; there was no element of coercion or undue influence at play, and the agreement was entered into voluntarily. In addition, Parents already benefited from certain provisions of the agreement (e.g., a compensatory education fund and payment of counsel fees), and this was not a case in which the playing field was one-sided or there was unfairness, but rather the two parties participated in a give and take negotiation and resolution process. AP noted that according to agreement, District is not required to fund any placement other than the particular 60/40 placement the agreement specifies. The placement Parents chose is not the placement specified in the agreement. AP also noted that in the agreement Parents acknowledged that the March IEP was appropriate, and to argue now that it was not is inconsistent. AP also agreed with HO's analysis of the two additional prongs - whether the private placement is appropriate and which party the equities favor, as he properly considered and weighed the evidence presented by the professionals (Parents' own psychologist and the District behavioral analyst who both opined that the Student did not necessarily need a residential placement), and the District abided by the terms and provisions of the settlement agreement, while Parents chose to

disregard a crucial term and place the Student unilaterally in a private placement.

### **ODR #7059106-07 | Opinion #1803**

#### ***In Re The Educational Assignment of a Student in the Ridgway Area School District, Before David Lee, Hearing Officer, January 22, 2007***

Parent Pro Se  
Jennifer Gornall-Rouch, Esquire – School District Attorney

Student, 13, was identified as eligible in 5th grade, and has been receiving special education services. District considered Student properly enrolled, identified Student, and provided special education services. Father claimed the enrollment information was not correct, that Student was not a resident, and, therefore, the District was in error when it identified Student as eligible and Student should be in the regular education program. Mother, who has physical custody of Student, later admitted that they were not residing within the boundaries of the District during the period of time of enrollment, identification and provision of services. However, Mother then presented District with an affidavit indicating a residence within the District boundaries. HO noted his jurisdiction is limited to the evaluation, identification, and program placement of a student, that residency is governed under PA Code 24 P.S. §13-1301, that IDEA does not reference residency, that there is limited case law to offer guidance regarding HO jurisdiction regarding residency, and that AP have determined the issue of residency is hearable when it is intertwined with the provision of FAPE, i.e., determining which District has the responsibility to provide FAPE to a particular student. HO ascertained that Father was challenging the District's eligibility determination of Student solely on the issue of residency, making residency a stand-alone issue that was proper before a different forum. HO concluded Father apparently had the erroneous understanding that the meaning of eligibility in reference to public school enrollment is equivalent to eligibility under IDEA. HO noted that any potential consequence of previously falsified residency did not disturb Student's eligibility status under IDEA and "the seemingly fortunate outcome of this prolonged and sometimes convoluted procedural matter is the constancy of FAPE in the interest of [Student]."

### **Special Education Opinion #1803**

#### ***In Re The Educational Assignment of a Student in the Ridgway Area School District, March 5, 2007***

Panel Members John Salvia, Kay Seven, Cathy Skidmore  
Cathy Skidmore – Appeal Author

Original HO determined the primary issue was Student's residency and that all other claims arose from that issue. Although District objected to HO's jurisdiction over the matter, HO ruled she did have jurisdiction over the claim "if it is



## HEARING OFFICER DECISIONS/APPEAL FILED

intertwined with the provisions of FAPE.” Another HO was assigned based on availability. HO explained he did not have the authority to enroll or disenroll a particular student from a school district, but did have jurisdiction over IDEA claims. When Parent realized all his claims were based on residency which the HO ruled he could not decide, Parent did not call witnesses. The hearing adjourned, and the HO subsequently issued a decision which did not order any relief. Parent filed exceptions, claiming HO should have exercised jurisdiction over the residency issue, that HO should have recused himself, and that HO erred in refusing to admit certain AP decisions submitted by the Parent.

AP affirmed HO, noting the Pennsylvania Public School Code of 1949 provides for the right to free school privileges based on residency. Questions pertaining to residency ordinarily are presented to the school board, with an aggrieved party having the right to appeal that decision to a court of common pleas. However, “where residency under state law is intertwined with the FAPE obligation under the IDEA,” hearing and appellate review officers have jurisdiction to resolve such matters. AP found it “very clear that all of the issues presented by the Parent related solely to whether Student is or was a resident of the District,” and concluded the HO properly determined he lacked jurisdiction to decide Student’s residency in this case, as unlike the authority cited by the Parent, there was no intertwining of residency with Student’s special education program, identification, evaluation, or placement, such that jurisdiction would lie in a special education due process forum. AP found no error or abuse of discretion in HO’s failure to accept as evidence the AP decisions referenced, as those opinions are readily available to HOs as well as the public, and, like court decisions, statutes, and regulations, may be relied upon in rendering a decision without formal introduction as an exhibit. Finally, AP found no basis to suggest that HO had any reason to recuse himself.

### **ODR #7228|06-07 | Opinion #1804**

#### ***In Re The Educational Assignment of a Student in the South Eastern School District, Before Debra Wallet, Esquire, Hearing Officer, January 24, 2007***

Daniel Fennick, Esquire – Parent Attorney  
Stephen Russell, Esquire – School District Attorney

Student, 14, ingested two prescription pills from fellow student and took two pills at home the following morning, knowing that pills were for friend’s ADHD. District suspended Student; one week following the incident family physician diagnosed Student with ADHD and prescribed medication, which significantly improved Student’s attention. One and one-half months later board of school directors held a hearing and, concluding the conduct was not a manifestation of Student’s ADHD, decided on expulsion for remainder of year for violating code of student conduct that prohibits being under the influence of /possession of drugs at school. Hearing held on questions of entitlement

to manifestation protections of IDEA 2004 (i.e. eligibility), and whether behaviors are a manifestation of disability or not. Parties agreed Student is entitled, at the least, to a Section 504 Service Plan.

District psychologist found consistent problems in paying attention in class and an inability to focus, and suggested specific methods of teaching mathematics and the chunking of assignments. HO found Student needed special education and related services for math and to deal with ADHD problems in the classroom, as history and psychologist’s observations supported eligibility, and psychologist’s recommendations were tantamount to special education and related services. HO found Student also possibly needed SDI to help cope with emotional difficulties and assist in developing appropriate behavior management. HO also found, impulsive or not, that the taking of medication to help Student concentrate had a “direct and substantial relationship” to the ADHD, using the test set forth in IDEA 2004, as Student recognized a problem with focus and concentration, discussed this problem with a classmate who offered medication designed to improve these same symptoms, and engaged in some self-medication in the hope of alleviating the problems. HO ordered Student immediately returned to school, with an IEP meeting to be convened as soon as possible.

### ***Special Education Opinion #1804***

#### ***In Re The Educational Assignment of a Student in the South Eastern School District, February 22, 2007***

Panel Members James Nevant, Joseph Rogan, Perry Zirkel  
Perry Zirkel – Appeal Author

AP found case’s difficult and special circumstances warranted a “restricted scope” rather than the two issues that the HO addressed in the decision, as Parents’ request for hearing was directly in the wake of and in relation to the expedited ER, thus “providing a fittingly narrow frame” for AP’s consideration. AP noted Congress made clear a parent may only assert the full IDEA protections for a child not determined to be eligible before the conduct violation only in three specified circumstances, which did not apply in this particular case, and, significantly, removed the fourth alternative, which was the HO’s de facto source of statutory support—“the behavior or performance of the child demonstrates the need for special education.” Also, in cases such as this one where these limited conditions do not apply but the Parent has made a request for an IDEA evaluation after the precipitating incident, Congress specifically provided two requirements—that “the evaluation shall be conducted in an expedited manner” and that stay-put does not apply during the completion of said expedited evaluation. AP found clear evidence that District complied with these carefully crafted IDEA provisions, and AP declined to venture into the “unsettled implicit territory beyond these narrow explicit boundaries” for various reasons: because AP has no authority to review issues under Section 504, which was the basis for the District’s manifestation



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determination; it is not at all clear whether Student needs special education at this time, in light of the purported beneficial effects of prescribed medication; and if the Student, on a more careful basis, is determined to qualify under the IDEA, intertwined issues also merit thorough consideration, including the new manifestation determination criteria, the optional interim alternate educational setting, the applicable stay-put, and the possibilities of FAPE and compensatory education.

Although AP declined to address these issues, parties were urged to “provide due deliberation and constructive collaboration” to resolve them. AP made clear that it had not determined whether the Student is eligible under the IDEA, thus not making this decision res judicata if either party found it necessary to initiate another hearing short of resolving these other, related, matters without further third-party intervention.

### **ODR #7117/06-07 | Opinion #1805**

#### ***In Re The Educational Assignment of a Student in the Grove City Area School District, Before David Lee, Hearing Officer, January 26, 2007***

Pamela Berger, Esquire – Parent Attorney  
Andy Evankovich, Esquire – School District Attorney

Student, 7, is autistic. Parent requested a hearing when District did not agree to provide an aide in the mini-van during 30-35 minute transportation to and from Student’s IU program, located in a neighboring district. HO considered the question whether Student required an aide in the mini-van.

Student has tantrums, which Parents said have been less frequent, that include self-injurious behaviors (hitting, rocking, biting, and head-slamming); exacerbation of self-injurious behavior resulted in psychiatric hospitalizations in late winter and early spring 2006, although there was no indication that hospitalizations were related to or caused by incidents on the mini-van. In October 2006, a 16-item daily van checklist developed by the parties was started. The driver, transporting Student since the beginning of the SY, did not express any concerns about having Student in the mini-van. Following adjustments of car seat strap in beginning of the SY, Student’s arms are not free. Aside from two specific incidents, there was no evidence to indicate Student was presenting consistent unmanageable self-injurious behavior during transport. HO found that Student’s current related service of transportation was appropriate to enable Student to benefit from special education, noting however that Student’s seating arrangement in the mini-van will most likely need to be modified over time with growth in size and weight, and that both parties need to continue to monitor safety needs.

### ***Special Education Opinion #1805***

#### ***In Re The Educational Assignment of a Student in the Grove City School District, March 8, 2007***

Panel Members Lorraine Heeter, James McAfee, Barry Smith  
Lorraine Heeter – Appeal Author

Parents filed a motion for acceptance of additional evidence, and exceptions to the HO’s decision, asserting the decision was not based on substantial evidence. District filed an Answer to parents’ exceptions and motion, requesting both be denied.

AP reviewed the entire record and considered the applicable legal principles, concluding that it was only empowered to rule on issues of IDEA and could not address potential liability and negligence issues and safety as argued by the Parents. Instead, AP was required to consider the issue within framework of IDEA and pertinent regulations. AP had to examine the issue of behavior on the bus and how that behavior impeded Student’s ability to benefit from the special education services Student received throughout the school day, as that is the test of a related service. As the related service of transportation in the IEP is listed as from door to door, Student’s school day begins when the Student is picked up from the front door until the Student is dropped off at the front door. The IEP includes a BP clearly spelling out behaviors of concern, and a variety of strategies to stop maladaptive and self-injurious behaviors. Each strategy requires at least one trained professional or paraprofessional to implement it. Noting research supports efficacy of consistency in applying a BP, AP noted that the plan had to be implemented when Student steps on the van and ends only when Student exits the van in the afternoon. Failure to implement the plan throughout the day will not allow the Student to derive meaningful benefit. The BP is an integral part of the IEP. Thus, Student requires not only transportation, but a specific type of transportation as a related service.

AP notes there is no BP for the van, as the checklist is not an intervention, and is not integrated with the intervention plan. AP was “at a loss as to how the driver is expected to drive and implement the interventions enumerated by the District.” Response to behavior needs to be immediate and consistent, not when the driver can find a safe place to pull off the road or wait until her next stop to respond to Student’s behavior. AP was unable to determine how the intervention plan crafted by the District can be implemented without a professional or paraprofessional present. Thus, AP reversed the decision of the HO and ordered District to implement the BP on the van using the services of a professional or paraprofessional, who is immediately available to the student(s) on the van. Based on the AP decision, Parents’ motion to accept additional evidence was denied.



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### **ODR #6924/06-07 | Opinion #1808**

#### ***In Re The Educational Assignment of a Student in the Palmyra Area School District, Before Joy Fleming, Esquire, Hearing Officer, February 5, 2007***

Amy Slody, Esquire – Parent Attorney  
Stephen Russell, Esquire – School District Attorney

Student, 9, in 4th grade, attends private school for learning disabled students, after spending kindergarten through 3rd grade in District. Parent alleged District did not retrospectively or prospectively adequately address ADHD, anxiety, S/L deficits, dysgraphia, and reading deficits, Student did not make adequate progress in math, and Student required ESY. Parent sought IEE, tuition and transportation reimbursement.

HO determined that District's IST process, the evaluation that determined no eligibility and the subsequent Section 504 Service Plan were appropriate for the first year considered. Likewise, HO determined that a second evaluation and three subsequent IEPs were appropriate, finding no denial of FAPE for the second year considered. Although the IEE played a crucial role in the development of subsequent programming, HO found Parent's case devoid of testimony or documentary evidence that their dissatisfaction with previous evaluation was communicated to the District, and denied reimbursement of the IEE. HO found the final IEP, which finished out the second year under consideration and was the offered IEP for the coming year, had some needs without corresponding goals and did not address ADHD through goals and objectives, and therefore, an appropriate award of compensatory education was owed, although overall the IEP provided FAPE. HO found no credible testimony or evidence supporting necessity for ESY. As the program and placement proposed by the District was appropriate with the exception of the lack of certain goals, tuition reimbursement was denied.

### **Special Education Opinion #1808**

#### ***In Re The Educational Assignment of a Student in the Palmyra Area School District, March 19, 2007***

Panel Members James Nevant, Joseph Rogan, Perry Zirkel  
Perry Zirkel – Appeal Author

AP addressed HO's findings that District did not deny Student FAPE for first of two years under consideration and did not deny FAPE for the second year with the exception of the lack of a goal to address Student's ADHD and other needs, and HO's subsequent order for limited compensatory education, denial of reimbursement for private school tuition, for an IEE, and for ESY.

AP found HO was correct that ESY reimbursement should be denied, and that there was no FAPE denial for the first year based on District's actual and constructive knowledge at the

time. AP agreed with HO's overall conclusion with regard to FAPE being provided for the second year, but did not agree that the IDEA requires, per se, a goal for every identified disability-related need, finding however that the compensatory education order equitably resolved the matter. The AP agreed that tuition reimbursement was not warranted given a generally appropriate offer of FAPE. AP agreed that IEE reimbursement was not warranted, but for partially different reasons from HO who based denial on lack of Parentally-expressed disagreement with ER, juxtaposing the Third Circuit's seeming square rejection of an automatic exclusion of IEE reimbursement based on the lack of disagreement alone, with the federal district court in Pennsylvania's having used this basis in at least two subsequent unpublished decisions to deny IEE reimbursement, and the Pennsylvania Commonwealth Court's similarly treating the notice of disagreement as a prerequisite for IEE reimbursement, with the further complication that in a decision subsequent to Warren G., the Third Circuit appeared to follow the Pennsylvania Commonwealth Court's approach. AP reasoned, "it may be that these seemingly conflicting decisions may be harmonized under the proposition that failure to express disagreement is relevant but not controlling as part of the equitable analysis for IEE reimbursement." AP observed that the amended ER seemed to be appropriate but noted "it is even less clearly settled whether the procedural requirement for the District to file a hearing for this purpose (defending appropriateness of ER) without unnecessary delay is an absolute essential or only an equitable factor," but found the reimbursement issue was resolvable at the next step, concerning the appropriateness of the IEE. AP concluded that the IEE fell below the general professional norms for an appropriate evaluation, as independent evaluator: cherry-picked the highest of the four major components of the WISC-IV, using the verbal comprehension index for the discrepancy analysis for math calculation, while the norm for this purpose is the full-scale IQ; ran an excessive number of discrepancy analyses, which further increased the risk of "false positives," whereas the IDEA only provides for eight areas for SLD eligibility; relied on the Parents for ADHD rating scales, whereas DSM-IV makes clear that the designation requires evidence in at least two domains; and applied IDEA's Rtl and S/L eligibility elements much more broadly than would be reasonably expected for an IEE specialist. AP noted that resolution of this issue was, as a matter of equities, closer than it would be otherwise, because, although the District was obligated to "consider" the IEE it gave it more weight than it objectively warranted and thus, it could be argued that the District should be stopped from denying reimbursement. AP concluded however, on balance, the ER, rather than the IEE, identified the Student's specific area of SLD and, to the extent the ER was deficient, the IEE did not satisfactorily remedy said deficiency.



## HEARING OFFICER DECISIONS/APPEAL FILED

### **ODR #5713/05-06 | Opinion #1700**

#### ***In Re The Educational Assignment of a Student in The School District of Philadelphia, Linda Valentini, Psy.D., Hearing Officer, January 15, 2006***

Frederick Stanczak, Esquire – Parent Attorney  
Kenneth Cooper, Esquire – School District Attorney

Student is 19 years old and graduated in June 2004. From kindergarten on, Student was deemed to be eligible due to learning disabilities. Parent alleged that Student has been denied FAPE, specifically in the areas of reading and math, during Student’s entire educational career. Parent also alleged an inappropriate transition plan caused detriment at the current time. Parent requested two years of compensatory education in accordance with IDEA 2004.

The IEP relevant to the timeframe at issue for compensatory education failed to confer meaningful educational benefit to Student in relation to Student’s potential. Present levels of educational functioning were too general to allow for meaningful goals and objectives to be written and did not begin to address Student’s severe deficits in reading and math. The projections for progress were not measurable and even if they were, the standard for achieving the objectives was unacceptably low. Regarding SDI, the IEP lacked provisions for structured programs in reading and math designed to teach these subjects to individuals with severe learning disabilities. The HO agreed with Parent about deficiencies regarding transition. Compensatory education was awarded.

### **Special Education Opinion #1700**

#### ***In Re The Educational Assignment of a Student in The School District of Philadelphia, February 21, 2006***

Panel Members Perry Zirkel, Joseph Rogan, Cathy Skidmore  
Perry Zirkel – Appeal Author

Parent filed exceptions, expressly limited to the appropriate limitation period to be applied to claims for compensatory education that arose before the effective date of IDEA 2004. The Panel reiterated its consistent application of Montour.

### **ODR #5713/05-06 | Opinion #1809 (Remand Decision)**

#### ***In Re The Educational Assignment of a Student in the School District of Philadelphia, Before Linda Valentini, Psy.D., Hearing Officer, February 11, 2007***

Frederick Stanczak, Esquire – Parent Attorney  
Kenneth Cooper, Esquire – School District Attorney

This remanded case concerns a learning disabled Student, age 20, identified in kindergarten and graduated from high school in

June 2004. Under a pre-IDEA filing date, Parent sought recovery for four high school years for denial of FAPE in reading, math and transition services. A January 2006 decision rendered under Montour awarded compensatory education only for the last 45 full days of senior year with no reduction for absences. Given the “magnitude” of FAPE denial, and the short period of recovery, the HO awarded a very generous amount of compensatory education (270 hours); the decision was upheld by the AP (#1700). The parties entered into a stipulated order for remand “to determine the entitlement, if any, of [Student] to compensatory education prior to April 6, 2004, as well as the nature and amount of any such compensatory education award.”

On remand, the HO found a denial of FAPE for 10th through 12th grades, considered the “more equitable recovery period of three and a half years” and while leaving the previous award intact, adjusted the additional award by applying a 60-day rectification period, limiting compensatory education to the estimated time for the particular services of reading instruction, mathematics instruction, and transition services, reduced days for absenteeism, and adjusted the award for 12th grade “to reflect the large amount of hours given for the portion of the year covered in the previous decision”, reducing what would have been the 12th grade award by 180 hours. The HO also ordered that the award be used for reading assessment and instruction, math assessment and instruction, and/or vocational training leading to post-secondary employment, and be used prior to Student’s 26th birthday, a period consistent with the time that typically developing peers acquire postsecondary education and training.

### **Special Education Opinion #1809 (Remand Decision) In Re The Educational Assignment of a Student in the School District of Philadelphia, April 2, 2007**

Panel Members Lorraine Heeter, Constance Lyttle, James McAfee  
James McAfee – Appeal Author

This case concerns an award of compensatory education in a pre-IDEA remand decision involving a 20-year-old high school graduate. The AP affirmed in part and reversed in part. The AP affirmed the adoption of a four-year period of potential recovery, as this period was originally requested by the Parent who only on appeal sought a twelve-year period of consideration. The AP reversed the redistribution of a previously awarded amount of compensatory education, given that “[a] decision by a due process hearing officer or an appellate panel is a final decision unless the decision is appealed 1 Pa Code §35.213, and given that the remand order of the Eastern District Court ordered the HO to limit her consideration to “entitlement ... to compensatory education for the period prior to April 6, 2004.” The AP held that both the finality provision of unappealed issues and the remand order expressly demarcated the HO’s remanded review to the period before April 2004 and that the HO erred when she “redistributed” the previously awarded and unchallenged hours of compensatory education for that period. Although the



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AP understood the HO's desire to examine "equities," finality provisions to the period before April 2004 defined her equitable considerations. The AP calculated the Student's compensatory education award for 12th grade from September to April 5th, using the HO's original formula, and ordered that this award be in addition to the previously awarded hours for 12th grade (April 6th through graduation in June). The AP also reversed the HO's application of a "reasonable rectification period" holding that the period began in 1993 as the findings of fact revealed a pattern of inappropriateness for many years before the high school experience.

### **ODR #7013|06-07 | Opinion #1810**

#### ***In Re The Educational Assignment of a Student in the Souderton Area School District, Before Kenneth Rose, Hearing Officer, February 19, 2007***

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

Student, 14, has SLD in reading, writing and math, as well as ADD. A prior hearing found denial of FAPE by inappropriate programming. AP upheld relevant portions of that HO decision, and ordered IEP meeting in 30 days. IEP meeting was held, but Parents rejected the IEP and the District placement. Parents placed Student in private school and requested tuition reimbursement, which was the issue for the current case.

HO found that IEP was comprehensive but failed to provide FAPE. The District did not test Student for purposes of the new IEP, and the present levels were 10 months old. As such, the present levels did not provide an objective starting point for the goals, rendering them not measurable. The HO rejected the District's argument that Student would be tested at the beginning of the SY, reminding the District that the previous IEP had been judged to deny FAPE because of vague and unmeasurable goals, noting, "To expect the parents to accept an IEP without measurable annual goals would be akin to asking them to buy a 'pig in a poke.' Without measurable annual goals you cannot know what progress is expected." HO found the Parents' unilateral placement appropriate, and that the equities favored the Parents, and thus awarded tuition reimbursement until an appropriate IEP was developed.

#### ***Special Education Opinion #1810, In Re The Educational Assignment of a Student in the Souderton Area School District, April 2007***

Panel Members Joseph Cautilli, Vincent Quinn, Michael McElligott  
Joseph Cautilli – Appeal Author

District appealed HO decision, alleging that HO exceeded the issues identified, wrongly placed burden of proof on the District, erred as a matter of law, violated the District's constitutional

and statutory rights, and produced findings of fact that were erroneous and prejudicially selective. District also opined that reimbursement, if any, should be based on proof of the actual out-of-pocket payment by the Parents.

The AP rejected the District's exceptions that the HO exceeded the issues and that he placed the burden of proof onto the District. The AP found evidence to support each of the HO's finding of fact and found that the IEP was "fatally flawed" for the reasons stated by the HO. Because the record supported the conclusion that Parents were committed to placing Student in the private school from the beginning of the summer 2006, AP found they were not considering the District's offer entirely in good faith, thus while not nullifying Parents' position or negating their right to tuition reimbursement, the equities favored the District and warranted a reduction in the amount of the tuition reimbursement award by 50%. Finally, AP noted that an administrative hearing is not the forum for constitutional issues, and thus the AP had no claim over this exception. By way of dicta, the AP however found no violation of the District's rights under IDEA as the record supported that the HO examined the evidence, including the testimony, and substantially discussed this body of evidence in the decision and did not put undue weight on previous rulings to prejudice the issues of the current appeal. The AP agreed that reimbursement should be for out-of-pocket expenses.



## LEGEND OF TERMS

ADD	Attention Deficit Disorder	RIC	Regional Intensive Coordinator
ADHD	Attention Deficit Hyperactivity Disorder	Rtl	Response to Intervention
AP	Appeals Panel	S/L	Speech/Language
APS	Approved Private School	SBBH	School-Based Behavioral Health
BEC	Basic Education Circular	SDI	Specially Designed Instruction
BIP	Behavior Intervention Plan	SLD	Specific Learning Disability
BMP	Behavior Management Plan	SY	School Year
BP	Behavior Plan	TBI	Traumatic Brain Injury
BPR	Behavior Performance Review	TSS	Therapeutic Support Services
BSC	Behavioral Specialist Consultant	WISC-IV	Wechsler Intelligence Scales for Children
CAP	Central Auditory Processing Disorder		
CASSP	Child and Adolescent Service System Program		
CBA	Curriculum-Based Assessment		
CE	Conductive Education		
CSAP	Comprehensive Student Assistance Program		
DPW	Department of Public Welfare		
EI	Early Intervention		
ER	Evaluation Report		
ES	Emotional Support		
ESOL	English for Speakers of Other Languages		
ESY	Extended School Year		
FAPE	Free Appropriate Public Education		
FERPA	Family Educational Rights and Privacy Act		
FBA	Functional Behavior Assessment		
GIEP	Gifted Individualized Education Program		
HO	Hearing Officer		
IDEA	Individuals with Disabilities Education Act		
IDT	Intensive Day Treatment		
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		
MH/MR	Mental Health/Mental Retardation		
NOREP	Notice of Recommended Educational Placement		
ODR	Office for Dispute Resolution		
OHI	Other Health Impairment		
OT	Occupational Therapy		
PDD-NOS	Pervasive Developmental Disorder Not Otherwise Specified		
PE	Physical Education		
PECS	Picture Exchange Communication System		
PELs	Present Education Levels		
PPRA	Pupil Rights Amendment Act		
PT	Physical Therapy		
PTE	Permission to Evaluate Form		