PENNSYLVANIA

Special Education Hearing Officer

Child's Name: R.M.

Date of Birth: xx/xx/xx

File Number: 8241-07-08 LS

Dates of Hearing: December 21, 2007; March 5, 2008;
March 12, 2008; April 30, 2008

CLOSED HEARING

Parties to the Hearing:	Representative:	Date Transcript Received:
		May 8, 2008
Mrs.	Frederick Stanczak, Esq. 170 North Broad Street Doylestown, PA 18901	Date of Decision:[1] June 2, 2008
Palmerton Area School District 3533 Fireline Road Palmerton, PA 18071	Andrew Faust, Esq. Sweet Stevens Katz & Williams P.O. Box 5069 New Britain, PA 18901	Date Parent's Brief Received: May 21, 2008[2]
		Date District's Brief Received: May 17, 2008 [3]
		Hearing Officer's Name: Gregory J. Smith

[1] The record was kept open until receipt of the final transcript and closing briefs from both parties. On May 21, 2008 the record was closed. This decision was rendered within 15 days after the closing of the record following the receipt of the transcript and closing briefs from both parties.

[2] The parent's closing brief was dated and sent as an e-mail attachment on May 16, 2008. On May 19, 2008 a corrected copy of the parent's closing brief was sent to this hearing officer via regular mail. The parent's corrected closing brief was received on May 21, 2008.

[3] The District's closing brief was originally dated and sent as an e-mail attachment on May 15, 2008. A corrected copy of the closing brief was dated and sent as an e-mail attachment to this hearing officer on May 17, 2008.

Background

Student is a xx-year-old student who resides with her mother in the Palmerton Area School District (District). Student is eligible for special education and related services as a child with a disability. Student has a history of school phobia and anxiety related to school attendance, emotional difficulties, and learning difficulties in reading, written expression, and math. Student has been the subject of three prior due process hearings, all completed in 2005. One result of those hearings was that the District was ordered to provide Student with instruction in the home. After spending part of the 2006 – 2007 school year at a private school in California, Student returned home in April 2007. Since April 2007 Student has attended school only briefly.

Student's mother requested the present due process hearing to address two issues: Must the District provide Student with instruction in the home? And, must the District provide Student with compensatory education? At the present hearing the parties agreed to have one issue raised by the District heard at this hearing: May the District complete a psychoeducational reevaluation of Student?

Findings of Fact

1. Student is a xx-year-old (d.o.b. xx/xx/xx) student who resides with her mother within the area served by the Palmerton Area School District (District). (N.T. at 57; S-1)

2. Student is eligible for special education and related services as a child with a disability. Student has a history of school phobia and anxiety related to school attendance, emotional difficulties, and learning difficulties in reading, written expression, and math. (N.T. at 183-184, 378, 485-486, 488, 588-589; P-1, P-2, P-3, P-4)

3. Student has been the subject of three prior due process hearings completed in 2005. One result of those decisions was that the District was ordered to provide Student with instruction in the home. (N.T. at 385-386; P-1, P-2, P-3)

4. After multiple meetings lasting over one year, on October 5, 2006 an individualized educational program (IEP) was developed. The IEP included a plan to gradually reintegrate Student into the school program; a behavior support plan; goals, objectives, program modifications, and specially designed instruction addressing self-esteem, anxiety, school attendance, reading, written expression, math, independent work, career objectives, and organization related to long term or complex assignments; and transition services. The placement proposed in the IEP was a part-time learning support placement. (N.T. at 75, 121, 389-393, 471-478; S-1)

5. On October 11, 2006 a notice of recommended educational placement (NOREP) was produced which called for the program proposed in the October 5, 2006 IEP to be implemented in "part-time learning support with phased transition to in-school programming…" S-1 at 1 (N.T. at 73-75; S-1)

6. On October 12, 2006 Student's mother disapproved of the NOREP and requested a due process hearing. (N.T. at 393; S-1)

7. During the fall 2006, Student and her mother, while browsing on the internet, identified the Academy [redacted], located in [redacted town, redacted state], as a potential placement. Student's mother proposed that placement to the District. (N.T. at 81, 83, 162, 395, 537-538)

8. The Academy is a school designed to serve the behavioral and emotional needs of adolescents who have difficulty controlling their weight. The Academy is not designed to address students' specific learning challenges. (N.T. at 316-317, 323, 394-395)

9. Student's mother never visited the Academy. (N.T. at 86, 163-164)

10. On November 21, 2006 the parties signed a settlement agreement resolving all claims up to that point in time. That agreement included, among other things, the following components: (N.T. at 84, 173-174, 394; S-2)

A. The District would pay for Student's placement at the Academy or another private school placement chosen by Student's mother, for the remainder of the 2006-2007 school year through until either Student received a high school diploma or until the conclusion of the 2008-2009 school year, whichever was sooner. (S-2)

B. If Student were to be discharged from, or withdrawn from the Academy and Student's mother was to seek public school services from the District, the District would be notified within 10 days of Student's discharge or withdrawal. (S-2)

C. Within 10 school days, or 20 calendar days, whichever came sooner, after being notified of Student's discharge or withdrawal, an IEP team would be convened and an interim IEP would be developed "that describes an interim program and placement for the student to be implemented pending completion of (a) reevaluation." S-2 at 4

D. Once notified of Student's discharge or withdrawal, the District would complete a multidisciplinary team reevaluation within 30 days. That reevaluation would consist of:

> (1) norm- or criterion-referenced assessments of academic skills and knowledge; (2) curriculum-based assessment or measurement of reading, written language, and math; (3) review of progress reports, work samples, and other documentation from Academy establishing the present levels of educational performance of the student; (4) observation of the student in the current educational environment, if possible; (5) interview of an consultation with Academy or other private school staff who have worked directly with the student; (6) teacher, parents, and student-informed rating scales; and (7) functional behavioral assessment, if consultation with teaching staff indicates the presence of behaviors that have interfered or might interfere with the learning of the student or others. S-2 at 4

E. Student's mother would cooperate with the multidisciplinary team reevaluation and would provide any consent required. (S-2)

F. An IEP team meeting would be scheduled within 30 days of completion of the reevaluation. (S-2)

G. If Student's mother and the District were unable to agree upon a program or placement for Student:

> the obligation of the District under state or federal law to maintain the 'then-current educational placement' of the student pending the outcome of any due process proceedings will be satisfied in full either (a) by the completion of a multidisciplinary team evaluation and report in accordance with paragraph 5 of this agreement and by the completion of a program and placement as described in an IEP and interim IEP developed in accordance with and with the time required by that paragraph; or (b) if the parent does not reenroll the student in the District, by the offer to implement a program and placement so developed. S-2 at 3

11. On November 28, 2007, Student flew by herself to the Academy, where she attended school until April 2008. The District paid for Student's tuition and expenses to attend the Academy, including transportation. (N.T. at 84-87, 90, 164, 293-294, 396)

12. Student showed good adjustment to the Academy. (N.T. at 262-263, 304-305, 538; S-17)

13. Student did well academically while enrolled at the Academy. (N.T. at 87-88, 113, 176-177, 263, 301-302, 435-436, 539-540; S-17)

14. After about three months at the Academy, Student contacted her mother and asked to come home. The reasons Student gave her mother were that friends she had made were leaving, there were new students arriving, and the school had changed some of its rules. (N.T. at 91-92, 178)

15. On April 3, 2008 Student returned home from the Academy. On April 11, 2008 Student's mother, through her legal counsel, informed the District that Student had returned home from the Academy. (N.T. at 90, 103, 106-107, 396, 399; P-6)

16. On April 23, 2008 an IEP team meeting was held and an interim IEP was developed. Student's mother was not in attendance at that IEP team meeting. (N.T. at 111, 401; S-3)

17. The April 23, 2007 interim IEP included goals, objectives, program modifications, and specially designed instruction addressing self-esteem, anxiety, school attendance, reading, written expression, math, independent work, career objectives, and organization related to long term or complex assignments. It also included transition services. The IEP did not include a plan to gradually reintegrate Student into the school program or a behavior support plan. The placement proposed in the IEP was a part-time learning support placement for language arts and math. (N.T. at 114-115, 119-121, 386-388, 401-403, 48-489, 523-524; S-3)

18. On April 23, 2007 a NOREP was produced which called for the program proposed in the April 23, 2007 IEP to be implemented in a part-time learning support placement. (N.T. at 112, 119; S-3)

19. On April 26, 2007 Student's mother disapproved of the NOREP and requested mediation. (N.T. at 112-113, 492; S-3)

20. On May 2, 2008 Student's mother proposed amending the interim IEP to replace instruction in the learning support classroom with regular education instruction supported by tutoring and counseling. (N.T. at 130-132; P-7)

21. Following Student's return from the Academy, the District attempted to complete a reevaluation of Student In response, Student's mother failed to return a release of records, asked the District to provide an outline of the proposed reevaluation, and asked the District to provide a rationale for completing a reevaluation at that time. Student's mother did not make Student available for the reevaluation. (N.T. at 382, 413-414; S-5)

22. Student did not attend school, nor did she participate in the scheduled reevaluation, between her return home from the Academy in April 2007 and the end of the 2007 – 2008 school year. (N.T. at 122-123, 404, 414)

23. During the summer of 2007 Student attended a weight loss camp in [state redacted]. (N.T. at 123, 552)

24. Student began to attend school again four days after the start of the 2007 – 2008 school year. At that time the April 23, 2007 interim IEP was implemented. For the first several days Student attended as scheduled. After a few days she began to attend school late, asked to leave early, and/or did not attend school. In October 2007 Student only attended school for three days. From October 2007 through to the present hearing, Student did not attend school. (N.T. at 125-128, 135, 211-213, 404-406, 414, 494-495, 537, 553)

25. On October 3, 2007 an IEP team meeting was held where the April 23, 2007 interim IEP was revised so that Student would attend English in a regular education class rather than in learning support. (N.T. at 417-419, 427-429; P-8, S-8)

26. On October 26, 2007 Student's mother rejected the October 3, 2007 IEP and requested the present due process hearing. (S-8)

27. In October 2007, about two weeks after she stopped attending school, Student attended the Homecoming dance. (N.T. at 139-140, 221-222, 559-560)

28. During the fall 2007 Student attended District football games. (N.T. at 574)

29. Through the fall 2007 the District made repeated attempts to complete a reevaluation, but those attempts were not successful. (N.T. at 420-425; S-7, S-8, S-10, S-11, S-12, S-13)

30. On December 4, 2007 a privately obtained psychiatric evaluation was completed. The psychiatrist interviewed Student and her mother, but did not contact the District for input into the evaluation. The recommendation made by the psychiatrist was that Student be placed in "an acute partial hospitalization program" (P-5 at 3) to address her school phobia and avoidance behavior. The psychiatrist also recommended that Student begin to take anti-anxiety medication. (N.T. at 142-143, 222-224; P-5)

31. Student's mother requested the present hearing to address two issues: Must the District provide Student with instruction in the home? Must the District provide Student with compensatory education? (N.T. at 23-30, 47-48, 251-252)

32. At the present hearing the parties agreed to have one issue raised by the District heard at this hearing: May the District complete a psychoeducational educational reevaluation of Student? (N.T. at 40-43, 48-49, 251-252)

33. The first session of the present hearing was held on December 21, 2007. That hearing session and all subsequent hearing sessions were held in the board room of the District administrative offices, attached to the District's high school building. (N.T. at 1, 15, 224-225, 246, 445)

34. December 21, 2007 was a school day with students in attendance at the District's high school. (N.T. at 282)

35. Student attended the first session of the present hearing along with her mother. (N.T. at 5, 226)

36. At the first session of the present hearing, the parties agreed that the multidisciplinary reevaluation that had been agreed to as part of the November 21, 2006 agreement would be completed during January 2008. After Student met with the school psychologist to discuss the evaluation, it was agreed that the evaluation would be completed in the District administration building on January 7, 10, and 15, 2008. The parties also agreed that if either party believed that a due process hearing was still required they would contact the hearing officer and request that the present hearing proceed. (N.T. at 7-11, 19, 226-227, 257-258, 282-284, 350-351)

37. On January 15, 2008 the District notified this hearing officer that it was unable to complete an evaluation and requested that the hearing proceed. (N.T. at 19-20)

38. Following the District's request to proceed with the hearing, hearing sessions were held on March 5, 2008, March 12, 2008, and April 30, 2008. Student attended and testified at the April 30, 2008 hearing session. April 30, 2008 was a school day with students in attendance at the District's high school. (N.T. at 13, 246, 445, 534-536)

Issues

Must the Palmerton Area School District provide Student with instruction in the home?

Must the Palmerton Area School District provide Student with compensatory education?

May the Palmerton Area School District complete a psychoeducational reevaluation of Student?

Discussion

The present dispute is one dispute [Fact 30] in a long line of disputes between the parties. [Facts 3, 6, 10, 19] Given that history, it is not surprising that there was much in dispute at the present hearing. Evidence was presented regarding prior IEPs and/or interim IEPs, [Facts 4, 17, 25] as well as other matters that apparently remain in dispute. However, the parties did not ask this hearing officer to rule on the appropriateness of previously proposed IEPs or interim IEPs, nor did they ask him to resolve all of their other disputes. What they did ask was that this hearing officer address three relatively narrow issues: 1) Must the District provide Student with instruction in the home? [Fact 31] 2) Must the District provide Student with compensatory education? [Fact 31] 3) May the District complete a psychoeducational reevaluation of Student? [Fact 32]

Because hearing officers are not empowered to address issues that have not been raised at the hearing and because hearing officers cannot provide relief that the parties have not sought at the hearing, (see *In Re the Educational Assignment of B.Y.*, Spec. Educ. Op. 1807 (2007)) this hearing officer will confine the current decision to the specific issues raised at the present hearing and will not expand this decision to attempt to resolve all the disputes that apparently remain between the parties, including the appropriateness of previous IEPs and interim IEPs.

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

In the present matter Student's mother sought instruction in the home, claiming that was the only way for her daughter to receive a FAPE, [Fact 31] and requested compensatory education for the District's failure to provide a FAPE since the time her daughter returned to the District in April 2007. [Facts 15, 31] The Supreme Court has held that the "burden of proof in an administrative hearing… is properly placed upon the party seeking relief..." *Schaffer v. Weast*, 126 S.Ct. 528, 537 (2005) In so doing the Court found no reason to depart from "the ordinary default rule that plaintiffs bear the risk of failing to prove their claims." *Id* at 534

The *Schaffer* decision by the Supreme Court effectively settled a split, present in the Circuit Courts, in assigning the burden of proof. As noted in *M.S. v. Ramsey Bd. of Educ*, 435 F.3d 384 (3rd Cir. 2006) the Third Circuit

Court had previously placed the burden of proof on the school district. However, in *M.S. v. Ramsey* the Third Circuit Court found *Schaffer* controlling and extended the reach of *Schaffer* writing "It would be unreasonable for us to limit that holding to a single aspect of an IEP, where the question framed by the Court, and the answer it provided, do not so constrict the reach of its decision." at 5 Shortly after the Third Circuit issued its decision in *M.S. v. Ramsey*, the Eastern District Court of Pennsylvania issued a decision in *Greenwood v. Wissahickon*, 2006 U.S. Dist. LEXIS 4274 (E.D. Pa. 2006) concluding that "the burden of persuasion at the administrative level in Pennsylvania is now on the party contesting the IEP." at 7

Although the scenario in *Schaffer* was one where the facts in evidence were *in equipoise*, or, as the Court phrased it the question of "which party loses if the evidence is closely balanced" (*Schaffer* at 533-534), the Court's holding was not so limited. *J.N. v. Pittsburgh City School District*, 2008 U.S. Dist. LEXIS _____ (W.D. Pa. 2008)

Because it was Student's mother who sought instruction in the home and compensatory education, it is Student's mother who carries the burden of proof on those two issues. The third issue, that of may the District complete a reevaluation, was raised by the District. [Fact 32] In *Schaffer* the Supreme Court held that the burden of proof, discussed above, "applies with equal effect to school districts." Therefore, because it was the District that sought the reevaluation, the burden of proof will fall on the District for that issue.

Must the Palmerton Area School District provide Student with instruction in the home?

Student's mother's request that Student be provided with instruction in the home must be denied for the following reasons: first, instruction in the home is a specific placement and placement determinations can only be made after a program has been decided on, and second, Student's mother failed to meet her burden of proof to establish that instruction in the home was an appropriate placement for Student

Instruction in the home is one of several possible placements for students that fall along a continuum of alternative placements. 34 CFR §300.115(b)(1) Under 34 CFR §300.116(b)(2) placement decisions must be made "based on the child's IEP." In other words, the creation of an appropriate program (i.e., the development of an appropriate IEP) must be completed first, before the determination of where that program will be implemented (i.e., the placement). In the present matter there is no agreement as to what is an appropriate program. IEPs and/or interim IEPs were offered in fall 2006, spring 2007, and fall 2007. [Facts 4, 5, 17, 18, 25] Student's mother rejected all of those IEPs. [Facts 6, 19, 26] Because, as noted above, this hearing officer cannot consider issues that were not raised at the due process hearing (*In Re the Educational Assignment of B.Y.*, Spec. Educ. Op. 1807 (2007)), and because this hearing officer was not asked to hear the issue of what is an appropriate program for Student, [Facts 31, 32] this hearing officer cannot now rule on the question of an appropriate program for Student Because the parties remain in dispute over what is an appropriate program for Student, [Facts 6, 19, 26] because this hearing officer has not been asked to resolve the question of what is an appropriate program for Student, and because a decision about placement can only be made after a program has either been agreed to or a decision is issued delineating what is an appropriate program, this hearing officer cannot make a determination as to whether or not instruction in the home is appropriate for Student

Even if the above were not the case, Student's mother would not prevail on this issue because she failed to carry the burden of proof in this matter. There was certainly evidence presented that Student has anxiety related to school attendance and there was evidence presented that in the past the District was required to provide instruction in the home, but there was nothing presented that showed that instruction in the home was currently an appropriate placement for Student In fact, the most recent professional recommendation, which Student's mother obtained from a private psychiatrist in December 2007, was that the appropriate placement for Student is a partial hospitalization placement. [Fact 30] Although the District objected to that report on hearsay grounds, because it was the parent's exhibit and because it so clearly recommends that a placement other than instruction in the home is what Student requires, this hearing officer gave that recommendation due weight.

Even if in the past Student's school anxiety made instruction in the home an appropriate placement, the evidence at the present hearing, taken as a whole, suggests that Student's school anxiety may be different now than it was in the past. For example, Student was able to travel alone to California to attend the Academy, a private school that she and her mother had found on the internet and had actually never visited, she adjusted well to that school, and she did well academically even though the school was not designed to address learning difficulties. [Facts 7, 11, 12, 13] After about three months things changed at the Academy, old friends left, new students started to attend, and the school imposed new rules characterized by Student as "punishing all of us for some people's mistakes." N.T. at 542 [Fact 14] As a result, Student asked to come home. [Fact 14] It was striking in both the testimony of Student and her mother that the primary reasons for Student's wanting to return home were because of the changes at the Academy, not because of school anxiety.

Once she did return home in April 2007, Student did not attend school. [Fact 22] In her testimony Student stated that she did not attend school at that time because she believed that she would be placed in an all day learning support classroom and that she "didn't want to do that." N.T. at 576-577 Noteworthy in her testimony was that she did not say that she could not attend school because of her anxiety, only that she didn't want to because of the learning support placement. Student's mother confirmed her daughter's report that the reason she did not attend school at that point in time was Student's dislike for the learning support placement. see N.T. at 113

Similarly, although it was claimed at the hearing that Student could not be at school, or even the administration building adjacent to the high school, when other students were present, Student was able to attend football games, the Homecoming dance, and this hearing on two occasions when school was in session. [Facts 27, 28, 35, 38] During Student's testimony on April 30, 2008 students were passing by windows that Student was facing as she gave her testimony. Student showed no change in affect, demeanor, or behavior during that part of her testimony.

Given the above, it appears to this hearing officer that Student' school anxiety or the expression of that anxiety may have changed over time. Whether or not that change would affect the appropriateness of instruction in the home as a placement for Student is an open question. However, neither these aspects of the record nor any other aspect of the record support or establish that instruction in the home is an appropriate placement for Student at this time.

In summary, because the determination of an appropriate placement can only be made based on the program for the student and because a program for Student has neither been agreed to by the parties nor ordered by a hearing officer, appellate panel, or court, the appropriateness of any placement, including instruction in the home, cannot be determined at the present time. In addition, the record, read as a whole, does not establish that instruction in the home is an appropriate placement for Student at the present time. Given these conclusions, the District cannot and will not be required to provide Student with instruction in the home.

Must the Palmerton Area School District provide Student with compensatory education?

Student's mother has sought compensatory education for the period of time starting when Student returned from the Academy in April 2007 through until an appropriate program is provided to Student

A student is entitled to compensatory education services if the student is an eligible student; is in need of special education, related services, and/or accommodations; and, if through some action or inaction of the District, the student was denied FAPE. *Lester H. v. Gilhool*, 916 F. 2d 865 (3d Cir. 1990), *cert. denied* 499 U.S. 923, 111 S.Ct. 317 (1991); see also *M.C. v. Central Regional School District*, 81 F. 3d 389, (3d Cir. 1996)

In the present matter, the procedures by which a program would be developed and FAPE would be offered if Student were to return from the Academy were established through a settlement agreement the parties entered into on November 21, 2006. [Fact 10] That settlement agreement called for an interim IEP to be developed

within 10 school days, or 20 calendar days, whichever came sooner, of the District being notified of Student's return, the completion of a reevaluation within 30 days of that notification, and the completion of an IEP within 30 days of the completion of the reevaluation. [Fact 10] With Student's return in early April 2007, all of those steps should have been completed by the end of the 2006 – 2007 school year. They were not.

The District upheld its end of the November 21, 2006 settlement agreement. It paid for Student's attendance at the Academy, [Fact 11] it developed an interim IEP within the required timeline, [Fact 23] and it attempted to complete the reevaluation. [Fact 21] On the other hand, after taking advantage of the parts of the settlement agreement that called for the District to expend a considerable amount of money for Student to attend the Academy, upon Student's return Student's mother became uncooperative. Even though the settlement agreement spelled out the specific terms for a reevaluation if Student were to return from the Academy and although the settlement agreement required Student's mother to cooperate with the reevaluation and to provide consent if needed, [Fact 10] when contacted about the reevaluation she failed to return a release of records, she asked the District to provide an outline of the revaluation, she asked the District to provide a rationale for the reevaluation, and she did not make Student available for the reevaluation. [Fact 21]

While there was clearly a dispute regarding the timing of the interim IEP team meeting and whether or not Student's mother would be able to be present, that procedural dispute was minor. If the agreement had been followed by Student's mother, the interim IEP would have only been in effect for approximately six weeks and a new IEP would have been developed by the end of that school year. Instead, Student did not participate in the reevaluation and did not attend school for the remainder of the 2006 – 2007 school year. [Fact 22]

With the start of the school year, Student did begin to attend school, [Fact 24] but her mother continued to argue with the District over what was to be merely an interim IEP and also argued over the already agreed to reevaluation. Ultimately, in spite of repeated attempts by the District to complete the reevaluation, [Fact 29] no evaluation has been completed and Student has not attended school since October 2007. [Facts 24, 29, 37, 38] The blame for all of that must fall squarely on Student's mother's shoulders.

After having reaped the benefits of the settlement agreement, Student's mother cannot selectively ignore and/or actively work against other aspects of the settlement agreement, or pretend that the settlement agreement ceased to exist upon her daughters return from the Academy. It is the determination of this hearing officer that the actions of Student's mother amounted to unreasonable obstruction of the agreed to process for the provision of FAPE to her daughter, much like the parents' actions in *C.G. ex rel. A.S. v. Five Town Community School*, 513 F.3d 279 (1st Cir. 2008). As noted by the Court in *Five Town*, the parents' "unreasonable obstruction of an otherwise promising IEP process fully justifies a denial of reimbursement under the IDEA." at 288 Similarly, Student's mother's unreasonable obstruction of an otherwise promising IEP process, agreed to in the November 21, 2006 settlement agreement, fully justifies the denial of compensatory education under the IDEA.

Even if Student's mother had not obstructed the process, and even if Student had been found to be entitled to compensatory education, Student's mother failed to carry her burden of proof to show what that compensatory education should consist of. Because of that, even if compensatory education was warranted, and, as noted above, it is not, it would be impossible for this hearing officer to fashion an award of compensatory education.

In Pennsylvania the standard for an award of compensatory education, once a deprivation of FAPE is found, is one focused on what it will take to bring the student to the point he or she should have been if not for the deprivation of FAPE. *B.C. v. Penn Manor,* 906 A.2d 642 (Pa. Comwlth. 2006) That is in contrast with decisions by some appellate panels and some courts that have focused the award of compensatory education on the period of deprivation. In *B.C.* the Commonwealth Court developed the following standard for determining the amount of compensatory education to be awarded:

> We find the Ninth and the District of Columbia's Circuits' standard more persuasive and workable than that of the Third Circuit, as it tailors the equitable award of compensatory education to the particular student's needs, which a one-for-one standard fails to do. Hence, we reject Student's

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

In the present matter, Student's mother failed to carry her burden of proof to present evidence that would allow the *B.C.* Court's standard to be applied. There is nothing in the record that establishes where Student is currently functioning, where she should be functioning, or where she might have been functioning if not for the alleged denial of FAPE. Because of that, there is no basis on which this hearing officer could have fashioned an award of compensatory education even if he had determined one was required.

Because it was Student's mother's obstruction of the agreed to process for the completion of a reevaluation leading to the development of an IEP that resulted in the reevaluation not being completed and the question of the IEP not being resolved, because a parent's obstruction cannot then result in a decision in the parent's favor, and because no evidence was presented that would allow this hearing officer to fashion an award of compensatory education, even if one was warranted, the District will not be required to provide Student with compensatory education.

May the Palmerton Area School District complete an psychoeducational reevaluation of Student?

At the present hearing the District requested permission to complete the reevaluation that was part of the November 21, 2006 settlement agreement between the parties. As noted above, because it was the District that raised this issue, it is the District that has the burden of proof on this issue.

Central in deciding this issue is the question of whether or not agreements between the parties are enforceable in due process proceedings. In *In Re the Educational Assignment of C. G.,* Spec. Educ. Op. 1816 (2007) the Appeals Panel concluded that it had jurisdiction over settlement agreements, writing:

> We reviewed the settlement agreement which was admitted as an exhibit in this proceeding. The Panel, in general, clearly has jurisdiction to determine whether a settlement agreement has been implemented. (In Re: The Educational Assignment of B.B., Special Education Opinion No. 1484 (5-10-04); In Re: The Educational Assignment of C.T., Special Education Opinion No. 1505 (7-16-04); In Re: The Educational Assignment of S.K., Special Education Opinion No. 1769) (9-21-06)). at 3, 4

Earlier, the Appeals Panel in *In Re the Educational Assignment of R.B.*, Spec. Educ. Op. 1802 (2007), emphasized the contractual nature of and important role that settlement agreements play when it wrote:

> The Hearing Officer correctly interpreted the significance of the settlement agreement and the terms and provisions contained in that agreement in making his decision. The settlement agreement is viewed as a contract and public policy favors such agreements, which serve, as this one did, to resolve disputes between parties amicably. (See, D.R. v. East Brunswick Board of Education, 109 F. 3d 896 (3rd Cir. 1997); In Re: The Educational Assignment of B.B., Special Education Opinion No. 1484 (2004)). In looking at the totality of the circumstances surrounding the execution of the settlement agreement, pursuant to W.B. v. Matula, 67 F. 3d 484 (3rd Cir. 1995), and Special Education Opinion No. 1484, we note that the agreement is well drafted and the terms and provisions are 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, as the District pointed out, Parents already benefited from certain provisions of the agreement (e.g., a compensatory education fund and payment of counsel fees). This is not a case in which the playing field was one-sided or there was unfairness. To the contrary, there were two parties participating in a give and take negotiation and resolution process.
>
> Furthermore, it is clear that pursuant to the settlement agreement (see, paragraph 3 of the agreement), the District is not required to fund any placement other than the particular 60/40 (or 4010) placement that the agreement specifies. The placement the Parents chose is not the placement specified in the agreement, despite whatever argument the Parents chose to make during these proceedings (i.e., that the District would be paying the same amount of money the state would be paying and that Parents would be stepping into the shoes of the state with regard to payment). at 6 – 7

From the above it is clear that in most cases a hearing officer (and the appeals panels) has jurisdiction over issues of implementation and enforcement of settlement agreements. However, there are two exceptions: In the implementing Regulations to the IDEA, the enforceability of mediation agreements is left to a "State court of competent jurisdiction or in a district court of the United States." 34 C.F.R. § 300.506(b)(7) Likewise, written settlement agreements from a resolution meeting are enforceable by a "State court of competent jurisdiction or in a district court of the United States." 34 C.F.R. § 300.510(d)(2) That section of the Regulations goes on to state "or, by the SEA, if the State has other mechanisms or procedures that permit parties to seek enforcement of resolution agreements." 34 C.F.R. § 300.510(d)(2) To date, Pennsylvania has not established any alternative means of enforcement of resolution agreements. In a discussion of the Regulations published in the Federal Register, Vol. 71, No. 156, at 46703 the Federal Department of Education made it clear that the addition of the section on other enforcement mechanisms was added to the Regulations to allow states to offer other resolution mechanisms (including the due process complaint procedure) to enforce mediation and resolution agreements. But, the Regulations do not require this. Until Pennsylvania enacts legislation or promulgates regulations that allow due process procedures to be used to enforce settlement agreements reached in mediation or during a resolution meeting, a hearing officer does not have jurisdiction over those types of settlement agreements.

Because in the present matter there is no evidence that the settlement agreement was developed through the mediation process or in a resolution meeting, the issue of enforcement of the November 21, 2006 settlement agreement between Student's mother and the District is within the jurisdiction of this hearing officer.

As noted above, Student's mother took advantage of the November 21, 2006 settlement agreement when it was advantageous to her and her daughter. [Fact 11] Once Student returned from the Academy, Student's mother stopped cooperating with the implementation of the settlement agreement, [Facts 21, 22, 29] part of which was that a reevaluation would be completed within 30 days of Student's return from the Academy. [Fact 10]

Because the parties entered into a settlement agreement that called for a reevaluation if Student were to return from the Academy, [Fact 10] because the District fulfilled its commitments under the settlement agreement, [Facts 11, 16, 21] and because settlement agreements are enforceable by a due process hearing officer, it is the conclusion of this hearing officer that the District may complete the reevaluation called for in the November 21, 2006 settlement agreement

Accordingly we make the following:

ORDER

The Palmerton Area School District is not required to provide Student with instruction in the home.

The Palmerton Area School District is not required to provide Student with compensatory education.

The Palmerton Area School District may complete the psychoeducational reevaluation of Student

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Signature of Hearing Officer