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PENNSYLVANIA

## Special Education Hearing Officer

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Child's Name: Student

Date of Birth: xx/xx/xx

File Number: 8052-07-08 KE

Dates of Hearing: November 2, 2007; November 30, 2007

CLOSED HEARING

Parties to the Hearing:

Mr. and Mrs.

Souderton Area School District  
760 Lower Road  
Souderton, PA 18964-2311

Representative:

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Date Transcript Received:

December 6, 2007

Date of Decision:<sup>1</sup>

January 15, 2008

Date Parent's Brief Received:

January 2, 2008

Date District's Brief Received:

January 2, 2008

Hearing Officer's Name:

Gregory J. Smith

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<sup>1</sup> The record was kept open until receipt of the final transcript and closing briefs from both parties. On January 2, 2008 the record was closed. This decision was rendered within 13 days after the closing of the record following the receipt of the closing briefs from both parties.

## **Background**

Student is a xx-year-old student who resides with her parents within the area served by the Souderton Area School District (District). Student is eligible for special education and related services as a child with a disability who has been identified as having a specific learning disability in the areas of reading, reading comprehension, written expression, and math. From the fourth grade through the completion of ninth grade in June 2007 Student attended the Private School, a private placement paid for by the District. During the spring 2007 the District completed an evaluation of Student in anticipation of her return to the District. On June 19, 2007 an IEP was offered to Student's parents. On August 23, 2007 Student's parents filed a complaint with the District and requested the present due process hearing seeking reimbursement for Student's parents' unilateral placement of Student at the Private High School for the 2007 – 2008 school year. Student began to attend 9<sup>th</sup> grade at Private High School at the end of August 2007.

## **Findings of Fact**

1. Student is a xx-year-old (d.o.b. xx/xx/xx) student who resides with her parents within the area served by the Souderton Area School District (District). (P-7, S-11)
2. Student is eligible for special education and related services as a child with a disability who has been identified as having a specific learning disability in the areas of reading, reading comprehension, written expression, and math. (N.T. at 191-192; P-7, S-11)
3. In 2000 an independent educational evaluation (IEE) was completed by Dr. S, a licensed psychologist and certified school psychologist. Dr. S concluded that Student "had a severe reading disability, as well as a disorder of written expression." P-6 at 2 Dr. S also concluded that Student met the criteria for ADHD – Primarily Inattentive Type and recommended medication to address her impaired attention. (P-6, S-28)
4. From the 4th grade, the 2001 – 2002 school year, through the completion of 9th grade, the 2006 – 2007 school year, Student attended the Private School, a private placement paid for by the District. (N.T. at 40-42, 143, 149-150, 163, 233, 247, 254; P-1, P-5, P-7, S-11, S-24, S-30, S-31, S-35)
5. While at the Private School Student received individual supports including teacher direction and support, repetition of material, frequent review, use of graphic organizers and rubrics on writing projects, multi-modal and multi-sensory instruction, peer tutoring, the use of a daily planner, the use of a laptop in classrooms, extended time for testing, breaking assignments into manageable tasks, and individual learning plans. Her instruction in reading was in the Wilson Reading Program and in math in the Saxon Math program. Student's classes had a low student-teacher ratio. Early in her career at the Private School Student received speech and language services, but those services were discontinued in June 2004 when they were no longer needed. (N.T. at 40-45, 148-149, 244-245; P-5, S-35)
6. In June 2004, at the end of Student's 6<sup>th</sup> grade year at the Private School, the District agreed to pay for an IEE completed by Dr. S. Dr. S. interviewed Student and her parents, reviewed available records, and completed testing consisting of 19 measures, completed over two days, that assessed cognitive functioning, academic achievement, attention and concentration, learning and memory, language skills, visual spatial and visual-motor skills, fine motor skills, executive functioning, and behavioral functioning. Dr. S. concluded that Student demonstrated "marked weaknesses in language-based academic skills – that is, reading, spelling, and writing. Her math is a relative strength for her. Auditory attention is variable and there seems to be a weakness in processing complex visual material. Emotionally, she appears to be doing fine and seemed more outgoing, confident and sociable compared to four years ago." P-6 at 9 Dr. S. reported that although Student had been placed on Ritalin earlier to address her attention difficulties, its' use was discontinued after two months. He also reported that soon after starting her enrollment at the Private School in the fall of 2001, Student no longer exhibited problems with attention and that she was able to complete her homework independently. Dr. S.

concluded that Student was no longer a student exhibiting characteristics of ADHD, nor did she show attention or concentration difficulties. (N.T. at 145, 177-178, 235, 248; P-6, S-28, S-29)

7. In the spring of 2006, near the end of Student's 8<sup>th</sup> grade year at the Private School and in anticipation of Student's return to the District for 9<sup>th</sup> grade, the District completed an evaluation. On May 16, 2006 an evaluation report (ER) was produced. That evaluation consisted of a review of records, including Dr. S.'s 2004 IEE, information obtained from Student's parents, information from progress reports obtained from the Private School, an observation of Student at the Private School, and achievement testing. The conclusion in the ER was that Student continued to have a learning disability in the area of language arts and that her achievement in math was not at the expected level. Recommendations included structured reading instruction focused on decoding, instruction in reading comprehension, instruction in writing, instruction in math, use of printed rather than cursive materials, and work on Student's computer and word processing skills. (N.T. at 179; S-22)

8. Student completed 8<sup>th</sup> grade at the Private School with grades ranging from B- through A. In Language Arts Student received a fourth quarter grade of A and a second semester grade of A. In that course Student received reading instruction using the Wilson Reading Program, instruction on spelling, and instruction on cursive writing. She ended the year working in Step 7.4 of the 12-step Wilson Reading Program. In Literature Student received a fourth quarter grade of B+ and a second semester grade of B+. In Writing Student received a fourth quarter grade of A- and a second semester grade of B+. In that course Student received instruction in composition writing, grammar, sentence structure, and type to learn. In Social Studies Student received a fourth quarter grade of A and a second semester grade of A-. In Science Student received a fourth quarter grade of B- and a second semester grade of B. In Math Student received a fourth quarter grade of B and a second semester grade of B+. In that course Student received instruction using the Saxon Math Program. She ended the year by completing the 6/5 Saxon Math book, which her teacher noted was below her current grade level. Across all subjects, the teacher ratings of Student's attention was "Good" (the highest possible rating of attention) and of her classroom behavior was "Excellent" (the highest possible rating of behavior). In Art and Physical Education Student received ratings of "Consistently Strong" (the highest possible rating) in all areas, including follows directions. (P-5, S-35A)

9. On June 6, 2006 and June 13, 2006 an individualized education program (IEP) team meeting was held and an IEP was developed. That IEP called for Student to receive learning support instruction in Math, Science, Social Studies, English, and Reading. Student would receive 50 percent of her instruction with non-disabled children in regular education classes. (S-21)

10. On June 21, 2006 the District issued a Notice of Recommended Educational Placement (NOREP) and provided a copy of the NOREP and IEP to Student's parents. (S-21)

11. On July 3, 2006 Student's parents informed the District that they had four concerns regarding the proposed IEP: the IEP did not include a specific statement that the Wilson Reading Program would be provided, extended school year services were not considered an option, the IEP did not address writing instruction and writing support services, and that Student required "an incremental math program that emphasizes continual review." S-20 at 2 (S-20)

12. On July 13, 2006 an IEP team meeting was held and a revised IEP was produced. On July 20, 2006 Student's parents rejected that IEP and requested a pre-hearing conference. (S-17)

13. On August 14, 2006 a pre-hearing conference was held. At that meeting Student's parents raised the following concerns: 1) Student required at least three hours per week of direct instruction in reading using the Wilson Reading Program, 2) Student required a math program that teaches to mastery, 3) Student needed direct instruction in writing that was sequential, 4) Student needed to be in small classes, and 5) Student did not want to attend the District's school. (S-15)

14. In response to Student's parents concerns, on August 21, 2006 the District provided Student's parents with a revised IEP and a new NOREP. That IEP called for Student to receive reading instruction using the Wilson Reading Program; math instruction using the Saxon Math program; and to be provided learning support in English (language arts), science, and social studies. Student would receive 50 percent of her instruction with non-disabled children in regular education classes. (S-16)
15. On September 15, 2006 the attorney representing Student's parents filed a complaint with the District and requested the present due process hearing. In that complaint Student's parents sought reimbursement for Student's continued placement at the Private School. The nature of the problem was described as deficiencies in the ER, with it failing to evaluate all areas of suspected disability, and deficiencies in the IEP, which included:
  - 1) minimal Present Educational Levels that fail to adequately identify (Student's) actual classroom-based levels in all relevant domains; 2) vague Goals and Objectives that include inappropriate measures of success which were too low to promote independent functioning; 3) Specially Designed Instruction that almost entirely consists of accommodations rather than actual instruction; 4) no Related Services despite having significant language and attentional (sic) needs; 4) (sic) meaningless Supports for School Personnel that are not designed to allow for meaningful integration into regular education programming throughout the school day; 5) no appropriate Functional Assessments of Behavior or Behavior Management Plans; and 6) no appropriate Extended School Year programming S-14 at 2
16. In the September 15, 2006 complaint the District's failure to conduct a speech and language evaluation and to provide services in that area was also challenged. (S-14)
17. The parties resolved their dispute and the District agreed to continue to pay for Student's placement at the Private School. (N.T. at 254)
18. Because instruction at the Private School extends only through 9<sup>th</sup> grade, in the fall of 2006 Student's parents began to explore placement options for the following school year, including the Private High School (Private High School). During the winter of 2007 Student was interviewed for acceptance to Private High School. (N.T. at 83, 132-133)
19. In the spring of 2007, near the end of Student's 9<sup>th</sup> grade year at the Private School, the District completed an evaluation and on May 25, 2007 an ER was produced. That evaluation consisted of a review of records, including Dr. S.'s 2004 IEE and the May 2006 ER, information obtained from Student's parents, information from progress reports obtained from the Private School, an observation of Student at the Private School, testing of Student's performance in the Wilson Reading Program using the Wilson Assessment of Decoding and Encoding (WADE), testing of Student's level of instruction in the Saxon Math program using the Saxon Publisher's Middle Grades Test Placement Guide, and achievement testing consisting of the Woodcock-Johnson III Test of Achievement (W-J III) and the Weschler Individual Achievement Test (WIAT-II) . The conclusion in the ER was that Student continued to have a learning disability in the area of language arts and that her rate of skill acquisition in math had lagged behind grade level expectations. Recommendations included structured reading instruction such as used in the Wilson Reading program, instruction in reading comprehension, instruction in written expression, and instruction in math using the Saxon Math program. (N.T. at 107-108, 175-193, 197, 201, 210, 227; P-7, S-11, S-13)
20. While completing the evaluation at the Private School, a staff member at the Private School informed the District's school psychologist that Student would be attending Private High School the following year. (N.T. at 183)
21. At the time of the May 2007 ER, Student had completed the third marking period of 9<sup>th</sup> grade at the Private School. In Language Arts Student received a third quarter grade of B+. In that course Student received reading instruction using the Wilson Reading Program and had just started working at Step 9.4 of the 12-step

Wilson Reading Program. In Literature Student received a third quarter grade of A-. In that course Student received instruction in reading novels that had been integrated into the social studies curriculum. The teacher noted that Student required guidance with understanding complicated thoughts presented in the novels. In Writing Student received a third quarter grade of B. In that course Student received instruction in composition writing, sentence structure, and grammar. In Social Studies Student received a third quarter grade of A-. In Math Student received a third quarter grade of C-. In that course Student received instruction using the Saxon Math Program, working in the 8/7 Saxon Math book, which her teacher noted was at the 7<sup>th</sup> grade and early 8<sup>th</sup> grade level. Across all academic subjects, the teacher ratings of Student's attention was "Good" (the highest possible rating of attention) and of her classroom behavior was "Excellent" (the highest possible rating of behavior), except for "Good" in Literature (the next highest rating). (P-5, S-11)

22. Student completed 9<sup>th</sup> grade at the Private School with grades ranging from C+ through A. In Language Arts Student received a fourth quarter grade of B and a final grade of B. In that course Student received reading instruction using the Wilson Reading Program, ending the year working in Step 7.4 of the 12-step Wilson Reading Program. In Literature Student received a fourth quarter grade of A and a final grade of A. In that course Student received instruction in reading novels and writing essays in response to the readings. The teacher noted Student's difficulty with comprehension of abstract material. In Writing Student received a fourth quarter grade of B and a final grade of B. In that course Student received instruction in composition writing, grammar, and sentence structure, and wrote a graduation speech. In Social Studies Student received a fourth quarter grade of A and a final grade of A. In Forensic Science Student received a final rating of "Met expectations well" (the highest rating possible). In Math Student received a fourth quarter grade of B- and a final grade of C+. In that course Student received instruction using the Saxon Math Program and was placed in a group using the 8/7 Saxon Math book, which her teacher noted was at the 7<sup>th</sup> grade and early 8<sup>th</sup> grade level. Across all academic subjects, the teacher ratings of Student's attention was "Good" (the highest possible rating of attention) and of her classroom behavior was "Excellent" (the highest possible rating of behavior). In Physical Education Student received ratings of "Consistently Strong" (the highest possible rating) in all areas, including follows directions. (N.T. at 40-45,140, 286; P-5)

23. On June 19, 2007 an IEP team meeting was held and an IEP was developed. Participants in that meeting included both of Student's parents, a regular education teacher, two special education teachers, and the District's supervisor of secondary special education. (N.T. at 110-111, 256; P-8, S-8, S-9)

24. The June 19, 2007 included a summary of Student's current educational levels based on progress reports from the Private School; reports of present levels of academic achievement based on the WADE, W-J III, and WIAT-II, completed as part of the ER process, and on reports from the Private School, noting weaknesses in the areas of word reading, reading comprehension, reading fluency, and math; a statement of the effect of Student's disability on her progress in the regular curriculum, noting that she had been educated at the Private School for the past six years and had been receiving instruction through the Wilson Reading Program and in the Saxon Math program there; a statement of transition services; five goals; a list of program modifications and specially designed instruction; and supports for school personnel. (P-8, S-8)

25. The five goals included in the June 19, 2007 IEP were: 1) accurate computation of 7<sup>th</sup> and 8<sup>th</sup> grade "calculations involving basic math operations, fractions, decimals, percentages, ratios, variables and coefficients, and scientific notation;" S-8 at 21 2) solving "multi-step word problems at the 4<sup>th</sup>-5<sup>th</sup> grade instructional level, involving basic math operations, fractions, decimals, percentages, and ratios;" S-8 at 22 3) an increase in "writing fluency to a mid 5<sup>th</sup> grade level, applying appropriate word usage, grammar, and conventions;" S-8 at 23 4) increase in level of "reading comprehension skills from a 6.8 grade level to a 7.8 grade instructional level;" S-8 at 24 and 5) demonstration of "understanding/mastery of the advanced concepts of language structure (as noted in Step 12 in Wilson Language System)." S-8 at 25 Each of the first four goals included a baseline based on scores obtained on the W-J III administered as part of the spring 2007 ER. The last goal had a baseline based on scores obtained on the WADE administered as part of the spring 2007 ER. (P-8, S-8)

26. In the June 19, 2007 IEP the following program modifications and specially designed instruction were to be provided to Student in all classes: providing materials in manuscript form, checking frequently for comprehension of abstract concepts, use of a calculator to check work, preferential seating, providing Student with multi-step instructions, teacher asking Student to check work when completed especially in math, extended time to complete assignments and assessments, use of a computer when writing or completing research, and using tools to organize content area information. In addition, Student was to be provided with direct, explicit, multi-sensory reading instruction 3 hours per week, have assistance with class work and to review concepts available on a daily basis in the learning support classroom, and to have “E-Op” support 4 days per week during the second block. At the IEP team meeting Student’s parents were informed that the reading instruction would be provided through the Wilson Reading Program and that the math instruction would be provided through the Saxon Math program. (N.T. at 147-148; P-8, S-8)

27. Supports for school personnel included in the June 19, 2007 IEP were that the learning support teacher would meet with the regular education teachers at least once per marking period to discuss Student’s need for specially designed instruction and that the learning support teacher would communicate with regular education teachers and with Student’s parents at least once per marking period or on request. (P-8, S-8)

28. The program proposed in the June 19, 2007 IEP included instruction outside of the regular education classroom 50 percent of the time. It was proposed that Student would not participate with non-disabled children in the regular education class for Math, Science, Social Studies, English, and Reading. (P-8, S-8)

29. At the June 19, 2007 IEP team meeting the only concerns raised by Student’s parents about the proposed program were regarding Student’s transition from the Private School to a much larger District school, class size in the District’s proposed program, and Student’s desire to go to college. Student’s parents did not express other concerns about the proposed program, but asked to take the IEP and look at it before approving it. (N.T. at 111-114, 119, 135-136)

30. At the June 19, 2007 IEP team meeting Student’s parents did not inform the District that they were planning to enroll Student at Private High School. (N.T. at 134-135, 288)

31. On June 22, 2007 the District issued a NOREP and sent a copy of the NOREP and IEP to Student’s parents. The program proposed in the NOREP was for Student to “attend the district’s learning support program at [a District] High School for the 2007-08” S-8 at 2 and to “receive the special education supports and services outlined in the 6/19/2007 IEP.” S-8 at 2. (N.T. at 110; P-8, S-8)

32. In June 2007 staff at Private High School prepared a learning plan for Student. Learning plans are only prepared at Private High School for students in need of learning support and who intend to attend Private High School. (N.T. at 84, 92, 94-95)

33. The Private High School learning plan was based on testing completed by the District, including the District’s ER. The learning plan did not contain specific goals, but focused on Student’s language based learning difficulty related to reading and writing, and her struggles with math. Private High School determined that it could not meet Student’s needs as a 10<sup>th</sup> grader and offered her a learning plan for her acceptance as a 9<sup>th</sup> grader. On June 27, 2007 Student’s parents approved that learning plan. (N.T. at 71-72, 84-85, 88, 92, 137)

34. The week of June 30, 2007 the District was contacted by staff at Private High School to arrange to have the District provide transportation for Student. On July 10, 2007 the District requested that Student’s parents confirm that Student would be attending Private High School. (N.T. at 258; S-7)

35. On July 24, 2007 a meeting was held, at Student’s parents’ request, to discuss the District’s use of block scheduling at the high school and to review a sample schedule. Student’s parents were again informed that reading instruction would be provided through the Wilson Reading Program and that math instruction would be provided through the Saxon Math program. Student’s parents told the District that they were still reviewing the

District's IEP and that they did not have questions about the IEP at that time. At the end of the meeting Student's parents told the District that within a week they would inform the District whether or not they planned to enroll Student at Private High School. District staff requested that Student's parents return the NOREP so that a decision regarding placement could be made. (N.T. at 117-122, 153, 259-263; P-9, S-4, S-5, S-6)

36. Between the July 24, 2007 meeting and August 16, 2007 District staff continued to answer questions that Student's parents had about the proposed program. On August 16, 2007 District staff again requested that Student's parents return the NOREP so that a decision regarding placement could be made. (S-4)

37. On August 23, 2007 the attorney representing Student's parents filed a complaint with the District and requested the present due process hearing. On that complaint Student's current placement was listed as Private High School. The nature of the problem was described as deficiencies in the ER, with it failing to evaluate all areas of suspected disability, and deficiencies in the IEP, which included:

1) minimal Present Educational Levels that fail to adequately identify (Student's) actual classroom-based levels in all relevant domains; 2) vague Goals and Objectives that include inappropriate measures of success which were too low to promote independent functioning; 3) Specially Designed Instruction that almost entirely consists of accommodations rather than actual instruction; 4) no Related Services despite having significant language and attentional (sic) needs; 4) (sic) meaningless Supports for School Personnel that are not designed to allow for meaningful integration into regular education programming throughout the school day; 5) no appropriate Functional Assessments of Behavior or Behavior Management Plans; and 6) no appropriate Extended School Year programming. S-37 at 6

38. The August 23, 2007 complaint also challenged the proposed program and placement because of the use of block scheduling and the lack of the availability of Student to graduate with a regular education diploma under the program. (S-37)

39. The resolution sought by Student's parents in the August 23, 2007 complaint was tuition reimbursement for their unilateral placement of Student at Private High School for the 2007 – 2008 school year. The August 23, 2007 complaint was the first notice to the District that Student's parents disagreed with the ER. It was also the first confirmation that Student was going to be enrolled at Private High School and that Student's parents were going to seek tuition reimbursement. (N.T. at 264, 288; S-37)

40. On August 23, 2007 the District informed Student's parents that a resolution meeting would be held on September 5, 2007. Subsequently, that resolution meeting was postponed until September 24, 2007 at Student's parents' request. (S-3, S-38)

41. Student began 9<sup>th</sup> grade at Private High School on August 27 or 28, 2007. (N.T. at 93, 137, 282, 286)

42. Student's program at Private High School includes Algebra, English Skills, World Cultures, Foundational Physics, Directed Study, Freshmen Physical Education, Chorale, and Chapel. The Algebra course is taught at a slower pace, covering a typical Algebra curriculum over a two year period. The English Skills course follows the regular 9<sup>th</sup> grade English curriculum at a slower pace, uses the same materials as the regular English class, except for the use different assessments than in a regular English course. The focus of the English Skills class is on reading, writing, listening, and speaking. In Directed Study Student receives instruction in time management, organization, study skills, problem solving, and communication skills. Student may also receive assistance with assignments in the Directed Study class and extended time for completion of exams. All of Student's classes at Private High School, except for English Skills and Directed Study, are regular education classes. (N.T. at 53-55, 58-60, 63, 67, 78-79; P-2, P-3, P-4, S-36)

43. Student has been successful at Private High School and has become involved with cheer leading, a choral group, and the fall and spring musicals. (N.T. at 57, 60, 158-159)

44. Because Private High School does not offer the Wilson Reading Program, Student's parents have hired a private tutor to provide Student with instruction using the Wilson Reading Program. (N.T. at 63, 78-79, 140)

45. On September 5, 2007 the District filed a sufficiency challenge to the parents' complaint. That challenge suggested that the claims relative to the ER lacked specificity and that the claims relative to the IEP failed to identify any harm. (S-39)

46. On September 9, 2007 this hearing officer ruled on the District's sufficiency challenge, concluding that the portions of the parents' complaint challenging the ER were not sufficient, but that the portions of the parents' complaint challenging the IEP and seeking tuition reimbursement were sufficient. In that ruling this hearing officer wrote:

the hearing will be allowed to proceed on two issues: 1) whether or not the proposed IEP is appropriate, with that issue limited to the areas addressed in the complaint, and 2) whether or not the District must provide tuition reimbursement for a placement at the Private High School School. S-40 at 2

47. On or before September 12, 2007 the attorney for Student's parents informed the District of Student's parents' concerns regarding the ER, specifically that the ER did not address speech and language, auditory processing, and behavior related to ADHD. (S-2)

48. On September 12, 2007 the District issued a permission to evaluate in order to complete a re-evaluation of Student that would include a speech and language evaluation, an auditory processing evaluation, and an ADHD behavior scale. (N.T. at 264-265; S-2)

49. On September 14, 2007 the attorney representing Student's parents filed an amended complaint. That amended complaint was not objected to by the District. The amended complaint continued to request that a hearing be held for the purpose of reimbursement for Student's parents' unilateral placement of Student at Private High School. The amended complaint stated that the claim for tuition reimbursement was:

based on the deficiencies in the ER, which failed to comprehensively and appropriately evaluate all areas of suspected disability. Specifically, the ER contained: 1) no auditory processing testing; 2) no speech and language assessment; 3) no curriculum-based assessments; 4) no behavior assessment in light of her ADHD; and 5) no executive functioning testing. Additionally, the proffered IEP which includes: 1) minimal Present Educational Levels that fail to adequately identify (Student's) actual classroom-based levels in all relevant domains; 2) vague Goals and Objectives that include inappropriate measures of success which were too low to promote independent functioning; 3) Specially Designed Instruction that almost entirely consists of accommodations rather than actual instruction; 4) no Related Services despite having significant language and attentional (sic) needs; 4) (sic) meaningless Supports for School Personnel that are not designed to allow for meaningful integration into regular education programming throughout the school day; 5) no appropriate Functional Assessments of Behavior or Behavior Management Plans; and 6) no appropriate Extended School Year programming. S-46 at 2

50. The September 14, 2007 amended complaint also challenged the proposed program and placement because of the use of block scheduling and the lack of the availability of Student to graduate with a regular education diploma under the program. (S-46)

51. On September 24, 2007 a resolution meeting was held and a revised IEP was produced. At that meeting the District also agreed to complete additional testing requested by Student's parents. (N.T. at 157-161, 204, 231, 264-265; S-1)



52. On September 27, 2007 a copy of the revised IEP was provided to Student's parents. (N.T. at 161; S-1)

### Issues

Must the Souderton Area School District reimburse the parents of Student for the cost of tuition for Student's attendance at the Private High School during the 2007 – 2008 school year?

### Discussion

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 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 conforms 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 Intermediate 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. Dist. v. Diamond*, 808 F.2d 847 (3rd Cir. 1986); *J.C. v. Central Regional Sch. Dist.*, 81 F.3d 389 (3rd Cir. 1996), *cert. denied*, 519 U.S. 866

In the present matter, Student's parents have challenged the appropriateness of District's proposed program and have sought reimbursement for tuition they have paid for their unilateral placement of Student at the Private High School. [Facts 37, 39, 49] The Supreme Court has held that the "burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief... the rule applies with equal effect to school districts: If they seek to challenge the IEP, they will in turn bear the burden of persuasion." *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 its decision in *Greenwood v. Wissahickon*, 2006 U.S. Dist. LEXIS 4274 (E.D. Pa. 2006). The *Greenwood* Court held that "the burden of persuasion at the administrative level in Pennsylvania is now on the party contesting the IEP." at 7

It should be noted that in their analyses the above referenced courts have limited themselves to the burden of persuasion and have not considered the burden of production. As noted by the Supreme Court, the burden of persuasion addresses "which party loses if the evidence is closely balanced." *Schaffer* at 533-534

Because it was Student's parents who challenged the appropriateness of the District's proposed program, because it was Student's parents who requested the present due process hearing, and because it was Student's parents who have sought an order requiring the District to pay for their unilateral placement of Student at Private High School, it is Student's parent who carry the burden of persuasion in this matter.

Must the Souderton Area School District reimburse the parents of Student for the cost of tuition for Student's attendance at the Private High School during the 2007 – 2008 school year?

Student's parents requested the present hearing seeking reimbursement for the tuition they have paid in order for their daughter to attend Private High School during the current school year, the 2007 – 2008 school year. [Facts 37, 39, 49] Parents who believe that a district's proposed program is inappropriate may unilaterally choose to place their child in an appropriate placement. The right to consideration of tuition reimbursement for students placed unilaterally by their parents was first clearly established by the United States Supreme Court in *Burlington School Committee v. Department of Education*, 471 U.S. 359, 374 (1985). At the Circuit Court level the court wrote that a court may grant "such relief as it determines is appropriate" and that "whether to order reimbursement and at what amount is a question determined by balancing the equities." *Burlington*, 736 F.2d 773, 801 (1<sup>st</sup> Cir. 1984), *affirmed on other grounds*, 471 U.S. 359 (1985).

In 1997, a dozen years after *Burlington*, the IDEA specifically authorized tuition reimbursement for private school placement. Reauthorized in 2005, the IDEA now provides (at 20 U.S.C. § 1412(a)(10)(C)):

(i) In General. – Subject to subparagraph (A) this part does not require a local education agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such a private school or facility.

(ii) Reimbursement for private school placement. -If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private school without the consent of or referral by the public agency, a court or hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency has not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

(iii) Limitation on reimbursement The cost of reimbursement described in clause (ii) may be reduced or denied—

(I) if—

(aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in item (aa);

(II) if, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in section 1415 (b)(3) of this title, of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for such evaluation; or

(III) upon a judicial finding of unreasonableness with respect to actions taken by the parents.

In the present matter, Student's parents did not inform the District that they would be placing Student at Private High School and seeking tuition reimbursement until August 23, 2007. [Fact 39] That notification came in the form of the complaint filed by their attorney and the request for the present hearing. [Facts 37, 39] Because that notice did not come at the last IEP team meeting held on June 19, 2007 [Fact 30] or at a July 24, 2007 meeting with school staff, [Fact 35] and because Student began attending Private High School on August 27 or 28, 2007, [Fact 41] just 4 or 5 calendar days (not even business days) after the parents informed the District of that placement, it is the conclusion of this hearing officer that the parents request for tuition reimbursement should be denied under 20 U.S.C. § 1412(a)(10)(C)(iii)(I)(aa) and (bb) which require that the parents either inform the District at the last IEP team meeting or 10 business days prior to the unilateral placement of their intent to seek tuition reimbursement.

Upon a review of the entire record, including the following facts: 1) that Student's parents began to explore her placement at Private High School in the fall of 2006; [Fact 18] 2) Student interviewed for admission in the winter of 2007, [Fact 18] 3) in the spring of 2007 staff at the Private School, which Student was attending during the spring of 2007, were aware that Student would be attending Private High School; [Fact 20] 4) the parents did not inform the District that they planned to enroll Student at Private High School at the June 19, 2007 IEP team meeting; [Fact 30] 5) in June 2007 a learning plan was prepared by staff at Private High School, something that is only done if a student plans to attend that school; [Fact 32] 6) on June 27, 2007 Student's parents approved the Private High School learning plan; [Fact 33] 7) in late June or early July the District was contacted by staff at Private High School to arrange transportation for Student and on July 10, 2007 the District requested that Student's parents confirm Student's placement at Private High School; [Fact 34] 8) at a July 24, 2007 meeting with District staff Student's parents would not confirm their intention to enroll Student at Private High School, but told the District that they would inform it of their decision within a week; [Fact 36] 9) between July 24, 2007 and August 16, 2007 District staff made repeated requests for Student's parents to return a NOREP to confirm their placement decision; [Fact 36] 10) Student's parents did not confirm their decision to enroll Student at Private High School until they filed a complaint on August 23, 2007; [Facts 37, 39] 11) Student's parents did not notify the District of specific disagreements with the June 19, 2007 IEP or reject the NOREP until August 23, 2007, [Facts 37, 38] 12) over two months after the IEP and NOREP were issued; and 13) Student's parents did not notify the District of any disagreement with the ER until August 23, 2007, [Fact 39] which was almost three months after the ER was issued, [Facts 19, 39] and even then they did not provide sufficient details to their disagreement with the ER for the District to respond or act upon their concerns until more than three weeks later when they filed an amended complaint on September 14, 2007, [Fact 49] and then only after the District had challenged the sufficiency of the original complaint [Fact 45] and this hearing officer had ruled that the aspects of the August 23, 2007 complaint relative to the ER were not sufficient; [Fact 46] it is the conclusion of this hearing officer that the actions of Student's parents were unreasonable and tuition reimbursement should be denied under 20 U.S.C. § 1412(a)(10)(C)(iii)(III).

The process of review of the ER and the development of an IEP are supposed to be cooperative and collaborative endeavors. *L.S. ex. rel. K.S. v. Abington School District*, 2007 U.S. Dist. LEXIS 73047, 2007 WL 2851268 (E.D. Pa. 2007) In this case, Student's parents were given the opportunity to be cooperative and collaborative in response to the ER and the IEP, instead they chose to practice secrecy, bordering on deceit. Throughout the summer of 2007, even when repeatedly asked whether a placement decision had been made, they strung the District along until the eve of Student's start at Private High School and the beginning of the 2007 – 2008 school year. Student's father's testimony at the present hearing was telling. When asked if, by the June 19, 2007 IEP team meeting, Student's parents had made up their mind regarding Private High School, he responded:

At that point based on the way the spring went, unless we saw an IEP that had – that met her objectives for appropriateness, chances, are, yes, we would probably pursue Private High School.

N.T. at 134

Listening to Student's father's testimony and noting the changes to his tone of voice, his halting speech, posture, and facial expression as he gave the above, carefully worded answer, it was clear to this hearing officer that at

least by June 19, 2007 the parents had made up their mind to place Student at Private High School. Now, after reviewing the entire record, it is clear that if the placement decision was not technically finalized as of June 19, 2007, making Student's father's testimony technically accurate, it was certainly made by June 27, 2007 when Student's parents approved the Private High School learning plan. [Fact 33]

Given the above, it is the conclusion of this hearing officer that Student's parents are not entitled to tuition reimbursement because they failed to inform the District of their intentions either at the last IEP team meeting, as required under, 20 U.S.C. § 1412(a)(10)(C)(iii)(I), or 10 business days, as required under 20 U.S.C. § 1412(a)(10)(C)(iii)(I)(bb), and because their actions related to their placement of Student at Private High School and their request for reimbursement were unreasonable. 20 U.S.C. § 1412(a)(10)(C)(iii)(III)

Even if the Supreme Court's more traditional and comprehensive analysis of tuition reimbursement, found in *Florence County Sch. Dist. Four V. Carter*, 114 S. Ct. 361 (1993), is applied, as suggested by the parents in their closing brief, the result is the same. The District cannot be required to pay for Student's placement at Private High School because it offered her an appropriate program.

Following its' decision in *Burlington*, in *Carter* the Supreme Court outlined a three-part test for determining whether or not parents may receive reimbursement when they place their child in a private school. The three parts of the test are: 1) whether the school district's proposed program was appropriate; 2) if not, whether the parents' unilateral placement was appropriate, and; 3) if so, whether the equities reduce or remove the requested reimbursement amount.

Applying the *Carter* three-part test and considering the first part of that test, that of the appropriateness of the District's program, it is the conclusion of this hearing officer that the District's program proposed on June 19, 2007 was appropriate.

In their original, August 23, 2007, complaint Student's parents challenged the District's proposed program first because of a faulty ER, then because of deficiencies in the IEP. [Facts 37, 38] After the part of their complaint challenging the ER was found not to be sufficient by this hearing officer, [Fact 46] on September 14, 2007 Student's parents filed an amended complaint. [Fact 49] The amended complaint continued to request that a hearing be held for the purpose of reimbursement for Student's parents' unilateral placement of Student at Private High School. [Fact 49] The amended complaint stated that the claim for tuition reimbursement was based on alleged deficiencies in both the ER and the IEP. [Facts 49, 50]

Both at the hearing and in their closing brief Student's parents argued that because the ER was not appropriate, the IEP could not be appropriate. Their argument fails because the ER was appropriate and meets the requirements under the law. The purpose of an evaluation is to collect enough information, through a variety of methods, to determine whether or not the student is and/or continues to be a child with a disability, to determine the need for special education and related services, to determine whether or not additions and/or modifications to the IEP are needed, and in general, to inform the IEP team about the content of the IEP. 20 U.S.C. §1414(b)(2)(A); §1414(c)(1)(B) Depending on the student and his or her needs, cognitive, behavioral, physical, and developmental factors are to be considered, §1414(b)(2)(C) and the student must be assessed in all areas of suspected disability. §1414(b)(3)(B) Following an evaluation, the IEP team, informed by that evaluation, as well as other factors, develops the IEP. §1414(d)(3)(A) In short, the evaluation is intended to provide a comprehensive picture of the student's strengths, weaknesses, and specific needs and the IEP should be responsive to those identified needs. However, it is not intended to be a fishing expedition or to explore all disabilities where there is no evidence that those exist.

In the present matter the ER consisted of a review of records, including Dr. S.'s 2004 IEE and the May 2006 ER, information obtained from Student's parents, information from progress reports obtained from the Private School, an observation of Student at the Private School, testing of Student's performance in the Wilson Reading Program using the Wilson Assessment of Decoding and Encoding (WADE), testing of Student's level of instruction in the Saxon Math program using the Saxon Publisher's Middle Grades Test Placement, and

achievement testing consisting of the Woodcock-Johnson III Test of Achievement (W-J III) and the Weschler Individual Achievement Test (WIAT-II) . [Fact 19] The conclusion in the ER was that Student continued to have a learning disability in the area of language arts and that her rate of skill acquisition in math had lagged behind grade level expectations. [Fact 19] Recommendations included structured reading instruction such as used in the Wilson Reading program, instruction in reading comprehension, instruction in written expression, and instruction in math using the Saxon Math program. [Fact 19]

Student's parents claimed that the ER was incomplete because it contained 1) no auditory processing testing; 2) no speech and language assessment; 3) no curriculum-based assessments; 4) no behavior assessment in light of her ADHD; and 5) no executive functioning testing. However, they failed to meet their burden under *Schaffer* to establish either that Student was in need of any of those assessments or that the District should have been aware of a need for testing in those areas. In fact, without specific programming addressing Student's auditory processing, executive functioning, or ADHD, Student did quite well at the Private School in both 8<sup>th</sup> grade [Fact 8] and around the time of testing in 9<sup>th</sup> grade. [Facts 21, 22] There was no indication that Student had any need for a speech or language assessment, services she had received earlier in her educational career, but that were discontinued when she no longer needed them in June 2004. [Fact 5] Similarly, there was no indication that Student had any need for assessment of ADHD, something she had been treated for early in her educational career, but which a private IEE had concluded she no longer exhibited in 2004. [Fact 6] In fact, in 2004 Dr. S. concluded that Student did not show attention or concentration difficulties, something corroborated by reports from the Private School where she regularly received the highest possible ratings on attention and classroom behavior through 8<sup>th</sup> and 9<sup>th</sup> grades. [Facts 8, 21, 22]

One additional challenge to the ER that was not raised in the parents complaint or revised complaint, [see Facts 37, 49] but which was raised at the present hearing and in the parents' closing brief was the District's use of the Saxon Publisher's Middle Grades Test Placement Guide to asses Student's current math ability. Even if, as claimed, that test is only for use with students who have not been using the Saxon Math program, there was no harm in this case because that single test did not inform the IEP team or affect its decision. Looking at the June 19, 2007 IEP, Student's current educational levels were based on progress reports from the Private School and the present levels of academic achievement were based on the WADE, W-J III, and WIAT-II, plus reports from the Private School, noting weaknesses in the areas of word reading, reading comprehension, reading fluency, and math. [Fact 24] Nothing in those sections or any other section s of the IEP appear to be based on the results from the Saxon Publisher's Middle Grades Test Placement Guide.

Considering all of the above, it is the conclusion that, at the time it was completed in May 2007, the ER was comprehensive enough and complete enough to provide the information necessary for the IEP team to plan for Student's educational program and therefore, it was appropriate. The good faith actions of the District were striking to this hearing officer when, three and one-half months after the issuance of the ER, Student's parents finally told the District of their concerns regarding the ER, the District immediately offered to complete additional evaluations to address those concerns. [Facts 47, 48, 51]

Turning to the IEP proper, it is the conclusion of this hearing officer that it was reasonably calculated to provide Student with meaningful educational benefit. Student's parents specifically challenged the following components of the IEP:

- 1) minimal Present Educational Levels that fail to adequately identify (Student's) actual classroom-based levels in all relevant domains;
- 2) vague Goals and Objectives that include inappropriate measures of success which were too low to promote independent functioning;
- 3) Specially Designed Instruction that almost entirely consists of accommodations rather than actual instruction;
- 4) no Related Services despite having significant language and attentional (sic) needs;
- 4) (sic) meaningless Supports for School Personnel that are not designed to allow for meaningful integration into regular education programming throughout the school day;
- 5) no appropriate Functional Assessments of Behavior or Behavior Management Plans; and
- 6) no appropriate Extended School Year programming. S-46 at 2 [Fact 50]

Considering Student's parents' first claim regarding the present educational levels, the present educational levels and current levels of academic achievement were based on both standardized testing and reports from the Private School. [Fact 24] It is the conclusion of this hearing officer that the statements of present educational levels and current levels of academic achievement were adequate to identify Student's needs and to allow the IEP team to develop appropriate goals for Student and, therefore, they were appropriate.

Student's parents' second claim is that the goals and objectives in the IEP were not appropriate. The IEP must contain "measurable annual goals" that relate to "meeting the child's needs . . . to enable him to progress in the general curriculum." 20 U.S.C. § 1414(d)(1)(A). The goals must also aim to meet "the child's other educational needs that result from the child's disability." *Id.* The term "other educational needs" is understood to encompass the child's needs both in and outside the classroom, where warranted. *M.C. v. Central Regional School District*, 81 F.3d 389 at 393-94 (3d Cir. 1995) In the present matter the goals and objectives in the IEP were clearly stated, addressed the exact areas of need identified in both the ER and reports from the Private School, including instruction in reading, writing, and math. [Facts 19, 22, 25] Each goal had a specific, objective statement of the degree of progress expected and an equally specific baseline. [Fact 25] It is the conclusion of this hearing officer that the goals and objectives in the IEP were appropriate.

The program modifications and specially designed instruction (see Student's parents' third claim above) were also clearly stated and appropriate. They are similar to, and in many respects identical to, the program modifications and specially designed instruction Student had been receiving at the Private School. [Facts 5, 22, 26] Coupled with the specially designed instruction of the Wilson Reading Program and Saxon Math programs, parts of the District's proposed program, [Facts 26, 35] it is the conclusion of this hearing officer that the program modifications and specially designed instruction were appropriate. They also appear to be exactly the types of program modifications and specially designed instruction that Student's parents have been seeking.

Student's parents' fourth claim, that of a lack of speech and language services or related services to address behavioral needs, that issue was addressed above within the context of the ER. Student's parents failed to meet their burden to show that these services were needed. Even though Student received both services earlier in her educational career, [Facts 3, 5] she has not received either service since the end of sixth grade, June 2004. [Facts 5, 6] In addition, the reports from the Private School showed that she has performed well without those services and that she has neither attention nor behavioral issues at school. [Facts 8, 21, 22]

Student's parents' fifth claim, regarding supports for school personnel, is also not supported by the record. In fact, they offered no evidence that suggested that the proposed supports for school personnel, that of the learning support teacher meeting with regular education teachers each marking period and communicating with those teachers each marking period, [Fact 27] was not appropriate. Merely claiming in a complaint or a closing brief that some aspect of an IEP is not appropriate does not make it so. Accordingly, it is the conclusion of this hearing officer that the supports for school personnel in the IEP were appropriate.

Similarly, Student's parents' sixth and seventh claims, the need for functional assessments of behavior or behavior management plans and the need for extended school year (ESY) programming are simply not supported by the record. Student's parents provided no evidence to suggest that either a functional assessment of behavior or behavior management plan was needed. In fact, as noted above, Student exhibited no behavioral difficulties at the Private School. [Facts 8, 21, 22] Student's parents also presented no evidence that Student required ESY programming. The fact that they may have paid for private tutoring in the Wilson Reading Program during the summer does not equate to proof that Student requires ESY programming.

Student's parents also challenged the proposed program and placement because of the use of block scheduling and the lack of the availability of Student to graduate with a regular education diploma under the program. [Fact 50] However, none of the evidence relative to block scheduling was convincing and the concern regarding a regular education diploma had no basis. The staff from Private High School and Student's father testified broadly as to concerns about block scheduling, but did not provide evidence specific to Student that would

support a conclusion that if the District's proposed program was provided within the context of block scheduling, Student would not gain meaningful educational benefit from that program. It seems that the staff from Private High School and Student's parents had the unfounded notion that in block scheduling Student would be required to sit and do just one thing for an extended period of time. That is clearly not what block scheduling entails. In fact, it was easy for this hearing officer to see how extended blocks of say language arts, for example, working on multiple, yet interrelated activities, would benefit Student given her specific disabilities and needs.

As far as the regular education diploma concern goes, that is exactly the type of diploma Student would be expected to receive under the District's proposed program.

After careful consideration of each of Student's parents claims, it is the conclusion of this hearing officer that the claims lack supporting evidence or that there is compelling evidence requiring an opposite conclusion. Further, after carefully considering the record as a whole, it is the conclusion of this hearing officer that the June 19, 2007 IEP was appropriate at the time it was offered.

Although not raised in either their initial complaint [Fact 37] or their amended complaint [Fact 49], at the hearing and in their closing brief Student's parents raised two additional claims. First, that the IEP should have included transition services for Student's transition from the Private School to the District's program and second, that the proposed program was not in the least restrictive environment (LRE). Unless the opposing party agrees otherwise, the issues at a hearing must be limited to those raised in the complaint. 34 CFR §300.511(d) In addition, on September 9, 2007 this hearing officer ruled that the hearing would be limited to the claims raised. [Fact 46] Because of this, it was surprising that the District did not challenge the consideration of these two claims. Even if 34 CFR §300.511(d) is read to allow any and all claims relative to a broadly defined issue, in this case the issue of tuition reimbursement, to be considered, and even if this hearing officer's limitation were to be ignored, or at least not cited by the District, the result would be the same.

Nothing in the record supports Student's need for transition services to move from the Private School to a District program. In fact, she transitioned without difficulty to Private High School. [Fact 43] Although Private High School is smaller than the District's school, there was no evidence presented that proved that Student would not be successful in a transition to a District school.

Similarly, there was no compelling evidence that the District's proposed placement was not in the LRE. The LRE requirement is found at 20 U.S.C. §1412(a)(5)(A), which reads:

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

Except for some generalized testimony of staff from Private High School and Student's parents, there is nothing specific on the record that establishes that the District's proposal does not educate Student with non-disabled students to the maximum extent possible. In fact, the record suggests that the District provided the exact program that Student's parents were seeking. In a dispute over the District's proposed program during the summer and fall of 2006 Student's parents requested the Wilson Reading Program, the Saxon Math program, individualized instruction in writing, small class size, and individualized instruction and support in all classes. [Facts 11, 12, 13, 14, 15] During the current dispute Student's parents requested the same things, the Wilson Reading Program, the Saxon Math program, individualized instruction in writing, small class size, and individualized instruction and support in all classes. That is exactly what the District proposed in the June 19, 2007 IEP. In addition, the District proposed a program that was closely modeled after the program that Student had received at the Private School, a program that Student was quite successful in. [Facts 8, 21, 22] Simply put,

Student's parents failed to meet their burden to show that the District's proposal does not meet the LRE requirements.

In *Greenwood v. Wissahickon*, 2006 U.S. Dist. LEXIS 4274 (E.D. Pa. 2006) the Court concluded that *Schaffer v. Weast* "effectively overturned the Third Circuit's holding in *Oberti v. Bd. Of Educ. Of Borough of Clementon Sch. Dist.*, 995 F.2d 1204, 1207 (3rd Cir. 1993), which had placed the burden of proving compliance with the mainstreaming requirement upon the school district regardless of who brought the action." at 2. Having failed to meet their burden to show that the proposed program was not in the LRE, Student's parents have failed to prove that the District's proposed program was not appropriate.

In summary, above this hearing officer concluded that Student's parents failed to meet the notice requirements for receipt of tuition reimbursement under 20 U.S.C. § 1412(a)(10)(C)(iii)(I)(aa) and (bb) and that their actions were unreasonable and therefore tuition reimbursement should be denied under 20 U.S.C. § 1412(a)(10)(C)(iii)(III). Further, under the first part of the *Carter* test it was the conclusion of this hearing officer the District's May 25, 2007 ER and June 19, 2007 IEP were appropriate at the time they were completed and offered. Because this hearing officer has concluded that the District's June 19, 2007 IEP, the IEP offered at the time that Student's parents requested the present hearing, was appropriate, there is not need to consider the IEP developed a resolution meeting held on September 24, 2007 and offered on September 27, 2007. [Facts 51, 52] In addition, because this hearing officer has concluded that the proposed program was appropriate, there is no need to consider the second and third prongs of the *Carter* test, those of the appropriateness of the parents' placement and the weighing of the equities. That is the case because a school district cannot be required to pay for the unilateral placement of a student by his or her parents if the school district has offered an appropriate program.

However, this hearing officer would be remiss if he did not at least note the gross deficiencies evident in the Private High School program or the fact that the equities in this matter tilt entirely in the favor of the District. Private High School refused to accept Student as a 10<sup>th</sup> grader, [Fact 33] because it determined that it could not meet Student's needs as a 10<sup>th</sup> grader. [Fact 33] The solution was for Student to repeat 9<sup>th</sup> grade at Private High School, [Fact 41] in spite of having successfully completed 9<sup>th</sup> grade at the Private School. [Fact 22] The plan appeared not to be individualized to meet Student's programmatic needs, but rather to have Student meet the programmatic needs of Private High School. In reading, because Private High School does not offer a program similar to the Wilson Reading Program, [Fact 44] which both parties at the present hearing agree Student needs, her parents are paying for a private tutor to instruct Student in the Wilson Reading Program this year. [Fact 44] In math, although Student finished the last school year in a 7<sup>th</sup> grade to low 8<sup>th</sup> grade textbook, [Fact 22] Private High School decided to place her in 9<sup>th</sup> grade Algebra. [Fact 42] In Directed Study Student receives instruction in time management, organization, study skills, problem solving, and communication skills. [Fact 42] There was nothing in the record to suggest that, other than help with organization, that Student needs any of that instruction. It is clear to this hearing officer that the program decisions made by Private High School were not responsive to, nor were they individualized to meet, Student's needs. Student's parents were simply told that if they wanted their daughter to attend that school, she would have to fit into the programs and services it regularly provided.

Lastly, a brief review of the equities shows that at every turn the District requested information and agreed to the Student's parents' requests. [Facts 34, 35, 36, 48, 51] That pattern can be seen in the District agreeing to fund Student's placement at the Private School for the past several years, [Fact 4] and repeatedly trying to address the parents concerns over the past several years. [Facts 4, 11, 12, 13, 14, 15, 17] Student's parents, on the other hand, and as was discussed above, did not fully contribute to the ER or IEP process and withheld information regarding their enrollment of Student at Private High School until the eleventh hour.

Accordingly we make the following:



**ORDER**

The Souderton Area School District is not required to reimburse the parents of Student for the cost of tuition for Student's attendance at the Private High School during the 2007 – 2008 school year.

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Signature of Hearing Officer