PENNSYLVANIA

SPECIAL EDUCATION HEARING OFFICER

Student's Name: H. H.

Date of Birth: xx/xx/xx
O.D.R. #5659/05-06 KE

Dates of Hearing: September 9. 2005; October 24, 2005

Type of Hearing: Closed

Parties to the Hearing:

Parents	Represented by Heidi Konkler-Goldsmith 30 Cassatt Avenue Berwyn, PA 19312
School District Owen J. Roberts S.D. 901 Ridge Road Pottstown, PA 19465	Represented by Karl Romberger 1250 S. Broad Street Lansdale, PA 19448
Date Final Transcript Received November 1, 2005	Date of Decision December 19, 2005
Hearing Officer	Linda J. Stengle

* Parties notified of need for extension by HO.

Background

The student's date of birth is xx/xx/xx, and he resides within the geographical boundaries of the Owen J. Roberts School District (District) with his family. The parents requested the due process hearing, asserting that the student was owed compensatory education for the period from September 2002 to present and that the parents were entitled to tuition reimbursement for the student's participation at [Redacted] School for the summer of 2005 and for the current school year. The case for which this decision is written is the result of a bifurcated request. The parents had requested a hearing earlier this year to address the Extended School Year concerns. The parties agreed to bifurcate the claim and deal with the Extended School Year issue as a compensatory education or tuition reimbursement issue in the present hearing, and no decision was rendered regarding the first part of the bifurcation of the complaint.

The district opened the case by moving that the Hearing Officer limit the period of consideration for compensatory education in accordance with *Montour* or IDEIA 2004. The parent objected. I ruled for the parent for reasons that are identified in the Discussion section below. The district then moved that it should not sustain the burden of proof because of the then pending Supreme Court oral argument in *Schaffer v. Weast.* I denied this motion for the reasons contained in N.T. 33-34. Essentially, I stated that the motion was denied because I had to rule in accordance with existing law, not by guessing about what the Supreme Court might rule. Finally, the district objected to the parent's proposal of alternative remedies. I denied this motion on the grounds that alternative remedies were something that were explicitly foreseen and addressed by IDEA regulation Section 1415(1) and that time-honored rule that Hearing Officers may order any appropriate remedies to address a complaint.

Immediately prior to the issuance of the decision, the Supreme Court issued its ruling in *Schaffer v. Weast* (USSC, #04-698, 2005), which switched the burden of persuasion to the party requesting the hearing, a significant change in the way Third Circuit cases had been handled previously. The district reiterated its motion and asked for reconsideration in light of the ruling. I took additional argument via email and notified the party that I would need an extension to consider the issue. Further discussion of this topic is found in the Discussion section below.

Findings of Fact

1. The student's date of birth is xx/xx/xx. He resides with his family in the District, which is the local educational agency responsible for his education. (Stip. at N.T. 36-37)
2. The student is eligible for special education supports and services under IDEA, and he is a protected handicapped student qualifying under Section 504 of the Rehabilitation Act of 1973. (Stip. at N.T. 37-38)
3. The mother is employed by the district as [redacted]. (N.T. 386)
4. In the first quarter of kindergarten, the 2002-2003 school year, the district noted that the

student needed extra help with patterns and letters. Suggestions were made regarding further development of fine motor skills. The kindergarten teacher said she would refer the student to the Instructional Support Team. (SD 23)

5. In the second marking period, the same teacher noted problems with attention to task and following directions. (SD 23)
6. On December 20, 2002, the student was referred to the instructional support team for the district because he was having difficulty recognizing alphabet letters and identifying beginning consonant sounds. (SD 19)
7. The data summary to the instructional support team stated that, prior to the intervention meeting date of January 28, 2003, the student had been provided with "one on one assistance." (SD 19)
8. The district's intervention plan called for an occupational therapy consultation to obtain strategies for fine motor/handwriting skills, small group activities with a reading specialist, and a variety of multi sensory instructional strategies. (SD 19)
9. Shortly afterwards, the [Redacted] Intermediate Unit conducted the occupational therapy consultation. It found that the student had more difficulties with reversals and letter placement than the average kindergartener. It also noted that he had difficulty with visual motor and visual discrimination activities. The report stated that the student had not made progress that seemed to correspond to his potential. It concluded, with the parent's input, that he needed an evaluation to determine eligibility for special education services. (SD 19)
10. The IU conducted another consultation on February 26, 2003, and issued a report on March 26, 2003. It noted that the student did not consistently respond to directions in a timely fashion, as well as other issues. Two pages of recommendations were provided to the district for implementation in the classroom. (SD 19)
11. In the third marking period of kindergarten, the teacher noted that he was inconsistent in skill areas but was showing some improvement. (SD 23)
12. On April 4, 2003, the district requested permission to evaluate the student for a learning disability. The parent consented on April 9, 2003. (SD 18)
13. The district issued its Evaluation Report on September 11, 2003. The report concluded that he was eligible under IDEA as a student with a specific learning disability. (SD 17)
14. The Evaluation Report identified his needs as auditory memory, perceptual reasoning/perceptual organization, comprehension of directions, reading readiness/decoding skills, spelling/writing skills, and retention of information. (SD 17)
15. The district convened an IEP team meeting on September 23, 2003. The parent attended and participated in the meeting. The team stated that the student was having significant difficulties with letter and sound recognition. Goals and objectives were developed in the areas of phonemic awareness, word recognition, fine motor skills, written expression, and work skills. (SD 16)
16. The section regarding Least Restrictive Environment stated that the student would not participate with the regular class for language arts or math. Though a teacher testified

that the issue was discussed, she could not recall what was said or the nature of the discussion. She said the student was removed from the regular education classroom for math because he "worked better in a small group setting." He was removed from the regular education class for approximately two and a half hours each day. (SD 16; N.T. 112, 118-119)

17. There were no math goals in the IEP. The Hearing Officer asked the district to provide the math goals for review at the hearing, and it failed to do so, though a witness said they existed. (SD 16; N.T. 234, 242)
18. The parent approved the Notice of Recommended Educational Placement. (SD 15)
19. The student mastered two of five annual goals. He was reading at the same reading level at the end of the year as he was at the beginning of the year, a preprimer level. The student was also still functioning on a preprimer level for written expression at the end of the year, which is where he was functioning at the beginning of the year. (SD 1; N.T. 185-187)
20. The teacher used the Wilson Fundations Program but adopted and adapted other methods to teach reading. She did not administer the Wilson program in the way it was designed. (N.T. 125-126, 160-162)
21. During the first grade school year, the parent notified the teacher that the student was unhappy about being removed from the regular education classroom. (N.T. 120)
22. There were continuing issues with distraction and inattention in the special education classroom during the school year. (N.T. 167-168)
23. Progress monitoring did not incorporate information or input from the regular education teacher. (N.T. 169-170)
24. There is no data regarding the student's ability to wield independent work skills in the regular education environment. (N.T. 178-179)
25. In June 2004, the teacher requested an occupational therapy evaluation of the district. She did not know what happened in response to her request. (N.T. 165-166, SD 14)
26. At the end of first grade, the student was found to be able to decode 85% of the words on a first grade word list. After returning from the summer break, he was unable to read any of the first grade words and only 50% of the kindergarten word list. (N.T. 154-157, SD 11, SD 1)
27. The parent privately retained a tutor who worked with the student on reading, twice weekly, all through 2004. (N.T. 410)
28. The district never offered extended school year services to the student for the summer of 2004. The parent privately retained a handwriting program to work with him over the break. (N.T. 387)
29. On August 9, 2004, the parent wrote a letter to the district, stating that she did not feel that her child was making progress. She stated that she was concerned about "the unhappiness that being pulled from class for IEP (sic) is causing him." (SD 14)
30. The district requested permission to reevaluate on August 24, 2004. The parent consented on August 25, 2004. The district did not complete the assessments identified

in the permission form. (SD 3; SD 13; N.T 282-283, 390)

31. The parent suggested that the student be provided with a Wilson reading program, occupational therapy, and guidance for self esteem issues. (SD 12)
32. Another IEP was crafted on September 23, 2004. The mother participated. This document included goals on reading and math. (SD 11)
33. Again, in second grade, the student was removed from the regular education classroom for two and a half hours a day for language arts and math. Though the teacher testified that this was "discussed with the family," no information was provided regarding the nature of the discussion. (N.T. 223-224)
34. Again in second grade, the mother reported that the student was upset about being removed from the regular education environment. (N.T. 268)
35. According to his first grade language arts teacher, the IEP for second grade needed to have a goal for written expression, with accompanying specially designed instruction. It did not have these items. The second grade teacher did not include them because she felt that his writing issues were "mechanical." The psychologist who wrote the Evaluation Report shared the view that manifestations of written language ability may go beyond letter formation, disagreeing with the second grade teacher. (N.T. 175-176, 366-367, 384-385)
36. The mother was expressing a lot of concern about the student's program to the teacher. (N.T. 204)
37. The second grade special education teacher could not discern whether the student's difficulty was due to reading issues or attention issues. She advised the parent that a school evaluation on attention was a first step to seeking medication for the student. (N.T. 204-205, 228)
38. The mother reported that she was going to send the student to a private placement for the summer. The teacher stated on the IEP that the district would "monitor for [ESY] eligibility." (N.T. 224)
39. A referral for an occupational therapy evaluation was forwarded to the occupational therapist near the end of September 2004. (N.T. 88)
40. An initial occupational therapy evaluation was conducted on October 20, 2004. The evaluator recommended that the student receive direct occupational therapy for thirty minutes per week, with a consultation of thirty minutes per month to classroom staff. (SD 10; N.T. 41)
41. The IEP team met on December 3, 2004, and revised the IEP to include occupational therapy. (SD 9)
42. Though revised OT goals were supposed to be added to the IEP, they were not, and progress was not reported accurately or clearly as a result. Specifics of the goals were not reported to the mother. (MT. 56-58, 73-76, 102-103; SD 2; SD 10, SD 11)
43. The IEP was not revised to include any of the specially designed instruction or accommodations recommended by the occupational therapist. (SD 11; N.T. 81)
44. He did not receive direct OT services or regular consultative OT services prior to January

2005. (N.T. 85-86)

45. The parent had the student's reading skills assessed by a certified Wilson reading instructor employed by a private school. He was reading at a beginning preprimer level. The information was included in a letter dated September 8, 2005. (P 4)
46. The district's expectation for second graders is that they will read with fluency at the second grade level by the end of second grade. (P 2)
47. It was appropriate to expect the student to make a year's growth in one school year. (N.T. 272; SD 17)
48. He did not master either of his reading goals in second grade. (N.T. 272, SD 1)
49. On February 10, 2005, the parent asked to have the student tested for Attention Deficit Disorder on the advice of his teachers. The district agreed to conduct an evaluation, and the parent signed that she agreed to it, all on the same day. (SD 7, SD 8)
50. The parent requested a due process hearing on April 28, 2005. The parents alleged that the IEP was deficient, that his program and placement were insufficient to allow him to make progress towards independence and self-sufficiency. They also stated they would be requesting an Extended School Year program for summer 2005, an appropriate program and placement for the entire school year, compensatory education, private school tuition reimbursement, and reimbursement for an independent evaluation. (SD 6; N.T. 9)
51. The complaint noted several specific, alleged deficiencies in the IEP. (SD 6)
52. The complaint asserted, on April 28, 2005, that the district was obligated to pay for the private summer program. (SD 6)
53. On May 2, 2005, the district proposed an extended school year program for the student. It recommended ninety minutes of learning support, four days a week, starting on July 5, 2005. It did not mention occupational therapy services. The teacher understood the student would not be attending the district's program and issued the NOREP in the event the student did not attend the private summer program and needed the public school program. (SD 5; N.T. 77-78, 233-234)
54. ESY goals for 2005 were not discussed with the parent nor were they the result of an IEP team meeting. No IEP team meeting was held to discuss ESY. The goals were not made available for review at the due process hearing. The teacher approached the parent in the parking lot and asked her to sign a document regarding ESY. (N.T. 232-234, 286, 388)
55. The second grade teacher reported that she collected data on regression and recoupment, and the data showed he had regressed, and his recoupment was slow. (N.T. 286-287)
56. On or about May 4, 2005, the district was notified by the occupational therapist that she felt the student needed extended school year services in occupational therapy at the rate of thirty minutes per week. The therapist developed goals for the ESY program. She was not involved in an IEP meeting to discuss ESY services. (SD 4; N.T. 59, 78)
57. The hearing was bifurcated, and the immediacy of the extended school year issue was resolved by agreement of the parties. (N.T. 34)
58. On May 17, 2005, the district issued its report of the testing it conducted to determine if

the student had Attention Deficit Disorder. It concluded that he should be identified as a student with ADHD – Inattentive Type. (SD 3)

59. The finding was based, in part, on two teachers' response forms that indicated that the student demonstrates many hyperactive and inattentive behaviors in class. One of those teachers was his special education teacher. (SD 3; N.T. 284-285)
60. The psychologist who reviewed the student's records for the evaluation was able to find evidence of attention problems and problems following directions before age seven. (SD 3: N.T. 326, 334, 341-342)
61. The ESY teacher contacted the mother via voice mail at the end of June 2005 for the ESY program. The ESY teacher never received goals or objectives for the summer program for the student. (N.T. 175-176)
62. The student was enrolled in the [Redacted] School for a summer program. He received instruction in math, reading, writing, and classroom behaviors. Other than personally feeling that he made progress, the parent received no written, formal reports of progress. (P 3, N.T. 409)
63. The [Redacted] summer program offered two hours of reading instruction plus forty minutes of math instruction for each of 19 sessions. (P 3)
64. The student was enrolled in the [Redacted] School, a private school for students with learning differences, for the current school year. (P 4; N.T. 394)
65. The parent asserted, during testimony, that the student needed a pure Wilson approach to reading instruction and emotional support. (N.T. 395)

Issues

Is the student entitled to compensatory education for the period from September 2002 to present? If so, what is the appropriate amount and form of the compensatory education?

Are the parents entitled to reimbursement for the student's participation at [Redacted] School for the summer of 2005?

In the alternative, is the student entitled to compensatory education for Extended School Year services for the summer of 2005?

If so, what is the appropriate amount and form of the compensatory education?

Are the parents entitled to tuition reimbursement for the student's participation at [Redacted] School for the current school year?

In the alternative is the student entitled to compensatory education for the current school year?

If so, what is the appropriate amount and form of the compensatory education?

Discussion

Burden of Proof

As mentioned in the background section above, the district moved that the burden of proof should be placed on the parent in this matter. I find for the district on this issue in part and agreed that the parents, in this case, bear the burden of persuasion on most issues raised as they are the party that requested the hearing. *Schaffer* was silent on the issue of burden of production, which is a moot subject in this case.

In Pennsylvania, all special education due process proceedings are conducted in accordance with the due process hearing requirements identified in IDEA, so this case, which encompasses rulings under Section 504 of the Rehabilitation Act of 1973 and the IDEA, is affected by *Schaffer*. Arguably, placing the burden of persuasion on the parent has always been the intention in Pennsylvania. Explicit language in the PARC Consent Decree (1973) states that districts could very easily fulfill their burdens of production by presenting their reports (IEPs, ERs), and then outlines several parent-directed "rights," or opportunities, for the presentation of evidence.

> Introduction by the school district or intermediate unit of the official report recommending a change in educational assignment, provided a copy of such report was given to the parent at the time notice was given, shall discharge its burden of going forward with the evidence, thereby requiring the parent to introduce evidence (as contemplated in paragraphs f, r, s, and t herein) in support of his contention. (id at 22)

It should also be noted that while the Decree originally conceived that decisions were to be based on substantial evidence, IDEA has expressly lowered the standard to a "preponderance" of the evidence. This record was reviewed again, and the decision re-written in accordance with *Schaffer* and the explicit review requirements of IDEA, as required by Chapter 14 of 22 PA Code. The parents, for the most part, bore the burden of persuading me that the district denied the student a free appropriate public education.

An exception to the above posture is when IDEA's mainstreaming requirement is specifically at issue. Very recently, PDE entered into a settlement agreement regarding implementation of least restrictive environment obligations under IDEA, Section 504 of the Rehabilitation Act of 1973, and Title II of the Americans with Disabilities Act. In *Gaskin v. Pennsylvania,* No. *Civ.* A. 94-4048, (E.D. Pa. September 16, 2005), PDE agreed to require school districts to adhere strictly to the IDEA and the case law "including *Oberti v. Board of Education, 995* F.2d 1204, (3d Cir. 1993) when making placement decisions." In *Oberti,* the Court decided that "it is appropriate to place the burden of proving compliance with IDEA on the school. Indeed, the Act's strong presumption in favor of mainstreaming would be turned on its

head if parents had to prove that their child was worthy of being included, rather than the school district having to justify a decision to exclude the child from the regular classroom." The *Oberti* Court held that the district court had correctly placed the burden of proof on the school district to prove that a proposed segregated placement was in compliance with IDEA. When the issue of placement in the least restrictive environment arose in this case, the burden was shifted to the party proposing the more restrictive placement, in accordance with *Gaskin* and the Pennsylvania Department of Education's obligation to adhere to *Oberti.*

Compensatory Education

Statute of Limitations

IDEIA 2004 does not apply to this case because it is the second part of a bifurcated case originally brought in the time period that the Office for Dispute Resolution determined would be reviewed "start to finish" under IDEA 1997 procedural safeguards. (SD 11)

Following is my reasoning regarding the complicated issue of compensatory education, *Montour,* and IDEA.

A. The student and his parents seek relief under IDEA, in the form of compensatory education. The student's date of birth is xx/xx/xx.
B. The district requested that the Hearing Officer limit the parents' compensatory education claim in accordance with *Montour School District v. S.T.* 805 A.2D 29 (Pa. Cmmw. 2002)
C. As an alternative, the district requests that the Hearing Officer limit the parents' claim for compensatory education in accordance with its interpretation of IDEA 2004, Section 615 (f)(3)(c).
D. *Montour* does not discuss compensatory education as a remedy for violations of Section 504, a claim explicitly asserted by the parents.
E. *Montour* conflicts directly with several federal court decisions on the subject of compensatory education. See *Jonathan T v. Lackawanna Trail School District,* No. 3:03 cv 522 (M.D. of Pa. Feb. 2004); *Jonathan H. v. Elizabeth Forward School District,* No. 03-1996 (W.D. Pa. March 2004); *Amanda A. v. Coatesville Area School District,* No. 04-4184 (E.D. Pa. Feb. 2005); and *Ridgewood Board of Education v. N.E.,* 172 F. 3d (3d Cir. 1999).
F. *Ridgewood* rejected the position that IDEA-based compensatory education claims were subject to a statute of limitations because it found that such claims were for a minor child, unlike *Bernardsville Bd. Of Educ. v. J. H.*(42 F.3d 149, 3d Cir., 1994), which involved a claim for monetary relief for parents in a tuition reimbursement case. *Ridgewood* also found that compensatory education claims could go back many years and that a failure to object to a student's placement did not deprive him of the right to an appropriate education.
G. *Montour* based its decision on *Bernardsville,* rather than *Ridgewood. Ridgewood is*

the controlling decision in this case's compensatory education consideration, according to *Amanda A.*

H. *Amanda A.* clearly states that if the question of compensatory education for the student in that case were a matter of state law, the federal court itself would be bound by state court precedent. However, compensatory education decisions, even that discussed by *Montour,* were found in *Amanda A.* to be decisions of federal law. *Montour* was identified as a state court decision interpreting federal law. The Court in *Amanda A.,* therefore, stated that federal law applies. It then launched into a detailed review of applicable federal law and found that the statute of limitations dictated by *Montour* was inapposite when compared to the then current federal law and that no time limit applied to compensatory education claims.

I. *Montour* did not address the applicability of "equitable tolling." The concept of equitable tolling requires the federal courts to extend "any statute of limitations" which might denigrate a civil right protected by federal law under certain circumstances.

J. In this case, the civil right protected by federal law is the entitlement of children to receive appropriate special education services during their educational years under IDEA and the Rehabilitation Act of 1973, which are federal statutes.

K. IDEIA 2004 Section 615 (f)(3)(C) regarding the timeline for requesting a hearing states, "A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or the agency **knew or should have known about the alleged action that forms the basis of the complaint,** or, if the State has an explicit time limitation for requesting such a hearing under this part, in such time as the State law allows."

L. IDEIA 2004 does not state that compensatory education claims are automatically limited to two years prior to the filing of the request. In any event, IDEIA 2004 does not apply to this matter.

M. The state administrative review process (i. e., this due process hearing) was created as a mandatory procedure under federal special education law, 20 U.S.C. § 1415 (b), (e), (f), (g); 34 C.F.R. §300.507 to 510.

N. State Appeals Panels themselves have been in conflict with whether or not *Montour* applies in these situations. Compare Appeals Panel Opinions #1481, 1499, 1517, and 1595.

0. At least one Appeals Panel Member has published a highly critical analysis of *Montour* entitled, The Statute of Limitations with Disabilities Education Act: Is *Montour* Myopic? (Zirkel, Perry A., 12 Widener L.J. 1, 2003). The perspicacious document echoes and informs the view that *"Montour* ignored the Third Circuit's clear, although questionable, distinction between tuition reimbursement and compensatory education and its inevitable, albeit implicit, first stage limitation period for compensatory education."

P. In Opinion #1499, the Appeals Panel criticized *Montour* and astutely acknowledged

that it creates a problem of "venue shopping" for litigants. It held, however, that it was somehow bound by *Montour* and was promptly reversed by the Federal Court in *Amanda A. v. Coatesville Area School District,* No. 04-4184 (E.D. Pa. Feb. 2005).

Q. The position of the majority of Appeals Panels has evolved to be that they are obligated to follow state law.

R. In IDEA cases, "Pennsylvania law dictates that the statute of limitations does not begin to run against any claim of an unemancipated minor until that individual reaches the age of 18." See *Irene and Gary B. v. Philadelphia Academy Charter School,* 2003 U.S. District LEXIS 3020 (E.D. Pa. 2003); *Jeffrey and Mary Y. v. St. Mary's Area School District,* 967 F. Supp.852 (W.D. Pa. 1997)

S. *Montour* did not acknowledge the difference between parental rights to monetary relief and the separate and distinct right of the child to an appropriate education. Parents do not possess the same underlying substantive rights that their children possess. The substantive rights under IDEA are so unique to children who are protected by that law that parents are not even seen as having joint rights with their children under IDEA. See *Collinsgru v. Palmyra Board of Education,* 161 F. 3d 225 (3d Cir. 1998); *Carpenter v. Pennell School District Elementary Unit,* US. Dist. LEXIS 15152 (E.D. Pa, 2002)

T. Pennsylvania Consolidated Statutes Part 6, Section 5533, is an actual state statute on the subject of limitation of time.

U. Subsection (b) regarding Infancy states, "If an individual entitled to bring a civil action is an unemancipated minor at the time the cause of action accrues, the period of minority shall not be deemed a portion of the time period within which the action must be commenced. Such person shall have the same time for commencing an action after attaining majority as is allowed to others by the provisions of this subchapter. As used in this subsection the term "minor" shall mean any individual who has not yet attained the age of 18."

V. The student in this case is an unemancipated minor, and it is his rights which are at issue in the portion of the claim dealing with compensatory education, not the parents' rights.

W. As noted previously in *Irene and Gary B.,* Pennsylvania law **requires** that any statute of limitations in IDEA claims in such instances be set aside until the child reaches the age of majority.

X. In addition to the infancy statute, at the start of the hearing, there was not yet an evidentiary base upon which the Hearing Officer could determine when the parents knew or should have known about the alleged action which formed the basis of this complaint.

Y. When a federal right is greater under federal law than state law, the Supremacy Clause of the United States Constitution mandates that the expanded federal right be honored by a state administrative hearing officer. (US Constitution, Article VI,

Clause *2, Lehman v. Pennsylvania State Police*, 839 A.2d 265, PA 2003, *Kise v. Department of Military and Veteran Affairs*, 832 A.2d 987, PA 2003)

Z. Even if some future reviewer can find cause to reject the obligations of Y mentioned immediately above, it is clear that PCS 5533 should be applied over *Montour* simply because it is a statute and was adopted through a more rigorous and intensive review process. Appeals Panels, even if they feel they must apply state law over federal law, **must apply state statutes.**

AA. As of this writing, federal district courts have remanded several cases to the administrative due process system and directed that Hearing Officers and Appeals Panels determine entitlements of individual students to compensatory education for periods beyond the period of limitation asserted by *Montour.*

Summary – *Montour is* inapposite when compared to decisions handed down by federal district courts and the Third Circuit and to state statute. Several cases have been remanded to the Office for Dispute Resolution by the federal district courts ordering that Hearing Officers and Appeals Panels disregard *Montour and* render decisions on the entitlement of several students to compensatory education beyond *Montour's* time limitation. *Montour* did not address the applicability of "equitable tolling." It did not distinguish between the child's right to an appropriate education with parental rights to monetary relief for tuition reimbursement. As a result, it did not toll the student's claim to compensatory education in accordance with state statute. Even if some future reviewer finds that *Montour* does apply in this case and that *Montour is* a "statute of limitations", PCS § 5533 requires that any such time limitation be set aside until this student reaches the age of majority.

Conclusion - Whether one chooses to follow the reasoning of several district court decisions. or the prevailing Appeals Panels' position that they, in compensatory education cases, are bound by state law, *Montour* cannot be applied in this instance at this time. It is not consistent with federal law or state statute. Hearing Officers and Appeals Panels have an affirmative, fiduciary responsibility to decide records based on a preponderance of the evidence and the statutes, federal and state regulations, and legal interpretations of the statutes by federal and state courts. Application of *Montour,* in light of the above circumstances, would be irresponsible.

The district's Motion to Limit the Parents' Claim for Compensatory Education was denied.

Is the student entitled to compensatory education for the period from September 2002 to present? If so, what is the appropriate amount and form of the compensatory education?

Section 504

Explicitly asserted by the parents, there is no denying the fact that students who are eligible under the IDEA are also protected handicapped students under Section 504 of the Rehabilitation

Act of 1973. *Chad C. v. the West Chester Area School District* where the Court required a Hearing Officer to render two decisions in a case, one under IDEA and one under Section 504, a clear indication that such orders and considerations are appropriate and at times, necessary. In further support of this concept, I invite attention to *LC vs. Olmstead* (Eleventh Circuit, Docket No. 1:95-CV-1210-MHS), a case which discusses community programming and institutionalization of people with disabilities, affirmed by the Supreme Court in 2000 and offers further insight into Section 504 and the ADA. *Olmstead* requires that states apply Section 504 in all cases. Hearing Officers cannot simply ignore 504. To do so would defy the clear directive of *Olmstead.*

34 C.F.R. 104 is the section of the Rehabilitation Act addresses education.

Reg. Sec. 104.33 which identifies a public school's obligations to provide a free appropriate public education states:

(a) General. A recipient that operates a public elementary or secondary education program shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.

(b) Appropriate education.

(1) For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that
(i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and

(c) Free education.

(1) General. For the purpose of this section, the provision of a free education is the provision of educational and related services without cost to the handicapped person or to his or her parents or guardian, except for those fees that are imposed on non-handicapped persons or their parents or guardian. It may consist either of the provision of free services or, if a recipient places a handicapped person in or refers such person to a program not operated by the recipient as its means of carrying out the requirements of this subpart, of payment for the costs of the program. Funds available from any public or private agency may be used to meet the requirements of this subpart. Nothing in this section shall be construed to relieve an insurer or similar third party from an otherwise valid obligation to provide or pay for services provided to a handicapped person.

By authority of the Rehabilitation Act, the Office of Civil Rights has awarded compensatory education to a student with a disability who had been denied appropriate education services. *(Chicago Board of Education,* EHLR 257:526, OCR 1984). There is no statute of limitations contained within the Rehabilitation Act, and again, *Montour* does not address the Rehabilitation Act.

Compensatory Education – Fundamental Concepts

The Third Circuit first awarded compensatory education in *Lester H. v. Gilhool* [916 F.2d 865, 872, (3rd Cir. 1990)] reasoning that compensatory education required school districts to belatedly pay expenses that they should have paid all along. *M.C. v. Central Regional School District*, 23 IDELR 1181 (3rd Cir. 1996), further clarified that a grant of compensatory education did not require a showing of bad faith or gross violations of IDEA on the part of the district. This case indicated that a child is entitled to compensatory education if a district knew or should have known that a child had an inappropriate IEP or was not receiving more than a de minimis educational benefit and did not correct the situation. The period for which compensatory education can be granted is equal to the period of deprivation minus time reasonably required to rectify the problem.

Denial of an appropriate education is specifically differentiated from the denial of an appropriate IEP. The denial of an appropriate education results in an award of compensatory education. The denial of an appropriate IEP may or may not, though the two are, of course, very closely related. To determine whether or not an appropriate education has been provided, one must determine whether the program has provided the student with educational benefit.

Special Education Appeals Panel Opinion #1595 found that the student in that case was entitled to compensatory education because of the poor quality of the IEPs in that case. It reasoned, flawlessly, that in order for the student to receive FAPE, he must be provided with an IEP that is reasonably calculated to afford him meaningful educational progress. The district did not provide him with appropriate IEPs, making numerous error of omission and IEP construction in the program plans it did provide. Accordingly, the Panel, reasoned, the student is entitled to compensatory education in such circumstances.

Cypress-Fairbanks Independent School District v. Michael F., 26 IDELR 303, 118 F.3d 245 (5th Cir. 1997) established a four part test for determining whether or not educational benefit has been provided.

1. Was the program individualized on the basis of the student's assessment and performance?
2. Was the program administered in the least restrictive environment?
3. Were the services provided in a coordinated and collaborative way by "key stakeholders"?
4. Were positive and nonacademic benefits demonstrated?

1.Was the program individualized on the basis of the student's assessment and performance?

No aspects of the student's evaluation were ignored or misinterpreted when the IEPs were written. The issue of a written expression disability was not appropriately addressed in the second grade IEP. (FF 35, 43) The district agrees that the student needed extended school year services but either did not provide them (FF 28) or did not convene meetings to have the team craft goals for the program. (FF 54) The reading goals are vague, as anyone can see by looking at the document. The specially designed instruction section does not include important items. Occupational therapy issues abound, with everything from unnecessary delay in identifying and addressing the need to simple, but serious, oversights in forwarding paperwork. (FF 39, 31, 42, 43) Perhaps the largest, most significant problem is the failure of the district to follow up on an agreed upon evaluation process. The parent had alerted the district to problems she saw with regard to educational progress, and the district responded by asking her permission to conduct a series of assessments. Then, without explanation, the district does not pursue those assessments. (FF 30) Consequently, the team went without information on the student that all agreed needed to be obtained.

2. Was the program administered in the least restrictive environment?

If the district fails to offer the student program and placement which occurs in the least restrictive environment, it has failed to offer FAPE. The two concepts (LRE and FAPE) are inextricably intertwined. Children who are not provided with educational services in the LRE appropriate to their needs are not provided FAPE. *Millersburg Area School District v. Lynda T,* 707 A.2d 572 (1998).

The least restrictive environment is defined in several ways – distance from a child's home, amount of contact with typical peers, and positioning of the proposed placement within a well-defined hierarchy of educational placements. The expectation of least restrictive environment is so rigorous that the courts have held, for example, that a school district is prohibited from placing a child with disabilities outside of a regular classroom if educating the child in the regular classroom with supplementary aids and support services can be achieved satisfactorily. *Oberti* instructs that factors to consider in determining whether this can occur are as follows:

A. Steps to be taken by the school to try to include that child in a regular classroom;
B. The comparison between the educational benefit the child would receive in a regular classroom – social and communication skills, etc – and the benefits the child would receive in the segregated classroom. Thus a determination that a child would make greater academic progress in a segregated program may not warrant excluding that child from a regular classroom.
C. Possible negative effect inclusion may have on the education of the other children in the classroom.

Additionally, if placement outside of a regular classroom is necessary for the child to

receive educational benefit, a school district may still be violating IDEA if it has not made sufficient efforts to include the child in school programs with non-disabled children whenever possible. *[Oberti v. Board of Education, 995 F.2d 1204 (3rd Cir. 1993) 19 IDELR 908]* By inference, it is concluded that the burden for proving that a more restrictive environment is necessary falls on the party which is proposing the more restrictive placement.

A more recent decision, *Girty v. School District of Valley Grove,* 163 F.Supp.2d 257 (W.D. Pa. 2001), builds upon the *Oberti* test for determining when a child should be placed within a more restrictive environment. It states, "The IDEA **does not require disabled children to receive the same educational experience as nondisabled children, and recognized that disabled children may benefit from regular education differently** than nondisabled children. Stated differently, the relevant focus is whether [the student] can progress on his IEP goals in a regular education classroom with supplementary aids and services, not whether he can progress at a level near to that of his non-disabled peers."

The district did not put on any evidence that any of its proposals met the *Oberti* test. By all accounts, it did not conduct necessary reviews of whether or not the student could be included in the regular education classroom, and the record is devoid of evidence to the contrary. (FF 16, 33) IEP teams did not discuss a full range of supplementary aids and supports before excluding the student from the regular education environment, and the record shows that even recommended supports are missing from the IEPs. (FF 42) The district has the burden of proof in matters of least restrictive environment and failed to meet its burden here.

3. Were the services provided in a coordinated and collaborative way by "key stakeholders"?

No, the parents persuaded me that services were not provided in a coordinated and collaborative way. Stakeholders are, minimally, the teachers, the parents, and the therapists. First, teachers had substantially different interpretations of the student's written expression issues, and at the hearing, they disagreed with each other. (FF 35) Second, the occupational therapy component was confused from the first IU consultative report. The most glaring of these errors is the failure of the occupational therapist to craft goals in collaboration with the IEP team or to even notify the parent of what goals she was working on (FF 42).

The IEPs are significantly and fatally flawed for the reasons asserted by the parents. In order for there to be coordination and collaboration, there must be a vehicle of communication. IDEA envisions this vehicle of communication among team members to be the IEP. It is the unifying document, providing a common basis for team members to participate in planning, to share information, and to guide decisions regarding the student. Here, there was no reliable vehicle of communication regarding the student's program because the IEPs were fatally flawed. The IEP is the blueprint, the map, for the student's educational program. When the student has learning difficulties, the IEP is critical because regular education curriculum guidelines cannot always be followed. If stakeholders don't have an IEP of reasonable quality, they have no other

way to communicate expectations regarding a student like this one.

With these IEPs, the goals are unclear. (SD 11, SD 16) One cannot pick up any IEP and implement it with any degree of coordination. How can team members communicate about IEP progress if they have no starting point upon which to base such a discussion? If the team does not have a clear IEP, it cannot begin to share information about the student's progress or lack of it. It cannot communicate reasonably about the student's education if the IEP does not adequately provide the foundation upon which the team can work. Progress reports are of significant concern. (FF 42, 23) We spent much time at the hearing trying to ferret out exactly what is meant by the documents. This is a concern because without rigorous examination, team members would not and did not understand the progress reports, impeding effective program design. If stakeholders aren't clear on the IEP and don't properly take decisions to the IEP team and don't have easily understandable progress reporting, there is simply no way that the student's program can be considered to be implemented in a coordinated way. The parents persuaded me that all those factors were at play here.

4. Were positive and nonacademic benefits demonstrated?

There might have been some positive and nonacademic benefits, but this is difficult to determine. The parents asserted that the program has not permitted the student to progress towards independence and self-sufficiency, (FF 50) and they have been persuasive in their presentation. If there was progress, it is hard to see it in a way that makes sense when considering the overall goal of moving the student towards independence and self-sufficiency.

SD 1 and SD 20 with testimony are the bulk of the district's presentation regarding progress. The documents are highly technical and somewhat arbitrary. They show that two goals during the one year were achieved of five. (FF 19) Other reports of progress compared oranges to apples and were not helpful in answering this question. Teacher testimony on this subject seemed like habitual platitudes and not based on anything other than vague feelings. The student arrived "on the scene" on a pre-primer reading level; in January 2005, he was still on a beginning pre-primer level. (FF 45) Impact of the special education program on his regular education participation was not even assessed. (FF 23) Progress reports of occupational therapy do not match up with what the therapist stated she was working on. A teacher attested that he regressed over summer breaks but offered no specifics.(FF 55)

It was reasonable to expect this student with his roughly normal IQ to make one typical year of progress in one chronological school year. (FF 47) When evidence was provided that allowed this to be measured, like for reading, the evidence shows that in two and a half school years, he made no progress at all. Admittedly, the record is thin and disjointed with regard to progress, overall.

There is no significant evidence that the student regressed from September 2002, but the preponderance of the evidence shows that he did not make meaningful educational progress

and did not progress towards independence and self-sufficiency.

Calculation and Form of Compensatory Education

The district took reasonable action during the 2002-2003 school year to address the student's concerns. (FF 4-12) The student was referred to the Instructional Support Team, and this was initiated by the kindergarten teacher. The instructional support team met and crafted interventions. They were not effective, so the IST properly referred the student for a full evaluation to determine eligibility. Scant evidence is provided on the record regarding a problem with this process, so the parents failed to persuade me that compensatory education is owed for the kindergarten year of 2002-2003.

One school year, in light of the above process; however, is more than reasonable in terms of time allowed for the district to identify and program for this student's needs. Therefore, the period of deprivation begins with the first day of school for the third grade year, the 2003-2004 school year. The student was deprived of appropriate language arts and math instruction. The first was ineffective (FF 16); the math was provided in a setting which was too restrictive and for one of the years, included no goals (FF 17). Worthy of mention is the fact that the student was deprived of adequate supports in regular education as well, but no persuasive evidence exists to show that any additional award is needed to remedy whatever occurred in that setting. While there were several procedural lapses with occupational therapy, I was only persuaded that these lapses required a remedy of compensatory education for the period from September 2003 until the first week of January 2005. Otherwise, he received occupational therapy, and the parents did not persuade me that the procedural lapses resulted in a denial of FAPE on their own. To the hours already mentioned, I add thirty minutes per week for each week of each school year in question for the time period from September 2003 through December 2004. No separate award is given for the occupational therapy for the summers, and the award for ESY is discussed below.

The student is entitled to receive two and a half hours for each school day between the start of school in August or September 2003 until such time as the district presents an appropriate IEP for the student. Two and a half hours is equal to the time he spent in language arts and math during the years in question. In addition, he is entitled to two hours and forty minutes for 38 days for the denial of appropriate ESY services, or 101 hours and twenty minutes. I relied on P 3 and multiplied the amount of summer support by two to develop the compensatory education award on this subject. The record is very thin regarding remedy for denial of FAPE. This was the best, most objective information which addressed the subject.

The student is entitled to compensatory education because the district failed all four parts of the Cypress-Fairbanks test for determining educational benefit.

Compensatory Education Award

2.5 hours per day for math and language arts for each school day for the period from the first day of school in the 2003-2004 school year and for each school day for the period from the first day of the 2004-2005 school year.

30 minutes per week for each week of school for the period from the first day of school in the 2003-2004 school year and for each school day for the period from the first day of the 2004-2005 school year to January 2005.

30 minutes per month for consultative occupational therapy for the period from for the period from the first day of school in the 2003-2004 school year and for each school day for the period from the first day of the 2004-2005 school year to January 2005.

101 Hours and twenty minutes for summer program for the summers of 2004 and 2005.

The parent may decide how the hours should be spent, as long as they take the form of any appropriate developmental, remedial, or enriching instruction that furthers the goals of the student's pendent or future IEPs. Such hours must be in addition to the student's then current IEP and may not be used to supplant such services. These services may occur after school hours, on weekends, and during the summer months, when convenient for the parent and the student. Reimbursement for the services shall be at the rate that the parent is obligated to pay, not a district determined rate. This provision shall remain in effect until the student's 21st birthday, but it is urged that the parties attempt to provide this student with compensatory services and supports as soon as possible. The hours are not to be used for college tuition, unless the parties both agree. Should the parties agree, the district may set up a fund with a set dollar amount that the parent may draw upon for educational services and equipment.

Are the parents entitled to reimbursement for the student's participation at [Redacted] School for the summer of 2005?
Are the parents entitled to tuition reimbursement for the student's participation at [Redacted] School for the current school year?

There are three prongs to the decision to award reimbursement for a unilateral placement of a student at a private school. First, one must determine whether or not the district offered the student a free appropriate public education. Second, the parents, if the district does not prevail on the first prong, must show that the private school selected is appropriate for the student, and third, the Hearing Officer must weigh the equities in the case. *[Burlington School Committee v. Massachusetts Department of Education,* 1984-85 EHLR 556:389 (1985); *Florence County School District 4 v. Shannon Carter,* 510 U.S. 7 126 L.Ed.2d 284, 114 S.Ct. 361 (1993)]

The First Prong

The IDEA requires that school districts provide a "free appropriate public education:

("FAPE") to all eligible students with disabilities. An appropriate program is one that is provided at no cost to the parents, is provided under the authority of the District, is individualized to meet the educational needs of the student, 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); 20 U.S.C. § 1401(8). *See also 22* Pa. Code § 14.1. The United States Court of Appeals for the Third Circuit interprets *Rowley* to require school districts to offer children with disabilities individualized education programs ("IEP's) that provide more than a trivial or de minimus educational benefit. *Polk v. Central Susquehanna Intermediate Unit 16,* 853 F.2d 171, 180-85 (3d Cir. 1988), *cert. denied,* 488 U.S. 1030 (1989). Specifically, the Third Circuit defines a satisfactory IEP as one that provides "significant learning" and confers "meaningful benefit." 853 F.2d at 182-184. *See also Board of Education of East Windsor Sch. Dst. v. Diamond,* 808 F.2d 847 (3d Cir. 1986); *J.C. v. Central Regional Sch. Dst.,* 23 IDELR 1181 (3d Cir. 1'996).

The district's lapses in IEP development for the summer of ESY resulted in a program offering that was not reasonably calculated to afford the student with meaningful educational progress for the reasons mentioned in the foregoing section. Likewise, the district failed to offer FAPE for the current school year.

Thus, the parents pass the first prong of the three part test for tuition reimbursement.

The Second Prong

Appeals Panel Opinion #1472 affirmed a Hearing Officer's decision not to prospectively place a student with dyslexia in a private school. The Hearing Officer and the Panel did not find the placement in the private school to be appropriate because of a paucity of evidence regarding its program and because the student could be educated in the less restrictive environment of the public school. In #1472, the parents had an independent evaluator who opined that private school placement was appropriate, and this was deemed insufficient.

The parents have the burden not only to prove that the private school is appropriate, but they have the burden to prove that the highly restrictive nature of a segregated setting is appropriate for this student. The parent's feelings and a few reports written by private school personnel, absent accompanying and more weighty evidence, does not satisfy the stiff requirements of *Oberti,* discussed in an earlier section of this decision. Here they did not even present an expert or personnel from the school.

The parent's request for tuition reimbursement for the summer of 2005 and the current school year fails due to the parents' failure to provide persuasive evidence that the private school is appropriate.

Parents' request for reimbursement for the student's participation at the

[Redacted] School for the summer of 2005 and for the current school year is denied.

Order Hereby:

1. Student is entitled to compensatory education for the district's failure to provide a Free Appropriate Public Education in accordance with IDEA.
2. Student is entitled to compensatory education for the district's failure to provide a Free Appropriate Public Education in accordance with the Rehabilitation Act of 1973.
3. The [Redacted] School District is ordered to provide Student with compensatory education in the form and amounts above.
4. The [Redacted] School District is ordered to convene the IEP team and develop an appropriate IEP for the student within two weeks of receiving this Order.
5. The [Redacted] School District is not obligated to reimburse the parents for any expenses associated with the student's participation at the [Redacted] School.

December 19, 2005
Date

Linda J. Stengle
Hearing Officer