PENNSYLVANIA

# Special Education Hearing Officer

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**This is a redacted version of the original hearing officer decision. Select details may have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.**

**DECISION**

Due Process Hearing for K.C.
Date of Birth: xx/xx/xx
ODR File No.: 5806/05-06 KE

Dates of Hearing:
November 9, 2005
November 14, 2005
November 29, 2005

Closed Hearing

| Parties to the Hearing: | Representatives: |
|---|---|
| Parent(s) | Pro Se |
| Upper Perkiomen School District<br>201 West Fifth Street<br>East Greenville, PA 18041-1501 | Lawrence D. Dodds, Esquire<br>Wisler Pearlstine<br>484 Norristown Road, Suite 100<br>Blue Bell, PA 19422 |
| Dates Transcripts Received: | November 15, 2005<br>November 17, 2005<br>December 3, 2005 |
| Date of Decision: | December 17, 2005 |
| Hearing Officer: | Rosemary E. Mullaly, Esquire |

## I. Background and Procedural History

### *A. Background*

The Student (DOB.xx/xx/xx) is a resident of the Upper Perkiomen School District (the "District") who currently attends the District's middle school. This matter involves a parental request for tuition reimbursement of costs associated with placement of their then-[redacted age] daughter at the [Redacted Private School (Private School)] for the 2004-2005 school year. The Student had attended another private school, [First Private School] at parent expense for the 2003-2004 school year. The Student was identified as having an orthopedic impairment during the 2002-2003 school year while she attended the District's Elementary School. The parents assert both procedural and substantive issues as to why they believe that the District's proposed IEP for the 2004-2005 school year was not appropriate and that the [Private] School was an appropriate alternative to the District's inappropriate offer. The District asserts that it offered the Student a free appropriate public education based upon the information to which the parents gave it access and that the equities favor a denial of the parents' request for tuition reimbursement.

### *B. Procedural History*

The Office for Dispute Resolution received the parents' hearing request in this matter on August 28, 2005. In their Due Process Complaint Notice, the parents asserted

> The District denied Student FAPE for the 2004-2005 school year. The district failed to provide an Evaluation Report prior to conduct an IEP Team Meeting. The district refused to address or incorporate their evaluations into the IEP. The district failed to have the appropriate IEP Team Members attend the IEP Team Meeting. The district held a 2nd IEP Team Meeting without providing an ER prior to the meeting. Furthermore, the district did not allow Student's parents to attend the 2nd IEP Team Meeting.

Their proposed resolution was that "The District should reimburse the tuition costs for the 2004-2005 school year where Student attended [Private] School."

On September 9, 2005, the District challenged the sufficiency of the "Family Complaint," specifically that the first sentence did not provide a statement of the nature of the problem. On September 14, 2005, the hearing officer rendered a decision on the sufficiency challenge of the "Family Complaint" finding that the first sentence of the complaint related to the denial of FAPE for the 2004-2005 school year provided no description of the nature of the problem nor did it include facts relating to such problem. On September 21, 2005, the timeframe for the 30 day resolution period contained in Section 1415(f) recommenced when the parents amended their complaint. Therein the parents provided the following position:

The District denied FAPE for the 2004/2005 school year because of the following:

1. The District did not provide their independent Auditory Processing Evaluation Report to the IEP Team prior to, or at the IEP Team meeting (8/9/04).
2. The District did not have an individual, as a member of the IEP Team, who could interpret the instructional implications of the Auditory Processing Evaluation results.
3. The District held a 2nd IEP Team Meeting (8/26/04) without allowing Student's parents to attend.
4. The IEP offered by the District (after they held a 2nd IEP Team Meeting without Student's parents in attendance) is not designed to meet Student's needs.

Once again their proposed resolution was that "The District should reimburse the tuition costs for the 2004-2005 school year where Student attended [Private] School."

By the end of the 30 day resolution period which terminated on October 20, 2005, the parties were unable to resolve their dispute without a hearing, so several attempts were made to schedule a time and date that were convenient to both parties. Hearing sessions were held on November 9, 14 and 29, 2005.

On November 4, 2005, the hearing officer received a voicemail message from the Student's mother explaining that the district had not arranged for the attendance at the hearing of the individual who completed the Student's central auditory processing evaluation. After the hearing officer investigated the parent's complaint through direct contact with the parents, the district and the requested witness, it became evident that the evaluator was not willing to provide testimony in this matter. The hearing officer indicated that she would issue a subpoena to attempt to compel the evaluator's participation in the hearing, but the parents indicated on the record that they did not wish to pursue such a course of action.

On November 15, 2005, after the hearing had begun, the U.S. Supreme Court issued its decision in *Schaffer v. Weast*, Docket No. 04-698 (November 14, 2005), 546 U.S. ___ (2005), which established for the first time that the burden of persuasion at an impartial due process hearing lies on the party seeking relief. Slip Op. at 1. Because this decision overturned what had been the applicable burden in the Third Circuit when the hearing started, the hearing officer ruled *sua sponte* that she would continue to apply the applicable burden of proof that pre-dated the Supreme Court's decision in *Schaffer*.

## II. Stipulation and Findings of Fact

### *A. Stipulation*

The physical therapy and occupational therapy services contained in the IEP that was developed for the 2004-2005 were appropriate and were not an issue in this hearing.

The record reflects the following colloquy at N.T. 34-36 that evidences this stipulation.

> MR. DODDS: On November 4th of 2005 I received a fax letter from Parent stating that the District offered and provided the services of occupational therapy and physical therapy for the 2004-2005 school year. It states that: We are not raising any issues regarding occupational therapy and physical therapy at the hearing. Therefore, we would stipulate that any evidence or testimony regarding occupational therapy and physical therapy is unnecessary, and we are not seeking compensation for these services. So, I would ask on the record the Parent(s) to agree and stipulate that the need to present testimony about occupational therapy and physical therapy is not necessary at this hearing, that they are not basing their complaint with the IEP on the adequacy of offered physical therapy and occupational therapy.
>
> PARENT: That is correct.
>
> THE HEARING OFFICER: So, for clarification purposes, the offer that's contained in the IEP that was developed for the 2004-2005 IEP, that document, you do not have any issue with the way or manner or frequency or -- you are not arguing about that as it is configured in the 2004-2005 proposed IEP.
>
> PARENT: No, we're not.

(N.T. 34-36).

### *B. Findings of Fact:*

1. The Student is a resident of the School District. (S-1 at 1).

2. The Student was identified as having an orthopedic impairment during the 2002-2003 school year while she attended the District's [Redacted] Elementary School. The following physical information relevant to her disability and need for special education was contained in an evaluation report dated November 22, 2002: [redacted]. (P-26 and S-1, at 2).

3. During the 2003-2004 school year, the Student attended the [First Private] School, a private school located in [Redacted], Pennsylvania at parental expense. In April 7, 2004 correspondence, the Student's parents notified the District that the

Student would not be returning to [First Private School] for the 2004-2005 school year and would need to be "mainstreamed back into the public school system, since [First Private School] stops at 6th grade." Therein they stated their belief that "it would not be in [the Student's] best interest to return to school" in the District and that they had contacted a neighboring school district that agreed to accept the Student at the District's expense. At that time they requested a meeting to develop an IEP for the 2004-2005 school year. (S-2, S-3, S-5; P-8).

4. As the result of a prior administrative review of the Student's educational program and placement, the District was ordered to obtain a central auditory processing assessment of the Student that was completed in May 2004. (P-9; P-13, at 1).

5. The May 2004 Central Auditory Evaluation identified that the Student has remarkable difficulty in auditory figure/ground perception and selective attention, particularly the left ear, and auditory closure. Less difficulty was noted in tasks involving auditory memory and auditory sequencing. The Student demonstrates some breakdown when attempting to complete lengthier multiple or sequential instructions. The evaluation further stated that the Student will continue to benefit from a smaller, structured classroom setting where more individualized attention is available and listening conditions are highly favorable; seating in close proximity to the teacher and blackboard; a sound field enhancement system; a study buddy seated next to her; the use of earplugs; being told the number of tasks at hand prior to the details of such; a slower conversational rate, placing stress on key words to delineate salient information; "hands-on" types of instruction; use of mnemonic devices; being called upon to repeat instruction; being encouraged to ask questions when unsure of the task at hand and positively reinforced for doing so; handouts confirming information she hears; interaction with her teacher at the end of class to confirm assignments and clarify any points of confusion with follow-up the next day to assures that the Student has accurately grasped new concepts; a teaching approach that is animated in nature employing stress on key words to delineate salient information; and a slower conversational rate, coupled by hand and facial gestures. (S-4, at 4-7).

6. On May 27, 2004, the District requested permission to perform a speech and language assessment, an occupational therapy assessment and a physical therapy assessment of the Student. The parents refused to grant consent for these assessments. (S-33, at 3; S-34, at 1).

7. Because the Student's parents did not permit the District to evaluate the Student, and did not participate in the IEP meeting, the District only had limited access to information that could have resulted in a more detailed IEP. (S-33, at 1; S-34, at 1; P-14, at 1-2; N.T. 148, 149, 162, 192 193, 257, 265, 266, 268, 270, 271, 273,275).

8. On June 7, 2004, the parents entered into a binding contract with the [Private] School for the Student to attend school for the 2004-2005 school year obligating them to pay $6380 to the school regardless of whether the Student actually attended the school. (P-28).

9. Starting on May 27, 2004, the district offered the parents several dates to schedule an IEP meeting to discuss programming for the Student for the 2004-2005 school year. The first date upon which the parents were available of all the dates offered by the district was August 9, 2004. (S-33, at 1; N.T.).

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10. The Student's IEP addressed each of the educational needs by providing goals, objectives, specially designed instruction and supports for school personnel that are consistent with recommendations contained in the Student's educational records from her educational program for the 2003-2004 school year. (S-2, S-3, S-5; S-15; N.T. 83, 258, 259, 276-77, 279).

11. The IEP team members who attended the August 9, 2004 IEP meeting had copies of the Central Auditory Processing evaluation. (N.T. 56, 74-75, 189).

12. The OT who attended the August 9, 2004 and August 26, 2004 IEP meetings and ST who attended the August 26, 2004 IEP meeting were qualified to interpret the instructional implications of the Central Auditory Process evaluations. (N.T. 42, 53, 253).

13. [Private School] offered a challenging curriculum and speech therapy in a small setting and offered adaptation due to the Student's physical limitations. (N.T. 200-210, 215)

14. The District conducted the August 26, 2004 IEP meeting without the parents in attendance because it was clear that it would be unable to convince the parents that they should attend a meeting prior to the start of the 2004-2005 school year based upon the following factors: it took the District two months of attempts to get the parents to agree to a mutually agreeable time and place for an IEP meeting to discuss educational programming for the 2004-2005 school year; the Student's mother attended this meeting for only seven minutes; during the August 9, 2004 meeting she notified the District representatives that the parents were placing the Student in a private school and would be seeking tuition reimbursement; the start of the school year was imminent and the District was obligated to offer a FAPE. It also offered the parent the opportunity to participate via conference call and to reconvene the IEP meeting after the school year started. (S-10, at 2; S-11 at 1).

## III. Issue Presented

**Whether the Student's parents are entitled to tuition reimbursement for the 2004-2005 school year for their unilateral placement at the [Private] School?**

## IV. Discussion and Conclusions of Law

*A. Burden of Persuasion – Tuition Reimbursement*

The United States Supreme Court explained the concept of burden of proof in *Addington v. Texas*, 441 U.S. 418, 423 (1979) (citation omitted) stating

> The function of a [burden] of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.

In administrative and judicial proceedings under the IDEA, the party bearing the burden of persuasion must prove its case by the "preponderance of the evidence." *See* 20 U.S.C. § 1415(i)(2)(C)(iii). The term "preponderance of evidence" is defined as "evidence that is of greater weight or more convincing than the evidence that is offered in opposition to it." *Black's Law Dictionary* (Fifth Edition), at 1064. Prior to the US Supreme Court's November 14, 2005 decision in *Schaffer v. Weast*, the burden of persuasion regarding the appropriateness of a proposed IEP rested with the district. *Carlisle Area School District v. Scott P.*, 62 F.3d 520, 533 (3rd Cir. 1995); *Oberti v. Bd. Of Educ.*, 995 F.2d at 1204, 1219 (3d Cir. 1993); *In re: Educational Assignment of C.L. a Student in the Tyrone Area School District*, Spec. Educ. App. Op. No. 894 (PDE 1999) at 6.

In any analysis related to a parental request for reimbursement of private school tuition, the following three factors articulated by the U.S. Supreme Court in *School Comm. of Burlington v. Department of Ed. of Mass.*, 471 U.S. 359, 369 (1985) and *Florence County School Dist. Four v. Carter*, 510 U.S. 7, 114 S. Ct. 361, 363 (1993) must be considered: did the district offer a free appropriate public education to the student, *Burlington* at 369; if not, did the parents obtain a program that was otherwise proper under the IDEA, *Burlington* at 369, but does not meet all the requirements of Section 1401(a)(18), *Carter* at 366; and do the equities favor the award of tuition reimbursement, *Burlington*, 471 U.S. at 374; *Carter* 114 S. Ct. at 366.

While the current law articulated by *Schaffer* suggests that the parents now bear the burden of persuasion to prove that the District failed to offer FAPE to the Student, because *Schaffer* was decided after the initiation of the current matter, the hearing officer

determined that the district continued to bear the burden of persuasion on the issue of the appropriateness of the proposed IEP and the parents bore the burden on whether the unilateral placement was otherwise appropriate under the Act.

*B. Tuition Reimbursement*

In addition to the *Burlington-Carter* factors articulated above, the Individuals with Disabilities Education Improvement Act of 2004 ("IDEA"), 20 U.S.C. Sec. 1400 et seq., and the implementing regulations for the 1997 version of the Act, 34 C.F.R. Part 300[1] codify the parental right to tuition reimbursement if a district does not make a timely offer of FAPE and the equities which can automatically weigh against the parents in their attempt to obtain tuition reimbursement, specifically

> 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 elementary or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the costs of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

20 U.S.C. Sec. 1412(a)(10)(C)(ii); 34 C.F.R. Sec. 300.403(c). It further provides that, in the part pertinent to the instant matter

> [T]he cost of reimbursement may be reduced or denied if at the most recent IEP meeting that the parents attended prior to removal of the child from 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 ten business days 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 [above]; If prior to the parents' removal of the child from the public school, the public agency informed the parents … of its intent to evaluate the child (including a statement of the purpose of the evaluations that was appropriate and reasonable), but the parents did not make the child available for such evaluation; or upon judicial finding of unreasonableness with respect to actions take by the parents.

20 U.S.C. Sec. 1412(a)(10)(C)(iii); 34 C.F.R. Sec. 300.403 (d)(1)(2).

[1] While the regulations interpreting the 2004 legislation have yet to be issued, unless otherwise noted, the current regulations have been considered highly instructive whenever the 2004 legislation salient to the instant matter remains unchanged from the 1997 version of the Act.

*B. Did the District timely offer free appropriate public education to the Student?*

*1. Free Appropriate Public Education*

Any discussion of a parental request for tuition reimbursement must start with an analysis of the procedural and substantive requirements for an appropriate educational program. The IDEA defines a free appropriate public education ("FAPE") as special education and related services that

(a) are provide at public expense, under public supervision and direction and without charge;
(b) meet the standards of the State educational agency;
(c) include preschool, elementary school or secondary school education in the State involved ; and
(d) are provided in conformity with an individualized education program (IEP) under Sec. 614(d).

*See* 20 U.S.C Sec. 1402(9) and 34 C.R.F. 300.13.

In *Board of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034. 3051 (1982), the U.S. Supreme Court articulated for the first time the IDEA standard for ascertaining the appropriateness of a district's efforts to educate a student. It found that whether a district has met its IDEA obligation to a student is based upon whether "the individualized educational program developed through the Act's procedures is reasonably calculated to enable the child to receive educational benefits." *Id.* The high court placed procedural compliance on the same level as substantive compliance with IDEA mandates. *Id*. In *In re: the Educational Assignment of K.N*., Spec. Educ. Op. No. 1225 (2002), the Pennsylvania state-level appeals panel was called upon to interpret how to ascertain whether an IEP is appropriate, and it similarly stressed process and substance in IDEA compliance; specifically it explained:

> An appropriate IEP is one that meets the procedural and substantive regulatory requirements and one that is designed to provide meaningful education benefit to the child. (*Board of Education v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982); *Rose by Rose v. Chester County Intermediate Unit*, 24 IDELR 61 (E.D. Pa. 1996).

*Id.* at 4. In addressing whether a student was offered an appropriate program, the Pennsylvania appeals panel offers the following standard:

> In order to be appropriate, the program must be in a regular public school class unless certain criteria are met, and when offered be "reasonably calculated" to confer "educational benefit", or "meaningful educational benefit", that is not trivial nor de minimis. *See Board of Education v. Rowley*, 458 U.S. 176 (1982), *Polk v Central Susquehanna Intermediate Unit 16* , 853 F 2d 171 (3rd Cir., 1998), *Fuhrmann v. East Hanover Board of Education*, 993 F. 2d 1031 (3rd Cir., 1993),

> *Susan N. v. Wilson school District,* 70 F. 3d 751 (3rd Cir., 1995), *Neshaminy School District v. Karla B.,* 25 IDELR 725 ( ED PA, 1997), *Oberti v. Board of Education of the Borough of Clementon,* 995 F.2d 1204 (3rd Cir., 1993), 20 U.S.C. § 1412 (a) (5), and 34 C.F.R. § 300.550.

*In re: the Educational Assignment of S.J., A Student in the Tredyffrin/Easttown School District,* Spec. Educ. Op. No. 1435 (PDE 2004), at 5 and *In re: The Educational Assignment of R.A., A Student in the Interboro School District,* Spec. Educ. Op. No. 1431, at 7-8 (PDE 2004). *See also T.R. v. Kingwood Township Board of Education*, 205 F.3d 572 (3rd Cir. 2000); *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999); *S.H. v. Newark,* 336 F.3d 260 (3rd Cir. 2003).

Judicial and administrative bodies interpreting the *Rowley* standard have fleshed out the extent of a district's obligation to provide FAPE to students. For example, a school district is not required to maximize a child's opportunity; it must provide a basic floor of opportunity. *See Lachman v. Illinois State Bd. of Educ., 852* F.2d 290 (7th Cir.), *cert. denied*, 488 U.S. 925 (1988). An appropriate IEP will identify a student's needs and strengths and provide programs and services to address the needs and enhance the strengths the IEP identified. *See In Re: Educational Assignment of K.H.,* Spec. Op. No. 1031 (PDE 1999). An IEP is appropriate if it offers meaningful progress in all relevant domains under the IDEA. *See e.g., M.C. v. Central Regional S. D.,* 81 F.3d 389 (3rd Cir. 1996), *cert. denied*. 117 S. Ct. 176 (1996); *Ridgewood Bd. of Education v. N.E.,* 172 F.3d 238 (3rd Cir. 1999). If an IEP does not address all areas of a child's needs, if it does not contain measurable annual goals to monitor a student's progress, or if it is inadequate in any material way, the IEP is not appropriate. *See e.g., Rose by Rose v. Chester County Intermediate Unit*, 24 IDELR 61 (E.D. Pa. 1996); *In Re: the Educational Assignment of T.K.*, Spec. Educ. Op. No. 892; and *S.H. v. Newark*, 336 F.3d 260 (3rd Cir. 2003).

In the 2004 revisions to the IDEA, Congress has recently affirmed its position that de minimis procedural violations do not constitute a deprivation of FAPE. In Section 1415, it provides

> In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies (1) impeded the child's right to a FAPE; (2) significantly impeded the parents' opportunity to participate in the decisionmaking process…; or (3) caused a deprivation of educational benefits.

20 U.S.C. Sec. 1415(h)(3)(E)(1). The hearing officer is required to base his or her decision solely on the "substantive" issue of whether the student actually received a FAPE, and can only rely on procedural violations in the specific limited situations codified in the Act. For judicial analysis of this concept, *see also, Doe v. Alabama State Bd. of Educ*., 915 F.2d 651, 662 (11th Cir. 1990); *Doe v. Defendant I*, 898 F.2d 1186, 1191 (6th Cir. 1990), *Independent School Dist. No. 282 v. S.D. by J.D.,* 88 F.3d 556, 562 (8th Cir. 1996)(*quoting Roland M. v. Concord School Comm*., 910 F.2d 983, 996 (1st Cir. 1990), *cert. denied,* 499 U.S. 912, 111 S.Ct. 1122, 113 L.Ed.2d 230 (1991). Moreover,

the appropriateness of an IEP must be based upon information available at the time a district offers it; subsequently obtained information cannot be considered in judging whether an IEP is appropriate. *See Fuhrmann v. East Hanover Board of Education,* 993 F. 2d 1031 (3rd Cir., 1993); *Delaware County Intermediate Unit v. Martin K.*, 831 F. Supp. 1206 (E.D. Pa. 1993); *Adams v. State of Oregon,* 195 F.3d 1141 (9th Cir. 1999); *Rose v. Chester County Intermediate Unit,* Docket No. 95-239 (E.D. Pa., May 6, 1996), *reprinted in* 24 IDELR 61.

The US Supreme Court recognized that in developing an appropriate IEP, "Congress placed every bit as much emphasis upon compliance with procedures giving the parents and guardian a large measure of participation at every stage of the administrative process… as it did upon the measurement of the resulting IEP against a substantive standard." *Rowley* at 205-06. With that large measure of participation by parents and guardians come certain responsibilities that, unless discharged, can impact upon remedies to which parents might otherwise be entitled. In a recent case involving compensatory education, the Pennsylvania appeals panel noted, as it relates to the district's obligations to provide FAPE, "if evidence were preponderant that the parent precluded the District from fulfilling its obligations to evaluate and develop an appropriate IEP", the parents would not be eligible for the compensation they sought. *In Re: The Educational Assignment of J.R.*, Spec. Educ. Op. No. 1648 (PDE 2005), at 5. *See, e.g., Patricia P. v. Bd. of Educ.*, 203 F.3d 462 (7th Cir. 2000); *Great Valley Sch. Dist. v. Douglas M.*, 807 A.2d 315 (Pa. Commw. Ct. 2002).

*2. Was the August 25, 2004 IEP Appropriate*

Based upon the parents' pre-hearing articulation of issues, the hearing officer limited the hearing to the following reasons as to why the parents believed that district's proposed IEP for the 2004-2005 school year was not appropriate.

1. The District did not provide their independent Auditory Processing Evaluation Report to the IEP Team prior to, or at the IEP Team meeting (8/9/04).
2. The District did not have an individual, as a member of the IEP Team, who could interpret the instructional implications of the Auditory Processing Evaluation results.
3. The District held a 2nd IEP Team Meeting (8/26/04) without allowing Student's parents to attend.
4. The IEP offered by the District (after they held a 2nd IEP Team Meeting without Student's parents in attendance) is not designed to meet Student's needs.

**Issue 1: The District did not provide their independent Auditory Processing Evaluation Report to the IEP Team prior to, or at the IEP Team meeting (8/9/04).**

The parents believe that the District's proposed IEP was rendered inappropriate due a procedural violation – specifically that a copy of the auditory evaluation report was not physically provided to the IEP team prior to or after the August 9, 2004 IEP meeting. Apparently this assertion was raised at the beginning of the August 9, 2004 IEP meeting

and further supported by a statement made by the OT close to a year after the date of the August 9, 2004 meeting that she had not seen the report.

No legal requirement exists for a District to provide a copy of a report to every member of the team, so failing to provide such a report cannot form the basis of a procedural or substantive violation of the IDEA. Notwithstanding this fact, the evidence supports, all of the members attending the August 9, 2004 IEP received copies of the report. The OT testified at hearing that she made the statement that she did not remember the documents; upon closer scrutiny on this issue, she found a document which demonstrated that she had received the document on August 6, 2004. While it appears that the speech therapist did not receive a copy of the evaluation, he did not attend the August 9, 2004 meeting. He did, however, indicate that even after reviewing the report, until he saw how the Student performed within the classroom, he believed that the proposed IEP was appropriate. He felt that he would require further information to determine if some of the evaluator's recommendations were necessary to provide the Student with FAPE.

**Issue 2: The District did not have an individual, as a member of the IEP Team, who could interpret the instructional implications of the Auditory Processing Evaluation results.**

The fact that the district did not arrange for the attendance of Ms. H, the individual who performed the central auditory evaluation of the Student, did not render the configuration of the IEP team legally insufficient or the IEP inappropriate. While an IEP team must include an individual who can interpret the instructional implications of evaluation results (20 U.S.C. 1414(d) (1)(B)(v); 34 C.F.R. 300.344(a)(4)), testimony on the record indicates that the OT who attended the August 9, 2004 and August 26, 2004 IEP meetings was able to interpret the instructional implications of the evaluator's findings and recommendations. The speech therapist who attended the August 26, 2004 IEP was also qualified to, and at hearing, did explain the Student's needs in the area of auditory processing and described how they would have been addressed in an instructional setting.

**Issue 3: The District held a 2nd IEP Team Meeting (8/26/04) without allowing Student's parents to attend.**

The parents make a particular point of criticizing the fact that the district held an IEP meeting without them. The district was, however, justified in proceeding as it did because of its need to present the Student with a timely offer of FAPE. It had taken the District from May 27, 2004 until August 9, 2004 to get the parents to attend a meeting. When the Student's mother did arrive at the IEP meeting, she had two primary areas of concern that she expressed to the team, specifically the lack of an evaluation report summarizing the results of the central auditory processing assessment and the configuration of team. After seven minutes of attendance she notified the team that she wanted to terminate the meeting. At this time she also informed the team that the Student

would be attending a private school for the 2004-2005 school year and that the parents would be seeking reimbursement for the cost of this placement.

While the IDEA is clear that parents are members of IEP teams and should be involved in IEP development, it does provide for methods other than hearing attendance to ensure parent participation. It also recognizes that there are situations when it is necessary to conduct an IEP meeting without a parent in attendance when a district is unable to convince the parents that they should attend. See 34 C.F.R. Sec. 300.345(c) - (d). By not making themselves available to meet to develop an IEP until August 9, 2004 and then not participating in the meeting in any meaningful way, by refusing to provide any alternative dates prior to the start of the school year when they were available to meet to develop an IEP, and by not explaining why participating in the IEP development by some other means was possible, the parents gave the District every reason to believe that it would be unable to convince the parents that they should attend a meeting prior to the start of the 2004-2005 school year.

Even if one were to consider the fact that the District only offered one date and time for the second IEP meeting in August 2004 to be a procedural violation, it does not rise to the level of the factors articulated in Section 1415(h)(3)(E)(1) which would permit the hearing officer to consider it in her analysis of whether the District offered the Student FAPE. The August 26, 2004 meeting was the second meeting wherein the parents were being given the opportunity to participate in the decisionmaking process; they were given an alternative to attending the meeting – specifically participation via conference call; and they were promised the opportunity to receive a copy of the IEP document for review and to attend a meeting after the school year started.

**Issue 4: The IEP offered by the District (after they held a 2nd IEP Team Meeting without Student's parents in attendance) is not designed to meet Student's needs.**

Because the parents have stipulated to the fact that the physical therapy and occupational therapy services offered by the District for the 2004-2005 school year were appropriate, those services will not factor into the analysis of whether the District offered FAPE to the Student – leaving only the appropriateness of the IEP as it relates to the other services contained therein.

As far as the evidence presented at the hearing suggests, the dispute regarding the content of the IEP was limited to the specially designed instruction, supports for personnel and the content of the IEP which articulates the Student's current levels of functioning related to two issues. The first issue was the manner in which the Student's physical limitations would impact her ability to access the regular education curriculum in physical education, home economics, wood shop and metal shop. The second was the manner in which information from the central auditory evaluation was incorporated into the IEP. Specifically, the fact that no level of functioning in the area of auditory processing was included into the IEP and certain recommendations contained in the report were not included as specially designed instruction.

The parents assert that the IEP was lacking in current information regarding what adaptations would be made to the Student's curriculum because it did not include under specially designed instruction the "modified list of physical activities for P.E. and other physical activities." The adaptive physical education teacher testified that in order to develop this list for a Student he had no current data on, he would have needed input from the parents and the Student's physician. At the time of the meeting, there was every reason to believe that the parents would have participated in the IEP development, provided requested information similar to that which they provided in November 2002 or that if the parents incurred costs associated with obtaining this information that the District would have reimbursed them for the costs. While a regular education representative who attended the meeting testified that she did not make recommendations regarding adaptations to the regular education curriculum necessitated by the Student's physical limitations, the occupational therapist who attended both IEP meetings was clearly able to do so. She explained at the hearing how the list of adaptations would be accomplished through on-going consultation that she would have with the Student's regular education teachers.

Regarding the central auditory processing needs of the Student, the fact that the IEP did not contain a specific reference to the evaluation results within the present levels section did not render the IEP inappropriate. The August 25, 2004 IEP did include supports that the speech therapist testified were appropriate. He further testified that he could not say whether others were necessary because he had not yet worked with the Student in the instructional setting in order to ascertain whether certain recommendations would necessarily assist the Student. The occupational therapist who testified at the hearing similarly testified that many considerations go into what evaluation recommendations make their way into an IEP, the most important being whether or not the parents and the Student are willing to accept them in the instructional setting.

Related to the issue of the appropriateness of the IEP, it is important to note that the District had requested current information from a variety of sources including a request for permission to evaluate the Student in order to develop tan IEP for the 2004-2005 school year. Perhaps more detail could have been added to the IEP in August of 2004 had the parents consented to these evaluations, but based upon the information it had, the District proposal was appropriate. The District is obligated to provide what is appropriate, which does not mean that it must incorporate every recommendation made in a report – only those that are necessary for the Student to benefit from her educational program. As described more fully above, the record does not support the parents' assertion that the District committed procedural violations in the development of the 2004-2005 IEP or that the procedures followed rose to the level of the factors listed in Section 1415(h)(3)(E)(1). Therefore, based upon the evidence offered at hearing and the weight afforded thereto, the August 26, 2004 IEP offered by the District was reasonably calculated to yield meaningful educational benefit in that it offered measurable annual goals, specially designed instruction, and program modifications that specifically addressed the Student's presenting needs.

*B. Was the [Private] School proper under the Act?*

Because of the finding that the District did timely offer the Student a FAPE, no determination need be made whether [Private School] met the second prong of the *Burlington-Carter* analysis - was proper under the Act. The only evidence of record that provides insight into the program at [Private School] was testimony by the [teenaged] Student who is the subject of the hearing, a copy of the school handbook and progress reports that were compiled after the Student started attending the school. After acquired information cannot form the basis of a determination that the private school placement was appropriate. The analysis is limited to information available to the parties at the time the decision was made to unilaterally place the child. Notwithstanding the paucity of evidence that was presented on this topic, it appears that as it relates to the Student's identified needs, a small school with a low staff to student ratio which provided a challenging curriculum and speech therapy was proper under the Act.

*C. Do the equities support reimbursement?*

Notwithstanding the fact that the District was found to have offered a FAPE, the situation presented in this matter begs an analysis regarding the balancing of the equities.

First, the August 9, 2005 and August 25, 2005 IEP were, by circumstance, developed without any parental input, without current evaluation data that had been requested by the District, and without the District having seen the Student in an education setting in over fourteen months. The District had to repeatedly request access to information or simply was denied access to information that could have formed the basis for additional or different IEP content. The record is un-refuted that the District made repeated requests of the parents to provide information about the Student's educational program at [First Private] School and her progress in this program. The District received correspondence from the parents on June 2, 2004 wherein they explained that the Student's records would be forwarded to the District shortly and that the believed that this "gives you plenty of time to review [the Student's] records and hold an IEP meeting prior to the beginning of the 2004-2005 school year." In May 28, 2004 correspondence to the District, the Student's parents requested that the District "extend the dates for the IEP meeting to allow time for the records to be transferred and reviewed. Again, the District has plenty of time to review records and develop an IEP for the 2004-2005 school year." The District finally obtained this information when the director of special education drove to the school to pick up the information in June 2004. On May 27, 2004, the District requested permission to perform a speech and language assessment, an occupational therapy assessment and a physical therapy assessment of the Student. The parents refused to grant consent for these assessments.

The hearing officer is mindful of the fact that when they made decisions regarding the Student's education for the 2004-2005 school year the parents were understandably concerned and highly motivated to do what was best for their daughter. Districts, of course, need only provide what is appropriate in the least restrictive environment. In

early April, 2004, they had already made preliminary arrangements for the Student to attend school in a neighboring public school. By June 7, 2004, they acted on their desire to do what was best for their child and made a binding legal commitment for the Student to attend [Private School] or forfeit $6380. So while they were telling the District that there was plenty of time to develop the IEP, on June 7, 2004, they had already signed a binding agreement for the Student to attend [Private School]. Whether or not it is was their understanding of the agreement, the terms of the contract were clear that "The contract may be canceled only if notice of withdrawal is received in writing prior to June 1, 2004. Otherwise, if the student is withdrawn, the Parents are liable for the full year tuition." Of particular note, the parents' expressed concern that the August 9, 2005 and August 25, 2005 IEPs lacked sufficient detail or particular supports seems rather disingenuous in light of the fact that there was no evidence of record to demonstrate that these supports were provided at the [Private School] where they unilaterally placed the Student two months before the IEP meeting to develop an educational program for the 2004-2005 school year that the Student's mother attended for seven minutes. Any assertion that their perceived deficiencies in the IEP caused them to place the Student in [Private School] is belied by their actions of June 7, 2005. It is also telling that at hearing the parents criticized the District's proposed IEP even though [Private School] had no IEP at all. While it is not necessary for private schools to develop and implement IEPs for parentally-placed students, the parents' argument regarding how lacking the district's IEP was must be viewed in the context that the [Private School] did not develop an IEP for the Student at all.

Based upon the above actions by the parents, the equities favor denial of their request for tuition reimbursement.

## V. ORDER

AND NOW, this 17th day of December 2005, in accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED that the School District is not obligated to reimburse the parents for the Student's placement at the [Private] School for the 2004-2005 school year.

Dated: December 17, 2005

*Rosemary E. Mullaly*
Special Education Hearing Officer