



Defendants' Motion for Summary Judgment on the Third-Party Complaint. The Court heard oral argument on all motions on November 14, 1998. This memorandum deals specifically with Plaintiff's Motion for Disposition, in which Plaintiff requests this Court reverse the Appeals Panel Opinion. Plaintiff's and Third-Party Defendants' Motions for Summary Judgment will be decided subsequently. For the reasons discussed below, the Court will adopt the Appeals Panel Opinion with some modification.

### **I. Statutory Background**

The IDEA's purpose is "to assure that all children with disabilities have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs." 20 U.S.C.A. § 1400(c). A "free appropriate public education" is one that is "provided in conformity with the individualized education program ["IEP"] required under section 1414(d)." 20 U.S.C.A. § 1401(a)(18). The IEP is the "centerpiece of the statute's education delivery system for disabled children." Honig v. Doe, 484 U.S. 305, 311 (1988). The IEP must include, inter alia, a statement of the services to be provided to the child, an assessment of the child's current educational levels, and the annual goals set for that child. See 20 U.S.C.A. § 1401(a)(20).

Under the IDEA, the parents have the right to participate in the development of an appropriate IEP for their child. Id. Parents also have the right to both administrative and judicial review of an IEP proposed by the school. In Pennsylvania, parents who object to an IEP may first request an "impartial due process hearing" before a Hearing Officer. 22 PA. Code § 14.64 (1996). Any party aggrieved by the Hearing Officer's decision may then appeal that decision to the Special Education Appeals Panel. Id. at § 14.64(m). When a final administrative decision has been rendered, a dissatisfied party then has the right to bring a civil action in either federal or state court. 20 U.S.C.A. § 1415(e)(2).

## **II. Factual and Administrative Background**

Scott B. is a student residing in the East Penn School District; he was born on April 24, 1978 and is nearly 21 years of age. The District has diagnosed him with multiple disabilities, specifically mental retardation and physical disabilities. (School District ("S.D.") Hearing Exhibit ("Ex.") 78.) He is eligible for special education services under the IDEA.

In early 1996, in order to comply with its biennial responsibility to re-assess children eligible for special education services under the IDEA, Plaintiff proposed that its personnel re-assess Scott and develop a new multi-disciplinary

evaluation ("MDE") report. At that time, Defendants disputed the District's categorical diagnosis of Scott as multiply disabled, wanted their own independent educational evaluators ("IEEs") to assess Scott, and, therefore, requested a due process hearing. A due process hearing was held before a Special Education Hearing Officer ("Hearing Officer") on March 20, 1996, at the conclusion of which the Hearing Officer ordered Plaintiff to conduct an evaluation of Scott using its personnel and to develop an Independent Educational Plan ("IEP") for Scott reflecting that evaluation. (S.D. Ex. 74.) Thereafter, Plaintiff conducted the evaluation, and produced a Comprehensive Evaluation Report ("CER") and a proposed IEP in June and July of 1996 respectively. (S.D. Ex. 78, 81.) Scott's parents were dissatisfied with the CER and submitted a dissenting opinion.

During the time that Plaintiff was conducting its evaluation of Scott, Defendants obtained their own IEEs. (Due Process Hearing Transcript ("Tr.") at 81-82; Parents' ("P.") Hearing Exhibit ("Ex.") 185, 186, 187.) The results of Defendants' IEEs' findings were not shared with Plaintiff prior to Plaintiff's formulation of the CER and proposed IEP. (Tr. at 319, 338.) In addition, the parents chose not to participate in the Multidisciplinary Team ("MDT") or IEP meetings of July 11, 1996 and August 6, 1996, at which the District's CER was used to develop the IEP in question. (Tr. at 257, 524, 593.)

At the parents request, a second due process hearing was held with regard to the following issues:

- (a) the proper classification and identification of Scott B., i.e. mentally retarded or neurologically impaired;
- (b) reimbursement for the parents' independent educational evaluators;
- (c) the appropriateness of Scott B.'s IEP for the 1996/1997 school year; and
- (d) compensatory education.

The due process hearing was conducted in six sessions commencing on August 21, 1996 and concluding on November 1, 1996.

By order dated December 26, 1996, the Hearing Officer found in favor of Plaintiff in all respects and ordered it to proceed with its proposed IEP, without revision or modification. He denied Defendants' claims for compensatory education and for reimbursement for the IEEs.

Defendants filed exceptions to the Hearing Officer's decision with the Right to Education Office. On February 17, 1997, the Appeals Panel affirmed in part and reversed in part the order of the Hearing Officer. The Panel upheld the Hearing Officer's decision concerning the identification and classification of Scott B. as physically disabled and mentally retarded, rather than neurologically impaired. (App. Pan. Op. No. 744 at 6-7.) It also upheld his denial of reimbursement for the IEEs. (Id. at 15-16.) The Panel reversed the Hearing Officer's decision regarding the appropriateness of the proposed IEP and

compensatory education, concluding that the District's proposed IEP was inappropriate. (Id. at 11.) Specifically, the Panel held that the proposed 1996/1997 IEP was substantively violative of the IDEA in the areas of transition planning and assistive technology, and further, that the 1994/1995 and 1995/1996 IEP were similarly inappropriate. (Id. at 11-13.) Based on these violations, the Panel awarded 675 hours of compensatory education in the deficient areas. (Id. at 13-14.)

In the matter at bar, Plaintiff argues, inter alia, that the Appeals Panel erred as follows:

(a) by concluding that the proposed IEP for the 1996/1997 school year was inappropriate;

(b) by concluding that the multi-disciplinary team did not include persons who could or did conduct an evaluation of Scott B.'s transitional needs, when in fact, a transition coordinator was a part of the team;

(c) by concluding that the transition plan failed to identify goals for Scott B. and failed to provide for a community-based instruction, when, in fact, goals were specifically laid out in the transition plan and Scott B. was being provided community-based instruction;

(d) by concluding that the IEP was inappropriate because the short-term objectives were not specific, measurable and observable when, in fact, specific criteria for achieving all objectives were listed in the IEP;

(e) by concluding that the assistive technology device proposed by the School District was not appropriate, when, in fact, such device met his needs and was preferable;

(f) by concluding that the assistive technology device was not integrated into all aspects of Scott B.'s school day;

(g) by concluding that Scott B. was entitled to 675 hours of compensatory education because he had not received an

appropriate transition program and assistive technology plan for two and one-half school years of service; and,

(h) by concluding that if compensatory education was appropriate, it should be for two and one-half school years, when, in fact, all parties agreed that an assistive device was not appropriate until the 1995/1996 school year.

(Pl.'s Compl. at 4-6.)

Plaintiff requests this Court enter an order reversing the Appeals Panel Opinion insofar as it modified the decision of the Hearing Officer. Therefore, the issues before this Court are (a) the appropriateness of the proposed IEP, specifically regarding its transition and assistive technology components and (b) the appropriateness of an award of compensatory education.

### **III. Discussion**

#### **A. Scope of Review**

The district court's scope of review under the IDEA is defined in § 1415(e)(2), which provides:

Any party aggrieved by the findings and decision made [pursuant to a subsection of this Act] . . . shall have the right to bring a civil action . . . which action may be brought . . . in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

20 U.S.C.A. § 1415(e)(2). In making its decision, the Court will use its "independent judgment" "based on a preponderance of the

evidence," while giving "due weight to the administrative determinations." See Board of Education v. Rowley, 458 U.S. 176, 205-206 (1982). The Court must "avoid substituting [its] educational judgments for those of state administrative bodies." See Jonathan G. v. Lower Marion School District, 955 F.Supp. 413, 414 (E.D.Pa. 1997).

Furthermore, in a two-tiered administrative scheme such as Pennsylvania's, the United States Court of Appeals for Third Circuit ("Third Circuit") has held that the district court should accord due weight to the Appeals Panel, rather than the Hearing Officer, except with regard to questions of testimonial credibility. Carlisle Area School v. Scott P., 62 F.3d 520, 529 (3d Cir. 1995).<sup>1</sup> Therefore, because the Appeals Panel's reversal of the Hearing Officer's decision rests on errors of law, over which the Panel exercised plenary review, rather than on factual findings based solely on credibility judgments made by the Hearing Officer, in its review of the administrative proceedings, this Court will accord due weight to the Appeals Panel. See Id. at 527.

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<sup>1</sup> "[A] district court should still give 'due weight' to the appeals panel's decision when it reverses the hearing officer's conclusions of law, inferences from proven facts, and factual findings based on credibility judgments where non-testimonial, extrinsic evidence justified the appeals panel's contrary decision." Carlisle Area School v. Scott P., 62 F.3d 520, 529 (3d Cir. 1995).

The Third Circuit has not spoken definitively on what constitutes "due weight" under the Rowley standard, but it has favorably cited the standard as developed by the Court of Appeals for the First Circuit.

The question of the weight due the administrative findings of fact must be left to the discretion of the trial court. The traditional test of findings being binding if supported by substantial evidence, or even by a preponderance of the evidence, does not apply. This does not mean, however, that the findings can be ignored. The court, in recognition of the expertise of the administrative agency, must consider the findings carefully and endeavor to respond to the hearing officer's resolution of each material issue. After such consideration, the court is free to accept or reject the findings in part or in whole.

Susan N. v. Wilson School District, 70 F.3d 751, 758 (3d Cir. 1995) (quoting Town of Burlington v. Department of Education, 736 F.2d 773, 791-92 (1st Cir. 1984)). In his dissenting opinion in Fuhrmann v. East Hanover Board of Education, "Judge Hutchinson further defined this standard by saying 'if the evidence fairly and rationally supports the agency's findings, and those findings are not cast into doubt by other evidence the agency did not have before it, the district is justified in deferring to the state education authorities' expertise in deciding what educational program is appropriate for an individual child.'" Delaware County Intermediate Unit #25 v. Martin K., 831 F.Supp. 1206, 1214 (E.D.Pa. 1993) (quoting Fuhrmann v. East Hanover Board of

Education, 993 F.2d 1031, 1043 (3d Cir. 1993)(Hutchinson, J., dissenting)).<sup>2</sup>

With the above mandates in mind, the Court notes at the outset that it has heard no additional evidence in the instant matter, and is therefore making its determination on the same factual record available to the Appeals Panel. After careful consideration of the record, and for the reasons more thoroughly discussed below, this Court will adopt the findings of fact and conclusions of law set forth in the Appeals Panel Opinion, as its own, with some modification.

B. The IEP

The Appeals Panel held that the District's proposed IEP for the 1996/1997 school year was inadequate. The Panel explained that while the IEP may have complied with the procedural regulatory requirements of the IDEA, as the Hearing Officer held, it failed to meet its substantive regulatory requirements, and therefore could not provide Scott with any meaningful educational benefit. (App. Pan. Op. No. 744 at 7 (citing Board of Education

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<sup>2</sup> As noted by the court in Delaware County, the Fuhrmann majority made no comment on the dissent's proposed definition of "due weight," and in Susan N., the Third Circuit cites Judge Hutchinson's proposed definition approvingly. See Susan N., 70 F.3d at 758.

v. Rowley, 458 U.S. 176 (1982).)<sup>3</sup> The Court notes that, “[i]n administrative and judicial proceedings, the school district bears the burden of proving the appropriateness of the IEP it has proposed.” Carlisle Area School, 62 F.3d at 533.

(1) Transition

According to the Appeals Panel, the major substantive deficiency of the District’s evaluation and subsequent educational plan was its lack of transitional evaluation and planning. “Transition is an outcome oriented process that is long range in nature. . .[and] should be conceptualized as a bridge between school programs and the opportunities of adult life.” 22 PA. Code § 342.37. A statement of transition services in the IEP is required by the IDEA beginning no later than the age of 16. 20 U.S.C.A. § 1401(a)(20)(D). The Court finds that the District provided Scott only with vocational evaluations and training, rather than with the full panoply of services that transition planning envisions which are services “designed to

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<sup>3</sup> In Rowley, the Supreme Court of the United States held that an appropriate education as envisioned by the Education for Handicapped Act, the IDEA’s predecessor, is one which “consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.” 458 U.S. at 200-01. The Third Circuit has interpreted Rowley to mean that in order for an IEP to be appropriate it must confer “more than a trivial educational benefit” to the disabled child. Polk v. Central Susquehanna Intermediate Unit, 853 F.2d 171, 180 (3d Cir. 1988).

prepare [Scott] . . . [for] life outside the public school system." 22 PA. Code § 14.37.<sup>4</sup>

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<sup>4</sup> Pennsylvania's statutory scheme defines "transition" in 22 PA. Code § 14.37 and 22 PA. Code § 342.37.

22 PA. Code § 14.37 "Transition" provides:

Each school district shall provide services designed to prepare eligible students to make a successful transition to life outside the public school system. The district shall request the participation of other appropriate agencies, such as the local, regional or State Offices of Vocational Rehabilitation, Mental health/Mental retardation and Health and higher education institutions, in the provision of these services.

22 PA. Code § 342.37 "Transition" provides:

(a) Transition is an outcome-oriented process that is long range in nature. Transition planning involves a partnership of consumers, school-age services and programs, post-school services and programs and local communities that results in higher education, employment, independent living and community participation. Transition should be conceptualized as a bridge between school programs and the opportunities of adult life.

(b) The school district shall designate persons responsible to coordinate transition activities.

. . .

(d) The [Individual Transition Plan ("ITP")] shall be developed by an interdisciplinary team comprised of . . . (1) the student and the student's parents. . . (2) the appointed district representative. . . [and] (3) representatives of community agencies. . .

(f) The ITP shall be a multi-year document that covers the remaining period prior to the student's prospective graduation or exit from school.

First, the Panel held that the District's transitional evaluation was inadequate because the multidisciplinary team ("MDT") was not appropriately constituted as specified in 22 PA. Code 14.25.<sup>5</sup> "Specifically, the District did not include persons who could or did conduct an evaluation of Scott's transition needs although the District recognized that Scott had such needs at the age of 15." (App. Pan. Op. No. 744 at 9.) While the District argues that its transition coordinator Mary K. Naunas was a part of the MDT, the fact that the team had a transition specialist does not require the conclusion that transitional evaluations were conducted. The Court finds that the Panel's conclusion that no such transitional evaluations were performed is supported by a preponderance of the evidence and adopts the Panel's conclusion.

The Appeals Panel further found that the transition plan, as articulated in the proposed IEP, "b[ore] no resemblance to that which is required" by the statutory scheme. See 22 PA. Code

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<sup>5</sup> § 14.25(f) provides:

Multidisciplinary evaluations shall be conducted by MDTs. The MDT shall be formed in accordance with Chapter 342 on the basis of the student's needs and shall be comprised of the student's parents, persons familiar with the student's educational experience and performance, persons knowledgeable in each area of suspected exceptionality, persons trained in appropriate evaluation techniques and, when possible, persons familiar with the student's cultural background. A single member of the MDT may meet two or more of the qualifications specified in this subsection.

14.37; 22 PA. Code 342.37, n. 3 supra.<sup>6</sup> First, the Panel explains, the District failed to identify any goals that it had for Scott after he leaves school, and “[w]ithout such goals, any transition plan becomes a transition to nowhere.” (App. Pan. Op. No. 744 at 10.)<sup>7</sup> Second, the District’s transition plan was not a multi-year document covering the remaining period prior to Scott’s prospective graduation as anticipated by the Act. 22 PA. Code 342(f). Finally, the Panel found that the transition plan failed to address Scott’s individual and unique needs and instead placed Scott into existing generic programs with some minor adaptations. (App. Pan. Op. No. 744 at 10-11.)<sup>8</sup>

Although the District argues that the transition plan was adequate in that it contained specific goals and addressed Scott’s individual needs, this Court agrees with the Appeals

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<sup>6</sup> Indeed, as the Panel indicated at the outset, the MDE provides the foundation for the IEP, “an IEP cannot be appropriate if the evaluation is incomplete. If the MDE and/or IEP are incomplete, then a correct placement cannot be made and the student has been denied [a free appropriate public education (“FAPE”)].” (App. Pan. Op. No. 744 at 8-9.)

<sup>7</sup> The Panel found that many of the objectives set forth in the IEP, not only the supposed transition goals, were unspecific. For example, the Appeals Panel noted that criterion such as “passing grade” are vague and elusive. The Panel explained that more definitive criterion were needed for measuring Scott’s progress, especially because in Scott’s case his progress is likely to be slow and incremental. (Id. at 10-11.)

<sup>8</sup> “In sum, the transition plan especially and the IEP in general does not reflect a plan to help Scott survive an adult life. It is not functional. . . .” Id. at 11.

Panel's assessment that it was not sufficiently tailored to meet Scott's individual needs, and adopts the Panel's findings. As noted, the District bears the burden of proving the appropriateness of the IEP, and it has simply failed to carry its burden. The District correctly notes the vocational assessments it conducted and the vocational goals which are included in the proposed IEP. However, the District fails to address the other aspects of transition planning which the Panel found to be woefully lacking in its IEP, such as how Scott will get around in the community, how he will meet his personal needs, and what recreation opportunities he should strive for. (App. Pan. Op. No. 744 at 10.) Throughout its Opinion, the Appeals Panel emphasizes that vocational training is not transitional training.<sup>9</sup> The Panel notes that Scott's transitional needs are broader than vocational education as he has multiple disabilities. (App. Pan. Op. No. 744 at 11.) All of the District's arguments for the appropriateness of the transition plan address only vocational goals and training for Scott and do not address the critical distinction identified by the Panel and adopted by the Court.

## (2) Assistive Technology

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<sup>9</sup> "A vocational evaluation is not a transition evaluation. Vocational competence is but one part of transition services." (App. Pan. Op. No. 744 at 10.)

Assistive technology is a piece of equipment, in this case a laptop computer with a word prediction program, "that is used to increase, maintain or improve the functional capabilities of [a child] with disabilities." 22 PA. Code § 14.1.<sup>10</sup> The Pennsylvania Code provides that "[e]xceptional students who require special instruction materials, supplies and equipment, including assistive technology, shall be provided with these

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<sup>10</sup> 22 PA. Code § 14.1 further provides:

Assistive technology services -- Services that directly assist a child with a disability in the selection, acquisition or use of an assistive technology device. The term includes the following:

- (i) Evaluating the needs of a child with a disability, including a functional evaluation of the child in the child's customary environment.
- (ii) Purchasing, leasing or otherwise providing for the acquisition of assistive technology devices for use by children with disabilities.
- (iii) Selecting, designing, fitting, customizing, adapting, repairing or replacing assistive technology devices.
- (iv) Coordinating and using other therapies, interventions or services with assistive technology devices, such as those associated with existing education and rehabilitation plans and programs.
- (v) Training or technical assistance for a child with a disability, or if appropriate, that child's family.
- (vi) Training or technical assistance for professionals (including individuals providing education and rehabilitation services), employers or other individuals who provide services to, employ or are otherwise in the major life functions of children with disabilities.

items. . .with the modifications necessary to meet the needs of the exceptional student." 22 PA. Code 342.38(c).

The Appeals Panel explained that the assistive technology component of the IEP was substantively flawed for "reasons identical to those in [its] discussion of the transition component," and was therefore rendered inadequate. (App. Pan. Op. No. 744 at 12.) That is to say that the assistive technology component was inappropriate as formulated by the District, in that it would not confer any meaningful educational benefit to Scott. Specifically, the Panel found, inter alia, that the assistive device component was inappropriate because: (1) it was not designed to permeate Scott's entire school day<sup>11</sup>; (2) the keyboarding instruction that he received was inadequately adapted to his physical needs; (3) the School District wasted nearly a year in obtaining and setting up the assistive device; and, (4) the School District failed to offer any educational justification for the use of the Telepathic program. (Id. at 12-13.) The Court agrees.

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<sup>11</sup> The parent's expert testified that Scott needed to learn to use the laptop computer and word prediction program in a functional manner as a tool for language. The District's plan did not integrate the assistive technology into all aspects of Scott's written language needs and therefore did not provide a strategy for Scott to learn to use the technology effectively. (Tr. at 870-872, 877-880, 912, 927-928.) This testimony was not contradicted by the District, and giving deference to the Panel's educational judgment, the Court adopts its conclusion that the assistive technology plan asserted by the parent's expert would confer a meaningful educational benefit to Scott.

Again, it is the School District's burden to prove the appropriateness of its proposed IEP and, as was the case with the transition component, the Court finds that the District has failed to carry its burden with respect to the assistive device.

The record reflects the following:

(1) Scott's need for assistive technology was recognized by the MDT in June 1994. (S.D. Ex. 69 at 2; P. Ex. 25 at 5; Tr. at 279, 289, 1130-31.);

(2) The 1994/1995 IEP indicates that Scott was assessed by Bonnie Young, the District's assistive technology expert, for the possible acquisition of an assistive technology device. (P. Ex. 25 at 5.);

(3) Although the need was recognized in 1994, the assistive device, in the form of a laptop computer with a word prediction program called Telepathic, was not acquired until September 11, 1995, and the system was not functional until February 1996. (S.D. Ex. 69 at 3-5; Tr. at 293, 453-457.);

(4) Scott's teacher, Mary Lou Grigalonis, received only partial training on Telepathic on February 19, 1996, and was not retrained until May 29, 1996, at which time other members of the MDT were also trained. (S.D. Ex. 69 at 4; S.D. Ex 78 at 24.);

(5) Scott's classroom aide was never trained on Telepathic. (Tr. at 512.);

(6) Scott's parents were not trained on Telepathic or on his laptop computer. (Tr. at 1059-60.);

(7) Scott has significant fine motor skills problems. (Tr. at 253-54, 336-37, 534.);

(8) Scott was enrolled in an integrated keyboarding class, i.e. with non-disabled students. (Tr. at 499-500.);

(9) When Scott was tested at the A.I. duPont Institute, on April 17, 1996, the Telepathic program on his laptop "did not appear to have any word prediction dictionary installed or customized." (P. Ex. 187 at 3; Tr. at 870.);

(10) During the fall semester of 1996, Scott was utilizing his computer only once or twice per school day. (Tr. at 537-38.);

(11) The parents' assistive technology expert testified that Scott's assistive technology needs were greater than word prediction and included assistance with word recognition and reading skills as he wrote, as well as a grammar model. (Tr. at 914.);

(12) The Telepathic program is only a word prediction program and contains no grammar model. (Tr. at 876.)

As the facts above illustrate, the record supports the Panel's conclusions, now adopted by the Court, with respect to the assistive device component of the IEP. Furthermore, the Panel found the parents' expert's testimony regarding the educational benefits of the Co:Writer word prediction program very persuasive and uncontradicted by any evidence presented by the District. Giving due weight to the Panel's educational judgment, and after a review of the record, this Court also finds the case for Co:Writer persuasive, and will not deviate from the Panel's conclusions. The program's grammar prediction facility, which Telepathic does not contain, makes the benefits of the Co:Writer program educationally meaningful to Scott. As the parents' expert indicated, a word prediction program such as Telepathic, which does not contain such a function, may actually be detrimental to the rate at which Scott performs. (Tr. at 926-28.) The District's case for Telepathic was unpersuasive in that it presented no evidence that the Telepathic program would confer a similar educational benefit to Scott.

Finally, the District argues that, in reaching its conclusions regarding the assistive device, the Appeals Panel was judging the IEP retrospectively, rather than prospectively, and hence using the wrong legal standard. (Pl.'s Mem. Supp. Mot. Disp. at 21 (citing Carlisle Area School v. Scott P., 62 F.3d at 530).)<sup>12</sup> The Court finds no merit in this argument. The Panel's conclusion that the IEP was inappropriate was not based upon the fact that Scott failed to progress in any one area. To the contrary, the Panel's conclusion was based on its educational judgment that the IEP was inappropriate on its face when drafted. The Panel's conclusions regarding Scott's keyboarding instruction and the timing of the District's acquisition of an assistive device merely support its judgment and are not illustrative of hindsight. For example, a deficiency in the actual keyboarding instruction during the 1995/1996 school year with no proposed change in the keyboarding instruction in the IEP for the following year, supports the prospective conclusion that the proposed IEP must also be inadequate.

(ii) Compensatory Education

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<sup>12</sup> "[A]ppropriateness is judged prospectively so that any lack of progress under a particular IEP, assuming arguendo that there was no progress, does not render that IEP inappropriate." Carlisle Area School, 62 F.3d at 530.

Under the IDEA, school districts are required to provide disabled students with a free, appropriate education until they reach the age of twenty-one. 20 U.S.C.A. § 1412(2)(b). "An award of compensatory education extends the disabled student's entitlement to the free appropriate education beyond age twenty-one to compensate for deprivations of that right before the student turned twenty-one." Carlisle Area School, 62 F.3d at 536.

The Panel awarded 675 hours of compensatory education based on its determination that the IEP's for the 1994/1995, 1995/1996 and 1996/1997 school years were inappropriate. The Panel determined that the District failed to provide appropriate education in assistive technology and transition services from the time that Scott was 16. It therefore ordered the District to provide compensatory education in those areas equivalent to two and one half (2 ½) school years of service, i.e., the amount of time equivalent to what Scott should have received.

The District makes two arguments in its opposition to the Panel's award of compensatory education. First, it argues that the facts of this case do not approach the level of "quite egregious circumstances" in Lester H. v. Gilhool, 916 F.2d 865, 872 (3d cir. 1990) or the "quite culpable conduct" discussed in Carlisle Area School, 62 F.3d at 537, that the Third Circuit has found to be involved in cases where it upheld the awarding of

compensatory education. Second, it argues in the alternative, that if compensatory education were appropriate in this case, the Panel incorrectly applied the standard for such an award as expressed by the Third Circuit in M.C. on Behalf of J.C. v. Central Regional School, 81 F.3d 389 (3d Cir. 1996).

The District's first argument is untenable as the standard for granting compensatory education was not determined by Lester H. or Carlisle Area School. In Carlisle Area School, the Third Circuit declined to precisely define the appropriate level of culpable conduct required to justify an award of compensatory education. Carlisle Area School, 62 F.3d at 537. There, the Court noted "that it is necessary, but not sufficient to demonstrate that some IEP was actually inappropriate, and that bad faith is not required." Id.

The Third Circuit established the standard in M.C. on Behalf of J.C. and held that "the right to compensatory education should accrue from the point that the school district knows or should know of the IEP's failure." M.C. on Behalf of J.C., 81 F.3d at 396. The Court expressed its holding as follows:

a school district that knows or should know that a child has an inappropriate IEP or is not receiving more than a de minimis educational benefit must correct the situation. If it fails to do so, a disabled child is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably required for the school to rectify the problem.

Id.

After a careful review of the record, this Court believes that compensatory damages are appropriate in this case. Therefore, the Court adopts the Appeals Panel award, but will modify the amount of compensatory education the Panel awarded for assistive technology.

The Panel awarded Scott B. compensatory education with regard to the assistive technology component for two and one half years, corresponding to a period of deprivation for the 1994/1995 and 1995/1996 school years as well as the first half of the 1996/1997 school year. However, the record does not support the Panel's award of compensatory education for assistive technology for the 1994/1995 school year.

The Court finds, as the Appeals Panel did, that the 1994/1995, 1995/1996 and the proposed 1996/1997 IEPs were deficient in the assistive technology component. However, the Appeals Panel's award of two and one half years of compensatory education does not take into consideration "the time reasonably required for the school to rectify the problem," and therefore, the Panel misapplied the standard set forth by the Third Circuit. M.C. on Behalf of J.C., 81 F.3d. at 396.<sup>13</sup>

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<sup>13</sup> The Court has considered the District's other arguments regarding the Panel's alleged misapplication of the M.C. on Behalf of J.C. standard and finds they are without merit. Specifically, the District's argues that because it was not aware that the IEPs in question were inappropriate and because it still does not believe them to be inappropriate that compensatory education is not warranted. This argument is specifically

Rather than remand that question to the Appeals Panel, in the interests of time (as this case has been contested for nearly three years and Scott is almost 21 years old) this Court will decide the appropriate measurement. The Court finds that the District dragged its feet in acquiring Scott's assistive device after the need for such a device was recognized, and certainly in the training of its personnel so that Scott could realize some benefit from the technology. The Court finds that one school semester is a reasonable amount of time for the District to have procured a suitable laptop computer and word prediction software, and to have designed a functional plan for the implementation of the technology such as the plan proposed by the parents' expert witness. Therefore, the Court will reduce the Appeals Panel award by one school semester, the first semester of the 1994/1995

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contradicted in M.C. on Behalf of J.C., where the Third Circuit stated:

Obviously the case against the school district will be stronger if the district actually knew of the educational deficiency or the parents had complained. But a child's entitlement to special education should not depend upon the vigilance of the parents (who may not be sufficiently sophisticated to comprehend the problem) nor be abridged because the district's behavior did not rise to the level of slothfulness or bad faith. Rather, it is the responsibility of the child's teachers, therapists, and administrators--and of the multi-disciplinary team that annually evaluates the student's progress--to ascertain the child's educational needs, respond to deficiencies, and place him or her accordingly."

Id. at 397.

school year, and award Scott two years (270 hours) of compensatory education in assistive technology. The Panel's award of compensatory education for the inappropriate transition services remains undisturbed. Therefore, this Court awards Scott a total of 608 hours of compensatory education.

An appropriate order follows.

