

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.

Due Process Hearing for VG

Date of Birth: xx/xx/xx

ODR File Number: 5661/05-06/LS

Dates of Hearing: September 26, 2005, October 31, 2005, December 5,
2005, January 31, 2006

CLOSED HEARING

Parties:

Ms.

School District of Philadelphia
440 N. Broad St., 3rd Flr.
Philadelphia, PA 19130

Date Final Transcript/Exhibits Received:

Date Closing Statements/Record
Closure:

Date of Decision:

Hearing Officer:

Representative:

Tanya Alvarado, Esq.
30 Cassatt Ave.
Berwyn, PA 19312

Mr. Kenneth Cooper, Esq.

February 6, 2006

*March 3, 2006

March 18, 2006

Joy Waters Fleming, Esq.

*Request from counsel for an extended period of time for the submission of closing statements granted.

Findings of Fact

1. Student is currently xx years of age and in the ninth grade in a private school.
2. Student attended school within the School District of Philadelphia, “District” from first through eighth grade.
3. Early in his academic career, Student struggled with reading and his Parents sought outside intervention. (P-11, N.T. 558-559)
4. While repeating the third grade, the District evaluated Student. (P-9, P-10)
5. In that evaluation, Student was credited with an IQ score of 89 and based on a variety of evaluative measures, he was diagnosed with a learning disability manifesting itself as a reading disorder. (P-9)
6. As an eligible student, the District recommended that Student receive supportive intervention in the regular education environment with supplemental resource level learning support. (P-9)
7. In July 2002, Student began receiving tutoring through the [redacted] Centers. (S-9, 264, 276, 476-477)
8. On January 22, 2003, the District completed a re-evaluation of Student. (P-5, P-6, N.T. 466)
9. As part of the re-evaluative process, District staff provided information regarding Student’s educational levels and needs. (P-5)
10. On May 5, 2003, the IEP team convened to draft Student’s IEP for the 2003-2004 school year. (S-7)
11. The May 2003 IEP identified both Student’s instructional reading and math levels as “grade 5 (B)”. (SD-7)
12. The May 2003 IEP contained math and language arts goals and a behavior support plan. (SD-7)

13. Parents approved the recommended program and placement in the May 2003 IEP via a NOREP. (S-8)

2003-2004

14. During the 2003-2004 school year Student attended the seventh grade at the Middle School. (S-7)
15. During the seventh grade, Student received learning support services at the itinerant level in the inclusion program. (S-7, S-8, N.T. 237, 245, 277)
16. Although he had difficulty completing his homework, Student was not a behavior problem. (N.T. 242, 245, 250, 259-260, 262, 334)
17. For reading instruction, Student received a modified curriculum and he participated in a small group with guided instruction on occasion. (N.T. 265, 281, 293-294, 299, 312-313)
18. In February 2004, Student changed math teachers and began receiving daily instruction from the resource teacher in a pull-out program. (SD-7, N.T. 312-313, 327-328, 334)
19. In April 2004, on the Keymath, Student earned the following: basic concepts 6.4, operations 5.3, application 6.1, and total test 5.8. (P-3, p.2, N.T. 332)
20. After the Keymath, the District determined Student to have weaknesses in numeration, geometry, addition, subtraction, multiplication, division, mental computation, measurement and problem solving. (P-3, p.2, N.T. 365-366)
21. On April 22, 2004, the District administered the Woodcock Reading Mastery test to Student. (S-10)
22. On the Woodcock, Student earned basic skills cluster score of 4.6, a reading composite cluster score of 5.0 and a total reading score of 4.7. (S-10)

23. Less than one month later, on May 3, 2004, the District re-administered the Woodcock Reading Mastery Tests to Student. (S-11)
24. On the Woodcock, Student earned a composite grade equivalent scores in the total reading cluster – full scale of 5.9, basic skills 6.7 and reading comprehension 5.3. (S-11)
25. On the Woodcock, Student earned equivalent scores on the individual subtests of word identification 6.1, word attack 8.0, word comprehension, 6.1 and passage comprehension 4.7. (S-11)
26. On May 10, 2004, the IEP team convened to develop an IEP for Student's eighth grade year. (SD-1)
27. On May 10, 2004, Parent approved the IEP by signing the NOREP. (SD-2)
28. The May 2004 IEP contained math and literacy goals, a functional behavioral assessment and a behavior plan. (SD-1)
29. At the May IEP meeting, ESY services were discussed for Student. (N.T. 447-448, 488)
30. A summer academic program was offered to Student but Parents declined. (N.T. 448)
31. On May 24, 2004, the District conducted a re-evaluation of Student. (P-3, N.T. 504-507)
32. As part of the re-evaluation the District administered the WISC-III and WIAT to Student. (P-3)
33. On the WISC-III, Student is credited with a verbal IQ of 93, a performance IQ of 96 and a full scale IQ of 94 classifying him in the average range of cognitive ability. (P-3, p.3)
34. On the WIAT, Student demonstrated inconsistent decoding skills and received standard scores in reading comprehension of 99 (8.2 grade level), basic reading of 77 (4.8 grade level) with a reading composite score of 84. (P-3, p.3)

35. On the WIAT in math, Student received a standard score of 95 (7.3 grade level) in mathematics reasoning and of 69 (4.5 grade level) in numerical operations. (P-3, p.4)
36. On the writing assessment administered by the District, Student received a writing composite standard score of 75, a written expression standard score of 81(3.9 grade level) and a spelling standard score of 78 (4.8 grade level). (P-3, p.4)
37. Based on the re-evaluation, the District concluded that Student exhibited a severe discrepancy existed between ability and achievement in basic reading, numerical operations, and spelling and written expression. (P-3, p.4, P-8)
38. The District's re-evaluation report was issued after the IEP for the 2004-2005 school year was drafted. (P-8)

2004-2005

39. During the 2004-2005 school year, as an eighth grader, Student received itinerant learning support in the District's inclusion program receiving special education support within the regular education setting. (S-1)
40. On February 20, 2005, Student received a score of 6.1 on the District administered KeyMath Revised test. (SD-4, p. 4)
41. Mid-year, Parents began receiving daily reports of Student's progress because of concerns of behavior and incomplete homework. (N.T.35, 36-38, 56, 58)
42. During math instruction, Student was in class with 30-32 other students and received small group instruction about one time a week with ten other students. (N.T. 92)
43. The specially designed instruction Student received was primarily in the form of guided practice, calculator usage, simplified directions, all form a pre-printed checklist in his IEP. (S-1, p.5E)

44. On March 1, 2005, the District administered the Woodcock Reading Mastery Tests to Student. (SD-12)
45. On the Woodcock, Student earned equivalent scores on the individual subtests of visual auditory learning 4.7, letter identification 4.7, word identification 7.1, word attack 8.0, word comprehension, 6.3 and passage comprehension 5.3. (S-10)
46. Student's readiness cluster score was determined to be 4.7, his reading comprehension cluster a 5.7 and his total reading cluster at a 6.7 grade level. (SD-12)
47. On April 26, 2005, the IEP team convened to draft an IEP for the end of Student's eighth grade and ninth grade year. (S-4, N.T. 466, 448)
48. Parent approved of the program and placement recommended at the April 2005 meeting. (SD-5)
49. In May 2005, Student received an independent neuropsychological evaluation. (P-4)
50. In his report, the evaluator concluded that Student's performance profile is often indicative of fluctuations in motivation or in variability in attending behaviors. (P-4, p. 6)

Issues

Was Student denied FAPE during the summer of 2004?

Was Student denied a free appropriate public education "FAPE" during the 2003-2004 school year?

Was Student denied a free appropriate public education during the 2004-2005 school year?

Was Student denied FAPE during the summer of 2005?

If denied FAPE, is Student entitled to compensatory education/and reimbursement for tutoring and counseling?

Discussion

The IDEA requires that states provide a “free appropriate public education” “FAPE” to all students who qualify for special education services. 20 U.S.C. §1412. In Board of Education of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982), the U.S. Supreme Court held that this requirement is met by providing personalized instruction and support services to permit the child to benefit educationally from the instruction, providing the procedures set forth in the Act are followed. The *Rowley* standard is only met when a child's program provides him or her with more than a trivial or *de minimus* educational benefit. Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3rd Cir. 1988). This entitlement is delivered by way of the IEP, a detailed written statement arrived at by the IEP team which summarizes the child’s abilities, outlines goals for the child’s education, and specifies the services the child will receive. Oberti v. Board of Education, 995 F.2d 1204 (3d Cir. 1993). School districts are not required to provide the optimal level of services. Carlisle Area School District v. Scott P., supra. However, a program that confers only trivial or minimal benefit is not appropriate. Polk The appropriateness of the IEP is judged based on information known at the time it is drafted. Fuhrman v. East Hanover Board of Education, 993 F.2d 1031 (3d Cir. 1993). A school district bears the burden of proving the appropriateness of the program it has proposed. Oberti

Early in his academic career, Parents expressed concern to the District about Student’s reading and math difficulties. (FF. 2-4, 7) While repeating the third grade, the District performed an evaluation and determined Student eligible for special education because of a “language based learning disability primarily manifesting itself as a reading disorder.”(FF.4-6) At that time, the IEP team acknowledged Student needed to improve reading comprehension, word recognition, word analysis, grammar and his motivation for difficult tasks. (FF. 6) Five years later, Student needs have remained essentially unchanged and now include additional academic and behavioral issues.

Parents filed this request for due process on July 8, 2005 claiming that Student has been denied FAPE by the District since 1999 and seeking compensatory education.¹

2003-2004 School Year

Parents contend that Student was denied FAPE during the 2003-2004, school year, as a seventh grader, because the IEP implemented by the District did not address his needs, the re-evaluation and IEP were untimely, the behavior management plan was deficient and that needed extended school year services, “ESY” were denied.

First, Parents contend that the re-evaluation of January 2003 that preceded development of Student’s IEP for the 2003-2004 school year was untimely. On January 20, 2000, the District completed a re-evaluation of Student. (FF. 8) A student may be denied FAPE when a procedural violation results in the loss of educational opportunity or benefits, or seriously infringes upon the parents’ opportunity to meaningfully participate in the IEP process. W.G. Board of Trustees of Target Range School District No. 23, 18 IDELR 1019, 960F. 2d 1479 (9th Cir. 1992). Although this evaluative process did not commence until January 14, 2003, the six day “delay” was hardly significant when viewed in light of the entire IEP process.

Next, Parents contend that this IEP was untimely because it was developed more than thirty days after the District’s last evaluation report dated January 22, 2003. 34 CFR § 300.343 The evidence establishes and the District concedes that the May 2003 was in fact untimely. (FF. 8-9) However, in order to constitute a denial of FAPE, this procedural misstep must somehow detrimentally affect Student’s programming. During this time, Student had programming that continued that was not materially different than the preceding years. He was not denied FAPE as a result of delay in the IEP development.

Near the end of Student’s sixth grade year, on May 5, 2003 the IEP team met to develop an IEP for Student’s seventh grade year. (FF. 10) That

¹ Although the letter requesting a hearing was dated June 23, 2005, the Office for Dispute Resolution did not receive Parent’s request for due process until July 8, 2005. Accordingly, the hearing officer made a preliminary determination was made that the newly authorized IDEA 2004 was applicable to the claims in this matter.

IEP contained goals designed to address Student's math and language arts needs as well as a "behavior support plan". (FF. 12) On May 5, 2003, Parents by signing the NOREP indicated agreement with implementation of the IEP. (13)

In the May 2003 in math, Student's needs were documented as large number computation, multiplication facts, computation of fractions, decimals and percentages, measurement and problem solving. These needs appear to be based on information from the "staff input forms" provided as part of the re-evaluation of January 2003. (FF. 9) Student's present level of performance as well as his current instructional level is described as a "5(B)". (FF. 10) The sole math goal expected improvement in math skills primarily whole number and rational number computation and problem solving. (FF. 10)

First, the instructional level, as a "5(B)" presented in the performance level does not adequately describe what math abilities it is identifying. Many components can exist with a math skill deficiency and it is difficult to tell, without testing data, whether Student's functioning in all or only selected areas is indeed on a fifth grade level. As written, the math goal is not measurable as it is devoid of baseline data nor does it adequately define the expected rate of progress within a defined time period. The math goal also fails to be responsive to all of Student's needs as "measurement", "computation of fractions and decimals" were recognized as needs but was not addressed in this goal. Finally, the objectives start with the expectation that Student will learn his multiplication facts, progress to multi-digit multiplication and division, move on to adding fractions and simplify the answers, do basic percent-decimal fraction conversions before ending with interpreting charts and learning the metric system. These objectives, while ambitious, do not realistically relate to Student's identified areas of skill weakness. Furthermore, the expected level of achievement as high as 75% for multiplication facts and ranging downward to 60% for multi-digit multiplication and division and the adding of fractions appear disjointed as a failure to master multi-digit multiplication and division as well as the addition of simple fractions compromises the success of the other math benchmarks.

In language arts, Student was identified as having reading needs in vocabulary, written expression and organizational skills. (FF. 12) In

response, the 2003-2004 IEP contained one language arts goal. (FF.10, 12) Through that goal, Student was expected to improve his word recognition, comprehension and written expression skills. The goal also addressed Student's study and organizational skills. Student's instructional level in literacy was defined as a "level 5". (FF. 10) His levels in word recognition and comprehension were also determined to be a level 5. (FF.10) No levels were provided for study or organizational skills.

Although the current performance level in this goal does contain some baseline information by providing individual, instructional and frustration levels, the identity of assessment or measure used would be helpful to monitor subsequent progress. Unfortunately, this goal lumps four different, but equally important, skill areas together (word recognition, comprehension, written expression and study & organizational skills). In Student's situation, a single generalized goal addressing a multitude of needs is inappropriate given the pervasive nature of Student's literacy deficits. Again, this goal does not adequately define the end point for improvement, only stating that he would be expected to "improve" his...levels." The levels contain no baseline data from which to measure improvement in study skills and organization. Finally, the short term objectives, as written, do not adequately provide a plan for achievement of this literacy/writing/organization goal.

Progress

During his seventh grade year, Student participated in the inclusion program in the District receiving itinerant learning support. (FF. 14-15) Although Parents maintained daily contact with the District in order to monitor Student's progress, Student had difficulty completing homework, was frequently off-task and required prompting. (FF.16) Student was described as described as very social and talkative but not regarded as behavior problem in school. (FF. 16) During the 2003-2004 school years, as part of his special education program to remediate his weaknesses in math and language arts, Student received specially designed instruction in both language arts and math. The specially designed instruction he received came in the form of a pre-printed checklist of accommodations listed on his IEP in the form of "extended time, preferential seating, verbal testing...". (FF. 18) In reading, the District offered testimony that Student would receive individual help when he needed it and on occasion he would receive small group reading instruction with six to seven other students. (FF. 17)

During this school year Student also received outside tutoring from [Redacted] Learning Center and his reading teacher attributed some of Student's progress to that intervention. (FF. 7) However, Student's reading grade was on average a "C". (FF. 17)

In May 2003, Student's instructional reading level, according to the District was determined to be at the fifth grade. (FF.11) His individual skill level in word recognition was a third-fourth grade level, in comprehension a fourth grade level and in listening comprehension a fifth grade level. (FF.11) One year later, in May 2004, when assessed using the Woodcock Reading Mastery, all but Student's reading comprehension scores had increased by at least a grade level. (FF. 23-25) A previous administration of the Woodcock in April 2004 yielded dramatically lower scores for Student. (FF. 21-22) However, Student, in a later evaluation is recognized as an inconsistent performer whose scores are affected by motivation and attention. (FF.49-50) Undoubtedly, the one month difference in scores is attributable to those factors. The scores of the May 2004 testing are found to be more credible in light of Student's later documented performance.

In math, Student changed teachers in the middle of the school year. (FF. 18-20). He then began receiving instruction from resource math teacher in a pull-out program with six to ten other students. (FF. 18-20) Similarly, in math, the specially designed instruction, described in Student's IEP for math was derived from the same pre-printed checklist of accommodations used for his other IEP goals.

In May 2003, all of Student's math skills were defined as at a "5(B)" level. (FF.18, 19) One year later, when assessed in May 2004 as part of a re-evaluation, Student's math abilities were characterized as "diverse". (FF. 35) Specifically, Student received scores on the WIAT in math reasoning of 7.3, numerical operations of 4.5, and math computation of 5.7 resulting in a math composite score of 5.7. (FF. 31, 35) This testing reveals Student's numerical operations abilities to be lower than when assessed the previous year but largely consistent with the Keymath testing given a few months before. (FF. 19-20) Based on this comparison, Student made progress in math.

Next, Parents contend that Student's behavior support plan "BSP" was inadequate. Although, the IEP indicates that Student did not exhibit behaviors that impeded learning, Student's level of motivation, attention to

task and organizational weaknesses were certainly a concern. (FF. 12,16) A behavior service plan was developed and incorporated into this IEP. No functional behavioral assessment was introduced by the District in support of this plan. A BSP plan can include, when appropriate: (1) strategies, including positive behavioral interventions, strategies, and supports; (2) program modifications; and (3) supplementary aids and services that may be required to address the problem behavior. The BSP in place during the 2003-2004 school year identified one goal, that Student will be able to demonstrate appropriate self control. Although the identified strategies to prevent the behavior appear to be well thought out, without baseline data in the goal, the success of this goal will be difficult to gauge. This goal does not completely state the setting in which the targeted behaviors arise nor do the objectives accurately and completely set forth a plan for achievement. On its face, this goal/BSP is vague and fails to provide any means to measure progress.

2004-2005 School year

In May 2004, the IEP team met and drafted Student's eighth grade IEP. (FF. 26, 28) On May 10, 2004, Parents approved the NOREP recommending that Student continue to receive special education at an itinerant level in the inclusion program. (FF. 26) On June 9, 2004, the District issued its evaluation report. (FF. 31-37 This re-evaluation not only revealed a severe discrepancy existed between Student's ability and achievement in basic reading, numerical operations, spelling and written expression but also yielded crucial information about his achievement to date. (FF. 37) As a result, Student's IEP intended for his eighth grade year was crafted without the benefit of information that Student's needs had expanded. (FF. 38)

That May 2004 IEP remained in effect until April 2005 when a new IEP was approved by Parents. (FF. 47-48) In the May 2004 IEP, Student was identified as having weaknesses in reading comprehension, independent reading, long division and fractions. (FF. 26) From a behavioral standpoint, the team noted that Student was easily distracted and did not do well as an independent learner. (FF. 26) Under the present educational levels, the District clearly stated that Student functioned "on grade level", (presumably in language arts), based on curriculum data and Gates testing. (FF. 26) The precise sub-tests and their scores utilized to ascertain these results were not listed. However, the inconsistent testing pattern revealed after the repeat

administration, of only one month apart, of the Woodcock Johnson tests was not revealed. (FF. 21, 23, 31) In math, Student was credited with a 5.0 grade level on the Keymath administered in April 2004 but again the specific subtests were not identified; therefore a precise determination of skill weakness is not known. Behaviorally, Student's level indicated that Student needed supervision to insure class work and homework were completed as well as to stay on task. (FF. 26)

Despite the acknowledgment of Student's needs in various areas of reading and math, this IEP contained one catch-all literacy/study/organizational goal and one math goal. (FF.26) A behavior support plan was also incorporated into the IEP. (FF.26) Under the literacy goal, Student was expected to improve his word recognition, comprehension and written expression skills to 80% of 8th grade level. (FF.26) This goal provided no baseline data, is not measurable and is unsupported by information in the present educational levels. Although the team identified Student's literacy needs in reading and understanding passages, this goal addresses skill areas not previously mentioned or assessed. The three short term objectives of increasing reading vocabulary, passage comprehension and written expression skills merely reiterate Student's goal without sufficiently describing how his literacy goal will be attained. This goal is supported by data in the present levels that inadequately describes Student's instructional level as a "grade 7". It is impossible to determine from this description whether Student is functioning at this level in all areas addressed by the goal (word recognition, comprehension, writing) or only selected areas. Furthermore, with the exception of the Gates testing, no precise measures are provided of Student's academic level; therefore tracking of progress is difficult. As a student attending regular education classes, involving reading, throughout the day, the specially designed instruction fails to describe the location or frequency of the services to be provided.

As drafted, the math goal is also inadequate. In math, Student was expected to increase and improve his knowledge and skills in numeration, operations and problem solving. (FF. 26) In the development of this goal, the Student's needs in long division and fractions were known yet this goal does not mention either. Furthermore, the two short term objectives in support of this goal relate only to multiplication and division and fail to adequately describe the plan for achievement of a goal involving "numeration, operations and problem solving" skills. Although the PLEP in this goal does cite a specific assessment (Keymath) as well as Student's

level of achievement (5.8), it does not sufficiently reveal how that performance relates to the goal as written. As with the reading goal, the specially designed instruction does not list the frequency or location of the accommodation provided.

In this IEP, Student was noted as exhibiting behaviors that impeded his learning or that of others. (FF. 26-27) Therefore the May 2004 IEP also contained a behavior management plan. This time, the BMP was preceded by a functional behavior assessment that documented Student's inappropriate behaviors as failure to: complete assignments, follow class rules or directions, and staying organized. (FF.26-27) The problematic targeted behaviors were chronicled and the setting, antecedents and consequences were listed. (FF. 26-27) Overall, the FBA appeared complete. However, it is silent as to Student's inconsistent performance on assessment measures and the underlying motivational/attention factors that it may indicate. The subsequent BMP was written in the format of an IEP goal. Although it attempts to address the needs outlined in the FBA it is skeletal in nature and inadequate.

On April 26, 2005, the IEP team met and drafted an IEP for the remainder of Student's eighth grade year. (FF. 47). On April 27, 2005, Parent signed the NOREP agreeing to a change in placement of Student to a learning support, resource level in high school. (FF. 48) The April 2005 IEP contained three literacy, three math and three behavior goals. The April IEP did not contain a BMP as Student was not regarded as a behavior problem but it did contain a behavioral goal. (FF. 47) Unlike its predecessors, this IEP contains detailed information as to Student's current performance levels, strength, needs and progress. The inclusion of such in depth information assures accurate and meaningful progress tracking of Student's performance. Unfortunately, the goals in this IEP bear little relationship to the needs they are intended to address (maintaining an organized notebook and letter identification have little to do with reading and understanding content information). Similarly, in math, the IEP provides a goal for geometry when that is not listed as a need and no testing data is presented to substantiate that as a weakness. In this IEP, the specially designed instruction clearly and completely is set forth with sufficient detail as to the location, frequency and duration of the modification.

Progress

For the eighth grade year, Student received itinerant learning support. (FF. 39) During this time, Student's IEP was implemented and he appeared to make progress. Mid-year, Parents began receiving daily reports of Student's progress because of concerns of incomplete homework. (FF. 41) Student's math teacher did not regard him as a behavior problem and problems completing homework improved after a meeting with his parents. (FF. 41). During math instruction, Student was in class with 30-32 other students and received small group instruction about one time a week with ten other students. (FF. 42) The specially designed instruction Student received was primarily in the form of guided practice, calculator usage, simplified directions, all form a pre-printed checklist in his IEP. (FF. 43) When tested in May 2004, Student received a math reasoning score of 7.3, numerical operations of 4.5 and math composite score of 5.7. (FF. 35) When evaluated privately one year later, Student received a score of 8.7 in math reasoning and 7.2 in numerical operations. (FF. 49)

Student also made progress in literacy during the 2004-2005 school year. The repeat of the Woodcock Johnson showed improvement. (FF. 44-46) Similarly, in May 2004, Student received in reading comprehension of 8.2, basic reading of 4.8, spelling of 4.8 and a composite reading score of 5.8. (FF. 34) When evaluated privately in May 2005, Student's reading comprehension was a 4.5, his word reading a 6.6 and his decoding a 5.8. (FF. 49) Student's progress in writing and spelling was not assessed. Overall, Student made progress in literacy.

Although Student's reading and math teachers saw no behavioral concerns, a BSP was incorporated into the IEP for the 2004-2005 school year. (FF. 26) The behavior support plan although supported by a functional behavioral assessment remains inadequate. This goal, the same from the previous year is still vague and difficult to measure. The objectives under this goal that Student will follow directions, complete assignments and follow instructions fall short of describing a plan for the achievement of the desired behaviors.

Accordingly, based on a totality of the evidence, the District has not met its burden of establishing that Student was provided with FAPE during the 2003-2004 and 2004-2005 school years. Although Student has made progress under the auspices of the District provided program, he did so only

in spite of the denial of FAPE that has occurred. The deficiencies in the IEP's coupled with the lack of individualized programming that Student received all denied him an education that conferred meaningful educational benefit.

ESY 2004/2005

Parents contend that Student did not receive extended school year, "ESY" services in 2004 and 2005 for which he was eligible. Federal and Pennsylvania special education regulations provide that determinations with respect to eligibility for ESY, and services necessary for the provision of FAPE in the ESY program, lie with the IEP team. 34 CFR §300.309(a); 22 Pa. Code §14.132. The purpose of ESY services is to avoid the regression and poor recoupment experienced by some eligible students. If regression during program breaks, and subsequent recoupment makes it "unlikely the student will maintain the skills and behaviors relevant to IEP goals and objectives," then ESY is required, without which, the school year IEP would not provide FAPE. 22 PA Code § 14.132 (2) (iii). In this case, the District has established that the team appropriately concluded that Student was "not in need of ESY". The District, through testimony, has established that a consideration of factors supporting a denial of ESY did occur, that other intervention services were offered and declined and that the determination was appropriate (FF. 29,30)

Compensatory Education

Compensatory education is the appropriate equitable remedy for a District's failure to provide a free appropriate public education, through a program from which a student can derive "meaningful educational benefit". Board of Education v. Rowley, 458 U.S. 176 (1982). The purpose of compensatory education is to replace lost educational services. See M.C. v. Central Regional Sch. Dist., 81 F.3d 389 (3d Cir. 1996). The period of compensatory education is calculated by finding the period of deprivation, and excluding the time the school district would reasonably require to arrange appropriate services.

In this case, the amount of compensatory education is calculated as follows. Student will be reimbursed for every day of the 2003-2004 and 2004-2005 school year multiplied by two hours, representing .50 hour each

for reading, math, written expression and behavior skills instruction.² The parent may select the form of the compensatory education so long as it furthers any appropriate developmental, remedial, or enriching instruction that furthers the goals of the student's present or future IEPs. Such hours must be in addition to the Student's current IEP.

ORDER

And now, this 18th day of March 2006, the District is ordered to provide the following:

1. The District shall provide 2.0 hours of compensatory education for each school day that student attended from July 8, 2003, exclusive of summer, to the last day of the 2004-2005 school year.
2. The District shall provide the parents with a written accounting of the calculation of the hours. The nature of the compensatory education shall be the parents' choice within the guidelines provided above.

By: Joy W. Fleming
Joy Waters Fleming, Esq.
Special Education Hearing Officer
March 18, 2006

² As compensatory education is ordered, no reimbursement is appropriate to Parents for the costs associated with tutoring or counseling services.