

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

PENNSYLVANIA
SPECIAL EDUCATION HEARING OFFICER

DECISION

Student: RV
Date of Birth: xx/xx/xxxx
Hearing Dates: September 2, November 2, November 10, 2009, January 11, and January 12, 2010
ODR File No.: 10272-08/09LS

CLOSED HEARING

School District: Wilson Area School District

Parties:

Representatives:

Parent Attorney: Jonathan S. Corchnoy, Esq.
Law Offices of Jonathan S. Corchnoy
1515 Market Street, Suite 1510
Philadelphia, PA 19102

Wilson Area School District

School District Attorney: Sharon Montayne, Esq.
Sweet, Stevens, Katz & Williams, LLP
P.O. Box 5069
331 Butler Avenue
New Britain, PA 18901

Date Record Closed: March 1, 2010
Decision Date: March 15, 2010
Hearing Officer: Gloria M. Satriale, Esquire

INTRODUCTION AND PROCEDURAL HISTORY

This case concerns the provision of a Free Appropriate Public Education (hereinafter FAPE) for Student (hereinafter referred to as “Student”), an eligible 10 year old student, who resides with his mother in the District and who has been identified with a variety of diagnosis including Autism Spectrum Disorder (hereinafter ASD). The parent challenges the provisions of a FAPE during the 2007-2008 and 2008-2009 school years.

Due process concerning the current matter was filed with the Office for Dispute Resolution on June 26th, 2009. A Resolution meeting was conducted on July 7th, 2009. The due process hearing was held over five (5) sessions from September 2009 to January 12, 2010. Following the submission of written closing arguments, the record was closed on March 1, 2010.

For the reasons that follow, I find in favor of the PARENT IN PART in that that the District denied the student FAPE by failing to provide appropriate instruction in reading and in failing to provide related services for vision therapy and will ORDER reimbursement to the Parent for the costs of the private evaluation and costs of privately secured reading and vision therapies as well as to order compensatory education for the 2008 and 2009 ESY term; and find IN PART for the DISTRICT with respect to the remaining claims.

ISSUES

Was the program and placement the District offered to the Student for the 2007-2008 and 2008-2009 school years appropriate? Specifically:

1. Whether the District’s provision of programming for the 2007-2008 and 2008-2009 school years in the areas of reading, math and the provision of related services in the areas of occupational therapy (hereinafter OT); speech and language, behavior; vision therapy and assistive technology and the accompanying extended school year (hereinafter ESY

programming) constituted FAPE. *The Student seeks a compensatory education and reimbursement of expenses as a remedy*¹

FINDINGS OF FACT

1. [Parent] is an individual and the parent of the minor child, Student , who reside within the District. P - 33.
2. Student (hereinafter “Student”), [Redacted], is in 4th grade for the 2009-2010 school year. S-16
3. Student attended the District during the 2007-2008 and 2008-2009 school years.
4. The Student was enrolled by his Parents in the [Redacted Private School] which is a private school for students with learning disabilities for the 2009-2010 school year. NT 26, 103.
5. The Student is currently classified as a child with a disability under the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. §1400 *et. seq.* and has been receiving special education services in the (District) since the beginning of school year 2005 - 2006. P - 33
6. The Student has had an IEP during all relevant time periods. S-4, S-5, S-7, S-8, S-10, S-11, S-14, S-17, S-18
7. The (District) by Stipulation agrees that the District is a Local Education Agency (LEA) and a federal funds recipient as defined by §504 of the Rehabilitation Act of 1973, 29 U.S.C. §794(a). NT p. 10

¹ In his opening argument before Hearing Officer Meyers, counsel for the Parent asserted claims under section 504 which were objected to by School District Counsel as such claims were not originally raised in the complaint filed in this matter. As the complaint was not timely amended to include the 504 claims, those claims are not properly at issue and are not addressed. Additionally a claim is made for future services. Payment for future services that are not in the form of compensatory education are not cognizable under IDEA as all rulings by a Hearing Officer are based upon a finding of denial of FAPE 34 C.F.R 300.513

8. Maxine L. Young's, CCC-A/SLP, FAAA, was retained by the Parents to conduct an Independent Auditory-language Processing Educational Evaluation (IEE) as Exhibit P - 8. NT, p. 10. The District reimbursed the cost of said evaluation to the parents by the agreement. Exhibit P-8 NT, p. 10
9. Maxine Young is a Pennsylvania a licensed Speech/Language Pathologist and Audiologist. She is certified by the American Speech-language-Hearing Association (ASHA) as a certified Speech and Language Pathologist; has a B. S. in speech/language pathology, a Master's degree in both speech/language pathology and audiology from Hahnemann Medical School and Graduate School in 1978. She has a Certificate of Clinical Competence conferred by the American Speech and Language Hearing Association, is Board Certified by the American Board of Audiology, is a Fellow of the American Academy of Audiology, and is a Fellow of the Academy of Doctors of Audiology. She has been in private practice in audiology for 18 years where she specializes in the area of auditory processing evaluations, management treatment. NT 359-363, 402-407; P-34
10. Maxine Young was admitted as an expert in the areas of Audiology, Auditory Processing Disorder (APD), and Speech/Language Pathology. NT pp. 362 - 63, 402 - 407
11. Maxine Young's testimony was credible.
12. Maxine Young evaluated the Student on February 24th, March 10th, and March 18th, 2009, and reported her results and recommendations in her report, dated March 25th, 2009, and an addendum to that report dated June 26th, 2009 P-8; P-9; NT, pp. 363, 392-93
13. Maxine Young diagnosed Auditory Processing Disorder and noted the degree of the disorder significant to affect his ability to access his education by making it difficult to process spoken language when the conditions in the listening environment are not favorable, cause difficulties making academic progress where students must listen to

spoken language instruction, and would cause difficulties in age peer social interaction,
NT, pp. 419 - 21

14. Maxine Young recommended

- research-based auditory training programs such as Fast ForWord Literacy and Fast ForWord Literacy Advanced for 30 minutes per day to address noted deficiencies with speech perception, background noise, temporal processing, and word retrieval P-8, p. 8; NT, pp. 395 - 401, 413 - 16, 419, 487 - 89, 498 - 99
- one-to-one reading tutoring for comprehension in a quiet environment using multi-sensory reading programs such as Wilson Reading until eleven or twelve years of age, when support for his auditory processing will probably plateau P - 8, p. 8; NT, pp. 401 - 407, 489 - 91
- work with an occupational therapist due to his problems with the mechanics of handwriting which she noted when (the Student) took the WORD-R test NT, pp. 459 - 60, 474 - 75
- speech/language therapy one-to-one by a certified Speech/Language pathologist three 45-minutes to 1-hour sessions per week to develop his receptive and expressive skills, to help with his word retrieval, and to develop cognitive based “central resources” listening skills with minimal background noise P-8, pp. 8 - 9; NT, pp. 391 - 94
- accommodations in his classrooms P- 8, pp. 9 - 10; NT, pp. 386 - 90, 408 - 11
- A mobile FM listening system, such as the Edulink system, should be used in all environments where “spoken language instruction” is given P - 8, p. 10; NT, pp. 408 - 11, 421 - 22, 438, 500 - 501.

15. The District implemented the recommendations regarding classroom accommodations, but did not implement any other of the recommendations included in Maxine Young's evaluation. S-4; NT 901
16. The District engaged in a trial of a fixed FM system during the 2007-2008 school year. S-7 at 5
17. The District assessed the efficacy of the FM trial through the use of the Listening Inventory for Education (L.I.F.E) which demonstrated no meaningful benefit of the use of the FM system for the Student. S-13pp 22-23; S-30; N.T. 902-903
18. Meaningful progress was achieved on speech goals NT 759; S-26; S-10
19. An FBA was conducted in March of 2007 during first grade to address off-task fidgeting behaviors. S-4 at 6. A Positive Behavior Support Plan (hereinafter PBS) was developed and implemented for the remainder of the first grade school year. S-4 at 30-32.
20. Organizational difficulties addressed by the PBS were remediated. NT 977-978
21. Meaningful progress was achieved in the area of occupational therapy. S-13; S-16; S-25
22. By March 2008, the IEP team determined that continuation of the Positive Behavior Support Plan was not necessary because the Student demonstrated appropriate behavior in the classroom, was able to follow the classroom rules, attend to the teacher during large and small group instruction, work in small groups with peers and work independently. S-10 at 6, 7-8.
23. The Student was proficient in his PSSA in 3rd grade in 2008-2009. S-24 at 3. He was at or above expected 3rd grade levels for all math skills. Id. at 4-5.
24. Robert Copeland, O.D was retained by the Parents to conduct an independent evaluation regarding the students vision and additionally treated the Student for Convergence Insufficiency using Vision Therapy P-17, P-18, P-35, P-36; NT, pp.592-659

25. Dr. Robert Copeland is a Pennsylvania licensed Optometrist, who practiced at the Wyomissing Optometric Center for over 30 years, until his retirement on June 31st, 2010. He has a B. A. Degree in biology from LaSalle University, a B.S. in visual science from the Illinois College of Optometry and a degree in Optometry from the Illinois College of Optometry. He is a Fellow of the College of Vision Development and he has treated more than 5,000 patients with Vision Therapy, and Convergence Insufficiency. He is a member of the Pennsylvania Optometric Association; the American Optometric Association, and the College of Optometrists in Vision Development (COVD) NT. 592-662
26. Dr. Robert Copeland was admitted as an expert in Optometric sub-specialty of Convergence Insufficiency NT, pp. 625
27. Vision Therapy is a researched based medical treatment for Convergence Insufficiency. NT 594-597
28. Dr. Robert Copeland's testimony was credible.
29. Dr. Robert Copeland evaluated the Student on July 16th, 2008, January 6th, 2009, and April 29th, 2009, and reported his results and recommendations in his reports, dated August 21st, 2008, and February 26th, 2009. P - 18; P - 17; P - 35; P - 36; NT, pp.627
30. As a result of the above referenced evaluations, Dr. Copeland determined that the student exhibited heterophoria, which is a tendency for the eye to turn outward or away from the nose leading to an inability to control eye movement; fluctuations and fusional reserves were noted to be very poor indicating a need for glasses and vision therapy. P-35, p-3 N.T. pp632-637.
31. Dr. Copeland's findings and recommendations are medical in nature. NT 602
32. The Re-evaluation Report of March 5th, 2007 S-1, completed at the end of first grade showed a decline in the Student's word reading, reading comprehension, spelling, and written expression NT, pp. 37 - 38;

33. The Plaintiffs consulted with Dr. Hain who, after evaluating the Student in April, 2007, recommended a multi-sensory approach reading program that teaches phonological awareness and processing skills, including the Wilson reading program P - 27; NT, p. 43
34. The District responded to Dr. Hain's recommendations by offering a multi-sensory reading program within the Districts Autistic Support Classroom. NT. 44, 107-108
35. Linda Bell was privately retained by the parents to provide additional instruction to the student in the area of reading. P-1; P-15
36. Linda Bell has a Master's degree in Curriculum and Instruction, a Master's equivalency in Education, and a B.S. in Elementary Education. She has a Pennsylvania Reading Specialist Certification and is a Wilson Reading certified instructor. She has taught reading in elementary school as an instructor and as a reading specialist for over 25 years and is currently is a Reading Specialist for the Twin Valley School District NT 125-134
37. Linda Bell was admitted as an expert in the area of Reading. NT, p. 133
38. The cost of remedial Reading instruction is \$4,900.00 P-1, P-15 1-34 N.T 46, 63
39. The Student was found eligible for ESY services for the 2007-2008 and 2008-2009 school years. S-4; S-11
40. The District offered ESY services which included: .5 hours of speech and .5 hours of O.T. per week, work on social skills goals with the District social worker. The District offered to provide services in either the autistic support class or in the learning support class. The Parent rejected these placement options as the offer did not constitute the least restrictive environment. S-11; NT 522-524.
41. The District offered appropriate ESY services for the summer of 2009, which were intended to continue working on goals from the proposed IEP. The Student did not participate in the District's proposed ESY program. S-17
42. The cost of the evaluation by Dr. Lisa Hain was \$2,200.00. P-1; P-15; pp 35-38

43. The cost of vision therapy was \$ 1, 487.58. P-15

44. The parties waived a resolution meeting. A due process hearing was conducted in this matter on September 2, 2009 (Hearing Officer Myers)², November 2, 2009, November 10, 2009, and January 11, 2010, January 12, 2010 and January 12, 2010 (Hearing Officer Satriale).

a. Exhibits were submitted on behalf of the Hearing Officer as follows:

- September 2, 2009: HO-1
- November 2, 2009: HO-1
- November 10, 2009: HO-1
- January 11, 2010: HO-1, HO-2
- January 12, 2010: HO-1, HO-2

b. Exhibits were submitted on behalf of the Parent as follows:

- September 2, 2009: P-1, P-2, P-7, P-8, P-10, P-15, P-17, P-18, P-23, P-24, P-25
- November 2, 2009: P-1, P-2, P-7, P-8, P-10, P-12, P-15, P-17, P-18, P-23, P-24, P-25, P-27, P-28, P-29, P-32,
- November 20, 2009: P-1, P-2, P-7, P-8, P-9, P-10, P-12, P-14, P-15, P-17, P-18, P-23, P-24, P-25, P-27, P-28, P-29, P-32, P-34
- January 11, 2010: P-1, P-2, P-7, P-8, P-9, P-10, P-12, P-14, P-15, P-17, P-18, P-19, P-20, P-21, P-22, P-23, P-24, P-25, P-27, P-28, P-29, P-32, P-34, P-35, P-36
- January 12, 2010: P- 1, P-2, P-7, P-8, P-9, P-10, P-12, P-14, P-15, P-17, P-18, P-19, P-20, P-21, P-22, P-23,

² This matter was originally assigned to Hearing Officer Myers and reassigned to this Hearing officer following Hearing Officers resignation.

P-24, P-25, P-27, P-28, P-29,
P-32, P-34, P-35, P-36, P-37

c. Exhibits were submitted on behalf of the District as follows:

- September 2, 2009: SD-7, SD-8, SD-9, SD-10,
SD-11, SD-10, SD-12, SD-13, SD-14,
SD-15, SD-16, SD-17,
SD-19, SD-22, SD-23, SD-24
- November 2, 2009: SD-1, SD-4, SD-7, SD-8, SD-9,
SD-10, SD-11, SD-12, SD-13, SD-14,
SD-15, SD-16, SD-17, SD-19, SD-19,
SD-22, SD-23, SD-24
- November 10, 2009: SD-1, SD-8, SD-8, SD-9, SD-26,
SD-14, SD-15, SD-28, SD-17,
SD-18, SD-19, SD-22, SD-23,
SD-24, SD-26, SD-28, SD-33
- January 11, 2010: SD-1, SD-2, SD-3, SD-4, SD-5,
SD-6, SD-7, SD-8, SD-9, SD-10,
SD-11, SD-12, SD-13, SD-14,
SD-15, SD-16, SD-17, SD-18,
SD-19, SD-22, SD-23, SD-24,
SD-25, SD-26, SD-28, SD-32,
SD-33, SD-34
- January 12, 2010: SD-1, SD-2, SD-3, SD-4, SD-5,
SD-6, SD-7, SD-8, SD-9, SD-10,
SD-11, SD-12, SD-13, SD-14,
SD-15, SD-16, SD-17, SD-18,
SD-19, SD-22, SD-23, SD-24,
SD-25, SD-26, SD-28, SD-32,
SD-33, SD-34

d. Stipulations:

- Admitted: SD-20, SD-35, SD,
P-3
- Removed: P-3, P-4, P-6, P-30,
- Admitted over Objection: P-16

- Not Admitted - Objection Sustained³: P-11, P-19, P-20, P-31

DISCUSSION AND CONCLUSION OF LAW

The Right to a Free and Appropriate Public Education and Burden of Proof

The Individuals with Disabilities Education Act (“IDEA”) requires that a state receiving federal education funding provide a “Free Appropriate Public Education” (“FAPE”) to disabled children. 20 U.S.C. § 1412(a)(1). In Pennsylvania, the Commonwealth has delegated the responsibility for the provision of FAPE to its local school districts. School districts provide a FAPE by designing and administering a program of individualized instruction that is set forth in an Individualized Education Plan (“IEP”). 20 U.S.C. § 1414(d). The IEP “must be ‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’ ” Shore Reg’l High Sch. Bd. of Ed. v. P.S., 381 F.3d 194, 198 (3d Cir.2004) (quoting Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 182-85 (3d Cir.1988)). In assessing whether an individualized program of instruction is “reasonably calculated” to enable the student to receive meaningful benefit, the progress noted must be more than a trivial or *de minimis*. Board of Education v. Rowley, 458 U. S. 176, 73 L.ed.2d.690, 102 S.Ct.3034 (182); Ridgewood Board of Education v. M.E. ex.rel. M.E., 172 F.3d 238 (3d Cir.1999)

A parent who believes that a school has failed to provide a FAPE may request a hearing, commonly known as a due process hearing, to seek relief from the school district for its failure to provide a FAPE. 34 C.F.R. § 300.507. In Pennsylvania, the hearing is conducted by a Hearing Officer. Carlisle Area Sch. v. Scott P., 62 F.3d 520, 527 (3d Cir.1995).

As the moving party, the student bears the burden of proof in this proceeding. The

³ Exhibits to which objections were sustained have not been considered as evidence in this decision but have been transmitted as part of this record and separate seal.

United States Supreme Court has held that the burden of proof in an administrative hearing challenging a special education provision of FAPE is upon the party seeking relief, whether that party is the disabled child or the school district. Schaffer v. Weast U.S., 126 S. Ct.528, 163L. Ed.2d 387 (2005). In Re J.L and the Ambridge Area School District, Special Education Opinion No. 1763 (2006). Because a student's parents seek relief in this administrative hearing, they bear the burden of proof in this matter., i.e., they must ensure that the evidence in the record proves each of the elements of their case. The U.S. Supreme Court has also indicated that, if the evidence produced by the parties is completely balanced, or in equipoise, then the party seeking relief (i.e., student's parents) must lose because the party seeking relief bears the burden of persuasion. Schaffer v. Weast U.S. , 126 S. Ct.528, 163L. Ed.2d 387 (2005); L.E. v Ramsey Board of Education, 435 F. 2d 384 (3d Cir.2006). Of course, where the evidence is not in equipoise, one party has produced more persuasive evidence than the other party.

Compensatory Education as a Remedy

Compensatory education is an appropriate remedy where a school district knows or should know that a child's educational program is not appropriate or that the student is receiving only trivial educational benefit, and the district fails to remedy the problem. The period of compensatory education granted should be equal to the period of deprivation, excluding the period of time reasonably required for the district to act accordingly. Ridgewood Board of Education v. M.E. ex.rel. M.E., 172 F.3d 238 (3d Cir.1999); M.C. v. Central Regional School District, 81 F. 3d 389 (3rd Cir. 1996).

However a technical violation alone does not entitle a student to compensatory education. A mere procedural glitch or technical violation of the IEP is insufficient. A violation must amount to a substantive effect on the child's ability to receive FAPE in order to hold the district responsible for any procedural glitches--such as the instant issue of difficulty with delivering

related services.

20 U.S.C. 1415(f)(3)(E)(ii), 34 C.F.R. 300.513(2) provides:

(2) In matters alleging a procedural violation, a Hearing Officer may find that a child did not receive FAPE only if the procedural inadequacies —

- (i) Impeded the child’s right to a FAPE;
- (ii) Significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent’s child; or
- (iii) Caused a deprivation of educational benefit.

Having been found eligible for special education, the student is entitled by federal law, the Individuals with Disabilities Education Act (IDEA) as reauthorized by Congress December 2004, 20 U.S.C. *Section 600 et seq.* and Pennsylvania Special Education Regulations at 22 PA Code § 14 *et seq.* to receive a Free Appropriate Public Education (FAPE). FAPE is defined in part as: individualized to meet the educational or early intervention needs of the student; reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress; provided in conformity with an Individualized Educational Program (IEP).

As previously noted, a student’s special education program must be reasonably calculated to enable the child to receive meaningful educational benefit at the time that it was developed. *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). The IEP must be likely to produce progress, not regression or trivial educational advancement *Board of Educ. v. Diamond*, 808 F.2d 987 (3d Cir. 1986). *Polk v. Central Susquehanna IU #16*, 853 F.2d 171, 183 (3rd Cir. 1988), cert. denied, 488 U.S. 1030 (1989), citing *Board of Education v. Diamond*, 808 F.2d 987 (3rd Cir. 1986) held that “*Rowley* makes it perfectly clear that the Act requires a plan of instruction under which educational *progress* is likely.” (Emphasis in the original). The IEP

must afford the child with special needs an education that would confer meaningful benefit. The court in Polk held that educational benefit “must be gauged in relation to the child’s potential.” This was reiterated in later decisions that held that meaningful educational benefit must relate to the child’s potential. See 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.) (District must show that its proposed IEP will provide a child with meaningful educational benefit). 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. 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 supra.

Districts need not provide the optimal level of service, maximize a child’s opportunity, or even a level that would confer additional benefits, since the IEP as required by the IDEA represents only a basic floor of opportunity. Carlisle Area School District v. Scott P., 62 F. 3d at 533-534.; Hartmann v. Loudoun County Bd. of Educ., 118 F.3d 996, 1001 (4th Cir. 1998); Lachman, supra. In creating a legally appropriate IEP, a school district is not required to provide an optimal program, nor is it required to “close the gap,” either between the child’s performance and his untapped potential, or between his performance and that of non-disabled peers. In Re A.L., Spec. Educ. Opinion No. 1451 (2004); See In Re J.B., Spec. Educ. Opinion No. 1281 (2002)

What the statute guarantees is an “appropriate” education, “not one that provides everything that might be thought desirable by ‘loving Parents.’” Tucker v. Bayshore Union Free School District, 873 F.2d 563, 567 (2d Cir. 1989). Under the IDEA parents do not have a right to compel a school district to provide a specific program or employ a specific methodology in educating a student. M.M. v. School Board of Miami - Dade County, Florida, 437 F.3d 1085

(11th Cir. 2006); Lachman v. Illinois Bd. of Educ., 852 F.2d 290, 297 (7th Cir. 1988) If personalized instruction is being provided with sufficient supportive services to permit the student to benefit from the instruction the child is receiving a “Free Appropriate Public Education as defined by the Act.” Polk, Rowley. The purpose of the IEP is not to provide the “best” education. The IEP simply must propose an appropriate education for the child. Fuhrman v. East Hanover Bd. of Educ., 993 F. 2d 1031 (3d Cir. 1993). (See also Board of Education v. Murphysboro v. Illinois Bd. of Educ., 41 F.3d 1162 (7th Cir. 1994)) (Under the IDEA a District must follow the procedures set forth in the act, and develop an IEP through procedures reasonably calculated to enable the child to receive educational benefits. Once the district has done this the court cannot require more; the purpose of the IDEA is to open the door of public education to handicapped children, not to educate a child to his/her highest potential), citing Rowley, 458 U.S. at 206-07.) More recently, the Eastern District Court of Pennsylvania ruled, “Districts need not provide the optimal level of services, or even a level that would confer additional benefits, since the IEP required by the IDEA represents only a basic floor of opportunity.” S. v. Wissahickon Sch. Dist., 2008 WL 2876567, at *7 (E.D.Pa., July 24, 2008), citing Carlisle, 62 F.3d at 534, citations omitted. . See also, Neena S. ex rel. Robert S. v. School Dist. of Philadelphia, 2008 WL 5273546, 11 (E.D.Pa., 2008).

The IEP for each child with a disability must include a statement of the child’s present levels of educational performance; a statement of measurable annual goals, including benchmarks or short-term objectives, related to meeting the child’s needs that result from the child’s disability to enable the child to be involved in and progress in the general curriculum and meeting the child’s other educational needs that result from the child’s disability; a statement of the special education and related services and supplementary aids and services to be provided to the child...and a statement of the program modifications or supports for school personnel that will be provided for the child to advance appropriately toward attaining the annual goals (and) to

be involved and progress in the general curriculum...and to be educated and participate with other children with disabilities and nondisabled children; an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class... CFR §300.347(a)(1) through (4)

An IEP must be crafted in such a manner that provided it is implemented; there is a reasonable degree of likelihood that the student will make educational progress. Implementation of an appropriate IEP does not guarantee that the student will make progress.

The starting point for the determination of the appropriateness of an offer of a FAPE is the initial evaluation from which the needs of a student are identified. In order for an evaluation to be determined to be appropriate, it must meet the requirements of 34 CFR § 300.532. More specifically, the Evaluation Report (ER) should: 1) utilize a variety of assessment tools and strategies to gather relevant functional and developmental information about the student, including information provided by the parents; 2) assess the student in all areas related to the suspected disability; 3) be sufficiently comprehensive to identify all of the student's special education and related services needs; and 4) utilize technically sound instruments to assess the relative contribution of cognitive, behavioral, physical and developmental factors. *See In Re the Educational Assignment of L.-M. B., Special Educ. Op. No. 1795 (2007).*

Pursuant to 34 CFR §300.502(b)(i), a parent is entitled to reimbursement of an IEE at public expense if they disagree with the District evaluation report and the District evaluation report is in some way inappropriate. Holmes v. Millcreek Tp. School Dist., 205 F.3d 583 (3rd Circ. 2000). See also P.P. ex rel. Michael P. v. West Chester Area School Dist., 585 F.3d 727, 740 (3rd Circ. 2009) (Third Circuit agreed with holdings of Hearing Officer, Appeals Panel, and District Court that, because the parents were not challenging the District's evaluation, the District was not responsible for reimbursement for privately-obtained IEE); *In Re: The Educational Assignment*

of D.S., (rejects IEE reimbursement on legal grounds because no evidence that parents disagreed with District's evaluation).

In its reevaluation report the District revealed a regression in reading the reparation of which was not specifically addressed within the report S-13 N.T. 38-45. On this basis, the Parent sought an independent evaluation. P-12 This evaluation properly reviewed and incorporated the Districts evaluation, but came to a different conclusion regarding the action necessary to remediate the deficit. When the District declined to follow the recommendation of the private evaluation, the parent pursued implementation of the recommendations privately. It is noted that, although not a criteria for reimbursement, implementation of the recommendation enunciated in the private evaluation remediated the deficit established in the Districts evaluation.

The District takes the position that the parent did not explicitly state that she disagreed with the findings of the District's evaluation and, consequently is not entitled to reimbursement. I disagree. The parent established, by her actions, her disagreement with the findings of the Evaluation and her concern that left unchecked, the recommendations would not rise to the legally sufficient standard. In the end, she was right. Additionally, support exists within the decisions of the appellate panel for the reimbursement of an independent evaluation even if a disagreement with the District report does not exist or is not supported in the record. PA Spec. Educ. Op. No. 899 (1999); PA Spec. Educ. Op. No. 1111 (2001); PA Spec. Educ. Op. No. 1140(2001); PA Spec. Educ. Op. No. 1573 (2005); PA Spec. Educ. Op. No. 1733 (2006).

Reimbursement in the amount of \$2,200.00 for Dr. Hain's report will be ordered.

Math

Teacher [Redacted Name], who had been the Student's autistic support teacher from Kindergarten through 2nd grade, the described Student's performance in math as normal. She explained that at the end of first grade, Student was "exactly where he should be." NT 836. And with regard to Student's 2nd grade math levels she testified, "The Student was right on par with where the program felt he needed to be for third grade." Id. at 892. The record established by the District demonstrated that the Student was performing as expected for his grade level. S-23 at 3-4, 7. Although the Parent clearly testified that she disagreed that skill assessment in the "developing range" were not satisfactory to her, the provision of a FAPE does not require that Districts provide the optimal level of service, maximize a child's opportunity, or even a level that would confer additional benefits, since the IEP as required by the IDEA represents only a basic floor of opportunity. Carlisle Area School District v. Scott P., 62 F. 3d at 533-534.; Hartmann v. Loudoun County Bd. of Educ., 118 F.3d 996, 1001 (4th Cir. 1998); Lachman, supra. In creating a legally appropriate IEP, a school district is not required to provide an optimal program, nor is it required to "close the gap," either between the child's performance and his untapped potential, or between his performance and that of non-disabled peers. In Re A.L., Spec. Educ. Opinion No. 1451 (2004); See In Re J.B., Spec. Educ. Opinion No. 1281 (2002) (Showing Student as Secure or Developing in all Math areas for all four quarters of the 2007-2008 school year⁴). The District's evidence establishes that Student continued to make clear progress in math over the 2008-2009 school year. See S-24 at 4-5 (showing Student at or above expected skill levels in all thirty-one learning goals).

Conversely, the Parents have provided no evidence that the District's math curriculum was not reasonably designed to provide an educational benefit to Student. The only evidence

⁴ When Mrs. Vaughn was asked if she received the grade report, she stated "His math is not -okay." NT 73. In actuality, the teacher explained in S-23 that "It is not unusual for a second grader to have "developing" for skills and concepts at the end of the second grade year. The Every Day Math Program is a spiral program in which students will revisit the skill again in third grade". See S-23 at 7.

presented by the Parents as evidence that Student was not offered a FAPE is that they were concerned with Student's math scores at the end of second grade⁵, and so they decided to hire a private math tutor for Student for the summer to work on his math skills. Parents often engage the services of private tutors to give their children an advantage or to keep existing skills primed. Private services for these purposes are not a compensable. The record is absent justification for the retention of the services of a mater tutor for reasons other than to maximize the student's potential. Therefore, for the above-referenced reasons, the Student was given appropriate mathematics instruction over the course of the 2007-2008 and 2008-2009 school years that was reasonably calculated to provide meaningful educational benefit.

Reading

School districts are required, to the maximum extent appropriate, to educate children with disabilities with children who are nondisabled. 34 CFR §300.114(a) *Carlisle Area School District v. Scott P.*, 62 F.3d 520, 535 (3d Cir.1995) A school district's obligation to make reasonable efforts to accommodate a disabled child in a regular education classroom is substantial. *Girty v. School District of Valley Grove*, 163F.Supp.2d 527 (W.D. Pa. 2001)

School district's must include disabled students in regular education classrooms even if the curriculum must be modified to permit such placement. 34 C.F.R. §300.116(e). The school district must tailor a program and placement to the student's capabilities and limitations; it cannot simply attempt to fit the student into a program, placement and curriculum that already exists within the school district. In *Re C.D. and*

the Great Valley School District, Special Education Opinion No. 1858 (2008) An

Individualized Educational Program does not mean a separate class or room, but a set of coordinated services and interventions, delivered by persons capable of providing them,

⁵ Unnecessarily so according to the classroom teacher. See S-23 at 7.

in the least restrictive environment appropriate. Id.; 34 CFR §300.114 Learning support services can be provided in any classroom by competent professionals; it does not require the aggregation of disabled students in a room. *Great Valley School District, supra*.

The two-part Oberti LRE test is to determine: 1) whether education in the regular classroom can be achieved satisfactorily with the use of supplementary aids and services; and 2) if not, what is the extent to which the child can be mainstreamed with regular education peers. *Oberti v. Board of Education, 995 F.2d 1204 (3d Cir. 1995)* It not necessary to move to the second part of Oberti's two-part test unless the first part demonstrates that placement outside the regular classroom is required. Id.

This analysis involves several factors, including: 1) whether the school district has made reasonable efforts to accommodate the student in a regular classroom; 2) the educational benefits available to the student in a regular education classroom with supplementary aids and services, as compared to the benefits of a segregated special education classroom; and 3) the possible negative effect of the student's inclusion on the other children's educations. Although not argued by either side of this dispute, I find principles of CRE important consideration.

The factual background to this case is perplexing since the Student participated in regular education, however the instruction necessary to meet the Student's needs is withheld from the Student in regular education since the District would only provide this instruction if the Student was placed in a more restrictive setting. The District's own reevaluation demonstrated a regression in reading, N.T. 37. Although a specific approach to reading was recommended (multi-sensory approach P-27, N.T. 43), the District did not change the approach, but rather adopted the recommendations in the reevaluation report which were calculated to strengthen existing skills. Strengthening existing skills does not address the regression.

For the reading program failure, I will award reimbursement for private reading tutoring services in the amount of \$4,900. Compensatory education is not warranted as the reading deficits were remediated. N.T.139-140; 142-145; 154-157; P-23

Provision of Related Services

Under IDEA, schools must provide not only special education, but also related services in order to furnish students with a FAPE. 20 U.S.C. §§ 1401(9), 1412(a). However, not all services that can be broadly construed as educational are cognizable under IDEA. This is because “ultimately any life support system...can be construed as related to a child’s ability to learn.” Mary T.v. School District of Philadelphia, 575 F.3d 235 (3rd Cir. 2009). The term “related services” is defined to include:

transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child.

Of the related services at issue here, all are specifically authorized by statute except vision therapy. Although vision therapy is not specifically listed as a related service, it would seem that such services could be cognizable under IDEA as required to provide a FAPE where a nexus can be clearly established between the student’s ability to learn and receive meaningful benefit from the educational program as outlined in the IEP. *See Kruelle V. New Castle County School District, 642 F.2d 687 694 (3rd Cir 1981) (stating that IDEA requires “courts to assess the link between the supportive service or educational placement and the child's learning needs”)*.

Vision Therapy

With respect to vision therapy, the expert testimony of Dr. Copeland is uncontroverted regarding the diagnosis and the effects of the diagnosis upon the Student's ability to benefit from educational programming. Dr. Copeland testified that, based upon testing and Parent reports, the Student was experiencing a number of difficulties including:

- (1) Difficulty copying from blackboards;
- (2) Eyes tire easily;
- (3) Reverses letters and words when reading or writing;
- (4) Omits and/or repeats letters or words;
- (5) Confuses similar words and letters;
- (6) Short attention span while reading;
- (7) Avoids reading and other close work;
- (8) Unusual tension or irritability with sustained visual activity,
whether it's computer work or reading a book;
- (9) Difficulty understanding or remembering what has been read;
and
- (10) Poor eye-hand coordination, including poor handwriting; NT.
630, 631, 640, 641, 646, 652 – 657.

Many of these findings are consistent with difficulties noted by other experts. Reimbursement is warranted in the amount of \$1,487.58 P-1; P-15 pp 47-55. However, as the condition was remediated by the private therapy, an award of compensatory education is not warranted. P-35: citation omitted p.3; N. T. 634-638

Occupational Therapy/Speech and Language Therapy

The District's record establishes that provision of these related services and establishes sufficient progress in these areas. With respect to occupational therapy direct service was reduced to consultation based upon sufficient progress with goals for occupational therapy S-13 at 19-22, S-16 at 24 and S-25 at 7-9. This decision was based upon current data as well as the administration of the test of Visual-Motor Skills- R; Word Sentence Copying Test; Test of Handwriting Skills-R. Id.

Regarding Speech, the Student mastered three of his speech goals during the 2007-2008 school year and continued to make progress regarding the rest of the goals. S-26 at 1; S-10 at 7. Speech goals were continually revised to ensure continued progress. NT 759. Although the Parent's expert recommended increase speech/language revision and recommended the direct rather than consultative service, no testimony was offered regarding the inappropriateness of the services or the progress demonstrated. Of great importance is the Parent's testimony regarding her desire to have as many supportive services as possible be implemented within the regular education environment as it was her paramount desire for the Student to remain with his peers in a typical environment as much as possible. Such a desire is in opposite to a request to implement the Parent's expert recommendations for 3 hours per week of individual instruction NT 42. Further, additional speech is not warranted under the record established by the District regarding the students continued progress under the District's program.

The District's provision of related services in occupational therapy and speech was reasonably calculated to render meaningful benefit to the Student and constituted a FAPE.

ESY

2008

Eligibility for services is not in issue for either of the ESY terms in question. The standard for determining whether an ESY program is sufficient is whether or not it is

reasonably likely to permit a student to access a free and appropriate public education during the regular school term. In Re the Educational Assignment of T.G., Appeals Panel Decision No. 1759.

The District takes the position that its proffer of an ESY program meets the above standard and, further should be absolved from controversy as the Parent agreed to the ESY program in 2008 composition. Initially it is noted that because a parent agrees with or places trust in the representations/recommendations of the district, the district is not absolved from its responsibilities under the law. Secondly, the District's provision of services does not meet the above standard in that the services were provided as inconsistently, not at all, or not within the least restrictive environment appropriate for this Student. (N.T. 108-109; S-17; N.T. 671-684). Compensatory education for the period of ESY is appropriate in the areas of social skills, as no instruction was provided in order to ensure a FAPE during the school year. The District simply placed the Student in a "child care" environment presumably assuming that social skills defects are remediated by "osmosis" since the only "service" provided was to expose the Student to typically developing peers. Further, the Student was never even observed in this environment during ESY, further reinforcing the notion that the Student's needs were abandoned during this time. N.T

Thus the Student will be entitled to compensatory education for the length of the ESY program at 3 days per week for six weeks (S-4 p25) for a total award of 18 days of social skills instruction. Occupational therapy and speech were provided and thus no award required. As aforementioned as the reading and vision deficits have been remediated, an award of compensatory education is not warranted for those areas either.

Although the record is uncontroverted that ESY services for the summer of 2009 are necessary for the provision of a FAPE during the 2009/2010 school year, again the District fails to offer the provision of these services in the least restrictive environment. Compensatory education, however, and not reimbursement is the appropriate remedy here as in order for the unilateral private placement to be reimbursed, the record must establish the appropriateness of the private placement. 20 U.S. C. 1412 (a)(10)(C)(ii); Florence County School District Four v. Carter 114 S. Ct. 361 (1993) The record here is completely devoid of evidence supporting whether the private program was individually devised and reasonably likely to permit the student to access a free and appropriate public education during the regular term. In fact, the private ESY program was not even provided with the IEP upon which the need for continued provision of FAPE was based N.T. 104. Nor was testimony presented from a representative of the program. Compensatory education is appropriate for the balance of the ESY term in that the Districts proffer for ESY was not reasonably likely to permit a student to access a Free and Appropriate Public Education during the regular school term and, as more fully described above, was not offered, as required, in the least restrictive environment. 20 U. S. C 1412 (5);

The District merely offered for the Student to participate in the remaining weeks of ESY in an autistic support class or learning support class NT 530-531. This is particularly troubling since the student has historically participated in regular education with typically developing same aged peers. Further the record provides no evidence how the ESY program, particularly in light of the suggestion of placement with students who are likely to be experiencing social skills challenges of their own, will be individualized in the area of social skills instruction/support. The discussion regarding the applicability of least restrictive environment standards under the

discussion regarding reading is incorporated here.

The Districts violations in this regard apply are repeated and apply to their actions with respect to ESY and reading instruction. (with respect to multi-sensory reading instruction, the district would comply with this recommendation, but only if the student were placed in the autistic support classroom and not as either a push-in or pull-out service since it was only available there NT, pp. 44, 107 - 8; with regard to ESY services, continuation of instruction designed to allow a FAPE during the school year was only available in the autistic or learning support classrooms S-17.

In keeping with standard in Pennsylvania for awarding compensatory education in calculating the amount of compensatory education necessary to return the student to the position he would have been in but for the deprivation of a FAPE, and based upon the record establishing the students current levels of performance and recommendations for remediation, the student shall be entitled to compensatory education for the 6 week period of ESY less the two weeks the student attended the private program, for total of 4 weeks as follows:

- 2 hours per week for 4 weeks of social skills instruction for a total award of 4 hours of social skills instruction.
- 2 hours per week for 4 weeks of occupational therapy for a total award of 8 hours of occupational therapy
- 3 hours of speech/language therapy per week for 4 weeks for a total award of 12 hours of speech and language therapy.
- 5 days per week of program instruction with typically developing peers for 4 weeks for a total award of 20 days of classroom instruction.

B.C. v Penn Manor SD, 906 A.2d 642 (Pa. Comwlth. 2006).

CREDIBILITY OF WITNESSES

Hearing Officers are empowered to judge the credibility of witnesses, weigh evidence and, accordingly, render a decision incorporating findings of fact, discussion and conclusions of law. The decision should be based solely upon the substantial evidence presented at the hearing. Spec. Educ. Op. No. 1528 (11/1/04), quoting 22 PA Code, Sec. 14.162(f). See also, *Carlisle Area School District v. Scott P.*, 62 F.3d 520, 524 (3rd Cir. 1995), cert. denied, 517 U.S. 1135 (1996). Quite often, testimony or documentary evidence conflicts; which is to be expected as, had the parties been in full accord, there would have been no need for a hearing. Thus, part of the responsibility of the Hearing Officer is to assign weight to the testimony and documentary evidence concerning a child's special education experience.

Hearing Officers have the plenary responsibility to make "express qualitative determinations regarding the relative credibility and persuasiveness of the witness". *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIZ 21639 at *28 (2003). This is a particularly important function, as in many cases the Hearing Officer level is the only forum in which the witness will be appearing in person.

Although the testimony of all the witnesses was carefully considered, the credibility of the following witnesses will be specifically commented upon here:

Mother: Clearly one could not hope for a more dedicated and loving mother and this Hearing Officer is profoundly admiring of this Parent's relentless pursuit of necessary treatment for her son. It is also clear that the Parents, were seeking what they were led to believe was the best possible program to address the Student's educational needs.

Parent's Vision Expert: The expert testifying on behalf of the parent in support of the necessity of vision services was well versed in current literature and applied practice in the field and was

able to clearly establish a nexus between the disorder and educational challenges as well as establish the educational benefit of treatment recommendations.

Classroom Teacher: The classroom teacher had instructed the student since Kindergarten and was able to give a broad perspective of this students abilities and progressions. She was knowledgeable and informed regarding this students needs and a willing participant in the co-teaching arrangement.

CONCLUSION

The Districts provision of reading instruction and ESY Services for the 2007-2008 and 2008-2009 school year were inappropriate and denied the FAPE under IDEA to the Student. Additionally, the Districts failure to provide vision services which were necessary for the student to access education likewise denied him FAPE under IDEA. Consequently the student shall be awarded reimbursement for services privately secured and awarded compensatory education for the indicated unremediated failures of a FAPE.

ORDER

- The Student was denied a FAPE in the area of reading and is entitled to reimbursement for private tutoring services in the amount of \$4,900.00.
- The Student was denied a FAPE for failure to provide vision services and is entitled to reimbursement for private vision services in the amount of \$1,487.58
- The Student is entitled to reimbursement for Dr. Hain's evaluation is the amount of \$2,200.00

- The student was denied appropriate ESY Services calculated to ensure a FAPE during the school year during the summers of 2008 and 2009 and is awarded compensatory education as follows:
 - 2 hours per week for 4 weeks of social skills instruction for a total award of 4 hours of social skills instruction.
 - 2 hours per week for 4 weeks of occupational therapy for a total award of 8 hours of occupational therapy
 - 3 hours of speech/language therapy per week for 4 weeks for a total award of 12 hours of speech and language therapy.
 - 5 days per week of program instruction with typically developing peers for 4 weeks for a total award of 20 days of classroom instruction.
- The Student was afforded a FAPE in the areas of speech and language; occupational therapy, behavior therapy and assistive technology.

Dated: March 15, 2010
Gloria M. Satriale, Esq.,
Special Education Hearing Officer

Gloria M. Satriale