

*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**

**Child's Name:**

E. M.

**Date of Birth:**

[redacted]

**CLOSED HEARING**

ODR Case #18674-1617AS

**Dates of Hearing:**<sup>1</sup>

March 22, 2017 – May 11, 2017

**Parent:**

Parent[s]

Angela Uliana-Murphy, Esquire – 106 N. Franklin Street – P.O. Box 97 –  
Pen Argyl, PA – 18072  
*Counsel for Parent*

**School District:**

Jim Thorpe Area School District – 410 Center Avenue – Jim Thorpe, PA –  
18229

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*Counsel for the School District*

**Date of Decision:**

June 27, 2017

**Hearing Officer:**

Michael J. McElligott, Esquire

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<sup>1</sup> The parties presented evidence at the March session. An early April session, which would have been the final session in the hearing, was cancelled due to hearing officer illness, and the hearing concluded at the May session. Counsel for the parties requested time to submit written closing statements thereafter.

## **INTRODUCTION**

Student (“student”)<sup>2</sup> is [a preteen-aged] student who resides in the Jim Thorpe Area School District (“District”). The parties agree that the student qualifies under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEIA”)<sup>3</sup> as a student with a specific learning disability in reading.

Parent claims that the student was denied a free appropriate public education (“FAPE”) for a period from the 2014-2015 school year through January 2017 related to allegations of deficiencies in failing to identify the student’s disability prior to November 2016 and in the student’s reading programming in the period from the issuance of the November 2016 evaluation report (“ER”) through mid-January 2017.<sup>4</sup> Parent seeks a quantitative/hour-for-hour compensatory education as a remedy.

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<sup>2</sup> The generic use of “student”, rather than a name and gender-specific pronouns, is employed to protect the confidentiality of the student.

<sup>3</sup> It is this hearing officer’s preference to cite to the pertinent federal implementing regulations of the IDEIA at 34 C.F.R. §§300.1-300.818. *See also* 22 PA Code §§14.101-14.163 (“Chapter 14”).

<sup>4</sup> In terms of the chronology of the claims, the ER was issued in late November 2016, and an IEP was in place approximately three weeks later shortly before the Christmas holiday in December 2016. (School District Exhibit [“S”]-6, S-7). In terms of the scope of the denial-of-FAPE evidentiary record in this matter, parent’s complaint was filed in January 2017. The acts/omissions which form the basis of the complaint range back to the outset of the 2014-2015 school year. Strictly, then, the scope of the denial-of-FAPE evidentiary record would potentially extend to a point beyond two years prior to the filing of the complaint (January 2015). In such cases, the IDEIA requires fact-finding related to the date(s) on which parent knew or should have known (“KOSHK”) of the action(s) which form(s) the basis of the complaint to determine if the claim(s) in the complaint is/are timely filed. (34 C.F.R. §§300.507(a)(2), 300.511(3); *G.L. v. Ligonier Valley School Authority*, 801 F.3d 602 (3d Cir. 2015)). Here, counsel stipulated to the scope of the denial-of-FAPE evidentiary record and agreed to make any KOSHK/timely-filing arguments for the period August 2014 – January 2015 as part of closing statements. KOSHK findings, then, will be part of this decision. The denial-of-FAPE evidentiary record does not extend beyond mid-January 2017 because the parties agreed that,

The District counters that it timely identified the student's reading disability. Additionally, the District asserts that at all times its programming was designed to provide FAPE to the student and, when implemented, provided FAPE for the period of parent's allegations. As such, the District argues that the parent is not entitled to a compensatory education remedy.

For the reasons set forth below, I find in favor of the parent.

### **ISSUES**

Did the District meet its obligations to provide FAPE to the student for claims timely presented in the complaint?

If this question is answered in the negative, is the student entitled to compensatory education?

### **FINDINGS OF FACT**

#### Kindergarten – 2<sup>nd</sup> Grade: 2011-2012 through 2013-2014 School Years

1. In December 2011, the student enrolled in the District in kindergarten after attending a neighboring school district to start the 2011-2012 school year. The student has attended District schools since enrollment in kindergarten. (S-1, S-12).
2. At the end of the student's kindergarten year, the student exhibited largely "great work" in most areas of reading readiness but was noted as needing improvement in recognizing vocabulary words and reading emergently with adequate fluency. (S-12 at pages 1-4).
3. At the end of the student's 1<sup>st</sup> grade year (the 2012-2013 school year), the student's final reading grade was 85% with satisfactory teacher comments. (S-10 at pages 1-4, S-12 at page 5).

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as of that time, the student was in an agreed-to program/placement for reading. (Parent Exhibit ["P"]-8; Notes of Testimony ["NT"] at 190-192, 224-226).

4. In the fall of 2<sup>nd</sup> grade (the 2013-2014 school year), the District's regular education testing in reading showed that the student was in the low-average range for that point in a 2<sup>nd</sup> grade year and was below the target level for reading achievement. (P-4 at page 1).
5. In the winter of 2<sup>nd</sup> grade, the District's regular education testing in reading showed slight improvement in reading levels but indicated that the student had fallen into the below-average range for that point in a 2<sup>nd</sup> grade year. The student remained below the target level for reading achievement. (P-4 at page 1).
6. In the spring of 2<sup>nd</sup> grade, the District's regular education testing in reading showed continued improvement in reading levels but indicated that the student remained in the below-average range for that point in a 2<sup>nd</sup> grade year. The student continued to be below the target level for reading achievement. The recommendation on the assessment instrument was "further assess and consider individualizing program". (P-4 at page 1).
7. Over the first three quarters of the student's 2<sup>nd</sup> grade year, the student's reading grades were 82%, 83%, and 79%. In the third quarter of 2<sup>nd</sup> grade, the student's teacher commented to the parent that the student needed to be reading nightly and taking weekly quizzes on reading. (S-10 at page 7, S-12 at page 6).
8. In April 2014, in the spring of 2<sup>nd</sup> grade, the student's teacher noted in a letter sent to the parent that the student's academic performance had increased since mid-year grading but that "some areas that [the student] definitely still needs extra time with is with...out loud reading fluency. Please keep reading with [the student] and have [the student] read (anything) out loud." (P-2, bracketed material modified to preserve student confidentiality, parenthetical material presented as parenthetical in the original).
9. The student's grade in reading in the fourth quarter of 2<sup>nd</sup> grade was 85%. The student's teacher commented to the parent that the student showed improvement in this quarter. The student's final grade in reading in 2<sup>nd</sup> grade was 82%. (S-10 at page 9, S-12 at page 6).
10. At the end of 2<sup>nd</sup> grade, the District determined that based on report card grades, reading assessment data, and teacher

recommendation, the student should receive Title I reading services in 3<sup>rd</sup> grade. (S-11 at page 33, S-14 at page 1).<sup>5</sup>

### 3<sup>rd</sup> Grade: 2014-2015 School Year

11. In 3<sup>rd</sup> grade, the student received Title I reading services. (S-11 at page 13; NT at 128-169).
12. In the fall of 3<sup>rd</sup> grade, the student began to participate in a District afterschool care program with an academic component. (P-5 at pages 2-4, P-7).
13. In the fall of 3<sup>rd</sup> grade, the District's regular education testing in reading indicated that the student was in the below-average range for that point in a 3<sup>rd</sup> grade year. The instructional recommendation on the assessment instrument was "further assess and consider individualizing program". (S-11 at page 25).
14. In the fall of 3<sup>rd</sup> grade, the District's regular education testing in reading comprehension showed that the student was in the well-below-average range for that point in a 3<sup>rd</sup> grade year. The instructional recommendation on the assessment instrument was "begin immediate problem solving". (S-11 at page 25).
15. In the winter of 3<sup>rd</sup> grade, the District's regular education testing in reading showed improvement in reading levels but indicated that the student continued to fall in the below-average range for that point in a 3<sup>rd</sup> grade year. The student remained below the target level for reading achievement, and the instructional recommendation on the assessment instrument continued to be "further assess and consider individualizing program". (S-11 at page 25).
16. In the winter of 3<sup>rd</sup> grade, the District's regular education testing in reading comprehension indicated that the student's reading comprehension for that point in a 3<sup>rd</sup> grade year had declined. The student remained below the target level for reading achievement, and the instructional recommendation on the assessment instrument was "begin immediate problem solving". (S-11 at page 25).

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<sup>5</sup> The student's 2<sup>nd</sup> grade teacher did not recall whether or not she explicitly referred the student for Title I reading services but documentary evidence confirms that, at some point, she submitted a recommendation which played a role in determining the student's eligibility for Title I. (S-11 at page 33; NT at 205-207).

17. Over the first three quarters of 3<sup>rd</sup> grade, the student's reading fluency increased from approximately 30 words correct per minute ("WCPM") in the beginning of 3<sup>rd</sup> grade to the high 50s WCPM (first quarter) to approximately 66 WCPM (second quarter) to the high 70s WCPM (third quarter). In the fourth quarter, the student's WCPM declined to 72. (S-11 at pages 3, 6-7).
18. In the spring of 3<sup>rd</sup> grade, the District's regular education testing in reading showed that the student's reading levels had declined into the well-below-average range for that point in a 3<sup>rd</sup> grade year and remained below the target level for reading achievement. The instructional recommendation on the assessment instrument was "begin immediate problem solving". (P-4 at page 2).
19. In the spring of 3<sup>rd</sup> grade, the District's regular education testing in reading comprehension showed slight improvement in reading comprehension, into the below-average range for that point in a 3<sup>rd</sup> grade year. The student remained below the target level for reading comprehension, and the instructional recommendation on the assessment instrument was "further assess and consider individualizing program". (P-4 at page 2).
20. In the first quarter of 3<sup>rd</sup> grade, the student's reading grade was 78%, and the regular education teacher noted that the student was receiving Title I reading services. In the second quarter of 3<sup>rd</sup> grade, the student's reading grade was 74%, and the student's regular education teacher noted that the student continued in Title I and that the student needed to improve study habits in reading. In the third quarter of 3<sup>rd</sup> grade, the student's reading grade was 72%, and the student's regular education teacher noted that the student continued in Title I. In the fourth quarter of 3<sup>rd</sup> grade, the student's reading grade was 79%, and the student's regular education teacher noted that the student continued in Title I. The student's final grade in reading in 3<sup>rd</sup> grade was 76%. (P-1 at page 1; S-10 at pages 10-15, S-12 at page 7).
21. At the end of 3<sup>rd</sup> grade, the District determined that based on report card grades, reading assessment data, and teacher recommendation, the student should receive Title I reading services in 4<sup>th</sup> grade. (S-11 at pages 1, 34; S-14 at page 2).
22. On statewide Pennsylvania System of School Assessment testing for 3<sup>rd</sup> grade, the student scored basic in English/language arts. (S-13 at pages 1-4).

#### 4<sup>th</sup> Grade: 2015-2016 School Year

23. In 4<sup>th</sup> grade, the student received Title I reading services. (S-11 at page 14, 18-20; NT at 128-169).
24. In 4<sup>th</sup> grade, the parent did not have the student continue in the afterschool care program because of the time commitment involved. (NT at 58-59).
25. In September 2015, a District diagnostic reading report indicated that the student's reading grade equivalency was at the mid-2<sup>nd</sup> grade level and the student's instructional reading level was for "materials prepared at the second grade level." On nine reading domains at the fourth grade level, with scoring from 0-100, the student's scores ranged from 31-51. The student's "zone of proximal development" indicated that books for the student for optimal reading without frustration would be in the mid-2<sup>nd</sup> grade to mid-3<sup>rd</sup> grade level. The diagnostic reading report recommended reading intervention. (S-11 at page 32).
26. In the fall of 4<sup>th</sup> grade, the District's regular education testing in reading showed that the student's reading levels were in the well-below-average range for that point in a 4<sup>th</sup> grade year and were below the target level for reading achievement. The instructional recommendation on the assessment instrument was "begin immediate problem solving". (P-4 at page 2, P-6; S-11 at page 31).
27. In the fall of 4<sup>th</sup> grade, the District's regular education testing in reading comprehension showed that the student was in the below-average range for that point in a 4<sup>th</sup> grade year in reading comprehension. (S-11 at page 28).<sup>6</sup>
28. In November 2015, the student's regular education teacher noted that the student was doing poorly in English and recommended that the student receive academic support in English instead of participating in recess. (P-5 at pages 8-10).
29. In December 2015, the same teacher communicated with the student's reading teacher as follows: "I'm seeing some substantial difficulties in English and writing with (the student). I know (the

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<sup>6</sup> This scoring does not report the instructional recommendation as with prior assessments utilizing this instrument. On those assessments, below-average score levels indicated an instructional recommendation of "further assess and consider individualizing program". Therefore, lacking such clarity, this instructional recommendation will not be noted as a finding of fact. It is preponderant on this record, however, that such an instructional recommendation in reading comprehension was likely at that time.

student's) reading grade is average but do you see problems in the language arts and 'interpreting prompts' areas?". (P-5 at page 5).

30. In the first quarter of 4<sup>th</sup> grade, the student's reading grade was 79%, but the student's grade in English was 67% and in spelling was 47%. The student's regular education teacher indicated that the student was in danger of failing English and spelling. (P-1 at pages 2-3; S-10 at pages 16-17, S-12 at page 8).
31. In the second quarter of 4<sup>th</sup> grade, the student's reading grade was 80%, but the student's grade in spelling was 68%, in social studies was 67%, and in science was 67%. The student's regular education teacher indicated that the student was in danger of failing spelling. (P-1 at pages 2, 4; S-10 at page 20, S-12 at page 8).
32. In late January 2016, the District informed the parent that, based on mid-year grades, the student was being considered for retention in 4<sup>th</sup> grade. (P-3, P-5 at pages 6-7).<sup>7</sup>
33. In the winter of 4<sup>th</sup> grade, the District's regular education testing in reading showed that the student's reading levels were in the well-below-average range for that point in a 4<sup>th</sup> grade year and were below the target level for reading achievement. (S-11 at page 26).<sup>8</sup>
34. In the winter of 4<sup>th</sup> grade, the District's regular education testing in reading comprehension showed that the student's reading levels were in the below-average range for that point in a 4<sup>th</sup> grade year and were below the target level for reading comprehension. (S-11 at page 26).<sup>9</sup>
35. In the spring of 4<sup>th</sup> grade, the District's regular education testing in reading showed that the student's reading levels were in the well-below-average range for that point in a 4<sup>th</sup> grade year and were below the target level for reading achievement. (S-11 at page 26).<sup>10</sup>

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<sup>7</sup> Why the student was considered eligible for retention was not made entirely clear through testimony. Apparently, however, the District's grading (at S-10 at pages 16-20 and S-12 at page 8) in conjunction with the retention criteria (for this student, "failure in two or more subjects" at P-3) indicate the grades of 69 or below in a subject is considered a failing grade. The teacher's comments (S-10 at pages 16-22) on quarterly grades does not indicate this with consistency, but the entire mosaic of these exhibits indicates that the student's mid-year grades in spelling, certainly, and/or social studies and/or science indicated to the District that the parent should be placed on notice that the student could be retained in 4<sup>th</sup> grade without improved grades in certain academic subjects. (P-3).

<sup>8</sup> See footnote 6, except for the instructional recommendation for well-below-average scores on this record being "begin immediate problem solving".

<sup>9</sup> See footnote 6.

<sup>10</sup> See footnotes 6 and 8.



36. In the spring of 4<sup>th</sup> grade, the District's regular education testing in reading comprehension showed that the student's reading levels were in the below-average range for that point in a 4<sup>th</sup> grade year and were below the target level for reading comprehension. (S-11 at page 26).<sup>11</sup>
37. In May 2016, the student's parent communicated to the student's regular education teacher that the student indicated a wish to repeat 4<sup>th</sup> grade. He replied that he foresaw "challenges in fifth grade in...(language arts, both writing and English)" for the student. He also indicated that it was a difficult decision, one that the parent and student would have to make for themselves. (P-5 at page 11).
38. In 4<sup>th</sup> grade, the student's final grade in reading was 83%. The student failed spelling with a grade of 57%. (S-12 at page 8).
39. At the end of 4<sup>th</sup> grade, the District determined that based on report card grades, reading assessment data, and teacher recommendation, the student should receive Title I reading services in 5<sup>th</sup> grade. (S-11 at pages 1, 35; S-14 at page 3).
40. On statewide Pennsylvania System of School Assessment testing for 4<sup>th</sup> grade, the student scored basic in English/language arts. (S-13 at pages 5-8).

#### 5<sup>th</sup> Grade: 2016-2017 School Year

41. In late August 2016, the student's mother requested that the District complete an evaluation of the student. (S-2).
42. In mid-September 2016, the District requested permission to conduct the evaluation. (S-3).
43. In late September 2016, the student's mother provided permission for the evaluation process to begin. (P-4).
44. In late September 2016, after the District had sought permission to evaluate in light of the mother's request for an evaluation but prior to receiving permission, a District diagnostic reading report indicated that the student's reading grade equivalency was at the early-3<sup>rd</sup> grade level and the student's instructional reading level was at the early-3<sup>rd</sup> grade level. The student's "zone of proximal development" indicated that books for the student for optimal reading without frustration would be in the

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<sup>11</sup> See footnote 6.

mid-2<sup>nd</sup> grade to mid-3<sup>rd</sup> grade level. (P-4; S-11 at page 9, duplicated in the exhibit at page 11).

45. Aside from mathematics (85%), the student did not have grades reported officially for the first quarter of 5<sup>th</sup> grade, but the student's present levels of academic performance in the December 2016 IEP indicated the student's grades in all subjects for the first quarter, including a grade of 71% in reading. The student was failing spelling (42%). (S-7 at page 7, S-12 at pages 9, 11).
46. In late November 2016, the District issued its ER. (S-6).
47. The November 2016 ER identified the student with specific learning disabilities in basic reading and reading fluency. (S-6).
48. In mid-December 2016, just prior to the issuance of the December 2016 IEP, a District diagnostic reading report indicated that the student's instructional reading level remained at the early-3<sup>rd</sup> grade level. The student's "zone of proximal development" indicated that books for the student for optimal reading without frustration would be in the late-2<sup>nd</sup> grade to late-3<sup>rd</sup> grade level. (P-4 at page 3; S-7).
49. In mid-December 2016, the student's IEP team (including counsel for both parties) met. (S-7).
50. The December 2016 IEP included three reading goals: two goals in accuracy/fluency and one goal in reading comprehension. (S-7 at pages 21-23).
51. The December 2016 IEP included specially designed instruction/program modifications, including assessment (and ultimate implementation) of the student's reading using a research-based reading curriculum. At the mid-December 2016 IEP team meeting, a particular reading curriculum was discussed. (S-7 at page 24, S-8).
52. The December 2016 IEP indicated that the student would receive 75 minutes of reading instruction daily in a learning support environment. (S-7 at pages 28, 30).
53. At the December 2016 IEP team meeting, the student's mother approved the District's recommended program/placement as outlined in the December 2016 IEP. (S-7 at pages 33-36).
54. As of early January 2017, over the few weeks of instruction under the December 2016 IEP from late December to mid-January, the student was making progress early on with the December 2016 IEP goals. (S-9).

55. In mid-January 2017, the reading assessment for the reading curriculum discussed at the December 2016 IEP meeting indicated that the student, at that time 10 years/7 months and at 5<sup>th</sup> grade/4 months was below age and grade equivalencies in all four areas of assessment--word identification (age 9 years/1 month, 4<sup>th</sup> grade/0 months), spelling (age 8 years/4 months, 3<sup>rd</sup> grade/3 months), fundamental literacy ability (age 8 years/7 months, 3<sup>rd</sup> grade/6 months), and letter-sound knowledge (below 6 years/1month, 2<sup>nd</sup> grade/0 months). (P-8).
56. As of mid-January 2017, parties agree that the student was in an appropriate reading placement/program utilizing the reading curriculum discussed at the December 2016 IEP meeting. (P-8; S-15; NT at 190-192, 224-226).
57. The parent did not know, nor had any reason to know, of the actions/omissions which form the basis of her complaint in the period August 2014 – January 2015. (P-1 at page 1, P-5 at pages 2-4, P-7; S-10 at pages 10-15, S-11 at page 3, 6-7, 25, S-12 at page 7; NT at 38-93, 128-169, 234-244).

### **WITNESS CREDIBILITY**

All witnesses testified credibly, and no one witness's testimony was accorded materially more or less weight than any other witness.

### **DISCUSSION AND CONCLUSIONS OF LAW**

#### **Denial of FAPE**

School districts are under a “child-find” obligation to identify students who may potentially qualify under IDEIA as students with disabilities. (34 C.F.R. §300.111; 22 PA Code §§14.121, 14.123). Where a student may potentially qualify as a student with a disability, that student must be undergo an appropriate evaluation process—once parental permission has been

obtained—to see if the student should be identified as an eligible student under IDEIA. (34 C.F.R. §§300.300, 304-306; 22 PA Code §§14.102(a)(2)(xxiv-xxv), 14.123).

Once identified as a student with a disability, to assure that an eligible child receives FAPE (34 C.F.R. §300.17), an IEP must be reasonably calculated to yield meaningful educational benefit to the student. Board of Education v. Rowley, 458 U.S. 176, 187-204 (1982). ‘Meaningful benefit’ means that a student’s program affords the student the opportunity for significant learning in light of his or her needs (Andrew F. ex rel. Joseph F. v. Douglas County School District, U.S. , S. Ct. , 197 L. Ed. 2d 335, (2017); Ridgewood Board of Education v. N.E., 172 F.3d 238 (3<sup>rd</sup> Cir. 1999)), not simply *de minimis* or minimal education progress. (Andrew F.; M.C. v. Central Regional School District, 81 F.3d 389 (3<sup>rd</sup> Cir. 1996)).

Here, the parent’s claims have two aspects—an alleged failure of the District in its child-find obligation and alleged failure to provide FAPE for the period between the identification of the student in late November 2016 through mid-January 2017.

As an initial matter and as set forth in the *Introduction* section, the parties dispute whether the parent’s claims based on actions/omissions at the outset of 3<sup>rd</sup> grade (over the period August 2014 – January 2015) are timely. The parties deferred this KOSHK fact-finding determination to this decision. The parent did not know, nor did she have any reason to know, of the actions/omissions which formed the basis of her complaint over the period

August 2014 – January 2015. Having so found, however, and as set forth more fully below, the District did not deny the student FAPE over this period.

In terms of the child-find claim, coming out of 2<sup>nd</sup> grade (the 2013-2014 school year) the student was experiencing some difficulties in reading. But nothing in the record suggests that the District, let alone the parent, knew or should have known or suspected that the student should be evaluated for special education services at the outset of 3<sup>rd</sup> grade. Indeed, at that point, the District's decision to pursue regular education Title I intervention in 3<sup>rd</sup> grade is wholly appropriate.

Likewise, over the course of 3<sup>rd</sup> grade (the 2014-2015 school year), the record is preponderant that neither the District nor the parent knew, or should have known or suspected, that the student should have been evaluated for special education. In 3<sup>rd</sup> grade, the student made progress with the Title I interventions. Granted, the student was well below average in reading comprehension throughout the school year and, overall, made little progress in this regard. Additionally, the student's grades in reading declined through the first three quarters of the school year before rising in the fourth quarter. But the student's fall, winter, and spring reading assessments showed progress over the course of the year, and the student's fluency rate increased. Taken altogether, the record fully supports a conclusion that the student's reading ability required programming. But with the Title I interventions, the student was improving steadily in enough areas to discount a conclusion that the District failed in its child-find obligations in 3<sup>rd</sup> grade.

The situation in 4<sup>th</sup> grade (the 2015-2016 school year), however, is a different matter. Using an additional reading assessment, at the outset of the school year, the student was instructional in reading at 2<sup>nd</sup> grade, nearly two grade levels behind. Using the reading assessments employed throughout the student's education, the student's reading comprehension improved in the fall of 4<sup>th</sup> grade (albeit from well-below-average to below-average), but the student's reading overall declined from below-average to well-below-average. In November of that school year, the student's regular education teacher in English and spelling was seeking additional supports for the student, and, by December, that teacher voicing serious concerns with the student's achievement. Over the same period—roughly the first and second quarters of 4<sup>th</sup> grade—the student was failing multiple classes. By January of that school year, the District placed the parent on notice that should failing grades persist, the student would be retained in 4<sup>th</sup> grade. The student's reading assessments in the winter of 4<sup>th</sup> grade indicated improvement but still registered at the below-average level in reading comprehension and at the well-below-average level in reading.

Therefore, it is an explicit conclusion that, on this record, the District knew or should have known by January 2016, an academic year-and-a-half into Title I reading services, failing regular education classes and on a trajectory to be retained— with the student's regular education teacher having already voiced concerns for the student's progress—, that the student was a student who should have been evaluated for special education. Accordingly,

compensatory education will be awarded for this failure of the District in its child-find obligation (see *Compensatory Education* sub-section below).

The District did not identify the student as a student requiring special education until late November 2016, in the fall of 5<sup>th</sup> grade (the 2016-2017 school year), and an IEP was not in place until mid-December 2016. Here, though, the District's IEP was appropriately designed. And even though there were only a few instructional weeks from the implantation of the December 2016 IEP and the cessation of parent's claim in mid-January 2017, the student showed progress over that period. Therefore, compensatory education will not be awarded for the period after the implementation of the December 2016 IEP.

#### Compensatory Education

Where a charter school has denied FAPE to a student under the terms of IDEIA, compensatory education is an equitable remedy that is available to a student. (Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990); Big Beaver Falls Area Sch. Dist. v. Jackson, 615 A.2d 910 (Pa. Commonw. 1992)). The award of compensatory education accrues from a point where a school district knows, or should have known, that a student was being denied FAPE, accounting for a reasonable rectification period to remedy the erstwhile denial. (Ridgewood; M.C.).

In this case, the District knew or should have known by late January 2016, and more precisely on January 26, 2016 when the retention letter was sent (P-5 at page 6), that the student should be evaluated for special education

services. Allowing for a reasonable rectification period—ten calendar days for the District to solicit the parent’s permission, 60 calendar days for the District to issue its evaluation report, and ten school days (approximately fourteen calendar days) to implement any IEP (22 PA Code §14.131(a)(6)— the District should have had in place no later than April 20, 2016 a special education program for the student. This program, however, was not in place until the next school year, specifically December 19, 2016. Thus, for approximately 22 school weeks between April 20, 2016 through the end of the 2015-2016 school year, and the start of the 2016-2017 school year and December 19, 2016 (strictly, this is approximately 24 school weeks, but accounting for various holidays, breaks, and teacher in-service days, the number of weeks is reduced to 22), the student was without necessary special education services. This amounts to 110 instructional days.

For a student in 4<sup>th</sup> and 5<sup>th</sup> grades, Pennsylvania requires a minimum of 6 instructional hours per day. (22 PA Code §11.3(a)). It must be noted, though, that the student was not certainly deprived of instruction over this period and, indeed, the student made educational progress—even, to a degree and heroically, in reading— notwithstanding the fact that the student did not receive necessary special education services. Having said that, the deprivation in this case is related to reading, which is the necessary and critical foundation for academic achievement and, where a deprivation occurs, almost always ripples across most of a student’s learning. Taken as a whole, then, it is this hearing officer’s determination that, as a matter of equity, 3 hours of



compensatory education will be awarded per instructional day that the student went without special education services over the period April 20, 2016 through December 19, 2016, for a total compensatory education award of 330 hours.

As for the nature of the compensatory education award, the parent may decide in her sole discretion how the hours should be spent so long as those hours take the form of appropriate developmental, remedial, or enriching instruction or services that further the goals of the student's current or future IEPs. These hours must be in addition to any then-current IEP and may not be used to supplant an IEP. These hours may be employed after school, on weekends and/or during the summer months, at a time and place convenient for, and through providers who are convenient to, the student and the family. Nothing in this paragraph, however, should be read to limit the parties' ability to agree mutually and otherwise as to any use of the compensatory education hours.

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## **ORDER**

In accord with the findings of fact and conclusions of law as set forth above, the School District denied the student a free appropriate public education by failing to timely identify the student as a student requiring special education and having in place, as of April 20, 2016, special education programming to address the student's needs in reading. This deprivation continued until December 19, 2016. In light of this deprivation, and again as set forth above, the student is equitably awarded 330 hours of compensatory education.

Any claim not specifically addressed in this decision and order is denied.

*Michael J. McElligott, Esquire*

Michael J. McElligott, Esquire  
Special Education Hearing Officer

June 27, 2017