

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

ODR No. 1899-1011KE

Child's Name: O.Z.

Date of Birth: [redacted]

Dates of Hearing: 9/22/11, 9/28/11, 11/10/11, 11/15/11
12/2/11, 12/19/11, 1/4/12, 1/10/12

CLOSED HEARING

Parties to the Hearing:

Parents

School District
Kutztown Area
251 Long Lane
Kutztown, PA 19530

Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

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February 20, 2012

March 11, 2012

Anne L. Carroll, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

Student entered the District in kindergarten with several diagnoses and disorders that adversely affected school functioning due to deficits in language, pre-academic and motor skills. The Student's conditions and functional difficulties created complex educational needs. After first diagnosing Student with other health impairment and learning disabilities before kindergarten, the District changed Student's disability category to MR following a reevaluation in the winter of 2011.¹

Dissatisfied with Student's academic progress and in disagreement with the change in disability category, Parents enrolled Student in a cyber charter school for the current school year and filed a due process complaint in June 2011 seeking compensatory education for the District's alleged failure to provide Student with a free, appropriate public education (FAPE). The hearing began in September 2011 and continued through eight sessions, ending in January 2012. For the reasons explained below, Student will be awarded compensatory education for the 2009/2010 and 2010/2011 school years, as well as for ESY services for the summers of 2009, 2010 and 2011.

ISSUES

1. Did the School District appropriately evaluate Student and appropriately identify Student's disability category or categories?
2. Did the School District offer Student appropriate special education services during the 2009/2010 and 2010/2011 school years and during the summers of 2009, 2010 and 2011?

¹ The MR disability category designation existed at the time the reevaluation report was issued, as reflected in the District's reevaluation report (RR) and other documents. The MR category no longer exists, having been replaced by the term "Intellectual Disability" (ID) in January 2012. The ID designation will be used hereafter, even when referring to documents in which MR was the term used at the time the documents were drafted.

3. Is Student entitled to an award of compensatory education, and if so, for what period, in what amount and in what form?

FINDINGS OF FACT

Background/History

1. Student is an [elementary school-aged] child, born [redacted]. Student is a resident of the Kutztown Area School District and is eligible for special education services. (Stipulation, N.T. pp. 16, 17)
2. After an initial evaluation by the School District prior to enrollment in kindergarten, Student was determined to be eligible for special education services in accordance with Federal and State Standards due to other health impairment (OHI), specific learning disabilities (SLD) and speech/language impairment. 34 C.F.R. §300.8(a)(1), (c)(9), (10), (11); 22 Pa. Code §14.102 (2)(ii); (N.T. pp. 36, 38; P-16, pp. 12, 13)²

² Although the attorneys for the parties did not submit joint exhibits, they successfully avoided duplicating exhibits, which made for as streamlined a record as possible, much to their credit. The District's exhibits included school records as to which there was no dispute concerning contents, as well as correspondence that the District considered relevant. Parents' exhibits included primarily privately obtained medical and other reports, as well as District records and correspondence not identified as exhibits by the District.

Despite the cooperation demonstrated by the parties in that regard, however, considerable controversy arose at the hearing on two occasions over documents referenced by District witnesses to support their testimony that were not included in the District's exhibits and had not been provided to Parents, despite an early and continuing request for all of Student's school records. Additional controversy arose over documents that Parents sought to introduce into the record that had not previously been available, such as a final reevaluation report conducted by the charter school in which Student is currently enrolled, and, therefore, was not included in Parents' pre-hearing disclosures.

After being given the opportunity to review the final evaluation report, P-17, which differed from the draft report, originally included in Parents' exhibits as P-5, by only a two paragraph addition to explain why the results of the WISC-IV test were invalidated by its re-administration less than a year after the same test was administered by the District, the District' asserted only a procedural objection based upon a delay in providing the final report until the last hearing session.

It was more than a little disingenuous for the District to be so outraged by Parents' request to include a recently completed evaluation report in the record, after admittedly failing to give Parents documents that were obviously responsive to Parents' request for all of Student's educational records, that District witnesses reviewed prior to testifying at the hearing, referred to and relied upon in their testimony, but for reasons not satisfactorily explained by the District, had not been provided to Parents in response to their ongoing request for Student's educational records. After canceling a hearing date to permit copying and production of records that were not timely provided to Parents, and after assurances that this time all educational records had been produced, the identical situation arose at the next hearing session a few weeks later, during the testimony of the District's next witness who reviewed, referenced and relied upon additional educational records that had not been produced. Despite the revelation of that stunning additional lapse in the District's compliance with the IDEA regulations relating to Parents' right of access to an eligible Student's educational records (34 C.F.R. §§ 611, 613), the originally withheld documents, including progress monitoring reports and Student work samples were permitted since Parents had the opportunity to review the records well before the end of the hearing and respond to the new evidence if necessary.

Although the District failed for months to fulfill its obligation to permit Parents' inspection of all of Student's educational records, much less fulfilled the 5 day rule for disclosure of evidence to be admitted at the due process hearing, the District's previously undisclosed records were nevertheless admitted into the record over Parents'

3. Student received home-based services for developmental delays beginning before age two, and IU early intervention (EI) services from age 3—5 in a regular pre-school program. (N.T. p. 33)
4. From early childhood, Student had been examined and evaluated for a number of significant physical/neurological conditions and developmental concerns, including language deficits, seizure disorder, apraxia, possible autism spectrum and attention disorders and [redacted]. (N.T. pp. 32, 34, 38, 115 ; P-12, P-13, P-14, P-20, S-28)
5. Apraxia is a motor planning disorder that with respect to speech, affects articulation/expressive ability in terms of planning and coordinating the muscle movements necessary to make sounds and speak words. To remediate the effects of apraxia, individual speech/language therapy is recommended for two to five sessions/week. There is a high co-morbidity/correlation between apraxia and difficulties with learning to read and spell. (N.T. pp. 1277, 1279, 1310—1313, 1330, 1352, 1420, 1421, 1423, 1424)
6. The effects of Student's conditions and disorders create complex educational needs. (N.T. pp. 511, 548, 895, 918)
7. After kindergarten, Student continued in District elementary schools during the 2009/2010 and 2010/2011 school years, receiving specially designed instruction in reading, writing and math in a learning support classroom, after a brief period of inclusion in regular education classes for language arts early in 1st grade, and otherwise participating in regular education classes, lunch and recess with grade level peers for part of each school day. (N.T. pp. 28, 581; S-2, S-4, S-6, S-17)
8. Student enrolled in a cyber charter school at the beginning of the 2011/2012 school year, where Student is currently receiving instruction at the second grade level with modifications for presenting some material at the first grade level. (N.T. p. 28; P-1, P-17, p. 2)

Evaluations/Reevaluations

9. The District's 2008 evaluation preceding Student's enrollment in kindergarten included Parent input, an observation of Student in the pre-school classroom, standardized assessments of cognitive ability (WJ-III COG), and academic achievement (WJ-III-ACH) and the BASC-2, a social-emotional rating scale completed by Parent. The assessments were administered and analyzed by a District school psychologist. A District speech/language pathologist conducted language assessments, reviewed Student's records and accepted the results of recently completed measures of speech articulation. (N.T. pp. 368, 1307, 1312; P-16)

objections because they included information relevant to the issues in dispute. The District was in no position to insist upon strict adherence to the procedural disclosure rules and preclude evidence on that basis. The District was offered the opportunity to review the finalized Charter School evaluation report and respond to the new information, but identified no substantive basis for precluding the updated evaluation and did not request the opportunity to recall any witnesses to respond to the final document.

10. The school psychologist identified Student's primary disability category as specific learning disability based upon a significant discrepancy between Student's overall cognitive ability in the low average range and the phonemic awareness scores of the cognitive assessment, although the evaluation report referred more generally to a severe ability/achievement discrepancy. (N.T. pp. 402, 403; P-16, pp. 8, 12)
11. The school psychologist also identified OHI as a disability category based upon a diagnosed seizure disorder, but ruled it out as the primary basis for IDEA eligibility because it did not appear to have a significant effect on Student's cognitive ability or educational performance. The evaluation report further notes that Student's significant difficulties in expressive and receptive language skills impeded the development of reading and writing readiness skills. (N.T. pp. 401, 402; P-16, p. 12)
12. Although Parent's ratings on the BASC-2 identified significant concerns with social skills, attention, communication and adaptive skills, the school psychologist's classroom observation indicated no issues in those areas. Additional assessments for attention, such as the BRIEF and Connors Rating Scales, were not conducted. (N.T. pp. 378—381; P-6, P-16, p. 11)
13. An independent evaluation obtained by Parents around the same time as the District's evaluation identified significant issues with attention/executive functioning, tasks requiring planning performance, language, sensorimotor functions and learning/memory. Student's cognitive ability was also assessed in the low average range. (P-12, pp. 9, 17)
14. The District speech/language pathologist assessed Student's language abilities using measures of: a) receptive language (Peabody Picture Vocabulary Test-PPVT); b) concepts necessary for achievement in the early school years (Boehm Test of Basic Concepts); c) language usage (Test for Examining Expressive Vocabulary-TEEM); d) Student's ability to attach meaning to language (Language Processing Test-3 Elementary LPT-3) (N.T. pp. 1319—1321; P-16, pp. 5—7)
15. Student scored in the low average range on the PPVT and LPT-3 and exhibited significant difficulties and delays overall on the Boehm and TEEM assessments (N.T. pp. 1319—1321; P-16, pp.5—7)
16. At Parents' request, based upon a regression they noted in Student's reading skills, the District reevaluated Student in the winter of 2011. When the District's school psychologist analyzed the results of the WJ-III COG, which yielded a general intellectual ability (GIA) standard score of 74 (Delayed range), and the WISC-IV results, which resulted in a full scale IQ (FSIQ) of 68 (Very Delayed range), he recommended that Student's primary eligibility classification be changed to intellectual disability (ID). (*See* Ftnt.1, above) The secondary disability categories of OHI and speech/language impairment were retained. (N.T. pp.76, 79, 80; S-13, S-16, pp. 2, 12, 13)

17. In 2011 there was considerably more scatter among Student's WJ- III COG subtest scores, including much lower scores on verbal ability subtest and a large regression in the general ability (GIA) score. On the other hand, on the auditory working memory scale, presenting tasks very challenging for most people, Student's score was considerably higher, in the average range. (N.T. pp. 423—426, 434; S-16, p. 6)
18. The school psychologist noted that the significant drop in some scores might be due to environmental factors, such as increased attention issues, and that Student may have been more focused for the auditory working memory tasks, leading to the surprisingly high score on that subtest. Other low subtest scores on both the cognitive and achievement assessments were attributed to difficulties understanding complex directions. (N.T. pp. 428, 436, 437)
19. During the 2010/2011 school year, Parents were receiving increased complaints from the regular and special education teachers about Student's inattentiveness and distractibility. Teacher input for the reevaluation report (RR) reflected those concerns. On the BASC-2, Parents and both teachers rated Student in the clinically significant range for attention problems, social skills and adaptive skills. Like the first evaluation, the 2011 reevaluation did not include any additional assessments for attention issues. (N.T. pp. 418—422, 440, 441, 443; P-16, pp. 3, 4)
20. The school psychologist did not conduct a classroom observation of Student in connection with the reevaluation, but observed Student during the assessments he conducted, noting that Student was very distractible and fidgety, requiring frequent breaks and re-direction. (N.T. pp. 422, 423, 444; S-16, p. 6)
21. The recommendation to change Student's eligibility category to ID was based upon Student's classroom performance and the BASC-2 adaptive skills ratings by Parents and teachers, as well as the results of the WJ-III COG and WISC-IV intellectual ability assessments. (N.T. pp. 442, 443)
22. Although the school psychologist was, and remains, puzzled by the large drop in Student's ability scores, and acknowledged that Student does not fit "neatly" within the ID eligibility category, he concluded that Student's overall cognitive potential is less than average. (N.T. pp. 433, 447, 448)
23. Language assessments conducted as part of the 2011 reevaluation by the speech/language pathologist who worked with Student during the 2010/2011 school year revealed regression in Student's score on the PPVT, the only assessment common to both District speech/language evaluations. Other language assessments conducted in 2011 identified language deficits ranging from 10% to 25% based upon the measures that provide age equivalents. (N.T. pp. 1377—1379; S-19, pp. 6—8)
24. In conjunction with the 2011 reevaluation, Parents provided the District with a privately obtained audiologist's report diagnosing Student with Central Auditory Processing Disorder (CAPD). More recently re-designated auditory processing disorder (APD), the

condition affects how sound is processed, not sensitivity to sound, or hearing. (N.T. pp. 78, 1135; S-15)

25. Based upon the independent audiology report the District contracted an audiologist to review the results of the auditory processing assessments and the recommendations of the evaluator, as well as to advise the District with respect to implementing the recommendations. (N.T. pp. 1136—1138; S-15)
26. After reviewing the assessments of the private evaluator, the District's audiologist concluded that because Student did poorly on measures designed to distinguish between the effects of attention disorders, such as ADHD and a true auditory processing disorder, the difficulties with processing language in noisy environments and with phonemic sequencing revealed by the testing likely arise from a combination of attention and auditory processing difficulties. (N.T. pp. 1138—1152, 1174—1193; S-15, pp. 3—5)
27. After Student enrolled in the Cyber Charter School, the School reevaluated Student in October of the current school year, also at Parents' request. Standardized assessments of cognitive ability administered at that time indicated intellectual capacity in the average range, as measured by the Comprehensive Test of Non-verbal Intelligence (C-TONI), a non-verbal measure of ability. The school psychologist invalidated his administration of the WISC-IV, which resulted in an FSIQ of 87, in the low average range, because it was the second administration of that assessment in less than a year. The Charter School identified SLD as Student's primary disability category and speech/language impairment as a secondary disability category, based upon speech/language assessments that revealed a significant global speech/language impairment impacting Student's ability to understand and use language in both school and social settings. (P-17, pp. 6, 11, 16)
28. A comparison of standardized achievement tests from the 2008 and 2011 evaluations, revealed a widening gap between Student's academic achievement and the progress of same-age peers. (N.T. pp. 437, 438; P-16, pp. 8, 9; S-16, pp. 7, 8)
29. Based upon reading and math assessments administered in September 2011, the Charter School evaluation report indicated that with the exception of receptive oral vocabulary skills at the mid 2nd grade level, Student's reading and spelling skills were at the low to mid kindergarten level. Student's math skills were somewhat stronger, at the first grade level. In reading, Student was working on pre-primer sight words and decoding consonant-vowel-consonant words. (P-17, pp 12, 13, 14, 16).

School District Programs & Services/ Student's Progress/Classroom Difficulties

30. Student began the 2009/2010 school year with an IEP that provided for direct, explicit, scaffolded math instruction by a special education teacher in the learning support classroom and language arts instruction delivered in the regular classroom with modifications and additional support/reinforcement provided in the learning support classroom. (S-2, pp. 28, 36)

31. It quickly became apparent that Student had great difficulty maintaining focus/attention and keeping pace with the language arts instruction in the regular education classroom, leading to an IEP revision within a few weeks to provide for direct, explicit, scaffolded instruction in reading, spelling and written expression in the learning support classroom. (N.T. pp. 536, 539, 542, 544, 583, 584; S-4, pp. 6, 8, 11, 14, 19)
32. As characterized by the special education teacher, Student made slow progress in reading and inconsistent progress in math during the 2009/2010 school year. By the end of the school year, Student had not mastered any reading or math goals, including identifying all capital letters and lower case letters expressively and identifying vowel and consonant sounds with 100% accuracy and counting to 50 without errors. (N.T. pp. 759—766; S-36, pp. 1—10)
33. During the 2010/2011 school year, Parents noted, and the special education teacher confirmed, that Student no longer knew material that had previously been mastered. Student returned to the levels measured at the end of the prior school year by approximately the end of the first quarter to the middle of the second quarter. (N.T. pp. 99, 961, 967—971, 1024)
34. In the 2010/2011 school year, Student's IEP provided for 30—45 minutes of reading instruction daily, but Student received one to one reading instruction in the Reading Mastery Program for 20—30 min./day, depending upon the day and Student's attention level. (N.T. pp. 98, 998, 1096—1098; P-4, p. 1, S-6, p. 30)
35. The special education teacher's conclusion that academic progress during the 2010/2011 school year was satisfactory for Student, meaning a child in the ID category, included as an indication of progress Student's recoupment of the skills that had regressed from the end of the previous school year. The teacher acknowledged that many areas of instruction were very difficult for Student, and progress was well below average on many measures. (N.T. pp. 1025—1029, 1039, 1055, 1060—1062, 1065, 1067, 1068)
36. The regular education 2nd grade teacher completed progress notes with "S" marked on all categories on the reports without specific comments/descriptions of Student's knowledge and skills. Although the teacher had rated Student in the clinically significant range on the BASC-2 for the 2011 evaluation, she could recall nothing that caused her particular concern during Student's time in the regular education classroom. (N.T. pp. 99, 867, 868; S-22)
37. In both the 2009/2010 school years, Student's regular and special education teachers noted persistent and significant problems with attention in all classroom settings, which they attributed to academic work that was too hard for Student. Neither the special education director nor teachers believed that inattentiveness constituted a behavior that impeded Student's learning and needed to be addressed with functional behavioral assessment (FBA) or a behavior management plan because Student was easily re-directed. (N.T. pp. 317, 674, 869, 933, 976, 977, 1099, 1101; S-2, p. 7, S-6, p. 9, S-17, p. 7, S-31, pp. 1—48)

38. During the 2009/2010 and 2010/2011 school years, Student received speech/language therapy as a related service for two thirty minute sessions each six day cycle. Goals were developed based upon Student's articulation, expressive language and conceptual deficits identified in the 2008 evaluation. Speech language goals were changed/updated to focus on new areas of significant unaddressed needs as Student mastered speech/language skills and met IEP goals. (N.T. pp. 1327—1341)
39. After the District audiologist reviewed the independent evaluation that identified Student's auditory processing difficulties arising from background noise, she procured an FM amplification system for use in all school settings. Although it initially appeared that Student was benefiting from it, staff assessments after a few weeks indicated that Student's attention and focus had not improved and that the equipment itself was distracting to Student, leading to abandonment and then removal of the FM system within a few weeks. (S-17 p. 43, S-18, S-20)
40. To implement another of the private evaluator's recommendations, the District's consulting audiologist and Student's speech/language pathologist for the 2010/2011 developed a word in noise training and an annual goal to add to Student's speech/language therapy. The annual goal did not include a baseline. (NT. pp. 1250, 1251, 1253; S-17, p. 27)
41. The District offered Student participation in its ESY programs in 2009, 2010 and 2011 to work on reading and math goals. Student participated in ESY in 2009 and 2010, but not 2011. The District did not offer speech/language services as part of any of the summer programs because Student had not demonstrated regression on any speech/language goals. (N.T. pp. 48, 51, 101, 186, 298—301, 1375; P-7 p. 1, P-8, p. 1, S-2 pp., S-5, S-6 pp., S-17 pp.)

DISCUSSION AND CONCLUSIONS OF LAW

A. Basis for Concluding that the District Failed to provide Student with FAPE

As in many cases, the District's arguments in support of its contention that it provided Student with a free appropriate public education rests on the underlying premise that it did the best it could under the circumstances to address Student's "complex needs." (FF 6)

Effort, however, is not the criterion for assessing compliance with special education requirements. Under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400, *et seq.*, and in accordance with 22 Pa. Code §14 and 34 C.F.R. §300.300, a child with a disability is entitled to receive a FAPE from the responsible local educational agency (LEA) in accordance

with an appropriate IEP, *i.e.*, one that is “reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress.” *Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982). “Meaningful benefit” means that an eligible child’s program affords him or her the opportunity for “significant learning.” *Ridgewood Board of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999). Consequently, in order to properly provide FAPE, the child’s IEP must specify educational instruction designed to meet his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. *Rowley*; *Oberti v. Board of Education*, 995 F.2d 1204 (3rd Cir. 1993). An eligible student is denied FAPE if his program is not likely to produce progress, or if the program affords the child only a “trivial” or “*de minimis*” educational benefit. *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F. 2d 171 (3rd Cir. 1988).

In light of the foregoing legal standards, the evidence must be examined in light of whether the District’s efforts were appropriately targeted toward accurately identifying and meeting Student’s complex needs with at least a reasonable likelihood that the services it provided to Student would result in meaningful progress. Otherwise, any special education services provided to an eligible child would be deemed sufficient without considering whether such services were reasonably calculated to provide real educational benefits.

In this case, the District’s argument that its efforts should be deemed appropriate and sufficient largely depends on whether the District correctly concluded that Student’s disability category was appropriately re-designated ID in 2011 after two years of reading and math services in District learning support classes failed to yield any measurable progress in basic reading, writing and math skills. (FF 16, 21, 27, 28, 29, 32, 33, 35)

Review of the record in this case leaves no doubt that Student's academic progress was incremental at best during the two school years in dispute, and that despite ESY services during the summer of 2010, Student showed significant regression in reading skills, particularly, that were not recouped until the middle to end of the second quarter of the school year. (FF 33, 35) When confronted with Student's regression in reading skills at the beginning of the 2009/2010 school year, *e.g.*, the District did not respond with an investigation into why Student lost skills despite ESY services and had been unable to make any significant gains in basic academic skills. The District never considered a change in either the type or level of services, such as a different instructional approach in reading, additional goals and/or specially designed instruction to improve attention and focus, or considered whether increasing speech language services might improve Student's progress. Rather, the District's approach was to point to Student's "complex needs" and search for a disability-based or medical reason to explain Student's lack of progress.

For example, the District searched Student's many medical reports and fastened on an esoteric diagnosis of [redacted] in a 2007 medical report to suggest that Student might have [redacted] that impacts cognitive abilities. *See* N.T. p. 300. With neither medical training nor consultation with a medical doctor, the District's director of special education offered the opinion that the term, unexplained in the medical report in which it is listed, constitutes [redacted]. (N.T. p. 301). That unusual attempt to explain why the District failed this Student was apparently constructed specifically for testimony at the hearing, since there is no indication that anyone from the District considered [redacted] interference with Student's learning ability, other than the school psychologist's consideration and rejection of OHI as Student's primary disability category in 2008, based upon the conclusion that Student's seizure disorder was not a significant factor in Student's educational functioning. (FF 11)

The District's more plausible attempt to divest itself of responsibility for providing Student with a special education program reasonably likely to produce a meaningful educational benefit rests upon the 2011 reevaluation suggesting the possibility of intellectual disability. (FF 16, 17, 21) There is no doubt that the cognitive ability assessments showed a decrease in Student's measured ability level, but the District failed to explore whether the evaluation results validly support ID as a disability category that should be applied to Student or whether other factors, noted but apparently not fully considered, interfered with the measurement of Student's cognitive potential at that time.

The school psychologist noted, *e.g.*, that Student needed virtually constant re-direction during the testing sessions, yet apparently did not question the validity of the test scores as a basis for changing Student's eligibility category, although noting that factors such as attention might have caused the lower scores. (FF 18, 20) In addition, the evaluator noted that Student's surprisingly high score on one measure could reflect greater attention and engagement on that task. (FF 17, 18) The record is replete with references to Student's attention and focus issues in all settings, but the District never conducted assessments to determine whether Student exhibits characteristics of attention deficit/hyperactivity disorder (ADHD) or conducted an FBA to explore attention issues. (FF 12, 13, 19)

Despite the results of the BASC-2 ratings in 2008 and 2011, and despite the school psychologist's impression that an auditory processing disorder can affect a student in ways similar to deficit disorders (N.T. p. 445), the District never attempted to assess either the source of the attention issues or the effects of Student's inability to maintain attention and focus on academic progress.

Equally difficult to understand is the District's failure to consider the impact of Student's language and processing disorders on Student's learning, particularly in reading. The speech/language assessments conducted as part of the 2011 evaluation demonstrated regression in receptive language skills and continuing difficulties in expressive language. (FF 23) Moreover, although neither the school psychologist nor the Student's teachers were familiar with the effects of Student's apraxia diagnosis in the educational setting, the District's speech/language pathologist is quite familiar with the disorder and knows that it can adversely affect the ability to acquire reading and spelling skills. (FF 5) Had the apraxia diagnosis, the auditory processing disorder diagnosis provided to the District by Parents during the 2011 evaluation, and the results of the District's own speech language evaluation been more thoroughly investigated with the assistance of the speech/language pathologist and the audiologist, the District might have concluded that speech/language impairment provides a better organizing principle for viewing Student's inability to make academic progress than intellectual disability.

In addition, those disorders and Student's significant attention difficulties suggest that the District should have more thoroughly assessed the extent of Student's speech/language needs and the level and intensity of speech/language therapy necessary for Student to make greater gains in improving receptive and expressive language skills rather than continuing with the same level and types of academic instruction that had not resulted in meaningful progress through the completion of the 2011 evaluation. (FF 32, 35)

Unfortunately, the record in this case establishes that the District was far more interested in finding reasons for Student's lack of progress that would not involve altering instructional methods or the levels of special education and related services it provides to address delays in

learning reading, writing and math. Consequently, when Student did not make academic progress that District staff could objectively describe as meaningful, the District changed Student's IDEA eligibility category to intellectual disability.

The District argued that properly identifying a disability category is of little importance since the point is to identify and address Student's needs. Although that is certainly true, in this case the District's change of disability category was used to justify its failure to fully investigate all the potential sources of Student's "complex needs" and appropriately address them. By relying so heavily on the results of intelligence assessments to diagnose intellectual disability, and citing that eligibility category as the reason for Student's lack of academic progress, particularly in reading, the District clearly intended to drastically lower the bar for success in order to justify Student's teachers' subjective definition of progress in terms of Student's purportedly limited intellectual abilities and potential. (FF 35) In other words, contrary to the purposes of IDEA, the District substituted a disability category label for a real and thorough investigation of the needs arising from Student's disabilities and the types and levels of services that could appropriately address them.

B. Remedy/Compensatory Education

An eligible student who has received no more than a *de minimis* educational benefit is entitled to correction of that situation through an award of compensatory education, an equitable "remedy ... designed to require school districts to belatedly pay expenses that [they] should have paid all along." *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 249 (3rd Cir. 2009) (internal quotation marks and citation omitted). Compensatory education is intended to assure that an eligible child is restored to the position s/he would have occupied had a

violation not occurred. *Ferren C. v. School District of Philadelphia*, 612 F.3d 712, 718 (3rd Cir. 2010), citing *Reid v. District of Columbia*, 401 F3d 516, 518 (D.C. Cir. 2005).

Compensatory education is awarded for a period equal to the deprivation and measured from the time that the school district knew or should have known of its failure to provide FAPE. *Mary Courtney T. v. School District of Philadelphia* at 249; *M.C. v. Central Regional School District*, 81 F.3d at 395; *Carlisle Area School District v. Scott P.*, 62 F.3d 520, 536 (3d Cir.1995). The school district, however, is permitted a reasonable amount of time to rectify the problem once it is known. *M.C. v. Central Regional School District* at 396.

The District's failure to appropriately address Student's academic/instructional needs as well as to effectively address Student's significant difficulties with attention and focus warrants full days of compensatory education for the entire two school years within the statutory limitations period, since the District was aware of Student's significant needs from a year of experience with Student during the 2008/2009 school year. In addition, it became obvious very early in the 2009/2010 school year that Student's difficulties, particularly with attention and focus made it very difficult for Student to fully participate in classroom instruction. (FF 30)

Although, as the District contended, Student may have been easily redirected when teachers noticed wandering attention, (FF 37), constant re-direction is not a sufficient response to a problem that existed for over two years, and maintaining only that strategy was insufficient to assure a reasonable likelihood of meaningful progress. It is reasonable to expect that an eligible Student will be offered special education services designed to remediate the effects of his/her disabilities to the extent possible, not to simply work around them. Student's difficulties with attention were pervasive and existed during the entire time Student was enrolled in the District, yet re-direction was virtually the only effort made to address that issue. The failure to effectively

address Student's attention issues, along with ineffective instruction that led to minimal academic progress, pervaded Student's entire school days. The primary purpose of education in the early grades is to develop basic academic skills that provide the foundation for higher level skills. A child who has not learned the basic reading, writing and math skills will have accumulating educational deficits. Student, therefore, will be awarded full days of compensatory education for the days school was in session during the 2009/2010 and 2010/2011 school years.

Student will also be awarded compensatory education for ESY for the summers of 2009, 2010 and 2011. There was no evidence in the record that establishes, or leads to a reasonable inference, that the ESY instruction the District provided to Student during the summers of 2009 and 2010, and offered in 2011, were anything but generic programs, not instruction designed to meet Student's individual needs. Moreover, despite ESY services in 2010, Student showed significant regression for the first quarter of the 2010/2011 school year, establishing that the services were not appropriate. Finally, the District failed to offer speech/language services during the summers, despite Student's significant language needs, including the apraxia diagnosis. The District's speech/language pathologist was aware of the recommendations for more intensive speech/language therapy than the District offered to Student. (FF 5) Since Student received less than the recommended level of speech/language services during the school years, additional services should have been provided during the summers.

C. §504 Violation

In the context of education, the protections of §504 are considered co-extensive with those provided by the IDEA statute with respect to the obligation to provide a disabled student with a free, appropriate public education (FAPE). *D.G. v. Somerset Hills School District*, 559 F.Supp.2d 484 (D.N.J. 2008); *School District of Philadelphia v. Deborah A. and Candiss C.*,

2009 WL 778321 (E.D. Pa. 2009). The substantive right to FAPE, as well as the procedural safeguards to which a qualified disabled student is entitled under §504 may be satisfied by complying with IDEA substantive and procedural requirements. 34 C.F.R. §§104.33(b)(2), 104.36; *Centennial School District v. Phil L. and Lori L.*, 559 F.Supp.2d. 634 (E.D. Pa. 2008); *Lyons v. Smith*, 829 F.Supp.2d 414 (D.D.C. 1993).

Proof of an IDEA violation does not, however, automatically establish a §504 violation. *D.G. v. Somerset Hills*. Rather, to assert a successful §504 claim a parent must prove four elements: 1) that the student has a disability; 2) that he or she is otherwise qualified to participate in school activities; 3) that the LEA receives federal financial assistance; 4) that the student was excluded from participation in, denied the benefits of or subjected to discrimination at school. *Andrew M. v. Delaware Valley Office of Mental Health and Mental Retardation*, 490 F.3d 337, 350 (3rd Cir. 2005); *School District of Philadelphia v. Deborah A.*

Parents in this case did nothing more than assert a §504 violation. They did not attempt to demonstrate how the evidence in this case meets the elements of a §504 violation, and provided neither evidence nor argument to establish that their claims against the District are not fully addressed by the remedy awarded under the IDEA statute. The §504 claims, therefore, will be denied.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, the Kutztown Area School District is hereby **ORDERED** to take the following actions:

1. Provide [Student] with full days of compensatory education for every day school was in session from the first day to the last day of the 2009/2010 and 2010/2011 school years.

2. Provide [Student] with the same number of hours provided for ESY services during the summers of 2009 and 2010 and offered during the summer of 2011

It is **FURTHER ORDERED** that the compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product or device that furthers the goals of [Student's] current or future IEPs and/or will otherwise assist him/her in overcoming the effects of his/her disabilities.

Selection of compensatory education services, products or devices shall be at Parent's sole discretion.

Compensatory services may occur after school hours, on weekends and/or during the summer months when convenient for Student and Parents. The hours of compensatory education, or fund for compensatory education services/products/devices should the District choose to create such fund, may be used at any time from the present to Student's 21st birthday.

It is **FURTHER ORDERED** that Parent's claims under §504 of the Rehabilitation Act of 1973 are **DENIED**.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are denied and dismissed

Anne L. Carroll

Anne L. Carroll, Esq.
HEARING OFFICER

March 11, 2012