PENNSYLVANIA

Special Education Hearing Officer

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

DECISION

Due Process Hearing for A. K.
Date of Birth: xx/xx/xx
ODR File No.: 6413/05-06 AS

Dates of Hearing:
May 19, 2006
May 22, 2006

Closed Hearing

Parties to the Hearing:	Representatives:
Parents	Drew Christian, Esquire 801 Monroe Avenue Scranton, PA 18510
North Pocono School District 850 Church Road Moscow, PA 18444	Anne Hendricks, Esquire Levin Legal Group 1402 Masons Mill Business Park 1800 Byberry Road Huntington Valley, PA 19006
Dates Transcripts Received:	May 27, 2006 May 30, 2006
Record Closed:	May 30, 2006
Date of Decision:	June 10, 2006
Hearing Officer:	Rosemary E. Mullaly

I. Background and Procedural History

A. Background

The Student is a resident of the North Pocono School District (the "District") who currently attends the District's middle school. In March, 2006, the District identified the Student as having a specific learning disability. The dispute in this matter arises from the Parents' claim that 1) the District did not timely or completely identify all the Students educational needs associated with his learning disability and related delays in his handwriting skills and 2) the District failed to offer an appropriate program and placement in the least restrictive environment. The District claims that it has timely and completely identified the Student's needs and offered a free appropriate public education in the least restrictive environment.

The Parents seek an IEP that addresses each area of the Student's disability, a placement in the least restrictive environment, and an award of compensatory education in the nature of two and one half hours a day (one hour of reading, one hour of written expression and a half hour of handwriting) for each school day dating back to March 20, 2004.[1] The District seeks an order confirming that it has met it obligation by timely and properly identifying the Student as a student with learning disabilities and by offering a free appropriate public education in the least restrictive environment.

B. Procedural History

The Office for Dispute Resolution received the parents' hearing request in this matter on March 21, 2006. The hearing was originally scheduled for May 1, 2006, but during an April 20, 2006 conference call with counsel, the parties sought a continuance until May 19, 2006 in light of a delay in assignment of District's counsel and potential disclosure issues resulting there from, and counsels' desire to reconvene an additional meeting in an attempt to resolve this matter. The continuance was granted contingent upon the assurance that the parties would develop an acceptable interim educational program for the Student pending the resolution of the matter. The parties were unable to resolve their dispute, and a two-session hearing took place on May 19 and 22, 2006. Due to the intervening federal holiday, the hearing record was closed on May 30, 2006.

By means of a pre-hearing motion, contained in the record as H.O. Exhibit 2, the District requested that the hearing officer apply the statute of limitation period established by the July 1, 2005 amendments to the Individuals with Disabilities Education Act to the instant matter citing as authority *Lawrence Township Board of Education v. New Jersey*, 417 F.3d 368, 370 (3d Cir. 2005) which provides that the limitation period in effect at the time of the parents' hearing request is the one that should obtain. The District further asserted that the statute of limitations section of the 2005 amendments to the IDEA required the hearing officer to apply the equitable limitation period established in *Montour School District v. S.T.*, 805 A.2d 29 (Pa. Cmwlth. 2002), appeal denied, 820 A.2d 163 (PA 2003) and to limit the parents claim for compensatory education to one year unless mitigating circumstances showed that the equities favored extending it to two years. The District's asserted basis for the application of *Montour* to this matter was premised upon its belief that the

[1] The Parents had also sought an independent educational evaluation at public expense, but the parties resolved this issue prior to the hearing. The results of this evaluation were not in evidence at this hearing.

holding in this case was tantamount to Pennsylvania establishing an explicit time limitation for requesting special education due process hearing. The pertinent section of the 2005 amendments to the IDEA states

> A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing under this subchapter, in such time as the State law allows.

20 U.S.C. § 1415(f)(3)(C).

At the first session of the hearing, the decision regarding this motion was placed on the record, specifically granting the request to apply the 2005 IDEA amendments to the instant matter, but rejecting the District's interpretation that *Montour* establishes an explicit state law time limitation of one year. While no court has specifically interpreted the District's requested characterization of the *Montour* decision, analogous Third Circuit case law suggests that a court decision in absence of a state statute or regulation cannot establish an exception for IDEA matters. *See L.E. v. Ramsey Bd. of Educ.*, 435 F.3d 384 (3d Cir. 2006) (seeking to establish by case law an exception to the burden of proof for IDEA cases). Moreover, in the state-level Appeals Panel case *In Re the Educational Assignment of T.H., A Student of the Pittston Area School District*, Spec. Educ. Op. No. 1680 (PDE 2005), this exact interpretation of *Montour* was found unpersuasive, specifically stating

> In the context of a statute of limitations, the "explicit" time limitation rather obviously refers to a provision in legislation, or, in states such as Pennsylvania where the legislature has delegated special education to administrative policy-making, regulations. *Montour* shows the folly of, rather than providing the compelling justification for, an exception, because it was ultimately an interpretation of the previous IDEA, attempting to fill the gap that is no longer there. Inasmuch as the Commonwealth court found "persuasive" the Third Circuit case law, which itself was premised on the previous, silent version of the IDEA, the District's argument inevitably would put us back in the black hole that Congress resolved. If Pennsylvania chooses a different limitation period, it obviously should do so through the policymaking process, as the federalism framework of the IDEA allows.

Id. at 7. Having found no explicit state time limitation for requesting a hearing, the default two-year limitation period established by the 2005 amendment to the IDEA was applied to this matter. Evidence that pre-dated the two-year limitation period was admitted on the record solely to determine what the District knew or should have known about the Student's learning needs, whether the District timely evaluated and identified the Student as a child with a disability, and whether the two year period should be limited by the time reasonably required for the District to rectify the problem related to the Student's educational program.

II. Stipulations and Findings of Fact

A. Stipulations

1. The Student's date of birth is xx/xx/xx.
2. The Student's address is [redacted].
3. The Student is a resident of the School District.
4. The Student's classification as specific learning disability is appropriate.
5. During the 2005-2006 school year, the Student was in the seventh grade.

(N.T. 29-31, 40).

B. Findings of Fact

1. Beginning with the 2000-2001 school year, the Student's parents have continuously expressed their concerns about his educational performance to District personnel. (N.T. 41-44, 55; 63, 348, 357; P-2, at 1; P-4 at 1; P-5 at 1 and 2; P-18 at 1-2; P-20 at 1).

2. Throughout his education experience, the Student's parents provided significant amount of assistance at home to complete homework, review concepts and prepare him for tests. (N.T. 44-45, 45, 56, 87; P-4, at 1).

3. During the period between May, 2000- May, 2003, the Student had an IEP which provided speech language services. He was exited from special education in fourth grade by means of a parentally approved NOREP dated May 14, 2003. (P-2, P-3 at 1, 11, P-4, P-5 at 3, P-6, P-7, P-8, P-12, P-13, P-15, P-16).

First Grade – 1999-2000 School Year

4. During first grade, the Student attended the District's Academy Street School and received the following final grades: Reading "S," Math "B," Science "S," Social Studies "O," Health "S," Penmanship "O," Art "S," Music "O," Physical Education "S," and Conduct "O." (S-26, at 1).

5. The Student had an IEP for speech language services based upon articulation needs. N.T. 102; S-4).

Second Grade - 2000-2001 School Year

6. During second grade, the Student attended a District Elementary School and received the following final grades: Reading "S," Spelling "B," English "B," Math "B," Science "O," Social Studies "S," Handwriting "S," Health "S," Art "S," Music "S," Physical Education "S," and Conduct "O." (S-26, at 2).

7. In February 2001, the Student's second grade teacher identified comprehension skills, logical reasoning and inferring, oral and written expression as areas of need and noted that the Title I Reading and speech therapy he was receiving did not result in the Student performing

satisfactorily in "proper instruction level and appropriate text." He received in class modification in the form of increased instruction time in reading and one-on–one instruction. His teacher noted that he experienced the physical symptoms of being "tense, seems on edge (nervous)" (P-3, at 2, 9).

8. The Student received Title I Reading services ¾ hours per day, 4 days a week in second grade. (N.T. 69-70, P-1, P-3 at 1).

9. During second grade, in addition to his regular education reading programming, he received an additional eight sessions per week of reading services through the District. His parents were also providing him with private tutoring services at their expense. The Student's Parents notified the District that he was receiving private tutoring during second grade. (N.T. 56, 59, 69-70).

10. On January 26, 2001, the District completed a CER in which it administered the Weiss Comprehensive Articulation Test. On March 9, 2001, the District completed a CER solely to determine continued eligibility to receive speech and language support services during the 2001-2002 school year and did not administer any testing. On April 20, 2001 the District completed a CER solely to determine continued eligibility to receive speech and language support services during the 2001-2002 school year and did not administer any testing. (P-2, P-4, P-6).

11. On February 26, 2001, the district sought permission to reevaluate the student for "state mandated reevaluation" through achievement testing, review of records and parent teacher input. Various documents were generated during the timeframe for completing this evaluation but no evidence exists to establish achievement testing was administered. (N.T. 190, 194-96; S-7, at 1; S-8, S-9, P-2, P-4 at 1, P-6, at 1).

12. In March 21, 2001, school psychologist, Mr. W, observed the Student in the educational setting, and the reason given for the observation was "the parents and teachers have expressed some concerns about [the Student's] ability to comprehend." He noted that "the Student received extra reading services through the "Read to Succeed" program and Remedial Reading. These services are largely provided due to comprehension needs." (P-5 at 1).

Third Grade – 2001-2002 School Year

13. During third grade, the Student attended a District Elementary School and received the following final grades: Reading "S," Spelling "B," English "B," Math "B+," Science "A," Social Studies "A," Handwriting "S," Health "O," Art "S," Music "O," Physical Education "O," and Conduct "O."(S-26, at 3).

14. The Student continued to receive Title I Reading services in third grade but they were increased to ¾ hours per day 6 days a cycle with the addition of "Teacher Aides" and "Volunteer Aides" services. (P-3 at 11).

15. During third grade, in addition to his regular education reading programming the District was providing an additional six sessions a week of reading services and the Student's parents were providing him with private tutoring services partially funded by Pennsylvania Department of Education grant monies and partially funded at their own expense. The Student's Parents notified the District that he was receiving private tutoring during third grade. (N.T. 56, 59, 69-70; P-11, P-14).

16. In October, 2001 during the Student's third grade year, his teacher identified word recognition, phonics skills, reading and comprehension as areas of need and noted that the Title I Reading ¾ hours six days a cycle; speech services and ¾ hour of teacher aides 2-3 days a week he was receiving did not result in the Student performing satisfactorily in the "proper instruction level and appropriate text." His teacher noted that he had some problems with his attention and that his attitude toward authority was always shy and overly anxious to please. (P-3, at 12, 17, 19).

17. On January 2, 2002 the District completed a reevaluation to explore the validity of scores presented by the Kaufman Brief Intelligence Test (K-BIT) administered on October 23, 2001 by administering a Wechsler Abbreviated Scale of Intelligence (WASI) (P-10, at 1; S-9 at 1).

18. The District completed six separate evaluation report between 2001-and 2006 related to the Student, but no testing to address his academic achievement was administered until the February 17, 2006 evaluation report. (N.T. 190, 194-196, S-7, P-2, P-4, P-5, P-6 at 1, P-10 at 1; S-13, S-18, at 1; S-20, at 1).

Fourth Grade – 2003-2004 School Year

19. During fourth grade, the Student attended a District Elementary School and received the following final grades: Reading "S," Spelling "B+," English "B+," Math "B+," Science "A," Social Studies "A," Handwriting "S," Health "O," Art "S," Music "S," Physical Education "O," and Conduct "O." (S-26, at 4).

20. During fourth grade, in addition to his regular education reading programming the District was providing an additional six sessions a week of Title I reading services and the Student's parents were providing him with private tutoring. The Student's Parents notified the District that he was receiving private tutoring during fourth grade. (N.T. 41, 56, 59, 69-70; P-11, P-14).

21. On the March 31, 2003 administration of the Terra Nova group achievement test, the Student achieved a grade equivalent score of 4.4 in reading when he was chronologically at a 4.6 grade equivalent. (S- 27, at 5).

22. On May 12, 2003 the District completed a reevaluation to determine if the Student continued to be a child with a disability for speech language services. He was exited from special education in 4th grade by means of a NOREP dated May 14, 2003 (S-19, at 1; S-18, at 1).

Fifth Grade – 2003-2004 School Year

23. During fifth grade, the Student attended a District Elementary School and received the following final grades: Reading "S," Spelling "A," English "B+," Math "B," Science "A," Social Studies "B+," Health "S," Art "S," Music "S," Physical Education "O," and Conduct "O." (S-26, at 5).

24. During the 2003-2004 school year, while in fifth grade, the Student received Title I reading twice a week. Notwithstanding this service, his Title I reading teacher noted that he continued to need improvement in reading fluency. During the third marking period of fifth grade, according to his accommodations checklist, the Student received individual instruction and additional time to complete assignments/tests in Reading and English (S-26, at 6, P-19; P-21 at 2).

25. In March 2004, the Student's parent provided a written description of her concerns regarding his educational progress, and a "Student Assessment Team" meeting was held to address these concerns. At that meeting, the District staff suggested that the Student had an auditory memory problem, but he was not referred for an evaluation as the result of that meeting. (N.T. 62-64, P-18).

Sixth Grade – 2004-2005 School Year

26. During sixth grade, the Student attended a District Middle School and received the following final grades: Reading "A-," Spelling "B+," English "B+," Language Arts Enrichment "S+," Math "A-," Math Enrichment "S," Science "A-," Social Studies "A," Health "O," Art "O," Computers "S," Family/Consumer Science "S," Music "S+," Technical Education "S+'" Physical Education "S+," and Health/Positive Life Skills "O." (S-26, at 6).

27. Title I Reading services were not offered to the Student during the 2004-2005, his sixth grade school year. In April 2005, at the end of sixth grade, the Student's reading achievement on the Terra Nova group achievement assessment placed him at the 4.2 grade equivalent as compared with his actual 6.7 grade equivalent. His reading achievement level on the April 2005 administration of the Terra Nova was lower than the 4.4 grade equivalent in reading achievement he had attained on the March 31, 2003 administration of this test. At or around the same time that the Terra Nova group achievement test placed him at a 4.4 grade equivalency in reading he received a quarterly grade of A in sixth grade Reading. (N.T. 72; P-17 at 1, S-27 at 5).

Seventh Grade – 2005-2006 School Year

28. During seventh grade the Student attended a District Middle School and received the following quarterly grades: Reading "C+, B-, B-," Remedial Reading "S, S," English "B-, B, B," Language Arts Enrichment "S+," Math "A, A, A+," Math Enrichment "S," Science "A-, A+, B+," Social Studies "A+, A+, A+," French "O," Art "S+," Computers "S," Technical Education "S+," and Physical Education "S, S, S," (S-26, at 7).

29. When the Student was starting seventh grade, the Student needed more support in reading than a typical regular education student. (N.T. 352)

30. During seventh grade, the Student was placed in the "Reading Support Class" where he received remedial reading services 2 periods per week and was provided with additional help on reading tests and quizzes. For most of the reading skills listed on his Reading Support Class progress report, he needed improvement or was improving; for only two skills he received a satisfactory. During the first two marking periods of the 2005-2006 school year, the Student was receiving accommodations in reading, English, math, science, social studies. Part of his grade in seventh grade reading was based upon his comprehension of stories below grade level that he could listen to on tape or that were read to him. The seventh grade language arts teacher would read the literature book to the students in her class. (N.T. 91-96, 284, 301-02, 303; P-23, P-26, at 2, P-24 at 2).

31. On February 17, 2006, the District completed an evaluation report that identified the Student as a child with a specific learning disability in the areas of basic reading, decoding, comprehension, and written expression. Therein it acknowledged that "The Student has struggled with reading throughout his educational career. Remedial services were provided in the elementary school and at one time he was receiving services six times per week. The Student had been receiving accommodations including additional time, clarification of directions, assistance for expressing himself orally and in written form; less complex materials and individualized assistance (reading), assignments broken into component parts; tests broken into component parts, use of study guides, advance notice of tests; written tests read orally and questions reworded." (P-26 at 2, 14).

32. In October, 2005, the District administered the Gates-MacGinitie Reading Tests which placed him at a 5.5 grade equivalent in vocabulary, a 4.0 grade equivalent in comprehension, and a 4.6 grade equivalent of in total reading. The Student received a C+ in seventh grade Reading for the first quarter of the 2005-2006 school year. (P-26 at 2, P-28, at 2; S-26 at 7).

33. At or around the time of the February 2006 administration of the Woodcock Johnson Test of Achievement III which placed the Student's basic reading – word skills between a 3.0 and 4.5 grade equivalent and broad reading skills between a 3.6 and 5.4 grade equivalent, the Student Received a "B-" in seventh grade Reading. (P-26 at 8, S-26 at 7).

34. At or around the time of the February 2006 administration of the Woodcock Johnson Test of Achievement III which placed the Student's writing skills in automaticity and structure between a 3.6 and a 3.7 grade equivalence and in letter-word identification between the 3.5 and 4.7 grade equivalent and the Woodcock Johnson Language Scale III identified a standard score of 60 in the area of spelling of sounds, the Student received a "B" in seventh grade English. (P-26 at 4, 8; S-26 at 7).

35. The record does not support the conclusion that the District compiled present levels of functioning through curriculum based assessment criterion references to the general curriculum. (N.T. 196-97).

36. The results of the reading assessments contained in the February 17, 2006 ER were consistent with how the Student was performing in reading during seventh grade. (N.T. 305, 306, 333).

37. The District's February 17, 2006 ER supports the conclusion that the Student has a specific learning disability in written expression. (P-26 at 4, 8, 12, 13).

38. The team who developed the Student's IEP did not agree with the conclusion in the ER that the Student has a specific learning disability in written expression and therefore did not address the Student's needs in written expression in the IEP or at the IEP meeting. None of the IEP team members certified in writing that the report did not reflect their conclusions or submitted a separate statement presenting their conclusions. (N.T. 132, 154, 172, 173, 223; P-26).

39. While the Student's handwriting is below grade level, evidence of record does not support the conclusion that it is significantly below grade level to require specially designed instruction in handwriting. (N.T. 140, 273).

40. Based upon the testing administered by the District described in the February 2006 Evaluation Report and the Student's presenting needs, the SRA Corrective Reading program is reasonably calculated to meet the Student's learning needs in that it is a tightly sequenced program designed for students his age who are reading one or more years below grade level. The three goals of the program are increasing reading accuracy (decoding), developing fluency and building reading comprehension. (P-26 at 8-9; N.T.144-46, 176-177, 181, 214, 215, 218-221, 224, 229-31, 244-45).

41. Due to the nature of the Corrective Reading Program, the District does not offer it in a regular education setting. (N.T. 180, 226, 239-40).

42. At various points during the students' educational history, removal of the Student from the regular classroom setting for "less than 21% of the day" has been described as "Itinerant" as well as "Part-Time" levels of intervention. The current District proposal calls for him to be outside the regular education classroom one 42-minute period a day. The District's rationale for describing this as part-time is because the grade for this class will be given by a special education teacher. The current classroom configuration has eighteen students all functioning within the same level of the Corrective Reading Program. (N.T. 180, S-12 at 1; S-17 at 1; S-18 at 1, P-28).

43. The March 16, 2006 IEP is devoid of any programming for, or reference to, the Student's disability in written expression. The IEP should have contained a written expression goal and a spelling goal. (N.T. 148, P-26 at 4, 8, and 12; P-28).

44. As it relates to the Student's reading disability, the March 16, 2006 IEP is lacking for the following reasons: it fails to establish a reading baseline prior to the Student starting the proposed reading program; it does not provide a description of the specially designed instruction that the student will receive to address his reading disability or the schedule for, or method of how, the student's progress will be monitored; progress is to be measured only through achievement in the proposed reading program although a grade equivalent for the

proposed reading program could be achieved through administration of the DIBELS. (N.T. 144, 149, 153, 212, 234-35, P-28).

III. Issues Presented

A. **Whether the District violated its child-find obligations to the Student, and if so, is the Student entitled to compensatory education?**

B. **Whether the District's March 16, 2006 IEP constitutes a free appropriate public education, and if not, is the Student entitled to compensatory education from the date of the offer until an appropriate program is provided?**

IV. Discussion and Conclusions of Law

Burden of Persuasion

The United States Supreme Court explained the concept of burden of proof in *Addington v. Texas*, 441 U.S. 418, 423 (1979) (citation omitted) stating

> The function of a [burden] of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.

In administrative and judicial proceedings under the IDEA, the party bearing the burden of persuasion must prove its case by the "preponderance of the evidence." *See* 20 U.S.C. § 1415(i)(2)(C)(iii). The term "preponderance of evidence" is defined as "evidence that is of greater weight or more convincing than the evidence that is offered in opposition to it." *Black's Law Dictionary* (Fifth Edition), at 1064. The burden of persuasion in "an administrative hearing challenging and IEP is properly placed upon the party seeking relief." *Schaffer v. Weast*, 546 U.S __, __, 126 S.Ct. 528, 537 (2005).

A. Whether the District violated its child-find obligations to the Student, and if so, is he entitled to compensatory education?

The parents assert that the District knew or should have known that the student was a child with a disability long before it completed the February 2006 evaluation of the Student, and therefore it has violated its child find obligation. Review of its child find obligations to the Student will determine the timeliness of the District's response to the Student's recently identified needs. Specifically, the Individuals with Disabilities Education Act's child find provisions require that each state ensure

> all children with disabilities residing in the state, including children who are homeless or are wards of the state and children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.

20 U.S.C. Sec. 1412(a)(3); *see also* 34 CFR Sec. 300.125. The Commonwealth of Pennsylvania has established school district responsibility in fulfilling this child find obligation by means of regulatory authority. Specifically, Pennsylvania regulations require districts to conduct both public awareness activities and impose upon every school district the affirmative "child find" obligation to implement a comprehensive process whereby it locates and identifies resident students who may need special education services and programs. *See generally* 22 Pa. Code 14.121-14.122. The federal regulation relating to child find makes clear that this obligation includes children who are suspected of being "a child with a disability"[2] and in need of special education, *even though they are advancing from grade to grade."* 34 C.F.R. Sec. 300.125(a)(2) (emphasis added).

Districts who fail to discharge their child-find obligation can be liable for compensatory education services. Since 1999, the Third Circuit has recognized that a student's right to compensatory education may precede the time that a district actually identifies a child as eligible under the IDEA. In *Ridgewood Bd. Of Educ. v. N.E.,* 172 F.3d 238 (3d Cir. 1999), the court clarified "[s]ince the IDEA's central goal is that disabled students receive an appropriate education, not merely an appropriate IEP, a disabled student's right to compensatory education accrues when the school knows or should know that the student is receiving an inappropriate education." *Ridgewood Bd. Of Educ. v. N.E.,* 172 F.3d at 250. Determination of an award of compensatory education, however, must take into consideration "the time reasonably required for the school to rectify the problem … since a school district may not be able to act immediately to correct an inappropriate IEP; it may require some time to respond to a complex problem." *M.S. v. Central Regional Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. 1996). In summary, the holdings in *M.C.* and *Ridgewood* demonstrate that "a school district that knows or should know that a child has an inappropriate IEP or is not receiving more than a *de minimis* educational benefit must correct the situation." *Ridgewood*, 172 F.3d at 250. If it fails to do so, "a disabled child is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably require for the school district to rectify the problem." *M.C.* 81 F.3d at 397.

1. Timely Evaluation

Exactly when a district knew or should have known that a student is receiving an inappropriate education is a fact specific analysis for which the legislature and the state-level Appeals Panel have provided some guidance. For example, the IDEA has established a statutory analysis to determine whether a district is deemed to have knowledge that a child is a child with a disability in the context of

[2] The IDEA defines the term "child with a disability" as a child

(1) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments,(including blindness), serious emotional disturbance (referred to in this title as "emotional disturbance"), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; AND

(2) who, by reason thereof, needs special education and related services.

20 U.S.C. Section 1402(3) (A).

disciplinary action. Section 1415(k)(5)(B) provides: "A local educational agency shall be deemed to have knowledge that a child is a child with a disability if…

> (i) the parent of the child has expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;
> (ii) the parent of the child has requested an evaluation of the child pursuant to section 614(a)(1)(B); or
> (iii) the teacher of the child, or other personnel of the local educational agency, has expressed specific concerns about a pattern of behavior demonstrated by the child, directly to the director of special education of such agency or to other supervisory personnel of the agency."

20 U.S.C. Sec. 1415(k)(5)(B). Recent Appeals Panel decisions also provide guidance as to the type of information that should result in district evaluation to determine if a student is a "child with a disability." For example, in its decision *In Re: the Educational Assignment of C.B., A Student in the Donegal School District*, Spec. Educ. Op. No. 1637, the Panel affirmed the hearing officer's finding that after difficult years in third and fourth grade, including recommendation for summer school, it should have raised suspicions that the student may have learning needs. *Id* at 11. Moreover, it affirmed the conclusion that the District definitely should have evaluated the Student after fifth grade when the Student received scores evidencing only marginal reading levels and more questionable math abilities on the PSSA. *Id.* In the Panel decision, *In Re: the Educational Assignment of A.C., A Student in the Lakeland Area School District*, Spec. Educ. Op. No. 1622 (PDE 2005), it affirmed that evidence of severe attendance issues, failing grades, acting out behaviors, and issues explicitly presented by the student to the guidance counselor, should have resulted in the District seeking permission to evaluate the student. *Id*. at 4.

Turning to the facts of the instant matter, what did the School District know about the Student on March 20, 2004? Because of the applicable statute of limitation period any claims for compensatory education in this matter were limited to the period after this date, but information that predated that period, however, is relevant to what the District knew or should have known at that time. The preponderance of the evidence demonstrates that the District knew or should have know: that through parent report since second grade, the Student was having academic difficulties which necessitated an inordinate amount of time working with the Student on homework assignments and test preparation; that in during the 2001-2002 school year the district administered two brief intelligence tests to the student which suggested an IQ in the average range; that during the 2001-2002 school year, the Student received a PDE grant for tutoring based PSSA testing results; that the parents provided this tutoring for the 2001-2002, 2002-2003 and 2003-2004 school years; that his teachers in second and third grade had concerns about his educational performance; that for every year between second through fifth grade, and seventh grade he was eligible for and received Title I reading service; that in second grade in addition to Title I reading, the Student was also provided with reading services called Reading for Success which resulted in him receiving eight sessions of reading assistance over and above the general curriculum reading program for that grade; that also in second grade, the student received increased instructional time in reading and one on one instruction and in addition to the Title I reading, the student received supports which were described as "Teacher Aides" and "Volunteer Aides" services; that at one point during the 2003-2004 school year, the District notified the parents

they it believed the Student may have an auditory memory problem; that in March of 2004, the parents provided a written statement of all their concerns to a team of school personnel identified as the Student Assessment Team; that in sixth grade the District did not provide the student with Title I reading and his grade equivalence in reading on the Terra Nova dropped below the level he had achieved two years earlier when he was in 4th grade. Significantly, the only other evidence in record related to how the Student was functioning during the period prior to the March 20, 2004 date that was known to the District - which did not support a conclusion that the Student might be a child with a disability - was his 2003 Terra Nova reading assessment results and the average to above average grades the Student received in all of his subjects throughout his educational career to date.

Prior to the February 17, 2006 evaluation, the response of the District to what they knew about this Student included completion of several multidisciplinary team evaluations addressing speech-language issues and two instances of the administration of brief tests of intelligence; the placement of the student in Title I reading for grades 1-5 and 7; a year of Reading for Success in second grade in addition to Title I reading and the regular second grade reading program; a meeting of the "Student Assessment Team" at the end of his fifth grade year prior to the Student entering the middle school; and two years of implementation of accommodation checklists.

In light of what it knew, the response of the District, unfortunately, did not fulfill their child find obligation to the Student. All this evidence should have raised the District's suspicions that the Student could be a "child with a disability," and it should have evaluated him. The District committed the same error as the district described in the state-level Appeals Panel decision *In Re: The Educational Assignment of C.B.,* Spec. Educ. Op. No. 1637 (PDE 2005). Specifically, in that case, the district provided a variety of supports in the regular education setting, and because the student was making progress in regular education, it concluded that the child was not a child with a disability and it failed to evaluate the student. The School District asserts that it offered the Student a variety of interventions as part of its regular education program and that in light of these services and accommodations there was no reason to believe that he needed special education services. As the Panel in *C.B.* did, I applaud the District's attempt to provide specialized instruction in the context of general education so as to promote less restrictive placements, but like the district in *C.B.* it failed in its child find duties because it did not first determine whether the Student met the first prong of the definition of the term child with a disability and then determine if the services it was offering were appropriate for this student on an individual basis. *C.B.* at 11. Like the district in *C.B.,* the School placed the Student in "special" regular education programs for several years without sufficient understanding of the Student's individual needs and of whether these program could appropriately meet those needs. *Id.*

In rendering a decision about whether the District's evaluation was timely, the hearing officer is called upon to weigh contradictory evidence regarding whether or not the District knew or should have known that the Student was a child with a disability since March of 2004. Review of the evidence of record demonstrates that everything but the Student's 2003 Terra Nova test and grades scores suggested that he should have been evaluated long before the February 2006 ER. These two factors, however, do not excuse the District's inaction. Analysis of these facts demonstrate that for the three years prior to the 2003 Terra Nova test, the parent obtained individual tutoring for the Student outside the school setting – a significant factor in explaining his achievement levels on this instrument. Moreover, several factors suggest that the School District's grades did not tell a full story about the

student's performance and simply were not an accurate reflection of his needs in the area of reading and written expression. For example, at or around the same time that the 2005 Terra Nova group achievement test placed him at a 4.4 grade equivalency in reading, he received a quarterly grade of A in sixth grade Reading. At or around the time the scores on the 2005 Gates-MacGinitie Reading Tests placed him in a 5.5 grade equivalent in vocabulary, a 4.0 grade equivalent in comprehension, and a 4.6 grade equivalent of in total reading, he received a C+ in seventh grade Reading. At or around the time the Student was identified as having a specific learning disability in reading, the Student received a B- in seventh grade Reading. At or around the time that the Woodcock Johnson Test of Achievement III placed the Student's writing skills in automaticity and structure between a 3.6 and a 3.7 grade equivalence and in letter-word identification between the 3.5 and 4.7 grade equivalent and the Woodcock Johnson Language Scale III identified a standard score of 60 in the area of spelling of sounds, he received a B in seventh grade English.

Moreover, whether or not the Student achieved passing grades does not automatically mean he is not a "child with a disability." As the parents' articulated in their opening and closing statements, merely making progress from grade to grade is not dispositive of whether a student is a child with a disability relying on *West Chester Area School District v. Chad C.*, 194 F. Supp. 2d 417 (E.D. Pa. 2002). In its closing the District suggests that the facts in *Chad C.* are distinguishable from the facts in the instant matter and concludes that the holding should not obtain in the instant matter. Its suggestion regarding the *Chad C.* facts is correct, but it does not support the conclusion that the District asserts. In the *Chad C.* case, the district actually evaluated the student and, after a full multidisciplinary evaluation in which the parent was provided with notice of their rights, a determination was made that the student did not require special education since he was receiving passing grades, and therefore he did not meet the second prong of the special education eligibility criteria. In the instant matter, the District never tested the student to ascertain whether he did meet the criteria for any of the special education classifications; instead it essentially provided additional services to the Student – as much as eight sessions a week of specialized instruction plus myriad accommodations, and concluded that since the Student was achieving passing grades with these supports, he did not even need to be tested to ascertain whether his need rose to the level of a disability. Significantly, without the IDEA protections afforded to the services it was providing to the Student, the District simply did not offer Title I reading supports during sixth grade. Coincidently -and unfortunately - the Student achieved a lower score on the sixth grade Terra Nova assessment than he had achieved two years earlier on his fourth grade administration of the test.

In finding that the District's grades are not an accurate measure of the Student's education needs or dispositive of whether the student is a "child with a disability, it is not necessary to challenge the credibility of witnesses testimony regarding the Student's progress in the District general curriculum. The District witnesses did not testify that the Student did not need to be evaluated – merely that they believed that they could meet the needs that they actually knew about at the time they were teaching him. Simply experiencing some difficulty in one class for one school year does not rise to the level of a violation of the District's child find obligations. What the District knew or should have known for purposes of child find, however, is premised upon the collective knowledge of all its staff and not just on what each individual teacher knew about the Student when he or she taught him. Unfortunately for the District, *Ridgewood* and *M.C.* establish that actual knowledge is not necessary to establish liability for compensatory education, and the federal regulations caution that advancing from grade to grade cannot by itself excuse inaction on the District's part to fulfill its child find obligations.

2. Calculation of Compensatory Education

Whether a learning disability diagnosed in 2006 was also present in 2004 is a valid inquiry in determining awards of compensatory education. Once the District did finally evaluate the Student, it determined that he had multiple learning disabilities and required specially designed instruction. Preponderant evidence of record supports the conclusion that the Student had the same presenting needs prior to March 20, 2006 and a timely evaluation by the District would have similarly found. The Student is therefore entitled to an award of compensatory education for the period between March 20, 2004 and March 20, 2006.

In calculating the amount of compensatory education owed to the Student, the District could argue that back in March of 2004, it was entitled to a certain amount of time to refer the student to an instructional support team to collect data, to sixty school days to evaluate and generate an evaluation report, to thirty calendar days to develop an IEP and to ten days to implement an IEP– easily totaling several months that should be subtracted from the time it owes the student for compensatory education. Regarding any limitation on the claim for compensatory education, because the record supports the conclusion that the manifestation of Student's specific learning disability did not just arise during his seventh grade year or during his fifth grade year, the District is not permitted to invoke the *M.C.* limitation on a compensatory education award for the period of time necessary for the District to address the Student's educational needs. Therefore the amount of compensatory education will cover the period between March 20, 2004 and March 20, 2006. Calculation of the compensatory education is by necessity related to what an appropriate educational program for the Student should have contained. Analysis of the scope of the award follows the analysis of what constitutes a FAPE for the Student.

B. Whether the District's March 16, 2006 IEP constitutes a free appropriate public education, and if not, is the Student entitled to compensatory education from the date of the offer until an appropriate program is provided?

1. Free Appropriate Public Education

The IDEA defines a free appropriate public education ("FAPE") as special education and related services that

(a) are provide at public expense, under public supervision and direction and without charge;
(b) meet the standards of the State educational agency;
(c) include preschool, elementary school or secondary school education in the State involved ; and
(d) are provided in conformity with an individualized education program (IEP) under Sec. 614(d).

See 20 U.S.C Sec. 1402(9) and 34 C.R.F. 300.13.

In *Board of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034. 3051 (1982), the U.S. Supreme Court articulated for the first time the IDEA standard for ascertaining the appropriateness of a district's efforts to educate a student. It found that whether a district has met its IDEA obligation to a student is based upon whether "the individualized educational program developed through the Act's procedures is reasonably calculated to enable the child to receive educational benefits." *Id.* The high court placed procedural compliance on the same level as

substantive compliance with IDEA mandates. *Id*. Moreover, *Rowley* establishes substantial deference to districts in determination of methodology. *Id*. at 209-210. In *In re: the Educational Assignment of K.N*., Spec. Educ. Op. No. 1225 (2002), the Pennsylvania state-level Appeals Panel was called upon to interpret how to ascertain whether an IEP is appropriate, and it similarly stressed process and substance in IDEA compliance; specifically it explained:

> An appropriate IEP is one that meets the procedural and substantive regulatory requirements and one that is designed to provide meaningful education benefit to the child. (*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).

Id. at 4. In addressing whether a student was offered an appropriate program, the Pennsylvania Appeal Panel offers the following standard:

> In order to be appropriate, the program must be in a regular public school class unless certain criteria are met, and when offered be "reasonably calculated" to confer "educational benefit", or "meaningful educational benefit", that is not trivial nor *de minimis*. *See Board of Education v. Rowley*, 458 U.S. 176 (1982), *Polk v Central Susquehanna Intermediate Unit 16* , 853 F 2d 171 (3rd Cir., 1998), *Fuhrmann v. East Hanover Board of Education*, 993 F. 2d 1031 (3rd Cir., 1993), *Susan N. v. Wilson school District*, 70 F. 3d 751 (3rd Cir., 1995), *Neshaminy School District v. Karla B.*, 25 IDELR 725 (ED PA, 1997), *Oberti v. Board of Education of the Borough of Clementon*, 995 F.2d 1204 (3rd Cir., 1993), 20 U.S.C. § 1412 (a) (5), and 34 C.F.R. § 300.550.

In re: the Educational Assignment of S.J., A Student in the Tredyffrin/Easttown School District, Spec. Educ. Op. No. 1435 (PDE 2004), at 5 and *In re: The Educational Assignment of R.A., A Student in the Interboro School District*, Spec. Educ. Op. No. 1431, at 7-8 (PDE 2004). *See also 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).

Judicial and administrative bodies interpreting the *Rowley* standard have fleshed out the extent of a district's obligation to provide FAPE to students. For example, a school district is not required to maximize a child's opportunity; it must provide a basic floor of opportunity. *See Lachman v. Illinois State Bd. of Educ., 852* F.2d 290 (7th Cir.), *cert. denied*, 488 U.S. 925 (1988). An appropriate IEP will identify a student's needs and strengths and provide programs and services to address the needs and enhance the strengths the IEP identified. *See In Re: Educational Assignment of K.H.*, Spec. Op. No. 1031 (PDE 1999). An IEP is appropriate if it offers meaningful progress in all relevant domains under the IDEA. *See e.g., M.C. v. Central Regional S. D.*, 81 F.3d 389 (3rd Cir. 1996), *cert. denied*. 117 S. Ct. 176 (1996); *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999). If an IEP does not address all areas of a child's needs, if it does not contain measurable annual goals to monitor a student's progress, or if it is inadequate in any material way, the IEP is not appropriate. *See e.g., Rose by Rose v. Chester County Intermediate Unit*, 24 IDELR 61 (E.D. Pa. 1996); *In Re: the Educational Assignment of T.K.*, Spec. Educ. Op. No. 892; and *S.H. v. Newark*, 336 F.3d 260 (3rd Cir. 2003).

The US Supreme Court recognized that in developing an appropriate IEP, "Congress placed every bit as much emphasis upon compliance with procedures giving the parents and guardian a large

measure of participation at every stage of the administrative process… as it did upon the measurement of the resulting IEP against a substantive standard." *Rowley* at 205-06. In the 2004 revisions to the IDEA, however, Congress has recently affirmed its position that *de minimis* procedural violations do not constitute a deprivation of FAPE. In Section 1415, it provides

> In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies (1) impeded the child's right to a FAPE; (2) significantly impeded the parents' opportunity to participate in the decisionmaking process…; or (3) caused a deprivation of educational benefits.

20 U.S.C. Sec. 1415(h)(3)(E)(1). The hearing officer is required to base his or her decision solely on the "substantive" issue of whether the student actually was offered a FAPE, and can only rely on procedural violations in the specific limited situations codified in the Act. For judicial analysis of this concept, *see also, Doe v. Alabama State Bd. of Educ*., 915 F.2d 651, 662 (11th Cir. 1990); *Doe v. Defendant I*, 898 F.2d 1186, 1191 (6th Cir. 1990), *Independent School Dist. No. 282 v. S.D. by J.D.*, 88 F.3d 556, 562 (8th Cir. 1996)(*quoting Roland M. v. Concord School Comm*., 910 F.2d 983, 996 (1st Cir. 1990), *cert. denied,* 499 U.S. 912, 111 S.Ct. 1122, 113 L.Ed.2d 230 (1991). Moreover, 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. *See Fuhrmann v. East Hanover Board of Education*, 993 F. 2d 1031 (3rd Cir., 1993); *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 v. Chester County Intermediate Unit,* Docket No. 95-239 (E.D. Pa., May 6, 1996), *reprinted in* 24 IDELR 61.

With regard to implementation of an IEP, the "IDEA's mainstreaming requirement to prohibit a school from placing a child with disabilities outside of a regular classroom if educating the child in the regular classroom, with supplementary aids and support services, can be achieved satisfactorily." *Oberti v. Bd. of Educ.* (995 F.2d 1204, 1207 (3d Cir. 1993).

2. Was the March 10, 2006 IEP Appropriate

In February, 2006, during the second half of the Student's seventh grade year, the District completed a multidisciplinary team evaluation and developed an IEP for the Student. The parents' objection to that IEP was based upon the following issues:

- the complete lack of any reference to or programming for the Student's specific learning disability in written expression and handwriting delays;
- the lack of a detailed and complete description of the student's reading needs - specifically the lack of baselines of current student functioning, lack of discreet goals for phonemic awareness and comprehension, lack of appropriate specially designed instruction, and lack of method and schedule for evaluating the student's progress;
- the inappropriateness of the Corrective Reading program and the number of students within the proposed instructional setting; and
- the lack of placement within the least restrictive environment requirement.

Based upon the evidence offered at hearing and the weight afforded thereto, the March 16, 2006 IEP offered by the District was not reasonably calculated to yield meaningful educational benefit

in that it did not address all of the student's presenting needs in the annual goals, specially designed instruction, and program modifications for some, but not all, of the reasons articulated by the parents.

a. Written Expression

In the February 17, 2006 evaluation report, the student was determined to be a child with a disability and in need of specially designed instruction due to "Specific Learning Disability: Basic reading, decoding, comprehension, and written expression." Notwithstanding the fact that the District's ER identified the Student as having a specific learning disability in written expression, the IEP contains no reference to this fact. There are no present levels of functioning, no goals, objectives or specially designed instruction to address this need and no discussion at the IEP team meeting as to why it did not. The explanation given by the District staff is that the ER provides no recommendations regarding this need, so the IEP team did not accept the conclusion contained in the ER and did not program for written expression in the IEP. While the ER contained a page wherein the multidisciplinary team members could have indicated their disagreement with the report, the only signature on the page is the certified school psychologist who agreed with the ER recommendations. Notwithstanding the IEP team members' disagreement with the conclusion that the Student had a specific learning disability in written expression, the District did not attempt to complete any additional testing to ascertain the extent to which the Student did demonstrated a learning disability in written expression or submit a separate statement presenting their conclusions.

The District therefore must reconvene the IEP team to develop baselines, measurable annual goals, objectives and specially designed instruction and provide an appropriate research-based written expression program in the least restrictive environment.

b. Handwriting

Regarding the issue of handwriting and the need for services, the record does not support a conclusion that the Student has a need for specially designed instruction in handwriting. Review of the record indicates that the Student's parents do not believe his handwriting is appropriate and they offer an extra credit writing sample to support their conclusion. The supervisor of pupil services suggests that it is below grade level and that handwriting should be addressed in the IEP, but does not offer an opinion about how far below grade level it is. The only other evidence on the record is the testimony of the Student's language arts teacher who stated that his handwriting is better than some students and not as good as others. While additional testing might, in fact, result in a determination that the student does require specially designed instruction in handwriting, there is not enough information contained in the record to assist the hearing officer in determining what is considered within normal range of handwriting for seventh grade students in order to make that determination at this time, so the parents' request for handwriting programming and compensatory education in handwriting is denied because it is not based upon the preponderance of the evidence. Additional testing of this skill may result in information necessary to determine the extent to which the Student is entitled to the remedies that his parents seek.

c. Reading

Based upon the preponderance of evidence presented at the hearing, the SRA Corrective Reading program is reasonably calculated to meet the Student's learning needs in that it is a tightly sequenced program designed for students his age who are reading one or more years below grade level.

The three goals of the program are increasing reading accuracy (decoding), developing fluency and building reading comprehension. However, the IEP is lacking to the extent that it fails to establish a reading baseline prior to the Student starting the proposed reading program; it does not provide a description of the specially designed instruction that the student will receive to address his reading disability or the schedule for, or method of how, the student's progress will be monitored; and progress is to be measured only through achievement in the proposed reading program. The District therefore must reconvene the IEP team to remedy these deficiencies.

d. Least Restrictive Environment

In the instant matter, the record is uncontroverted that no attempt was made to determine the extent to which the Students specific learning disability in reading could be addressed in the regular classroom. While evidence of record demonstrates that the Corrective Reading program recommended by the District is reasonably calculated to yield meaningful educational benefit, due to the nature of the program the District does not offer it in a regular education setting and the IEP provides for the Student be pulled out of his regular classroom in order to participate in the program. While it is generally true that a district ultimately has the discretion to chose from among a group of appropriate programs, the choice of methodology no longer belongs to the district if its choice results in a disregard of the least restrictive environment mandate. In keeping with the *Oberti* mandate, the District must either attempt to implement its choice of reading methodology in the regular classroom or implement a research-based reading program that can be implemented within the regular classroom.

e. Compensatory Education post-March 16, 2006

Regarding their request for compensatory education until such time as the District offers an appropriate program to the student, the stay-put provisions of the IDEA seem to present a legal impediment to such an award. As more fully articulated in *In Re: the Educational Assignment of K.R., A Student of the Philadelphia City School District*, Spec. Educ. Op. No. 1506 (PDE 2004), at 8, "Stay put or pendency, in a two-tier jurisdiction attaches to the decision of the review level, or appeals panel, not the hearing officer's decision. *See also, In Re: the Educational Assignment of D.H.*, Spec. Educ. Op. No. 1672 (PDE 2005), 12; *In Re: the Educational Assignment of J.M.* ., Spec. Educ. Op. No. 1612 (PDE 2005), 5; *In Re: the Educational Assignment of K.R.*, Spec. Educ. Op. No. 1506 (PDE 2005), 8; In re: the Education Assignment of __, Spec. Educ. Op. No. 1549 (PDE 2004).[3] Therefore this decision offers no analysis of the Student's right to this remedy. A compensatory education award for the period of time after March 16, 2006 "until the District offers the Student an appropriate education" is specifically denied and will need to form the basis of some future action.

[3] Support for this concept is contained within footnotes of these various Appeals Panel decisions through citation to the following: *Susquenita Sch. District v. Raelee S.*, 96 F.3d 78 (3d Cir. 1996); *Matthew K. v. Parkland Sch. Dist*., 27 IDELR 831 (E.D. Pa. 1998); *Murphy v. Arlington Cent. Sch. Distr. Bd. Of Educ*., 297 F.3d 295 (2d Cir. 2002); *Bd. Of Educ. v. Schultz*, 290 F.3d 476 (2d Cir. 2002); *St. Tammany Parish Sch. Bd. v. State of Louisiana*, 142 F.3d 776 (5th Cir. 1998); *Mr. and Mrs. R. v. Maine Sch. Admin. Dist. No. 35*, 295 F. Supp 2d 113 (D. Me 2003); *c.f. Penn Trafford Sch. Dist. v. C.F*., 45 IDELR 156 (W.D. Pa. 2006).

V. ORDER

AND NOW, this 10th day of June 2006, in accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED that the School District must convene an IEP team meeting:

a. to modify the IEP and to develop a plan for the implementation of the IEP in the least restrictive environment consistent with the recommendations above; and

b. to develop and include with the Student's IEP a plan for the provision of 42 minutes of small group instruction in a research–based reading program and 42 minutes of small group instruction in a research-based written expression program for each school day (excluding days that the Student did not attend school) for the period between March 20, 2004 and March 20, 2006. In the event that small group instruction is not as readily available and convenient to the Student and his parent as individual instruction, the instruction will be provided to him on one-to-one basis.

All other relief not contained in this order is specifically denied.

Dated: June 10, 2006

Rosemary E. Mullaly

Special Education Hearing Officer