

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

DUE PROCESS HEARING
ODR File Number 6511/05-06 LS

Name of Child: C.R.

Date of Birth: xx/xx/xx

Dates of Hearing:
July 7, 2006
July 17, 2006

CLOSED HEARING

Parties to the Hearing:

Representative:

Drew Christian, Esquire
801 Monroe Avenue
Scranton, PA 18510

Carole Natitus-Jackell
Pupil services director
North Pocono School District
851 Church Street
Moscow, PA 18444

Anne Hendricks, Esquire
Levin Legal Group
1301 Masons Mill Business Park
1800 Byberry Road
Huntingdon Valley, PA 19006

Date Transcript Received: July 22, 2006
Date Record Closed: August 1, 2006
Date of Decision: August 9, 2006
Hearing Officer: Lynda A. Cook, Ed. D.

BACKGROUND

Student, whose date of birth is xx/xx/xx, resides with her family within the geographic boundaries of the North Pocono School District. She will be entering the fifth grade for the 2006-2007 school year. Student was diagnosed with learning disabilities in March 2006. Student brought this due process hearing alleging failures by the North Pocono School District (hereinafter, District) in providing her with an appropriate evaluation and program since the beginning of the 2004-2005 school year. Student also alleges that she is entitled to compensatory education and an Independent Educational Evaluation.

ISSUES

The parties agreed on the record to three issues for the hearing. (N.T. 4-5)

1. Whether there is a Child Find obligation that was not met by the District from April 21, 2004 through April 6, 2006. If so, is Student entitled to an award of compensatory education?
2. Whether there is a denial of FAPE in the IEP offered on April 6, 2006? If so, is Student entitled to an award of compensatory education?
3. Whether the Student is entitled to an Independent Educational Evaluation at District expense?

FINDINGS OF FACT

1. At the time of this hearing, Student was a xx year-old student residing in the District. She has been a student in the District since kindergarten, and will be a 5th grade student in the [redacted] Elementary [School] during the 2006-2007 school year. (N.T. 22-23)
2. Parent noted Student's problems with academics beginning in kindergarten, at which time she asked the kindergarten teacher for help. Parent's initial concerns began when Student was 2 1/2 to 3 years old because Student was "overly active". Parent noted that as Student entered first grade and progressed through the fourth grade, she demonstrated inability to stay focused or be organized, along with impulsivity and hyperactivity. (N.T. 24-27, 29, 32, 35)
3. Parent discussed her concerns about Student's problems in learning on numerous occasions with District personnel, including discussions with: first grade teacher in the 2003-2004 school year (N.T. 24-27, 29), the reading teacher following referral by the first grade teacher (N.T. 27-28), the second grade teacher and the substitute teacher in the 2003-2004 school year (N.T. 31), the third grade teacher (N.T. 38) in the 2004-2005 school year, the fourth grade teacher in the 2005-2006 school year (N.T. 39-41, P 1, S 13), and the reading specialist in fourth grade. (N.T. 208)

4. Student's final report card indicators first grades through third include the following: (S 9)

Grade	Reading	Math	English
First	Satisfactory	B+	NA
Second	Satisfactory	B+	B+
Third	Satisfactory	B	B+

5. Fourth Grade, 3rd quarter grades include: B for English, C+ for reading and B+ for math. Teacher comment for Reading was, Student "needs to improve comprehension". (S 9)
6. Fourth grade teacher describes Student's reading grade of C+ as average, but states that Student has a reading comprehension disability. She stated, "It's not as simple as black and white. The grades - - you're looking at a grade. If you were to look at her paperwork, you would see some ups and downs. And that's where it comes in to play with what you're working with the child with." (N.T. 273-276)
7. Samples of student's written school work were not entered as exhibits at the hearing.
8. Student has received the following school-based interventions: Reading support program in first grade (N T27); District-sponsored summer tutoring program in reading (N.T. 33); and Title 1 remedial reading beginning in October of 4th grade. (N.T. 42)
9. Parent arranged for provision of tutoring in reading from two private providers since first grade. Parent informed the District of this tutoring. (N.T. 28-29, 32-34, S11)
10. Instructional Support, an intervention for regular education students prior to formal referral for special education evaluation, was not provided as an option for Student. (N.T. 233)
11. Student's fourth grade teacher referred Student for Title 1 remedial reading with school's Reading Specialist. (N.T. 199 - 204) Pre-post scores on the Gates-MacGinitie Reading Test, a screening instrument administered by the Reading Specialist, indicate the following grade equivalencies: (P 7)

	10/14/05	5/23/06
Vocabulary	3.1	3.2
Comprehension	2.8	4.0

Total reading score for October 2005 was a 2.9 grade equivalency. Total reading score for May 2006 was a 3.6 grade equivalency.

12. Student's Title 1 remedial reading teacher saw Student two times a week following the referral in the fourth grade year. (N.T. 206) She described Student as "very quiet, but a hard worker". She also spoke to the fourth grade teacher about Parent having expressed wanting Student to be evaluated for special education. In January 2006 the reading teacher sent a progress report to the Parent noting that "at times when other students were reading, Student would be inattentive". (N.T. 207, 208)
13. District reading assessments routinely administered to all students offer the following indicators of Student's progress (S11, N.T. 132, 139-140):
 - a. Scott Foresman assessment record for 1st grade provides the comment, "Student works at the Sylvan Learning Center 2x/week. Comprehension is difficult for her."
 - b. Dynamic Indicators of Basic Early Literacy Skills (DIBELS), 2002-2003, student report, an oral reading fluency indicator, indicates that Student was reading between 40 and 60 words per minute, with the goal being 40.
14. The fourth grade teacher has observed Student demonstrate behaviors in the classroom as noted in the March 2006 Evaluation Report: off task behavior, inattentive, distractible, difficulty focusing. (N.T. 227) Teacher stated that Student did very well in her class, but that she occasionally saw focusing problems (N.T. 255, 265, 268) Teacher further stated, "it was a little bit of everything, but nothing major – major of one, so that's why there's a whole ball of things. She had little symptoms." Teacher further stated that cumulatively, these "symptoms" rise to the level of impacting Student's learning. (N.T. 284-285)
15. Fourth grade teacher referred Student for Title 1 reading in September 2005 because Student had difficulty focusing. (N.T. 231)
16. Student's pediatrician sent a note on November 18, 2005 to the fourth grade teacher requesting an evaluation for ADHD. (S 14)
17. Parent sent a letter to Student's fourth grade teacher, on November 29, 2005 (following a November 16, 2005 conference in which Teacher suggested Parent make her request in writing) summarizing her concerns about her daughter's learning and expressing her hope that Student would be evaluated. (P 1,S 13, N.T. 39-40, 41-8)
18. When Parent provided the letter in November 2005 requesting testing, the fourth grade teacher took it to the guidance department, the appropriate procedure identified by the District for making referrals for special education evaluation (N.T. 232-233)

19. The District issued a Permission to Evaluate form on February 14, 2006, 78 days after Parent requested an evaluation on November 29, 2005. Parent signed the form on February 16, 2006, indicating consent. (P 2)
 - a. Reason for referral for evaluation was listed as “Attention Concerns”. (P 2)
 - b. Specific types of assessment tools, tests and procedures to be used in the evaluation are listed as “A standardized individually administered ability and achievement test”. (P 2)
20. The District’s Supervisor of Pupil Services stated that she did not know why the permission to evaluate form had not been issued until February 14, 2006, and that if she received such a letter today, she would issue the permission form. (N.T. 102). The District’s Supervisor of Pupil Services was not in her current position in November, 2005. She had been in her position for five months at the time this due process hearing took place, after having served as special education supervisor for 12 years in two other districts before being employed by the School District. (N.T. 100, 125).
21. The Pupil Services Director agreed in testimony that when the permission to evaluate form was issued, the District was seeking informed consent only to do an intelligence and achievement test. She further agreed that other tests were conducted outside of the categories for which consent was given. (N.T. 102-103)
22. The District performed an evaluation and published an Evaluation Report (ER) dated March 24, 2006. (P 3, S 3)
 - a. The ER identifies the reason for referral as Student’s “parent, pediatrician, and personal tutor initiated a referral for testing to rule out the presence of any attention deficits or learning disabilities). (P 3, S 3)
 - b. The conclusion identified on the ER is “Student is a child with a disability AND in need of specially designed instruction. Disability category: Specific learning disability in reading comprehension and listening comprehension.” (P 3, S 3)
23. All evaluation team members signed in agreement with the ER conclusion (S 3, P 3), although the District’s special education teacher in testimony stated that she did not agree that the student had a learning disability in reading. (N.T. 175)
24. The School Psychologist who developed the ER no longer is employed by the District, was not working for the District when Student’s IEP meeting was held on April 6, 2006, and did not testify at the Due process hearing. (N.T. 60, 61, 103, 110)
25. The District’s Pupil Services Director stated that she had concerns with the way the ER was developed by the psychologist, and that she reported her concerns to

the Superintendent. (N.T. 103, N.T. 113) She also stated that even though the psychologist “came up with a diagnosis of a reading and listening comprehension, the issues were attentional”. (N.T. 133)

26. Parent signed the March 24, 2006 ER indicating disagreement. (S 3)
27. Assessment results included in the ER dated March 24, 2006 are summarized below. (S 3, P 3) Some of the assessments were conducted prior to the actual evaluation following Parent consent, primarily as screening tools in the regular school program.
 - a. Terra Nova standardized test results (2nd grade, February 2004) indicate that Student achieved the following national percentile ranks: Reading (57), language (51), mathematics (43), and total score (49). (S 12, S 3, P 3, N.T. 138, N.T. 146)
 - b. PSSA scores (3rd grade, September, 2004) indicate Basic performance in reading and Advanced performance in mathematics, and the need for help with fundamentals in the area of Comprehension and Reading Skills. (S 10, N.T. 137)
 - c. Kaufman Brief Intelligence Test, a screening tool for intellectual ability administered on January 20, 2006, provided the following results: Vocabulary (104), Matrices (116), and Composition IQ (111). (S 3, P 3, N.T. 107)
 - d. Cognitive Assessment System (CAS) full scale scores (not dated) indicate strength in simultaneous processing and significant cognitive weakness in attention. No date of test administration was included. (S 3, P3) The Pupil Services Director agreed on direct examination that the CAS is not widely accepted as a valid form of intelligence testing, is not based on the multiple intelligences model which is a psychology industry standard, and that no one in the District is trained to interpret results of the CAS. (N.T. 108-110)
 - e. Results of the Integrated Visual and Auditory Continuous Performance Test (IVA CPT), a test of attention, concluded that Student’s overall auditory and visual attentional functioning did not show any significant deficits, and that “Other factors may need to account for any reported attentional problems.” No date of test administration was included. (S 3, P 3)
 - f. Results of the language component of the NEPSY: A Developmental Neuropsychological Assessment indicate the following: slightly below expected limits in comprehension of instruction and phonological

processing, and expected or above limits on speed naming and language composite. No date of test administration included. (S 3, P 3)

- g. Present levels of academic achievement were reported using a chart of estimated instructional zones from the Woodcock Johnson Tests of Achievement (no date of test administration included). Student's estimated levels for reading are identified below. No indicator was provided for actual achievement levels.

	EASY	HARD
Writing Fluency	3.6	5.7
Word Attack	2.3	4.5
Broad Reading	2.8	4
Letter-Word Identification	3.2	4.3
Passage Comprehension	2	3
Reading Comprehension	2.1	3.7
Reading Fluency	3.1	4.4

- 28. The evaluation report did not include specific assessments for determining ADD or ADHD. Nor did the report reference the need to pursue such testing, even though the results seemed to indicate the need. (N.T. 105-106, N.T. 113-114, N.T. 117, N.T. 122)
- 29. On March 31, 2006 the special education teacher administered the Woodcock-McGrew-Werder Mini-Battery of Achievement (MBA), with the summary conclusion that Student's combined measure of reading, writing and mathematics skills is in the average range. The MBA is a screening battery, not a comprehensive assessment of achievement levels. (S 15) The MBA was administered to the Student individually, outside of the classroom, even though the Parent had not provided specific permission. (N.T. 174)
- 30. The District issued the form, Invitation to Participate in the IEP Team Meeting or Other Meeting, dated April 6, 2006. (S 4)
- 31. The record of the hearing includes two versions of a proposed Individualized Education Program (IEP), both dated as having been developed on April 6, 2006 IEP. (P 4, P 5)
 - a. The P-4 IEP, identified at the hearing as the first version (N.T. 176), identifies Goals & Objectives in three areas: general academics, organization, and attention.
 - b. The final version of the IEP (P 5, N.T. 176) includes goals and objectives in two areas: organization and attention. (S 3, P 3)
 - c. Handwritten on the bottom of the IEP form(s) and signed by the Parent is the comment, "I waive my right to a 10-day waiting period between

receipt of the evaluation report ER) and development of the IEP.” (S 5, P 5, N.T. 115)

32. Section II of the IEP (P 5, S 5), Present Levels of Academic Achievement and Functional Performance, provides only the following about Student’s level of academic achievement: Student’s functional performance is comparable to that of her same age peers with the exception of Reading and listening comprehension.

33. Section V of the final IEP (P 5, S 5) identifies two Goals & Objectives:

Organization

Student will set instructional goals for herself and explain how she will approach and accomplish a task. She will indicate the steps necessary to complete it, and the order in which she will proceed with them, as measured 4 out of 5 times weekly during completion of classroom assignments.

(Specially Designed Instruction)

- Have Student restate the overall concept and structure of assignment to check for understanding.
- Break down plan into a series of steps and arrange them in sequential order.
- Practice a few steps at the outset of the activity.
- Call attention to a structure of new information at the outset of a lesson or lecture.

Attention

Student will learn rules for approaching tasks, defining them, checking for her own knowledge of them, considering possible solutions, and checking her own work carefully.

(Specially Designed Instruction)

- Student will learn and use organized and exhaustive scanning techniques
- Use focusing strategies to check for critical information.
- Stop and think before responding.
- Use rehearsal strategies and pneumatic (spelled as mneumonic in P 5, S 5) devices.
- Learn and practice reading strategies.

34. The final IEP did not identify any goals to address the ER conclusion of Specific learning disability in reading comprehension and listening comprehension. The goals do address attention deficits regarding organization and attention. (P 5, S 5, N.T. 119)

35. Section VI (Special Education/Related Services) identifies two areas for Modification and Specially Designed instruction (SDI): Reading and General Academics. Peer reviewed research-based methods are not identified. (P 5, S 5)

36. Although there was not formal diagnosis of ADHD, IEP goals address attention deficits regarding organization and attention (P5, S 5, N.T. 119)
37. Neither the first nor final version of the IEP provides measurable annual goals (how Student's progress toward meeting the goals will be measured), baseline data (present education levels) or exit criteria. (P 5, S 5, N.T. 120-121, N.T. 178)
38. The District issued a Notice of Recommended Educational Placement (NOREP) on April 7, 2006 which the parent did not sign. The NOREP lists the following as the educational placement for the Student: Itinerant Learning Support, special education outside of the regular classroom less than 21% of the day. (S 6, P 6) The IEP states that Student would participate 5 times per week in itinerant learning support. (P 5, S 5)
39. On April 7, 2006 the District's special education teacher sent a handwritten note to the Parent along with copies of the IEP and NOREP, asking Parent to sign and return them with Student unless anything further was to be added. (N.T. 7) A second note was sent on April 19, 2006, asking if Parent had reviewed the paperwork. (N.T. 8)
40. On April 21, 2006 Student's parent filed with the District a complaint and request for due process hearing, alleging denial of FAPE since the beginning of the 2004-05 school year. The relief sought was compensatory education from the beginning of the 2004-05 school year until such time as the District provides FAPE, an independent education evaluation at public expense, and an order from the hearing officer for the IEP team to reconvene. (S 1, N.T. 156-157)
41. One June 9, 2006, the District responded to Parent's complaint denying all allegations and request for compensatory education. This response does not comply with the required 10 day timeframe. [615(c)(2)(B)(11)]
42. On April 26, 2006, the Office for Dispute Resolution assigned this Hearing Officer, at which time May 31, 2006 was set as the date for the due process hearing. On May 23, 2006, this Hearing Officer granted a continuance to June 30 at the request of the District's counsel. Counsel already had matters scheduled when the case was assigned. On June 14, 2006, this Hearing Officer granted a second continuance to July 7, 2006 at the request of District's counsel because witnesses would not be available on June 30th.
43. Because a Resolution Meeting was not held prior to the July 7, 2006 due process hearing, the parties provided to this hearing officer a signed waiver dated July 7, 2006 immediately before going onto the record of the due process hearing. The record indicates that the District took no steps to schedule a pre-hearing conference or formal resolution session. (N.T. 157-158).

DISCUSSION AND CONCLUSIONS OF LAW

Whether there is a Child Find obligation that was not met by the District from April 21, 2004 through April 6, 2006. If so, is Student entitled to an award of compensatory education?

The District has an affirmative obligation to locate, identify, and evaluate all children thought to be disabled who reside in the District. 22 Pa Code. §14.121 (a). *J. G.*, Opinion No. 1292 (SEA PA 2002). Child Find provisions under the Individuals with Disabilities Education Improvement Act (hereinafter, IDEIA) and 22 Pennsylvania Code Chapter 14 require that the state to ensure that:

All children with disabilities residing in the state, including 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. §1412(a)(3); 34 CFR § 300.125. 22 Pennsylvania Code §14.121 (b), (c).

In this case, the Student, who completed the fourth grade during the 2005-2006 school year, has attended District schools since kindergarten. Beginning in the Student's kindergarten year, Parent testified that she discussed concerns about attention and focusing with the teacher. Parent also stated having discussed these concerns with teachers in teachers in first through fourth grades. In addition, Parent arranged for two private tutoring providers to work with Student.

A review of Student's performance on District's screening indicators reveals that the student was making progress, despite noted concerns by teachers and Parent in comprehension areas and attention areas. On the Dynamic Indicators of Basic Early Literacy Skills (DIBELS), Student was reading between 40 and 60 words per minute, with the goal being 40. This tool, however, measures only oral reading fluency. The first grade assessment record from the Scott Foresman reading program provides the comment, "Student works at the Sylvan Learning Center 2x/week. Comprehension is difficult for her." Terra Nova standardized test results in second grade show that Student achieved national percentile ranks of 57 in Reading, 51 in language and 43 in mathematics, with a total score of 49. PSSA scores in third grade reveal "Basic" performance in reading and "Advanced" performance in mathematics, but identify the need for help with fundamentals in the area of Comprehension and Reading Skills. The district provided general education remedial reading interventions.

A review of Student's report cards reveals that she earned average and above grades for kindergarten through third grades. In discussing Student's fourth grade report card, the teacher stated that while a C+ is an average grade, Student has a reading comprehension disability. She further explained that Student's paperwork reveals ups and downs. It is noticeable that samples of Student's actual schoolwork were not entered into the record of

this hearing. The fourth grade classroom teacher also noted off task behavior, inattentiveness, distractibility and difficulty focusing. The reading specialist for Student's Title 1 program in fourth grade noted difficulty focusing, and reported discussing this with the Parent.

Student has a history of involvement in school-based regular education interventions (e.g., Title 1 remedial reading, summer reading program) for reading development throughout first through fourth grades. This fact by itself, however, does not necessarily mean that the District should have referred Student for evaluation to determine special education eligibility and need. It is noteworthy, however, that District personnel did not refer Student for the Instructional Support Program, a first step toward identification for special education.

The record of the hearing presents limited documentation on Student's progress in these school-based interventions, except for fourth grade. In this instance, Student met with the Title 1 remedial reading teacher two times a week following the referral in the fourth grade year. The reading specialist described Student as "very quiet, but a hard worker". The reading specialist reported consulting regularly with the classroom teacher, and telling her about Parent having expressed wanting Student to be evaluated for special education. In January 2006, the reading specialist sent a progress report to the Parent noting that "at times when other students were reading, Student would be inattentive" Review of Student's beginning and end-of-year performance on the Gates-MacGinitie Reading Test, a screening instrument administered by the Reading Specialist, does reveal concern over Student's progress in the Title 1 program. In the October 2005 pre-test, Student's grade equivalency scores were 3.1 in vocabulary, 2.8 in comprehension, with a total score of 2.9. In May 2006, her scores were 3.2 in vocabulary, 4.0 in comprehension, with a total score of 3.6. Student's performance on this screening test, however, indicates that she was making progress.

It is a fact that Parent discussed concerns with District personnel across Student's elementary grades about Student's academic performance. Testimony at the hearing and exhibits entered into the hearing record, however, reveal that Parent did not make a formal request for evaluation until November 29, 2005 following a conference with the fourth grade classroom teacher. Further, Student's pediatrician notified the District on November 18, 2005 of the need for evaluation. It is at that time the District knew or should have known it needed to conduct an evaluation on this student. From that time on, no matter what the District purports to have done on behalf of this Student in regular education, the evidence demonstrates this Student was in need of an evaluation to determine if Student was in need of individualized instruction. In fact, the District did not issue the Permission to Evaluate form until February 14, 2006. The District's Director of Pupil Services, who was not employed by the District at time the Parent made the request in writing, stated on the record of the hearing that had she been in the District, she would have issued a permission to Evaluate form at that time.

In Student's special education due process hearing, a review of the record reveals that the District did not meet its Child Find obligations beginning November 18, 2005, pursuant.

to 20 U.S.C. 1412(a)(3); 34 CFR § 300.125; and 22 Pennsylvania Code §14.121 (b), (c). Student is entitled to an award of compensatory education. The amount of compensatory education will be discussed below.

Whether there is a denial of FAPE in the IEP offered on April 6, 2006? If so, is Student entitled to an award of compensatory education?

An appropriate educational program is one that is provided at no cost to the parents, is individualized to meet a student's educational need, is "substantively and reasonably calculated" to yield meaningful educational benefit, and conforms to applicable federal requirements. Rowley v. Hendrick Hudson Board of Education, 458 U.S. 176, 102 S. Ct. 3034 (1982)

The Individualized Education Plan (IEP) is the primary vehicle for providing students with the required free and appropriate education. The IEP process must be based upon an appropriate and comprehensive evaluation which identifies the student's complete educational needs. East Penn School District v. Scott B., IDELR 1058 (E.D. PA. 1999). The IEP must be based on information known at the time it is drafted. Fuhrmann v. East Hanover Board of Education, 993 F. 2d 1031 (3d Cir. 1003).

IDEIA 2004 requires that an individualized education program (IEP) must include the following: USC §1414(d)(1)(A)

- (I) A statement of the child's present levels of achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general curriculum.
- (II) A statement of measurable annual goals, including academic and functional goals designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and meet each of the child's other educational needs that result from the child's disability.
- (III) A description of how the child's progress toward meeting the annual goals will be measured and when periodic reports on the progress the child is making toward the annual goals will be provided.
- (IV) A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provide to the child or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child: to advance appropriately toward attaining annual goals; to be involved in and make progress in the general education curriculum and to participate in extracurricular activities and other nonacademic activities; to be educated and participate with other children with disabilities and non-disabled children.
- (V) An explanation of the extent, if any, to which the child will not participate with non-disabled children in the regular class.
- (VI) A statement of any individual appropriate accommodations that are

necessary to measure the academic achievement and functional performance of the child on State and district-wide assessments.

- (VII) The projected date for beginning of services and modifications, the anticipated frequency, location and duration.

An IEP that is inadequate in any material way is inappropriate as a matter of law. Rose v. Chester County Intermediate Unit, 1996 WL 2386999, 24 IDELR 61,114 F. 3d 1173 (3d cir. 1997) The IEP must include, among other things, measurable annual goals and present levels must be interpretable so as to address specific areas of need. Lascari v. BOE Ramapo Indian Hills Reynolds High School, 116 N.J. 30, 48-49 (absent present levels IEP denied FAPE). Goals in the IEP must point toward the child's actual educational needs. 20 U.S.C. Section 1414(d)(1)(A), 34 C.F.R. Section 300.347; 22 PA Code Sections 14.32(f) and 342.32(d). An IEP must be sufficiently specific to address all of the needs which are identified concerning the child. Christen G. v. Lower Merion School District, 919 F. Supp. 793 (E.D. Pa. 1996) Specially designed instruction must be specific and meet the individual needs of the child as reflected in the ER, and must extend beyond mere classroom accommodations. 20 U.S. Section 1414(d)(1)(A), 34 C.F.R. Section 300.347; 22 Pa. Code Sections 14.32(f) and 342.32(d).

Student's Proposed IEP

It is difficult to examine the IEP entered into the record of this hearing based upon Student's needs and potential since the District's Evaluation Report (ER) is neither appropriate nor comprehensive. However, the IEP entered in the record clearly exhibits numerous flaws.

The IEP does not identify present levels of achievement and functional performance as necessary for establishing a baseline. The annual goals and objectives in this IEP do not address all of the Student's needs and concerns as listed on the IEP itself. Further, the IEP goals are not designed to meet the student's specific identified needs in reading and listening comprehension. Nor are the annual goals measurable. Present levels of academic and functional performance were not adequately assessed or reported. Present levels of academic achievement were reported using a chart of estimated instructional zones from the Woodcock Johnson Tests of Achievement (no date of test administration included). No indicators were provided for actual achievement levels. Instead, the special education teacher administered the McGrew-Werder Mini-Battery of Achievement, a screening tool only, after the ER was published. She did so in order to determine levels of academic performance so that she could develop the IEP.

The areas of statement of the special education and related services and supplementary aids and services, and program modifications/support based make no reference to peer-reviewed research.

For all of these reasons, the proposed IEP for this Student is not appropriate. Student is entitled to an award of compensatory education for denial of FAPE (free appropriate public education). The amount of compensatory education will be discussed below.

Whether the Student is entitled to an Independent Educational Evaluation at District expense?

Although federal regulations to assist in implementing the IDEIA (2004) have not yet been issued, guidance regarding the appropriate process when a parent disagrees with the appropriateness and/or the conclusions of a District's evaluation is found under the previous regulations for IDEA 1997 as follows:

A parent has the right to an independent evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency. If a parent requests an independent educational evaluation at public expense, the public agency must either initiate a hearing and at that hearing show that its evaluation is appropriate or ensure that an independent evaluation is provided at public expense. If the public agency initiates a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent evaluation, but not at public expense. 34 CFR §300.502(b)(1)(2)(3).

In Student's case, the Parent raised the issue of appropriateness with the District's evaluation, and filed a complaint requesting a due process hearing and an Independent Educational Evaluation at District expense.

The Commonwealth of Pennsylvania established a 60 school day time limit for completion of the evaluation following written parental consent. Therefore, the District was not within the boundaries of Pennsylvania regulations when, after receiving written notice requesting evaluation on November 26, 2005 from the Parent, it did not issue a Permission to Evaluate form until February 14, 2006. The District did not publish the Evaluation Report (ER) until March 24, 2006 (a period of 78 days).

This discussion then turns to the specific issue in this matter, that is, was the evaluation conducted by the District appropriate. If the District's evaluation was not appropriate, then Student is entitled to an Independent Education Evaluation (IEE) at public expense. It is therefore necessary to look at what constitutes an appropriate evaluation in light of the federal statute.

IDEIA 2004 provides, at Section 614(b)(2) that, in conducting the evaluation the local educational agency shall use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including: whether or not the child is a child with a disability; and the content of the child's individualized education program.

No single measure or assessment may be used as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child. Only technically sound instruments can be used to assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

Further, IDEIA 2004 at Section 614(b)(3) imposes additional requirements that local educational agencies ensure that assessments and other evaluation materials used to assess a child:

- Are selected and administered so as not to be discriminatory on a racial or cultural basis;
- Are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally and functionally unless it is not feasible to so provide or administer;
- Are used for purposes for which the assessments or measures are valid and reliable;
- Are administered by trained and knowledgeable personnel; and
- Are administered in accordance with any instructions provided by the producer of such assessments;

IDEIA 2004 at Section 614(b)(3) also requires that the child be assessed in all areas of suspected disability, and that the assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided.

Once a child has been evaluated it is the responsibility of the multidisciplinary team to decide whether the child is eligible for special education services. IDEIA 2004 provides, at Section 614(b)(4), that upon completion of the administration of assessments and other evaluation measures, the determination of whether the child is a child with a disability as defined in section 602(3) and the educational needs of the child shall be made by a team of qualified professionals and the parent of the child in accordance with paragraph (5).

The evaluation is the foundation for the IEP. An IEP cannot be appropriate if the evaluation is incomplete. M.H., Special Education Opinion No. 736 (1999); K.B., Special Education Opinion No. 1300 (2002). 34 C.F.R. 300.531, 300.536 and 22 Pa Code 123 and 124.

In this case, although the District issued the Permission to Evaluate form for “attention concerns”, the District requested permission only to conduct ability and achievement tests. The Student was not assessed to rule out the presence of any attention deficits. Even when evaluation results discussed in the ER indicated the possibility that attention was an issue, the District did not seek to re-evaluate.

The only intelligence assessment used was the Cognitive Assessment System (CAS). The District’s Supervisor of Pupil Services testified that the CAS is not widely accepted as a valid form of intelligence testing, and is not based on the multiple intelligences model which is psychology industry standard. Further, the Supervisor of Special Education testified that no one in the District is trained to interpret the results of the CAS.

The published ER did not deliver to the IDEIA 2004 requirements listed above, nor did it

deliver to Pennsylvania regulations requiring that appropriate test and evaluation tools must be administered so that evaluation results accurately reflect the child's needs. 22 Pa. Code §14.125.

It is important to note that the school psychologist who developed the ER was no longer employed by the District and was not available to provide testimony at the hearing.

The Office for Special Education (OSEP) addressed the 34 CFR 300.502(a)(2) requirement regarding independent education evaluations in "Letter to Young" in 2003. OSEP said that there is nothing in the regulations prohibiting a local education agency from providing parents with a list of qualified examiners. If, however, a local education agency wants to limit parents to using the examiners on the district's list, the list must be exhaustive, i.e., all qualified examiners in the geographic location must be included on the list. Also, the local education agency must include in its policy that parents must have the opportunity to demonstrate that unique circumstances may justify the selection of an IEE examiner who does not meet the local education agency's qualification criteria and are not on the local education agency's list of examiners.

After listening to testimony and reviewing the records in this case, this hearing officer finds for the Student based on the discussion above concerning the inappropriate evaluation of the Student and subsequent denial of FAPE through delayed evaluation and a flawed IEP.

Student is entitled to an independent education evaluation (IEE) at public expense. The evaluation and resulting IEP denied Student a FAPE based on an inadequate ER and a flawed IEP.

Issue of Compensatory Education

Compensatory education is an available remedy when a school district either fails to provide FAPE to a child with a disability, or simply fails to provide services that it has agreed to provide. Ridgewood Board of Education v. N.E. for M.E., 172 F. 3d 238 (3d Cir. 1999); M.C. v. Central Regional School District, 81 F.3d 389, 393 (3d Cir.1996).

Compensatory education is a remedy designed to provide eligible students with the services they should have received pursuant to a free appropriate public education. Lester H. v. Gilhool, 916 F. 2d 865 (3d Cir. 1990)

On July 1, 2005, a new statute of limitation in the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA 2004) 20 U.S.C. Section 1415 et. seq. became effective, statutorily limiting the time for requesting a due process hearing.

Which sets forth an alleged violation that occurred not more than 2 years before the date the parent or public 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 presenting such a complaint under this part, in such time as the State law allows, except that the exceptions to the timeline described in subsection (f)(3)(D) shall apply to the timeline described in this paragraph.

Federal courts in Pennsylvania previously unanimously rejected “statutes” of limitations on compensatory education, while in state court Montour School District v. S.T., 805 A. 2d 29 (2002), found an “equitable” statute of limitations applied to such claims.

PA Special Education Opinion 1750 (July 2006) recognized that the Individuals with Disabilities Education Improvement Act of 2004 (“IDEA-2004”) established a window of recovery for compensatory education claims, and that the two-year limitation on claims in IDEIA 2004 governs. Research into the legislative intent behind §1415(f)(3)(C) led this panel to the U.S. Senate Committee Report 108-185 on IDEIA 2004. There, express legislative intent stressing only statute or regulation as the vehicle to apply some other limitations period, and Pennsylvania lacking such a statute or regulation, they found that the two year limitation provision of IDEA-2004 is controlling.

The District’s denial of Student’s Child Find identification in a timely manner and the denial of Student’s FAPE based on a flawed IEP are the threshold bases for awarding compensatory education in this case. The District identified and evaluated Student inappropriately. The District offered a flawed IEP. Further, the District delayed any effort toward resolving Parent’s complaint when it did not make an attempt to schedule a resolution session as required by IDEIA 2004. Where the IEP is flawed procedurally or substantively, a student is denied a FAPE. The remedy for denial of a FAPE is compensatory education. Ridgewood Board of Education v. N.E. for M.E., 172 F. 3d 238 (3d Cir. 1999) Compensatory education is equal to the period of deprivation, excluding the time reasonably required for the district to act accordingly. M.C. v. Central Regional School District, 81 F.3d 389, 393 (3d Cir. 1996).

The District knew or should have known that Student might be in need of special education beginning on November 18, 2005 when Student’s pediatrician communicated this need in writing to the fourth grade teacher. The District did not issue a permission to evaluate form until February 14, 2006, and did not publish the evaluation report until March 24, 2006. The evaluation report was not comprehensive or appropriate. Consequently, the resulting IEP is not appropriate.

Student is entitled to 300 hours of compensatory education for the period November 18, 2005 through the end of the 2005-2006 school year and until such time that the District provides FAPE. The amount of compensatory education from November 18, 2005 until the end of the 2005-2006 school year is as follows:

7 months @ 20 days per month (20 school days per month) = 140 days
140 days @ 6 hours per day = 840 hours

Minus 90 days (exclusion of time reasonably required for District to respond)
140 days – 90 days = 50 days
(60 days for completion of ER, 30 days for development of IEP)
50 days @ 6 hours per day = 300 hours

The award of compensatory education for full school days (6 hours per day) is based on two factors. First, the District made no effort to schedule a resolution session prior to the scheduled due process hearing, thus resulting in even more delay in conducting a comprehensive and appropriate evaluation that would result in an appropriate IEP. Second, it reasonably can be expected that had Student had the benefit of an appropriate IEP, she would have derived benefit from specially designed instruction targeted to her identified needs in the areas of reading, attention and organization.

Order

And now, on this 9th day of August, 2006, the School District is ordered to take the following action:

1. The District must provide funding for a comprehensive Independent Educational Evaluation (IEE).
2. Parent has 15 days from the date of this order to make the arrangements for the evaluation (e.g., identify an evaluator and schedule a date for the appointment). The actual date for an evaluation will depend on the evaluator's schedule.
3. Within 10 school days of the receipt of the IEE report, the District must revise Student's evaluation report (ER). The ER must consider results of the IEE relative to Student's disability determination and needs for special education and related services.
4. Within 15 school days of the receipt of the IEE, Student's IEP team must reconvene for the purpose of developing Student's 2006-2007 program and placement. The IEP team must consider all information available to it in making determinations.
5. Student is entitled to an award of compensatory education for the period 2005-2006 school year November 18, 2005 until such a time that FAPE is provided. The amount of compensatory education time for the 2005- 2006 school year is 300 hours.
6. Student's Parents shall decide how the compensatory education hours should be spent so long as those hours take the form of appropriate developmental, remedial or enriching instruction that furthers Student's needs and furthers the goals of Student's pendent or future IEPs. These services may occur during the weekday, on weekends and during the summer months, when convenient for Student and Student's Parents.

Lynda A. Cook, Ed. D.
Hearing Officer

DECISION DATE: August 9, 2006