

This is a redacted version of the original hearing officer decision. Select details have been removed from the decision to preserve anonymity of the student as required by IDEA 2004. Those portions of the decision which pertain to the student's gifted education have been removed in accordance with 22 Pa. Code § 16.63 regarding closed hearings.

PENNSYLVANIA

Special Education Hearing Officer

Decision

Due Process Hearing

For

J.S.

File No. 6723-05-06

Date of Birth: [redacted]

Date of Hearings: September 7, 18, October 16, 17, November 9, 2006

Closed Hearing

Parties to the Hearing:

Representative:

Parent[s]

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Transcript Received: November 15, 2006

Record Closed: December 5, 2006

Date of Decision: December 18, 2006

Hearing Officer: Max Wald, Ed.D.

Background

[Student] (hereinafter Student or [Student]) is a second grade [redacted] eligible child living with [Student's] parents [redacted] (hereinafter Parents or Parent) within the Saucon Valley School District.

The Student was identified as hearing impaired, having a mild low to mid-frequency conductive hearing loss.

The Student began receiving early intervention services through [the local] Intermediate Unit but the speech and language support was provided by the staff of the [another] County Intermediate Unit.

After being fitted for bi-lateral hearing aids the Student's services were reduced to monitoring status following [Student's] IEP review. The Parents requested reconsideration and the Mutually Agreed Upon Written Agreement (MAWA) restored the weekly speech and language support for the period from July 6 through July 30, 2004.

The Student was enrolled for kindergarten at the [redacted] School in [redacted] for the 2004-2005 school years. [Student] was transferred to [redacted] Elementary School for first grade for the 2005-2006 school year. The Student currently attends second grade at [redacted] Elementary School.

While in kindergarten the Student received speech and language services. During the year (2004-2005) because of staff changes at the County Intermediate Unit services were halted for various periods of time between December, 2004 and February 2005.

When the Student entered the School District the IEP indicated that [Student] would receive "Itinerant, Deaf or Hearing Impaired" service and support. There was no mention of speech or language support in the IEP other than monitoring [Student's] development.

[Redacted.]

On May 22, 2006 the Parents notified the District that they had concerns regarding their child's [redacted] program. The Parents also requested an Independent Educational Evaluation at Public Expense.

On June 29, 2006 the Parents filed requests for a due process hearing with the Intermediate Unit, The [other] County Intermediate Unit, and the School District. Subsequently the School District voluntarily assumed responsibility for the entire matter and both IU's were released from participation.

The Parents alleged a denial of FAPE, that the Student was denied speech and language services, that the 2005-2005 and 2005-2006 IEP were flawed, as was [redacted].

The Parents are seeking compensatory education for their child along with a comprehensive independent evaluation at the District's expense.

Resolution meetings to resolve the dispute failed. The hearing commenced and was conducted over five sessions.

Issues

1. Was the Student denied a Free Appropriate Public Education (FAPE) because [Student] was denied Speech and Language Services for the 2004-2005 and 2005-2006 school years? If so, is the Student entitled to compensatory education?
2. Was the Student denied a Free Appropriate Public Education for the period from January, 2006 to June, 2006 because [redacted]? If so, is the Student entitled to compensatory education?
3. Is the Student entitled to an Independent Evaluation at public expense?

Findings of Fact

1. The Student who is [elementary school-aged] is currently enrolled in the School District and attends 2nd grade at the [redacted] Elementary School. [Student] became eligible for special education as an early intervention student and in Kindergarten received services under IDEA through the [redacted] County Intermediate unit. (NT 32, 337, S-2 at 1-2).
2. The Student has been identified as hearing impaired with a conductive hearing loss. [Student] entered [redacted] Elementary School in 1st grade on 9/13/05. (NT 33, 343, P2 at 2-3, S-4).
3. The Student attended private kindergarten at the [redacted] School in [redacted] where [Student] received speech therapy through the [redacted] County Intermediate Unit. (NT 35, 337, P-2 at 3, S-2 at 1-2).
4. The [redacted] County Intermediate Unit presented a Notice of Recommended Educational Placement dated 2/24/2004 and an IEP for special education services providing speech therapy prior to the Student's attendance in kindergarten. (NT 35, 36, P 1 at 2, P-2 at 8).
5. An Early Intervention Review Summary issued by the [redacted] Intermediate Unit 20 dated 6/14/2004 indicated that services were to be provided to the Student

during the summer from 7/6 through 7/30/2004. Services addressing the Student's hearing impairment were provided but not to the Parent's satisfaction.(NT 37-38)

6. The District issued an Evaluation Report dated 11/15/2004 while the Student was enrolled in a private kindergarten. The ER concluded that the "Student is a child with a disability in the category of Hearing Impaired with a secondary disability in Speech." The Student was administered the Brigance Diagnostic Inventory of Early Development on which [Student] scored 100% on the following subtests: *Verbal Directions, Responses to and Experiences with Books, Visual Discrimination, Recites Alphabet, Upper Case Letters, Lower Case Letters, Auditory Discrimination, Initial Consonants with Pictures, Initial Consonants Visually, Initial Consonants Auditorily*. It was recommended that the Student receive Hearing Support thirty minutes per week for the maintenance of [Student's] hearing aids. Speech support, through a federally funded program, was also recommended(NT 38, P-4 at 3)
7. Speech and Language Therapy was not initiated by the District until November 1, 2004. Prior to 11/2006 the Student was seen by the IU hearing support teacher on a diagnostic basis. (NT 40, 147, 149).
8. The District did not meet with the Parent at the beginning of the 2004 school year to review the IU IEP dated 11/15/2004 or the School District NOREP dated 11/15/2004. (NT 40-42, P-6 at 1).
9. Speech and Language services were not provided to the Student until the end of February, 2005. (NT 44-45, 46, P 7, P 8).
10. The District, through its IEP dated 9/15/2005 and a letter to the Parents 5/23/2006 adopted the contents of the Early Intervention IEP. (NT 48, P 12 at 1, P-23).
11. [Redacted.]
12. [Redacted.]
13. A second IEP bearing the date 11/9/2005 was issued by the District. The IEP did not show signatures of the participants and was largely identical to the IEP that had been previously issued under the same date. (11/9/05). This IEP, however, included some related services [redacted] that the other document did not contain. This document was a revised IEP issued on 1/30/2006 in order to incorporate IEP Goals [redacted]. (NT 54, 67-68, P-18 at 1, 11, P-20 at 3).
14. An FM (hearing) system was acquired for the Student by the Parents through the ACCESS program. The Parents complain that the system has no back-up and is broken once or twice each year. Repair requires, with shipping, two to three weeks. (NT 57-58, 90, 159, 160).

15. The Parent testified that the Student is affected by ambient classroom noise and [Student's] inability to hear during assemblies or morning announcements. The problem can be corrected through a "tie in" to the audio-visual system. The problem was also addressed by the family's audiologist. (NT 59-60, 104-105).
16. [Redacted.]
17. [Redacted.]
18. [Redacted.]
19. [Redacted.]
20. The Parent notified the District on 5/22/2006 that she had concerns [redacted]. The District responded on 5/25/2006. (NT 78, P-22, P-23).
21. The Student's Early Intervention IEP of 2/24/2004 was discussed with the Parent on 5/11/2004. The Parent was informed that the Student was demonstrating age appropriate articulation and it was recommended that [Student] be placed on a four-month monitoring cycle to ensure that [Student] maintained [Student's] skills. The Parent agreed. (NT 85-86, 88, S-1 at 41-42).
22. The Parent agreed with the Evaluation Report that was issued on 11/5/2004, but subsequently found fault because the ER would not provide the Student with an FM hearing system (NT 89-90, S-2 at 17, 22).
23. [Redacted.]
24. There was no Parent objection to the IEP dated 11/15/2004. There was agreement that the Parent had the opportunity of participating in the development of the IEP and that "procedural safeguards" information had been received. The Parents' only objection to the IEP was the lack of an FM system noted in the document. (NT 91-92, S-2 at 2, 4).
25. The Student did not receive early intervention speech and language services from 7/6/2004 through July 30, 2004 as promised. Total services were 30 minutes per week for three weeks. This service was to have been provided by the [redacted] County Intermediate unit. (NT 98-99, 203, P-3 at 2).
26. [Redacted.]
27. On August 30, 2006 the District sent a revised "permission to evaluate" form to the Parents. Though satisfied with the testing protocol, the Parent was dissatisfied that it was not being performed by an independent evaluator [redacted]. The form was signed. (NT 116, 118, S-13).

28. The Parent has shown consistent concern about her child being “under assessed”. This concern has been expressed regarding the private school, public school, and the public school evaluator. (NT 96, 108, 119, 130)
29. The Student participated in [redacted]. (NT 137, P 18 at 11).
30. The Student, while in private kindergarten, (2004-20205) received Act 89 services for speech and language but not for hearing support. Act 89 services are paid for through funding provided by the IU to private schools for therapeutic services and other uses. (NT 147-148, 199, 338-339).
31. The “learning goal” in the 11/2004 IEP does not have a baseline or ending point for purposes of measurement. The teacher responsible indicated that this goal focused on compensatory strategies such as physical positioning in the classroom, asking for help when needed, changing a hearing aid battery, and making certain the hearing aid microphone is turned on. (NT 151-153, 155, P-16).
32. All children in the IU hearing disability program have the same goals, regardless of their level of disability with assessments based upon the Student’s audiogram and the support teacher’s professional experience in the field. (NT 152-153).
33. Evidence of the attainment of a “learning” goal is based upon the teacher’s direct observation of the Student. The support teacher visits the classroom twice each week to monitor progress and confer with the classroom teacher. Progress was reported through anecdotal notations. (NT 156-158, 163).
34. The Student’s hearing loss was mild in one ear rising to within normal limits in the higher frequencies. The left ear had moderate hearing loss rising to the normal range at higher frequencies. This hearing loss resulted in a prescription for bilateral digital hearing aids with FM attachments. (NT 170-171, S-1 at 2).
35. During the “diagnostic period” of the Student’s services the hearing support teacher gathered information about how [Student] functions in the classroom academically and socially. She is looking at how the Student tolerates wearing [Student’s] amplification and whether [Student] and the teacher are using it consistently. Room acoustics, noise, student positioning, and maximizing learning capability are also reviewed. (NT 172-173).
36. The Audiological information in the Evaluation report was obtained from County IU audiograms, doctors’ reports, and information provided by the Parent. In addition, the evaluation included classroom observations and the results of the Brigance Diagnostic Inventory of Early Development. The Brigance results indicated that the Student was superior and achieved 100% on all subtests administered including listening comprehension. Speech testing however was not the responsibility of the hearing support teacher. (NT 174-176, S-2 at 17, P-4 at 3)

37. The IU Hearing Support Teacher testified that the Student, as far as the IEP was concerned, demonstrated strengths as being ready for kindergarten without any academic (remedial) needs. [Student's] needs focused on caring for and trouble shooting [Student's] (Audiological) equipment, using a battery tester, changing a battery, placement of [Student's] ear mod, turning on [Student's] hearing aid and microphone, and sitting in an appropriate place in the room. These needs were determined through observation. (NT 177-178 S-2 at 2).
38. The Student, in terms of hearing support needs, required and received the least amount of service deliverable. This translated into hearing, maintenance, and self-advocacy in regard to the Student's hearing devices. (NT 182).
39. The Student received all hearing support services called for in the IEP. (NT 184) S-1 at 30-39).
40. The Student was not eligible for speech and language services for the period from July 30, 2005 to the beginning of school because [Student] did not meet the IU criteria for services. The IU, however, provided services, beginning February 2005 out of courtesy to the Parents and the [redacted] School though [Student] did not meet the criteria. No IEP was created for this service. Instead, a Student Therapy Plan (STP) was developed. (NT 205-206, 20-7, 213, S-1 at 16-19).
41. The Student was provided speech/language diagnostics through the 3rd week of October 2004. After that, until the first week of January [Student] was not seen until a replacement had been found for the Student's therapist. (NT 214, P-7).
42. The [redacted] School coordinator sent a letter to parents on 12/3/04 informing them that Speech and Language Services would be discontinued until January 10, 2005. A new speech and language therapist started work in January 2005 but remained for only 3 or 4 weeks. (NT 215, P-7).
43. A new speech/language therapist announced her presence to the Parents on February 2, 2005. Services, however did not resume until the end of the month. (NT 217, P-9).
44. By the end of the 2004-2005 the Student met [Student's] speech and language goals. The IU was no longer required to deliver services or to render a NOREP. If the District had been providing the services for the Student it would have been required to submit a NOREP to the Parents prior to the termination of services. (NT 219-220, 235).
45. The Student needs for Speech and Language service was the result of "a mild articulation error, a very minor phonological use where [Student] on occasion, not consistently, would drop final consonant sounds." [Student's] articulation difficulty was primarily with th's and the S and Z phonemes. On May 11, 2004, at

- the end of the Student's Early Intervention through [the] IU it was noted that [Student] was demonstrating age-appropriate articulation. (NT 222, S-1 at 41).
46. The Student's 2004-2005 IEP does not indicate a need for or agreement to provide speech and language services. (NT 241, S-2).
 47. At the end of the 2003-2004 school year the Student demonstrated age appropriate articulation. Though the Student's speech discrimination fell to 68% when speech was presented in noise.....through the use of the FM system, the Student was able to correctly discriminate 100% of the words presented in noise. (NT 223, P 25 at 1, S-1 at 41).
 48. The Student's speech and language skills were re-evaluated during 2004-2005 using the Goldman-Fristoe Articulation Test. The test results indicated some sound substitutions for th, for s, and z and occasionally for the initial sound of b. The result indicates a very minor articulation issue that would not make [Student] eligible for Act 89 services because ASHA standards (American Speech and Hearing Association) indicate that the sounds in question would not be expected to be acquired until the Student was 7 or 8 years old. [Student] at this time was [young than those ages]. The Peabody Picture Vocabulary Test was administered with similar results. Cognition and receptive language are within the average range and expressive language is age appropriate. (NT 224-227, 228, 233, S-1 at 9, 45).
 49. The Student's speech and language development based upon The Speech-Ease Screening Inventory administered on September 15, 2005, was appropriate and did not require further testing. The frontal lisp errors on "s" and "z" phonemes are considered age appropriate because of missing teeth during 1st and 2nd grade. The Student was not eligible for Speech and/or Language services. (NT 268, 271-272, 274, 288, S-12 at 16).
 50. The District's Speech Therapist testified that the Student was not affected by "the mild "s" and "z" problem. It did not affect [Student] socially. With the FM system [Student] was a good listener. [Student] comprehended language and...[Student's] communication skills, [Student's] oral communication skills were fine." This was in agreement with the Student's private audiologist. (NT 272, 273).
 51. At the time of the development of the 11/09/05 IEP all, including the Parents were in agreement that the Student's speech should continue to be monitored. Current testing indicates that [Student's] speech remains age-appropriate with average to superior language development in all areas. Evaluation results indicate that the Student is not eligible for Speech and Language services. (NT 274-275, S-12).

52. Based upon the results of The Goldman-Fristoe Test administered on 10/4/04 the Student would not have been found eligible for Speech and Language Services under IDEA. (NT 293, S-1 at 124)).
53. There are no program modifications or specially designed instruction regarding morning announcements, assemblies, and audio/visual support for the Student. (NT 299, 324-325, P-6 at 8, P-18).
54. The “transfer IEP” (P-12) incorporates the County IU IEP (P-6) and was in effect in September 2005. (NT 302-303, 345, P-6, P-12 at 1, P-5).
55. Annual goals A and B in the 11/15/04 IEP do not contain a baseline though specific objectives/ benchmarks are noted. [Redacted]. (NT 303-307, 477, P-6 at 6-7, P 18 at 13-14).
56. The Student has demonstrated learning strengths in the areas of Reading, Mathematics, Problem Solving and Computer Skills [redacted]. (NT 306, 314, 376,406, P 17 at 3, P 20 at 3).
57. [Redacted.]
58. The Parents wrote to the District Supervisor of Special Education on 5/22/2006 requesting student records and indicating that they had concerns regarding [redacted]. The District responded on 5/23/2006 providing the requested documents and inviting contact if additional information was needed. (NT 355, P 22, P23).
59. The Student entered the [redacted] program during first grade in January, 2005 and remains with the same teacher to this day as a second grader. Prior to January 2005 the teacher worked with the Student in a supplemental reading program [redacted]. (NT 372-373).
60. [Redacted.]
61. [Redacted.]
62. [Redacted.]
63. [Redacted.]
64. The Student, based on an evaluation completed on 4/27/06 is able to access the educational environment via the auditory channel using [Student’s] hearing aids and FM system. (NT 501, 507-508, S-8 at 3).
65. April 2006 was the first time that “trouble shooting” was required on the Student’s hearing aids and FM system. Though there was a problem with the FM

- receiver switch it had no impact on the student in class. The same inspection of this equipment was made in September 2006. There was no problem with the hearing aids. The FM system was, however, problematic. A loaner FM system was provided. (NT 504, 509).
66. The Student's word understanding in all conditions, with and without classroom noise was between 96-100%. This understanding was with and without the use of FM system or visual clues. (NT 506, S-8 at 2).
 67. The District IEP team on 9/16/2005 decided to "work off" the IEP dated 11/15/2004 (S-2) and referred to as the "transfer IEP" until November 9, 2005(S-5) when a new IEP was crafted. (NT 527- 528, S-2, S-4, S-5).
 68. The District evaluated the Student as part of the November 2005 process to determine if [Student] had lip reading abilities. This skill is addressed in hearing impaired students to encourage them to watch a speaker for visual, facial, and gestural clues. Such a skill will help hearing impaired students to access their environment when an FM system is not available. No team member, including the Parent objected. (NT 530, 532, S 5 at 11).
 69. Accommodations were made by the Student's teacher for [Student] to sit at the front of the auditorium or near the speaker at group settings. Other students were handed the FM microphone in order to enable the Student to hear properly. The teacher also provided visual reinforcement for the Student by writing on the chalkboard. (NT 595).
 70. The Parent did not voice specific complaints regarding the Students program or progress to the Principal, teacher or school counselor. (NT 554, 559, 591-592, 614-615, 616-618).

Issues

1. Did the School District provide the Student a Free Appropriate Public Education (FAPE) for the 2004-2005 and 2005-2006 school years and if not is the Student entitled to compensatory Education.
2. Is the Student entitled to an independent educational evaluation at public expense?

Discussion and Conclusions at Law

The hearing which required five sessions addressed a variety of issues within the overall question of whether or not the Student received a Free and Appropriate Public Education during [Student's] kindergarten and 1st grade school years. The Parents have asserted that their [child] was denied a FAPE by the District because [Student] did not receive services to which [Student] was entitled. These services included: Hearing Support, Speech and Language instruction, and [redacted]. To remediate this loss of service, they are seeking compensatory education for their son.

In addition, the Parents have requested an Independent Educational Evaluation of their son because of their dissatisfaction with the results of the evaluation provided by the District.

The original hearing requests were filed against three Local Education Authorities [including the] School District. Prior to the first session of the hearing, the School District voluntarily agreed to assume responsibility for the entire matter. The complaints against the two Intermediate Units were withdrawn.

The three major issues, (1) Independent Educational Evaluation, (2) Speech/Language and Hearing Services, and the (3) [redacted] will be addressed in the subsequent discussion.

Independent Educational Evaluation

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 provide to parents, upon request, information about where an independent education evaluation may be obtained, and the agency criteria applicable for independent educational evaluations. A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency. 34 CFR §300.502(a) (1) (2) (b) (1) and can substantiate that the public agency's evaluation is inappropriate.

[Redacted.]

The District's psychologist had spoken to the audiologist (NT 472) prior to the assessment to determine whether any adaptations needed to be made for the evaluation process. The Student's FM system (NT 473) was used to facilitate [Student's] hearing during the evaluation.

[Redacted.]

The Parents concern was that, though satisfied with the testing protocol, there was dissatisfaction that it was not performed by an independent evaluator [redacted]. (NT-116,118) The Pennsylvania Code has no such provision, only that the psychologist be fully certified and licensed for practice in the State. The District's psychologist met the standard for licensing and credibility. The District's psychologist [redacted] presented as a competent, credible, and licensed professional. The Parents presented no evidence to the contrary.

Insofar as evaluations for the Students services in Speech/Language and Hearing Support this Hearing Officer found that the support teachers and therapists who offered testimony supported by records were credible and reliable in their statements. The record contains multiple references to Speech/Language and Hearing Evaluations (P-4 at 2-4, P-6 at 5, S-1 at 2-17, 19, 40-42, 64-66, 124). There was no evidence that the Evaluations conducted or results shared at meetings were in any way incorrect, faulty, or lacking in accuracy. The evaluations met the criteria stated in IDEA and [redacted] The Pennsylvania Code.

The Hearing Officer is not persuaded that the evaluations conducted by the District are inappropriate. The request by the Parents for an Independent Educational Evaluation at public expense is denied.

Compensatory Education

The Parents have asserted that the Student was denied a Free Appropriate Public Education for the 2004-2005 and 2005-2006 school years. They contend that during the 2004-2005 year the [redacted] IU [programs] failed to provide adequate Speech/Language Services and during 2005-2006 the School District failed to provide adequate [redacted] and special education services (Speech/Language Therapy and Hearing Support).

The Student has been identified as a child with a disability with a diagnosis of Hearing Impairment.

IDEIA defines this as:

§ 300.8 Child with a disability.

(a) General.

(1) *Child with a disability* means a child evaluated in accordance with §§ 300.304 through 300.311 as having mental retardation, a **hearing impairment** (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as "emotional disturbance"), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services.

(2)(i) Subject to paragraph (a) (2) (ii) of this section, if it is determined, through an appropriate evaluation under §§ 300.304 through 300.311, that a child has one of the disabilities identified in paragraph (a) (1) of this section, but only needs a related service and not special education, the child is not a child with a disability under this part. (ii) If, consistent with § 300.39(a)(2), the related service required by the child is considered special education rather than a related service under State standards, the child would be determined to be a child with a disability under paragraph (a)(1) of this section.

(b) *Children aged three through nine experiencing developmental delays.* Child with a disability for children aged three through nine (or any subset of that age range, including ages three through five), may, subject to the conditions described in § 300.111(b), include a child—

(1) Who is experiencing developmental delays, as defined by the State and as measured by appropriate diagnostic instruments and procedures, in one or more of the following areas: Physical development, cognitive development, communication development, social or emotional development, or adaptive development; and (2) Who, by reason thereof, needs special education and related services.

(c) *Definitions of disability terms.* The terms used in this definition of a child with a disability are defined as follows:

(5) Hearing Impairment means an impairment in hearing, whether permanent or fluctuating, that adversely affects a child's educational performance but that is not included under the definition of deafness in this section

[Redacted.]

The Student, therefore, qualifies for a Free Appropriate Public Education (FAPE) and an Individualized Education Program (IEP) as a Hearing Impaired Student [redacted].

The Individuals with Disabilities Education Act (IDEA) requires that states receiving federal funds for education must provide every child with a disability with a free appropriate public education (FAPE). This entitlement is delivered by way of the IEP. A detailed written statement arrived at by the IEP team which summarizes the child's abilities, outlines goals for the child's education and specifies the services the child will receive. Oberti v. Board of Education, 995 F.2d 1204 (3d Cir.1993). A school district's failure to offer an IEP reasonably calculated to enable the child to receive meaningful educational benefit will be deemed a denial of FAPE. Board of Education v. Rowley, 458 U.S. 176, 102 S.Ct... 3034 (1982). Where violations of IDEA procedural safeguards result in the loss of educational opportunity, a denial of FAPE also will be found. W.G. v. Board of Trustees of Target Range School District, 960 F.2d 1479 (9th Cir. 1992); Ben G., Special Education Opinion No. 555 (1992).

A FAPE, as indicated, is delivered by way of an IEP. An appropriate IEP is one that meets the procedural and substantive regulatory requirements and is designed to provide meaningful educational 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)). The IEP must be likely to produce progress, not regression or trivial educational advancement [Board of Educ. v. Diamond, 808 F.2d 987 (3d Cir. 1986)]. The IEP must afford the child with special needs an education that would confer meaningful benefit. Polk v. Central Susquehanna IU #16, 853 F.2d 171, 183 (3rd Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989), citing Diamond, held that “Rowley makes it perfectly clear that the Act requires a plan of instruction under which educational *progress* is likely.” (Emphasis in the original). The Diamond and Polk standard based on meaningful educational benefit is incorporated into state regulations wherein FAPE is defined at 22 Pa. Code §14.1 in part as:

- (iv) individualized to meet the educational or early intervention needs of the student;
- (v) reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress;
- (vi) provided in conformity with an IEP.

[Redacted.]

The Parents have asserted that their son is entitled to compensatory education because [Student] was not provided a FAPE due to a denial of services and the construction of an inappropriate IEP.

Compensatory education is an in-kind remedy designed to provide an eligible student with the services [Student] should have received pursuant to a free appropriate public education (FAPE). When a student has been denied the appropriate educational program that [Student]/she should have received as this student has been, compensatory education is an in-kind remedy. [Lester H. v. Gilhool, 916 F. 2d 865 (3d Cir. 1990), *cert. denied* 499 U.S. 923, 111 S.Ct. 317 (1991)] A child is entitled to compensatory education services if the child is exceptional and in need of special education and related services and if through some action or inaction of the District the child was denied FAPE.

As the Pennsylvania Special Education Appeals Panel held in In Re: the Educational Assignment of Jillian B., Special Education Opinion #981 (1999), compensatory education is designed to remedy failure to provide an appropriate education for a period of time. In addition to Lester H. v. Gilhool, see also Carlisle Area School District v. Scott, 62 F.3d 520 (3d Cir., 1990), Pittsburgh Board of Education v. P.D.E., 581 A.2d. 681 (Pa. Cmwlth, 1990), Johnson v. Lancaster Lebanon Intermediate Unit 13, 757 F.Supp. 606 (ED PA, 1991).

Speech/ Language Therapy and Hearing Support

The Student since [Student’s] enrollment in the District was eligible for speech/language therapy and hearing support. The speech and language instruction started while the

Student was enrolled in early intervention services with the [redacted] Intermediate unit (IU).

The services were delivered and on May 11, 2004 prior to enrollment in the kindergarten, then Student was exited out of direct speech services because [Student] demonstrated age appropriate speech skills. (S-1 at 41-42)

There was no disagreement with this decision and the Student was enrolled in the kindergarten at the [redacted] School for the 2004-2005 school year. (NT 86, 88) An agreement was reached, however, that the Student would receive speech and language services from 7/6/2004 through 7/30/2004 for 30 minutes each week. These services were not delivered. Insofar as these services were not made available to the Student [, Student] is entitled to compensatory education for the three 30 minute sessions missed.

While at [redacted School] the Student received hearing support and speech therapy which was provided as part of a federal program and appeared to consist primarily of audiological testing (P-5 at 1). Services were delivered through a reciprocal agreement with the IU (FF #3).

The IEP, dated 11/15/04 indicated that the Student was being provided Hearing Support through the School District and Speech Therapy through a federally funded program. (P-6 at 5). No mention of Speech/Language Therapy is made under Program Modifications and Specially Designed Instruction (P-6 at 8).

The Student is not eligible for Speech services under IDEA. The Student scored 100% in the subtests administered as part of the Brigance Diagnostic Inventory of Early Development (see FF #6). [Student], as a courtesy and an arrangement with the IU and [redacted] School was provided with 18 sessions of direct speech therapy during the 2004-2005 school year (see FF #40). These services were provided through Act 89.

Act 89 - Auxiliary Services for Nonpublic School Students

Auxiliary services includes guidance, counseling and testing services, psychological services, services for exceptional children, remedial services, speech and hearing services, services for the improvement of the educationally disadvantaged (such as, but not limited to, teaching English as a second language), and other secular, neutral, nonideological services of a supplementary and remedial nature.

These state-funded services are provided directly by the local intermediate unit to students enrolled in a nonprofit private school within the intermediate unit. The school must affirm the eligibility of students and facilitate the delivery of services. **The local intermediate unit makes the final determination regarding what services shall be provided after consulting with the nonpublic school to determine which general categories of children shall receive services, what services shall be provided, how and where the services shall be**

provided and how the services shall be evaluated. These are not services that would carry an individualized entitlement for students but, rather, are provided subject to limitations of funding appropriated annually in the state budget. Services may be provided in the schools which students attend, in mobile instructional units located on the grounds of the students' schools or in other settings mutually agreed upon by the school and intermediate unit (subject to the extent permitted by the Pennsylvania and US constitutions).

Since the Act gives final determination to the IU as to what services will be provided, this Hearing Officer has no power to require the IU to compensate the Student for missed sessions. Nevertheless, [Student] was again evaluated in the fall of 2005 to determine whether or not there was regression and to determine whether [Student] was eligible for speech services. [Student] was again found to be ineligible. (NT-268-269, S-12 at 16-17 see FF #50, 51)

Hearing Support Services are part of the Student's IEP for both the 2004-2005 and 2005-2006 school years. These services consisted primarily of instruction and strategies for the use, care, and maintenance of the Student's assistive devices, i.e. [Student's] hearing aids and FM system. These services according to the testimony and the exhibits were faithfully and diligently provided. There was evidence that the Student was able to care for [Student's] equipment and to assert himself when [Student] required help in a variety of situations. (NT 172-173, 177-178, 182)

The Parent was quite concerned that there were no program modifications or specially designed instruction regarding morning announcements, assemblies, and audio/visual support for the Student (see FF # 53). No evidence was introduced, however that this had an effect on the Student's learning or comprehension of the events taking place. As a matter of dicta, it is most likely that during morning announcements the Student was not totally aware of what was being said by the speaker. These announcements were simultaneously broadcast to all classes in the school. The same announcement heard by a 5th grader was heard by a kindergartner all in the same level of language. Fortunately the teacher testified that she always repeated the announcements in language that her children could understand. The teacher also wore an FM system microphone. (see FF #15)

This Hearing Officer after a review of the testimony and exhibits must conclude that a preponderance of the evidence is weighted toward the District. Speech/Language instruction was not required since the Student had exited the program. The IEPs for 2004-2005 and 2005-2006 were appropriate and reasonably calculated to provide meaningful educational benefit. There was no denial of FAPE in the area of Speech/Language Services or Hearing Support. No compensatory education is due other than for the three 30 minute sessions not delivered during the summer of 2004.

[Redacted.]

Compensatory education will be awarded on the basis of two hours per week for each week in the school year between January 31 and June 2, 2006. Time will be deducted for periods of school holidays and Student absence (one day). The compensatory education is awarded [redacted],

There were 18 weeks during this period, less one week for spring vacation, and another week to allow for other holidays and the Student's absence. A total of 16 weeks at the rate of 2 hours per week for a total of 32 hours is awarded in compensatory education.

In addition, because the promised 90 minutes of speech therapy was not provided during the period from July 6 to July 30, 2004 an additional 1.5 hours of compensatory education is awarded.

Order

It is hereby ordered that:

1. The School District did not deny the Student a Free Appropriate Public Education for the 2004-2005 and 2005-2006 school years.
2. [Redacted.]
3. The Student is awarded 33.5 hours of compensatory education. The compensatory education is to be chosen by the Parent and may include any educational or developmental activity that will aid in the accomplishment of the Student's IEP. The hours may be used after school, on weekends, and during the summer. The District has the right to question the reasonableness of the hourly rate for services which may not exceed the rate normally paid in the area.

December 18, 2006
Date

Max Wald, Ed.D.
Max Wald, Ed.D.
Hearing Officer