

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.

PENNSYLVANIA
SPECIAL EDUCATION HEARING OFFICER

DECISION

DUE PROCESS HEARING

Name of Child: D S
ODR #6837/06-07 AS

Date of Birth: [Redacted]

Date of Hearing: October 10, 2006

OPEN HEARING

Parties to the Hearing:

Parent

Harrisburg School District
2101 North Front Street
Building 2
Harrisburg, Pennsylvania 17103

Date Transcript Received:

Date of Decision:

Hearing Officer:

Representative:

Pro Se

Shawn Lochinger, Esquire
Rhoads and Sinon
One South Market Square
P.O. Box 1146
Harrisburg, Pennsylvania 17108

October 16, 2006

October 30, 2006

Linda M. Valentini, Psy.D.

Background

Student is a twelve-year-old eligible student who, during the time period addressed in this hearing, was classified as having a Specific Learning Disability in Reading. [Redacted] (hereinafter Parent) asked for this hearing because she believes that the Harrisburg School District (hereinafter District) denied Student a free appropriate public education (FAPE) for the last two years. Specifically the Parent asserts that the IEP was not appropriate, and that some elements of the specially designed instruction were not implemented.

Issue

1. Did the Harrisburg School District fail to offer Student a free, appropriate public education during school years 2004-2005 and/or 2005-2006?
2. If the Harrisburg School District did not offer Student a free appropriate public education for school years 2004-2005 and/or 2005-2006 is student due compensatory education, and in what amount?

Findings of Fact

1. Student is a twelve-year-old resident of the Harrisburg School District who is eligible for special education services, being classified as having a Specific Learning Disability. (S-1/ P-10, S-8)^{1, 2}
2. Student received a reevaluation in May 2004 at the end of 4th Grade. On the Wechsler Intelligence Scale for Children – Third Edition (WISC-III)³ Student achieved a Verbal IQ of 102 (Average Range), a Performance IQ of 113 (High Average Range) and a Full Scale IQ of 108 (Average Range). Index Scores were: Verbal Comprehension 107, Perceptual Organization 107, Freedom from Distractibility 84 and Processing Speed 129. (S-1/ P-10)
3. Student was given the Woodcock Johnson III Tests of Achievement (WJ III) in April 2004 with pertinent results as follows expressed in Grade Equivalents: Letter-Word Identification 4.6, Passage Comprehension 6.7. (Standard scores were not reported.) (S-1/P10)

¹ Parent exhibits contained in whole or in part in District exhibits indicated by “/”.

² Certain Parent exhibits were included as “background information” at the end of the hearing at the request of the pro se Parent but were not referenced in testimony and were not relied upon for this decision. These are P-2, P-3, P-4, P-5, P-6, P-7, P-8, P-9, P-19, and P-22. Additionally, there is no Exhibit marked P-25. District Exhibits 9 and 11 were not used and were removed from the record.

³ There was no testimony regarding why the WISC-IV was not used. As of May 2004 the WISC III was outdated, Testing with the newer version of an instrument typically results in slightly lower, but not statistically significantly lower, scores.

4. Student was given the Wechsler Individual Achievement Test – Second Edition (WIAT II) in April 2004 and received the following Standard Scores in pertinent areas: Word Reading 103, Reading Comprehension 99, Pseudoword Decoding 93, Reading Composite 96. (S-1/P10)
5. Based on the “Predicted-Difference Method” (ability/achievement discrepancy) Student’s Reading Composite and Student’s Pseudoword Decoding scores were statistically significantly different from predictions based on Student’s cognitive ability.⁴ (S-1/P10)
6. Results of the Behavior Assessment System for Children (BASC) completed by one of Student’s teachers indicated no areas of clinical significance, and Student scored in the “Average” range in adaptive skills. (S-1/P10)
7. On the Scale for Assessing Emotional Disturbance (SAED) results suggested that Student was “Unlikely” to have an emotional disturbance. (S-1/P10)
8. Student has been diagnosed with Attention Deficit Disorder (ADD) and at the time of the 2004 evaluation was receiving 36 mg of Concerta daily. (S-1/P10, S-2/P-11)
9. Student is not receiving special education under the classification of Other Health Impairment, although Student’s IEPs for 5th and 6th grades addressed issues of focus and organization. (S-1/P10, S-2/P-11, S-3/P-13, P-14, S-4/P-16, S-7)
10. The Teacher Input Form completed for the May 2004 reevaluation noted needs in the areas of motivation and drill/repetition, and weaknesses were noted as copying notes from the board, gaining information from handouts, and gaining information from charts, graphs, etc. The teacher also noted that Student “doesn’t always complete work and has to be coaxed to give”. (S-1/P10)
11. The Parent Input Form noted, “There still seems to be some issues of Student actually ‘getting it’ and it sticking”; “Student still has some deficits in the decoding and phonetic awareness” (which) “has a great impact on Student’s spelling ability”. The Parent also noted math comprehension to be “a little below grade level” and that although Student is “meticulous” when writing, “Student doesn’t like to write for any length of time and frustrates self in the process”. Finally the Parent noted that Student “shuts down when Student hits a certain level of frustration”. (S-1/P10)
12. The finding of the reevaluation was that Student continued to meet the District’s eligibility criteria to be identified as a student with a “Specific Learning Disability

⁴ The Pseudoword decoding score would have affected the Reading Composite score.

- in Reading, Pseudoword Decoding”⁵ and it was recommended that Student “should receive specially designed instruction, i.e. adaptation of content, methodology, and delivery of instruction, to meet Student’s unique needs”. (S-1/P10)
13. An IEP was prepared on May 17, 2004 by an appropriately constituted IEP team. This IEP covered the 2004-2005 academic year (5th grade). The IEP notes, “Student’s disability minimally affects Student’s progress in the general curriculum”. The Needs Assessment statement notes, “Student needs supportive interventions to increase Student’s time on task and clarify academic materials and assignments for Student”. (S-2/P-11)
 14. The May 17, 2004 IEP had one annual goal: Student will improve self-advocacy skills in requesting and receiving assistance and/or clarification in an appropriate manner”. Short term objectives were: requesting assistance and/or clarification from adults and being able to repeat sequential directions to staff. Attainment criteria were 80% level and evaluation was to be by “observation”. (S-2/P-11)
 15. The May 2004 IEP carried no goal/objectives for addressing Student’s identified disability in reading. (S-2/P-11)
 16. A variety of specially designed instruction was offered in the areas of Test Taking/Assignments, Organization/Study, Instructional Levels, Equipment, and Instructional Strategies. (S-2/P11)
 17. Of the specially designed instruction, ‘tests read to student’ was not implemented because Student never requested it and ‘textbooks on tape’ were not provided. (NT 52-53; S-2/P-11)
 18. Student was assigned to itinerant learning support and was to receive all instruction in regular education classes. Student was to see the special education itinerant teacher every other day either in or out of class. (NT 31-32, 67; S-2/P-11)
 19. The learning support teacher testified she “worked with Student off and on in a --- either in a classroom, in the hallway, in passing”. Also, “I worked with Ms. Anderson, Student’s fifth grade teacher, talking about Student’s accommodations, which were for slowing down with Student’s work, doing – repeating –like asking for help when Student didn’t understand it. And – but I did not ---I pulled Student out for testing, but that was about all for fifth grade”. (NT 49-50)
 20. The learning support teacher did not meet with Student on a specific schedule. She “communicated with” Student “approximately once a week, once every other week”. (NT 50)

⁵ Pseudoword decoding is not an area of disability under the IDEIA; it is a subtest of the WIAT II, an individual achievement test.

21. The IEP shows no provision for “adaptation of content, methodology, and delivery of instruction, to meet (Student’s) unique needs” as per the reevaluation report, and testimony from the science teacher and the special education teacher indicated that such adaptation was not provided. (NT 111-127, NT 46-110; S-1/P-10, S-2/P11)
22. In February 2005 Student was administered the WJ III, and the instrument was readministered in May 2005. (S-3/P-13, P-14)
23. It was noted that during the February 2005 administration of the WJ III Student “did not give Student’s best effort. Student gave up very easily.” (NT 58; S-3/P-13, P-14)
24. An IEP was developed by an appropriately constituted IEP team in May 2005 to cover the 2005-2006 school year (6th grade). (S-3/P-13, P-14)
25. For the 2004-2005 school year Student attended the [Redacted] School.⁶ When the [Redacted] School was no longer a program that the District operated, the parents were given a choice of options. Student attended the [Redacted] School for academic year 2005-2006. (NT 36-37)
26. At the time of the May 2005 IEP it was again noted that “Student’s disability minimally affects Student’s progress in the general curriculum. With appropriate adaptations and modifications to Student’s learning styles, Student has and can be quite successful.” (S-3/P-13, P-14)
27. Needs were assessed as taking Student’s time to complete assignments, asking for assistance, repeating directions, and preparation for class. (S-3/P-13, P-14)
28. The May 2005 IEP contained two annual goals: “Student will ask for help on assignments, complete assignments without rushing through them, and repeat directions back to the teacher 9/10 times” and “Student will be prepared for Student’s classes 9/10 times”. (S-3/P-13, P-14)
29. Short term objectives were raising Student’s hand to ask for help as needed on assignments, completing assignments in class without rushing through them, repeating directions back to the teacher for assignments, use an assignment book to write down homework, and be prepared for Student’s classes (bring homework, pencil, paper, books daily). (S-3/P-13, P-14)
30. The May 2005 IEP carried no goal/objectives for addressing Student’s identified disability in reading. (S-3/P-13, P-14)

⁶ It appears that the [Redacted] School may have been a specialized facility of some sort as it was described as being a “small setting”. Student was allowed to remain there for 5th grade even though it was not Student’s home school as the Parent had concerns about the size of the home school. (P-12)

31. The learning support teacher did not provide any specialized instruction in reading to Student during fifth grade. (NT 75)
32. A variety of specially designed instruction was included in the IEP in the areas of general subjects, reading, math, written language, organization, and test-taking/assignment completion. (S-3/P-13, P-14)
33. Following an occupational therapy assessment another appropriately constituted IEP team met in September 2005 and concluded that no occupational therapy services were needed. (S-4/P16, P-15)
34. As occupational therapy services were not going to be provided and Student still resisted/had difficulty with handwriting, the IEP team recommended that an AlphaSmart be given to Student. (NT 42-44; S-4/P-16)
35. The AlphaSmart was never provided to Student. (NT 44-45)
36. During the 2005-2006 school year a Communication Log, specified under the May 2005 IEP as one element of Specially Designed Instruction, was not utilized by the District; it was started but “just stopped”. (NT 63-64, 77-78; P-24)
37. The learning support teacher testified that her services to Student during 6th grade until the February 2006 IEP were basically the same as those during 5th grade. (NT 62)
38. The learning support teacher testified that she did not see Student making improvement on the goals of Student’s IEP from the beginning to the middle of 6th grade. (NT 63)
39. Student’s social studies teacher did not afford Student the specially designed instruction contained in Student’s IEP and after the District tried unsuccessfully to rectify this through meetings with this teacher Student was moved to the resource room for social studies instruction. (NT 135-139; P-17)
40. At the beginning of February 2006 an appropriately constituted IEP team met at the Parent’s request and determined that Student would receive “learning support for direct instruction with spelling” and that “social studies (would) be provided in the learning support classroom. These additions increased the time Student would spend outside the regular education classroom. (NT 64, 146; S-5/P-18)
41. From the beginning of February 2006 to the end of the year the learning support teacher “added some reading, spelling” almost on a daily basis. (NT 65, 80)
42. On or about May 19, 2006 Student stopped attending school following a disciplinary incident. Initially Student was out of school for a ten-day suspension

- and then the Parent chose to keep Student out of school up to and including the last day of the school year, which was on or about June 12, 2006.⁷ (NT 83, 132,
43. The WJ III was readministered in May 2006. (S-9)
 44. The WIAT II was readministered in June 2006 as part of a comprehensive reevaluation. (S-7)
 45. For the June 2006 reevaluation at the end of 6th grade the Woodcock-Johnson III Test of Cognitive Ability was administered with the following standard score results: Verbal Ability 106, Thinking Ability 90, Cognitive Efficiency 111, Auditory Processing 97, Phonemic Awareness 95, Working Memory 101, Broad Attention 114, General Ability Index 99. (S-7)
 46. The June 2006 reevaluation found Student no longer eligible in the area of reading. (NT 159; S-8/P-21)
 47. Despite the fact that pseudoword decoding remains a weakness when Student is tested in this idiosyncratic skill on the WIAT II, Student reads and comprehends what Student reads. Student does not have a problem with phonics per se as demonstrated by Student's average level functioning in other phonics assessments. (NT 161-163)
 48. Based on the totality of testing results it was determined that Student continued to be eligible for special education as a student with a specific learning disability in the areas of math reasoning and written expression. (NT 159-160; S-8/P-21)
 49. It is likely that mathematics did not show up as an area of specific disability previously because Student knows basic processes but has difficulty with more abstract math reasoning. (NT 164)
 50. During the June 2006 evaluation Student found writing very frustrating. Although Student's spelling was fine there was no flow to Student's writing, Student's sentences were very short, Student didn't use any transitions, and Student could not sustain the writing task for the full fifteen minutes, stopping after five minutes. (NT 159-160)

⁷ Although not part of this hearing it is noted for informational purposes alone that Student still has not returned to school and that the Parent intends to, but has not yet, filed papers for home schooling and the District has not initiated truancy proceedings.

51. Pertinent data from three administrations of the WJ III⁸ are as follows:

Area	5/04SS	5/04GE	2/05SS	2/05GE	5/05SS	5/05GE	5/06SS	5/06GE
Le Wd Id	NR	4.6	100	5.2	114	8.0	99	6.1
PassComp	NR	6.7	93	3.8	110	8.9	95	5.2

52. Pertinent data from two administrations of the WIAT II⁹ are as follows:

WIAT II Area	5/04 SS	5/04 GE	6/06 SS	6/06 GE
Word Reading	103	4.8	99	6.8
Reading Comprehension	99	4.2	105	7.2
Pseudoword Decoding	93	2.8	85	2.8
Reading Composite	96	N/R	94	N/R

Credibility of Witnesses

A hearing officer is specifically charged with assessing the credibility of witnesses. As the parties agreed that the District would bear the burden of production, the Parent presented her case through the cross examination of the witnesses presented by the District and through the introduction of documents rather than through calling of witnesses for her case in chief. The Parent's sworn testimony consisted of statements regarding her position regarding the issues rather than a presentation of information for determination of fact. Therefore no credibility determination will be made regarding the Parent. The District presented two witnesses, the former Director of Special Education and the Special Education Facilitator, whose testimony was not particularly helpful as neither had much by the way of direct information to offer. Likewise, the weight given to the School Principal's testimony was limited, as the matters about which he testified were not directly related to the issues of the hearing. The testimony of the Special Education Teacher was credible and given considerable weight. The testimony of the Science Teacher was credible and given weight regarding her own implementation of Student's special education program. This hearing officer found the testimony of the School Psychologist highly credible and gave her testimony considerable weight as to the nature of Student's specific learning disability.

Discussion and Conclusions of Law

Legal Basis

Special education programming and placement issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA"), which took effect on

⁸ Although the DRA was also administered and testimony and exhibits received concerning the DRA, because of its structure this hearing officer finds the instrument not to be probative and therefore has not included the results in this decision. See NT 92-110.

⁹ See previous footnote.

July 1, 2005, and amends the Individuals with Disabilities Education Act (“IDEA”). 20 U.S.C. § 1400 *et seq.* (as amended, 2004).

In November 2005 the U.S. Supreme Court held that, in an administrative hearing, the burden of persuasion for cases brought under the IDEA is properly placed upon the party seeking relief. Schaffer v. Weast, 126 S. Ct. 528, 537 (2005). The Third Circuit addressed this matter as well more recently. L.E. v. Ramsey Board of Education, 435 F.3d 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006). The party bearing the burden of persuasion must prove its case by a preponderance of the evidence. Therefore in this hearing the Parent bore the burden of proving that the District did not offer Student FAPE.

Having been found eligible for special education, Student is entitled by federal law, the Individuals with Disabilities Education Act as reauthorized by Congress December 2004, 20 U.S.C. Section 600 *et seq.* and Pennsylvania Special Education Regulations at 22 PA Code § 14 *et seq.* to receive a free appropriate public education (FAPE). FAPE is defined in part as: individualized to meet the educational or early intervention needs of the student; reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress; provided in conformity with an Individualized Educational Program (IEP).

A student’s special education program must be reasonably calculated to enable the child to receive meaningful educational benefit at the time that it was developed. (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)]. Polk v. Central Susquehanna IU #16, 853 F.2d 171, 183 (3rd Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989), citing Board of Education v. Diamond, 808 F.2d 987 (3rd Cir. 1986) 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 IEP must afford the child with special needs an education that would confer meaningful benefit. Additionally, the court in Polk held that educational benefit “must be gauged in relation to the child’s potential.”

Districts need not provide the optimal level of service, or even a level that would confer additional benefits, since the IEP as required by the IDEA represents only a basic floor of opportunity. Carlisle Area School District v. Scott P., 62 F. 3d at 533-534. What the statute guarantees is an “appropriate” education, “not one that provides everything that might be thought desirable by ‘loving parents.’” Tucker v. Bayshore Union Free School District, 873 F.2d 563, 567 (2d Cir. 1989). If personalized instruction is being provided with sufficient supportive services to permit the student to benefit from the instruction the child is receiving a “free appropriate public education as defined by the Act.” Polk, Rowley. The purpose of the IEP is not to provide the “best” education or maximize the potential of the child. The IEP simply must propose an appropriate education for the child. Fuhrman v. East Hanover Bd. of Educ., 993 F. 2d 1031 (3d Cir. 1993).

The IEP for each child with a disability must include a statement of the child's present levels of educational performance; a statement of measurable annual goals, including benchmarks or short-term objectives, related to meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum and meeting the child's other educational needs that result from the child's disability; a statement of the special education and related services and supplementary aids and services to be provided to 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 the annual goals (and) to be involved and progress in the general curriculum...and to be educated and participate with other children with disabilities and nondisabled children; an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class... CFR §300.347(a)(1) through (4)

An IEP must be crafted in such a manner that, provided it is implemented, there is a reasonable degree of likelihood that the student will make educational progress. However, implementation of an appropriate IEP does not guarantee that the student will make progress.

Discussion

This hearing centered upon whether or not Student was offered FAPE for two academic years, 2004-2005 and 2005-2006. Although information gathered during this hearing raised the question, for this hearing officer at least, as to whether in fact Student should have been classified as having a specific learning disability in reading at the time of the May 2004 reevaluation, neither party challenged this classification for the period from September 2004 through June 2006. Therefore this decision will address Student's special education program from the point of view of what the District thought it knew about his needs during that period and what it did to address those needs.

Examination of the issue in this hearing involves a two-part analysis. The first part of the process for determining whether Student was offered FAPE involves scrutinizing the IEP documents on their face, as they were written, to see if they were appropriate given Student's disability and then to look for evidence of appropriate implementation. The second part of the process is an examination of whether Student made meaningful educational progress in the identified areas of Student's disability, specifically reading and self-advocacy/organization/study skills.

Entering the 2004-2005 school year Student was identified as having a specific learning disability in the area of reading. However, Student's IEP was devoid of goals or objectives addressing this area of disability. (FF 15) The IEP's single goal, promoting self-advocacy, was to be addressed, in part, through contact with the special education teacher every other day. (FF 14, FF 18) Testimony of the special education teacher failed to establish that during 2004-2005 she did much more than see Student in the hallway in passing and consult with the regular education teacher. (FF 19, FF 20) Certain modes of specially designed instruction contained in the IEP were not implemented, specifically 'texts on tape' and having tests read to Student, however the latter was to be implemented

only upon Student's request. (FF 17) This hearing officer finds that the IEP for 2004-2005 was inappropriate in that it lacked goals and objectives addressing reading, and that it was not implemented as written in terms of frequency of contact with the itinerant special education teacher and the provision of textbooks on tape. The contact that the special education teacher did have with Student did not appear to address the need for self-advocacy/organization/study skills that was identified in the IEP.

For the 2005-2006 school year Student continued to be identified as having a specific learning disability in the area of reading. Again Student's IEP was devoid of goals or objectives addressing this area of disability. (FF 29) The IEP's two goals, "ask for help on assignments, complete assignments without rushing through them, and repeat directions back to the teacher 9/10 times" and "be prepared for Student's classes 9/10 times" (FF 27, FF 28) were hardly sufficient for a student identified with a disability in reading and there was no testimony presented by the special education teacher regarding how she worked on these goals with Student. As with the 2004-2005 school year, testimony of the special education teacher failed to establish that during 2005-2006 she did more than see Student in the hallway in passing and consult with the regular education teacher. (FF 36) The learning support teacher, in fact, testified that Student made no progress on Student's 2005-2006 goals up to February 2006 (FF 37) Again, portions of specially designed instruction contained in the IEP were not implemented, specifically maintaining a communication book with the Parent (FF 35) and providing Student with an AlphaSmart (FF 33, FF 34). This hearing officer concludes that the 2005-2006 IEP was inappropriate in that it lacked goals and objectives addressing reading and that it was not implemented in terms of addressing organization /work completion/study skills, maintaining a communication book with the Parent or provision of an AlphaSmart device.

We now turn toward an examination of whether or not Student made meaningful educational progress. The learning support teacher testified, and there was no evidence to the contrary, that Student did not make much if any progress on Student's IEP goals addressing self-advocacy/organization/study skills. (FF 37) This is not surprising given that there appears to have been no special assistance provided to Student in this regard.

Looking at reading, the area of disability under which Student was classified according to the May 2004 reevaluation and under which Student remained classified throughout the period covered by this hearing, presents a somewhat puzzling picture. There is an anomalous set of scores reported for the May 2005 administration of the WJ III that is significantly out of pattern from all other administrations of this same instrument and with all the administrations of the WIAT II. In comparison with WJ III results obtained in May 2004 and February 2005 this score set reflects amazing reading progress in the apparent absence of any specialized reading instruction during the 2004-2005 school year, and in comparison with results obtained in May 2006 reflects an equally amazing subsequent loss of functioning during the 2005-2006 school year.¹⁰ In the face of a lack

¹⁰ It is not at all surprising that this data was partially responsible for leading to the Parent's conclusion that Student had regressed during the 2005-2006 school year (although she did not present the opposite point of view that he had made a great deal of progress during the 2004-2005 school year).

of relevant testimonial or documentary evidence on the record, this hearing officer has concluded on the basis of her professional experience with testing and measurements and on the basis of commonsense reasoning that these scores are erroneous. The source of error could have been mis-scoring, mis-counting, misreading of a scoring table, misunderstanding of scoring procedures and/or mistakes in transfer of scoring data or a mix-up in the records of Student and another student. Therefore these scores are not being taken into consideration, and we turn to the scores that are probative.

First of all, it must be noted that assessments of academic skills reported in terms of grade levels are unreliable indices of achievement and of progress for various reasons, including lack of grade-level curriculum standardization nationwide. When utilizing standardized, well-normed and well-researched instruments significantly more robust evidence of progress or lack thereof is found in an examination of standard scores, taking into account variance factors (standard error of measurement). In fact, Student was administered two reputable instruments, the Woodcock Johnson Tests of Educational Achievement Third Edition (WJ III) and the Wechsler Individual Achievement Test Second Edition (WIAT II), on several occasions and on all but one occasion standard scores were reported.

As expectations for raw score levels increase with the student's age, in order for a student to receive the same standard score range¹¹ on a later administration of the WJ III or the WIAT II as he received on an earlier administration, the student must progress from year to year in order to keep the same place Student formerly occupied in Student's same-aged cohort. Looking at the WIAT II, Student's standard scores in word reading, reading comprehension, and reading composite were all within the same range taking standard error of measurement into account, there being at most only a -4/+4 band of variability between the May 2004 and the June 2006 administrations. (FF 52) Likewise, looking at the February 2005 and the May 2006 administrations of the WJ III, Student's standard scores were all within the same range taking standard error of measurement into account, with there being only a -2/+2 band of variability. (FF 51) These standard score comparisons reflect that Student made progress in reading during the period in question, except in the area of pseudoword decoding, a 'weakness' that the school psychologist credibly testified does not show up at all in Student's actual reading of real words and passages.

However, an IEP is not a performance contract, and just as a child's lack of educational progress does not necessarily render an IEP inappropriate, conversely, a child's progress does not necessarily render an IEP appropriate. A school district has to craft an IEP that offers a program that allows a student the opportunity to derive meaningful educational benefit based on Student's assessed needs. This hearing officer has concluded that Student's IEP was not appropriate as written, and that what was written within the four corners of the documents was not implemented in such a way as to confer meaningful

¹¹ Standard scores may vary somewhat due to factors that are taken into consideration and quantified under the concept of Standard Error of Measurement (SEM).

benefit in the areas addressed by the goals. Therefore, compensatory education will be ordered for lack of provision of FAPE in the areas addressed by the goals of the IEP.

Compensatory education will be fashioned in accord with the court in the recent B.C. v. Penn Manor case which declared, “*we hold that where there is a finding that a student is denied a FAPE and ... an award of compensatory education is appropriate, the student is entitled to an amount of compensatory education reasonably calculated to bring Student to the position that he would have occupied but for the school district's failure*”.¹² This hearing officer finds that Student does not require reading instruction. but does require assistance in study skills, organizational skills and assignment completion. Therefore compensatory education shall be awarded to assist Student in these areas and/or in other areas that arise such as mathematics and written expression.

Thus, taking into consideration a reasonable rectification period of 60 days (2 months) during which the District could have but did not correct itself and produce an appropriate IEP, this hearing officer has determined that Student will be awarded two hours per week during the time periods from November 1, 2004 until June 15, 2005 and from September 1, 2005 to May 19, 2006, exclusive of one week of winter break and one week of spring break for each of the two years for a total of a 4-week exclusion. These hours are to be used to provide the services of a private learning coach/tutor who will meet with Student regularly throughout the current school year (and into the following school year if hours remain), after school or on weekends, and address ongoing study skills, organization of time and materials, quiz/test preparation, project and homework completion, and understanding/clarification of subject matter including mathematics and written expression if needed. The fee for this service may be charged at the usual and customary rate for provision of these services in the geographical area and the total cost of services may not exceed the expenditure in terms of salaries, benefits, and materials that the District would have borne had it provided appropriate special education services to Student to address the goals of Student's IEPs. The compensatory education must not in any way be used to replace that to which Student is entitled as part of a current IEP.

By way of concluding dicta, it is noted that the District and the Parent had previously agreed upon an independent evaluation to be done by Dr. Kay in late October 2006. The results of that evaluation, along with the results of the District's June 2006 evaluation done by the school psychologist whom this hearing officer found highly credible, will be considered in determining Student's special education program and placement for 2006-2007. The parties are urged to complete a new IEP as expeditiously as possible.

¹² B.C. v. Penn Manor School District, A.2d, LEXIS 445 (Pa. Commw. 2006)

Order

It is hereby ordered that the Harrisburg School District take the following action:

1. The Harrisburg School District failed to offer Student a free, appropriate public education during school years 2004-2005 and 2005-2006.
2. As the Harrisburg School District did not offer Student a free appropriate public education for school years 2004-2005 and 2005-2006 Student is due compensatory education as follows:

Two hours per week during the time periods from November 1, 2004 until June 15, 2005 and from September 1, 2005 to May 19, 2006, exclusive of one week of winter break and one week of spring break for each of the two years for a total of a 4-week exclusion. These hours are to be used to provide the services of a private learning coach/tutor who will meet with Student regularly throughout the current school year (and into the following school year if hours remain), after school or on weekends, and address areas including ongoing study skills, organization of time and materials, quiz/test preparation, project and homework completion, and understanding/clarification of subject matter including mathematics and written expression if needed. The fee for this service may be paid at the usual and customary rate for provision of these private services in the geographical area, but the total cost of services may not exceed the total expenditure in terms of salaries, benefits, and materials that the District would have borne had it provided appropriate special education services to Student to address the stated goals of Student's IEPs. The compensatory education must not in any way be used to replace that to which Student is entitled as part of a current IEP.

October 30, 2006

Date

Linda M. Valentini, Psy.D.

Linda M. Valentini, Psy.D.
Hearing Officer