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**Due Process Hearing for GT**

**Date of Birth: xx/xx/xx**

**ODR File Number: 6924-06-07/KE**

**Dates of Hearing: November 2, 2006 December 6, 2006, December 15,  
2006, December 20, 2006**

Parties:

M/M

Palmyra Area School District  
1125 Park Drive  
Palmyra, PA 17078

Date Final Transcript/Exhibits Received:

Date Closing Statements Received/  
Record Closed:

Date of Decision:

Hearing Officer:

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December 28, 2006

January 19, 2007

February 4, 2007

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## **Background**

Student is currently in the fourth grade at the Private School. From kindergarten through the third grade he attended school in the District. At the end of his third grade year, Parent's unilaterally placed Student at the Private School

## **Issues**

Was Student denied FAPE during the 2004-2005 and 2005-2006 school years because the District failed to develop:

- a) program that adequately addressed his ADHD and anxiety issues;
- b) a program that addressed his speech and language deficits in phonological awareness, phonological memory and rapid naming;
- c) A program that addressed his word deficits when speaking;
- d) a program that addressed his dysgraphia;
- e) a program to address his deficits in developing basic reading skills an implement the Wilson reading program;
- f) a program to address his reading comprehension skills.

Was Student denied FAPE because he failed to make appropriate progress in math skills?

Are Parents entitled to reimbursement for the IEE performed by Dr. K?

Did the District deny Student FAPE because he was not provided with ESY during the summer of 2006?

Did the District offer Student an appropriate program placement for the 2006-2007 school year?

If Student was not offered an appropriate program and placement, is Student entitled to tuition reimbursement for his attendance at the Private School as well as transportation?

### **Findings of Fact**

1. Student is currently xx years of age and in the fourth grade at the Private School.
2. Student attended kindergarten through third grade in the Palmyra Area School District, "District".

### **2004-2005 school year**

3. During the 2004-2005 school year, Student was a second grader in the District. (P-1)
4. At the beginning of his second grade year, Student was referred to the instructional support team, "IST" because of concerns related to attention and focus and academics. (P-1, SD-5, N.T. 387, 406)
5. The District's IST is designed to address difficulties a student may be encountering in the classroom and involves the compilation of data and series of meeting to develop a responsive strategy, if necessary. (N.T. 384)
6. As part of the IST process, a teacher interview was conducted, two observations of Student occurred, the nurse and others involved provided feedback and two curriculum based assessments were administered. (SD-5.5, N.T. 404)
7. On October 15, 2004, Student began receiving assistance from the IST in the form of a peer helper for writing support, a speech language screening, small group reading instruction, a peer tutor and a two-folder system for organization. (P-1, p.9)
8. On November 24, 2004, the IST concluded that the writing peer was not helpful; Student's reading level was progressing, the peer tutor

- and organizational system were working and that the speech screen revealed no concerns. (P-1., p.11)
9. In the IST progress review report of November 24, 2004, Student was credited with a reading level of 16. (P-6, p.11, SD-15.1 )
  10. After the November IST meeting, the team recommended that the interventions continue but that Student be exited from the IST. (P-1, p. 11, SD-5.5)
  11. In February 2005, Parents requested an evaluation of Student. (P-31, p.1, SD-6.2, SD-7-1, N.T. 156-157)
  12. The District completed the evaluation of Student on May 20, 2005. (SD-11, N.T. 717-720)
  13. As part of the evaluative process, the District administered the WISC IV, WCJ III, SORT-R, a curriculum based reading assessment, the VMI and reviewed Student's written work. (P-3)
  14. On the WISC IV, Student was credited with an IQ score of 93 based on his verbal comprehension score of 102, perceptual reasoning score of 96, working memory score of 91 and his processing speed of 85. (P-3, p. 6)
  15. On the WCJ-III, Student was credited with the following percentile scores: letter-word- 93, reading fluency-97, calculation-91, math fluency-76, spelling-86, passage comprehension-93, applied problems-102, writing samples-103. (P-3, p. 6)
  16. On the SORT-R, Student received a standard score in the average range of 96. (P-3, p.7)
  17. On a curriculum based assessment of a second grade reading passage, Student received a score of 69 correct words per minute for an accuracy of 98.6% and a comprehension score of 83%. (P-3, p.8)
  18. On the VMI, Student received a standard score of 96 which was interpreted to be consistent with his IQ score. (P-3, p.8)

19. Based on the evaluation results, the team concluded that Student did not meet the criteria to be identified as a child with a learning disability and recommended that his educational needs could be met in the regular education environment with accommodations pursuant to a section 504 service agreement. (P-3, p.11, p.13, N.T. 720)
20. In March 2005, as a second grader, Student had a DRA reading level of 18 or a beginning to early second grade level. (SD-15.1)
21. On May 20, 2005, Parents approved the recommendation finding Student ineligible for special education and recommending a section 504 service agreement. (P-3, SD-10, 727-728)
22. The section 504 plan proposed accommodations for Student's difficulties in focusing and attention and for writing. (N.T. 727-728)
23. On June 7, 2005, Student's physician wrote to the District identifying him as having ADD and suggesting a 504 plan. (SD-12, p.4)
24. Student's reading, spelling and writing progress report for first grade indicate that his skill development ranged from "developing" to "consistent". (SD-1.2)
25. Student's progress report for first grade in math ranged from consistent in understanding basic math facts to developing in problem solving. (SD-1.2)

### **2005-2006 School Year**

26. During the 2005-2006 school year, Student was a third grader in the District. (SD-
27. Student began the school year with a section 504 service agreement in place. (N.T. 302-303, 728)
28. From the beginning of the school year, Student had trouble paying attention, staying focused and was restless. (N.T. 303, 305, 358-359)
29. On September 14, 2005, a 504 conference occurred and Student's writing difficulties were discussed. (P-4, SD-12, N.T. 729)

30. On September 21, 2005, Parent consented to a second evaluation of Student. (P-5, p.2, SD-13)
31. On October 27, 2005, the MDT completed its evaluation report. (SD-15, N.T. 731)
32. As part of the evaluative process, the District reviewed its results from the May 2005 testing and administered the TOWL-III and a developmental spelling test. (P-6)
33. On the TOWL-III, the District reported Student's scores as in the average range with evident spelling problems. (P-6, p.6, N.T. 732)
34. On the developmental spelling test, Student demonstrated a "semi-phonetic" developmental level suggesting to the District that he has a basic understanding of letter-sound relationships. (P-6, p-7)
35. Based on the evaluation results, the team concluded that Student's writing revealed signs consistent with dysgraphia and recommended that he be identified as a student with a learning disability in written expression. (P-6, p. 8, N.T. 732)
36. On November 8, 2005, Student received a level 30 score on the DRA. (P-15, p.4)
37. On November 15, 2005, the IEP team convened to discuss programming for the remainder of Student's third grade year. (P-8, SD-17, N.T. 323)
38. The November IEP summarized Student's present levels of education as reported in the ER and noted his needs related to written expression, spelling skills and organization. (P-8, p. 5-6)
39. The November IEP contained three goals designed to address Student's spelling and writing needs. (P-8, N.T. 734-735)
40. In the November IEP, Student's spelling goal expected that he would correctly spell five out of six words. (P-8)

41. In the November IEP, Student's writing goals expected that he would write a minimum of three complete sentences with correct punctuation with an 80% score based on the District rubric incorporating correct spelling 90% of the time. (P-8)
42. The November IEP contained suggested modifications and specially designed instruction including the use of lined paper, writing checklists, small group writing instruction, spelling dictionary, graphic organizers, encouragement, decoding strategies, extended time and a peer helper. (P-8, p.13, N.T. 308-313, 520-528)
43. On November 15, 2005, Parent approved the NOREP recommending that Student receive part-time learning support in the resource room for writing. (P-10, p.2, N.T. 516, 735)
44. From mid-November through the rest of the school year, Student received writing and spelling instruction in the resource room. (N.T. 521, 525)
45. For the first marking period in third grade, Student was successful in math but was not reading on a third grade level, needing assistance from an instructional support teacher to read books on a middle-second grade level. (N.T. 307)
46. On or about January 18, 2006, Student's pediatrician informed the District of Student's adverse reaction to medication to manage his ADHD. (SD-19)
47. On January 19, 2006, Dr. K conducted an independent educational evaluation of Student. (P-11)
48. After evaluation, Dr. K suggested that Student demonstrated severe academic underachievement in basic reading, reading comprehension, math reasoning, math calculation, spelling, written expression, oral expression and severe deficits in reading, writing and math fluency. (P-11, p. 29)
49. Based on her IEE, Dr. K concluded that Student should be classified for educational purposes as a disabled student as other

- health impaired, “OHI because of his severe ADHD, with specific learning disabilities and as speech and language impaired. (P-31, p.4)
50. On February 8, 2006, Dr. K supplied the District with her IEE. (P-31, p.4)
  51. On February 24, 2006, the District administered the Wilson Assessment of Decoding and Encoding, (WADE). (P-15, p.4)
  52. On the WADE, Student knew sounds for 79% of the consonants, 33% of the digraphs/trigraphs, 23 % of the vowels and 88% of the welded letters.
  53. On February 27, 2006, the IEP team convened, discussed the IEE and developed an IEP for Student. (P-15, N.T. 736)
  54. In the February IEP, the present levels portion summarized the results of the IEE as well as District conducted reading assessments. (P-15, p. 4-6, N.T. 739)
  55. The February IEP summarized that Student had needs in phonological awareness, phonological memory, rapid naming, visual motor integration, word-finding, clerical speed, short-term auditory, sound-symbol relationships, basic reading, reading comprehension, math reasoning, math calculation, spelling, written expression and oral expression. (P-15, p. 6)
  56. After receiving the IEE, the District added to Student’s IEP, goals designed to address Student’s spelling, writing, decoding, reading fluency and math computation needs. (N.T. 739)
  57. The February IEP proposed a variety of SDI, which was implemented, including lined paper, decoding strategies, oral testing and study guides. (P-15, N.T. 310-314, 549)
  58. The February IEP proposed that Student receive individualized reading instruction in the resource room 45 minutes a day. (P-15)



59. In February, after Dr. K's IEE was received by the District, Student began receiving the Wilson reading program in the resource room. (SD-22, N.T. 527, 532-533)
60. On March 5, 2006, by letter to the District, Parent advised of its dissatisfaction with the February IEP. (P-31, SD-26, SD-27, N.T. 741)
61. On March 6, 2006, the District issued Permission to Evaluate Student's speech-language abilities. (SD-27)
62. On March 21, 2006, Parent consented to the speech-language evaluation of Student. (P-16, p. 2)
63. On March 21, 2006, the IEP team convened and developed an IEP with six goals designed to address Student's encoding, writing fluency, reading, reading fluency, math computation and reading comprehension needs. (P-17, pp. 11-15, SD- 29)
64. On March 29, 2006, Parent signed the NOREP recommending resource, learning support for writing and reading. (P-18, p.2, SD-30)
65. On August 15, 2006, Parent through counsel notified the District of their unilateral placement of Student at the Private School School. (P-31, p. 10)
66. During the 2005-2006 school year, Student's homework load was adjusted after Parent expressed concerns to the teacher about anxiety. (N.T. 341)
67. During the 2005-2006 school year, Student went to the nurse for headaches and stomachaches on a regular basis. (N.T. 330-331, 375)
68. To assist with organization, Student along with his classmates used different color folders for each subject. (N.T. 374)
69. While the Wilson reading program was in place, Student did make reading progress. (N.T. 537-538)

## **2006-2007 School Year**

70. For the current 2006-2007 school year, Student attends the Private School. (SD-34)
71. By letter of September 6, 2006, Parents requested a due process hearing. (SD-34)
72. On September 22, 2006, the District issued its report with results from the speech/language evaluation. (P-21, SD-38)
73. On the CELF-3, an assessment of receptive and expressive language skills, Student received a total language score of 84 placing him just below the average range of 85-115 for overall abilities. (P-21, p. 3)
74. On the EOWPVT, an assessment of expressive language, Student received a standard score of 105 placing him in the average range. (P-21, p. 3)
75. On the LPT-3, an assessment of auditory comprehension, Student received scores ranging from the low average to average range. (P-21, p.4)
76. Although the evaluator concluded that Student's language processing skills were within the average range, the team concluded that Student was eligible for special education as a child with a speech or language impairment. (P-21, p.4)
77. On August 15, 2006, Parents through counsel advised that Student had been unilaterally placed at a private school and informed the District of their intention to seek public reimbursement for that placement. (P-31, p.11)
78. On September 22, 2006, the District through a NOREP proposed that Student be identified as speech/language impaired and recommended that he receive speech/language support to address his phonological awareness, auditory memory and word retrieval skills. (SD-39)

## **Discussion and Conclusions of Law**

The IDEA requires that states provide a “free appropriate public education” “FAPE” to all students who qualify for special education services. 20 U.S.C. §1412. In Board of Education of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982), the U.S. Supreme Court held that this requirement is met by providing personalized instruction and support services to permit the child to benefit educationally from the instruction, providing the procedures set forth in the Act are followed. The *Rowley* standard is only met when a child's program provides him or her with more than a trivial or *de minimus* educational benefit. Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3<sup>rd</sup> Cir. 1988). 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). School districts are not required to provide the optimal level of services. Carlisle Area School District v. Scott P., supra. However, a program that confers only trivial or minimal benefit is not appropriate. Polk.

The appropriateness of the IEP is judged based on information known at the time it is drafted. Fuhrman v. East Hanover Board of Education, 993 F.2d 1031 (3d Cir. 1993). Under the IDEA and its implementing regulations, an IEP for a child with a disability must include present levels of educational performance, measurable annual goals, appropriate objective criteria by which it may be determined on at least an annual basis whether short term objectives are being achieved, and the specially designed instruction which will be provided. 34 C.F.R. §300.347. Of utmost import, the IEP must be responsive to the child’s identified educational needs. §300.346.

A student may be denied FAPE when a procedural violation results in the loss of educational opportunity or benefits, or seriously infringes upon the parents’ opportunity to meaningfully participate in the IEP process. W.G. Board of Trustees of Target Range School District No. 23, 18 IDELR 1019, 960F. 2d 1479 (9<sup>th</sup> Cir. 1992). Pursuant to because Schaffer v. Weast, 126 S. Ct. 528 (2005), the Parent bears the burden of proof in this due process proceeding.

## **2004-2005 School Year**

Student entered the 2004-2005 school year as a second grader in the District. (FF.3 ) Early in the school year, he was referred to the Instructional Support Team, “IST” for concerns related to attention and inability to stay focused and engaged in class. (FF. 4-5) The IST process remained in place for most of the school year ultimately resulting in a section 504 plan. (FF. 5) Parents contend that during this school year, Student was denied FAPE because the District conducted evaluations were inadequate and that Student’s needs related to ADHD, writing, anxiety, reading and speech although evident went largely unaddressed.

Student was initially referred to the IST because his “ADD was affecting academics” and because he “[could not] stay focused on class work – not even in [a] small group setting”. (FF. 4) Parents responded to these concerns trying unsuccessfully various medications to address their son’s ADHD. (FF. 5.) The District response was a referral to the IST. (FF.4, 46)

Student began receiving assistance from the IST fairly early in the school year. (FF. 4-6 ) Under the action plan, Student was to receive assistance in the form of a peer helper for writing support, small group reading instruction, a peer tutor and a two-folder system for organization. (FF. 7 ) Student also underwent a speech language screening. (FF. 7) About a month later, the IST concluded that the writing peer was not helpful; Student’s reading level was progressing and that the peer tutor and organizational system were working. The speech screening revealed no concerns. (FF. 8) As a result of these findings, the team recommended that the interventions continue but that Student be exited from the IST. (FF.9-10) Parent agreed with this recommendation. Student’s academic performance throughout his second grade year reveals a Student that appears to be achieving in all academic subject areas in school but at home is consumed with stress and anxiety. (FF.11 ) Based on the evidence presented, the Parents have not established that FAPE was denied their son during this period of time. Parents concerns, when brought to the District, were addressed through the IST process. The District at this point had no reasonable basis to conclude that a higher level of intervention was warranted or necessary.

In February 2005, Parents requested an evaluation of Student. (FF.11 ) That evaluation was completed on May 20, 2005. (FF.12-18) Although the team concluded that Student did not meet the criteria to be identified as eligible for special education, a 504 service plan was put into place. (FF. 19, 21-23) Again the District's actions were appropriate. Based on the information known at the time, Student was not in need of special education. Indeed his reading, writing and math levels appeared commensurate with his abilities. (FF. 20, 24-25) The District testing was sufficient in scope and legally compliant with all requirements, Parents have not presented any convincing evidence that the implementation of the IST services and later 504 somehow denied Student FAPE. Parents did not present the testimony of the second grade teacher and most of testimony from Parent centered on Student's home based anxieties. While these behaviors were undoubtedly worrisome and the source of a great deal of concern, no nexus was established through Parents case that Student's anxieties and purported physical manifestations were related to the educational program provided by the District. This conclusion in no way is intended to minimize or diminish any suffering the Student may have experienced.

With respect to his reading abilities, Student demonstrated progress in this area throughout the school year. (FF. 24-25) Similarly in writing, Student appeared to make consistent improvement requiring no special education intervention. (FF. 25) The only area of continued need was in the area of attention and writing believed to result from Student's diagnosis of ADHD. To respond to this need, the District's provision of a 504 plan was entirely appropriate. At this juncture, Student was in the middle of his second grade year. Although his teacher evinced concerns about his attention to task, some of the strategies employed through the IST appeared to address this issue. (FF. 24-25) As a result, the District's response with the IST, the evaluation that determined no eligibility and ultimately the 504 plan were appropriate. No denial of FAPE occurred during the 2004-2005 school year.

### **2005-2006 school year**

During the 2005-2006 school year, Student was in the third grade. (FF. 26) Student began the school year with a section 504 service agreement in place and by the end of the school year, three different IEPs were developed. (FF. 27) From the beginning of the school year, Student had

trouble paying attention, staying focused and was reported to be restless. (FF. 28, 45) After a 504 conference, Parent consented to a second evaluation of Student. (FF. 30) As part of the evaluative process, the District reviewed its results from the May 2005 evaluation, administered the TOWL-III as well as a developmental spelling test. (FF. 31-34) Although his performance on the TOWL-III was in the average range, the team, nevertheless concluded that Student's writing revealed signs consistent with dysgraphia and recommended that he be identified as a student with a learning disability in written expression. (FF. 35 ) An IEP was subsequently developed and a NOREP issued recommending that Student receive part-time learning support in the resource room for writing. (FF. 37) Parents agreed with this determination. (FF. 43)

Parents contend that the IEPs in place during the 2005-2006 school year were not appropriate because the present educational levels were not adequate, the goals were vague and the specially designed instruction was not individualized. Additionally, Parents seek reimbursement for the IEE they obtained, compensatory education for extended school year services, (ESY) as well as reimbursement for their unilateral placement of Student at a private school.

### **November 2005-March 2006**

In November 2005, the team convened to develop an IEP based on the ER results. (FF. 37 ) The November IEP summarized Student's present levels of education as reported in the ER and noted his needs relative to written expression, spelling and organization. As a result an IEP was developed that contained three goals designed to address Student's spelling and writing needs. (FF. 38-42 ) Parent's chief complaint with respect to the November IEP is that present levels as reported are deficient and that the accompanying goals were vague.

### **Spelling**

Under the present levels section of the IEP, Student's performance on both the TOWL III and a developmental spelling test resulted in creation of the spelling goal. (FF.39) Although he demonstrated average performance on the TOWL III multiple spelling errors were evident. (FF.33 ) This concern along with his performance on the developmental spelling test led the team to conclude that Student was one grade level behind in this area.

(FF. 38) Contrary to Parent's assertions, the information stated in the present levels section was clear and served to provide an adequate starting point for development of the spelling goals.

Under the IEP, Student was expected to spell five out of six words correctly. (FF. 40) Although the grade level of the spelling words to be administered to Student was not specified, this omission did not serve to impede implementation of this IEP. (FF.44) Furthermore, Student's spelling levels indicate a "basic understanding of letter-sound relationships" and clearly noted that one year's worth of progress was sought.

### **Writing**

In writing, under the present levels, Student's average performance on the TOWL-III was recounted along with the conclusion that his handwriting/printing weaknesses appear "consistent with signs of dysgraphia". (FF. 35 ) As a writing goal, Student was expected to write a minimum of three sentences with correct punctuation and receive an 80% on the District's writing rubric. (FF. 39 ) A second writing/spelling goal expected Student to write three complete sentences with 90% correct spelling. These goals like the spelling goal were developed as a result of Student's performance on the District assessments. They clearly delineate what Student is expected to do and how his performance will be measured. Overall, they are reasonably related to the writing and spelling needs identified in the evaluation report.

As written, the spelling and language goals provide a reasonable expectation of achievement within a twelve-month period. The goals contain the conditions under which the behavior is to be performed and clearly define the behavior, and the performance criteria desired. Furthermore, a direct relationship between the annual goals and the present levels of performance exists. From a technical standpoint, the law and regulations are clear as to the elements that must be present. The present levels and goals in the November 2005 IEP satisfy those requirements.

### **Program**

The November IEP was implemented after Parents approved the NOREP. (FF. 43-44) Consistent with the IEP, several program modifications

and methods of specially designed instruction were put into place for both the regular education and resource room environments. (FF. 42 ) These strategies were designed to assist Student with is organizational, spelling and writing needs. After the IEP was put into place, Student participated in regular education for all subjects except for writing where he was instructed in the resource room. (FF. 44 ) The modifications put into place included lined paper, graphic organizers, small group instruction for writing, redirection and help with decoding strategies. (FF.42 ) Parents contend that SDI accompanying the November IEP were not sufficiently individual to Student nor provided on a consistent basis. The evidence in this case reveals that Student’s third grade teachers employed the SDI as delineated in the IEP. (FF. 57 ) She sat Student in the front row, repeated directions, encouraged the use of lined paper, allowed a great deal of movement and provided a variety of strategies designed to encourage the development of his handwriting, spelling and attention needs. (FF. 42, 68 ) Although the SDI incorporated teaching practices from which others may benefit, this does not mean and Parents have not established that they were not developed specifically to address Student’s unique needs. Based on the evidence presented, both the 504 plan and subsequent IEP afforded meaningful educational opportunity to Student. No denial of FAPE up until this point has occurred.

### **IEE Reimbursement**

In January 2006, Student was evaluated by Dr. K. (FF. 47-50) Parents seek reimbursement for that testing.

Under the implementing regulations that govern the provision of special education, a Parent is entitled to reimbursement for a privately obtained evaluation in certain circumstances, as follows:

(b) Parent right to evaluation at public expense.

(1) 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.

(2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either—



(i) Initiate a hearing under §300.507 to show that its evaluation is appropriate; or

(ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing under §300.507 that the evaluation obtained by the parent did not meet agency criteria.

(3) 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 educational evaluation, but not at public expense.

(4) If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the explanation by the parent may not be required and the public agency may not unreasonably delay either providing the independent educational evaluation at public expense or initiating a due process hearing to defend the public evaluation.

34 C.F.R. 300.502

Consistent with the above regulations, a four part analysis to determine whether a Parent can be reimbursed for an IEE follows. Those grounds are: 1) Whether the Parent expressed disagreement with the evaluation provided by the District; 2) Did the District, without unnecessary delay, initiate due process proceedings to determine the appropriateness of its evaluation; 3) Is the District's evaluation appropriate; 4) Is the Parent's IEE appropriate ?

Parent sought an independent evaluation but provided no evidence under the first prong that they advised the District of their dissatisfaction with the testing District conducted testing. Although one could infer that by seeking an independent evaluation, dissatisfaction is evident, the regulations require an "expression" of that dissatisfaction. This IEE played a crucial role in the development of subsequent programming. The testing and data were cited and relied upon by the District in full recognition of Student's needs. However, Parent's case was devoid of testimony or documentary evidence that their dissatisfaction was communicated to the District. As a result, reimbursement of the IEE cannot occur. An analysis of the other requirements for reimbursement is unnecessary.

## **February/March IEP**

After receiving the information from the IEE, the IEP team convened to revise Student's IEP. (FF. 47) . In this IEP Student's needs were dramatically expanded to include most math and reading abilities. (FF. 55 ) Much of this information was based on selective portions of the IEE but also through the District's testing. (FF. 47, 51-53 ) In four months, Student went from being recognized as a child requiring only minimal academic assistance to a student needing extensive, reading, math and emotional intervention. This IEP now spanned five goals designed to address Student's spelling, writing, decoding, reading fluency and math computation weaknesses. The SDI accompanying the goals was also expanded. (FF. 53-58) Parents rejected this IEP. (FF. 60)

On March 21, 2006, the IEP team again convened. (FF.63) At this meeting, Parents consented to a speech language assessment. (FF. 61-62 ) This meeting resulted in an IEP with six goals an accompanying SDI designed to address Student's encoding, writing fluency, reading fluency, math computation and reading comprehension needs. (FF. 63) Parents agreed to the implementation of this IEP and it remained in place for the remainder of the school year. (FF. 64) This IEP also constitutes the basis for the current offer by the District for educational programming for the 2006-2007 school year.

Parents contend that the IEP in place since March 2006 is flawed because the present levels of education are incomplete, the goals are vague and the specially designed instruction does not fully address Student's needs. As a result, they contend, the implementation of this IEP was compromised. Under the present levels section, the District fully summarized its current and past academic and functional findings as well as selective passages of Dr. K's eighty-six page report. (FF. 54-58 ) As written, this section provides adequate information about Student's current educational program and provides a foundation upon which the IEP can be built. The present levels of academic achievement comply with all technical aspects of the law.

The goals in the March IEP address a mixed bag of academic deficits and relate to identified needs stated in the IEP. However, several of those identified needs (rapid naming, visual-motor integration, word-finding when

speaking, clerical speed, auditory memory and oral expression) do not appear to have a correlating goal.<sup>1</sup>(FF. 57, 72-76) Furthermore, the IEP and the IEE information distinctly mention that Student's hyperactivity and distractibility, known traits of ADHD, affect his attention, concentration and educational progress. (FF. 47, 63) Despite this recognition, no IEP goal was proposed to address this issue. The District should have developed goals to address this issue and their omission does constitute a denial of FAPE. Student's needs in the areas of attention and distractibility and failed trials of medicinal intervention were clearly known. Consequently, the District should have developed a goal in February to address this need. Student must be taught the skills of self-regulation, particularly if medical intervention is of no assistance. Although the SDI was helpful, it is not a replacement for an IEP goal. An appropriate award of compensatory education is owed.

With respect to the anxiety and stress reportedly endured by Student, a review of the record including the various correspondence, teacher input and other documentation fails to sufficiently connect the home based emotional issues to a lack of FAPE by the District. (FF. 4, 23,29, 47, 50, 60, 66-67 )

From an implementation standpoint, this IEP did and could continue to afford Student educational progress. This IEP was put in place near the end of Student's third grade year and in place a scant two and half months. (FF. 69) Prior to that time, all parties were operating under the previous IEP, already determined to be appropriate. The IEE conducted in January raises the question of whether the District should have recognized Student's reading and math needs sooner. The District could only know what it knew. Its initial and secondary testing did not yield results that warranted extraordinary concern in either reading or math. (FF. 9, 12, 24, 25, 32, 36)

In March 2005, near the end of Student's second grade year, a DRA indicated Student's reading level to be at an early second grade level. (FF. 20 ) By November of 2005, in his third grade year, Student received a level 30 on the DRA indicating reading ability on the third grade level. (FF. 36) However, by January 2006, Student's reading level according to the IEE, had declined. (FF. 47 ) No math concerns were ever detected by the District. (FF. 15, 25) Based on the information the District had at his disposal, its

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<sup>1</sup> The District's conclusions from the speech-language evaluation determining Student's language processing skills as within the average range but declaring him eligible for special education would have undoubtedly resulted in goals had this matter not gone to due process. The evaluation results were not available until after Parents requested this hearing. (FF. 61, 78 )

response was appropriate. After the results of the IEE were made known, the IEP team immediately convened and revised Student's IEP two different times to incorporate the findings and recommendations from the IEE. (FF. 53, 63 ) Based on the testimony presented, Student's reading and math functioning, before the IEE, although inconsistent could hardly be characterized as raising any "red flags". In the teacher input provided for the IEE, reading was described as "on grade level" with the majority of academic concerns related to Student's writing and spelling.(FF. 47) In providing their input for the IEE, Student teachers overwhelmingly described behavioral concerns related to attention, disorganization and distraction. (FF. 47) Certainly a District cannot be charged with acting upon information it did not have. Overall the District acted prudently and responsively in acting upon the information it received. Based on the evidence presented, Parents did not meet their burden of establishing that Student was universally denied FAPE during the 2005-2006 school year.

### **ESY 2006**

Parents contend that Student was denied FAPE because ESY was not provided during the summer of 2006. The purpose of ESY services is to avoid the regression and poor recoupment experienced by some eligible students. If regression during program breaks, and subsequent recoupment makes it "unlikely the student will maintain the skills and behaviors relevant to IEP goals and objectives," then ESY is required, without which, the school year IEP would not provide FAPE. 22 PA Code § 14.132 (2) (iii). No credible testimony or evidence was introduced to support the necessity of the provision of ESY. The only testimony supplied on this point was that Student attended a summer program at parental expense in preparation for his enrollment at the private school he currently attends. In this case, the Parents have failed to establish that the team inappropriately concluded that Student was "not in need of ESY".

### **2006-2007**

Before the start of the 2006-2007 school year, Parents informed the District of Student's placement at a private school. (FF. 70-71, 77) The IEP developed in March 2006 is the same IEP that would be in place for much of this school year. The program and placement proposed by the District for the 2006-2007 school year is appropriate. For the reasons previously stated, the March 2006 IEP, with the exception of the lack of attention goals is

calculated to afford meaningful educational progress to Student. Commensurate with the deprivation, compensatory education will be awarded and an analysis of the propriety of tuition reimbursement need not be undertaken.

### **Compensatory Education**

Compensatory education is the appropriate equitable remedy for a District's failure to provide a free appropriate public education, through a program from which a student can derive "meaningful educational benefit". Board of Education v. Rowley, 458 U.S. 176 (1982). The purpose of compensatory education is to replace lost educational services. See M.C. v. Central Regional Sch. Dist., 81 F.3d 389 (3d Cir. 1996). The period of compensatory education is calculated by finding the period of deprivation, and excluding the time the school district would reasonably require to arrange appropriate services.

In this case, the amount of compensatory education is calculated as follows. Student will be awarded one- half hour for every school day from February 27, 2006 to the last day of the 2005-2006 school year. This compensation is intended to provide reinforcement of strategies to address attention and distractibility not provided by the IEP's in place by the District.

### **ORDER**

AND NOW, this 5<sup>th</sup> day of February 2007.

1. The educational program and placement provided to Student by the District for the 2004-2005 school year was appropriate.
2. The educational program and placement provided during the 2005-2006 school year was appropriate with the exception of goals to address Student needs in the areas of attention, distractibility and focus. Student is awarded one- half hour of compensatory education for every school day from February 27, 2006 to the last day of the 2005-2006 school year. This compensation is intended to provide reinforcement of strategies to address attention and distractibility not provided by the IEP's in place by the District during the 2005-2006 school year.

3. This compensatory education shall not be used in place of services that are contained in any present or future IEP's. The nature of the services shall be decided by the Parent and may include any educational, therapeutic, developmental or vocational services that further the goals of the IEP. The services may be used after school, on weekends, or during the summer, and may be used after the Student reaches 21 years of age. The services may be used hourly or in blocks of hours. The District has the right to challenge the reasonableness of the hourly cost of the services.

By: Joy W. Fleming  
Joy Waters Fleming, Esq.  
Special Education Hearing Officer  
February 5, 2007