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Pennsylvania  
Special Education Hearing Officer

DECISION

IN RE: DUE PROCESS HEARING FOR A STUDENT  
IN THE CENTRAL YORK SCHOOL DISTRICT

Date of Birth: [REDACTED]

Dates of Hearing: 09/30/08, 11/06/08, 12/04/08,  
01/08/09

OPEN HEARING  
ODR No. 9036/08-09 LS

Parties to the Hearing:

Representative:

Parents

Parent Attorney: None

[REDACTED]

School District  
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Date Record Closed:

February 9, 2009

Date of Decision:

February 24, 2009

Hearing Officer:

Anne L. Carroll, Esq.

## **INTRODUCTION AND PROCEDURAL HISTORY**

Student, currently a middle school student in the Central York School District, is eligible for special education services by reason of Other Health Impairment (OHI) and Speech/Language Impairment incident to a medical diagnosis of cerebral palsy. Student resides with, and is in the physical and legal custody of Grandparents, who fulfill the role of “Parents” as that term is defined in the IDEA statute and regulations, and will hereafter be designated and referred to as such. 20 U.S.C. §14, 34 C.F.R. §300.30(a)(4).

Parents contend that Student was denied a free, appropriate, public education (FAPE) during the 2007/2008 school year primarily because of placement in a learning support classroom for all academic subjects. Parents asserted that Student’s 2007/2008 placement constituted a violation of the School District’s obligation to assure that Student received FAPE in the least restrictive environment (LRE) appropriate for Student.

The hearing took place over four sessions between September 30, 2008 and January 8, 2009. In connection with a pre-hearing ruling granting the District’s challenge to the sufficiency of the original complaint, Parents were permitted to submit an amended complaint. In response to the District’s objections prior to convening the first hearing session, Parents were not permitted to raise issues not asserted in the amended complaint, and no evidence was permitted with respect to issues that had previously been adjudicated via a complaint to the Bureau of Special Education.

For the reasons explained in detail herein, I find that the Central York School District violated its LRE obligation during the 2007/2008 school year and will award compensatory education for that violation.

## **ISSUES**

1. Did the Central York School District provide Student with a free, appropriate public education during the 2007/2008 School year?
  - a. Did the Central York School District assure that Student was placed in the least restrictive environment appropriate for Student during the 2007/2008 school year?
  - b. Did Student make meaningful educational progress during the 2007/2008 school year?
  - c. Did Central York School District provide Student with appropriate related services during the 2007/2008 school year?
2. Is Student entitled to compensatory education for the 2007/2008 school year, and if so, in what amount and what form?

## **FINDINGS OF FACT**

1. Student, a [] year old child born on [], is a resident of the Central York School District and eligible for special education services. (N.T. p. 404; P-1, P-40, S-2)
2. Student has a current diagnosis of Other Health Impairment (OHI) and Speech/Language Impairment in accordance with Federal and State special education standards. 34 C.F.R. §300.8(a)(1), (c)(9), (11); 22 Pa. Code §14.102 (2)(ii); (N.T. pp. 46, 403, 404; P-1).
3. Student also has a medical diagnosis of cerebral palsy. Student uses a wheelchair for traveling through the school and needs an aide for personal care. (N.T. pp. 47, 49, 77, 108, 138, 154, 403; P-1, P-36, P-40, P-2, S-2)
4. Student began attending school in the District as a second grade student. From the time Student entered the District until the 2007/2008 school year, 5<sup>th</sup> grade, Student was educated primarily in a regular education classroom, and progressed satisfactorily from grade to grade. By the end of 4<sup>th</sup> grade, Student had met, or was working toward meeting, District standards in all areas. During 3<sup>rd</sup> and 4<sup>th</sup> grades, Student received support for math from an instructional support teacher for 1½ hours during each six day academic cycle. (N.T. pp. 22, 92, 363; P-1, P-2)
5. At the end of 4<sup>th</sup> grade, Student's Parents and aunt expressed concern that Student was not doing as well as possible in academic classes. Student's teachers noted that Student struggled with learning and retaining concepts in all subject areas, was below average in reading, writing and math skills, and required significant assistance to accomplish academic tasks successfully. (N.T. pp. 82, 363, 364396; P-1, p. 3; P-41; S-2)

6. A re-evaluation of Student, including a review of records, was conducted by the District's school psychologist in August 2007. Intelligence assessments placed Student in the below average range for verbal and non-verbal intelligence. Memory assessments which measured Student's ability to encode, store and recall verbal and pictorial information were in the average range of functioning. The WIAT-II assessment of academic achievement placed Student's achievement in reading at the low average to average range for reading and non-word reading skills, but at the high average range for comprehension. In math, Student was in the high average range for computation skills, but in the borderline range for math reasoning skills. Student's writing was in the low average range. (N.T. pp. 29—33, 395—397, 400, 402; P-1, P-2, S-2)
7. The school psychologist noted that Student is motivated to do well, demonstrates progress with one to one assistance, has strong social interaction skills with both peers and adults, and that Student's peers were very helpful and kind. Recommendations based upon the re-evaluation results included more intensive small group or one to one instruction to address focus, concentration and inconsistent academic performance, continued monitoring by regular and special education teachers to assure that interventions and accommodations implemented as a result of the evaluation address identified difficulties. The school psychologist considered learning support the best setting for providing such additional services. (N.T. pp. 35—37, 44, 45, 401, 407, 408; P-1)
8. In a survey form completed prior to the August 2007 re-evaluation, Student's Parents requested learning support services, and continued to request such services at IEP team meetings in August and October 2007. Parents and the District believed that Student would benefit academically from learning support services. Parents thought Student would make better progress with additional time and support for tests and completing assignments, which was their understanding of the basis for adding learning support services. (N.T. pp. 44, 401; P-2, P-41; S-2)
9. Student had surgery during the summer of 2007, and recovery continued during much of the first quarter of the 2007/2008 school year. Student returned to school in 5<sup>th</sup> grade on October 22, 2007. (N.T. pp. 54, 303, 318, 319, 373; P-2)
10. The NOREP Parents approved for the 2007/2008 school year specified that Student needed learning support services for academic subjects and would receive "resource learning support services." (N.T. pp. 418, 419; S-1<sup>1</sup>)
11. The final 2007/2008 IEP provides that Student would receive all academic subjects in the special education classroom and would participate in homeroom, lunch and specials with 5<sup>th</sup> grade peers in a regular education setting. The time division listed on the October 9, 2007 IEP was 22 hours/week (68% of the time) in a learning support setting, leaving 10.5 hours/week (32% of the time) for inclusion in a regular education setting. (N.T. pp. 66, 89, 90, 91, 420, 421, 433, 434; P-2)

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<sup>1</sup> Parent identified the same document as "P-3" but did not provide a copy to include in the record. (N.T. p. 270)

12. With Parents' participation and approval, Student's IEP team had changed school-based occupational therapy from direct service to a consultative model at the beginning of 4<sup>th</sup> grade in order to reduce the class time Student missed to receive related services. (N.T. pp. 245, 270, 279, 280, 296—298, 304, 305; P-2)
13. Although Student's 2007/2008 IEP provided for consultative physical therapy services, direct as well as consultative services began in December 2007, when a new physical therapist took over and learned from the classroom teacher and Student's personal assistant that Student had experienced some regression in physical skills after surgery in the summer of 2007. During 5<sup>th</sup> grade, the amount of time Student was able to stand increased and the level of assistance Student needed decreased. Parents recognized and appreciated the progress Student made, particularly with respect to standing. (N.T. pp. 311—314, 318, 323—329; P-2, , P-25<sup>2</sup>)
14. Parents were dissatisfied with the OT and PT services Student received during the 2007/2008 school year because there were no goals listed for the consultative services to permit Parents to monitor Student's progress with respect to those related services. (N.T. pp. 389—391 )
15. The District reported that Student was making good academic progress throughout the 2007/2008 school year. A District math assessment given at the beginning of 6<sup>th</sup> grade indicated that Student was "partially proficient" on 5<sup>th</sup> grade math skills, with a score of 11 out of a possible 38 points. On the 5<sup>th</sup> grade PSSA test, Student scored "Below Basic" on the reading and math sections. Student's writing score was at the "Basic" level. (N.T. pp. 120, 121, 422--429; P-1, P-6, P-13, P-14, P-16, P-17, P-29)
16. In May 2008, Parents filed a complaint with the Pennsylvania Department of Education (PDE), Bureau of Special Education (BSE), which investigated and awarded Student 56 hours of compensatory education for being transported home before the school day ended during the 2007/2008 school year. BSE also concluded that the District was in compliance with federal requirements to provide Student with an IEP that included measurable annual goals and specially designed instruction. BSE further concluded that the District was in compliance with the requirements for reporting progress toward the annual goals in Student's IEP. (N.T. pp. 432, 433; S-5)
17. Student has been receiving academic instruction in regular education classes during the 2008/2009 school year, with a one to one personal assistant, who also scribes for Student, small group instruction, itinerant learning support services, accommodations such as chunking of material, extra time for completing work and adaptations such as a special chair and larger paper. Most of the time, Student takes tests and quizzes in the learning

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<sup>2</sup> During the School District's examination of Student's physical therapist for the 2007/2008 school year, extensive testimony was elicited concerning P-25, Student's physical therapy progress report compiled by the physical therapist during the second half of the 2007/2008 school year, after she began providing services to Student in December 2007. Neither party, however, offered the report for admission into the record. Accordingly, I have admitted the document, *nunc pro tunc*.

support classroom. Student is making good academic progress, but still not reading at grade level. (N.T. pp. 105—112, 115, 117, 122, 129, 130, 137, 138, 140, 143—151, 153, 154, 156, 161, 164, 165, 170, 172, 174, 181, 182; P-7, P-40)

## **DISCUSSION AND CONCLUSIONS OF LAW**

Over the course of the due process hearing in this case, Parents sought to establish a number of deficiencies in Student’s special education services for the 2007/2008 school year, and sought to raise their “concerns” about the current IEP. (N.T. pp. 107, 108) As noted in the statement of issues to be heard, which was placed on the record at the beginning of the first hearing session, the only issue for hearing and decision, however, was whether Student received an appropriate special education program during 5<sup>th</sup> grade, the 2007/2008 school year. (N.T. p. 14)

Within that framework, Parents focused the evidence at the hearing on four aspects of Student’s program/placement during the 2007/2008 school year: 1) whether Student was placed in an unnecessarily restrictive setting for academics; 2) whether Student regressed instead of making meaningful educational progress in 5<sup>th</sup> grade, specifically in reading and math; 3) the appropriateness of Student’s OT, PT and speech/language related services; 4) the adequacy of progress monitoring during the 2007/2008 school year.

As noted by the District, Parents bear the burden of proof in this case, since they initiated the challenge to the District’s 2007/2008 IEP. *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005). In *Schaffer*, the Supreme Court established the principle that in IDEA due process hearings, as in other civil cases, the party seeking relief bears the burden of proof. *See also, L.E. v. Ramsey Board of Education*, 435 F.3<sup>rd</sup> 384 (3d Cir. 2006).

A. Appropriateness of 2007/2008 IEP

1. Legal Standards

Under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400, *et seq.*, and in accordance with 22 Pa. Code §14 and 34 C.F.R. §300.300, a child with a disability is entitled to receive a free appropriate public education (FAPE) from the responsible local educational agency (LEA) in accordance with an appropriate IEP, *i.e.*, one that is “reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress.” *Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982). “Meaningful benefit” means that an eligible child’s program affords him or her the opportunity for “significant learning.” *Ridgewood Board of Education v. N.E.*, 172 F.3d 238 (3<sup>RD</sup> Cir. 1999). Consequently, in order to properly provide FAPE, the child’s IEP must specify educational instruction designed to meet his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. *Rowley; Oberti v. Board of Education*, 995 F.2d 1204 (3<sup>rd</sup> Cir. 1993). An eligible student is denied FAPE if his/her program is not likely to produce progress, or if the program affords the child only a “trivial” or “*de minimis*” educational benefit. *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F. 2d 171 (3<sup>rd</sup> Cir. 1988).

In addition, the IDEA statute and regulations provide that an eligible child is entitled to be educated in the “least restrictive environment” (LRE) appropriate for the student, *i.e.*, one in which the student is, to the maximum extent appropriate, educated with children who are not disabled. 34 C.F.R. §300.114(a)(2)(i). In order for a proposed placement to meet LRE requirements, school districts must, at a minimum, assure that placement decisions are “made by a group of persons, including the parents and other persons knowledgeable about the child, the

meaning of the evaluation data, and the placement options” §300.116(a)(1); are “determined at least annually” §300.116(b)(1); are “based upon the child’s IEP” §300.116(b)(2). In addition, unless an eligible child “requires some other arrangement, the child [must be] educated in the school he or she would attend if not disabled.” §300.116(c).

The United States Court of Appeals for the Third Circuit provided additional guidance for applying LRE requirements in *Oberti v. Board of Education*. In accordance with *Oberti*, the first step in evaluating a program and placement to determine whether it meets LRE criteria is an assessment of whether the student can be educated satisfactorily in the regular classroom with supplementary aids and services. *Greenwood v. Wissahickon School District*, 571 F.Supp.2d 654 (E.D. Pa. 2008). In making that determination, a school district is required to consider the full range of aids and services available, with the goal of placing the student with a disability in the regular classroom as much as possible. Consideration must also be given to the unique benefits that a student with a disability will derive from placement in a regular classroom, and those benefits must be compared to the benefits likely to be derived from a more segregated setting. Finally, the district must determine whether there are likely to be any negative effects upon the education of the other children from placement of a particular student with a disability in the regular classroom.

If education outside of the regular classroom for all or part of the school day is found necessary, the proposed placement must be evaluated to determine whether it provides for contact with non-disabled peers to the greatest extent appropriate. In *Oberti*, the court noted that the continuum of placements mandated by the IDEA statute and regulations is designed to assure that a school district does not take an “all or nothing” approach to the placement of a student with a disability, but considers using a range of placement options to assure that the unique needs



of each child are met. A school district's obligation to place an eligible student in the least restrictive environment does not diminish its responsibility to educate an eligible student appropriately. *L.E. v. Ramsey Board of Education*, 435 F.3d at 390.

2. Was Student placed in the least restrictive environment (LRE) appropriate for Student during the 2007/2008 school year?

It is undisputed that the District provided all of Student's academic instruction in a segregated learning support classroom for the entire 2007/2008 school year. (F.F. 10, 11) Parents' contention that such placement violated Student's right to FAPE in the least restrictive environment was the centerpiece of their claim in this case. See Closing Statements for Student N., Parents' written argument submitted on February 9, 2009. By contrast, the District made no direct reference to the LRE issue, focusing instead on whether Student received a meaningful educational benefit during 5<sup>th</sup> grade in terms of academic progress only. See Post Hearing Brief for the Central York School District. As the Court of Appeals for the Third Circuit noted in *L.E. v. Ramsey Board of Education*, however, determining whether an eligible child has received FAPE is not the same as determining whether the LRE requirement has been met:

Appellants are correct that whether an education is "appropriate" for purposes of the FAPE analysis and whether a student has been integrated "to the maximum extent appropriate" are distinct questions.

435 F.3d at 393.

In this case, there was no evidence submitted by the District suggesting that Student needed to spend 68% of the time at school in a segregated setting, outside of the regular classroom in order to make meaningful educational progress. It is true that concerns about Student's problems with attention, focus and fatigue were noted in the re-evaluation that immediately preceded the 2007/2008 school year, (P-1 at pp.1—3; F.F.7), and both the school psychologist and the 4<sup>th</sup> grade teacher believed that Student would benefit from learning support.

(P-1 at p.3). Parents also expressed concerns about Student’s academic progress in 4<sup>th</sup> grade, and believed that Student could be more successful with learning support. (F.F. 8) There was, however, no testimony from any District witness which provided any explanation, much less justification, for taking Student out of the regular education classroom for instruction in all academic subject areas every day. The school psychologist testified that she made no recommendation for any particular level of learning support services for Student. (N.T. pp. 35, 408) There was also no testimony concerning consideration of additional supports that might have been added to Student’s program, or other, less restrictive alternatives on the continuum of placements which the District is required to provide, including resource room instruction in conjunction with regular education classes. 34 C.F.R. §300.38, 300.115. The record, in fact, was entirely devoid of any evidence that could possibly justify providing Student with all academic instruction in a learning support setting for 5<sup>th</sup> grade. In response to Parents’ contention throughout the due process hearing sessions that Student did not need to be removed from the regular education classroom for all academic instruction, the District needed to present some reasonable explanation for providing all of Student’s academic instruction in a segregated setting during the 5<sup>th</sup> grade year.<sup>3</sup>

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<sup>3</sup> In *L.E. v. Ramsey Board of Education*, the Court of Appeals for the Third Circuit explicitly extended the *Schaffer* burden of proof analysis to a parental challenge to an IEP based upon an LRE violation. 435 F.3d at 392. It is, however, somewhat challenging to determine how allocating the burden of proof to parents with respect to an LRE violation works in practice, when both the IDEA regulations and controlling case law place an affirmative duty on districts to assure that an eligible child is not removed from the regular education environment unless, and only to extent, necessary. In *Oberti*, the Third Circuit described the IDEA LRE requirements as a “presumption” in favor of educating an eligible child with non-disabled peers. 995 F.2d at 1214. Moreover, in *L.E. v. Ramsey Board of Education*, the administrative hearing and district court decisions were rendered when school districts had the burden of proof, and those decisions were affirmed on that basis. In addition, the court analyzed and credited the evidence presented by the district with respect to the need for the student in that case to be educated outside of a regular classroom environment. It is likely, therefore, that the *L.E.* decision is not the last word on this issue.

In *Moore v. Kulicke & Soffa Industries, Inc.*, 318 F.3d 561 (3rd Cir. 2003), the court discussed the role of presumptions in a burden of proof analysis, concluding that when the party with the ultimate burden of proof successfully raises a presumption under the governing law, the burden of production shifts to the opposing party to come forward with some evidence to rebut the presumption. Failing that, the party with the burden of proof prevails

On the other hand, there was ample evidence that Student could have been successfully educated in the regular education classroom with additional supports and services. Student had been placed in regular education classes from the time Student entered the District until the 5<sup>th</sup> grade school year and is again placed primarily in regular education classes for the current school year, where Student is largely meeting District assessment standards with the use of supplementary aids and services. (F.F. 17) Moreover, there is no evidence that Student's academic progress was any better in the much more restrictive learning support setting during the 2007/2008 school year than it was either prior to the 2007/2008 school year or during the current year.

Although the District referred to the LRE issue in its closing argument only briefly and indirectly, the District appeared to base its defense to this aspect of the claim upon Parents' request for learning support (S-2), Parents' approval of the NOREP which provided for resource room learning support for the 2007/2008 school year (S-1) and the October 9, 2007 IEP, which noted that all academic instruction would be provided in the learning support classroom, with Student spending 68% of the time in that setting.<sup>4</sup> (P-2; F.F. 10, 11) Although the 2007/2008 IEP (P-2) contradicted Parents' expressed belief that they did not expect the learning support offered by the District for 5<sup>th</sup> grade to result in removing Student from the regular education classroom for all academic instruction, it is reasonable to infer from their questions to witnesses, as well as their own testimony, that Parents, who are not professional educators, either did not carefully read the October 9, 2007 IEP or misunderstood it. Student's aunt, *e.g.*, testified that she

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on that issue. In the absence of more specific guidance from the courts with respect to the LRE analysis following *Schaffer*, and noting that the Supreme Court specifically allocated only the burden of persuasion, which remains with parents, I am adopting and applying the *Moore* analysis with respect to the LRE issue in this case.

<sup>4</sup> The District also noted that Parents "did not take the District to due process over Student's placement or the NOREP." Post Hearing Brief for the Central York School District at 5, 15. That, of course, is inaccurate. Parents' complaint and the due process hearing concerned the 2007/2008 IEP/NOREP and Student's placement in particular. There is no requirement that Parents file a due process complaint immediately after an allegedly inappropriate program and placement was offered.

no longer lives with the family and did not begin questioning Student's 5<sup>th</sup> grade program until the spring of 2008. (N.T. pp. 74—76, 79) It is not surprising that Parents would rely upon a common sense understanding of the term “learning support” as additional supports for learning, including some time out of the regular education environment for extra academic help in a smaller class setting, without fully understanding that Student would have no opportunity for academic instruction in a regular classroom. The term “resource” as a type of special education placement is described in the Pennsylvania special education regulations in effect for the 2007/2008 school year as “regular classroom instruction for most of the school day.” 22 Pa. Code §14.141 (P-5). I found Parents' position that they did not realize Student would spend most of the school day in a separate learning support classroom credible. Moreover, even if Parents had completely understood and fully accepted the District's learning support proposal at the time it was offered, that does not, by itself, lead to the conclusion that the District's program was in fact, appropriate, or that the District did not violate its LRE obligations to Student.

In the absence of any evidence that the District considered, much less applied the *Oberti* factors in determining that Student should be placed in a learning support setting for all academic instruction, and in light of the evidence that Student was successfully educated in a far less restrictive environment before the 2007/2008 school year, and has been successfully returned to primarily regular education classes for the current school year, I conclude that the District failed to provide Student with FAPE in the least restrictive environment appropriate for Student during the 2007/2008 school year, and will award compensatory education for the District's violation of its LRE obligations to Student.

2. Did Student make Meaningful Educational Progress During the 2007/2008 School Year?

To the extent that Parents continue to assert that Student either regressed or failed to make appropriate educational progress during the 2007/2008 school year, which is not entirely clear from Parents' written closing argument, I conclude that Parents failed to meet their burden of proof on that issue. Although there was no evidence that Student made better progress in a more restricted setting than in other school years, there was also no evidence that Student failed to make reasonable and meaningful progress. Parents' limited, anecdotal comments concerning Student's lack of academic progress during the 2007/2008 school year did not overcome the evidence of academic progress found in documents that Parents offered into evidence, along with the District's testimony that Student's reading and math skills improved. (F.F. 15) Moreover, although there was relatively little evidence concerning Student's progress in other areas of the curriculum, it was Parents' burden to produce evidence supporting their claims of little progress or actual regression. There was no suggestion that the District failed or refused to make Student's 5<sup>th</sup> grade learning support teacher or personal aide available to testify at the hearing had Parents wanted to call those witnesses to testify concerning Student's academic progress in 5<sup>th</sup> grade—or absence of progress. Finally, there was considerable uncontradicted evidence that Student is experiencing academic success in regular education classes during the current school year. (F.F. 17) As the District pointed out, it is unlikely that Student would be keeping up with typical peers in regular education classes during this school year had Student made *de minimis* progress or regressed academically during the previous school year. Post Hearing Brief for the Central York School District at 14, 15.

3. Was Student Denied Appropriate Related Services During the 2007/2008 School Year ?

It is likewise not entirely clear whether Parents continue to pursue the claims in their amended complaint with respect to occupational therapy, physical therapy and speech/language

therapy, since their closing argument focused almost exclusively on the LRE issue. To the extent Parents continue to seek compensatory education for those components of their broad denial of FAPE claim, they again failed to bear their burden of proving that the District failed to provide appropriate services. There was no evidence that the consultative model for providing occupational therapy services to Student during the 2007/2008 school year did not appropriately meet Student's needs in the school environment, or that the absence of direct OT services adversely affected Student's ability to fully benefit from the special education program.

Although physical therapy was likewise supposed to be provided on a consultative basis, the physical therapist provided direct service to Student when the need arose, and Parents acknowledged that Student benefited from the PT services received during 5<sup>th</sup> grade. (F.F. 13)

Finally, although the District was unable to procure the presence of Student's 5<sup>th</sup> grade speech/language therapist, who was on sick leave throughout the due process hearing sessions, (N.T. pp. 342—346), Parents could have provided their own testimony concerning the deficiencies they perceived in Student's speech/language services, and were explicitly invited to do so, (N.T. pp. 344--346), but provided no such testimony. Consequently, there was no evidence concerning any alleged deficiencies in Student's speech/language program during the 2007/2008 school year.

## B. Miscellaneous Issues

### 1. Procedural Issues

Parents suggested throughout the due process hearing that the District failed to comply with all IDEA procedural requirements, noting specifically the lack of goals and progress monitoring reports with respect to occupational and physical therapy. (F.F. 14) As the District noted, however, procedural violations alone cannot support a conclusion that FAPE was denied.

Post Hearing Brief for the Central York School District at 16, 17. In order support a violation which may be redressed with compensatory education, procedural lapses must have a significant adverse impact on an eligible child's right to receive FAPE, or on a parent's ability to participate meaningfully in the special education process, or must amount to a denial of educational benefit. 34 C.F.R. §300.513(a). There was no evidence in this case that any of the foregoing criteria were met. Parents merely expressed dissatisfaction with their inability to monitor Student's OT/PT services to the extent they would like to do so.

2. §504/ADA Discrimination

In their Closing Statement, (pp. 3, 4, 7) Parents suggested for the first time that placing Student in learning support for all academic instruction during the 2007/2008 school year violated Student's rights under §504 of the Rehabilitation Act and/or the Americans with Disabilities Act, and was "racially and religiously charged." None of those issues were raised in the amended complaint and were not identified as hearing issues. Moreover, there was no suggestion during the due process hearing sessions that the District engaged in conduct that had the purpose or effect of discriminating against Student on any basis. That suggestion by Parents, therefore, was not considered.

C. Compensatory Education

An eligible student whose right to FAPE has been denied is entitled to correction of that situation through an award of compensatory education for a period equal to the deprivation and measured from the time that the school district knew or should have known of its failure to provide FAPE. *M.C. v. Central Regional School District*, 81 F.3d 389 (3<sup>rd</sup> Cir. 1996). This case, however, where the claim for deprivation of FAPE arises from the District's failure to fulfill its LRE obligation to place Student in regular education classes to the greatest extent possible, does

not easily lend itself to the usual computation of a compensatory education award. Although it is difficult to precisely identify and quantify the educational benefits lost due to placement in an educational environment much more restrictive than necessary to permit Student to derive meaningful benefit from the educational program provided, Student cannot be left without an adequate remedy for a substantial deprivation of an important right under IDEA.

The first step in determining an appropriate amount of compensatory education is to determine the deprivation period. Here, there is no doubt that the District should have known from the beginning of the 2007/2008 school year that Student did not need to receive all academic instruction in a segregated setting, since nothing in the District's own reevaluation report suggests that such a restrictive setting was necessary for Student to make meaningful progress. As discussed above, there is also no evidence in the record that the District considered whether Student's needs could be met in a less restrictive setting. Under the applicable law, particularly *Oberti*, the District had no basis for using Parents' request for "learning support" or the school psychologist's conclusion that Student would benefit from learning support (P-1) to remove Student from the regular classroom for all academic instruction.

On the other hand, however, both Parents and the school psychologist did identify a need for extra support to improve Student's academic performance, including time spent in a separate classroom. Despite an unfortunate lack of evidence with respect to how much time in a learning support setting would have been appropriate for Student, it is necessary to make a reasonable estimate based upon Student's needs identified in the 2007 re-evaluation report (P-1) and taking into consideration that Student missed almost the entire first quarter of the 2007/2008 school year due to Student's recovery from surgery. (F.F. 9) In the absence of direct evidence of any other rationale, I conclude that it is reasonable to infer that the amount of time in the learning



support and regular education classrooms would have been appropriately reversed. In other words, Student should have spent 32% of each week in the learning support setting and 68% in a regular education setting. Since Student spent 32% of Student's time in regular education classes during the 2007/2008 school year, Student will be awarded compensatory education roughly equal to 36% of the hours spent in school each week, *i.e.*, the difference between 68% and 32%. Converted to hours/week, Student is entitled to 11.7 hours of compensatory education each week, based upon 32.5 hours in school each week, or approximately 1.8 hours/day, which will be rounded to 2 hours/day. *See* P-2 at p. 21.

Compensatory education, however, will be awarded only for the days Student actually attended school, since Student could not have lost the opportunity to interact with non-disabled peers if Student was not in school. Accordingly, the compensatory education award will begin on October 22, 2007 and continue until the last day of the 2007/2008 school year, with days that school was closed or that Student missed, deducted from the compensatory education hours. In addition, since Student was awarded 56 hours of compensatory education by the Pennsylvania Department of Education/Bureau of Special Education (F.F.16) based on loss of instructional time, those hours will also be deducted from the compensatory education award.

A monetary value will be placed on the compensatory education award because it is not possible to determine specific services that would adequately compensate Student for losses arising from a violation of the District's LRE obligation. It is particularly challenging to fashion an appropriate award of compensatory education in kind under the circumstances presented by this case.

Parents may choose how the compensatory education fund created by the decision and order in this case will be used in accordance with the parameters set forth in the order which follows.

The cost of specific services/products and the length of time over which services or products may be provided, as well as the specific services and/or equipment/products which Parents may choose as compensatory education are, of course, circumscribed by the monetary limits placed on the compensatory education award. Translating the number of compensatory education hours to dollars is intended to allow for balancing the value of fewer, more expensive services or products against a greater number of less expensive compensatory services/hours and/or products. In other words, the choices permitted are broad but costs cannot exceed the value of the compensatory education fund, calculated as described below.

The monetary value of the compensatory education award will be measured by the average and proportional hourly cost of a 5<sup>th</sup> grade regular education teacher in the District during the 2007/2008 school year, including salary and fringe benefits. (Average hourly compensation of a regular education 5<sup>th</sup> grade teacher during the 2007/2008 school year divided by the average number of students in 5<sup>th</sup> grade classes in 2007/2008 school year multiplied by the number of compensatory education hours).

### **CONCLUSION**

Because Central York School District placed Student in a more restrictive setting than necessary for Student to make meaningful educational progress during the 2007/2008 school year, Student was denied a free appropriate education during that school year. Student will be awarded compensatory education for that violation in accordance with the order which follows.

Parents did not successfully bear their burden of proving that Student did not otherwise receive a meaningful educational benefit from Student's special education program during the 2007/2008 school year, or that the District committed procedural violations amounting to a denial of FAPE, denial of Parents' meaningful participation in decision-making with respect to the provision of FAPE to Student, or denial of educational benefit to Student.

### **ORDER**

In accordance with the foregoing findings of fact and conclusions of law, the Central York School District is hereby **ORDERED** to take the following action:

Except as described below, provide Student with compensatory education equal to two hours for each day Student attended school during the 2007/2008 school year.

It is **FURTHER ORDERED** that:

1. The compensatory education hours shall be calculated beginning on October 22, 2007, the date Student returned to school to begin the 2007/2008 school year.
2. No compensatory education hours shall be provided for any day that school was not in session or any day that Student was absent from school for the entire day;
3. The 56 hours of compensatory education awarded by the Bureau of Special Education in its June 11, 2008 adjudication in response to Parents' complaint to the Pennsylvania Department of Education shall be deducted from the compensatory education hours awarded in this order.
4. The compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product or device that furthers the goals of Student's current or future IEPs and/or will otherwise assist Student in overcoming the effects of Student's disabilities, including physical/orthopedic impairment, speech/language impairment and OHI. The compensatory education shall be in addition to, and shall not be used to supplant, educational services and/or products/devices that should appropriately be provided to Student by the School District through current and future IEPs to assure meaningful educational progress. Compensatory education services may occur after school hours, on weekends and/or during the summer months when convenient for Student and Parents. The compensatory education fund created by this provision may be used at any time from the present to Student's 21<sup>st</sup> birthday.

5. The monetary value of the compensatory education award will be measured by the average and proportional hourly cost of a 5<sup>th</sup> grade regular education teacher in the District during the 2007/2008 school year, including salary and fringe benefits. (Average hourly compensation of a regular education 5<sup>th</sup> grade teacher during the 2007/2008 school year ÷ average number of students in 5<sup>th</sup> grade classes in 2007/2008 school year x number of compensatory education hours)
6. Parents may decide how compensatory education fund is spent in accordance with ¶ 4, above.

Anne L. Carroll

Anne L. Carroll, Esq.  
HEARING OFFICER

February 24, 2009