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PENNSYLVANIA
SPECIAL EDUCATION HEARING OFFICER

DECISION
DUE PROCESS HEARING

Name of Child: Student
ODR #9610/08-09 LS

Date of Birth: xx/xx/xx

Dates of Hearing:
July 28, 2009
July 29, 2009
November 18, 2009
December 1/ 2009

CLOSED HEARING

Parties to the Hearing:

Representative:

Wallingford-Swarthmore School District
101 Plush Mill Road
Wallingford, Pennsylvania 19086

M. Shannon Moore, Esquire
Gallagher, Schoenfeld, Surkin,
Chupein & DeMis, P.C.
25 West Second Street
Media, Pennsylvania 19063

Timothy Gilbach, Esquire
Fox Rothschild, LLP
10 Sentry Parkway, Suite 200
Blue Bell, Pennsylvania 19422

Last Transcript Received:

December 8, 2009

Record Closed

January 6, 2010

Date of Decision:

January 21, 2010

Hearing Officer:

Deborah G. DeLauro, M.Ed, J.D.

Background

Student is a teen-aged, 11th grade student who resides in the Wallingford-Swarthmore School District. In second grade, Student was found eligible for special education services as a student with a Specific Learning Disability in the areas of Reading, Writing and Math.

Contending that the District failed to provide Student with a free appropriate public education, Parent filed a due process complaint seeking an intensive research-based reading program and compensatory education for the second half of the 2006-2007 school year, the 2007-2008 school year, and first half of the 2008-2009 school year. Parent also seeks compensatory education for the 2007 and 2008 Extended School Years. Additionally, Parent's requested relief includes a District-funded independent educational evaluation.

The due process hearing was held on July 28, 2009, July 29, 2009¹, November 18, 2009 and December 1, 2009. For the reasons explained below, the Parent has met her burden by a preponderance of the evidence.

Therefore, based upon the record compiled during the four hearing sessions and the arguments of counsel, Student will be awarded compensatory education for a the second half of the 2006-2007 school year, the 2008-2009 school year and the first half of the 2008-2009 school year. Student is not entitled to compensatory education for the 2007 and 2008 extended school years. The District will fund a comprehensive independent evaluation which will include recommendations for appropriate research-based reading programs.

Issues

1. Whether the District failed to provide a free appropriate public education (FAPE) to Student from January 14, 2007 to January 14, 2009?
2. Whether the District failed to provide Student with a FAPE during the 2007 and 2008 Extended School Years?
3. Whether Student is entitled to compensatory education; and if so, how much?

¹ Hearing Officer Daniel Myers conducted the first two hearings on July 28, 2009 and July 29, 2009. The next two hearing sessions were conducted by this Hearing Officer on November 18, 2009 and December 1, 2009.

4. Whether Student is entitled to an independent educational evaluation at District expense?

Findings of Fact

1. Student (hereinafter “Student”) is a teen aged 11th grade student in the Wallingford-Swarthmore School District (hereinafter “District”) where Student has been enrolled since kindergarten. [P-44; NT. p.94]²
2. Student’s date of birth is xx/xx/xx.
3. In second grade, Student was identified as an IDEA³-eligible student with learning disabilities in reading, writing and math. (P-43, P-44; N.T. pp. 95-96).
4. The District conducted a Comprehensive Evaluation Report (hereinafter “CER”) on November 3, 2000 which formed the basis of the eligibility determination. Student was given the Weschler Intelligence Scale for Children – Third Edition (hereinafter “WISC III”) and was found to have a Verbal IQ of 91 which is in the Average range; and a Performance IQ of 103 which is also in the Average range. Student’s Full Scale IQ is 96. [P-44]
5. Student achieved the following scores on the Weschler Individual Achievement Test (hereinafter “WIAT”):

Basic Reading	92	Average
Reading Comprehension	78	Borderline
Reading Composite	85	Below Average
Mathematics Reasoning	92	Average
Numerical Operations	87	Below Average
Mathematics Composite	88	Below Average
Spelling	93	Average
Listening Comprehension	92	Average

[P-44]

6. The CER concluded that Student’s cognitive functioning fell within the Average range. Student’s verbal comprehension and nonverbal problem-solving skills fell

² References to “SD” and “P” are to the School District, and Parent exhibits, respectively. References to “N.T.” are to the transcripts of the September 14 and November 24, 2009 hearing sessions conducted in this matter.

³ Individuals with Disabilities Education Act, 20 U.S.C. §1400 et seq. and Chapter 14 of the PA Code.

- within the Average range and appeared to be equally developed. When compared to others Student age, Student's academic achievement in math fell within the Average to Below Average range and is commensurate with Student's cognitive functioning. However, within the area of reading comprehension, Student's performance fell within the Borderline range and was significantly below expected levels given Student's age and ability. Based on this evaluation, Student met the criteria for classification as Learning Disabled. Specifically, Student met the eligibility requirements for specially designed instruction in the area of reading. [P-44]
7. In fourth grade, Speech and Language Impairment was added to Student's IEP⁴ as a related service. The District provided speech and language therapy for 30 minutes weekly. [P-37]
 8. Parent obtained a private Audiometric Evaluation and Central Auditory Processing evaluation dated September 29, 2004 from Crozer Chester Medical Center.[P-33; N.T. pp 96-97]
 9. Ms. A, M.A., CCC/A conducted the evaluation and diagnosed Student with a Central Auditory Processing Disorder (hereinafter "CAPD"). The evaluation included eleven recommendations under the heading "Environmental modifications and classroom strategies;" eight "Remediation strategies"; and five "Compensatory strategies." [P-33, P-46; NT p. 97]
 10. Although Student's diagnosed CAPD was not mentioned or addressed in Student's IEP, the District did implement some of the Audiometric Evaluation's recommendations, including a trial on a FM system. Specifically, Student's 11/12/04 IEP included the following pertinent Specially Designed Instruction (hereinafter "SDI"): "Preferential seating avoiding distractions and near instruction; and "Clarify directions given by providing examples and monitoring that Student begins correctly." [P-32, P-33; NT pp. 98, 102] However, the 11/12/04 also recommended that Student be exited from speech and language therapy. [P-32]
 11. On the PSSA's in both fifth and seventh grades, Student was found to be "Below Basic" in both Reading and Math. [P-29]
 12. In eighth grade, the District conducted a psycho-educational evaluation and issued a re-evaluation report (hereinafter "RR") dated December 21, 2006. [P-29].
 13. Although the RR did not mention Student's CAPD, and Parent ultimately signed the RR in agreement. [P-29, SD-7; NT pp. 168, 224, 263-264]
 14. The December 21, 2006 re-evaluation tested Student's Basic Skills⁵ using the Woodcock-McGrew-Werder Mini Battery of Achievement based on Grade.

⁴ Individual Education Plan.

Student's performance in Basic Skills was comparable to that of the average individual at grade 4.4 from the normative sample. This was within the low range of scores obtained by others at Student grade level, as shown by Student percentile rank of 6 and Student standard score of 77. [P-29]

MEASURE	GE	PR	SS
Basic Skills	4.4	6	77
Reading	5.7	23	89
Writing	3.7	5	76
Math	4.4	2	70
Factual Knowledge	3.5	5	75

15. The District also administered the WISC-IV and the WIAT-II, wherein the Student achieved the following scores:

WISC-IV COMPOSITE	Score	WIAT-II COMPOSITE	Score
Verbal Comprehension Index	93	Reading	90
Perceptual Reasoning Index	88	Mathematics	94
Working Memory Index	86	Written Language	92
Processing Speed Index	106		
Full Scale IQ	89		

16. Student's Subtest scores were notably variable.

Verbal Comprehension Score Summary

Subtest	Raw Score	Scaled Score	Percentile Rank
Similarities	24	9	37
Vocabulary	29	6	9
Comprehension	28	11	63

Perceptual Reasoning Subtest Score Summary

Subtests	Raw Score	Scaled Score	Percentile Rank
Block Design	34	7	16
Picture Concepts	18	9	37
Matrix Reasoning	21	8	25

Working Memory Subtest Score Summary

Subtests	Raw Score	Scales core	Percentile Rank
Digit Span	12	5	5
Letter-Number Sequencing	18	10	50

⁵ In this Battery, "Basic Skills" is the combined measure of reading, writing ad mathematics skills

Processing Speed Subtest Scores Summary

Subtests	Raw Score	Scaled Score	Percentile Rank
Coding	66	12	75
Symbol Search	30	10	50

Summary of WIAT-II Subtest Scores

Subtests	STD	PR	GE	
Word Reading	98	45	7.7	
Reading Comprehension	84	14	4.5	
Pseudo-word Decoding	94	34	4.6	
Numerical Operations	93	32	6.8	
Math Reasoning	98	45	7.5	
Spelling	90	25	5.5	
Written Expression	97	42	7.2	
Listening Comprehension	94	34	6.2	

17. The December 21, 2006 RR included the following pertinent recommendations⁶:

- *Continued tutoring in written expression may be useful to Student to build skills in this area
- *Student is encouraged to use a calculator to check work. Student may require extra time to complete math-related assignments.
- *Student is encouraged to learn a new vocabulary word each day and record this word in a log.
- *Student should set aside time for pleasure reading.
- *Teachers should modify assignments to Student's reading level.
- *Teachers should be encouraged to reduce the number of questions or problems to be completed at one time.
- *Lessons should incorporate visual presentation and class discussion...
- *Student may require extra time to finish assignments in reading.
- *Student may require extra assistance from teachers in reading instructions and test questions.
- *Student may benefit from a tutoring program which emphasizes a context-and meaning related approach to reading.
- *Student may need encouragement to take an active approach to reading for learning....
- *Open communication with Student regarding reading and spelling difficulties is encouraged to assist Student in gaining acceptance and understanding of

⁶ Although some of these recommendations were included as SDIs in the January 4, 2007 IEP, many were not and those which were, were not implemented consistently. [SD-7]

Student's problems, as well as buying into developing ways in which Student can compensate for Student's difficulties.

*Computer programs that focus on vocabulary development, work attack and phonics may be helpful in strengthening Student's reading skills. Programs that identify deficit skill areas and offer a means of monitoring progress are of particular value. Programs that emphasize verbal reasoning and comprehension would also be helpful.

18. On January 4, 2007, the District issued an IEP which included goals in word recognition, reading comprehension, and basic math skills. Although a "Language Arts" goal was included, it does not identify any specific skill, but instead only identifies SDIs to be used in Reading and Writing.⁷ [SD-7] Also included were nine additional SDIs and approval for participation in the extended school year (hereinafter "ESY") to remediate math and reading skills.⁸ [P-21; SD-7]
19. Parent signed a Notice of Recommended Educational Placement (hereinafter "NOREP") agreeing with continued learning support in the learning center. [P-24; NT p. 172]
20. In the Spring of 2007 when Student was in eighth grade, Student achieved the following scores on the PSSA:

Comprehension and Reading Skills: Student earned 10 out of 24 possible points.
 Interpretation and Analysis of Fiction and Non-Fiction: Student got 12 out of 28.
Student's overall performance in Reading was Basic with a score of 1154.

Numbers and Operations: Student got 2 out of 13 possible points.

Measurement: 2 out of 10 possible points.

Geometry: 5 out of 12 points

Algebraic Concepts: 7 out of 18 points

Data Analysis and Probability: 4 out of 13 points.

Student's overall performance in Math was Below Basic with a score of 1067.
 [P-25]

21. The 2007 ESY consisted of eight two hour sessions with one hour for reading and one hour dedicated to math. [NT p. 107] The reading program consisted of a computer program, identified as "Study Island." The District did not provide goals for the ESY and no progress monitoring was undertaken by the District at the conclusion of the ESY program. [NT p. 110, 125]

⁷ "[Student] will use Study Guides/questions, along with books on tape, to help guide and focus reading skills. Student will use a graphic organizer or outline to organize her written work. Student will also schedule a meeting with Student's teacher prior to due dates to review rough drafts and revise, if necessary."

⁸ The ESY was limited to Remedial math skills-small group tutoring: 2 to 3 session per week for up to 8 sessions; and Remedial reading class-individual : 2 to 3 sessions per week for up to 8 sessions"

22. Following the ESY program, Parent requested testing and in December 2007, Ms. Neeson (hereinafter “Ms. N”), a special education teacher and Student’s case manager, administered the Wide Range Achievement Test (hereinafter “WRAT”) and the Gates-McGinitie. Student achieved the following scores and grade levels: [NT pp. 222, 228-229]

WRAT:	Gates-McGinitie
Spelling 4E	Vocabulary: Below 4.6
Math 6E	Reading Comprehension: 4.2

23. Additionally, on December 14, 2007, another reading specialist⁹, Ms. S (hereinafter “Ms. S”) administered an Informal Reading Inventory (hereinafter “IRI”) to assess word recognition and comprehension skills. Student achieved the following scores and grade levels: [P-27]

Word Identification: 5 th grade
Reading Comprehension: 4 th grade
• Narrative Passage: 3 rd grade
• Informational Passage: 4 th grade

24. On December 20, 2007, the IEP team was convened and an IEP was developed. The IEP included goals in the following areas: Reading Comprehension; Vocabulary; Career Awareness; Grammar usage and Use of Study Guides to answer written questions and Math problems. Also included were twelve SDIs¹⁰ and three hours of remedial reading per week. Student was assigned one period a day in the learning center. [P-26]
25. The Present Levels of Achievement indicated that Student’s independent reading level decreased from the 4th grade level in January 2007 to the 3rd and 4th grade level in December 2007. [P-26, P-28; NT p.191]
26. Ms. N testified that Student conducted progress monitoring on the IEP goals and that Student made progress. [NT pp.280-281, 281-283]
27. Parent testified that progress monitoring was inconsistent and was rarely provided to Student contemporaneously with the IEP meeting. [P-28; NT p. 106]

⁹ Parent requested change in reading specialist from Ms Z to Ms. S in October 2008.

¹⁰ Modifications and SDIs: 50% additional time on tests; test questions read to Student; preferential seating; small group/one-on-one reading instruction; review of new material in Learning Center; Frequent and positive reinforcement; books on tape use of calculator when not taking tests; pre-teach vocabulary; provide background knowledge before reading new material; opportunities to practice new concepts; utilize supplemental aides to increase reading comprehension; require Student to use pre and active reading strategies when reading.

28. Mr. K (hereinafter “Mr. K”) was Student’s regular education ninth grade English teacher during the 2007-2008 school year. [NT p. 438] Mr. K co-taught Student’s ninth grade class with a special education teacher. [NT pp. 244, 473]
29. Mr. K testified that he received a copy of one of Student’s IEPs, but he wasn’t sure whether he received a copy of both. [NT pp.447-448]
30. Ms. N testified that she did not [automatically] distribute Student’s IEP to Student’s teachers at the beginning of the school year, instead, she would “make a judgment call” and provide teachers with a summary sheet of Student’s IEP if it was pertinent. [NT p. 276]
31. Mr. K also did not review Student’s RR before providing instruction. [NT pp. 276-277, 448-450]
32. The reading material in Student’s ninth grade English class consisted of: The Odyssey; Inherit the Wind; Lord of the Flies; and Romeo and Juliet. [NT pp. 443-444; 450-451]
33. Mr. K admitted that it would be difficult to teach Romeo and Juliet to a student with a 4th grade reading level, but added that the entire text was read aloud and he provided scaffolding. [NT pp. 451-452]
34. Student failed most of Student’s English tests in ninth grade. [P-23; NT pp. 113-114]
35. Parent testified that she discussed Student’s difficulty with tests and requested that test-taking strategies be added to Student’s IEP. [NT pp. 71, 126, 159]
36. Mr. K stated that in his opinion, Student didn’t take proper notes because Student just didn’t feel like doing it, but he added that he provided Student with responses to questions and he put notes on the board. [NT pp. 454-458]
37. The 2008 ESY, which the District had initially failed to schedule for Student, consisted of a remedial Math program which was designed for students who had previously failed math the semester before, so it also included a final. Parent elected to provide student with private tutoring in reading, but Student did participate in the Math program. [P-21; NT pp. 125, 230-231] Again, there were no goals or progress monitoring for ESY.
38. Parent requested an independent educational evaluation prior to the start of Student’s tenth grade year. District eventually denied Parent’s request. [NT p. 143]

39. On September 5, 2008, Ms. Z, a reading specialist in the high school, (hereinafter “Ms. Z”) administered another **IRI** wherein Student achieved the following scores:

Word Recognition: Independent at 5th grade

Reading Comprehension: Independent at 4th grade with look backs. [P-14]

40. On September 19, 2008, Ms. Z administered the **Woodcock-Johnson III Diagnostic Reading Battery** (hereinafter “WJ III DRB”) and Student earned the following scores:

Letter Word Identification: 4.1

Passage Comprehension: 4.2

Reading Fluency: 7.6

Broad Reading: 5.4

Brief Reading: 4.1

[P-13]

41. Ms. Z testified that Student did not know the meaning of the “Broad Reading” or “Brief Reading” categories when Student administered the test. [P-13; NT p. 200]
42. Ms. Z worked with Student during the Spring and Fall of 2008. [NT p. 186]
43. Ms. Z acknowledged that Student did not review Student’s IEP prior to working with Student. [NT pp. 186-187, 188]
44. Ms. Z was not aware that Student had a CAPD nor did Student know whether Student was in regular or special education prior to working with Student. [NT pp. 188, 193]
45. Ms. Z acknowledged that she missed three tutoring sessions with Student during the Spring of 2008. Ms. Z also testified that she assumed that Student had work to do for Student’s other classes, but she never discussed the reasons for the absences with Student directly. [NT p. 195]
46. Student was scheduled to meet with Ms. Z twice a week for forty minutes a session which Ms. Z believed “was fine for [Student].” Ms. Z acknowledged that Student’s schedule was based on her availability not on Student’s needs. [NT pp. 191-192] Parent requested a change in reading tutor from Ms. Z to Ms. S in October 2008. [NT pp. 149-150]
47. Ms. N acknowledged that Student gets frustrated with difficult work and that when Student’s frustrated, Student sometimes shuts down. Ms. N also agreed with Parent that Student’s frustration sometimes affects Student’s attitude and

- motivation which in turn affects Student's ability to complete work. [NT pp. 120, 231, 242-243]
48. Parent testified that Program modifications identified in Student's IEPs were not implemented with fidelity. [NT pp. 122-124]
49. Eventually, Parent sought private counseling for Student as a result of the emotional toll on Student due to Student's frustration at not understanding some of the materials or being able to complete the work regardless of how hard Student tried. [NT pp. 100, 158]
50. The District failed to address Student's emotional needs in either the 1/4/07 or the 12/20/07 IEPs. [P-26; P-28]
51. Parent requested an intensive research based reading program, and the District offered an additional day of tutoring, following the January 2009 IEP.¹¹ Therefore, Ms. S scheduled Student for tutoring three days a week following the January 2009 IEP meeting.
52. Ms. M¹², a certified reading specialist with seventeen years experience teaching special education, (hereinafter "Ms. M") reviewed Student's records and evaluated Student in January 2009¹³, testified credibly on Parent's behalf and made the following findings:
- *Student still had significant difficulty with decoding and did not read with automaticity. [NT pp. 33, 34]
 - *Student's CAPD impacted Student's ability to read. [NT p. 37]
 - *Student was reading words independently on a fifth grade level, but had a more difficult time when reading "informational" passages compared to "narrative" passages.
 - *Student was able to read independently on a 5th grade level with look-backs.
 - *It would be virtually impossible for a student who comprehends on a 4th grade level to access 10th grade books. [NT pp. 51-52]
53. Ms. M concluded that Student requires an intensive word recognition and word remediation program during the school day, which should be implemented 1:1 and include progress monitoring. [NT pp. 55-56]

¹¹ Parent requested an IEP meeting in August 2008 at the start of the 2008-2009 school year. An IEP meeting was convened for an hour on or about September 22, 2008. The team was scheduled to meet two weeks later but the IEP meeting wasn't scheduled until December 2008 and then had to be re-scheduled due to the death of Ms. N's father. [P-10; NT pp. 143-149]

¹² Ms M who taught learning disabled students, holds a Bachelor's degree in special education, a Master's degree in curriculum instruction with a specialization in reading. She is also a certified reading apprenticeship trainer for West Chester School District where she provides training in reading. [NT pp. 17-19]

¹³ Ms. M administered the Qualitative Reading Inventory-Fourth Edition, (hereinafter "QRI")

54. Parent also presented the expert testimony¹⁴ of Dr. G who conducted a comprehensive document review and issued a report dated July 17, 2009 and an addendum report dated September 20, 2009. [P-2; P-45]
55. Dr. G has extensive experience as a psychologist and as a supervisor in private and public school settings. She has personally evaluated, supervised evaluations and review evaluations of students with learning disabilities. [NT 336] She has also conducted training for teachers, psychologists and faculty in special education. [NT pp. 336-337]
56. Dr. G testified that CAPDs impact the student's ability to read and write. [NT p. 351] She testified further that Student's CAPD was not appropriately addressed by the District from eighth through tenth grade. [NT p. 349]
57. Dr. G stated that Student's CAPD would impact all classes, including content area classes. [NT p. 353] Specifically, as a result of Student's CAPD, Student would have difficulty taking notes and would require visual cues in order to learn in the school environment. [NT p.355]
58. Dr. G opined that an evaluation of the appropriateness of the physical location of the program by an expert or the intermediate unit would have been important in determining the affect of the acoustics on Student's ability to hear and process information. [NT pp. 362-364]
59. Dr. G made the following relevant selective findings:
- *The RR was insufficient because it didn't consider the effect of Student's CAPD
 - *The IEPs were repetitive in nature and failed to provide Student with individual programming, SDIs and modifications based on Student's disabilities. [NT p. 365]
 - *The IEPs did not reflect consideration of any other placement options; other than the Learning Center. [NT p. 365]
 - *Student didn't find evidence of frequent progress monitoring which would be an essential component of an evidence-based program. [NT pp. 366-367]
60. Dr. G opined that Student required an evidence reading program on a daily basis. [NT p. 380]

Discussion and Conclusions of Law

Burden of Proof

¹⁴ Dr. G has been previously qualified as an expert in due process hearing for both Parents and School Districts. [NT p. 338] She was admitted by this Hearing Officer as an expert in the field of psychology.[NT p. 349]

The Parents requested this hearing and therefore they bear the burden of proof. The burden of proof is in two parts: the burden of production (simply, which party presents its case first) and the burden of persuasion (which side has to convince the decision-maker(s) by a preponderance of the evidence that its position should be upheld).

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. This burden remains on that party throughout the case. *Jaffess v. Council Rock School District*, 2006 WL 3097939 (E.D. Pa. October 26, 2006). In this case, Parent bears the burden of persuasion because Parent alleges that the District has denied Student daughter a FAPE by not providing an appropriate individual education program, including a intensive evidence-based reading program from January 14, 2007 through January 14, 2009.

Credibility of Witnesses

Hearing officers are empowered to judge the credibility of witnesses, weigh evidence and, accordingly, render a decision incorporating findings of fact, discussion and conclusions of law. The decision should be based solely upon the substantial evidence presented at the hearing.¹⁵ Quite often, testimony or documentary evidence

¹⁵ Spec. Educ. Op. No. 1528 (11/1/04), quoting 22 PA Code, Sec. 14.162(f). See also, *Carlisle Area School District v. Scott P.*, 62 F.3d 520, 524 (3rd Cir. 1995), cert. denied, 517 U.S. 1135 (1996).

conflicts; which is to be expected as, had the parties been in full accord, there would have been no need for a hearing. Thus, part of the responsibility of the hearing officer is to assign weight to the testimony and documentary evidence concerning a child's special education experience. Hearing officers have the plenary responsibility to make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses". *Blount v. Lancaster-Lebanon Intermediate Unit, 2003 LEXIS 21639 at *28 (2003)*. This is a particularly important function, as in many cases the hearing officer level is the only forum in which the witnesses will be appearing in person.

In the instant case, since the evidence was heard by two different hearing officers, credibility played a less critical role than usual in shaping the perceptions of this Hearing Officer. That being said, however, a review of the testimonial and documentary evidence did reveal some notable inconsistencies. For example, contrary to testimonial evidence, Student's ninth grade English teacher, Mr. M, stated that he implemented the SDIs in Student's IEP including providing Student with a note taker or with teacher prepared notes, but then later admitted that he still expected Student to take written notes as he wrote responses to questions on the board. Similarly, Mr. M first stated that he provided Student with books on tape, but again later qualified his statement by testifying that Student could have requested books on tape in the Learning Center if Student really needed them. Furthermore, after acknowledging that Student was reading on a fourth grade level and that reading a book like Romeo and Juliet would be difficult for Student, Mr. M first stated that he modified the work for Student, but then later indicated that he did not modify tests. Mr. M explained that instead of modifying the tests, he read the correct responses aloud and gave the students the opportunity to "redo" the test, thereby

giving them the opportunity to “rehearse” what they studied in class. [NT p. 455] When Student did not always redo the test, or complete assignments on time, Mr. M attributed Student failures to lack of effort, “just not wanting to.” [NT pp. 457-458]

Equally troubling was Ms. Z’ testimony which clearly indicated that she did not fully understand the testing she administered when, for example, she didn’t know what the “broad reading” or the “brief reading” scores referred to. Overall, Ms. Z’s testimony must be given less weight in light of the fact that she did not even know whether Student was in regular or special education, or that Student had a CAPD. [NT pp. 188, 193]

On the other hand, the evidence clearly shows that the Parent is committed to her child and concerned that Student be provided with an appropriate educational program to address Student’s unique educational needs. This is a Parent who tried to work with the District; she was proactive and persistent in making sure that Student had the necessary academic supports to successfully access the curriculum and make meaningful educational progress. However, it appears as though the District frequently ignored her. This hearing officer appreciates the perseverance Parent has demonstrated in the face of the District’s consistent refusal to provide Student with a FAPE.

Finally, this Hearing Officer found the Parent’s expert witness, Dr. G to be highly credible and knowledgeable not only about evaluations and appropriate individualized educational plans, but also about CAPD, learning disabilities and evidence-based reading programs. It was her detailed testimony about the impact of Student’s CAPD on Student’s ability to read and write, and why the District’s evaluations and IEPs were inappropriate which established a significant part of the Parent’s case.

Whether the District failed to provide a free appropriate public education (FAPE) to Student from January 14, 2007 through the end of the 2006-2007

school year, the 2007-2008 school year and the first half of the 2008-2009 school year through January 14, 2009?

Students with disabilities are entitled to a Free Appropriate Public Education (hereinafter “FAPE”) under both federal and state law. 34 C.F.R. §§300.1-300.818; 22 Pa. Code §§14.101-14 A school district offers FAPE by providing personalized instruction and support services pursuant to an IEP. FAPE does not require IEPs that provide the maximum possible benefit or that maximize a student’s potential, but rather FAPE requires IEPs that are reasonably calculated to enable the child to achieve meaningful educational benefit. Meaningful educational benefit is more than a trivial or de minimis educational benefit. Whether an IEP is reasonably calculated to afford a child educational benefit is to be determined as of the time it is offered to the student and not at some later date. 20 U.S.C. §1412; *Board of Education v. Rowley*, 458 U.S. 176, 73 L.Ed.2d 690, 102 S.Ct. 3034 (1982); *Ridgewood Board of Education v. M.E. ex. rel. M.E.*, 172 F.3d 238 (3d Cir. 1999); *Stroudsburg Area School District v. Jared N.*, 712 A.2d 807 (Pa. Cmwlth. 1998); *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3rd Cir. 1988) *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031 (3d Cir. 1993); *Daniel G. v. Delaware Valley School District*, 813 A.2d 36 (Pa. Cmwlth. 2002) Additionally, the placement of a student with a disability must be in the least restrictive environment appropriate. 34 C.F.R. §300.114(a)(2); 22 Pa. Code §14.145(1); *Oberti v. Board of Education*, 995 F.2d 1204 (3rd Cir. 1993); *L.E. v. Ramsey Board of Education*, 435 F.3d. (3rd Cir. 2006)

Furthermore, the Court in *Polk, supra., 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. The court in *Polk* held that educational benefit “must be gauged in relation to the child’s potential.” This was reiterated in later decisions that held that meaningful educational benefit must relate to the child’s potential. *See T.R. v. Kingwood Township Board of Education, 205 F.3d 572 (3rd Cir. 2000); Ridgewood Bd. of Education v. N.E., 172 F.3d 238 (3rd Cir. 1999).*

Here the Student’s potential was average, yet Student’s reading level consistently fluctuated between third and fifth grades. As delineated below, this was in large part due to IEPs which were based on insufficient evaluations and which were not individualized enough to address Student’s unique needs.

Furthermore, 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)

Finally, 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. Implementation of an appropriate IEP does not guarantee that the student will make progress.

In the instant matter, a review of the record reveals that the both IEPs do not meet the criteria for appropriateness for the following reasons: first, the IEP team failed to consider Student's communications needs, Student's ability to hear within the classroom, or Student's CAPD. [P-28; NT p. 105] Neither IEP has a writing goal despite Student's significant needs in the area of writing. Second, the reading goals are not appropriate as they are vague and not measurable. [P-28; NT pp. 67-68, 71-72] Additionally, the IEPs do not include any reading fluency or decoding goals which are significant areas of weakness for Student. [P-28; NT p.75] Next, a review of the progress monitoring on the January 4, 2007 IEP goals indicated that the Reading goals were not addressed from April to June 2007. [NT pp. 70, 72]

Most importantly, however, neither IEP was reasonably calculated to provide Student with meaningful educational progress. For example, the evidence confirms that the December 20, 2007 IEP still did not include writing, reading fluency or decoding goals nor did it address Student's CAPD. [P-26; NT pp. 75, 121] Additionally, the IEPs did not include specific SDIs such as test taking strategies, tape recording content area classes or teacher prepared notes which would have further supported Student's ability to access the curriculum and make meaningful educational progress. [P-26; NT p. 77]

Contrary to the District assertion otherwise, the record reveals that Student consistently failed to make progress in either reading or math. For example, the evidence

confirms that Student had not mastered basic math skills as reflected on the 2007 PSSA. [P-25] With regard to Student's progress in Reading, although Student achieved a slightly higher score which barely placed Student on the Basic Reading level on the PSSA, the evidence shows in December 2007 Student was still reading at approximately the fourth grade level on the IRI and the WRAT. [P-27; NT pp. 222, 228-229]

Furthermore, it was becoming clearer that the District was not implementing Student's SDI or program modifications with fidelity¹⁶, [NT pp. 122-123] and consequently, Student was not, in fact, "making steady and meaningful progress" as stated on the progress monitoring data. [P-28; SD-7; SD-10; NT 70, 72] To the contrary, the record is replete with evidence that Student regressed between January 2007 and December 2007 while basically maintaining a fourth grade reading level from eighth to tenth grades..

In addition, the IDEA requires a local educational agency to address every substantial educational need of the child with a disability, including behavior and social skills. If the IEP is inadequate in any material way, it is inappropriate as a matter of law. *Rose v. Chester Co. Intermed. Unit*, 196 WL 238699, 24 IDELR 61, aff'd 114 F.3d 1173 (3d Cir. 1997). This is reflected in the requirements for both evaluations and individual education plans.

The local educational agency must conduct a "full and individual initial evaluation" 20 U.S.C §1414(a)(1)(A). The child must be "assessed in all areas of suspected disability." 20 U.S.C. §1414(b)(3)(B). The regulations require that the

¹⁶ For example, when Student was ninth grade and still reading on third to fourth grade level, the record reveals that Student was not provided with modified textbooks, [NT p. 115] nor was Student provided with books on tape and tests were not read aloud to Student. [NT pp. 120-122]

evaluation procedures “assist in determining ... [t]he content of the child’s IEP. 34 C.F.R. §300.304(b)(1)

In the present case, both the January 2007 and the December 2007 RRs were flawed in that they did not assess Student in all areas of suspected disability. For example, the District failed to appropriately consider the Crozer Chester Audiometric Evaluation and Central Auditory Processing Disorder evaluation or assess the impact that Student’s CAPD had on Student’s ability to read and write. [P-29; P-33; NT p. 349] Specifically, the District failed to evaluate the appropriateness of the physical location of Student’s program in order to assess the affect of the acoustics. [P-2; NT pp. 362-364]

Similarly, both RRs are insufficient in that they do not evaluate or address Student’s social emotional or behavioral needs. A review of the testimonial and documentary evidence, supports Parent’s assertion that the District frequently blamed Student for not completing work satisfactorily, particularly in content area classes where the reading level was significantly above Student’s level. District reports and the teachers’ testimony often characterized Student’s failures as due to Student’s lack of motivation, or effort. The record again supports Parent’s assertion that Student developed serious self-esteem issues and frustration from trying so hard and still not being able to understand the materials or class work. [NT p. 139]

Therefore, since neither evaluation included a Functional Behavior Assessment (hereinafter “FBA”), or an assessment of Student’s emotional needs, both are found to be inadequate and as such do not adequately assist in forming the basis of appropriate individual education plans.

Moreover, the District denied Student a FAPE by failing to consider other options when it was clear that Student was not making meaningful progress. Specifically, the District did not provide Student with an intensive evidence-based reading and writing program which Parent had requested and which the Parent's experts strongly recommended. Without an intensive evidence-based remedial reading and writing program, the District's program at the time that Parent filed the complaint was not reasonably calculated to enable Student to make meaningful educational progress. Therefore, Student is entitled to compensatory education.

Whether Student is entitled to compensatory education; and if so, how much?

When a school district fails to deliver a free and appropriate public education ("FAPE") to which a student is entitled, an award of compensatory education is justified. *M.C. v. Central Regional Sch. Dist., supra*. The right to compensatory education accrues when a school district "knows or should have known" that it is not providing an appropriate education. *Id; See, O.F. by N.S. v. Chester Upland Sch. Dist., 246 F. Supp. 2d 409 (E.D. Pa. 2002)*.

In determining whether an award of compensatory education is warranted, the first step in the analysis is to assess the appropriateness of the program offered by the School District at the time it was offered or provided. In re: The Educational Assignment of Karyn S., Special Education Appeals Panel Opinion No. 1124 (June 4, 2001).

Compensatory education is an equitable remedy, designed to assure that an eligible student receives all of the special education services to which he is entitled. *In re: The Educational Assignment of Nicholas T., Special Education Appeals Panel Opinion No. 1166 (August 17, 2001); In re: The Educational Assignment of Laura C.,*

Special Education Appeals Panel Opinion No. 1183 (October 19, 2001). Rather, once it is determined that a School District has failed to provide FAPE, compensatory education, measured as stated above, must be awarded. *Id.*

Here, the evidence establishes beyond question that the District's program was not reasonably calculated to enable Student to make academic progress.

Accordingly, due to the District's failure to provide Student an appropriate program which included an intensive evidence-based reading program which Student clearly needed, and Student's lack of meaningful progress in the absence of instruction appropriate to meet Student's significant needs, Student will be awarded compensatory education for one hour for every school day between January 14, 2007 and January 14, 2009.

The weeks of compensatory education due for the January 14, 2007 to the January 14, 2009 period will be reduced by any days the District was closed for holidays and summers with the exception of the ESY periods.

To the extent that the compensatory education hours will be used for reading instruction in a multi-sensory, research-based reading program, the District will have the first opportunity to locate a certified provider and arrange for such instruction. If the District is unable to do so within thirty (30) days of this decision, the Parent may locate a reading tutor who uses an appropriate multi-sensory evidence-based reading program.

Whether the District failed to provide a FAPE to Student during the 2007 and the 2008 Extended School Years?

ESY services are needed to assure that the student's program is reasonably calculated to confer meaningful educational benefit. *Board of Education v. Rowley, supra*. Again,

“meaningful benefit” requires that an eligible student’s program affords him or her the opportunity for “significant learning.” *Ridgewood Board of Education v. N.E., supra.*

The rationale for ESY for any special education student is basically a demonstrated regression if specified continued educational support is not provided, often along with a recognition that “recoupment” may consume a great deal of educational time and services. [P-2] In this instance, ESY was clearly required because of Student’s history of regression, slow progress and Student’s functioning considerably below grade level in reading and math. *See, e.g., In Re: A Student in the Freeport Area School District, ODR #9015/07-08 (August 7, 2008) at 7, 8.*

The evidence however reveals that the ESY programming offered by the District was not sufficiently individualized to provide student with a FAPE. Instead, the District offered a somewhat “one-size-fits-all” and shortened ESY. For example, the District provided Student reading instruction for eight sessions in the summer through a computer program identified as “Study Island,” which in and of itself should not have been a problem as it has been effective for many students. However, computer programs in general are not appropriate for Student especially when there is no reading specialist trained in evidence-based reading programs to work with Student on Student’s reading goals.

Although the District did not develop specific ESY goals for Student, that flaw frequently falls into the realm of procedural deficiencies for which no remedy is provided in the absence of proof of a substantive denial of educational benefit. 34 C.F.R. §300.513. Here, however, there is ample evidence of a substantive denial of educational

benefits. Consequently, Student will be awarded compensatory education for one hour each school day during the both the 2007 and 2008 extended school years.

Whether the Parent is entitled to a District funded IEE?

The crux of the District's argument is twofold: one, Parent didn't raise the issue of her request for an IEE in her complaint; and two, Parent didn't disagree sufficiently with the District's evaluation.

Here, the District applied the wrong legal standard when it initially did not respond but later denied Parent's IEE request made prior to the start of the 2008-2009 school year. In the instant case, the record supports Parent's assertion that she consistently expressed her concern that the Crozer Chester Audiometric Evaluation and Auditory Processing Evaluation, which she hand-delivered to the District, wasn't considered or even mentioned in any of the District's evaluations, including the December 2006 RR. In accordance with 34 C.F.R. §300.502(b)(2), upon receiving Parent's IEE request, the District was required to either (i) file a due process complaint for a hearing to demonstrate that its evaluation was appropriate or (ii) provide the evaluation. The District did neither, and when asserting the reason why Parent is not entitled to a District funded IEE, the District argues that Parent failed to establish disagreement with a District evaluation report. [See District's Closing Brief] The IDEA regulations governing IEEs, however, explicitly provide that the District may not "require the parent to provide an explanation and may not unreasonably delay either providing the independent evaluation at public expense or filing a due process complaint...." §300.502(b)(4). Since the District did not file a due process complaint in the three years that have elapsed since Parent expressed her concern over the District's failure to address

Student's CAPD and the one year since Parent requested an independent psycho-educational evaluation, it is no longer possible for the District to defend its evaluation in a hearing requested in a due complaint filed within a reasonable time following the IEE request. For that reason alone, the District would be required to fund the cost of an IEE, despite the District's contention that Parent did not "disagree" sufficiently with the December 2006 evaluation.

The District's reasoning that the fundamental purpose of the IEE regulations requiring disagreement by the Parent is to allow the District the opportunity to get "first crack" at the evaluation is also flawed. Here, again the record supports Parent's assertion that she has expressed her disagreement with all of the District's evaluations because of the District's failure to address Student's CAPD, its impact on Student's ability to read and write and because of evidence of Student's lack of progress. Moreover, the District had plenty of opportunity to get "first crack" at an evaluation in that it conducted no less than four reading evaluations during the 2007-2008 and the 2008-2009 school years. By requiring the District to support its evaluation via a due process hearing if it refuses to grant a parental request for an independent evaluation, the IDEA regulation places the burden of persuasion on the District with respect to this issue. Consequently, in this limited circumstance, it would have been the District's burden to establish the absence of a deprivation of educational benefit.

In this case, however, which party bears the burden of persuasion is entirely irrelevant, since the Parent has proven her case by a preponderance of the evidence. The District's December 2006 RR was not appropriate with respect to its failure to assess Student in all areas of suspected disability, including Student's communication and social

emotional needs, and which formed the basis of the District's future programming for Student. The central auditory processing disorder first identified in the independent Audiometric/Central Auditory Processing evaluation logically accounts for the full range of Student's needs as reflected in the record.

Therefore, for all of the reasons delineated above, Parent is entitled to a District-funded IEE, which should include a detailed analysis of which multi-sensory evidence-based reading and writing program would be appropriate to address Student's language based learning disabilities.

ORDER

It is hereby ORDERED that:

1. The Wallingford-Swarthmore School District failed to provide Student with a FAPE during the second half of the 2006-2007 school year, the 2007-2008 school year and the first half of the 2008-2009 school year.
2. The Wallingford-Swarthmore School District failed to provide Student with a FAPE during the 2007 and the 2008 Extended School Years.
3. The Wallingford-Swarthmore School District is required to provide compensatory education¹⁷ to Student for one hour for each school day from January 14, 2007 to January 14, 2009 including the extended school year days, minus all holidays and summers.

¹⁷ The form and utilization of services shall be decided by the Parent and may include only appropriate developmental, remedial or enriching instruction or therapy. The services may be used after school, on weekends, or during the summer. The services may be used hourly or in blocks of hours. The cost to the District of providing the awarded hours of compensatory education shall not exceed the rate the District would have paid for any like contracted services. The District has the right to challenge the cost of the services.

4. Parent is entitled to a District funded IEE which must include a detailed analysis of which multi-sensory evidence-based reading and writing program would be appropriate to address Student's language based learning disabilities.

January 21, 2010
Date

Deborah G. DeLauro
Deborah G. DeLauro, Esquire
Hearing Officer