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Due Process Hearing for S.D.

Date of Birth: xx/xx/xx

ODR File Number: 7174/06-7/KE

**Dates of Hearing: January 22, 2007, February 2, 2007, March 13, 2007,
March 20, 2007, April 18, 2007, April 20, 2007, June 4, 2007,
August 21, 2007**

Parties:

Upper Merion School District
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Representative:

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Mr.

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Date Final Transcript/Exhibits Received: August 21, 2007

Date Closing Statements Received/
Record Closed: October 2, 2007

Date of Decision: October 10, 2007

Hearing Officer: Joy Waters Fleming, Esq.

Background

Student is currently xx years of age and a tenth grader in the Upper Merion School District, "District". Student was identified as eligible for special education his primary years and has received special education programming since that time. Eight hearing session were held between January 2007 and August 21, 2007. Four other hearing sessions were scheduled but could not be held and continuances granted for reasons ranging from counsel illness to unavailability of scheduled witnesses. A final hearing session was originally scheduled for November 8, 2007; however, after the hearing officer communicated her intention to resign to the Office for Dispute Resolution, counsel agreed to waive the final session and submit closing statements in written form to retain involvement of the same adjudicator.

Issues

1. Did the District deny Student a free, appropriate public education (FAPE) from the 2004-2005 school year onward because of its failure to provide appropriate programming related to reading, written expression and necessary related services?¹
2. Did the District deny Student FAPE from the 2004-2005 school year onward for its failure to adequately address his social, emotional and behavioral needs?
3. Did the District deny Student FAPE by failing to provide needed occupational therapy and speech language services?
4. If FAPE was denied Student, is he entitled to compensatory education?

¹ Parent filed a due process complaint on November 29, 2006. Initially, the Parent raised claims that pertained to the 1998-1999 school year onward. Following an evidentiary hearing, the Parent's claims were limited under the statute of limitation to those that arose during the 2004-2005 school year onward.

5. Is Parent entitled to an independent educational evaluation consisting of a neuropsychological and speech language evaluations at public expense?

6. Is Parent entitled to reimbursement for an independent reading assessment performed by Lindamood-Bell processes in January 2007?

7. Is Parent entitled to reimbursement for out-of-pocket expenses for psychological expenses?

8. Is Parent entitled to reimbursement for privately provided services during the Summer of 2006?

Findings of Fact

1. Student, is currently xx years of age and in the 10th grade in the Upper Merion School District, "District".

2. Since his pre-kindergarten, 1996-1997, school year, Student has been continuously enrolled in and lived within the boundaries of the District. (JS-4)

3. In December 1996, after a comprehensive evaluation, Student was determined eligible for itinerant speech and language services to address articulation and syntax needs. (JS-4)

4. As of May 9, 2000, as a third grader, Student's reading level was determined to be at a first grade level and with support at a second grade level. (SD-2, p.4)

5. In January 2001, the District evaluated Student. (S-1)

6. After the ER, Student was determined to have a FSIQ of 100 and eligible and in need of specially designed instruction because of a speech impairment, specific learning disabilities in basic reading and written expression and occupational therapy needs. (JS-11, S-1)

7. The IEP team recommended that Student receive speech/language support services, daily small group reading remediation instruction and occupational therapy. (S-1, p. 10)

8. The team recommended that additional learning support (beyond daily remedial reading and speech/language supports) occur if Student does not make adequate progress at current instructional levels. (S-1, p. 10)
9. The January 2001 evaluation recommended consideration of a behavior intervention program because of reported behaviors consistent with ADHD, anxiety and/or depression. JS-11)
10. In January 2002, as a fifth grader, the IEP team determined Student's reading level to be at a beginning third grade instructional level and his writing to be weak, scoring a 2 or below in focus, style, content and conventions. (S-3, p.6)
11. In January 2002, the IEP team determined that Student could articulate the letter /r/ in isolation and syllables with approximately 90% accuracy, initial /r/ in words and phrases with 80% accuracy and final /r/ sounds produced correctly in words with approximately 70% accuracy with verbal cues. (S-3, p.8)
12. In October 2003, the District conducted a re-evaluation of Student. (S-6, N.T. 272)
13. During the re-evaluation, the IEP team determined that although no additional data was required, Student needed to improve his reading/written language (currently at 4th grade) articulation and fine motor skills. (SD-6, p.4, S-7, p.7)
14. In the October re-evaluation report, Student was reported as able to produce the /r/ sound correctly at the two to three sentence structured description level with 80% to 90% accuracy during therapy sessions. (SD-6, p.4)
15. In October 2003, speech therapy was discontinued by the District at Parent's request. (S-7, p.7, S-8, S-9, S-13, S-17, p.7)
16. No formal articulation assessment occurred as part of the October 2003 evaluation because Student's sole difficulty was with the letter "R". (N.T. 504-505)

17. On March 16, 2004, the IEP team convened to update Student's IEP (S-10)
18. On March 16, 2004, Parent signed the NOREP recommending the program and placement as outlined in the IEP. (S-10)
19. In the March 2004 IEP, under the present levels of educational performance, "PLEP", Student was described as receiving instruction in a learning support classroom for reading, spelling and English at a fourth grade level. (S-10, p. 5)
20. The March 2004 IEP identified Student as having needs in reading, comprehension, written expression, organization of information and following directions.
21. The March 2004 IEP identified Student as having strengths in class participation, class homework completion, positive attitude and parental support. (SD-14, p.6)
22. Student's seventh grade IEP contained seven goals designed to address his reading, writing, spelling, keyboarding, behavior and homework needs. (SD-14, pp. 7-16)
23. Under the March 2004, IEP Student received occupational therapy, "OT" two times a month. (S-14, p.20)
24. On March 16, 2004, the District conducted a functional behavioral assessment in conjunction with a manifestation determination. (SD-11)
25. After the manifestation determination, Student was placed at a 45 day alternate placement. (SD-12, p.2)
26. While attending the alternate school, Student received speech/language services from the District. (N.T. 457, 508)

2004-2005 School Year

27. During the 2004-2005 school year, Student was a seventh grader in the District.

28. Student entered the seventh grade with the IEP dated March 2004 that was largely implemented until the end of the school year in June 2005. (S-10, S-14, S-17, S-18, p.18 N.T. 759)
29. On September 20, 2004, the learning support teacher contacted Parent suggesting that speech and language services be re-instated to Student. (S-57, N.T. 888)
30. On September 22, 2004, speech and language services were added to Student's IEP. (S-10, S-14, N.T. 451, 509, 728, 876)
31. In the September IEP , as a speech goal, Student was expected to self-monitor his articulation to produce the /r/ sound correctly with 75% accuracy in therapy or classroom setting. (S-14, p.17)
32. No IEP meeting was held in order to add the speech/language services instead the Parent agreed by telephone and all other team members indicated agreement on the signature page of the IEP. (N.T. 454-455, 722)
33. After the addition of speech, Student received speech therapy, primarily on a pull-out basis, in a small group setting, at least three times a month for forty minutes. (N.T. 460, 510-512, 732)
34. During speech sessions, both structured and unstructured activities occurred to address articulation of the /R/ sound. (N.T. 515)
35. Mastery level of a speech goal for articulation is between 75-80%. (N.T. 461, 519)
36. During the seventh grade, Student's speech therapist consulted with Student's teachers checking on his articulation. (N.T. 521-522, 531)
37. Between September 2004 and February 2005, Student made significant progress in speech achieving up to 88% accuracy in some conversational situations. (S-17, p. 7, N.T. 525-526)
38. As a seventh grader, Student received reading, spelling and English instruction from his learning support teacher. (N.T. 730, 750)

39. In learning support, Student received reading, English and Thinking Skills for 45 minutes each day. (N.T. 731, 745)
40. In English, Student was instructed in the writing process with exposure to writing themes, narrative, persuasive and expository writing and participation in a once a week writing lab. (N.T. 754, 910-911, 914, 917)
41. In English, Student received a variety of writing tasks to practice the domain of conventions, punctuation and grammar skills. (N.T. 965-966)
42. In writing, Student's progress was measured through curriculum based assessments generated by the learning support teacher. (N.T. 762)
43. Student received spelling instruction during his seventh grade year advancing from a third grade level to nearly a fifth grade level by the end of the school year. (N.T. 730, 912)
44. In his learning support classroom, Student received spelling instruction, with a small group, three to four times a week for 15-20 minutes during the class. (N.T. 750, 752, 967)
45. During the 2004-2005 school year, Student received reading instruction using the Soar to Success Program, a reading intervention program designed for grades 3-8, to improve both fluency and comprehension. (S-17, p. 14, S-18, p.18, P-12, p. 13, N.T. 741, 896, 926, 943, 950-954)
46. In reading, Student received either whole group, direct, small group or one to one reading instruction with modifications made as needed. (N.T. 730, 734, 736, 939)
47. In conjunction with the Soar to Success program, Student also received instruction in phonics and decoding. (N.T. 742-743, 749, 907, 941)

48. In reading, Student's reading progress was evaluated using assessments made by his learning support teacher in conjunction with the Soar to Success program and his literature book as well as fluency probes. (N.T. 760-761, 955, 960)
49. In his learning support class, Student received instruction in fluency through shared in class reading exercises. (N.T. 947)
50. In reading, Student was instructed at a fourth grade level although he read two novels one at a 6.1 grade level and one at a 4.5 grade level. (N.T. 736, 739)
51. On three reading fluency reading probes administered in February 2005, Student received a score of 94 wcpm at a 3.0 level. (S-17, p. 7)
52. On March 14, 2005, the IEP team convened and revised Student's IEP. (SD-17, N.T. 758, 895)
53. In the March 2005 IEP, Student's PLEP baseline reading fluency was determined to be at 3.0 level. (S-17, p. 7)
54. The March 2005 IEP did not indicate a baseline or skill levels for writing, decoding or reading comprehension. (S-17, p. 7)
55. The March 2005 IEP indicated that Student had reading needs in oral fluency, decoding and inferential comprehension. (S-17, p. 5)
56. The March 2005 IEP contained an occupational therapy re-assessment of Student's fine motor skills performance. (S-17, p.8)
57. The March IEP 2005 IEP contained one key boarding goal, one speech-articulation goal and one reading-fluency goal with a variety of program modifications including small group instruction, assignment modifications, and an adapted spelling program. (SD-17, pp.10-13)
58. On September 12, 2005, Student's IEP was revised to reflect a change in the speech services. (S-18, p.19, N.T. 534)

- 59. The March 2005 IEP and the September 12 IEP were identical except for the change pertaining to speech goal. (S-17, S-18)
- 60. Under the September IEP, Student would receive speech services, three times a month for 40 minutes in integrated, pullout sessions per month. (N.T. 535, 538)
- 61. In the seventh grade learning support classroom, Student was focused, on target, followed directions, expressed a desire to complete his work and used school time appropriately and wisely (N.T. 765, 768, 773, 892, 968)

2005-2006 School Year

- 62. During the 2005-2006 school year, Student was in the eighth grade. (S-18)
- 63. Student entered the eighth grade with the March 2005 IEP. (S-18)
- 64. On a Critical Reading Inventory (CRI) administered on September 11, 2005, Student received scores of: 50% for 6th grade flash word list, 70% for 6th grade un-timed word list, oral passage reading of 96%, oral passage comprehension for 5th grade of 60% and silent passage comprehension of 5th grade at 80%. (SD-25)
- 65. According to Scholastic Reading Inventory administered in September 2005, Student's lexile score was determined to be 758. (N.T. 648)
- 66. As an eighth grader, Student received language arts, reading and Thinking Skills in a learning support classroom. (N.T. 606)
- 67. Student's learning support classroom contained twenty students, his teacher, an aide and two days a week a reading specialist. (N.T. 615)
- 68. In learning support, Student received two modules, "mod or mods" of reading, one module of English and one module of Thinking Skills on a daily basis. A module is the equivalent of 45 minutes. (N.T. 606-607)

69. In learning support, Student received reading instruction from the Read 180 program as well as through a REWARDS program implemented with a reading specialist. (S-18, p. 18, N.T. 609)
70. The Read 180 program is a reading intervention program for struggling readers in grades 4-12, that focuses on enhancing skills in phonemic awareness, phonics, fluency, vocabulary, text comprehension, spelling and writing. (P-12, p.1, N.T. 628, 794-796, 1242-1243)
71. The Read 180 program is a research-based program that addresses the five areas of reading instruction that have been identified by the National Reading Panel. (P-12, N.T. 1242, 1244)
72. The Read 180 program is designed to be implemented in a daily 90 minute reading block to classes of no more than 18 students with 20 minutes of whole group instruction, rotations of 20 minutes with small group instruction or instructional software or independent reading and final 10 minute whole group wrap up. (P-12, p.1, N.T. 1243)
73. In the READ 180 program, Student received daily, small group, direct reading instruction for two mods a day. (N.T. 611, 612)
74. In reading, Student received, twenty minutes of daily, large group reading instruction reading novels, literature and his social studies text book. (N.T. 618, 620, 791)
75. After the large group reading instruction, Student would receive twenty minutes of either small group direct instruction from the learning support teacher using the Read 180 program, independent reading activities monitored by the teaching aide or reading instruction using the computer. (N.T. 621)
76. During the small group direct instruction utilizing the Read 180 program , Student would receive instruction in phonics, reading fluency and vocabulary comprehension. (N.T. 626, 630)
77. Student was grouped for his small group direct reading instruction based upon his scores on the Scholastic Reading Inventories and Critical Reading Inventory (CRI) . (P-12, SD-25, N.T. 631, 633, 636)

78. During independent reading, Student read leveled material from the Read 180 program based upon his lexile score from the SRI. (N.T. 625, 803-805)
79. During the 20 minute computer time of the READ 180 program, Student could work in a reading, work or spelling zone set up for their individual instruction level. (N.T. 798-800)
80. Student received instruction through the REWARDS program two days a week with assistance from a reading specialist. (N.T.610, 806)
81. On the days, the reading specialist came to the learning support classroom, Student would receive twenty minutes of direct instruction in place of the small group instruction or he engage in independent reading activity. (N.T. 621-622)
82. From September 2005 to January 2006, Student's lexile score increased from 758 to 826. (SD-N.T. 649, 829-830)
83. In his Thinking Skills class, Student received 45 minutes of daily individual direct instruction, as needed, in math, science, English and homework completion. (N.T. 672-675)
84. During the learning support class, Student received instruction in written expression as a component of his English class. (N.T. 810-812)
85. During the eighth grade Student continued to receive speech services. (N.T. 537-538)
86. Although Student was disciplined two times, once for inappropriate conduct on a school bus and once for attempting to sell phone equipment in school, his learning support teacher had no concerns regarding his behavior. (S-21, 22, N.T. 815-818)
87. On a Critical Reading Inventory (CRI) administered on March 10, 2006, Student received scores of: 60% for 6th grade flash word list, 85% for 6th grade un-timed word list, oral passage reading of 98%, oral passage comprehension for 5th grade of 80% and silent passage comprehension of 6th grade at 80%. (SD-26, p.6)

88. Student achieved his speech goal of articulating the /r/ sound 75% of the time in the classroom the first semester of eighth grade. (N.T. 464, 468, 538-540)
89. On March 13, 2006 the IEP team convened and drafted a new IEP
90. The March 2006 IEP recommended dismissal from speech because Student was able to self-monitor his conversational speech to include /r/ productions with over 85% accuracy. (S-26 p. 8, N.T. 486, 539, 541)
91. The March 2006 IEP identified Student has having needs in decoding, reading fluency and written language (conventions). (SD-26, pp. 6, 7)
92. The March 2006 IEP contained a reading fluency and a writing goal. (SD-26, p.13)
93. The March 2006 IEP indicated that Student was receiving OT on a consultation basis, as requested by educational staff members but that no requests for consult had occurred related to areas of concern. (S-26, p.8)
94. The March 2006 IEP recommended dismissal from OT. (S-26, p.9)
95. Between November 2005 and March 2006, Student's reading fluency, on a fourth grade level, increased by 9 words, from 79wcpm to 88 wcpm. (S-26, p.5, N.T. 686)
96. Parent signed the NOREP approving the recommendation of the IEP team on April 4, 2006. (S-26, p.20)
97. The March 2006 IEP was implemented for the remainder of the 2005-2006 school year. (N.T. 833)
98. At the March 2006, IEP team meeting, the team concluded that Student was ineligible for extended school year because he was able to recoup skills/concepts taught him after breaks in the school year. (S-26, p.16)

99. During the summer of 2006, Student attended a program at the Private School at parental expense. (S-28, P-10)
100. The District offers a summer program to students receiving special education that do not qualify for ESY which provides instruction in reading, writing and math. (N.T. 1266)
101. The District summer program utilizes the Read 180 program. (N.T. 1267)

2006-2007 School year – 9th grade

102. Student entered the ninth grade with the March 2006 IEP in place. (N.T. 833)
103. In September 2006, Student's lexile score was determined to be 656. (S-49, S-60, N.T. 1276)
104. On October 3, 2006, the District conducted a re-evaluation of Student. (S-36)
105. The October 3 re-evaluation included a summary of prior evaluation data, parental input, a classroom assessment, results from past PSSA and Terranova assessments, a review of Student's progress reports, instructional evaluations completed by former and current teachers, aptitude levels using the WISC-IV, achievement levels using the WIAT-II, reading assessment information from 2005-2006, a social emotional screening based on administration of the BASC to the Student, a teacher and Parent and a summary of all findings. (S-36, N.T. 1040-1060, 1168-1184)
106. The October re-evaluation determined that based on Student's performance on the WIAT-II, his standard scores were average in reading comprehension, written expression and math. (S-36, p. 10)
107. The October re-evaluation determined that based on Student's performance on the WIAT-II, his standard scores were borderline or below average in word reading, pseudo word decoding and spelling. (S-36, p. 10)

108. On the Behavior Assessment System for Children (BASC), neither Parent nor Student's eighth grade learning support teacher provided responses indicating concerns regarding Student's social-emotional functioning. (S-36, p.13, N.T. 1171-1173)
109. On the Behavior Assessment System for Children (BASC), several of Student's responses on the emotional symptoms index indicated him to be "at-risk". (SD-36, p. 14)
110. On the Behavior Assessment System for Children (BASC), two of Student's responses, regarding "locus of control and "relations with parents" fell within the clinically significant range, suggesting a high level of maladjustment. (S-36, p. 14, N.T. 1053-1058, 1175-1177, 1179-1184)
111. As a result of the BASC and a review of his current school performance, the re-evaluation recommended consideration of school-based counseling services to further develop Student's coping skills and to help address any increased risk of interpersonal difficulty, anxiety and social stress. (S-36, p. 16)
112. Based on the results from the re-evaluation, Student was determined to be eligible and in need of special education as a student with a specific learning disability. (S-36, p.16)
113. On a Critical Reading Inventory (CRI) administered on October 3, 2006, Student received scores of: 65% for 6th grade flash word list, 90% for 6th and 65% for grade un-timed word list, oral passage reading of 96% on a Jr. High passage, oral passage comprehension for Jr. High of 85% and silent passage comprehension of 90% at a Jr. High level. (S-36, p.12)
114. On October 24, 2006, the IEP team convened and drafted an IEP for the remainder of Student's ninth grade year. (S-37, N.T. 1234)
115. On October 25, Student's lexile score was determined to be 865. (N.T. 1277)

116. The October IEP contained reading comprehension, written expression and reading fluency goals as well as a variety of program modifications and specially designed instruction. (S-37)
117. On November 29, 2006, Parent requested a due process hearing. (S-38)
118. During the ninth grade, Student continued to receive reading instruction from the Read 180 program. (N.T. S-37, 1241)
119. By the first marking period of his ninth grade year, Student had achieved progress toward his reading, writing and fluency goals. (S-46, pp. 1-2, S-60, N.T. 1252)
120. In January 2007, Student's reading skills were assessed by the Lindamood-Bell program. (N.T. 1089)
121. On March 20, 2007, a new IEP was developed adding counseling services, a speech language and occupational therapy assessments, a revision to the PLEP, a transition plan and revision to the goals. (S-59, N.T. 1254-1255)
122. Parent did not agree to implementation of the March 2007 IEP. (S-58, N.T. 1263)

Discussion and Conclusions of Law

The IDEA requires that states provide a “free appropriate public education” “FAPE” to all students who qualify for special education services. 20 U.S.C. §1412. In Board of Education of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982), the U.S. Supreme Court held that this requirement is met by providing personalized instruction and support services to permit the child to benefit educationally from the instruction, providing the procedures set forth in the Act are followed. the substantive standard for FAPE is whether the program or placement is reasonably calculated to provide meaningful benefit, gauged in relation to the child's intellectual potential.

The *Rowley* standard is only met when a child's program provides him or her with more than a trivial or *de minimus* educational benefit. Polk v.

Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3rd Cir. 1988). This entitlement is delivered by way of the IEP, a detailed written statement arrived at by the IEP team which summarizes the child's abilities, outlines goals for the child's education, and specifies the services the child will receive. Oberti v. Board of Education, 995 F.2d 1204 (3d Cir. 1993). School districts are not required to provide the optimal level of services. Carlisle Area School District v. Scott P., supra. However, a program that confers only trivial or minimal benefit is not appropriate. Polk.

The appropriateness of the IEP is judged based on information known at the time it is drafted. Fuhrman v. East Hanover Board of Education, 993 F.2d 1031 (3d Cir. 1993). Under the IDEA and its implementing regulations, an IEP for a child with a disability must include present levels of academic achievement and functional performance, measurable annual goals, a description of progress toward meeting the goals, statement regarding related services and program modifications, an explanation of regarding participation with regular education peers, accommodations provided and commencement date of services. 34 C.F.R. §300.320.

The United States Supreme Court has held that the burden of proof in an administrative hearing challenging an IEP is upon the party seeking relief, whether that is the disabled child or the school district. *Schaffer v. Weast*, 126 S.Ct. 528 (2005). Parent had the burden of proof in this proceeding.

Since his early academic years, Student has exhibited both language arts and speech concerns. (FF. 2-11) Parent contends that Student was denied FAPE because the IEP in place during his seventh grade year was so deficient in numerous respects and its implementation so flawed that educational progress could not and did not result. Among the deficiencies cited are that the present levels of educational performance are vague and/or devoid of critical information and that the annual goals are not responsive to Student's known needs.

2004-2005 School Year

March/September 2004 IEP

Student entered the seventh grade with an IEP that had been created six months before in March 2004. (FF. 17) Student was educated under that IEP for the duration of the seventh grade except for the addition of speech services in September 2004. (FF. 29-33) The March 2004 and September 2004 IEPs are identical except for the later added speech goal. (FF.28)

This IEP is technically insufficient and the implementation of the programmatic aspects have failed to afford Student FAPE. The present level of education performance, or “PLEP” serve a pivotal function in the development of a responsive, individualized educational program for a child with disabilities. It should provide a snapshot of a student’s performance in the current educational program in a clear, concrete manner. Furthermore, it should provide baseline data preferably from a previously conducted evaluation report or other assessment information. PLEP is intended to serve as both a springboard for the drafting of a responsive IEP as well a foundation for an understanding of the needs to be served. In this case, the IEP(s) in place during Student’s seventh grade year did neither.

Under the PLEP in this IEP, Student was noted as having needs in reading comprehension, written expression, organization and following directions.(FF.19-21) With respect to any baseline data regarding Student’s actual academic levels, the PLEP merely indicated that he would receive instruction in reading, spelling and English in a learning support classroom at a fourth grade level. (FF. 19) Whether Student’s actual instructional levels were at fourth grade is not clear, only that he was receiving instruction at that level. The last re-evaluation, completed in 2003, was not referenced although that information, cursory in nature would have done little to enhance the understanding of the depth of this student’s language arts needs. The 2003 re-evaluation simply stated that Student continues to need to improve reading/written language skills. (FF. 12-14) The IEP team then, unfortunately concluded, that no need for additional data existed. Noticeably absent in the PLEP was any source or reference from a specific assessment, test or measure. (FF. 19) The PLEP also fails to reference how Student’s needs and abilities in organization/following directions were ascertained although the IEP provides goals in that area. (FF. 22) The goals that ultimately resulted in this IEP were deficient and for the following reasons were not calculated to afford meaningful educational progress. The specially designed instruction does not fare much better. In this IEP only vague, non-specific program modifications were listed that barely describe what special

education programming Student would receive and how it would be adapted to support his needs.

Reading

The 2004 IEP in contention contained two reading goals. The first goal appears to address comprehension the second was designed to address fluency. (FF. 22) Because the re-evaluation and PLEP from which these goals spring was entirely deficient, it cannot be readily determined whether these goals are entirely responsive to Student's global reading needs.

In response to his reading needs, throughout the seventh grade, Student received reading instruction from his learning support teacher. (FF. 38-39) That instruction came primarily from a research based, reading intervention program designed to improve both fluency and comprehension. (FF.) To further address his mentioned and unmentioned reading needs, Student also received instruction in spelling, decoding and vocabulary. (FF. 45)

Despite the past efforts of the District to administer a reading program to remediate his difficulties, Student received instruction three grade levels below his current grade. (FF. 10,46) This disparity was troubling to the Parent and despite the objection of the District speaks to a history indicative of a lack of significant progress in reading. Although the IEP itself was far from technically perfect, on its surface, the reading instruction Student received represents an attempt by the District to take note of the severity of Student's needs and aggressively program for them. However, those efforts coupled with the lack of reliable, evaluative data and non-individualized, focused specially designed instruction, result in a program was not appropriate. Student did not make academic progress consistent with his intellectual potential. The Parent has sustained the burden of establishing that Student was denied FAPE, under this IEP, in reading, from the commencement of the school year until March 2005.

English/Writing/Spelling

Student's seventh grade IEP English goal expected that when given a fifth grade level assignment, he would utilize his written expression skills to complete the assignment. (FF. 40-41) In spelling, he was expected to spell fourth grade level words correctly 85% of the time. (FF. 43-44) Although,

“written expression skills” and “written language skills” were clearly noted as a need in the re-evaluation report and resulting March 2004, the PLEP that served as the foundation for this goal merely referenced Student receiving “English” and spelling instruction at a fourth grade level. How Student’s academic levels in these areas were ascertained is notably missing. Furthermore, although the PLEP provided detailed information about Student’s writing as it pertained to his motor skills and the provision of occupational therapy services, his precise needs with respect to written expression were absent.

With respect to the implementation of the English/writing goal, the testimony elicited on this point, from Student’s learning support teacher although confusing; nevertheless, indicated that Student received writing and spelling instruction consistent with a need for remediation. (FF. 39-42) Whether this need was called a need for English” instruction or writing, it was intended to fulfill the need for written expression as identified in the IEP.

However, the same difficulty arises with respect to the appropriateness of the writing goal. No objective, baseline information was presented in Student’s PLEP of this IEP. Precisely what type of writing/English needs did Student have? Again, the PLEP contained no reference to writing or spelling except to state that Student was receiving instruction three grade levels behind, or on a fourth grade level. Based on the evidence presented, Student was denied FAPE in written expression.

Behavior

Although the previous school year, Student was disciplined for a behavioral incident, his IEP in place did not indicate that he exhibited behaviors that impeded his learning or that of others. (FF. 24-26) The PLEP of the IEP in place during the seventh grade, did however note that Student had needs regarding following directions and organization. (FF.28)

As a result Student entered the seventh grade with an IEP containing two goals intended to address behavior and organizational needs. (FF. 28) The PLEP of this IEP, although indicating Student is “showing some defiance to some of his school work” also indicated that he is participating more and completing assignments on a more consistent basis. (FF. 28) The PLEP contained no baseline measure or other objective criteria justifying the necessity of goals in this area.

During the seventh grade, Student appeared to have limited if any behavioral needs. (FF. 61) His seventh grade learning support teacher credibly testified that he was focused, completed school work and behaved appropriately. (FF. 61) Based on the evidence presented, this goal was satisfactorily implemented and FAPE resulted. Although Parent introduced documentary evidence with scant comments related to missing homework assignments, overall Student did not present with significant behavioral needs.

Speech/OT

At the commencement of the seventh grade, Student had no speech goals in place. Speech goals were placed back into Student's IEP when the District expressed concern to Parent. (FF.15, 33-37) The PLEP indicated Student can produce the /r/ sound a the sentence although it was difficult for him to generalize this to a less structured setting, like conversational speech. (FF. 30) In response to this need, Student was expected to produce the /r/ sound correctly with 75% accuracy in both therapy and the classroom. (FF. 30) Progress toward this goal was to be evaluated by data collection. (FF. 35)

Unlike other aspects of the PLEP regarding the academic goals, the speech PLEP is adequately descriptive and outlines with specificity Student's level of ability. This speech goal was implemented by the therapist on a consistent basis and Student made measurable progress toward his goal. Based on the evidence presented, no denial of FAPE for speech programming for the time period involved occurred to Student.

With regard to occupational therapy, the PLEP in this section mixes Student's performance in written expression with the fine motor requirements of OT. (FF.28) Although the objective information with respect to Student's ability in this area is difficult to discern, the resulting keyboarding goals and twice monthly occupational therapy services were responsive to Student's needs and therefore, appropriate.

Overall, based on the totality of the evidence presented, Parent did sustain his burden of persuasion to in establishing that the IEP, specifically in the areas of reading and written expression, were not calculated to yield

meaningful benefit in light of the Student's intellectual potential. FAPE was denied Student.

2005-2006 school year – 8th grade

March 2005 IEP

Toward the end of the 2004-2005 school year, the IEP team convened, and revised Student's IEP. (FF. 52) This time only one reading goal was presented, shifting the emphasis from comprehension toward fluency although decoding and inferential comprehension were still identified as a chief reading needs. (FF. 55) This IEP was silent with respect to Student's other previously addressed needs, namely in the area of written expression. (FF. 57) This IEP largely replicated the format of its predecessor in that the PLEP failed to contain specific levels of Student in key academic areas. This time, the PLEP referenced reading fluency probes that had been administered a month before. (FF.51) However, no other baseline data was presented, yet according to this IEP Student still had continued needs in decoding, inferential comprehension, writing, and spelling. (FF.53-54) These deficiencies carry over to the goals that were ultimately drafted rendering this IEP deficient on its face.

Reading

In Student's eighth grade year, the District began using a different reading intervention program designed for struggling readers. (FF.66, 68-81) The difficulty with the program in place during Student's eighth grade year stems from the identification of his needs. Although decoding was clearly identified as a need under the PLEP, the IEP in place appears to shift the emphasis to reading fluency and strangely incorporates no English/writing/language arts goal. (FF. 54)

Despite these criticisms, this reading program put into place during the eighth grade was strong and Student did make progress. (FF. 64, 82, 87) In the READ 180 program, Student received daily, small and large group, as well as independent reading, phonics, fluency and vocabulary practice. (FF. 68-81) Although Student's other language arts needs were not specifically delineated in the IEP, he still received instruction in written expression as a component of his English class. (FF. 83-84)

With respect to reading comprehension, although no goal was provided, Student did make progress in this area moving from a fourth to fifth grade level. (FF. 64, 65, 87) Regarding reading fluency, although Student met this goal early in the school year, that goal was based on a third grade fluency level. (FF. S-46, p.50) Between November 2005 and March 2006, Student's reading fluency did increase but he still remained on a fourth grade level, four grade levels behind his peers. (FF. 47--50, 51, 53, 64, 87) The reading fluency goal was appropriate; however, the lack of reading comprehension and decoding goals in light of Student's total reading needs constitutes a denial of FAPE.

English/Writing/Spelling

Strangely, the March 2005, prepared when the IEP team convened, failed to contain any expectations for writing although a learning disability in this area continued to be referenced. (FF. 57, 63) In spelling, Student received specially designed instruction through an adapted program that appears to have afforded a degree of acceptable progress in this areas. (FF. 44) However, the lack of a writing goal or a clear reference with respect to how Student would receive instruction in this identified area of need and his progress in this area, renders this IEP flawed with respect to the writing program provided.

Speech/OT

Parent contends that Student was denied FAPE because the District failed to appropriately program for his speech language needs and prematurely exited him from services. In addition to that contention, Parent claims that the OT services provided to Student were not appropriate.

Speech services were reinstated at the beginning of Student's seventh grade year. (FF. 29, 33, 57-60, 85) With respect to this service, Student was afforded FAPE. His IEP clearly and concretely described what Student needed and what he would receive. (FF. 88, 90) The testimony from the District was credible that Student received speech consistent with the expectations in his IEP resulting in achievement of his speech goal and the resultant, appropriate discontinuation of speech services. (FF. 88)

The March 2005 IEP incorporated a keyboarding goal placing an emphasis on the completion of writing assignments in this manner. (FF. 56-57) This goal was based on a re-assessment of motor skills performance that

was detailed and fully described Student's abilities. (FF. 56-57) No denial of FAPE occurred with respect to the provision of OT to Student.

Behavior

In March 2005, when the IEP team convened and a new IEP drafted, the updated IEP contained no references to Student's behavior or organizational needs. (FF.62, 86) Although the PLEP section was silent with respect to completion of this goal in the previous school year, the evidence in this case has established no denial of FAPE in this area. Although Student was disciplined on two occasions during the eighth grade, those incidents were neither severe in nature nor were any other signals present to suggest that Student exhibited behavioral needs that warranted intervention by the District. (FF. 86)

Based on the evidence presented, Student was denied FAPE in the areas of reading comprehension, decoding and written expression while the March 2005 IEP was in place. Student's program in all other respects was calculated to afford meaningful educational progress.

2006-2007 School Year

March 2006 IEP

On March 13, 2006 the IEP team convened, drafted a new IEP and agreed to discontinue speech and OT services for Student. (FF. 89-90, 93-94) This IEP was implemented for the duration of the 2005-2006 school year with continued reading instruction using the READ 180 program. (FF. 70-71, 97) The PLEP in this IEP contained more detailed information and identified Student has having needs in decoding, reading fluency and written language (conventions). (FF. 91) Student's baseline information for reading fluency was presented along with testing results from the CRI with his decoding skills. (FF. 91) With respect to writing, the PLEP contained only that his progress had improved, without any objective basis presented for this information. As a result of the needs identified, the March IEP contained a reading fluency and a writing goal . (FF. 92) Although this IEP lacked both decoding and comprehension goals, instruction in that area remained a key component of the reading program Student received. (FF. 71,76)

Behavior goals were not included; nor were they needed based on the previous discussion. Additionally, speech and OT were also not included as Student had been dismissed from those services. (FF. 90, 94, 96) Parent has presented no evidence warranting the conclusion that the lack of behavior, OT or speech programming compromised this Student's program and constituted a denial of FAPE.

The reading fluency goal in this IEP was implemented primarily through the Read 180 program, in place the previous school year. In fluency, Student made progress moving from a fourth grade level in March 2006 to a sixth grade level early in his ninth grade year. (FF. 95) Again, no decoding goals were specifically put into place although Student's progress in that area appeared to budge from a fourth grade to between a fourth and fifth grade level. (FF. 64, 87) Similarly in oral passage comprehension, Student made slight progress, remaining on a fifth grade level while his silent comprehension moved to a sixth grade level. (FF. 64, 87, 105) In both decoding and reading comprehension, progress was slow but evident. Although no goals were specified in either of these areas, clearly the District's reading programming, at this juncture was responsive to Student's need. Overall, the denial of FAPE in decoding and reading comprehension, if any was de minimis. The evidence has established that the District provided programming in these areas consistent with Student's abilities.

The inclusion of a writing goal made this IEP favorably different from its predecessor. (FF.63, 84) However, without quantifiable data in the PLEP or goal related to Student's level of functioning, measurement of progress and the overall appropriateness are difficult to gauge. This exclusion renders the writing goal deficient.

ESY 2006

At the March 2006, IEP team meeting, the team concluded that Student was ineligible for extended school year because he was able to recoup skills/concepts taught him after breaks in the school year. (FF. 98) During the summer of 2006, Student attended a program at a private school. (FF. 99) Parents contend that Student was denied FAPE because ESY services were not provided, through the District to Student. The purpose of ESY services is to avoid the regression and poor recoupment experienced by some eligible students. If regression during program breaks, and subsequent recoupment makes it "unlikely the student will maintain the skills and

behaviors relevant to IEP goals and objectives,” then ESY is required, without which, the school year IEP would not provide FAPE. 22 PA Code § 14.132 (2) (iii). No credible testimony or evidence was introduced to support the necessity of the provision of ESY. In this case, the Parent has failed to establish that the team inappropriately concluded that Student was ineligible for ESY.

Student entered the ninth grade with the March 2006 in place. (FF.102) However, in October 2006, the District conducted a comprehensive re-evaluation of Student. (FF. 104-113) From that re-evaluation, an IEP resulted, in October 2006 which was implemented for the duration of Student’s ninth grade year. (FF. 114) Parent, through counsel, expressed disagreement with the re-evaluation report and now seeks reimbursement for an independent educational evaluation at public expense, namely a neuropsychological and speech language evaluations as well as reimbursement for an assessment conducted by Lindamood-Bell programs. (FF. 120) For the following reasons, the request for reimbursement for the privately obtained program and for a neuropsychological and speech evaluation is denied.

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

(b) Parent right to evaluation at public expense.

(1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency.

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

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

(ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a

hearing under §300.507 that the evaluation obtained by the parent did not meet agency criteria.

(3) If the public agency initiates a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

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

34 C.F.R. 300.502

Consistent with the above regulations, a four part analysis to determine whether a Parent can be reimbursed for an IEE follows. Those grounds are: 1) Whether the Parent expressed disagreement with the evaluation provided by the District; 2) Did the District, without unnecessary delay, initiate due process proceedings to determine the appropriateness of its evaluation; 3) Is the District's evaluation appropriate; 4) Is the Parent's IEE appropriate ? The pivotal question in this inquiry is the appropriateness of the District's October 2006 re-evaluation report.

Based on the totality of evidence presented, the October re-evaluation report was appropriate and fulfilled the requirements under 34 CFR §300.303-300.311. More specifically, the re-evaluation, utilized a variety of assessment tools and strategies to gather relevant functional and developmental information about Student, including information provided by the parents; assessed Student in all areas related to the suspected disability; was sufficiently comprehensive to identify all of Student's special education and related services needs; and utilized technically sound instruments to assess the relative contribution of cognitive, behavioral, physical and developmental factors .

The request for reimbursement for the Lindamood Bell program is denied. Furthermore, with respect to the request for additional evaluation, Parent has not obtained these evaluations; therefore no reimbursement can occur. Additionally, because the District complied with the regulations

governing the provision of special education, the request for an independent neuropsychological and speech evaluation is denied.

October 2006 IEP

In October 2006, the IEP team re-convened and drafted a new IEP. (FF. 114) The October IEP is different than those previously in place. This time, the team had before it detailed, comprehensive information that served to outline Student's needs in decoding, word reading and spelling. (FF. 115-116) For the following reasons, FAPE was afforded Student from October 2006 onward.

The October IEP contained detailed information about Student's academic functioning presented in a format that was both objective and comprehensive. (FF. 114) Although academic needs were clearly noted in the areas of reading fluency and written language (conventions), decoding was not included. (FF. 116) Additionally, although the re-evaluation recommended that counseling services be considered, because of Student's responses on the BASC, that information was not presented in the PLEP.

From the PLEP, this IEP presented three goals designed to address Student's reading comprehension, writing and reading fluency needs. (FF.116, 120) The record has established that throughout the school year, Student received reading instruction from the Read 180 program. As previously indicated that reading instruction provided Student with a program to address phonemic awareness, phonics, fluency, vocabulary, text comprehension, spelling and writing needs. (FF. 70) With the addition of a comprehension goal and a fluency goal grounded in the reading probes that had been performed, these goals and this IEP were appropriate to address all of Student's reading needs. Similarly, the writing program proposed was also appropriate. This time the writing goal specified the method measurement as well as more clearly stated the expectations of Student in writing. Based on the evidence presented, this program was sufficiently individualized to afford meaningful education progress to Student's in reading comprehension, decoding, fluency and written expression.

Parent contends that Student presented with behavioral or emotional needs that warranted intervention in the academic setting. Although the BASC administered to Student indicated his responses to be "clinically significant" in two areas, the team determined that no goals or services were

needed in this area. (FF. 108-111) Based on the testimony and other evidence in this case, the team conclusion was appropriate. Although, two areas of the student-self report were elevated, the District's approach in seeking "mutually confirming data " was prudent. (FF. 108-111) Neither Student's previous year instructor nor his father indicated similar concerns in this area. (FF. 108-111) Most indications were that Student appeared to be well-adjusted and functioning at an appropriate social-emotional level. Parent has not sustained his burden that a denial of FAPE has occurred; nor that reimbursement is owed for out of pocket psychological services.

Speech/OT

Finally, Parent contends that related services in area of speech and occupational therapy were prematurely stopped and as a result a denial of FAPE has occurred. Parent has failed to preponderantly establish this to be so. Both OT and speech services were discontinued on the basis of Student either meeting his goal or the demonstrated lack of necessity for the related service. (FF. 90, 94)

March 2007 IEP

On March 20, 2007, a new IEP was developed offering counseling services, a speech language and occupational therapy assessments, a revision to the PLEP, a transition plan and revision to the goals. (FF. 121) Parent did not agree to implementation of the March 2007 IEP. (FF. 122) By the time this IEP was offered due process hearings were well underway. (FF.117) F.) Based on the evidence presented, the program and placement proffered in March 2007, like the October 2006 IEP was also appropriate. This IEP was sufficiently individualized, offered education in the least restrictive setting and its goals were based on evaluative data permitting the measurement of progress. As such the District offered FAPE to Student.

Compensatory Education

Compensatory education is owed to Student for the denial of FAPE with regard to reading fluency, reading comprehension, reading decoding and written expression from November 29, 2004 through the end of the 2004-2005 school year. Compensatory education is also awarded to Student for a denial of FAPE in reading comprehension, decoding and written

expression from September 2005 until March 13, 2006 when the new IEP was implemented. Student is awarded compensatory education from March 2006 until the end of the school year and from September 2006 until October 2006, when an appropriate IEP was implemented, for a denial of FAPE in written expression.

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

In this case, the amount of compensatory education is calculated as follows. Student is awarded 1.5 hours (.75 reading and .75 English) of compensatory education for every school day from November 29, 2004 through the end of the 2004-2005 school year.

Student is awarded 1.25 hours (.75 writing and .50 comprehension and fluency) of compensatory education for every school day from September 2005 until March 13, 2006. Student is awarded .75 hours (writing) of compensatory education for every school day from March 2006 until October 6, 2006.

ORDER

AND NOW, this day 10th of October 2007,

1. Student is awarded 1.5 hours (.75 reading and .75 English) of compensatory education for every school day from November 29, 2004 through the end of the 2004-2005 school year.

2. Student is awarded 1.25 hours (.75 writing and .50 comprehension and fluency) of compensatory education for every school

day from September 2005 until March 13, 2006. Student is awarded .75 hours (writing) of compensatory education for every school day from March 2006 until October 6, 2006.

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

By: Joy W. Fleming
Joy Waters Fleming, Esq.
Special Education Hearing Officer
October 10, 2007