

*This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.*

## Pennsylvania Special Education Hearing Officer

### DECISION

ODR No.00043-0910LS

Child's Name: CG

Date of Birth: XX-XX-XXXX

Dates of Hearing: 10/28/09, 11/16/09

### CLOSED HEARING

Parties to the Hearing:

Representative:

Parents

Parent Attorney

Heather Hulse, Esquire  
400 Spruce Street, Suite 300  
Scranton, PA 18503

School District

School District Attorney

Carbondale Area  
101 Brooklyn Street  
Carbondale, PA 18407-2207

Andria B. Saia, Esq.  
Levin Legal Group  
1301 Mason's Mill Business Park  
1800 Byberry Road  
Huntingdon Valley, PA 19006

Date Record Closed:

December 21, 2009

Date of Decision:

January 5, 2010

Hearing Officer:

Anne L. Carroll, Esq.

## **INTRODUCTION AND PROCEDURAL HISTORY**

The Student in this case has never attended school in the District, having been enrolled by his Parents in either a charter school or parochial school since leaving early intervention services. During the 2008/2009 school year, Parents requested that Student be evaluated for special education services, but after eligibility was determined, Parents rejected a NOREP offered by the District for learning support services because it provided for Student to attend the District elementary school. Subsequently, Student was evaluated for speech/language and occupational therapy services, and Parents ultimately accepted the District's offer of speech/language and OT services provided in the parochial school. Parents also requested ESY services, which the District denied, leading to the due process complaint.

The Hearing Officer first assigned to this case initially accepted counsel's suggestion that the issues in dispute could be decided as a matter of law based upon a stipulation of facts. After reviewing the joint stipulation of facts and considering the arguments of counsel, however, he concluded that an evidentiary hearing was needed to adduce additional facts and that the parties should also address additional legal issues he identified. After this matter was reassigned, a brief hearing was held in 2 sessions in accordance with the original hearing officer's order and the parties submitted final closing arguments with respect to all issues.

For the reasons that follow, Parents' claims for compensatory education will be denied. The District will, however, be directed to convene Student's IEP team to determine how, if at all, Student can reasonably participate in any additional special education services located at District facilities pursuant to his dual enrollment status without disenrolling from the parochial school he is currently attending.

## **ISSUES**

1. Has the District offered FAPE to “Student”?
2. Did the District Area School District offer, and is it providing, adequate speech/language services to “Student”?
3. Did the District hinder, discourage or delay “Student’s” dual enrollment in the District or Parents’ acceptance of the May 28, 2009 IEP offered by the District for speech/language and OT services?
4. Did “Student’s” IEP team make a specific determination of ESY eligibility for the summer of 2009, and if so, what was the basis for that determination?
5. Was “Student” eligible for ESY services for the summer of 2009?

## **FINDINGS OF FACT**

Findings of Fact ##1—48 have been stipulated by the parties, and, therefore, are undisputed. Such Findings of Fact were entered into the record as part of Hearing Officer Exhibit 1. (N.T. p. 17)

### **Joint Stipulated Findings of Fact**

1. “Student” is a resident of the District, and therefore the District is the LEA for purposes of IDEA and Chapter 14, except when enrolled in a charter school. (SD-11).
2. “Student” received Early Intervention services from the Intermediate Unit from the 2004-2005 school year through the completion of the 2005-2006 school year.
3. At a meeting to transition “Student” from Early Intervention on January 23, 2006, parent indicated on the "Intent to Register and permission to evaluate" form that she (1) received her procedural safeguards, (2) intended to enroll “Student” at [Redacted] Charter School and (3) requested “Student” be evaluated for special education services. (SD-13, p. 1)
4. The District did not receive records or a request for an evaluation in 2006 because of parent's stated intent to register in the [Redacted] Charter School.
5. On May 12, 2006, parent indicated on the "Intent to Register and permission to evaluate" form that she (1) received her procedural safeguards, and (2) did not intend to enroll “Student” in the School District. (SD-13, p. 2)
6. As a result of the above, at the meeting to transition “Student” from Early Intervention to a school-age program, the District did not offer an IEP to “Student”.
7. On both the January 23, 2006 and May 12, 2006 "Intent to Register and permission to evaluate" forms, there is the following statement in bold capital letters: "I ALSO

UNDERSTAND THAT I MUST ACTUALLY REGISTER MY CHILD WITH MY SCHOOL BY MAY 15<sup>TH</sup> IN ORDER TO ENSURE THAT MY CHILD RECEIVES SPECIAL EDUCATION SERVICES NEXT YEAR."

8. "Student" has never attended a District Area School.
9. "Student's" parent enrolled "Student" in the District for the first time on August 20, 2009.
10. Each year the Intermediate Unit publishes a "child find" notice in the Times-Tribune paper. (SD-12)
11. "Student" is a nine year old rising third grader who has attended [Redacted] Parochial School in District, Pennsylvania continuously since first grade. (SD-11)
12. On January 12, 2009, Parent, signed an Evaluation Request form, citing her concern that "Student" was failing behind academically in reading comprehension and math. (SD-1)
13. On January 26, 2009, "Student's" parent completed the Parent Input Form indicating concerns with "Student's" speech, handwriting, social skills, behavior, reading comprehension, reading fluency, math calculations, math reasoning, written expression, listening comprehension, and oral expression. (P-1)
14. On January 27, 2009, the District received the Permission to Evaluate form back, in which Parent agreed to the proposed evaluation. (SD-1)
15. The District timely evaluated "Student" relative to the parents concerns about "Student's" academic progress, issuing an Evaluation Report on March 19, 2009. (SD-2)
16. The District's March 19, 2009 ER did not include a Speech/Language assessment or Occupational Therapy assessment. (SD-1, 2)
17. Although a specific speech and language assessment was not completed, the ER included a recommendation for direct instruction in phonologic, semantic, and syntactic abilities that permit ideas to be expressed orally. (SD-2. P. 18)
18. Based on the March 19, 2009 Evaluation Report, the School District determined "Student" was in need of special education services due to his primary disability category as Autism and secondary disability category as Specific Learning Disabilities in the areas of reading comprehension, mathematics problem solving, and oral expression. (SD-2)
19. Based on the March 19, 2009 Evaluation Report, the School District determined that "Student's" reading, math and oral expression difficulties are severely interfering with his education. (SD-2)
20. Based on the March 19, 2009 Evaluation Report, the School District acknowledged that "Student" had been diagnosed with an Autism Spectrum Disorder, Anxiety Disorder,

and Asperger's Disorder. (SD-2)

21. Based on the March 19, 2009 Evaluation Report, the School District determined “Student” is not adequate making progress within his current educational program. (SD-2, p. 22)
22. Based on the March 19, 2009 Evaluation Report, the School District determined “Student” had a full scale IQ of 86, with no unusual scatter. (SD-2)
23. Based on the March 19, 2009 Evaluation Report, the School District determined “Student” had the following standard scores in achievement:

Word Reading:	100
Reading Comprehension	74
Pseudoword Decoding	107
Numerical Operations	81
Math Reasoning	75
Spelling	103
Written Expression	103
Listening Comprehension	74
Oral Expression	75
24. Based on the March 19, 2009 Evaluation Report, the School District determined that “Student” is functioning at the 4<sup>th</sup> percentile in Reading Comprehension, 5<sup>th</sup> percentile in Math Reasoning, 4<sup>th</sup> percentile in Listening Comprehension, and 5<sup>th</sup> percentile in Oral Expression. (SD-2)
25. Based on the March 19, 2009 Evaluation Report, the School District determined “Student” may experience great difficulty keeping up with other students when Reading Comprehension and Math Reasoning skills are needed. (SD-2, p. 10)
26. Based on the March 19, 2009 Evaluation Report, the School District determined “Student’s” severe discrepancies in Reading Comprehension, Math Reasoning, and Oral Expression are severe, highly unusual, and indicate that “Student” should be achieving at a level significantly higher than the level he is currently at in reading comprehension, mathematics, problem solving, and oral expression. (SD-2)
27. Based on the March 19, 2009 Evaluation Report, the School District reported that at [Redacted] Parochial School “Student” has demonstrated difficulties within his current curriculum in the areas of reading comprehension and higher thinking skills in math despite receiving therapeutic staff support and small group instruction. (SD-2)
28. Based on the March 19, 2009 Evaluation Report, the School District reported that “Student’s” teacher at [Redacted] Parochial School had concerns about whether his current educational program was sufficient to meet his educational needs, even with small group instruction and therapeutic staff support. (SD-2)
29. Pursuant to the March 19, 2009 Evaluation Report, the School District was advised by

- “Student’s” teacher that he has difficulty understanding others, communicating with others, attending to tasks, with social interactions, and complying with teacher's directions. (SD-2)
30. Pursuant to the March 19, 2009 Evaluation Report, the School District was advised by “Student’s” teacher at [Redacted] Parochial School that he was performing on grade level in reading, math, science, social studies, and language arts in general. (SD-2. p. 1)
  31. Parent indicated her agreement with the March 19, 2009 Evaluation Report. (SD-2)
  32. On April 13, 2009, the District offered a NOREP for placement for “Student” at a District elementary school where he would receive special education and related services; however, an IEP meeting was not convened when parent did not approve the recommendation. (SD-3)
  33. Parent refused the offer of special education at the District because she did not want to move “Student” from [Redacted] Elementary School to receive the special education services. (SD-3)
  34. On the April 13, 2009, NOREP, “Student’s” parent requested mediation which never occurred. (SD-3).
  35. On or about April 28, 2009, parent spoke with Ann Boyle about rejecting services and her desire for the District to provide an aide at [Redacted] Parochial School. Mrs. Boyle suggested that parent request an evaluation for speech and language and occupational therapy by sending a written request.
  36. On April 28, 2009, Parent requested the District conduct a Speech and Language evaluation and an Occupational Therapy evaluation of “Student”. (SD-4)
  37. The results of the May 28, 2009 Evaluation Report found “Student” eligible for Speech and Language therapy as well as Occupational Therapy. (SD-5)
  38. Based on the May 28, 2009 Evaluation Report, the School District determined “Student” was in need of special education services due to his primary disability category as Autism and secondary disability category as Speech and Language Impairment; however, the previously identified Specific Learning Disabilities in the areas of Reading Comprehension, Mathematics Problem Solving, and Oral Expression were not included. (SD-2)
  39. On May 28, 2009, the School District offered an IEP for the delivery of speech and language and occupational therapies only that did not include any special education services related to “Student’s” Specific Learning Disabilities in the areas of Reading Comprehension, Mathematics Problem Solving, and Oral Expression that had previously been offered. (SD-6)

40. The District's May 28, 2009 IEP did not mention "Student's" primary disability category of Autism. (SD-6)
41. According to the May 28, 2009 IEP, the team determined that "Student" did not meet any of the seven factors which would make him eligible for Extended School Year (ESY) services, based on the information in its possession at the time that the IEP was offered. (SD-6)
42. Parent indicated her agreement with initial provision of services as indicated in the May 28, 2009 IEP, on the NOREP dated May 28, 2009. (SD-6, pp 24-27)
43. In a letter dated June 5, 2009, to the District, Parent rescinded her agreement to the initial provision of special education services and requested a meeting to further discuss the IEP. (SD-7)
44. In a second letter dated June 5, 2009, to the District, "Student's" parent indicated that although she and the District have previously discussed the matter, she is once again requesting dual enrollment for "Student" and further requested to discuss ESY services for "Student" at the District before June 21, 2009. (P-2)
45. On June 19, 2009, Ann Boyle, Supervisor of Special Education for the District, sent Parent a letter indicating: 1) receipt of Parent's rescinded agreement to the May 28, 2009 IEP; 2) that since "Student" did not fall under IDEIA, he does not qualify for ESY; and 3) that the District is reviewing Parent's other requests with the Department of Education and will set up a meeting when all pertinent information is received by the District. (SD-10)
46. Counsel for both the District and the Parent became involved in this matter in or about July, 2009.
47. "Student's" parent was never contacted by the District to schedule a meeting to discuss the May 28, 2009 IEP, dual enrollment, and/or ESY services.
48. In a letter dated July 2, 2009, to the District, Parent agreed to the May 28, 2009 IEP, but indicated her belief that "Student" required additional speech and language and occupational therapies, as well as Extended School Year services. (SD-10)

#### **Additional Findings of Fact**

49. Based upon Parent input and the results of the evaluation conducted by the school psychologist in March 2009, Student would have been found eligible for speech/language services had he also been evaluated for a language disability at that time. (N.T. pp. 272—276)
50. The speech/language and OT services offered to Student in the May 28, 2009 IEP were to be

provided in the parochial school Student attends. The District has delivered speech/language and occupational therapy services to eligible students at that parochial school for 5 years. (N.T. pp. 43—46, 53, 66, 192, 232; P-14)

51. Student's Mother her consent for services, in accordance with the advice of an advocate, because Parent believed that the speech/language and OT services offered by the District were inadequate. Parent did not state her reason for withdrawing consent in her letter to the District. (N.T. pp. 197, 203, 233—235; P-15, SD-7)
51. Parent did not realize at the time that withdrawing consent to the May 28, 2009 NOREP meant that Student could not receive any special education or related services from the District. Had she realized the implications of rescinding the NOREP, she would not have done it. (N.T. pp. 197, 198, 236, 237)
53. The speech/language services offered in the May 28, 2009 IEP consist of 30 minutes/week of group therapy divided among pragmatic social skills, receptive and expressive language skills. Student's therapist has noted progress in interacting with peers, taking turns and eye contact.(N.T. pp. 279—282, 289)
54. Parent first requested ESY from the District in January 2009. Parent was concerned that "Student" was struggling academically in school, regresses over the summer and takes a month or two to catch up. Parent understands the District ESY services to be a 4 hour/day, 5 week program. Parent expected Student to receive instruction in reading, math, as well as possibly receive OT and speech therapy during the summer. (N.T. pp. 211, 212, 220—222, 259—261)
55. Although Parent does not know specifically what the District offers in its ESY program, she believes Student needs routine and structure during the summer. Parent did not, however, express those concerns in her written input to the evaluation reports completed in March 2009 or May 2009, or directly to anyone at the District. (N.T. pp. 219—221, 259, 260; P-7, P-13, SD-2, SD-5)
56. When the District offered speech/language and OT services to be to be provided at the parochial school, Parent believed that "Student" was eligible for all services available to children enrolled in the District, including ESY. By the time Parent wrote to the District on June 5, 2009, requesting both ESY services and dual enrollment in the District and at the parochial school, Parent understood that those are separate, not interchangeable requests. (N.T. pp. 194, 236, 237; P-2)
57. In April 2009, when Parent first asked specifically about dual enrollment for "Student" in both the parochial school and the District, the District's Special Education Supervisor was not aware of any provision in the law permitting dual enrollment of a child in elementary school in both a private school and the District to access special education services. (N.T. pp. 50—54, 109, 190)



58. No IEP meeting was convened for “Student” in April 2009, before or after the District offered the April 13, 2009 NOREP, and no IEP had been developed for “Student” prior to May 28, 2009. (N.T. pp. 67, 68, 160)
59. The District decided that “Student” was not eligible for ESY services because the May 28, 2009 IEP was an initial IEP, with only evaluation data, no progress data, available as a basis for considering the ESY factors. The District takes data on progress toward IEP goals and the need for ESY services through March of each school year and makes the ESY determination based on the data. Student was determined not eligible for ESY based upon lack of data on regression and recoupmnt. (N.T. pp. 93, 95, 96, 283—285)
60. At the May 28, 2009 IEP meeting, the speech therapist referred to the factors to be considered for determining ESY eligibility and stated that Student was not eligible for ESY. There were no questions and no other discussion concerning ESY at the May 28, 2009 IEP meeting. (N.T. pp. 96, 97, 288, 289)
61. In conducting the speech/language evaluation, the speech therapist spoke to Student’s parochial school teacher, who expressed no concerns with respect to regression or recoupmnt of skills. (N.T. p. 286)
62. If the IEP team had determined that “Student” needed the speech/language and OT services to continue through the summer, he would have been provided with ESY services in those areas regardless of his District enrollment status. (N.T. pp. 93, 94)
63. On September 1, 2009 an IEP team meeting was held to discuss an IEP for the 2009/2010 school year that includes goals in the areas of speech/language, OT, reading and math. Parent did not return the NOREP, which provides for services to be provided within the District, including participation in regular education classes, with reading and math instruction in a learning support class and pull-out speech/language and OT services. (N.T. pp. 122, 123; SD-15)
64. At the time the due process hearing sessions were held in October and November 2009, Parent had not returned a signed NOREP accepting or rejecting the District’s program/placement offer. (N.T. p. 123)

## **DISCUSSION AND CONCLUSIONS OF LAW**

### I. Legal Standards

In light of the Parents’ position and arguments in this case, there are several underlying legal principles that must be set forth at the outset because they provide the framework for the discussion of the facts and the legal conclusions that constitute the ultimate decision in this matter.

Among these principles are the procedural and substantive limits placed on both the subject matter of a hearing and on a hearing officer's decision. A due process hearing may encompass only issues fairly raised in the complaint. 20 U.S.C. §1415(f)(3)(B); 34 C.F.R. §300.511(d). In addition, the decision must be based upon substantive grounds and upon a determination that the child in question has not received FAPE. 20 U.S.C. §1415(f)(3)(E)(i); 34 C.F.R. §300.513(a)(1). Procedural violations can support a claim for relief only if such violation(s) impeded a child's right to receive FAPE or significantly impeded parents' opportunity to participate in the decision-making process concerning provision of FAPE to the child or caused a deprivation of educational benefits. 20 U.S.C. §1415(f)(3)(E)(ii); 34 C.F.R. §300.513(a)(2). Nevertheless, the foregoing requirements do not preclude the hearing officer from ordering an LEA to comply with IDEA procedural requirements. 20 U.S.C. §1415(f)(3)(E)(iii); 34 C.F.R. §300.513(a)(3).

The next essential legal principle is allocation of the burden of proof. In *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005), the Supreme Court established that in IDEA due process hearings, as in other civil cases, the party seeking relief bears the burden of persuasion. Consequently, in this case, because Parents have challenged the appropriateness of the District's actions with respect to determining Student's eligibility, and right to/need, for ESY services, as well as the appropriateness of the services provided by the District, Parents must establish that the District denied Student all of the services it is obligated to provide.

Since the Court limited its holding in *Schaffer* to allocating the burden of persuasion, explicitly not specifying which party should bear the burden of production or going forward with the evidence at various points in the proceeding, the burden of proof analysis ordinarily affects

the outcome of a due process hearing only in that rare situation where the evidence is in “equipoise,” *i.e.*, completely in balance, with neither party having produced sufficient evidence to establish its position. Nevertheless, included with the burden of proof analysis is the common sense notion that the party with the burden of persuasion also bears a burden of production. A party cannot prevail if fails to produce sufficient evidence to support a claim. In other words, the party seeking relief also necessarily bears some responsibility for going forward with the evidence and providing a substantive evidentiary basis for a decision in their favor on any claim raised in their due process complaint.

## II. Determination of the Issues

### A. District’s Provision of FAPE to Student

#### 1. In General

In their due process complaint, Parents sought appropriate ESY services but also raised an overall issue of denial of FAPE. In Parents’ closing argument, they request full days of compensatory education from the date the District issued its initial evaluation report until, presumably, an appropriate IEP is offered. *See* Parent’s Closing Argument at p. 26. In addition to the claims for failure to offer ESY services and permit Student to dually enroll in the District prior to August 2009, Parents identified the following additional bases for denial of FAPE and entitlement to compensatory education in their closing argument: 1) failure to timely evaluate all of Student’s needs; 2) failure to offer an IEP after the initial evaluation was completed in March 2009; 3) failure to address all educational needs in the May 28, 2009 IEP.

Although all of those arguments are supported by the record, Parents’ claims for compensatory education must nevertheless be denied for several reasons. First, the complaint in this matter explicitly sought compensatory education from the beginning of the District’s ESY

program through the time an appropriate education program is proposed. Due Process Complaint, SD-7 pp. 1, 2. Parents never sought to amend the complaint to assert claims for additional compensatory education based upon other denial of FAPE issues. The facts were certainly available long before the complaint was filed, yet only in Parents' written closing argument did they develop a claim for full days of compensatory education dating to March 2009. The only other references to additional claims for denial of FAPE are found at the beginning and end of Parents' opening statement at the due process hearing, asserting that the School District failed to offer all services required under dual enrollment. *See* N.T. pp. 19, 1. 22—25; 20, 1. 1; 26, 1. 4—9.

Second, although the District clearly failed to follow all IDEA procedural requirements in this case, Parents' evidence and arguments stopped at pointing out the District's procedural lapses without establishing how the District's conduct resulted in a denial of educational benefit to the Student. In addition, although the District's actions interfered with Parents' ability to participate in the decision-making process, the evidence establishes that when Parent was offered the opportunity to participate in the decision-making process, she asked few questions and subsequently rejected services she knew Student needed, and that she had previously approved, because she believed he needed more services. (F.F. 51) Although Parent was not aware that she had extinguished, for the moment, Student's right to receive any IDEA services, Parent did not make the District aware of her reason for rescinding permission for services, and there is no evidence that the District was aware of Parent's reasoning. There is also no evidence that Parent would have acted differently at another time. Consequently, under the circumstances of this case, the District escapes liability for its failure to follow proper statutory/regulatory procedures.

In response to Parent's initial inquiries, the District appropriately issued a permission to evaluate, which was returned by Parent and was followed by a timely evaluation that identified autism and learning disabilities as eligibility categories and described several academic needs. (F.F. 12, 14, 15, 18, 19, 21, 24—26). At that point, Student became entitled to an offer of FAPE via and IEP that meets procedural and substantive standards. 20 U.S.C. §1412(a)(1)(A). In attempting to fulfill that obligation, however, the District significantly deviated from the procedures required by both the IDEA and Pennsylvania special education practices. *See, generally* P-11, Explanation of Child Find, Equitable Participation and Evaluations for parentally placed private school students.

Instead of convening an IEP team meeting in accordance with 34 C.F.R. §300.320, and following the procedures set forth in §§300.321—324 to develop an IEP based upon the evaluation results, the District issued a NOREP for special education services to be provided at a District elementary school. (F.F. 32, 58)

When Parent rejected the NOREP yet still requested services, the District suggested that Parent request another evaluation, this time for speech/language and OT services only. (F.F. 35) Although the second round of evaluations was completed in a short time and Student was found eligible for speech/language and OT services, (F.F. 36—38), the District's failure to conduct the additional assessments based upon the results of the first evaluation constituted another procedural misstep. The IDEA statute and regulations require that a child be evaluated in all areas related to a suspected disability. *See* 34 C.F.R. §300.315, 300.304(c)(4). The school psychologist who conducted the initial evaluation testified that he noted speech/language deficits that warranted further evaluation, which he recommended. (N.T. p. 145) The speech pathologist who ultimately conducted the speech/language assessment also testified that the initial evaluation

report indicated a need for further evaluation in that area. (F.F. 49) There is, however, no indication that the District followed through on the psychologist's recommendation or would have taken any other steps to assure that the additional evaluations would have been completed had Parents not been specifically advised by the District to request further evaluations, yet it was the District's obligation to proceed with the additional assessments.

After the speech/language and OT evaluations were completed, an IEP meeting was scheduled and speech/language and OT services offered. (F.F. 39) Most important for Parents, accepting the services would not require Student to change schools, since the services would be delivered at the parochial school. (F.F. 50) The May 28, 2009 IEP meeting, however, encompassed only the needs identified in the second evaluation and there was no discussion of all of the needs arising from Student's disabilities identified in both evaluations. (F.F. 39)

An IEP meeting that addressed all needs identified in both evaluations and resulted in a comprehensive IEP proposal was not held until September 1, 2009. The NOREP resulting from that IEP meeting again recommended providing both academic services (learning support for reading and math) and speech/language and OT services at the District elementary school. (F.F. 63; SD-15) As of the conclusion of the due process hearing, Parent had neither accepted nor rejected that proposal. (F.F. 64)

Despite the District's egregious procedural anomalies, as described above, Parents failed to establish that the District deprived the Student of services. Parent was unequivocal in her testimony that she did not and does not want to enroll Student in the District to receive services. There is no basis for concluding that Parent's participation in an IEP meeting prior to the time the District offered the NOREP on April 13, 2009 would have altered either the District's offer or the Parents' willingness to accept it, including the concept of dual enrollment. There is no

question that by the time the most recent IEP was offered in September 2009, Student was enrolled in the District as well as in the parochial school, and that the District is now aware of dual enrollment. (N.T. pp. 52, 53; S-11, p. 2). The most recent IEP, offered in September 2009, essentially combines the May 28, 2009 IEP with an IEP based upon the District's evaluation report of March 19, 2009. *See* SD-5, SD-6, SD-15. The District is still offering services at the District elementary school. SD-15. Although dual enrollment might provide the Student with the opportunity to access learning support or other special education services at District facilities, neither party has made any effort to explore that possibility.

Parents, who have both the burden of persuasion and the burden of producing substantive evidence in support of their claims, provided no testimony or other evidence to suggest that Student would have been offered additional or different services had an IEP meeting been held before the April 13, 2009 NOREP was offered to Parents, or if a speech/language evaluation had been conducted earlier, or if the May 2009 IEP meeting had included a discussion of the needs identified in the March evaluation report. It is a matter of pure speculation whether there would have been a reasonable means for Student to access learning support or other special education services in the District at any time between March 2009 and the present if he had been dually enrolled in the District in April 2009, when Parents first raised the issue. (F.F. 57) As noted, although Parents have relied on dual enrollment as the foundation of their arguments for denial of FAPE, they have not explored the past or present implications of dual enrollment for Student, including addressing "the scope and limitations of public services available to dually enrolled nonpublic students" as directed by the prior hearing officer. P-26, p. 7.

Finally, although Parents suggested that Student has social skills and behavior needs that the District allegedly did not address, Parents did not establish the scope and extent of such

needs or demonstrate how Student's ability to succeed in school is or was affected by such needs. Parents failed to produce evidence sufficient to support the conclusion that Student is entitled to compensatory education for a general denial of FAPE from March 2009 to the end of the 2008/2009 school year.

## 2. Speech/Language Services

Parents argued that the amount of speech/language services provided to Student in the current IEP is insufficient for a child with autism. Parents did not, however, establish how and why the services provided to Student are inappropriate or otherwise fail to meet his needs. To support compensatory education for insufficient services, Parents must produce some evidence of the level of services Student needs and why, based upon his particular, individualize needs, not simply because he is a child on the autism spectrum. Parents, however, produced no such evidence. Consequently, they have not established a claim for compensatory education for inadequate speech/language services.

In addition, because Parents revoked permission for the District to provide speech/language services when offered in May 2008, there is no basis for concluding that Student would have actually received the services earlier had they been offered. Consequently, Parents cannot establish that the procedural lapse represented by the delay in conducting a speech/language assessment and developing an IEP for speech/language and OT services denied Student an educational benefit.

## III. ESY

Parent's belief that Student needed summer services has been the central issue in the parties' dispute in this matter. Parent's ESY request for the summer of 2009 was primarily



directed toward obtaining structure, maintaining routine the summer and obtaining general academic support. (F.F. 54, 55)

The District's position that Student was not eligible for ESY and that it had no obligation to provide ESY services has two bases. First, the District argues that at the time ESY would have begun, Parent had rejected all special education services from the District, and, therefore, there was no legal basis for providing ESY, which is an extension of special education services provided during the school year and be provided in accordance with an IEP. *See* 34 C.F.R. §106. The District argues, in other words, that there is no stand-alone entitlement to ESY—it is not available because a Student has been evaluated and found to have a disability if there is no IEP in place.

Second, although the District would consider ESY for speech/language and OT, the areas in which Parents ultimately accepted special education services offered by the District, the District contends that there was no opportunity to collect data on the seven ESY factors required to be considered in accordance with 22 Pa. Code §14.132 to determine whether ESY was necessary. (F.F. 59) Moreover, the District contends that the underlying lack of entitlement to ESY for general academic issues likewise applies to ESY for speech/language and OT services—at the time Parents requested ESY in June 2009, they also rescinded the previously signed NOREP agreeing to speech/language and OT services. (F.F. 51)

There appears to be some disconnection between Parents' expectation of the type of ESY services they believe Student should have received and what the District believes it would have been required to provide if Student had been found eligible for ESY services. Parents appear to believe that by ultimately accepting the speech/language and OT services early in July 2009, they opened the door to Student receiving the academic services Parents primarily sought as ESY

services—additional help in reading and math over the summer. In this regard, however, the District’s position is entirely correct. Under the IDEA statute and Pennsylvania regulations, the threshold issue is whether extending special education services provided during the school year into the summer is necessary to assure that the eligible child receives FAPE. That is the foundation for considering the factors enumerated in §14.132. If summer services are not connected to services provided during the school year, there is no reason or basis for examining the 7 Pennsylvania factors that provide a framework for determining whether ESY services should be provided to a student. Because there was no IEP in place for either academic services or speech/language services by the end of the school year, Parents can establish no entitlement to ESY services under the IDEA statute or Pennsylvania regulations. The District had no reason to consider whether summer services were necessary to assure that the Student received FAPE, since he was not receiving any special education services in reading, math or any other academic area during the 2008/2009 school year. To the extent that Parents believed, or still believe, that the Student’s right to obtain ESY services from the District is directly tied to enrollment in the District, that belief is erroneous. The only relevant issue in terms of entitlement to ESY services for reading and math is whether the summer services Parents sought were related to a program in place during the school year. Here, there clearly were no services in place to extend into the summer.

Moreover, even if the ultimate acceptance of the IEP for speech/language services could provide a basis for ESY services, and if the IEP team had determined that Student should receive ESY services, the District would have provided him with speech language and OT services during the summer. (F.F. 62)

The underlying legal issue with respect to speech/language services, however, is identical to the issue presented by denial of academic ESY services. Because there was no IEP in place for Student to receive speech/language and OT services from the District during the school year, there was no basis for providing summer services. Once Parents rejected the speech/language services, Student could not receive special education services from the District and there was no reason to consider ESY services from June 5 until Parents reinstated consent for services on July 2, 2009. (F.F. 48) By that date, the school year had ended and there was no opportunity to extend services into the summer.

Finally, prior to Parents' initial consent for services and then rescission, Student's IEP had met, considered and rejected ESY eligibility based upon lack of data to establish a need for ESY services. (F.F. 59, 60, 61) Although Parents argue that the decision was flawed, they provided no actual evidence of a need for ESY services, either when the IEP team was considering that issue initially or at the due process hearing. Consequently, Parents failed to prove a claim for compensatory education based upon denial of ESY services.

#### IV. Dual Enrollment

Contrary to Parents' arguments in this case, dual enrollment based upon 24 P.S. §5-502, as interpreted by Pennsylvania court decisions, does not affect entitlement to ESY services. See *Veschi v. Northwestern Lehigh School District*, 772 A.2d 469 (Pa. Cmmwlth 2001), *Lower Merion School District v. Doe*, 878 A.2d 925 (Pa. Commwlth. 2005), *aff'd.*, 931 A.2d 640 (Pa. 2007). As explained above, entitlement to ESY services cannot, in general, be established where a Student has not received IDEA services from a school district prior to requesting ESY. Consequently, whether Student was dually enrolled in the parochial school and District is immaterial to determining whether ESY services should have been provided. The District's lack

of knowledge of dual enrollment in April 2009, when Parents first raised that concept with the District had no substantive effect on the Student's right to FAPE.

On the other hand, however, now that Student is dually enrolled in the District, the IEP team should meet to consider whether there is any reasonable way Student can access additional special education services within District facilities. It must be noted that ordering the parties to explore that possibility requires only that Student's IEP team meet in good faith to examine the schedules of both the parochial school and the District elementary school to determine whether Student could, *e.g.*, spend part of each day in a learning support class at the District and part of the day at Student's current school, or spend one or more entire days at the District elementary school on a regular basis. Dividing attendance on whatever basis, however, should be undertaken only if Student is likely to make meaningful progress by participating in District special education programs and dividing Student's time between two schools is otherwise feasible. There is no requirement that the District must assure that Student can access additional services in the District while remaining enrolled in and receiving some of his education at the parochial school.

### **CONCLUSION**

All of Parents' claims for compensatory education will be denied for lack of proof that the District deprived Student of FAPE, failed to provide necessary services, provided inadequate services.

Since Student is now dually enrolled in the District and a private school, the IEP team will be directed to meet and determine whether it is feasible for Student to be provided additional services under IDEA within the District while maintaining his parochial school enrollment.

In addition, the District will be directed to review its procedures for conducting evaluations, presenting special education evaluation results and conducting IEP meetings/developing IEPs for all eligible and potentially eligible children, whether enrolled in the District or in private schools, and assure that such procedures conform to statutory/regulatory requirements.

**ORDER**

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

1. Convene “Student’s” IEP team to discuss whether there is any reasonable means by which “Student” can access additional special education services within the District in accordance with the accompanying decision.
2. Review all procedures for conducting special education evaluations, reporting the results thereof to Parents and developing IEPs/conducting IEP meetings for all eligible and potentially eligible students, whether enrolled in District school or private schools and assure that all such procedures conform to statutory/regulatory requirements.

It is **FURTHER ORDERED** that Parents claims for compensatory education are **DENIED**.

Anne L. Carroll

\_\_\_\_\_  
Anne L. Carroll, Esq.  
HEARING OFFICER

January 5, 2010