

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 ON REMAND

Name of Student: D. G.
ODR #6810/06-07 KE

Date of Birth:
[redacted]

Dates of Hearing:
October 18, 2006,
January 5, January 8, January 9, February 23, March 5,
March 6, March 20, April 10, June 11, 2007 and June 12, 2007

DATE REMAND RECEIVED BY HEARING OFFICER
February 6, 2010

CLOSED HEARING

Parties to the Hearing:
Parent[s]

Council Rock School District
30 N. Chancellor Street
Newtown, Pennsylvania 18901

Date of Decision:
Date Remand Record Closed:
Date of Remand Decision:

Hearing Officer:

Representative:
Frederick Stanczak, Esquire
179 N. Broad Street
Doylestown, Pennsylvania 18901

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Doylestown, PA 18901

August 29, 2007
February 15, 2010
March 1, 2010

Linda M. Valentini, Psy.D., CHO

Background

This matter is on remand from the United States District Court for the Eastern District of Pennsylvania, which for unknown reasons did not reach me until early February 2010. It concerns Student, a twenty-five year old individual, formerly enrolled in the Council Rock School District (District), and special education eligible with a specific learning disability in reading and written expression, from the end of 1st grade through Student's school career. The Parents maintained Student was denied a free, appropriate public education (FAPE) in those areas as well as transition planning, entitling Student to compensatory education during the entire time of eligibility, while the District maintained that Student had always been provided with FAPE.

Following eleven hearing sessions from October 18, 2006 through June 11, 2007, and receipt of closing briefs on August 15, 2007, I rendered a decision on August 29, 2007, appealed by both parties to the Pennsylvania Special Education Appeals Panel which affirmed in total. Each then appealed that result by returning to the federal court action, previously stayed by the United States District Court of the Eastern District of Pennsylvania pending exhaustion of administrative remedies. The Court upheld the decisions in part, but under *Lauren P.*, 2007 WL 1810671, at *6 (E.D. Pa. June 20, 2007) found errors of law at both administrative levels. The Court held that both administrative levels erred "by removing from review the period prior to [Student's] seventh grade for equitable considerations based on the conduct of Student's parents. By imposing such a limitation on Student's compensatory education claim, they effectively punished Student for [the] parent's lack of vigilance, a result expressly forbidden by the Third Circuit caselaw." It then remanded the matter for me to determine whether Student is entitled to compensatory education for the second through sixth grade years. Therefore, this entire period is at issue, and the Court has directed me to determine which services were not appropriately, or were inappropriately, provided during that period, as well as the compensatory education if any Student should receive for them.

Issue

Did the Council Rock School District fail to offer Student a free appropriate public education from second through sixth grades?

Identification in 1st Grade¹

Early in Student's 1st grade year, prior to the November parent-teacher conferences, the teacher, certified both in regular and special education, had concerns about Student's academic, social, fine motor and speech/language functioning. Student was referred to the Child Study Team in early December 1992. The Parents gave the District permission to evaluate Student but also had Student evaluated privately. Among other things, the

¹ The 1st grade year is not being contested by the Parents. This brief summary is provided as an initial context for the matter.

private evaluator concluded that Student has a moderately severe reading disability and recommended reading instruction using an Orton-Gillingham based methodology.² The District reviewed the private evaluation report and issued its multidisciplinary evaluation report³ in April 1993, finding that Student should be identified as an exceptional student with a specific learning disability in the area of reading. Student was also recommended for evaluation for speech and language services. The IEP team developed an IEP in April 1993 that contained goals in the areas of decoding, reading comprehension, word recognition and spelling. The Parents agreed with the School District's recommendation and signed a NORA⁴ in April 1993. In 1st grade Student remained in the regular education first grade class room but the learning support teacher provided instruction and support through pushing-in to the regular education class and pulling-out Student and several other students for pre-teaching, re-teaching and independent instruction. The Language Arts block in first grade lasted approximately 160 to 180 minutes per day and included instruction in reading (including phonological awareness) and writing. During Student's pull-out time, the primary emphasis was phonics based instruction in reading and direct instruction in the organization of the writing process. Student began receiving Speech and Language as a related service and the special education teacher and the speech/language therapist communicated weekly. [NT 1271-1312, 1618-1632; S-1]

Findings of Fact

1. Student received four known intelligence tests. In December 1992 the K-BIT registered a Full Scale IQ of 97; in March 1993 the WISC-III registered a Full Scale IQ of 107; in October 1995 the WISC-III registered a Full Scale IQ of 97, and in February 2004 the WAIS-III registered a Full Scale IQ of 87. The FS 107 was done by a private practitioner who had seen other members of Student's family and given that this score is significantly out-of-pattern it may reflect some unconscious bias in scoring. The FS 87 was obtained in the midst of litigation

² This hearing officer, a licensed clinical and school-certified psychologist, takes notice of the fact that neurologist Dr. Samuel T. Orton (who died in 1948) and psychologist/educator Anna Gillingham (who died in 1963) first articulated a multisensory approach (sometimes referenced as a VAKT – visual, auditory, kinesthetic and tactile – approach) that has been adapted and refined in various incarnations that form the majority of today's "scientifically-based" reading instruction programs. Anna Gillingham with the help of Bessie Stillman first published *Remedial Training for Children with Specific Disability in Reading, Spelling and Penmanship* in 1935. The Orton-Gillingham methodology uses phonetics and emphasizes visual, auditory and kinesthetic learning styles. The approach provides students with immediate feedback and a predictable sequence that integrates reading, writing, and spelling. When the Parents' private evaluator Dr. [redacted] recommended an Orton-Gillingham type of instruction, the techniques were over fifty years old and widely used, just as they are today, but at the time period addressed in this decision there was no one specific marketed program called the "Orton-Gillingham Program".

³ MDE Report, in later IDEA authorization termed Comprehensive Evaluation Report [CER], and currently called the Evaluation Report [ER]. This simple example demonstrates the changes, sometimes subtle and sometimes not so subtle in special education statutes and regulations over the years. However, a District's duty to provide a free appropriate public education [FAPE] to a disabled student remains a constant.

⁴ Notice of Recommended Assignment, now called a Notice of Recommended Educational Placement (NOREP).

and may reflect respondent reluctance. Interestingly, the average of all four FS IQ scores (97+107+97+87) is 97; this may be the closest estimate of Student's cognitive potential. All scores obtained fall into the Low Average to Average Ranges.

2. Student was administered several Woodcock Johnson instruments over the years. Yielding Standard Scores, which are far more robust than grade equivalencies generated by the Stanford Achievement Test, they are the most suitable for comparison, yet Student's functioning was inconsistent. On the Woodcock Johnson Psychoeducational Battery-Revised given in March 1997 [5th grade] Student received scores as follows: Letter-Word Identification 83, Passage Comprehension 86, Writing Samples 95, Broad Reading 82, Broad Written Language 84. On the Woodcock Johnson Reading Mastery Test given in January 2003 [11th grade] Student received scores as follows: Word Identification 67, Word Attack 83, Word Comprehension 84, Passage Comprehension 78, Basic Skills Cluster 73, Reading Comprehension Cluster 80, Total Reading Cluster 78. On the Woodcock Johnson Psychoeducational Battery – III given in January/February 2004 [12th grade] Student scored as follows: Reading Fluency 80, Writing Fluency 97. In contrast, again in 12th grade, in January/February 2004 on a different instrument – the WIAT-II - Student scored a 71 in Reading and an 80 in Written Language. [S-7, S-23, P-1, P-4]

Grade 6 - 1997-1998

3. During all years relevant to this decision Student attended [Redacted] Elementary School which has approximately 350 to 400 students and is much smaller in comparison to the populations of other elementary schools in the District. Student's continuous attendance at [Redacted] allowed Student's teachers from the various school years to remain in contact with the next year's teacher, as well as to stay in contact with Student. On several occasions a teacher instructed Student in a lower grade and then again in a higher grade allowing for further continuity. [NT 1663-1664]
4. By the time they filed the complaint that forms the basis of this decision, the Parents had familiarity with special education programming through multiple receipts of the procedural safeguards notices for Student, and for their other child, who was also an eligible student.⁵ [NT 195-196]
5. In the summer prior to 6th grade the Parents retained legal counsel, [redacted], Esquire, to help with designing Student's program. The attorney communicated with the District before and during Student's 6th grade year both in early August 1997 and in February 1998. Meanwhile, in October 1997 the mother wrote directly to the District threatening to 'sue' for Student's education, "plus what

⁵ Student has a [redacted] who was not a student in special education.

- [Student] had lost”.⁶ The Parents were accompanied by their attorney for the IEP meeting at the end of 6th grade to plan for the 7th grade year, and they signed the NOREP for the upcoming year.
6. The record is silent about what specific complaints the Parents had about Student’s 6th grade special education program, or about any complaints they had about previous years. [NT 195-196, 427-428; P-21, P-23]
 7. The IEP for Student’s 6th grade year was drafted by Student’s fifth grade teacher, dually certified in both regular and special education, and Mrs. [redacted], the individual who was going to be Student 6th grade learning support teacher attended and participated in the IEP meeting. In October of 6th grade the fifth grade teacher prepared a summary of the program she delivered to Student in fifth grade at the request of Mrs. [redacted], the principal possibly in response to the mother’s letter threatening suit. [NT 1788, 1791; S-8, S-33]
 8. In 6th grade, Student was placed in an inclusion⁷ regular education classroom within which, in addition to typical students, there were eight special education students. The classroom was staffed by a regular education teacher, a special education learning support teacher, and two one-to-one teaching assistants serving two of the special education students. [NT 1928-1929]
 9. The special education teacher, Mrs. [redacted], was responsible for implementing Student’s 6th grade IEP and reviewed Student Student’s previous IEPs prior to beginning to work with Student. She holds a special education certification and a reading specialist certification. [NT 1916-1917, 1927-1929; S-8]
 10. Mrs. [redacted] had taught Student when she substituted for Student’s learning support teacher in March 1995, during Student’s 3rd grade year. [NT 1917]
 11. In 6th grade, the language arts period was comprised of fifty minutes for reading and fifty minutes for writing. [NT 1934, 1936]
 12. The inclusion class used the Houghton Mifflin text, a research based reading program, along with a series of adapted novels. In addition to the novels addressing different reading strategies and skills, the series included a workbook to address particular reading skills and vocabulary. The special education teacher would take Student and other special education students aside to provide pre-reading or re-reading activities so that they could access the curriculum in the inclusion classroom. Student’s whole class participated in choral reading and

⁶ The Parents did not follow through with a due process hearing until 2006, two years after Student’s graduation from high school.

⁷ This hearing officer takes notice that, now ubiquitous, in the middle to late 1990’s “inclusion classrooms” were on the cutting edge of providing students with disabilities an education in the least restrictive environment. These classrooms are staffed by a regular education teacher paired with a special education teacher for academic instruction.

- paired reading, and Student was also provided with books on tape. [NT 1932, 2008]
13. Student received daily small group or direct instruction when the special education teacher worked with a small group of students within the inclusion setting, or took a small group into the resource room setting. [NT 2026-2027]
 14. The special education teacher utilized several structured programs including the DC Heath text and the *Focus* Series, a structured reading program geared toward students with weaker reading skills that employed the strategy of “high interest” while providing skill building in the area of phonics to address various reading strategies. The *Focus* reading program taught phonics through the use of a work book that accompanied the text that covered vocabulary, comprehension and phonics and included assessments on each skill addressed in the text. [NT 1990-1991]
 15. The special education teacher found that Student was capable of reading aloud in the small group setting. [NT 1966]
 16. In addition to receiving reading instruction by the regular education teacher in the inclusion classroom, and the special education teacher in a small group in the inclusion classroom or in the resource room, Student also was instructed by the instructional support teacher, Mrs. [redacted], every day for forty-five minutes in order to work on decoding and phonics skills. The District’s director of special education purchased the Auditory Discrimination in Depth (“ADD”) kit specifically for the instructional support teacher to use when working with Student on phonological awareness. [NT 664-665, 1931, 1937, 1989]
 17. At the beginning of 6th grade, the instructional support teacher tested Student’s phonological awareness and shared results with the special education teacher. [NT 2020-2021]
 18. If the special education teacher noted that Student had particular difficulty with an aspect of decoding, she would tell the instructional support teacher so that Student’s difficulty could be addressed in the daily instructional support sessions. [NT 1933]
 19. The instructional support teacher provided additional support by pre-teaching the regular education reading lessons, re-teaching these same lessons and providing additional reading instruction. The special education teacher communicated with the instructional support teacher on at least an every other day basis to keep her informed about what Student was learning in the inclusion classroom setting. [NT 1931]
 20. Part of Student’s instruction in written expression would be in a “mini-lesson” with the whole inclusion class, followed by instruction by the learning support

- teacher in a small group to address pre-writing brainstorming. The instructional support teacher also participated in teaching Student writing skills. [NT 1935]
21. Expectations for 6th graders include going through the process of the “Elementary Performance Assessment”. The Elementary Performance Assessment is conducted in school over three days, and requires students to choose a topic, develop an outline, research a question about the topic, and produce a written piece that answers the student’s particular question. Students also must design a poster and prepare an oral presentation. [NT 1964-1965]
 22. The learning support teacher recognized the need for Student to have a topic that would motivate Student. Student selected pyramids, and with assistance from the instructional support teacher and the special education teacher Student produced a “fairly well written piece”. [NT 1935-1936]
 23. In terms of accessing the general education curriculum in social studies and science, the special education teacher used various strategies with Student including providing adapted tests that concentrated on the key objectives from the teacher manual, issuing study guides as well as class notes that only required Student to fill in missing words, and having Student participate in a study group during recess to prepare for tests. [NT 1954-1955]
 24. Although in the view of the learning support teacher Student was sociable and cooperative in group settings and with teachers, Student, as was Student’s habit, did not have a strong academic motivation in the classroom.⁸ [NT 1937, 1966]
 25. The learning support teacher explored various strategies to motivate Student including collaboration with the mother in the use of money as a reward. The librarian obtained a series of magazines on topics that Student enjoyed such as [redacted] and animals in order to assist with engaging Student in reading and writing. [NT 1937-1938, 1942]
 26. Inconsistent homework completion continued in 6th grade from previous years and the learning support teacher communicated concerns to Parents through a log that went back and forth between school and home on a daily basis. With respect to homework in the areas of reading and writing, the learning support teacher believed Student was capable but chose not to complete the homework. [NT 1940, 1942-1943]
 27. During Student’s 6th grade year, the learning support teacher attended parent-teacher conferences and a transition team meeting at the middle school level. Other than an issue involving Student’s being asked to complete a test using cursive writing and the mother’s objection, the learning support teacher never

⁸ In September 1995, during Student’s fourth grade year, the instructional support teacher had communicated her concerns about Student’s motivation in class to the Parents and instituted a behavior chart that included various rewards. [NT 1938-1939; S-33]

- received any complaints from Parents concerning Student's programming. [NT 1945-1947]
28. Student continued to receive speech and language therapy and occupational therapy during 6th grade. [NT 1963]
 29. The special education teacher kept data on Student's progress on Student 6th grade IEP goals and objectives, establishing baselines in each of the areas at the start of the school year [NT 1955-1960]
 30. By April of 6th grade, the special education teacher considered Student to be a "developing, expanding" reader, as opposed to being an "assisted developing or maybe developing" reader at the start of the school year. [NT 1960-1961]
 31. In the area of writing, which was more difficult for Student, the special education teacher noted that Student fell between the "assisted" and "developing" writer phase on the continuum. [NT 1961]
 32. When the learning support teacher left for maternity leave in the spring of Student's 6th grade year, she provided her replacement teacher with a summary of each of her students. The new replacement teacher shadowed the special education teacher for a few days in order to acquaint herself with the students and the program being delivered. [NT 1944, 1068; S-33]
 33. The replacement special education teacher, Mrs. [redacted], has certifications in regular education and special education and is a Literacy Specialist. She has also attended the two day training for the Wilson Reading Program. [J-1]
 34. Although the replacement learning support teacher did not recall much about teaching Student during the last two months of Student's 6th grade year, she reviewed her predecessor's testimony and confirmed that she carried over the implementation of Student's program as Mrs. [redacted] advised and directed her during the transition. She also testified that she collected data related to Student's IEP goals and objectives for the fourth marking period and reported this information to Parents. [J-1]

Grade 5 - 1996-1997

35. In 5th grade Student was placed in an inclusion classroom that had 24 children, 8 of whom were special education students. The 5th grade regular education teacher was dually certified in special education and regular education, providing a highly enriched educational environment along with the inclusion special education teacher, Mrs. [redacted]⁹. Two of the special education students had one-to-one "teaching assistants" who were in fact certified teachers themselves, and these

⁹ Mrs. [redacted] is the wife of [redacted]., Student's fourth grade regular education teacher.

- teachers supported all the students when they were not specifically assisting the children to whom they were assigned. [NT 1750-1751]
36. The 5th grade special education inclusion teacher holds a Master's Degree in Special Education, and received training in the Wilson Reading Program the summer before she taught Student. Mrs. [redacted] was the senior member of the special education staff at Student's school and as such had attended IEP meetings and IST meetings involving Student well before Student was placed in her classroom. She participated in the IEP meeting developing Student's 5th grade IEP and reviewed the file from Student's previous school years before actually beginning to work with Student. In addition the teacher had mentored Student's fourth grade special education teacher, Mrs. [redacted] who had taken over as the special education teacher when Mrs. [redacted] went out on maternity leave in October of Student's fourth grade year. [NT 1748-1749, 1752, 1800]
 37. The 5th grade special education teacher implemented the IEP, collected data to monitor Student's progress on the IEP goals and objectives and reported Student's progress to the Parents through a weekly parent contact log. [NT 1754-1755, 1787-1788; S-7]
 38. During 5th grade, Student received reading and writing instruction on a daily basis during a one hour and forty-five minute language arts block. Student's regular education classroom utilized the D.C. Heath Reading Series system that encompassed phonics, vocabulary, comprehension and fluency, along with a workbook that correlated with the stories in the text in order to reinforce the various skills The class also read novels which would be introduced through a "mini-lesson" in order to examine the genre of the book and to encourage students to make predications about the story. [NT 1758-1759, 1807]
 39. In addition to the one hour and forty-five minute language arts block, for the full 5th grade year Student spent an additional forty-five minute time period daily¹⁰ using a phonics based computer program in order to address Student's needs in the area of phonemic awareness. One of the learning support teaching assistants accompanied Student to oversee use of the computer program which presented phonics in a systematic and sequential program, requiring Student to master one level before moving to the next level. (NT 1761-1762).
 40. Student did not enjoy using the computerized phonics program and the 5th grade learning support teacher believes that may have been because this type of systematic program tends to be boring due to its repetitive nature and the fact that

¹⁰This was the inclusion class Social Studies period, so the 5th grade teacher gave Student a modified curriculum to be certain that Student received instruction in the essential concepts of the Social Studies units. The 5th grade teacher ran a study group at recess time for learning support students and issued study guides for each of the chapters in Science and Social Studies that were partially filled in or contained references to the page numbers where the answers could be found. [NT 1783, 1862-1863]

- a student can't move to another level until the student has mastered the one before. The 5th grade learning support teacher had a discussion with the Parents about the fact that Student was not motivated by the computer based program and a concern about Student's utilization of instructional time on a daily basis to engage something that Student was not "buying into".¹¹ [NT 1762, 1764-1765, 1844]
41. Throughout the 5th grade year, the special education teacher worked in the resource room with Student on a one-to-one basis to preview the reading selections with Student, using the Neural Impress Method¹², reading the assignment sentence by sentence. During this one-to-one time, the teacher reviewed phonics, decoding skills, word analysis and how to break words into syllables. This teacher knowledgeably testified about the elements of an Orton-Gillingham type approach to teaching reading and explained that the components of that type of program were used throughout Student's elementary school career. [NT 1760, 1859-1862]
 42. The 5th grade special education teacher employed elements and techniques of the Wilson Reading Program (an Orton-Gillingham based program), in which she had been trained, when instructing Student individually in word analysis skills. Although when she instructed Student she was not yet formally trained in the Lindamood Bell programs of *Visualizing and Verbalizing* and *Seeing Stars* she did utilize "visualizing" or "making movies in your head as you read" (Orton-Gillingham) techniques which are part of good reading pedagogy. [1799, 1803-1804]
 43. In the inclusion classroom, reading instruction (for which Student had been individually prepped by the special education teacher) would be given using guided reading of the story and re-reading with the special education students. The group of special education students engaged in partner reading and choral reading, with comprehension checks every few pages. Following the reading activity, the students were required to formulate a written response in their reading journals. [NT 1760-1761]
 44. The 5th grade students were required to read a selection of their choice for twenty minutes each evening. Student was also provided with books on tape for each of the novels read in class to use at home, in an effort to increase fluency. [NT 1776-1777]

¹¹ When asked whether the computer program interfered with Student's progress, Mrs. [redacted] testified that Student was making progress in reading and was receiving reading instruction other than the computer program. She testified candidly that she could not state whether or not the computer program was inhibiting Student's progress. [NT 1845]

¹² A very structured method whereby the student and teacher [or parent] reads a word, sentence or phrase aloud while the student follows on the page and then reads the piece back to the teacher; a pointing finger runs along the bottom of each word. A variation of VAKT, the technique is based on the same body of neuropsychological theories of reading that Orton and Gillingham proposed.

45. The 5th grade inclusion class approached writing through a “mini-lesson” and by reviewing writing samples completed by prior year’s students or the teachers as models. [NT 1769-1770]
46. As the class worked on a particular piece of writing, additional “mini-lessons” were provided to address specific problems the students were encountering. The regular education and special education teachers took the students through the steps of the writing process including brainstorming, individual conferencing, and using graphic organizers such as story maps, drafting and revising. The students used checklists to be sure their writing contained the key elements such as proper punctuation, sufficient details, and spelling. [NT 1770-1772]
47. Student exhibited needs in all areas of writing, including content, conventions, organization and style. [NT 1774]
48. Student had a talking Franklin Speller to assist in the writing process, and received direct instruction in each of the areas of need. Student’s reading and writing programs used a multi-sensory approach. [NT 1773,1775-1776]
49. Tailored use of a classroom incentive system was used for Student whereby Student was commended for participating in class, completing homework or demonstrating motivation. [NT 1780-1781]
50. The 5th grade teacher had contact with the Parents through parent-teacher conferences, the IEP conference in the spring and a few phone conversations when assignments were not being completed consistently. [NT 1784-1785]
51. The 5th grade teacher did not receive any complaints from the Parents or objections to Student’s programming during the fifth grade year, although the mother asked that the phonics based computer program be discontinued after fifth grade. Mrs. [redacted] executed and prepared a form memorializing parent’s request that Student discontinue the computerized reading program. Mr. [redacted]¹³, the previous supervisor of special education in the District, had direct communication with the principal, who in turn communicated with the 5th grade special education teacher about Student’s progress. The principal never communicated to the teacher that parents were unhappy or that they thought Mrs. [redacted] should be doing something differently when instructing Student. [NT 1785, 1790, 1839-1841; S-33]
52. As noted earlier, Student’s test scores were inconsistent, with one instrument registering a first grade instructional reading level in 5th grade while another test registered a third grade reading level in 5th grade. [NT 1787, 1819; S-5, S-7]
53. The 5th grade learning support teacher assessed Student’s decoding and fluency

¹³ Mr. [redacted], working in a New Jersey school district, nevertheless came to the hearing and provided in-person testimony.

skills on a routine basis, and found that at the end of 5th grade Student was reading at a third grade instructional level. When measuring Student's progress in the area of reading, Mrs. [redacted] considered Student's performance in the classroom as well as the administration of standardized tests. She testified that she definitely saw improvement with Student and progress during the 5th grade year in the area of decoding and reading.¹⁴ [NT 1766-1768, 1819, 1825-1827, 1838-1839]

54. In March of the 5th grade year, on the Woodcock Johnson Psychoeducational Battery-Revised, an individual achievement test yielding standard scores which are robust in comparison to grade-equivalent scores, Student received scores as follows: Letter-Word Identification 83 [low average range], Passage Comprehension 86 [low average range], Writing Samples 95 [average range], Broad Reading 82 [low average range], Broad Written Language 84 [low average range].¹⁵ [S-7]
55. At the end of the 5th grade year Student exhibited the ability to use Student's reading strategies to progress forward from the third grade level to comprehend materials at higher and higher levels. [NT 1588]
56. Progress on the writing goals was assessed by the teacher's examining Student's writing pieces with regard to each of the domains contained in the writing rubric. She assessed Student's progress using curriculum based tests and quizzes as well as responses in Student's reading journal, Student Student's writing itself, spelling tests and other assignments given on a regular basis. [NT 1808-1809, 1833-1835; SD-7]

Grade 4 - 1995-1996

57. In 4th grade Student was placed in an inclusion classroom that had 9 or 10 special education students with language-related needs. The classroom was staffed with a regular education teacher, Mr. [redacted] and a special education teacher, Mrs. [redacted] who co-taught the class. [NT 1293, 1302-1303, 1313]
58. Mr. [redacted], the regular education teacher is certified to teach grades 1 through 8 and Science. He worked as an elementary teacher at Student's elementary school for his entire thirty (30) year teaching career from which he has since retired. [J-1]

¹⁴ Mrs. [redacted] credibly testified that although she would hope for a student to make a year's worth of growth in one year's time, that is the measure of what a regular education student does and depending upon the severity of their disability, not every learning disabled student can be guaranteed to make a full year's growth every school year. [NT 1855-1856, 1864-1865]

¹⁵ Given Student's estimated IQ of 97, and Student's moderately severe learning disability in reading and written expression, these scores are indicative of skill acquisition at an appropriate level.

59. Mr. [redacted] noted that certain activities in reading and writing (story starters, story mapping, student conferencing, pre-reading and post reading) occurred in the regular education setting, taught by both teachers and that there was a “pull out” component for the special education students for language arts where more direct and individualized instruction occurred as described by Mrs. [redacted], the special education teacher. [J-1]
60. The special education teacher for Student’s 4th grade holds a Masters Degree in Special Education with certifications in elementary education and special education. Mrs. [redacted] had been Student’s first grade regular education teacher (1992-1993 school year) and it was she who had concerns about Student’s functioning early in that first grade school year, expressing concerns about whether Student’s speech/language acquisition was adversely impacting academics. [NT 1271-1275, 1313]
61. In September of the 4th grade year, Student was referred for a multidisciplinary evaluation. The special education teacher completing the referral form noted that the reason for referral was concerns about academic and social progress and concerns about lack of motivation. Student demonstrated an unwillingness to engage in activities and was unable to complete tasks without a great deal of teacher direction, and although both regular and special education teachers tried various strategies to motivate Student, Student performed inconsistently. The special education teacher found that the CER of October 1995 accurately described Student’s presentation as a student. [NT 1306-1308; S-4, S-5]
62. The results of the re-evaluation concluded that Student was severely learning disabled in the areas of grapho-motor abilities, language arts and visual perception. The evaluator found Student’s decoding skills to be stronger than Student’s comprehension skills. Although Student was found to have a pleasant demeanor and age appropriate interests (sports, pets, etc.), Student was not engaged in the learning process. [S-5]
63. After the issuance of the re-evaluation report, pursuant to a multidisciplinary evaluation meeting in November 1995, the District’s literacy specialist began providing supplementary reading instruction on a twice-weekly basis, in addition to the daily reading instruction provided by Student’s regular education and special education teachers, in order to increase Student’s reading confidence, context based phonic instruction and written expression. [S-6]
64. The IEP for Student’s 4th grade year carried goals addressing reading decoding and reading comprehension, and written expression. Student also received speech and language support and occupational therapy, as well as direct instruction in the writing process both in the regular education classroom as well as the resource room. [S-4]

65. The reading component of Student's programming occurred in the regular education inclusion classroom, as well as in the resource room where the special education teacher delivered a multi-sensory reading program to the students addressing reading fluency, comprehension, decoding, and vocabulary. [NT 1295-1298, 1299-1301]
66. The special education teacher addressed vocabulary, word patterns and studying word families as well as phonological awareness. [NT 1296-1298, 1311-1312]
67. The special education teacher focused specifically on decoding with Student in small group and one-to-one settings utilizing a multi-sensory approach; Student showed progress, although Student was inconsistent. [NT 1323]
68. In the area of writing, Student likewise had individualized as well as group instruction using research-based instructional techniques and strategies. [NT 1326, 1338-1339, 1350]
69. Writing instruction, in addition to utilizing aids such as graphic organizers and story maps, was enhanced by the fact that the regular education teacher, Mr. [redacted] and Student had a good working relationship that enabled Mr. [redacted] to succeed in engaging Student in the writing process. [NT 1300-1302]
70. During 4th grade the delivery of reading instruction and instruction in writing were intertwined. [NT 1309-1310]
71. Mrs. [redacted] went on maternity leave on October 27, 1995, and after she left, Mrs. [redacted] took her place. [NT 1304, 1347]
72. Mr. [redacted] confirmed that Mrs. [redacted] continued to implement the type of program being instituted by Mrs. [redacted]. He recalled that Student made steady progress throughout the 4th grade school year. [J-1]
73. Mr. [redacted] described his relationship with Student and the Parents as very good. Although it took effort to engage Student in the learning process, Mr. [redacted] found that allowing Student to speak with Student about preferred topics (such as redacted) in exchange for completing work proved to be a useful strategy. Mr. [redacted] also recalled that Student was motivated by the prospect of finishing work and then being able to go right to recess or to another "fun" activity. Mr. [redacted] found that Student responded well to positive reinforcement. [J-1]
74. Mr. [redacted]¹⁶ denied that he ever told Student's parents that he was unaware of Student having a reading disability, as they have alleged. Mr. [redacted] worked

¹⁶ His wife, Mrs. [redacted], was the senior learning support teacher who mentored Student's replacement special education fourth grade teacher when Student's original special education teacher went on maternity leave. She then became Student's fifth grade special education inclusion teacher.

closely with the special education inclusion teachers and had direct knowledge of who the special education students were in his class, as well as their individual needs, since he was also responsible for implementing the students' IEPs. [J-1]

Grade 3 - 1994-1995

75. Student received instruction in 3rd grade in an inclusion setting with the reading instruction working very similarly to first and second grades, with part push-in and part pull-out for language arts. There were two special education teachers in the 3rd grade year as one replaced the other on maternity leave.¹⁷ [NT 1667]
76. Mrs. [redacted], Student's 3rd grade special education teacher, has a Bachelor of Science degree in special education and gifted education and has her Master's equivalency. She is a certified special education teacher, teaching mainly reading, writing and mathematics, and has acted as an inclusion teacher as well as a resource room teacher. She first became acquainted with Student when she participated in developing and implementing the first grade IEP. [NT 1612-1616]
77. Mrs. [redacted] drafted Student's third grade IEP and implemented it until the middle of March when Mrs. [redacted] took over. Student continued to have needs in the areas of decoding, word recognition, reading comprehension and written expression. [NT 1662, 1664; S-3]
78. In third grade, for the special education students Mrs. [redacted] used the same reading text as was used for the 3rd grade regular education students, but she supplemented the reading program of her special education students with another series. [NT 1668]
79. Student progressed in 3rd grade in the area of phonics as well as reading comprehension. Student was able to answer questions about what Student read and during independent testing Student would answer questions without fail. However, unlike other students, Student did not read with any sense of purpose (such as wanting to know what happened next); Student read because Student was asked to do so. [NT 1674-1675, 1684-1685]
80. To assist Student with writing tasks the occupational therapist provided special paper for Student's use and Mrs. [redacted] and the occupational therapist obtained a "star writer" for Student as well. [NT 1668-1669]
81. Mrs. [redacted] testified that the delivery of the IEP in the inclusion setting with good regular education peer models worked well for Student, coupled with the

¹⁷ Before going out on maternity leave in March, Mrs. [redacted] arranged for Mrs. [redacted] "to shadow her" in order to acquaint herself with the students to insure a smooth transition (NT 1666).

- resource room programming that allowed for additional explicit instruction. [NT 1672-1673]
82. Student's instruction in writing was similar to what Student received during second grade, although the writing process now required students to establish a main idea, three supporting details and a conclusion, and use adjectives and adverbs. [NT 1673-1674]
 83. Student was a phonic speller and even if a word was not spelled perfectly, the word was understandable. Student also started to use word families to form other words by the time Student was in 3rd grade. [NT 1676-1677]
 84. During 3rd grade, Student continued to make steady progress based upon classroom assessments. Mrs. [redacted] testified that in third grade, as in second grade, Student's progress was reported to Parents at conferences and through report cards. A summary of the data taken during the year was provided to the next year's teacher and Mrs. [redacted] believes that this information was also provided to Parents either in writing or orally. [NT 1678-1681]
 85. During third grade, Student's affect remained similar to prior years but Student gained a core group of friends and Mrs. [redacted] never had a concern that Student was depressed or psychologically unstable. Addressing Student's motivation during third grade, Mrs. [redacted] testified that at times Student would put Student's head down on the desk and look tired, offering the excuse that Student had been up late because Student's cousins were visiting. [NT 1671-1672).
 86. In 3rd grade, Student's homework completion remained inconsistent but improved toward the end of the school year. Student's lack of homework completion affected class participation as well as overall progress since Student was missing the opportunity to practice and become more fluent. Mrs. [redacted] utilized different types of incentives (candy, privileges or positive reinforcement); initially new incentives would work for a short amount of time and then Mrs. [redacted] would look for something else to motivate Student. Student responded well to an incentive plan provided by Mrs. [redacted], Mrs. [redacted] replacement. [NT 1682-1684, 1926-1927]
 87. Mrs. [redacted] taught Student when she filled in for Mrs. [redacted] in March of 1995, during Student's 3rd grade year, and would later teach Student for the majority of the 6th grade year. [NT 1917-1918]
 88. When Mrs. [redacted] took over from Mrs. [redacted] she transitioned into the position by "shadowing" Mrs. [redacted] to become acquainted with her students and teaching techniques, and she kept in touch with Mrs. [redacted] such that Mrs. [redacted] had some involvement in the preparation of Student's IEP for fourth grade. [NT 1685-1686, 1918-1919; S-4]

89. Mrs. [redacted] provided her reading instruction program very similarly to Mrs. [redacted]. When she took children out of the inclusion setting she provided supplemental reading instruction, re-teaching and pre-teaching in small groups or on a one-to-one basis. [NT 1919-1920, 1924]
90. Mrs. [redacted] used a guided reading approach along with the Scott Foresman *Focus* Series. She addressed spelling and utilized multi-sensory techniques such as the Neural Impress Method. [NT 1920, 1924]
91. Writing instruction started with a “mini-lesson” in the inclusion setting and then the special education students were taken into a small group to elaborate on the “mini-lesson” or to provide individual writing instruction. [NT 1920-1921]
92. The students engaged in journal writing, use of word banks and other techniques to assist with organizing writing through small group and one-to-one instruction [NT 1921-1922]
93. Mrs. [redacted] tracked student’s progress on IEP goals and objectives and shared this information with the Parents. [NT 1922-1923]

Grade 2 - 1993-1994

94. Mrs. [redacted], a special education teacher who later also worked with Student in third grade, had first become involved with Student when she participated in developing and implementing the first grade IEP. [1612-1616]
95. In May of the first grade year, Mrs. [redacted] wrote the IEP for 2nd grade, which carried goals in the areas of reading (sight word recognition, decoding, comprehension) and written expression (spelling). The Parents approved the proposed IEP for second grade. [NT 1627-1630; S-2]
96. In 2nd grade Student was placed in an inclusion classroom staffed by a regular education teacher and Mrs. [redacted], the special education inclusion teacher. Student was one of about eight special education students served through both a push in program [learning reading in the inclusion classroom] and a pull out program [receiving instruction in the resource room]. [NT 1630-1631, 1633]
97. During 2nd grade the inclusion classroom used the D.C. Heath Text Book and Second Grade Readers, and in the resource room Student was instructed using the *Focus* series. [NT 1635-1636, 1667]
98. The regular education 2nd grade reading text was accompanied by a phonics workbook that reinforced the phonemes in the textbook. [NT 1636]

99. Student's special education reading instruction during 2nd grade involved pre-teaching and re-teaching of concepts from the regular education setting in small group pull-out sessions. Also, the special education teacher further divided the small group into two or three yet smaller groups; she would rotate between/among the groups, and a teaching assistant and often a parent-volunteer would rotate as well. Student progressed from learning individual sounds to building words by combining consonant and short vowel sounds. At times, to reinforce the benefit of reading, the small group would read plays or short poetry. [NT 1633-1635]
100. In the small group setting, Student was instructed in phonics using word cards, vowel sound cards, sight word cards, the use of picture icons to correlate to vowel sounds, and having the students draw pictures to symbolize the sounds. The special education teacher had Tupperware tubs filled with sand so that students could write letters in the sand and trace over them. She had sand paper letters with raised dots on them that students could trace while they were making the sounds and putting the words together. Student's class also enjoyed using shaving cream and the use of carpet squares that allowed students to write out the words and obtain tactile stimulation. All these techniques provided the multi-sensory approach articulated in the Orton-Gillingham method. [NT 1636-1639]
101. Student's reading fluency was addressed through repeated readings of the same story in the class and through the Neural Impress Method. [NT 1640]
102. During reading instruction, Mrs. [redacted] also used "visualization" as a method for developing reading comprehension. She required the students to draw an original picture that described what they had read. [NT 1647]
103. Student was encouraged to practice phonics and reading at home, and the special education teacher sent home word cards and sound cards, as well as assignments in the workbook. Stories read in class were also sent home as repeated readings of stories build confidence and fluency. [NT 1638-1639]
104. Mrs. [redacted] found Student to be very cooperative but not showing much emotion. She worked on raising Student Student's level of motivation to learn to read, creating a unit on [redacted] and finding material on animals, topics that interested Student. [NT 1957-1958]
105. Student began mastering the beginning and ending sounds of words but sometimes distorted the middle sounds. The special education teacher worked on focusing Student in this regard, and Student made progress during the 2nd grade year as Student learned new sounds and became more easily able to blend the sounds to put words together. Student continued to make progress in 2nd grade in the area of reading as Student learned new sounds and starting putting words together. Mrs. [redacted] commented that the progress Student made was good and steady. [NT 1642, 1659]

106. In 2nd grade Student's writing instruction followed the Pennsylvania Writing Project System which involved pre-writing which included brainstorming and the development of story maps in the resource room setting prior to returning to the regular education classroom where the students prepared their first draft. The writing process moved from jotting down some sentences to actually writing in paragraphs. After students prepared a draft, they were encouraged to add, remove, move and substitute different things to strengthen the written product after which the students edited the piece to check for spelling and punctuation. The final step was publishing the written piece on the bulletin board or sharing it with classmates. [NT 1643-1644]
107. In the inclusion class students also received writing "mini-lessons" in various areas of grammar and conventions. The learning support teacher supported Student in the regular education classroom, including providing individual direct instruction in the writing process during "student-teacher conferencing". Reinforcement of these skills also occurred in the resource room setting. [NT 1644-1645]
108. Student found writing to be the most difficult subject and often had difficulty deciding on a topic. Encouragement and peer modeling helped Student, who had fairly narrow interests. [NT 1646]
109. Mrs. [redacted] testified that when measuring the goals and objectives contained in the IEP, she would have obtained a baseline, and there were tests and informal assessments that went along with the D.C. Heath and *Focus* series and it was from these sources that she collected data on Student's progress with respect to IEP goals. Mrs. [redacted] testified that she utilized this same process when measuring Student's progress in third grade. [NT 1664-1666]
110. In 2nd grade Student received speech services and Mrs. [redacted] spoke with the speech therapist on a frequent basis about supports to improve Student's articulation. Mrs. [redacted] recalls that Student began receiving occupational therapy during the second or third grade as well. [NT 1647-1648]
111. Student's completion of homework in 2nd grade was inconsistent. Although Student was capable of doing the homework assignment Student did not complete the homework. She offered different types of rewards as incentives including candy, and sometimes started the homework together with Student in class. Mrs. [redacted] had parent volunteers, her assistant or an older student who acted as a tutor help complete the homework with Student. Mrs. [redacted] found that Student could complete homework when requested to do so in school, and this gave Student confidence to raise Student's hand and participate in class. Mrs. [redacted] had contact with Parents regarding Student Student's homework completion and during second grade attended two progress conferences and one IEP conference with the Parents. [NT 1652-1656]

112. During the 2nd grade year, the Parents did not raise any concerns about Student academically. Mrs. [redacted] testified that at no time when she instructed, in either first, second or third grades, did Parents ever advise her that they wanted her to use a different methodology in the areas of reading and writing. [NT 1657]
113. In 2nd grade Student interacted well with classmates, played with other children at recess and enjoyed participating in group activities. [NT 1656-67]

Legal Basis

Burden of Proof: In November 2005 the U.S. Supreme Court held that, in an administrative hearing, the burden of persuasion for cases brought under the IDEA is properly placed upon the party seeking relief. *Schaffer v. Weast*, 126 S. Ct. 528, 537 (2005). The rule applies to both parents and school districts. *Id.* Because the plaintiff has the burden to prove the essential elements of a claim, and the language of the IDEA does not state otherwise, the burden of persuasion rests with the party seeking relief. *Andrew M. v. Delaware County Office of Mental Health and Mental Retardation*, 2007 WL 1723604 (3d Cir.) citing *Schaffer*, 126 S.Ct. at 535-537. See also *L.E. v. Ramsey Board of Education*, 435 F.3d. 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006). The party bearing the burden of persuasion must prove its case by a preponderance of the evidence. This burden remains on that party throughout the case. *Jaffess v. Council Rock School District*, 2006 WL 3097939 (E.D. Pa. October 26, 2006). As the Parents asked for this hearing, the Parents bear the burden of persuasion. However, application of the burden of persuasion does not enter into play unless the evidence is in equipoise, that is, unless the evidence is equally balanced so as to create a 50/50 ratio. Regarding the school years covered by this remand decision, the District offered preponderant evidence and the Parents did not offer evidence sufficient to equal, or even to approach, that offered by the District.

Credibility: Hearing officers are empowered to judge the credibility of witnesses, weigh evidence and, accordingly, render a decision incorporating findings of fact, discussion and conclusions of law. The decision shall be based solely upon the substantial evidence presented at the hearing.¹⁸ Quite often, testimony – or documentary evidence – conflicts; this is to be expected as, had the parties been in full accord, there would have been no need for a hearing. Thus, part of the responsibility of the hearing officer is to assign weight to the testimony and documentary evidence concerning a child’s special education experience. Hearing officers have the plenary responsibility to make “express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses”. *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003). This is a particularly important function, as in many cases the hearing officer level is the only

¹⁸ Spec. Educ. Op. No. 1528 (11/1/04), quoting 22 PA Code, Sec. 14.162(f). See also, *Carlisle Area School District v. Scott P.*, 62 F.3d 520, 524 (3rd Cir. 1995), cert. denied, 517 U.S. 1135 (1996).

forum in which the witnesses will be appearing in person. As this remand decision is based on a record review of previously heard live testimony, a portion of the credibility finding from the August 2007 decision is repeated as follows as it remains on point:

Although this hearing officer was favorably impressed by the fact that both Student's Parents were present for virtually every hour of this hearing, and evidenced unconditional caring for Student as well as a general sense of warmth and cordiality during the proceedings, there are significant credibility issues with [mother's] testimony. In particular it was crystal clear that she was protective of Student, to the point where she told her attorney that Student was ill when Student was in fact incarcerated, and testified to no present knowledge about Student's illegal substance use/abuse despite being present for Student's earlier testimony to the contrary. One issue of particular import, given that the issue goes toward the scope of the hearing, is her denial of having received the Invitation to attend the IEP meeting on June 15th when the District intended to issue an exit NOREP. She had never previously failed to receive mail from the District, and Student had already told the [Redacted] School director that Student's parents were going to sue the District and that Student would not take Student's diploma. Credibility issues render it impossible to accept her testimony versus the District's whenever there is a conflict.¹⁹

The witnesses who were employed by, or who worked on behalf of or in conjunction with, the District presented no troubling issues of credibility.

Legal Basis:

Special education issues are currently governed by the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA"), which took effect on July 1, 2005, and amends the Individuals with Disabilities Education Act ("IDEA"). 20 U.S.C. § 1400 *et seq.* (as amended, 2004). IDEIA is the latest in a long line of legislation to ensure the rights of disabled people, beginning with the passage in 1975 of the Education of All Handicapped Children Act, renamed Individuals with Disabilities Education Act in 1990, and reauthorized in 1997. The hearing regarding which this remand decision is being issued was requested in November 2004, prior to the enactment of IDEA 2004 and prior to IDEA 2004's implementation on July 1, 2005. Furthermore, the school years under consideration in this remand decision are years prior to the 1997 reauthorization. However, the essential provisions of the Act remain unchanged.

The IDEA is intended to make possible a free and appropriate public education for any child with physical, mental and emotional challenges. The purpose of the IDEA is "To ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services that are designed to

¹⁹ An example of the mother's testimony being impeached by a disinterested third party through records is that although she testified that Student had applied and been accepted at [redacted] College, there was no acceptance letter on file at [redacted]; although she testified that Student had applied online, the college told the District upon inquiry that it was only just now beginning the process of setting up the capability to apply online. (S-38)

meet their unique needs and prepare them for further education, employment or independent living”. 20 U.S.C. § 1400(d), 34 C.F.R. § 300.1(a).

Having been found eligible for special education, Student was entitled under the IDEA and Pennsylvania Special Education Regulations at 22 PA Code § 14 *et seq.* to receive a free appropriate public education (FAPE). ‘Special education’ is defined as specially designed instruction...to meet the unique needs of a child with a disability. ‘Specially designed instruction’ means adapting, as appropriate to the needs of an eligible child ...the content, methodology, or delivery of instruction to meet the unique needs of the child that result from the child’s disability and to ensure access of the child to the general curriculum so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children. 34 C.F.R. §300.26

The Parents allege that the IEPs that were developed for Student were deficient in that they lacked the basic elements of an appropriate program under the Act, such as measurable goals, a statement of the specially designed instruction to be used and an accurate description of Student’s educational needs. Moreover, the Parents allege that the District ignored the recommendation by Dr. [redacted], included in his evaluation report completed during Student’s first grade year - that Student needed intensive, individual language arts remediation utilizing a sequential multisensory approach like the Orton-Gillingham Method.” S-1, p. 10. The Parents allege that the District utilized an “unfocused eclectic approach” to Student’s instruction which failed to meet Student’s needs.

A student’s special education program must be reasonably calculated to enable the child to receive meaningful educational benefit at the time that it was developed. *Board of Education v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982); *Rose by Rose v. Chester County Intermediate Unit*, 24 IDELR 61 (E.D. PA. 1996)). If personalized instruction is being provided with sufficient supportive services to permit the student to benefit from the instruction the child is receiving a “free appropriate public education as defined by the Act.” *Polk v. Central Susquehanna IU #16*, 853 F.2d 171, 183 (3rd Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989); *Rowley*. The purpose of the IEP is not to provide the “best” education. The IEP simply must propose an appropriate education for the child. *Fuhrman v. East Hanover Bd. of Educ.*, 993 F. 2d 1031 (3d Cir. 1993). (See also *Board of Education v. Murphysboro v. Illinois Bd. of Educ.*, 41 F.3d 1162 (7th Cir. 1994) (Under the IDEA a district must follow the procedures set forth in the act, and develop an IEP through procedures reasonably calculated to enable the child to receive educational benefits. Once the district has done this the court cannot require more; the purpose of the IDEA is to open the door of public education to handicapped children, not to educate a child to his/her highest potential), citing *Rowley*, 458 U.S. at 206-07.) More recently, the Eastern District Court of Pennsylvania ruled, “districts need not provide the optimal level of services, or even a level that would confer additional benefits, since the IEP required by the IDEA represents only a basic floor of opportunity.” *S. v. Wissahickon Sch. Dist.*, 2008 WL 2876567, at *7 (E.D.Pa., July 24, 2008), citing *Carlisle*, 62 F.3d at 534, citations omitted. . See also, *Neena S. ex rel. Robert S. v. School Dist. of Philadelphia*, 2008 WL 5273546, 11 (E.D.Pa., 2008).

Case law has established that what the statute guarantees is an “appropriate” education, “not one that provides everything that might be thought desirable by ‘loving parents.’” *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

Problems with IEPs such as vagueness or failure to set measurable goals may constitute a denial of FAPE if they result in “the loss of educational opportunity, seriously infringe upon the parents’ opportunity to participate in the IEP process, or cause a deprivation of educational benefits.” *Souderton Area School District v. J.H.*, 2009 WL 34973 (E.D. Pa. 2009). *Followed by Caitlin W. v. Rose Tree Media School District*, 2009 WL 1383304 (E.D. Pa. 2009). The record in this case does not contain evidence that any such consequences resulted with respect to Student and Student’s educational programming. In *Sinan L. v. School District of Philadelphia*, 2007 WL 1933021 (E.D. Pa. 2007), the Court examined a Hearing Officer’s acknowledgement that some of the goals in the IEP contained errors (for example, measurability of goals); however, the goals were responsive to the student’s needs, met the minimum baseline requirements of the IDEA 2004 and did not deprive the student of educational benefit. The Court reviewing the case now on remand, *D.G. v. Council Rock School District*, 2009 WL 3109808 (E.D. Pa. 2009) well understood and adopted this hearing officer’s appraisal that while Student’s IEPs from 1998 through the end of Student’s enrollment in the District were “less than stellar” and standing alone did not fully convey the delivery of FAPE, the testimony of Student’s teachers established that Student’s special education program was effective and that FAPE was indeed delivered.

In this remand decision, we are now asked to examine IEPs that were written beginning in 1992 and to evaluate instructional methodology utilized well over a decade ago. Between 1990 and the present there have been three versions of the IDEA, and with each successive reauthorization school districts across the nation more finely honed the provision of special education to disabled students. Even less than for the previously adjudicated second half of Student’s education in the District, it is clearly not appropriate or just to compare what we know now with what we knew at the time the events addressed in this remand decision unfolded. As special education practices have evolved, the expectations for an IEP have grown from a fairly simple and straightforward document of several pages to the sophisticated model version that appears on PaTTAN’s website and that routinely encompasses dozens of pages. This hearing officer finds that in the middle 1990’s District staff were only fair IEP writers, but were superb educators, and that deficiencies in Student’s IEPs did not deprive Student of educational benefit.

In addition to there being two new versions of the IDEA since the events covered in this decision occurred, there has been an accumulation of a considerable body of caselaw in special education, as well as changes in the areas of teaching reading and written expression to persons with learning disabilities. However, what was old is new again and, for example, the reading instruction referenced as an Orton-Gillingham method, now is routinely referenced simply as a “multi-sensory” method. Likewise,

“sequential scientifically based reading instruction” is the latest incarnation of methodology based upon the familiar sequential instruction in the acquisition of the relationship between a symbol and a sound, or phonics, and is the scaffold upon which an Orton-Gillingham based approach climbs.

Although what was offered to Student in Student’s second through sixth grades is being evaluated in light of what was considered to be appropriate at the time, the credible testimony offered by the District’s witnesses reveals that what was offered to Student from 1992 to 1998 to address Student’s specific learning disabilities in reading and written expression was, and remains even in 2010, an excellent program.

The District was an early adopter of the “inclusion classroom” model, which provides disabled students with the least restrictive environment as mandated by the IDEA and supported by caselaw. Under this model, for all the years in question, Student was a member of a regular education classroom with co-teaching and supports provided by a special education teacher in that classroom. For parts of the school day, Student was also provided individual and small group specially designed instruction by the learning support teacher in a resource room setting, and then returned to the regular education inclusion classroom. For one of the years in question, Student received part of Student’s specially designed instruction from yet a third teacher.

Not only were Student’s instructional settings appropriate by 1990’s standards as well as standards in 2010, the specially designed instruction utilized by the District to teach Student reading was appropriate as well. In the instant matter, the Parents’ complaint focuses in part on the methodology of teaching Student reading and written expression. IDEA caselaw holds that parents do not have a right to compel a school district to provide a specific program or employ a specific methodology in educating a student. *Lachman v. Illinois Bd. of Educ.*, 852 F.2d 290, 297 (7th Cir. 1988) remains the leading case on methodology, wherein the Court ruled that Parents could not force a School District to adopt what they perceived to be an even more effective educational program. The Court recognized, “Once it is shown that the Act’s requirements have been met, questions of methodology are for resolution by the responsible authorities.” *Lachman* at 292. See also *M.M. v. School Board of Miami - Dade County, Florida*, 437 F.3d 1085 (11th Cir. 2006).

That having been said, in the case of Student the District was using exactly the private evaluator’s recommended type of Orton-Gillingham based, multisensory, systematic instruction that interfaces the processes of learning to read and learning to write. Moreover, in the inclusion classrooms Student’s instruction was delivered through the use of systematic and research-based published reading education series, and another series for challenged readers supplemented Student’s instruction in the resource room. As an instructional adjunct, in 5th grade Student was tried on a computer-based program of systematic phonics instruction. In the middle 1990’s, when [children Student’s] age spent hours and hours in front of keyboards playing Nintendo, it was reasonable to believe that a computer-based reading program would appeal to Student. However, the computer-based sequential reading program apparently was not well-

suiting to Student's personality style and this was not continued the following year at mother's request after the special education teacher and the mother discussed its relative merits.

In their Memorandum on Remand, the Parents assert that "instead of utilizing the recommended intensive, sequential multisensory approach to Language arts instruction, Student was instead taught through the employment of an "eclectic" approach that was not consistent from one year to the next". The Parents cite, in support of criticizing an eclectic approach, two Appeals Panel opinions, one from 2004 and one from 2005.²⁰ Aside from the obvious fact that the Parents are engaging in a decade's worth of Monday morning quarterbacking, attempting to refute a mid-1990's practice through the lens of the mid 2000's, this hearing officer must respectfully disagree with the premise that an "eclectic" approach to teaching reading and written expression was inappropriate for Student. First, the cohesive overarching instruction methodology the District used to instruct Student was that developed by Orton and Gillingham. Second, there are different types of dyslexia that respond to different instructional approaches, and our neuroscience during the years in question, and as it remains today, is simply not precise enough to be capable of identifying one specific program as being the key to teaching one specific learner. Student's teachers knew and employed Orton-Gillingham methodology using various published text series and various methods of conveying the material to Student and engaging Student in the learning process. This was not random, undisciplined, unstructured and inappropriate teaching. This was professional, reasonably calculated, responsible utilization of state of the art approaches to teaching reading and writing known at that time, delivered with flexibility and creativity, and persistence in the least restrictive environment to a student with moderately severe disabilities in language arts.

Student made progress throughout Student's entire educational career. In addition to paying close informed attention to the very credible testimony offered by the teachers, this hearing officer also relies upon the opinion of Dr. [redacted], who was an especially credible and instructive witness in the hearing. Dr. [redacted] conducted a painstaking comparison of Student's reading scores throughout Student's school career, including the Peabody Individual Achievement Tests done in 1993 and 1997, the Stanford Achievement Test scores from spring 2000 through 2003 (albeit with variable results that Dr. [redacted] would like to have explored by speaking with the examiners), the Woodcock Johnson Reading Mastery Tests, the Wechsler Individual Achievement Test administered by a parentally-selected private evaluator in February 2004 and any and all Reading Cluster composite scores that yielded a standard score or a percentile in both the Parents' and the District's exhibit books used in this proceeding. Dr. [redacted] conservatively concluded that Student "retained [Student's] position" with respect to peers throughout Student's education, explaining that since there was not an appreciable change in scores, Student would have had to make yearly progress and had to improve and acquire new skills to maintain Student's ranking each year, keeping in mind that students to which Student was being compared within the standardized testing population also continued to increase their skills [NT 2539-2544] This hearing officer concludes, based upon the totality of the evidence

²⁰ *In Re: N.B.*, Special Ed. Op. 1685 (SEA PA 2005), *In Re: D.H.*, Special Ed. Op. 1474 (SEA PA 2004).

that Student's slow and steady progress, given Student's moderately severe learning disability, represented the "meaningful educational progress" that is "more than *de minimis*" to which the IDEA entitled Student, and that has contributed to Student's currently being a working, functioning adult who is capable of forming relationships and moving toward independence.

ORDER

It is hereby ordered that:

The School District did not fail to offer Student a free appropriate public education from second through sixth grades. Neither Student nor the Parents are entitled to compensatory education for those school years.

The District is not required to take any further action.

March 1, 2010

Date

Linda M. Valentini, Psy.D.

Linda M. Valentini, Psy.D.
Pennsylvania Special Education Hearing Officer
NAHO Certified Hearing Official