

*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. 01525-1011 AS

Child's Name: J.D.

Date of Birth: [redacted]

Dates of Hearing: 3/18/11, 3/30/11, 5/10/11

### CLOSED HEARING

Parties to the Hearing:

Parents

Parent[s]

School District

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Date Record Closed:

Date of Decision:

Hearing Officer:

Representative:

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June 3, 2011

June 10, 2011

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## **INTRODUCTION AND PROCEDURAL HISTORY**

This case centers on Student's transition from early intervention/Ages 3—5 services provided by the Intermediate Unit to school age services provided by Student's School District of residence. The issues in dispute concern an appropriate educational program for kindergarten, including related services. Student is IDEA eligible in the categories of specific learning disabilities and speech/language impairment due to an underlying diagnosis of childhood apraxia of speech. Although the parties worked diligently over a period of more than 6 months to reach an amicable resolution, they were ultimately unsuccessful in completing an agreement concerning the kindergarten program/placement offered by the District. The parties did, however, agree to continue Student's pre-school placement in that school's kindergarten program for the entire 2010/2011 school year, and the District agreed to provide the same level of speech/language and occupational therapy services Student was receiving from the IU at the time EI eligibility ended.

The parties' agreement for the current school year puts this case in an unusual posture. The IEP put in issue by the Parents' complaint is for a kindergarten program, and there was no suggestion that the parties expect Student to repeat kindergarten during the 2011/2012 school year. Consequently, the facts in the record compiled during the two session hearing in March and May 2011 have somewhat limited utility, in that the issues concerning the appropriateness of the kindergarten IEP offered by the District provide no basis for either retrospective or prospective relief. Nevertheless, because of the significant divergence of the Parties' views concerning the components of an appropriate program/placement, the conclusions drawn from the record of this case can provide guidelines for the parties in developing an appropriate program/placement for the 2011/2012 school year.

## ISSUE

1. Did the School District offer Student an appropriate kindergarten program and placement for 2010/2011 school year, including sufficient speech/language services?

## FINDINGS OF FACT

1. [Student] (Student) is [early elementary school-aged], born [redacted]. Student is a resident of the School District and is eligible for special education services. (N.T. p. 203; S-25)
2. Student has a current diagnosis of specific learning disabilities and speech/language impairment in accordance with Federal and State Standards. 34 C.F.R. §300.8(a)(1), (c)(10), (11); 22 Pa. Code §14.102 (2)(ii). (S-25, pp. 13, 14)
3. Student began receiving early intervention services for speech/language issues at the age of 19 months. The IU within which the family resides assumed responsibility for early intervention services from Student's 3<sup>rd</sup> to 6<sup>th</sup> birthdays. (P-56, pp. 1, 2)
4. Although verbal/oral motor apraxia were recognized as disorders underlying Student's speech/language disability from an early age, the definitive diagnosis of the very specific expressive language disorder, Childhood Apraxia of Speech (CAS), was not made until August 2010. CAS differs significantly from developmental language delays. (HO-1, pp. 11-13 [N.T. pp. 484—487, 489]<sup>1</sup> )
5. Student first became eligible for transition to the District's kindergarten program in the fall of 2009. After an evaluation by the District and discussions between the parties, Parents elected to have Student remain in the IU/EI program for an additional year as recommended by the District. (N.T. pp. 98—100, 108, 204—207; S-8)
6. The District conducted a second evaluation of Student in the winter of 2010. At that time, the District school psychologist administered WPPSI-III (Wechsler Preschool and Primary Scale of Intelligence-Third Edition), which placed Student's cognitive ability in the average range, with consistent scores in all subtests that comprise Student's FSIQ of 109. (N.T. pp. 103, 105, 208; S-25, pp. 3, 4, 20)

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<sup>1</sup> In October 2010, the District funded an independent evaluation of Student conducted by a neuropsychologist chosen by Parents. (N.T. p. 272) The evaluator was called to testify at one hearing session during the due process hearing involving the same family and the IU responsible for Student's EI services. A decision in that case was issued several weeks ago. *See* ODR # 01524-1011AS (May 1, 2011). The entire transcript of the hearing session in the prior case, at which Student's Mother also testified, was entered into evidence in this case as Hearing Officer Exhibit 1 (HO-1). References to HO-1 will be to both the pages of the condensed transcript and to the specific testimony on the original transcript pages, indicated by [N.T. p.]. References to testimony taken during the two sessions devoted only to this hearing will be designated as "N.T. p." without brackets.

7. Student's early academic abilities were assessed with the YCAT (Young Children's Achievement Test). Student's scores were in the average range for math and general information and in the low average range with respect to pre-reading, language and writing. Student's composite score was in the low average range. (S-25, pp. 4, 5, 21)
8. The OT assessment included in the 2010 evaluation report noted significant gains in visual motor integration and cutting skills compared to the 2009 assessment. Continued weaknesses and below average skills were noted in the areas of manual dexterity, upper limb coordination and visual motor integration skills, as well as challenges in completing basic self-help skills. The weaknesses/areas of need impact Student's handwriting, coloring and general ability to succeed in the classroom. (S-25, pp. 8—10, 13)
9. Significant improvement in Student's social-emotional functioning compared to 2009 was also noted in the 2010 evaluation report. The results were based on ratings by Student's Parent and pre-school teacher on the BASC-II (Behavior Assessment System for Children-Second Edition). (S-25, pp. 5, 6, 13, 22)
10. The District's 2010 evaluation report also included a speech/language evaluation in which Student was assessed using the CASL (Comprehensive Assessment of Spoken Language). That assessment measures the oral language processing systems of auditory comprehension, oral expression and word retrieval, knowledge and use of words in communication contexts. The specific subtests include antonyms, syntax construction and pragmatic judgment. Student's percentile rankings ranged from a low of 27 on the antonym subtest, measuring word knowledge, word retrieval and oral expression to a high of 79 on Syntax construction. All subtests and Student's composite score fell in the average range. (S-25, pp. 6, 7)
11. Student's scores on a second language assessment, the KSPT (Kaufman Speech Praxis Test), designed to assess developmental apraxia of speech, confirmed Student's eligibility for speech/language services due to mild verbal apraxia, characterized by speech disintegration at the polysyllabic level. Student's scores fell in the average range on measures of oral movement, speech production at the simple phonemic/syllabic level, spontaneous length and complexity of utterance, although with a number of articulation errors, and in mean length of utterance, with consistent error in the use of the pronoun "her" instead of "she." (N.T. p. 583; S-25, pp. 7, 8)
12. Subsequently, at Parents' request, two additional language assessments, the TOLD-P-3 (Test of Language Development-Primary-3) and TAPS-3 (Test of Auditory Processing Skills-Third Edition), were conducted and the results added to the 2/1/10 RR. The tests had been previously administered to Student in April 2009 as part of an evaluation by the Center for Childhood Communication at Children's Hospital of Philadelphia (CHOP) (N.T. pp. 129, 222, 223, 226, 227; S-13, p. 2, S-25, pp. 23—25)
13. Although the evaluator noted that Student's performance may have been impacted by an ear infection during the first testing session, Student's scores on the 2010 tests improved on all subtests administered on both occasions except for the TOLD-P-3 Picture

Vocabulary subtest. The District's evaluator concluded, however, that the TAPS-3 results indicated phonological weaknesses and possible attention issues. (N.T. pp. 582—584; S-13, p. 2, S-25, pp. 23—25)

14. The parties first met to develop an IEP for Student in February 2010. Due to overall dissatisfaction with the District's proposal and wanting to wait for the additional language assessments the District had agreed to conduct, Parents rejected the February IEP and a revision after the additional testing was completed. (N.T. pp. 128, 163, 164, 216—218, 221, 235, 238; S-32, pp. 5—7)
15. Via mediation, the parties agreed that the additional language assessments and other information would be considered in developing Student's IEP for the 2010/2011 school year, and that they would engage in a facilitated IEP meeting in August 2010. (N.T. pp. 130, 241, 242; P-37)
16. At the facilitated IEP meeting, the District offered goals for academic skills, including 6 goals in reading/language arts focused on letter identification, comprehension/re-telling of stories presented orally, dictating a sentence and drawing a picture in response to a story starter and writing the letters of the alphabet. There were 5 math goals for developing counting, measuring and coin identification skills, as well as identifying shapes. (S-40, pp. 23—29)
17. The August IEP proposal also included goals for classroom behavior/peer relations and OT. Although the 3 OT goals were the same as those offered at the February IEP meeting, the District proposed a 30 minute session of individual OT per cycle in addition to the 30 minute group session offered in February. The additional services were offered by the District to address Parents' concerns, but the therapist was concerned about the amount of extra time Student would be out of the classroom to receive the additional services. The OT goals relate to functional tasks needed in the school environment, but also address more global issues embedded in the classroom-related tasks. (N.T. pp. 134, 520, 523; S-27, pp. 23, 24, 27, S-40, pp. 22, 23, 29—31, 35)
18. The District continued to offer 2 articulation goals for speech/language services, but increased the level of services from 1 to 2 30 minute sessions/cycle, both sessions conducted in group therapy. In addition to the specified pull-out services, the speech/language therapist pushes into the classroom to address language goals and issues, including social language. (N.T. pp. 134, 141, 142, 589, 590, 608; S-27, pp. 24, 25, 27, S-40, pp. 30, 31, 34)
19. In addition to direct OT and speech/language services, the District proposed once/month consultation provided by the speech/language therapist and OT to assist Student's regular teachers, as well as monthly consultation between the special education and regular education teachers and consultation by a physical therapist and a behavior specialist with all of Student's teachers. (S-40, p. 35)

20. The proposed IEP provided for individual and small group academic instruction, depending on Student's instructional level in various areas and that of other children in the classrooms. (N.T. p. 153; S-40, p. 33)
21. Although the District provides a half-day kindergarten program, it proposed to provide a full day of kindergarten services for Student in two full-time special education kindergarten learning support programs, both taught by the same special education kindergarten teacher. (N.T. pp. 136—136, 141, 620; S-40, p. 37, S-43, p. 2)
22. The District proposed to place Student in the transitional kindergarten for the morning of each school day, which is comprised of children who might otherwise have remained in an EI program for an additional year. The District expected Student to receive related services and practice academic skills during the morning transitional class. During the 2010/2011 school year, there were 5 children in the transition kindergarten class. (N.T. pp. 169—171, 620, 646 )
23. In the afternoon, Student was expected to attend the diagnostic kindergarten program to receive most of the academic instruction. There were 7 students in that class during the current school year. At lunch, Student would have been with typical peers in an all day kindergarten program for "at risk" but not IDEA eligible students (N.T. pp. 169, 172, 173, 646)
24. In addition to the special education teacher, there were 2 classroom assistants/aides in both the morning and afternoon programs. (N.T. p. 621)
25. Reading, writing, spelling instruction is provided via Foundations, an intensive, phonemic rule-based program that is one of the Wilson reading programs. Soar to Success is also used for direct reading instruction, which is provided for approximately 20—25 minutes each day in both kindergarten programs. Additional literature-based activities are also incorporated into the program. (N.T. pp. 175—177, 623, 624)
26. Student, along with the other children in both classes, was expected to be included with a regular kindergarten class for app. 30 minutes during each session for specials (PE, art, music, library). During the current school year, students in the transitional and some students in the diagnostic class are also included in a regular kindergarten for some academic instruction and individual work each day. (N.T. pp. 170, 171, 621; S-40, p. 38)
27. As the 2010/2011 school year progressed, the students placed n the transitional kindergarten program spent more time than originally expected in the typical kindergarten room, with the special education teacher participating in the instruction provided in the regular kindergarten classroom using a co-teaching model. (N.T. pp. 641, 642)
28. Parents rejected the District's placement proposal due to questions arising from the District's/teacher's lack of experience with the transitional special education kindergarten class, which was initiated during the 2010/2011 school year. Parents expressed concerns

about the physical location of the classroom, composition of the classes in terms of the nature of the disabilities of other children in the classes and whether Student and classroom peers would have comparable cognitive ability. Primarily, Parents were dissatisfied with the level and intensity of services provided in the District's proposed IEP. (N.T. pp. 140, 190, 191, 246, 247, 266, 271, 272, 292—294, 521; P-49, pp. 3, 5)

29. Parents were also concerned about the limited contact with typical peers provided by the District's proposed placement of Student entirely in special education kindergarten classes. Around the time the first IEP was offered, Parents requested that the District consider placing Student in the diagnostic kindergarten program in the morning and in a typical kindergarten for the afternoon. The District, however, rejected a full day program at that time. (N.T. pp. 219, 220, 256, 272)
30. The District was willing to consider an out of District placement. Parents and/or District staff observed several other programs, but the potentially acceptable public or private school programs were either unavailable to Student because of enrollment limits or were not selected due to characteristics of the programs or other, undisclosed reasons. (N.T. pp.144—152, 179, 180, 218, 287, 324—326)
31. Because the parties were unable to agree upon a District placement, the District funded Student's kindergarten tuition at the private pre-school Student had attended for several years. (N.T. pp. 285, 304)
32. The District also continued Student's pendent speech/language and OT services during the current school year at the level of 3 45 minute individual speech therapy sessions/week and 2 45 minute OT sessions/week. (N.T. pp. 142, 143, 285)
33. The teacher for the private school kindergarten program is certified and experienced in special education as well as in early childhood and is also certified in elementary education. Student's class includes 4 girls and 3 boys in a program influenced by Montessori methods, including learning centers, hands-on materials and instruction tailored to each student's needs. The curriculum is aligned with Pennsylvania public school standards for kindergarten. (N.T. pp. 62, 63, 65, 78, 91)
34. The school day encompasses just over 4 hours (8:45 a.m. to 1:00 p.m.), including a 20 minute lunch/recess period; math instruction (using Everyday Math); writing (practicing letters/sentences); readers workshop (using pieces of the Wilson Foundations program and sight words); literature (story of the week). The children also engage in structured activities in various centers interspersed among the group instruction. After lunch, there may be writers workshop and/or "specials," *i.e.*, music, library, art, computers, fitness, Spanish. (N.T. pp. 66—68, 83, 84)
35. Student made academic progress during the kindergarten year, and is able to participate in the same academic instruction as the other children, but needs accommodations such as wait time and prompting to be successful. Student's utterances remain much below the

- class average, and Student is below average in achievement for the kindergarten curriculum. (N.T. pp. 64, 73—75, 80, 82, 91)
36. Student continues to exhibit difficulties with language, particularly, word recall, requiring extra time for responses. Student's language difficulties interfere with joining in songs, and Student also has difficulty simultaneously matching movement and words to songs used in the classroom. (N.T. pp. 63, 64, 68, 69, 75)
  37. Student's language difficulties create noticeable anxiety, particularly in unfamiliar settings. The anxiety lessened with classroom peers in small settings as Student's word recall speed and ability to converse improved over the course of the school year. Student still has difficulty socializing with peers and joining games because of the inability to verbalize appropriate responses quickly. (N.T. pp. 64, 65, 69, 70, 76, 94, )
  38. The teacher also noted Student's anxiety with reading, in particular, due to the difficulty of verbalizing the first word, but once past the initial hesitation, Student can read slowly. The teacher saw progress in Student's reading over the course of the school year. The teacher believes that her use of the Wilson Foundations program met Student's needs and the goals for Student during the current school year, but believes that there are other reading programs that will better meet Student's needs in the future. The teacher believes that because of Student's difficulties with language and the need to recall sounds and blends emphasized by the next phase of instruction, the Wilson System will be too complicated as the words Student is expected to read get longer. (N.T. pp. 70, 83—85, 87, 88, 92, 93)
  39. The kindergarten teacher believes Student is ready for 1<sup>st</sup> grade as long as significant supports are provided, including individual, intensive language therapy to improve Student's language skills, which affect progress in math as well as reading and social interactions. (N.T. pp. 70—72, 89, )
  40. The independent neuropsychologist who evaluated Student in the fall of 2010 determined that Student's cognitive abilities and academic skills are in the average range, noting, however, the difficulty associated with such assessments due to age, normal developmental variability and compromised skills arising from the speech/language impairment. Although recognizing that language deficits associated with Student's speech/language disability significantly impact other areas, such as attention, the evaluator concluded that Student has "well-developed intellectual and reasoning skills." (HO-1, p. 16 [N.T. p. 502]; P-56, pp. 11, 12)
  41. The neuropsychologist noted weaknesses in the areas of attention, working memory and executive functioning, as well as compromised receptive and expressive language skills, complicated by the attentional difficulties, which the evaluator considered a significant area of deficit. (HO-1, p. 16 [N.T. pp. 502—505]; P-56, pp. 7, 8, 12, 16)
  42. To meet Student's needs arising from those deficits, the neuropsychologist recommended a classroom/program with the following characteristics:



- a) a small class size (3—7 students) with a teacher who directs the classroom discussions with questions, models language, encourages students to elaborate on responses, and assures that students are active participants who are interacting with instructional materials and comprehending;
- b) highly structured small group interaction with peers of similar intellectual ability, rates of processing and linguistic skills;
- c) highly structured, organized, multi-sensory instruction and presentation of material, including 90 min./day of a multi-sensory reading program adapted for children with significant communication disorders, with measured mastery of skills before moving on;
- d) spiraling instruction, daily review of the previous day's lessons and integration of new material with previously learned information;
- e) language-related skills (reading, writing, spelling, oral language strategies) taught and reinforced across the curriculum with intensive, rule-based, systematic, highly structured, explicitly taught specialized programs delivered by trained, certified, and experienced teachers;
- f) intensive individual speech/language therapies for apraxia-related issues, as well as direct, therapeutic speech/language services delivered via a push-in model by a certified speech/language pathologist who also consults with the teacher on how to present information in a language-based model, and, in addition, weekly individual or group therapy directed toward global language-based difficulties not directly related to the speech/articulation difficulties arising from the apraxia;
- g) 3 30 minute sessions/week of OT;
- h) one-half of the school day spent in the highly structured program setting and the other half spent in a typical classroom with same-age peers;
- i) a behavior plan to address Student's anxiety by developing strategies for attention/executive functioning issues, such as breaking tasks into manageable segments, and encouraging Student to attempt new tasks, tolerate frustration, persist in challenging situations and initiate social interactions;
- j) school-based counseling to address anxiety issues and provide a safe place if Student becomes overwhelmed;
- k) training to encourage peers to give Student the necessary wait-time to respond verbally. (HO-1, pp. 15—17, 20 [N.T. pp. 500, 501, 506, 508, 517, 518]; P-56, pp. 13—16)

43. According to standards adopted by the American Speech and Hearing Association, (ASHA), an appropriate level of speech/language services for CAS is 3—5 sessions/per week, while a generalized developmental expressive language disorder can be sufficiently addressed with 1—2 sessions/week. (HO-1, pp. 13, 18 [N.T. pp. 490—492, 508, 509])
44. The District’s speech therapist considers the intense level of service specified for apraxic students to be needed only by children with profound communication deficits. The speech therapist was trained to assess the appropriate level of speech/language services based upon the severity of the disorder and the individual’s age and ability to participate in speech therapy sessions. (N.T. pp. 591, 592, 602)
45. Parents first obtained an evaluation of Student from the local [specialized learning] Center in September 2009. Based upon the test results, including several measures of academic skills, intensive instruction (2 hr./day, 5 days/week) for 8—12 weeks was recommended at that time in order to address Student’s needs. The Center instruction is directed toward developing reading and math skills. (N.T. p. 20; P-58, p. 1, P-66, p. 12 [N.T. pp. 275—281, 287—289]<sup>2</sup>)
46. In June 2010, Parents obtained a second Center evaluation, which showed higher scores on most of the assessments that were re-administered, although Student had not received the recommended services. Notably, on the Peabody Picture Vocabulary Test-IV, (PPVT-IV) a standardized test of one word receptive vocabulary, Student’s performance improved from a standard score of 97 at the 42<sup>nd</sup> percentile in 2009 to 105, at the 63<sup>rd</sup> percentile, in 2010, showing growth in receptive vocabulary. (N.T. p. 21; P-58, P-66, pp. 9, 17, 24 [N.T. pp. 261, 293—295, 320])
47. The Center again recommended intensive, one-to-one instruction for 4 hrs./day-20 hours/week for an initial period of 120—160 hours to build phonemic awareness, symbol/sound association, sight words. The Center also recommended that instruction in its math program be included. (N.T. pp. 21, 22)
48. The Acting Center Director recommended 4 hours/day if intensive instruction in order to “close the gap” between Student’s performance during testing and potential, based upon the most recent PPVT-IV results. At the time that test was administered in June 2010, Student was 5 years, 9 months old and had not yet begun kindergarten. The PPVT-IV results indicated a mental age of 6 years, 1 month and a grade equivalent of K-4, the fourth month of kindergarten. (N.T. pp. 34, 35, 41; P-58, p. 1)
49. The Center that tested Student does not provide instruction to kindergarten students, and currently has no 4, 5 or 6 year old children receiving services. (N.T. pp. 42, 59; P-66, p. 23 [N.T. p. 316])

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<sup>2</sup> The Acting Director for the [local] Center testified at the prior due process hearing for the family, as well in this case. The Director’s testimony from the prior hearing was admitted into the record of this case as P-66. Citation to the Director’s prior testimony in P-66 will follow the procedure established for the prior testimony of the independent neuropsychologist. (*See* Ftnt.1)

## **DISCUSSION AND CONCLUSIONS OF LAW**

### **Background/Posture of the Case**

In some respects, this case is a continuation of the recently decided case that Parents brought against the IU responsible for Student's early intervention services, in which Parents' claims for compensatory education were denied. *See* ODR #01524-10-11AS (May 1, 2011). As in that case, the reason Parents submitted a due process complaint, and persisted with the hearing after the parties had agreed to a kindergarten program/placement for the 2010/2011 school year based on pendency is their understandable desire to assure Student's academic success despite language and learning disabilities.

Although the current school year's program/placement were not truly at issue due to the parties' agreement, Parents still contended that the IEP the District proposed did not provide a level of related services, specifically, speech/language therapy, sufficient to meet Student's needs arising from the diagnosis of Childhood Apraxia of Speech. Because of the parties' deeply divergent positions on this issue, it is likely that without an analysis of the evidence concerning Student's needs and functioning, as disclosed by the evaluations in the record, and the testimony of Student's current teacher, the District's speech/language therapist who provide services to Student during the current school year, the parties will be unable to agree to a program/placement for the next school year, when Student will be in 1<sup>st</sup> grade. It is important, therefore that the parties understand where and how their respective positions are reasonable and unreasonable in order to move forward and work cooperatively in the future for Student's benefit. In addition, placement issues also need to be addressed.

### Current Claims

During the hearing, Parents requested specific relief in the form of an ESY program at Center, a language-based classroom for the 2011/2012 school year, and 3—5 sessions of speech/language services/week. N.T. pp. 274, 275. The complaint in this case and the prior decision concerning this family, do not, however, support those claims.

First, the evidence produced in this case concerned the District's offer of a kindergarten program for the 2010/2011 school year. There was no evidence from either party concerning a specific program/placement for the upcoming school year. The only evidence concerning future programming is found in the recommendations/description of program/placement components that will meet Student's needs found in the report and testimony of the independent neuropsychologist who evaluated Student in the fall of 2010. *See*, FF 42.

Second, the complaint in this case does not include a claim for ESY services. *See* P-1. Moreover, Center services were denied in the prior decision concerning the IU and this family, and no new or additional evidence was presented in this case to support a need for Center instruction now or at any time during the 2010/2011 school year. Student's language abilities improved significantly between the two evaluations conducted by the Center on the very measure the Center Director testified was critical, and although Student did not receive the recommended services during that year, intensive services were again recommended. (FF 45, 46, 47, 48) Other than Student's Mother and the Director of the Center that would gain financially if the District were ordered to fund the Center program, no witness, including Parents' advocate, recommended Center for Student. Finally, the Center does not usually, or currently, provide intensive reading and math instruction for children at Student's young age. (FF 49) There was, therefore, no convincing evidence that Student needed, or currently needs,

the intensive reading and math instruction recommended by Center in order for Student to make meaningful educational progress.

Finally, with respect to speech/language services, the pendent level of services provided by the District was found to be appropriate in the prior decision. No evidence was presented at the hearing to indicate that the implementation of those services was inappropriate, which is the only potential basis for relief. Although it was not entirely clear from Parents' testimony whether they were seeking compensatory education for additional speech/language services during this school year, to the extent that was their intention, such claim is denied.

Nevertheless, although the record in this case does not provide a basis for a specific, affirmative order, the evidence established that the IEP offered by the District for the current school year would not have provided Student with an entirely appropriate program/placement. The District did not fully consider Student's unique needs arising from the apraxia diagnosis in determining the level of speech/language services offered. In addition, in proposing full-time special education services, the District failed to fully consider both Student's need for significant contact with non-disabled peers who can model appropriate language and its legal obligation to provide special education services in the least restrictive environment appropriate for the Student.

#### Legal Standards

The underlying legal principles concerning the School District's obligations to provide special education and related services are simple and familiar. School districts are responsible only for providing an appropriate program and placement. Under that standard, an IDEA eligible school age student is entitled to receive a program/placement that is "reasonably calculated to yield meaningful educational or early intervention benefit and student or child progress." *Board*

*of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982); *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 249 (3<sup>rd</sup> Cir. 2009). “Meaningful benefit” means that an eligible child’s program affords him or her the opportunity for “significant learning.” *Ridgewood Board of Education v. N.E.*, 172 F.3d 238 (3<sup>RD</sup> Cir. 1999). School Districts are not required to provide an eligible student with services designed to provide the “absolute best” education or to maximize the child’s potential. *Mary Courtney T. v. School District of Philadelphia*, at 25; *Carlisle Area School District v. Scott P.*, 62 F.3d 520 (3<sup>rd</sup> Cir. 1995). A school district, therefore, is not required to provide services that although desirable and likely to be beneficial, are not necessary to meet an eligible school age school age child’s educational needs.

In addition to meeting the legal standards governing the contents of a special education program as set forth above, school districts are also required to meet the standards for an appropriate educational placement. The federal IDEA regulations provide that an eligible student’s program is to be delivered in the least restrictive environment (“LRE”) appropriate for the student, *i.e.*, one in which the student is educated with children who are not disabled to the maximum extent appropriate. 34 C.F.R. §300.114(a)(2)(i). In order for a proposed placement to meet LRE requirements, school districts must, at a minimum, assure that placement decisions are “made by a group of persons, including the parents and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options” §300.116(a)(1); are “determined at least annually” §300.116(b)(1); are “based upon the child’s IEP” §300.116(b)(2). In addition, unless an eligible child “requires some other arrangement, the child [must be] educated in the school he or she would attend if not disabled.” §300.116(c).

The United States Court of Appeals for the Third Circuit provided additional guidance for applying LRE requirements in *Oberti v. Board of Education*, 995 F.2d 1204 (3<sup>rd</sup> Cir. 1993). In accordance with *Oberti*, the first step in evaluating a program and placement to determine whether it meets LRE criteria is an assessment of whether the student can be educated satisfactorily in the regular classroom with supplementary aids and services. In making that determination, a school district is required to consider the full range of aids and services available, with the goal of placing the student with a disability in the regular classroom as much as possible. Consideration must also be given to the unique benefits that a student with a disability will derive from placement in a regular classroom, and those benefits must be compared to the benefits likely to be derived from a more segregated setting. Consideration must also be given to whether there are likely to be any negative effects upon the education of the other children from placement of a particular student with a disability in the regular classroom.

Finally, if education outside of the regular classroom for all or part of the school day is found necessary, the proposed placement must be evaluated to determine whether it provides for contact with non-disabled peers to the greatest extent appropriate. In *Oberti*, the court noted that the continuum of placements mandated by the IDEA statute and regulations is designed to assure that a school district does not take an “all or nothing” approach to the placement of a student with a disability, but considers using a range of placement options to assure that the unique needs of each child are met. A school district’s obligation to place an eligible student in the least restrictive environment does not diminish its responsibility to educate an eligible student appropriately.

### The District's Proposed Kindergarten Placement

There was no evidence in this case that the District considered any type of kindergarten placement other than full-time special education classrooms, despite Student's inclusion in a regular education private school for preschool, Student's well-developed pre-academic skills, Parents' questioning of the District's proposal because of limited contact with typical peers, and the recommendation of the independent neuropsychologist. (FF 7, 21, 29, 31, 33, 34, 35, 40, 42h) In addition, none of the District's witnesses provided any rationale for the limited inclusion with typical peers provided by the District's proposed IEP, focusing instead on the ways in which both of the special education kindergarten classes would have met Student's needs for a small class size and a structured program. Finally, the District did not consider any kind of supplemental aids and services that might have supported Student in a regular kindergarten program, although there was reference to a full day kindergarten program for students considered "at risk" but not IDEA eligible. (FF 23) It appears, therefore, that the District's placement proposal was based on Student's IDEA eligibility in the category of specific learning disability and need for a full day program rather than Student's needs.

Student's progress during the current school year in a regular classroom with accommodations indicates that a full-time special education classroom is not necessary in order for Student to make meaningful progress. (FF 33, 34, 35, 39) Moreover, Student benefits from the language models provided by typical peers. Going forward, therefore, the District needs to consider how to maximize Student's time in a regular education setting. It would, however, be unrealistic for Parents to expect the District to duplicate the private school kindergarten setting of 8 pupils in a regular education classroom. The parties need to recognize that Student is likely to need small group instruction carved out of a regular classroom that includes far more than 7



other students, including the possibility of some instruction in a learning support classroom, particularly for reading and language arts.

#### Speech/Language Services

The District also provided no good rationale for offering only 2 30 minute sessions of speech therapy per cycle. (FF 18) Although Student's articulation and speech production improved greatly during the pre-school years, that was accomplished with more than two hours of individual speech therapy each week. (FF 32) Student's kindergarten teacher noted continued issues with functional language in the classroom, including word finding, initiating conversation and hesitation with pronouncing the first word when beginning to read, all of which cause anxiety. (FF 35, 36, 37, 38) The District's proposed speech/language goals, however, addressed none of those needs, focusing only on articulation. (FF 18) Tellingly, the District's speech/language therapist testified that her recommendations for speech/language therapy were based only on the testing she conducted. (N.T. pp. 609, 617) She never observed Student interacting with peers and did not testify to her own impressions of Student's functional language. (N.T. p. 606)

In the future, the District needs to consider services to support Student's functional language in real settings, not just test results and progress in the therapy setting. To this point, 3 45 minute individual sessions weekly has been appropriate. Although it may be appropriate to reduce that level, any reduction must be based on Student's needs, including general educational progress and social interactions.

#### Future Programming

As noted, there was insufficient evidence to determine an appropriate program/placement for the next school year. Based upon the record, however, it is obvious that Student's current

teacher is knowledgeable about Student's needs and concerned about how the District will support Student in the public school program. The parties should carefully consider her input in developing an IEP for the upcoming school year. In addition, the parties should carefully consider many of the recommendations of the independent neuropsychologist to determine how some issues might be reasonably addressed in a public school setting, *e.g.*, attention, anxiety, executive functioning, memory and social skills. Parents must keep in mind, however, that the District is required to provide reasonable, not optimum services.

### **CONCLUSION**

Due to the unusual procedural posture of this case, there is no basis for any affirmative relief on Parents' claims. The parties, however, are urged to use the findings of fact and discussion as a basis for developing a cooperative relationship as well as an appropriate program for Student in the future, and particularly for the next school year.

### **ORDER**

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that School District need take no specific action with respect to the claims asserted in this matter. It is expected, however, that when the District convenes Student's IEP team to develop a program/placement for the 2011/2012 school year, the District will be mindful of its legal obligations under the IDEA statute to consider and meet Student's unique needs, as well as to fulfill the legal requirement of providing Student's special education services in the least restrictive environment.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are denied and dismissed.

June 10, 2011

*Anne L. Carroll*

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Anne L. Carroll, Esq.  
HEARING OFFICER