

*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

Child's Name: S.K.

Date of Birth: [redacted]

Dates of Hearing:  
May 4, 2006, June 5, 2006  
CLOSED HEARING  
ODR #6505/ 05-06 LS

Parties to the Hearing:

Parent[s]

North Pocono School District  
851 Church Street  
Moscow PA 18444

Representative:

Drew Christian, Esquire  
801 Monroe Avenue  
Scranton PA 18510

Anne E. Hendricks, Esquire  
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Huntingdon Valley, PA 19006

Date Record Closed:

June 12, 2006

Date of Decision:

June 27, 2006

Hearing Officer:

William F. Culleton, Jr., Esquire

## INTRODUCTION

[Student] is a [teenaged] old eligible student of the North Pocono School District [District]. (NT 32-10 to 33-2.) In June 2006 [Student] completed the eighth grade at the North Pocono Middle School of the District. [Student] is identified with Specific Learning Disability in reading decoding, reading comprehension, mathematics calculation, mathematics reasoning and written expression. (P-20 p. 19 to 20.) In eighth grade, the Student received part time learning support in a resource room. (P-21 p. 10.)

The Parents raise two issues for which they request compensatory education of three hours per day from February 3, 2004<sup>1</sup> until such time as an adequate IEP is finalized. First, they assert that the District failed to identify the Student until it provided an ER on January 12, 2006, even though it knew or should have known that the Student was in need of specially designed instruction. Second, they assert that the January 24, 2006 IEP based upon that ER was inadequate to offer FAPE because the ER was flawed, and because its goals failed to address the Student's above-listed learning disabilities.

The District argued that it did not have notice of the Student's specific learning disability before [Student] was referred for evaluation during [Student's] eighth grade year. It pointed out that there was not a significant discrepancy between achievement and potential, the Student had passing grades throughout [Student's] elementary school years, and that the Parents had acquiesced in a previous NOREP in 2000 finding the Student not to be in need of special education services.

## PROCEDURAL HISTORY

On March 7, 2000, the District issued a CER finding that the Student was not eligible for special education services. During [Student's] eighth grade year, the Student was again referred for evaluation. The District issued an ER dated January 12, 2006, in which it identified the Student. An IEP was offered on January 24, 2006. The Parents requested due process on or about February 3, 2006. This request was withdrawn and refiled on or about April 20, 2006. There was no resolution meeting, both parties having waived. The hearing was convened on May 4, 2006; a second session was scheduled and the hearing was completed on June 5, 2006.

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<sup>1</sup> The District argued that the Montour equitable limitations period limits any claim for compensatory education to one year, despite the new IDEIA limitation period of two years from parental or district notice of the denial of FAPE. 20 U.S.C. §1415(f)(3)(c). The hearing officer concluded that the Montour limitations period is not an "explicit" state limitations period under the exceptions to the IDEIA limitations period. The parties then agreed that the filing date for limitations purposes would be February 3, 2006, thus permitting consideration of an award of compensatory education beginning on February 3, 2004.

## ISSUES PRESENTED

The following issues were presented<sup>2</sup>:

1. Did the District's failure to identify the Student on or after February 3, 2004 constitute a failure of its child find obligation?
2. Did the January 12, 2006 IEP fail to offer FAPE?
3. Is an award of compensatory education appropriate, and if so, for what period of time?

## FINDINGS OF FACT

### Child Find

1. Throughout [Student's] school years, the Student has presented with problems in distractibility, inattentiveness, inability to follow directions, inconsistency in reading, inability to sound out words, reading comprehension problems, test avoidance and anxiety, and losing [Student's] place in homework assignments and spelling and mathematics problems. These problems were reported by [Student's] teachers for purposes of an ER prepared in January of [Student's] eighth grade year. (NT 79-2 to 20, 82-2 to 4; P-3, P-16, 20 p.1, 2.)
2. The Student was given a psychological evaluation at [Redacted] College on November 23, 1998, at Parents' request, due to poor academic performance compared with [Student's] peers and problems with attention to task. The report indicated that the Student did not have word analysis skills but was relying upon whole word memorization in reading. (NT 33-12 to 35-11; P-1, P-20 p. 3.)
3. The Student was in first grade in the District at that time and the Student's first grade teacher and school reading specialist recommended that [Student] be evaluated. (NT 33-17 to 19.)
4. The student received additional assistance with reading while [Student] was in regular education in first grade. (NT 35-12 to 20.)
5. The Student's second grade teacher provided a written report of academic problems including word recognition, reading decoding, reading comprehension, arithmetic problem solving, written expression and distractibility. (P-2.)

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<sup>2</sup> In their initial applications, the Parents requested an Independent Educational Evaluation at public expense. However, the District acquiesced prior to the hearing and this issue was removed from consideration. (NT 28-4 to 14, 538-20 to 539-6.)

6. From first grade until at least fifth grade, the student received Title I reading assistance. (NT39-8 to 24; P-2 p. 1.)
7. In second grade the Student received instructional support assistance in class for reading, in the form of teacher aides and peer tutors. [Student] was found to have improved [Student's] word recognition skills, but [Student's] progress was judged very slow, with difficulty in "thought processing." (P-2 p. 1, P-4 p. 3.)
8. In second grade, the Student's grades were accomplished with "many accommodations." (P-4 p. 3.)
9. The Parents provided private tutoring for the Student during second grade and in the following summer. (NT 39-17 to 40-20; P-2 p. 1, 4, P-3 p. 16, P-4 p. 3.)
10. The Student also received Classroom Plus services, a program of after-school assistance. (NT 44-5 to 16.)
11. In second grade, the student was referred for evaluation by the District for decoding and independent reading difficulties, inattentiveness and declining mathematics scores. Testing showed that [Student's] vocabulary was below [Student's] grade level, that [Student] exhibited weakness in attention, concentration and perceptual processing. The District's evaluation dated March 7, 2000 found that the Student's achievement and ability were not significantly discrepant and that [Student] therefore was not eligible for special education services. (P-4, P-20 p. 3.)
12. In 2003, while in fifth grade, the Student received a reading score on the PSSA test of below basic. (NT 45-13; P-6 p. 1.)
13. The Student's 2003 PSSA score in mathematics was Proficient, or at the 57<sup>th</sup> percentile. (P-6 p. 1, 2.)
14. Prior to the Student's seventh grade year, [Student] received additional after school programming, through a program called Classroom Plus. (NT 44-7 to 16, 54-12 to 18.)
15. An independent reading specialist report dated June 23, 2004, the end of the Student's sixth grade year, found that the Student exhibited 25% miscues in a sixth grade reading list, comprehended words in context but not in isolation, and had poor comprehension; it also found good fluency in an oral reading exercise. The report noted that the Student did not know short vowel sounds, and was reading words without comprehending them. [Student's] spelling suggested a lack of knowledge of basic spelling conventions. (P-7, P-20 p. 3-4.)

16. The reading specialist's report found "definite gaps in skills" and recommended "a total remedial program that begins with instruction at the fundamental level" and that the program should be multi-sensory. (P-7 p.3.)
17. The Student's Mother gave a copy of this evaluation to the District and a copy of it was in the Student's file with the District. The District knew about this report and its findings at the latest by the beginning of the Student's seventh grade year. (NT 47-24 to 48-15, 53-5 to 16, 54-2 to 55-14.)
18. Before seventh grade, the Student's teachers had reported repeatedly that the student was not staying on task and demonstrated attention problems that they addressed by preferential seating arrangements. (NT 50-20 to 51-1.)
19. The Parents noticed attentional difficulties at home, in that the student had trouble remembering tasks [Student's] parents gave [Student]. (NT 51-7 to 14.)
20. Prior to or at the beginning of the Student's seventh grade year, the Mother requested that the District investigate the Student's difficulties with reading and [Student's] attentional problems on multiple occasions and was told that the Student's grades were fine and that there was nothing to worry about. (NT 53-5 to 16.)
21. At the beginning of the Student's seventh grade year, the Student's Mother requested an evaluation for special education services in a conversation with the school guidance counselor. The counselor advised her that such an evaluation would take a long time because of the school psychologist's caseload and that the Mother could choose to have the student privately evaluated in order to save time. However, the District at that time did not present a permission to evaluate form to the Parents. (NT 54-9 to 55-16, 65-22 to 25, 154-1 to 155-6, 483-16 to 484-13.)
22. In the summers before the Student's seventh grade and eighth grade years, the Parents provided [Student] with six weeks of private remedial tutoring. (NT 46-19 to 47-1, 77-11 to 78-5.)
23. During the Student's seventh grade year, the Parents repeatedly requested that the District provide additional assistance to the Student. The District did not present a request for authorization to evaluate the Student during [Student's] seventh grade year. (NT 65-20 to 66-11.)
24. Beginning in the second quarter of the Student's seventh grade year, the District started providing [Student] with regular education accommodations in English and reading. (P-8.)
25. The Parents were not aware of these accommodations until the third quarter of the year, when they attended a meeting of the Student's teachers. (NT 57-20 to 60-16.)

26. During the first quarter of the Student's seventh grade year, the Parents received written notice that the Student was failing in English and Reading. (NT 60-22 to 61-4; P-8.)
27. In English, in the first quarter of seventh grade, the Student received a failing grade. (NT 61-6 to 13; P-11.)
28. The Student failed English in the Fourth quarter of [Student's] seventh grade year, finishing the year with a "D." (NT 61-25 to 62-6.)
29. In reading, in the first quarter of seventh grade, the Student received a "D" and finished the year with a "C minus." (NT 61-25 to 62-6; P-11.)
30. In mathematics, in the first quarter of seventh grade, the Student began with a "C" and ended the year with a "C plus." (NT 61-25; P-11.)
31. In computer science, a subject which the Student enjoyed, the Student received a grade of "unsatisfactory" because [Student] failed to complete [Student's] assignments. (NT 64-9 to 21; P-11.)
32. During the Student's seventh grade year, the regular education accommodations provided by the District increased in each quarter. None were provided in the first quarter. In the second quarter, some were provided in English and reading. In the third and fourth quarters, accommodations were provided in English, reading, math, science and social studies. (NT 61-14 to 19; P-11.)
33. In the third and fourth quarters, reading accommodations included reading materials to the Student retesting, and adapted or oral testing. (NT 301-6 to 302-1, 323-12 to 326-18; P-11.)
34. The reading teacher did not refer the Student for special education evaluation during the seventh grade because she did not feel qualified to make the judgment that the Student needed it. (NT 312-1 to 11, 315-8 to 13, 328-22 to 329-2.)
35. The English teacher did not refer the Student for special education evaluation because she felt that [Student] was not applying himself, even though she recognized that language arts was more difficult for the Student and required more work of [Student] than with other students. (NT 341-7 to 15, 361-17 to 20.)
36. During the Student's eighth grade year, the District had no permanent director of special education; the position was filled by interim appointments. (NT 159-24 to 161-8.)

37. Additional regular education accommodations were provided to the Student in eighth grade, including teacher assisted tests, extra time for tests, and adapted or oral tests. (NT 435-14 to 436-2; P-12.)
38. The Parents were made aware of these accommodations through the guidance counselor, but the Parents did not participate in the planning for them, nor did they know exactly what accommodations were being provided. (NT 66-17 to ^&-2.)
39. During the first and second quarters of the Student's eighth grade year, [Student's] teachers sent home notices that [Student] was failing tests and not completing homework assignments in reading, English, mathematics and social studies. (NT 68-4 to 25; P-13.)
40. In eighth grade, the Student received a reading support class and [Student's] first quarterly progress report indicated that [Student's] performance was below satisfactory in all areas addressed in the category of vocabulary and word recognition. (NT 71-8 to 24; 73-4 to 21; P-18.)
41. The reading specialist tested the Student and [Student] tested at almost two years below grade level in reading; [Student] was at basic level in vocabulary. The reading specialist also informally found decoding deficiencies. (NT 372-14 to 380-17, 388-18 to 20.)
42. When she became familiar with the Student, it was the reading specialist's opinion that [Student] should be referred for testing. (NT392-14 to 19.)
43. The reading specialist found that there was a problem with refocusing and redirecting the Student and that [Student] did better when refocused and redirected. (NT 383-24 to 385-1, 390-22 to 24.)
44. The reading specialist found that she was unable to address the Student's individual needs in her remedial reading class because the Student was too far behind the other students in the class, who needed remediation with problems other than decoding and vocabulary. (NT 390-3 to 9.)
45. The Parents did not participate in the decision to send the Student to reading support class. (NT 74-4 to 75-2.)
46. In the first quarter of eighth grade, the Student received a "W" in English, which is an alternative grade designation indicating failure. [Student's] Mother did not understand what that grade meant. [Student's] reading grade was "C". [Student's] remedial reading grade was "Satisfactory." (NT 399-1 to 16; P-19.)
47. The Student's first quarter mathematics grade in eighth grade was "D." (P-19.)

48. Parents were not aware of the nature of reported accommodations in social studies and science classes. (NT 75-3 to 11.)
49. Throughout [Student's] school years, the Parents made substantial efforts to make sure that the Student would do [Student's] homework and work on [Student's] school assignments. They worked with the Student in order to provide support and structure to enable [Student] to do [Student's] homework. (NT 43-6 to 44-4, 68-7 to 9, 109-3 to 4, 128-3 to 6.)
50. Nevertheless, often the Student was unable to complete [Student's] assignments for school. (NT 43-6 to 44-4, 54-22 to 25.)
51. The accommodations in seventh and eighth grade were not substantially effective. (P-11, 19, 20 p. 3.)

#### EVALUATION AND IEP

52. During the first half of the Student's eighth grade year, [Student] was referred for evaluation. On January 12, 2006, the District issued an ER that identified the Student with specific Learning Disability in basic reading decoding, reading comprehension, mathematics calculation, mathematics reasoning, and written expression. (P-20.)
53. The ER reported numerous teacher reports of inattentiveness, disorganization, poor reading comprehension, poor understanding of mathematics word problems, and poor problem solving. (P-20 p.2.)
54. The ER found that the adaptations and accommodations that had been provided to the Student throughout [Student's] school years were minimally effective. (P-20 p. 3.)
55. The ER found that the Student has "severe deficits for auditory processes." It found academic weaknesses in reading decoding skills, academic automaticity and fluency, listening memory, and mathematics calculation, compared with students of the same age. It concluded that the Student is approximately one year behind [Student's] grade level in reading, due to problems with reading comprehension cause by phonetic deficits. (P-20.)
56. The ER also found that the Student has serious attentional problems often associated with Attention-Deficit Disorder. (P-20 p. 16.)
57. The ER recommended small group and one to one instruction to provide "an intervention program with an auditory bottom-up approach to develop the skills [Student] lacks for understanding language." The program should be multi-sensory and phonemically driven, including reading and spelling. It



- recommended, previewing lessons, special approaches to giving directions, changing the rate of presentation and additional processing time for new material, chunking of tasks or information, additional time for answering questions, and teaching of self initiated comprehension checking strategies for reading comprehension, among other specially designed instructional accommodations. It recommended numerous strategies to deal with attentional problems. (P-20 p. 17 to 20.)
58. The ER did not set forth adequate baselines of functioning to enable District personnel to write adequate educational goals in the IEP. (NT 165-15 to 168-14, 171-11 to 22, 247-5 to 248-10, 443-20 to 445-17.)
59. The IEP dated January 24, 2006 offers part time learning support in a resource room. The IEP provided that the Student would attend the resource room in place of [Student's] regular education classes in reading, English and mathematics. (P-21 p. 10.)
60. The placement portion of the IEP adequately addresses the Student's need for a remedial reading program that addresses the recommendation in the ER that the program begin with basic instruction, be phonetically based, and be multi-sensory in nature. (NT 194-19 to 196-8, 241-19 to 243-3, 265-16 to 20.)
61. The Student was placed in resource room for English and Mathematics based upon [Student's] low achievement scores in those subjects. (NT 264-1 to 3.)
62. The IEP notes a measure of fluency at the fifth grade level. It lists two different baseline measures from the Woodcock Johnson Test of Achievement for every skill tested, including measures of word skills, reading, mathematics and writing. The baselines are "easy" and "hard" (P-21 p. 2 to 3.)
63. Goals are established in the IEP for reading comprehension, reading fluency, writing, and mathematics computation. There are no goals for addressing attentional difficulties. (P-21 p. 4.)
64. Except for the fluency goal, the goals do not refer to the baselines in the PLEP section in that they do not refer to the difficulty or grade level of the probes and tests called for. The basis for the fluency goal baseline is not clearly related to the PLEP baselines. The exit criteria are unclear. (NT 174-22 to 175-21, 230-6 to 232-7, 268-20 to 269-25; P-21 p. 4.)
65. Although mathematics reasoning is identified as a disability in the ER, there is no goal in the IEP for mathematics reasoning, which involves word problems. (NT 179-2 to 16, 427-2 to 5; P-21 p. 4.)

66. The IEP lacks benchmarks and objectives; it does not indicate how progress on the goals is to be monitored or reported to the Parents. (NT 183-23 to 185-5, 236-19 to 25; P-21.)
67. Although the IEP goals do not address attentional issues, there are many specially designed instruction recommendations in the IEP that do address this problem area. (NT 180-24 to 181-3, 209-5 to 210-25, 232-16 to 11 to 18; P-21 p. 5 to 6, S-8.)
68. At the IEP team meeting, although both parents were present, there was little discussion or explanation of the IEP, and the Parents' participation was minimal. (NT95-14 to 105-3.)

## DISCUSSION AND CONCLUSIONS OF LAW

### CHILD FIND

The Parents rely upon both the IDEA and Section 504 of the Rehabilitation Act of 1973. The IDEA requires the State to ensure the location, identification and evaluation of all children with disabilities who need special education services. 20 U.S.C. §1412(a)(3)(A); 34 C.F.R. §300.125(a)(1)(i). Thus, under the federal law, the District's Child Find procedures are adequate if they result in the evaluation only of children who need special education services. However, this Child Find obligation is not dependent upon the severity of the child's disability, nor is it obviated simply because a child advances from grade to grade. 34 C.F.R. §300.125(a)(1)(ii).

Pennsylvania regulations impose more detailed requirements in conjunction with the federal Child Find obligation, requiring each school district to implement a "screening" system that identifies and screens students "prior to referral for a special education evaluation", provides hearing and vision screening, and identifies students "who may need special education services." 22 Pa. Code §14.122(a)(1) through (4). The screening process must be "comprehensive" and must assess functioning in the curriculum, implement intervention, and assess response to intervention. 22 Pa. Code §14.122(b), (c)(1), (3), (4). The process must also determine "whether the student's needs exceed the functional ability of the regular education program to maintain the student at an appropriate instructional level." 22 Pa. Code §14.22(c)(6). This process may take the form of an Instructional Support program under the guidelines set forth by the Department of Education. 22 Pa. Code §14.22(b).

These regulations make one reference to the time within the district can retain a student in a pre-referral educational support program without referring the student for evaluation for special education. If the screening and support efforts "have produced little or no improvement within 60 school days after initiation, the student shall be referred for evaluation under §14.123..." Presumably, this is to prevent the screening

process from becoming a substitute for the evaluation and provision of needed special education services required by the IDEA.

The District was responsible for identifying the Student at the point at which it knew or should have known that [Student] was in need of specially designed instruction in order to make meaningful educational progress. In re the Educational Assignment of E.F., A Student in the Methacton School District, Special Educ. Op. No. 1733 at 9-10 (June 7, 2006); In re the Educational Assignment of P.S., A Student in the Methacton School District, Special Educ. Op. No. 1722 at 5 (May 4, 2006).

This hearing officer is persuaded that the District knew or should have known of the Student's need for specially designed instruction by at latest the beginning of the Student's seventh grade year, when they were in possession of the June 2004 reading specialist report and when the Mother specifically requested evaluation in discussion with the assigned school guidance counselor. (FF 17,20,21.) ). By that time, there was a long history of findings of weakness in reading decoding, auditory processing and attention to task. (FF 1,2,11,12,15,16,41.) These repeatedly manifested themselves in poor reading comprehension, spelling and vocabulary deficiencies and problems with mathematics word problems. (FF 1.3.5.18.53.) There were specific findings of such weaknesses in several previous evaluations. (FF 1,2,11,12,15,16,41.) There was a long history of repeated interventions, including Title I services, the District's IST services consisting of reading tutoring during the school day, after school services, and private tutoring both during the school year and during at least two summers. There were teacher reports from multiple school years, and there were multiple regular education accommodations. (FF 4,6,7,8,9,10,14,22,24,32,37,51.) All of these efforts had failed to remediate the Student's basic deficiencies in reading decoding, spelling and vocabulary, and mathematics. (FF 51,54.) See In re the Educational Assignment of J.L., A Student in the Western Wayne School District, Special Educ. Op. No. 1707 at 3 (March 15, 2005)(listing above factors as relevant to determination that district "should have suspected" need for special education).

It is apparent that the Student did not make meaningful progress during [Student's] seventh and eighth grade years and that the interventions provided to [Student] were not effective. Thus, without adequate specially designed instruction, [Student] was not given the opportunity for meaningful educational benefit. Consequently, compensatory education will be awarded as discussed below.

The District argues that it was not on notice that the Student was in need of specially designed instruction because the Student exhibited adequate grades through sixth grade and [Student's] intelligence was tested in the average range. However, grades alone are not a sufficient basis upon which to absolve the District of its duty to detect children with disabilities. West Chester Area School District v. Bruce and Suzanne C., 194 F. Supp. 2d 417, 421-422 (E.D. Pa. 2002). Moreover, the grades in sixth grade are suspect as a measure of the Student's actual learning. In the third and fourth reporting periods, the tests themselves were adapted, and there is no evidence as to how that was done. (NT 218-23 to 219-11; P-8; FF 33.)

In addition, the hearing officer has considered the adaptations and accommodations that were provided to the Student throughout [Student's] elementary school career and whether or not these constituted a sufficient effort by the District to address [Student's] difficulties in reading, spelling and mathematics. In the early grades, these efforts may have been appropriate, given the variability of performance and development that students show in the early grades and the mandate for education in the least restrictive environment.

Taken as a whole, however, the record supports the inference that the Student's basic deficiencies in reading decoding and spelling were not adequately addressed throughout [Student's] elementary school years, culminating in the succession of failures that [Student] experienced in seventh and eighth grade. In its ER of January 12, 2006, the District itself labeled all of these interventions "minimally effective." (FF 54.) Indeed, these interventions were haphazard and only partially focused upon reading decoding, vocabulary, and attention deficits. (FF 4,6,7,8,9,10,14,22,24,32,37,51.) There was little parental involvement in the provision of these interventions. (FF 25,38,45,48,68.) There was no basis in research based evaluation or teaching methodology. In sum, these interventions were not an adequate response to the signs and symptoms of basic phonological disability that was disrupting and impeding the Student's learning. Nor were they an appropriate substitute for the legally required process of identification and provision of an IEP with parental participation.

This finding is bolstered by the testimony and demeanor of the Director of Pupil Personnel. The Director, a recent appointee, testified that the District had no permanent director of special education during the Student's eighth grade year, but filled the position with several interim appointees. (FF 36.) Under these circumstances, it is all the more plausible that a serious need for intervention could have gone undetected, or not addressed by administrators who were in a constant state of transition. This circumstantially increases the weight of the inferences drawn here from the evidence.

Moreover, the demeanor of the Director, when Parents' counsel invited her to criticize the District's inaction during the years before the ER was finally issued in January 2005, also contributes to the finding in this case. (NT 161-16 to 163-18.) Although the Director quite properly demurred on the basis that she did not know the factual reasons for the District's inaction, her demeanor spoke volumes to this hearing officer. It suggested that she was defending a proposition that appeared to her to be at least in doubt. Moreover, her demurrer was far from a compelling endorsement of the District's inaction in this case, a fact that was telling in consideration of the fact that she had been prepared to testify in a due process proceeding, an event that would have led her to find out the facts in the ordinary course.

The District also suggests that the reason for the Student's failures in seventh and eighth grade was a failure to apply [Student's] self. Teachers' reports repeatedly pointed to failure to complete assignments and homework as a cause of the Student's failing grades. (NT 312-24 to 313-1; P-10, 11, 13, 18, 19.) No doubt this was a serious

problem. However, in the face of this record, with multiple evaluations identifying basic disabilities and the need for more intensive intervention, and with a long history of identified deficiencies in reading and spelling, as well as consistent reporting by teachers of the Student's attentional difficulties, the suggestion that all of the Student's problems were due to not doing [Student's] homework seems to be no more than a superficial response to one of the symptoms of [Student's] problems. The District's own evaluation undercuts this argument, for it focuses upon the Student's underlying functioning, and does not suggest that it all boils down to a lack of work ethic. (FF 55,56,57.) Moreover, this hearing officer finds credible the Mother's repeated depiction of her continuous efforts to discipline the Student to do [Student's] homework and her working with [Student] to make that possible. (FF 49,50.) [Student's] learning disabilities overwhelmed these efforts.

In addition, this hearing officer did not credit the testimony of the seventh grade reading teacher regarding the Student's performance in her class. Her demeanor suggested a defensive stance, and her answers were contradictory, as well as being out of step with the record as a whole. Similarly, the seventh grade English teacher's demeanor appeared to be adversarial in a very professional way. She appeared to be jousting with the Parents' lawyer. This witness' testimony on the critical issues of the Student's difficulty and effort in her class is given less weight because the witness unconsciously may have shaped her testimony in favor of the District.

The District's seventh grade reading and English teachers seemed to believe that the criterion for referral for special education evaluation was whether or not they believed that the Student needed specially designed instruction. (FF 34,35.) Thus, if they believed that the Student could succeed with greater effort, they did not feel a referral was appropriate. (FF 34,35.) However, effort and self application are not superordinate criteria for identification. An evaluation may be needed to sort out the various contributing factors to a student's failure in regular education, effort being one such factor. Here, with a lengthy history of struggle with phonemic and attentional deficiencies, [Student's] lack of motivation might have been alleviated by the special services that an IEP could provide. [Student's] self application might have been a function of poor self organization, poor attention, or poor memory functioning. An evaluation should have been requested to determine whether these possibilities were the case. The teachers should not have made this judgment for themselves without the benefit of an evaluation.

The District also raised the Parents' agreement with to the 2000 IEP and NOREP, suggesting that they acquiesced to the District's decision not to provide specially designed instruction. (NT 111-6 to 114-3.) However, parental vigilance is not determinative of the student's right to special education. Moreover, the Parent credibly testified that she made numerous efforts subsequent to 2000 to obtain additional assistance for her child. (FF 21,23.) Thus, the signing of a NOREP in 2000 does not suggest acquiescence on the part of the Parents.

The Parents requested compensatory education for a failure to identify the Student with a learning disability in mathematics. The hearing officer finds little evidence to support the argument that the District knew or should have known of the Student's need for specially designed instruction in mathematics prior to [Student's] identification in eighth grade. The Parents have not met their burden of persuasion on this request.

## IEP ADEQUACY

The IEP in this case is inadequate. The baseline functioning is unclear and certainly not clear enough to enable a reasonably informed special education teacher to devise a meaningful goal in each of the areas of disability identified in the ER. (FF 58,62,64.) This was illustrated by the eighth grade mathematics teacher, whom this hearing officer found to be clearly credible; the teacher reviewed the mathematics goals and could not understand how to implement them. (NT 443-20 to 445-17.) Except for the fluency goal, the goals do not refer to the baseline of functioning, and do not establish clearly the difficulty level of the probes or tests being used as measures of the goals themselves. (FF 58,62,64.) There is no goal on attentional issues, though both the history of this case and the ER make clear is a pervasive difficulty that the Student experienced and that impeded [Student's] educational progress. (FF 63,67.) There is no goal on the identified disability of Mathematics reasoning. (FF 65.) Because there are neither baselines nor benchmarks nor objectives, the IEP does not disclose how progress will be monitored during the school year. (FF 66.)

The District argued that the ER's identification section and the IEP did follow through on the attentional issues that were identified in the ER, because many of the Specially Designed Instruction items in the IEP were addressed to attentional issues. (FF 67.) However, there are no goals addressing this issue and goals are necessary in order to monitor the effectiveness of the SDI portion of the IEP. Therefore, the IEP makes an inadequate offer of FAPE in this regard.

The Parent argued that the IEP was deficient also in that it did not provide for accommodation in the least restrictive environment. (NT 181-4 to 183-15.) The IEP provided that the Student would be pulled from regular education classes in reading, English and mathematics. (FF 59,60,61.) However, the Director of Pupil Personnel explained that this was necessary because of the nature of the remedial program provided to the Student. (FF 60,61.) She testified that the program being offered would be research-based and multi-sensory, and would begin at the functioning level of grade four. (NT 195-3 to 8.) This is exactly what had been recommended. It requires a lot of interaction and noise, and is incompatible with a regular education class environment. (NT 196-3 to 8.) This hearing officer credits the Director's explanation, which was credible and reasonable.

The hearing officer does not, however, find that the placement in resource room for English and mathematics was supported by the record. (FF 61.) Prior to the beginning of the hearing, the District agreed to reevaluate the Student. Any such reevaluation and subsequent IEP process must address the question of whether or not the Student can achieve meaningful progress in English and Mathematics in a regular education setting with itinerant services.

## COMPENSATORY EDUCATION

Compensatory education is an in kind remedy designed to provide eligible students with the services that they should have received pursuant to FAPE and which their parents did not purchase as a replacement. In re the Educational Assignment of E.F., Special Educ. Op. No. 1733 at 8 (citing Lester H. v. Gilhool, 916 F.2d 865 (3<sup>rd</sup> Cir. 1990)). It is an appropriate remedy for failure to identify when a District is on notice of a need for specially designed instruction. In re the Educational Assignment of J.L., Special Educ. Op. No. 1707 at 3. The period of compensatory education is equal to the period of deprivation, excluding the time reasonably required for the district to provide specially designed instruction. Ibid.

Here, the hearing officer finds that the District knew or should have known that the Student needed specially designed instruction on or before the first day of school in the 2004-2005 school year. Although the District eventually identified the Student and provided an IEP, the record shows that these services were not provided by the end of the Student's eighth grade year. Thus, the basis for calculation of compensatory education in this case is two full school years, 2004 to 2005 and 2005 to 2006.

If the Student had been referred at the beginning of the 2004-2005 school year, the District would have had sixty school days to produce an ER, thirty calendar days to convene an IEP meeting and ten calendar days to commence services. Therefore this time period will be deducted from the award.

The hearing officer declines to further deduct for the period of time after the IEP was offered, from January 25, 2006 to the end of the school year. The District in closing argument suggested that the Parents prevented it from implementing the IEP by going to due process and waiving the resolution meeting. Given the history of this case, the hearing officer does not credit this argument. The Parents cannot be faulted or their child penalized for their exercise of rights under the IDEIA.

The remaining consideration is the number of hours per day to be awarded. Here, the eventually provided IEP called for part time special education classes, 21% to 60% outside the regular education classroom, with the Student not attending three regular education classes. (P-21 p. 10.) Thus, the Student would be attending the special education classes for at least three forty-five minute periods per day. However, one of

these periods would have been mathematics, regarding which the evidence did not show a denial of FAPE. Thus, the 2006 IEP indicates that an appropriate remedial reading and spelling program would be two periods per day or one and one-half hours per day. This will be awarded.

The District argues that this award should be further discounted by the fact that their IEP prescribed a group setting for remedial reading, rather than an individual setting, one-on-one. (NT 506-12 to 19.) However, the record does not clearly support that argument. The District's remedial reading program depended upon the reading grade level of the student, and students were grouped according to level. (NT 235-5 to 236-5.) Thus, the number of students in the room would depend upon the number of peers at the Student's particular level, which has not been determined yet. (NT 247-5 to 8.) It is possible that the Student would be alone at [Student's] level; this is not yet known. This hearing officer has found that the District's failure to determine baselines in its ER and set them forth in its IEP was a failure to offer FAPE. Thus, the lack of information at this point is the responsibility of the District. Given the equitable and remedial nature of compensatory education, it would be anomalous to reduce the award based upon a lack of information that is attributable to the default of the District. The award will not be reduced in this way.

The District also argues that the award should be reduced by the amount of remedial reading provided to the Student in [Student's] eighth grade year, which is two periods per six day cycle. The hearing officer declines to so reduce the award. The instruction was provided outside of the IEP process, which is what is being addressed by the compensatory education award. There was evidence that the remedial teacher felt that this setting was not adequate to meet the Student's needs. (NT 390-3 to 9.)

In sum, compensatory education will be awarded for two full school years, less sixty school days plus forty days. It will take the form of one and one half hours per school day of individual remedial tutoring for reading, or any form the Parent decides is appropriate for remedial reading or spelling purposes that does not exceed the ordinary cost to the District of individual remedial tutoring for reading.

#### CLAIM UNDER SECTION 504

The Parent argues that the Student's rights arose under Section 504 of the Vocational Rehabilitation Act of 1973, as well as under the IDEIA. While this argument arguably might affect the analysis of the applicable limitations period, but see In re the Educational Assignment of E.F., Special Educ. Op. No. 1733 at 8, or the form or amount of relief, the gravamen of this case is a violation of the District's child find obligation under the IDEIA, and its failure to offer FAPE in the form of an adequate IEP. Section 504 does not provide any additional remedy for such violations. All claims arise out of the same set of facts alleged as giving rise to the IDEIA claims. Therefore, no additional award or separate analysis is required. Cf. In re the Educational Assignment of E.F., supra.



## ORDER

1. The School District shall provide compensatory education in the form of individual remedial reading tutoring by a qualified remedial reading teacher for one and one half hours per session. The number of sessions shall be calculated as follows: Beginning with the total number of school days in the District's 2004 to 2005 and 2005 to 2006 school years for the Middle School, subtract ninety school days. The number of sessions awarded will equal the number of remaining days.
2. The compensatory education ordered in paragraph one above shall not be used in place of services that are offered in the January 24, 2006 offered IEP or any future IEP. The form of the services shall be decided by the Parents, and may include any form that the Parent decides is appropriate for remedial reading or spelling purposes, whether individual, group or some other form, but the total cost of services may not exceed the customary and reasonable cost to the District of individual remedial reading tutoring for the number of days awarded. The services may be used after school, on weekends, or during the summer, and may be used after the Student reaches 21 years of age. The services may be used hourly or in blocks of hours. The parents may balance expensive or inexpensive services so that the average cost is below the maximum amount. The District has the right to challenge the reasonableness of the hourly cost of the services.
3. Immediately upon receipt of the Evaluation Report agreed upon by the parties prior to the beginning of this due process hearing, the District shall convene an IEP team meeting to revise the IEP offered on January 24, 2006. The IEP shall be revised in accordance with the new evaluation, and, shall comply with the following:
  - a. The Present Levels of Educational Performance section shall incorporate baselines of functioning that identify the grade level, percentile rank or other measure of the Student's functioning.
  - b. All goals shall include baselines and specify the criteria for measuring attainment of the goals.
  - c. There shall be a goal for attention and organization, unless the revised ER specifically finds that attention and organization are not needs.
  - d. There shall be a goal for mathematics reasoning, unless the revised ER specifically finds that mathematics reasoning is not a need.
  - e. All goals shall incorporate benchmarks or objectives and shall specifically describe how progress will be monitored and reported to the Parents.

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WILLIAM F. CULLETON, JR., ESQ.  
HEARING OFFICER

June 27, 2006